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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2019 OF 2022

Mayuri Krishna Jabare

.. Petitioner

Vs.

General Manager, BEST & Anr.

.. Respondents

Mr. Karansingh Shekhawat a/w Mr. Swapnil Gite for petitioner.

Mr. Vishal Talsania a/w Mr. Rakesh Singh and Ms. Heena Shaikh i/by M. V. Kini & Co. for respondent no.1/BEST.

Ms. Rupali Adhate for respondent no.2/MCGM.

**CORAM: DIPANKAR DATTA, CJ. &
MADHAV J. JAMDAR, J.**

DATE : NOVEMBER 11, 2022

P.C.:

1. The petitioner is the daughter of late Krishna Daulat Jabare (hereafter "Krishna", for short). Krishna had been employed by the Brihanmumbai Electricity Supply and Transport Undertaking (hereafter "BEST", for short) as a bus conductor since 1998. After serving BEST for about 22 years, Krishna breathed his last on 6th August, 2020. That was the time when the first wave of COVID 19 was wreaking havoc in the country. Krishna, prior to his death, had been regularly attending his duty as bus conductor. The

'cause of death certificate' issued by Dr. R. V. Metkari of Brihanmumbai Mahanagarpalika (hereafter "MCGM", for short) clearly suggests that an acute respiratory distress syndrome together with influenza like illness led to Krishna's death. Dr. Metkari also certified that it was a suspected case of COVID 19 death and such certificate was being issued as per Circular dated 9th April, 2020 of the Government of Maharashtra (GoM) detailing "Medical Guidelines for death declaration and procedural methods in diagnosed Suspected COVID 19 cases, brought dead cases, unknown and unclaimed bodies, and inquest procedures.

2. To mitigate the hardship of family members of Government employees and other public servants who died of COVID 19 while being on active duty, the GoM conceived and brought into force through Government Resolution dated 29th May, 2020 certain benevolent measures. One of these was payment of one-time *ex gratia* compensation of Rs.50 lakh to the bereaved family members of the employee. One other was accelerated compassionate appointment to any one eligible family member, notwithstanding that there exists the normal procedure for compassionate appointment in terms whereof the petitioner is required to stand in the long queue.

3. It is not in dispute that after the death of Krishna, the petitioner applied for accelerated compassionate appointment together with a prayer for *ex gratia* compensation of Rs.50 lakh. The petitioner's application was rejected by BEST by the impugned order dated 25th November, 2021 on the ground that the Committee of

doctors constituted by the MCGM did not certify clearly that Krishna's death was caused by COVID 19. We find from the report of the Committee that there is a reference to absence of any RT-PCR test having been conducted by Krishna while he was alive.

4. Paragraph 11 of the writ petition is relevant for the purpose of a decision on this writ petition and it is, accordingly, reproduced below: -

"11. The Petitioner states that the Petitioner's father was regularly going to work and working during the Pandemic period and was infected by Covid 19 virus during and in the course of his employment and died due to 'Suspected Case of Covid 19' as stated in the Post-Mortem Report. The Petitioner's father did not have any previous medical history and hence, there is a strong possibility of his coming into contact with the Covid virus during and in the course of his employment. The Petitioner states that the Municipal Authority cremated the body without handing over the body to relatives of the deceased."

5. To appreciate to what extent the contents of paragraph 11 are trustworthy, we did have the occasion to look into the attendance record of Krishna during July, 2020, i.e., the month preceding his death forming part of Exhibit D. It is evident therefrom that except for the weekly off days and a couple of other days, Krishna was present to discharge his duties as bus conductor. It is also evident from other documents forming part of the paper-book that Krishna had attended duty for the last time on 1st August, 2020 and had ultimately left for his heavenly abode in the very early hours of 6th August, 2020. These were the days of nationwide restrictions which each and every citizen was

required to abide by. The inference that can legitimately be drawn from paragraph 11 as well as the relevant documentary evidence is that Krishna was quite fit to discharge his duty during the one-month period preceding his death notwithstanding innumerable deaths being recorded in the State of Maharashtra which was running neck and neck with the State of Kerala. The dreaded pandemic brought about by COVID 19 was the reason which threw normal life out of gear, yet, employees like Krishna were called upon to answer the call of duty and report. The time gap between the last date he attended duty and the date of his untimely death together with the cause of death as certified by Dr. Metkari is something which could not have been brushed aside by BEST only on the ground that the Committee of doctors constituted by the MCGM had not conclusively declared that Krishna died as a result of COVID 19 infection.

