

Varsha

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2721 OF 2021

1. **FIRDOUS MOHAMMAD YUNUS
PATEL,**
Aged: 38 yrs., Occupation: Nil,
R/o Block No. 7/8, Sadan Bazar, Police
Line Lashkar, Solapur-3.

...Petitioner

~ VERSUS ~

1. **THE STATE OF MAHARASHTRA**
2. **THE COMMISSIONER OF
POLICE,**
Solapur City, Solapur.
3. **THE DIRECTOR GENERAL &
INSPECTOR GENERAL OF POLICE**
(M.S.) Mumbai at Old Council Hall,
Shahid Bhagat Singh Marg, Mumbai
400 039

...RESPONDENTS

APPEARANCES

FOR THE PETITIONER Ms Misbaah Solkar.

FOR THE RESPONDENT Mr PG Sawant, AGP.
STATE

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**CORAM : G.S.Patel &
Gauri Godse, JJ.**

DATED : 4th August 2022

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** The Respondents waive service. By consent rule is made returnable forthwith and the Petition is taken up for hearing and final disposal.

2. This Writ Petition presents what is possibly an exceptional and, to our mind, a truly difficult situation. On the one hand there is a government policy for good and stated reason. On the other, there is a continuing tragedy that has befallen the widowed Petitioner, today about 42 years old.

3. The facts are these. The Petitioner, Firdous, was born in 1980. She took a Bachelor's degree. She married one Mohammad Yunus Patel, a police constable in the service of the State of Maharashtra. They had two children from this marriage. Firdous was Mohammad's second wife; he had a first wife, Raisa. In 2008, Mohammad and Raisa had a burn accident. Both were severely injured. Both succumbed to these injuries. Raisa died on 17th March 2008. Mohammad died a few days later, on 21st March 2008. Mohammad had three children by Raisa. These are now with their maternal uncle, Raisa's brother.

4. The family performed Mohammad's final rites. Then there was a settlement discussion and an agreement between Raisa's brother (her children's maternal uncle) and Firdous. They agreed that a succession certificate would be obtained, and, while Raisa's children would be solely entitled to Mohammad's terminal benefits (provident fund, gratuity and so on), Firdous would be entitled to apply for government service on compassionate grounds.

5. Firdous moved an application before the State of Maharashtra on 20th November 2009 seeking employment in government service on compassionate grounds. She received no reply. She sent a reminder on 7th April 2011. To this, she received a response that very day asking documentary proof of the age and number of children of the deceased Government servant, Mohammad. By a report of 22nd July 2011, the State Government informed the Director General and Inspector General of Police that on account of Clause (E) of a Government Resolution dated 28th March 2001, the application made by Firdous had to be rejected. Firdous approached the Home Minister. On that representation, on 26th September 2011, the Hon'ble Home Minister directed the State Government to examine the case. There was no action. Firdous made another representation on 18th October 2012. By this time a full four years had passed since Mohammad's death. In her 2012 application, Firdous mentioned the case of one Alka Bhiku Karade. There, too, a government servant was found to have had more than two children, and from two wives, and, therefore — at least in theory — Alka Karade should have suffered same disqualification or ineligibility. However, Alka Karade did get appointed on compassionate grounds. Firdous therefore claimed parity. She also pointed out that in the

Karade case, Alka was also the second wife, although that marriage was at least arguably null and void, the Karads being Hindus and Bhiku Karade's first wife, Indubai, being very much alive. Bhiku and Indubai were not divorced. There were thus two counts to render Alka Karade ineligible: more than two children, and an invalid second marriage. Despite this, the government exercised its discretion.

6. Receiving no response from the State Government, Firdous moved the Maharashtra Administrative Tribunal (“**MAT**”) in Original Application No. 154 of 2016. Here she pleaded that Rule (6) of the Maharashtra Civil Services (Declaration of Family) Rules, 2005 (“**the 2005 Rules**”) allowed for a relaxation of the eligibility provisions, and therefore sought a direction that the 2005 Rules be relaxed in the peculiar facts and circumstances of her case. That application was partly allowed by an order of 30th January 2017 remitting the matter to the 3rd Respondent, the Director-General and Inspector-General of Police, with a further direction that the Petitioner should be given an opportunity of being heard and that a decision should be taken in three months. By its letters of 20th February 2017 and 27th April 2017 the Government of Maharashtra called on the Principal Secretary to implement the MAT order of 30th January 2017. Then Firdous received a letter dated 7th June 2017 from the Home Department calling her to a hearing on 16th June 2017. She attended that hearing and submitted her reply.

