

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO.3492 OF 2020

Santosh s/o Sukhdeo Metkar
Aged 36 years,
Occupation - Labour,
R/o. Ward No.3,
Near Dharni Police Station,
Dharni, Tahsil – Dharni,
District - Amravati

...PETITIONER

VERSUS

1. Sub-Divisional Engineer,
Minor Irrigation Sub-Division,
Zilla Parishad, Dharni,
Tahsil – Dharni, District – Amravati
2. The Chief Executive Officer,
Zilla Parishad,
Amravati

...RESPONDENTS

Shri Vilas Waghmare, Advocate for the petitioner.
Shri T.M. Zaheer, Advocate for the respondents.

**CORAM : A.S. CHANDURKAR AND
URMILA JOSHI-PHALKE, JJ.**

DATED : JUNE 27, 2022.

JUDGMENT (Per Urmila Joshi-Phalke, J.)

RULE. Rule made returnable forthwith and heard the learned counsel for the parties.

2. The father of the petitioner was working as a Peon in the Minor Irrigation, Sub Division, at Zilla Parishad, Dharni having been appointed on 23/05/1985. He was reported missing on 15/10/1997 after which on 23/10/1997 a missing report was lodged with Police Station, Dharni. The Zilla Parishad on 28/10/1997 issued a notice to the petitioner's father stating therein that he was absent from duties without permission. The petitioner's mother informed the Zilla Parishad that her husband was missing since 15/10/1997. The police Authority on 14/01/1999 certified that despite undertaking search, the petitioner's father could not be traced. In this background on 10/01/2000 the petitioner's mother made an application for granting her appointment on compassionate basis since period of more than two years had elapsed from disappearance of her husband. The Zilla Parishad however did not take any steps in that regard. On the contrary on 23/05/2001 a public notice was issued

with regard to absence of the petitioner's father from duty. Such notice was accordingly published in the local newspapers on 15-16/06/2001 stating therein that it was proposed to take disciplinary action against the petitioner's father under Maharashtra Zilla Parishad District Services (Discipline and Appeal) Rules, 1964 (for short, the Rules of 1964). On 28/08/2001 the Chief Executive Officer passed an order that since there was no response to the public notice as issued, the petitioner's father was dismissed from service under Rule 9(2) of the Rules of 1964. The petitioner's mother then made a request for grant of retiral benefits and appointment of her son on compassionate basis. The petitioner's family then filed RCS No.26/2004 seeking a declaration as regards civil death of the petitioner's father. This suit was decreed on 10/04/2006 and a declaration that the petitioner's father was presumed to have died on 17/04/2004 was granted. Thereafter in response to the application for grant of compassionate appointment, the Zilla Parishad on 14/05/2009 issued a letter to the petitioner's brother Prakash seeking various documents for consideration of that application. The petitioner's brother Prakash expired on 21/05/2011 and thereafter the petitioner made an application for substituting his name in the place of his brother's

name in the waiting list of applicants seeking compassionate appointment. The name of the petitioner was included in the list published on 22/02/2016 at Serial No.50. In the subsequent years too till 2020 the petitioner's name figured in the said list. However, on 15/07/2020 the Chief Executive Officer by the impugned communication informed the petitioner that since the petitioner's father had been dismissed from service on 28/08/2001, it would not be possible to grant him appointment on compassionate basis in view of Clause-2(1) of Government Resolution dated 22/08/2005. Being aggrieved the petitioner has challenged the said communication.

3. The respondents have taken stand that the petitioner is not entitled for the appointment in view of Government Resolution dated 22/08/2005 which provides that only those employees working under Group 'A' and 'D' and who died during service tenure, only those employee's legal heirs will be given compassionate appointment. Here in this case, the father of the petitioner was dismissed from services on 28/08/2001 hence, the petitioner is not entitled for such appointment. Hence, writ petition is devoid of merit and deserves to be dismissed.

4. Shri V. Waghmare, learned counsel for the petitioner submitted that un-disputedly the petitioner's father was reported missing on 15/10/1997. A police report was immediately lodged and despite extensive search he could not be traced. The Zilla Parishad was not justified in conducting an enquiry in such situation when the whereabouts of the petitioner's father were not known. The absence from duty was therefore not wilful so as to warrant his dismissal. Relying upon the decision in ***Krushnakant B. Parmar vs. Union of India and anr. 2012 (4) ALL MR 442***, it was submitted that as the petitioner's father's absence was not wilful, he was not liable to be dismissed from service. The civil Court had granted a declaration as to the presumption of the death of his father and in these facts, the petitioner ought to have been granted compassionate appointment. The name of the petitioner figured in the waiting list from the year 2016 to 2020 until the impugned order was passed. He also referred to the decision in ***P. Shanthi vs. Chief Security Commissioner Railway, Chennai and Ors. AIR Online 2019 Madras 1617*** in that regard. In the light of the declaration as granted by the civil Court, Clause-2(1) of the Government Resolution dated 22/08/2005 could not have been relied upon for

denying the genuine claim of the petitioner. It was thus submitted that a direction was liable to be issued to restore the petitioner's name in the waiting list of the applicants seeking compassionate appointments.

5. On the other hand, Shri Zaheer, learned Counsel for the respondents submitted that as the father of the petitioner was already dismissed from the service. As per the Government Resolution dated 22/08/2005 the employees who are in service and died when they were in service, the legal heirs of such employees are to be considered for the compassionate appointment. As the petitioner's father was dismissed from the service, the petitioner is not entitled for the compassionate appointment.