6. Mr. Talsania, learned advocate appearing for BEST has contended that BEST is under obligation to reach out to the survivors of employees who genuinely died as a result of being infected by COVID 19. Since checks and balances were introduced by the GoM as well as the MCGM and BEST, it is in strict adherence to the policy decisions so taken by the authorities that the petitioner's application for accelerated compassionate appointment and *ex gratia* compensation came to be refused. Pertinently, there was no positive RT-PCR test report or a negative report being a false negative. In such circumstances, the refusal cannot be impeached.

7. Let us test this contention of Mr. Talsania bearing in mind the relevant circulars issued by the authorities.

8. Cause of death can be ascertained upon an autopsy being conducted on a cadaver, which is known in common parlance as the 'post-mortem' examination. No post-mortem examination on the cadaver of Krishna could be conducted since the circular dated 9th April, 2020 issued by the Directorate of Medical Education and Research prohibited any post-mortem in suspected COVID 19 deaths. The 'cause of death certificate' issued by Dr. Metkari clearly refers to the said circular dated 9th April, 2020 and also makes a note that no post-mortem had been conducted. In the absence of any post-mortem, the real cause of death of Krishna may not surface at all. The petitioner cannot, therefore, be blamed for absence of a 'post mortem' report. However, what was required in the circumstances was strict adherence to the circular dated 9th April, 2020.

9. We need to reproduce below certain clauses of the circular for a proper appreciation of the controversy that we are called upon to resolve. The relevant clauses read as under: -

"Following Guidelines are issued with respect to death and inquest.

- 1) *****
- 2) *****
- 3) *****
- 4) Nasopharyngeal swab from the dead body need not be collected.
- 5) Only in exceptional cases if indicated under special circumstances, if required the Nasopharyngeal swab

from the dead body can be collected by death declaring/doctor/CMO taking all precautions with PPE.

6) Following history to be noted by concerned doctor/CMO/treating doctor about –

History of previous illness in the past and treatment.

History of international travel in last 14 days.

History of contact with international traveller in last 14 days.

History of Quarantine.

History of contact with Covid-19 positive patients.

History of severe acute respiratory illness with symptoms of (Fever and cough and/or shortness of breath).

History of any suspicion/foul play as mentioned by the relative or bystanders.

Accordingly the treating doctor/CMO to give cause of death and the police to be informed to issue NOC in cases of death within 24 hours, brought dead cases, unknown and unclaimed dead bodies including unnatural deaths in admitted cases.”

10. Having read the aforesaid clauses together with the ‘cause of death certificate’ issued by Dr. Metkari, what can reasonably be inferred is this. Dr. Metkari did not consider it necessary to obtain nasopharyngeal swab from the cadaver because he suspected Krishna to have died of COVID 19. That apart, what is significant is the absence of any noting made by Dr. Metkari in the ‘cause of death certificate’ about any history of suspected foul play as mentioned by the relatives or bystanders. If indeed Dr. Metkari had suspected any foul play on the part of Krishna’s family members for setting up a fraudulent claim of benefits not otherwise due,

we would have expected him to say so in clear words in the 'cause of death certificate'. Absence of any such note goes a long way to suggest that he had no reason to suspect any foul play and based on external examination of the cadaver of Krishna in terms of the provisions of the Circular dated 9th April, 2020, he was of the view that Krishna had died of acute respiratory distress syndrome together with influenza which, at that period of time, was closely associated with COVID 19 infection being contracted by an individual.

11. Much has been argued by Mr. Talsania placing reliance on the report of the Committee. We reproduce below the minutes of the Committee's meeting dated 24th August, 2021: -

" Dated 24.08.2021 at 11.20 a.m., a meeting of the Committee of Directors was held regarding the implementation of ex-gratia grant to employees who die due to Covid-19 while on duty. The documents of Shri Krishna Daulat Javre (sic, Jabare) in the said meeting were verified.

When Shri Krishna Daulat Javre (sic, Jabare) has brought in K.E.M. hospital for the treatment on dated 06.08.2020 the medical officer has declared as dead. It is not clear whether his abscess (sic, death) was caused by Covid-19 as his RT-PCR test was not done and no documentation of his treatment was available.

Sd/- 8/10 Hemant Deshmukh Dean K.E.M.	SD/- 7/10/2021 Dr. Mohan Joshi (Dean Lotims)	Sd/- 8/10/2021 Dr. Nilam Andrade (Dean Nair dental)	Sd/- Dr. Ramesh Bharmal (Director M.E. & A.H.)
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12. The Committee consisted of expert doctors. We cannot sit in appeal over their decision. But certainly, in exercise of the power of judicial review, we can and should examine the manner in which such decision was arrived at.