7. Another year passed. On 8th August 2018 — and this is now 10 years after her husband died — Firdous received a letter from the Home Department that it would not be appropriate and proper to

place her case before the Secretary of a High Power Committee. This effectively rejected her plea for appointment on compassionate grounds.

8. Firdous went back to the MAT, now in Original Application No. 446 of 2019 challenging the last refusal of 8th August 2018. By its order of 3rd November 2020, the MAT rejected Firdous's Original Application. This is the order assailed in the present Writ Petition.

9. We turn first to the Government Resolution in question and then to the 2005 Rules. The Government Resolution in question is dated 28th March 2001. Mr Sawant has given us a copy with an English translation. It is taken on record and marked "X" for identification with today's day. The Government Resolution refers to earlier Government Resolutions dated 23rd August 1993, 26th October 1994 and 12th March 1997. Paragraphs Nos. 2(b), 2(c) and 2(d) of the Government Resolution dated 26th October 1994 were substituted by a revised provision. Then paragraph 2(a) of the Government Resolution dated 23rd August 1996 was deleted. After this, the Government Resolution of 28th March 2001 specified further clauses (C), (D), (E). Clause (E) reads thus:

“(E) Family members of employees having third child after 31.12.2001 shall not be considered eligible for appointment on compassionate basis.”

10. It is this clause that falls for interpretation. The 2005 Rules define a 'small family' to mean a wife and husband including two children. Rule 2(d) of the 2005 Rules reads thus:

(d) “Small family” means wife and husband including two children.

Rule 3 and Rule 6 of the 2005 Rules read thus:

“3. Necessity of declaration of Small Family.—

Notwithstanding any things contained in any rules or orders or instruments made in that behalf, regulating recruitment to Group A, B, C or D post in Government Service or any other order or instruments made in that behalf, **the declaration of Small Family shall be an additional essential requirement for an appointment to Group A, Group B, Group C or Group D post in any Government service:**

Provided that a person having more than two children on the date of commencement of these rules shall not be disqualified for appointment under these clause so long as the number of children he had on the date of such commencement does not increase:

Provided further that a child or more than one child born in a single delivery within the period of one year from the date of such a commencement shall not be taken into consideration for the purpose of disqualification mentioned in this clause.

6. Power to Relax the Provisions of these Rules—

Notwithstanding anything contained in these rules, Government may relax the provisions of any of these rules, under such circumstances in such manner as shall appear it to be just and reasonable and shall record the reasons for any such relaxation.”

(Emphasis added)

11. We will straightaway reject the submission that 2005 Rules are inapplicable because they speak only of recruitment. Even

appointment on a compassionate ground is a form of recruitment. It is not an entitlement. It is certainly a concession, and it is intended to assist the families of government employees to overcome the financial crises that result from a government employee's demise or early retirement. It is self-evident that any claim on compassionate appointment arises only from a scheme framed by the employer. There is no other legally enforceable right.¹

12. The question before us is about the correct interpretation of clause (E) of the Government Resolution of 28th March 2001. It speaks of family members of employees having a third child, i.e., more than two children. This clause must be reasonably read. It is intended to apply to a median situation where the employee and his spouse constitute a small family with no more than two children. If one sees it like this, then Mohammad and Firdous were indeed a small family. They had only two children. The rule does not contemplate a situation where the employee *separately* contracts a marriage with another person and has children by that other marriage. We do not see how Firdous could possibly be held responsible for Mohammad's relationship with Raisa, his first wife, or his three children from that marriage with Raisa. Firdous was no part of that marriage. It is impossible to contemplate a situation where Firdous would earn a disqualification for something for which she was not, and could not be, responsible. The consequences of Mohammad's marriage to Raisa, or, more accurately, any disqualification in that regard could not justly or justifiably be visited on Firdous. It is equally clear that had the situation been reversed, Raisa would not have been able to claim employment on a

1 *State Bank of India & Anr v Raj Kumar*, (2010) 11 SCC 661.

compassionate ground, because she did in fact have three children by Mohammad. But it seems most inequitable that while Raisa's three children get the terminal benefits owed to Mohammad on his demise, Firdous should suffer a complete threshold disqualification from being even considered for compassionate employment. Clause (E) cannot, in our judgment, be so broadly construed as to include cases that lie at the extremities and are clearly exceptions. Clause (E) must be read to include an immediate family of an employee, a sole spouse and no more than two children *by that marriage*. The disqualification attaches because of number of children of the employee *from that spouse*. We do not see how we can be extended to a situation such as the present one. We hasten to clarify that we are not saying, and we do not suggest, that this case can serve as a precedent even within a community that permits multiple marriages. Each case must be assessed on its own merits.