13. The Committee met on 24th August 2021. Krishna had died more than a year back. We discern from the minutes of the meeting not a very serious approach on the part of the members thereof. Judicial notice can be taken of what the situation was in Mumbai in July and August, 2020. Social distancing and other restrictive measures enforced by the Government of India as well as the GoM made it mandatory for citizens not to leave their residences except for urgent nature of work. Hospitals were packed and unable to admit patients. Doctors were not readily available. Even for RT-PCR tests, one had to wait for his turn to arrive. In such abnormal circumstances, what was required is taking into consideration all relevant factors. The minutes of the Committee's meeting, which was signed nearly 40 (forty) days after the meeting, does not reveal any consideration of the relevant factors at all. Obviously, it had not been taken into consideration that Krishna attended duty on 1st August, 2020 and died in the early hours of 6th August, 2020, i.e., only 4 (four) days thereafter which was quite normal for COVID 19 death cases. That apart, Krishna suddenly died after having rendered duty almost for the entirety of July, 2020. At least, there was no material to suggest prior history of Krishna suffering from respiratory distress. He was yet to attain 50 years of age. Having regard to the lapse of time since the death of Krishna, the minimum that

was required of the Committee was to either accept or reject the 'cause of death certificate' issued by Dr. Metkari on the basis of their collective wisdom instead of being ambivalent. The Committee ought to have realized that much depended on their report. However, its report is such that much left to be desired. We are conscious that the members of the Committee, as doctors trying to save lives of other COVID 19 affected patients, might have also been hard-pressed for time and, therefore, did not assign sufficient reasons. Nonetheless, without being too critical of the Committee's deliberations, what emerges clearly is that the Committee at least did not proceed to specifically record that Krishna did not die of COVID 19 infection. In the absence of any such clear finding, the reasonable course for the Committee could have been to accept the report of Dr. Metkari who was the only doctor having the occasion to externally examine the cadaver of Krishna. The 'cause of death certificate' issued by Dr. Metkari not having been disbelieved, it is considered creditworthy. We are of the view, bearing in mind the preambular promise of securing, *inter alia*, social and economic justice to all our citizens, that benefit has to be given in case of a real doubt in favour of the weaker class for whom the policy decisions to provide *ex gratia* compensation and accelerated compassionate appointment were conceived by the authorities.

14. Krishna, despite the first wave of COVID 19 being at its peak in Mumbai, had been discharging his duty as a bus conductor without having any prior history of respiratory distress. No material has been annexed by BEST in its

counter affidavit to disprove the contents of paragraph 11 of the petition memo. In such circumstances, the scales would obviously tilt in favour of the petitioner for us to conclude that Krishna, in all probability, died of COVID 19. The standard of proof applicable in a case of this nature cannot be 'proof beyond reasonable doubt' but the 'preponderance of probability' tending to draw an inference that the fact of death of Krishna due to COVID 19 must be more probable. Thus, merely because there was no RT-PCR report or adequate medical documentation could not have afforded ground to refuse the benefits flowing from the Government Resolution dated 9th May 2020. It would indeed be inhuman on our part if we refrain from interfering in this case and fold our hands to decline relief to the heirs of Krishna who died while answering the call of duty.

15. The argument of Mr. Talsania that the order that we propose to pass would open the floodgates has no substance. We have enquired of him and learnt that apart from this writ petition, no other proceedings are pending at the instance of eight other similarly placed survivors of deceased employees of BEST who have not been considered qualified to receive the benefit of *ex gratia* compensation as well as accelerated compassionate appointment. Even if any other proceedings were pending, that would not have any bearing on the facts and circumstances of the present case where, for reasons recorded above, we are of the view that BEST acted illegally, unjustly and in an arbitrary manner to deprive the petitioner the benefits of policy decisions taken by the authorities.

16. In that view of the matter, this writ petition must succeed. We set aside the impugned order dated 25th November, 2021 and direct BEST to sanction and release Rs.50 lakh on account of *ex gratia* compensation to the surviving heirs of Krishna in equal shares. BEST is also directed to offer accelerated compassionate appointment to the petitioner on such post as is commensurate with her educational qualifications. The above exercises for release of *ex gratia* compensation and accelerated compassionate appointment are to be made by BEST as early as possible but not later than 60 (sixty) days of receipt of an authenticated copy of this order.

17. The writ petition stands allowed, without any order as to costs.

18. Since the writ petition has succeeded and we have directed accelerated compassionate appointment in favour of the petitioner, we direct that BEST shall allow the petitioner and other surviving family members of Krishna to reside at the presently occupied accommodation; however, after the petitioner is appointed, BEST may, in accordance with law, permit the petitioner to occupy the same accommodation or allot similar such accommodation as per her entitlement. However, without allotment of an alternative accommodation, possession of the presently occupied accommodation of the petitioner shall not be disturbed.

(MADHAV J. JAMDAR, J.)

(CHIEF JUSTICE)