13. The 2005 Rules are squarely applicable. There is certainly room, as indeed there must be, to relax the provision of the Rules. In fact, there is material even in the impugned MAT order to show precisely such a relaxation. This was done in the case of Alka Karade. Her husband gave his life in the service of the State. His case was treated as special because of his courage and bravery. We believe the MAT was entirely wrong in saying that there were no special circumstances in the present case. In paragraph 13 of the impugned order, the MAT fell into error when it said that the family included children born from *both* wives and that Raisa's children could not be excluded. What was overlooked is the correct interpretation: that one must see the number of children the applicant had from the marriage with the deceased employee. To

put it another way, the deceased employee may have done many things with many people, perhaps not all of them to the knowledge of the applicant seeking compassionate employment, or even if with knowledge, beyond the control or responsibility of the applicant.

14. The MAT was not asked to do very much more than to direct the State Government to exercise its power under Rule 6 of 2005 Rules and to consider Firdous's case. While addressing the question, it is true that the MAT needed to have regard to the applicable Rules and to the applicable Government Resolution of 28th March 2001. As we have noted, the 2005 Rules provide for an exception, as the proviso of Rule 3 quoted above shows. This is a situation where the employee does have more than three children on the date of commencement of the 2005 Rules. The disqualification would not attach to such a case. The disqualification is therefore not absolute but must be addressed regarding the facts and circumstances of each case.

15. As a matter of administrative law, the power to relax the provisions of the 2005 Rules only means that there is built into the 2005 Rules room for administrative discretion; in the words of the classical statement of this branch of the law, 'some elbow room' or 'some play in the joints'. Sound administration, and every canon of sound administration, especially that which is subject to judicial review, requires that discretion must be exercised in a non-arbitrary, reasonably consistent, and discernibly certain manner. Otherwise, it is simply arbitrary, ad hoc, or perhaps even a distribution of largesse by the State, all forbidden. The Karade case is an example where a considerable exception was made. There, too, there was a second

marriage. Very likely, the second marriage was a nullity — unlike the present case. In the Karade case, too, there were more than three children. Yet, discretion was exercised, and an exception was made. This was only on account of Bhiku Karade's service. But in making that exception, other possible grounds of ineligibility or disqualification were waived. If exceptions can be made, and the rules can be relaxed, then there must be some parity. If there is not, all we are left with is an ad hoc and manifestly arbitrary decision. Any exception made must be with reference to the purpose and ambit of the applicable rules and norms, and with a conscious application of mind to the causes justifying that exception. Rule 6 uses the words 'just and reasonable', and it requires that reasons must be recorded. Therefore, necessarily, relevant criteria alone must be considered, including the broad circumstances in which earlier exceptions have been made. Irrelevant criteria (gender, religion, etc) have no place in this decision-making. To illustrate: such an application for compassionate employment by Raisa, the first wife, would present difficulty. An application by Mohammad (assuming he had retired and not died) on behalf of his children or spouses, would also not easily be termed as an exception.

16. The question that the MAT should have asked itself is of course what is it that the law mandates. But it ought also to have been mindful of the next two questions, namely, what is that justice requires — for very often the law and justice diverge — and what is the right thing to do.

17. No administration can be permitted to take so heartless approach towards its own employees and their families. All that

Firdous is been seeking for the last 14 years is an opportunity to seek employment. Every single time, the door has been shut in her face without good or sufficient reason. For the last 14 years, since she was 28, Firdous has been seeking a consideration of her application for compassionate employment. Hopefully, her quest for justice ends today.

18. We are inclined to make Rule absolute in terms of prayer Clause (a) and with a modification in terms of prayer Clause (c). Ms Solkar agrees that there is no question of pressing prayer Clause (b), i.e., of directing MAT to withdraw its impugned order.

19. Resultantly, the impugned order of 3rd November 2020 is quashed and set aside. Respondents Nos. 1, 2 and 3 are directed to consider the case of the Petitioner for compassionate employment. Firdous will make application to the relevant authority by 29th August 2022. The decision will be conveyed to her by 19th September 2022.

20. Having said this, we are mindful of the concern expressed by Mr Sawant, learned AGP for the Government. An order such as this, he says, and however compelling the circumstances, should not serve as an invariable precedent on facts because otherwise the floodgates will literally open, and the Government will be inundated with application after application for compassionate employment. We accept this. The operative portion of this order is limited to the very peculiar facts and circumstances of the case.

21. Having said that, we believe our interpretation of clause (E) of the GR and of Rule 6 of the 2005 Rules, being a pronouncement on law, must continue as a binding decision. That interpretation cannot be restricted to the facts of this case.

22. Rule is made absolute in these terms. No costs.

(Gauri Godse, J)

(G. S. Patel, J)