6. Heard learned Counsel for the respective parties and perused the documents on record.

7. Admittedly, the father of the petitioner i.e. Sukhdeo Metkar was appointed by the respondents as a Peon on 03/06/1985. He got missing since 15/10/1997. The mother of the

deceased son namely Saraswati Sukhdeo Metkar had informed to respondent No.1 on 26/03/1998 that her husband is missing since 15/10/1997. She had also lodged a report to the police station on 23/10/1997. The mother of the petitioner had also filed an application with respondent No.2 for appointment of her elder son on compassionate ground on 10/01/2000 i.e. before passing the dismissal order by the respondent No.2. In response to the application filed by the mother of the petitioner, the respondents on 09/11/2000 asked for some documents in compliance. She again communicated with respondent No.2 that she is not aware whereabouts of her husband.

8. The respondents issued a public notice on 16/06/2001. On 28/08/2001 by assigning reason that after publication of notice employee namely Sukhdeo Metkar has not joined his duty and, therefore, he is dismissed from service. Admittedly, said dismissal order was passed without giving an opportunity to the petitioner or his family members. It is also an admitted position that the mother of the petitioner had filed a Civil Suit bearing No.26/2004 for declaration of death of her husband. Said suit was decreed on 10/04/2006, accordingly Gram Panchayat, Dharni issued a death

certificate. On 13/10/2011, the petitioner had filed an application for substituting his name as his elder brother died on 02/06/2011.

9. On the question whether the absence of the petitioner's father from duty was wilful or not, it will be kept in mind that he was reported missing since 15/10/1997. As held in *Krushnakant Parmar* (supra) absence from duty without any application or prior permission could amount to unauthorised absence as it would not always mean wilful absence. There could be different eventualities due to which an employee may abstain from duty. The Honourable Supreme Court observed that while enquiring into an allegation of unauthorised absence from duty, the disciplinary authority is required to prove that such absence is wilful and in absence of such finding, the same would not amount to misconduct. In the order passed by the Zilla Parishad on 28/08/2001 it has been noted therein that despite show cause notice, as there was no response from the petitioner's father or mother, the services of the petitioner's father came to be dismissed. In the peculiar facts of the present case it is seen that the absence of the petitioner's father from duty cannot be said to be wilful especially when he was reported missing on 15/10/1997 which was followed by a

declaration by the civil Court as regards the petitioner's father having been presumed to have died.

10. Subsequently, the respondents have published waiting list of candidates to be appointed on compassionate ground for the year 2014. The name of the petitioner was shown at serial No.50 in the said list. The name of the petitioner was continued in the waiting list till 2020. Suddenly, without giving an opportunity to the petitioner, on 15/07/2020 the order was passed by the respondent No.2 rejecting the claim of the petitioner regarding the appointment on compassionate ground by assigning reason that his father was dismissed from the service. Once, the name of the petitioner was included in the waiting list after considering the entire record, the action of the respondents without giving him an opportunity to resist the said ground, is illegal and arbitrary.

11. Learned Counsel for the petitioner relied on the decision of the Madras High Court in case of *P. Shanthi vs. Chief Security Commissioner Railway, Chennai and ors. AIR Online 2019 Mad 1617* wherein it is held that the husband of the petitioner missing for more than seven years, presumption has to be drawn

that he is dead. Respondents directed to provide and settled pensionary benefits of husband of the petitioner.

12. Learned Counsel for the respondents also relied on the decision of the Hon'ble Apex Court in the case of ***State of Himachal Pradesh and anr. vs. Shashi Kumar (2019) 3 SCC 653*** wherein it is held by the Hon'ble Apex Court that there was a delay of more than seven years in filing the writ petition. The sense of immediacy is evidently lost by the delay on the part of the dependent in seeking compassionate appointment.

13. The petitioner's mother initially sought retiral benefits after which the petitioner's brother sought appointment on compassionate basis. On his death the petitioner's name was substituted and it figured in the waiting list from 2016 to 2020. His name was removed from the said waiting list in view of Clause-2(1) of the Government Resolution dated 22/08/2005. Clause-2(1) stipulates that from the date of the said Government Resolution only in the event of death of an employee from Class-C and Class-D that the members of the family would be entitled to seek compassionate appointment. As stated above, initially the

petitioner's mother had made an application seeking grant of compassionate appointment on 10/01/2000 by referring to the name of her elder son Prakash. On the death of Prakash, the name of the petitioner was substituted in the waiting list and the same figured therein from 2016 till 2020. In these facts therefore we find that Clause-2(1) of the Government Resolution dated 22/08/2005 could not have been applied to delete the name of the petitioner from the said waiting list. It is also urged on behalf of the petitioner that the petitioner's father having been reported missing on 15/10/1997 there could not have been any response to the public notice issued in July 2021. The enquiry proceedings held on that basis therefore also did not have legal sanctity which fact was clear from the declaration granted by the civil Court. We find that this aspect also have a material bearing on the facts of the case. Observations of the Division Bench of Madras High Court in *Secretary to the Public Heath, Chennai and Ors. vs. N. Ponni AIR Online 2020 Madras 1010* support the stand taken by the petitioner.

14. In the aforesaid peculiar facts of the present case, we find that deletion of the petitioner's name from the waiting list of

the applicants seeking compassionate appointment would be unjust to the family especially since the petitioner's father had been presumed to be dead by granting a declaration to that effect. Hence for aforesaid reasons the following order is passed :

The order passed by the Chief Executive Officer, Zilla Parishad, Amravati dated 15/07/2020 is set aside. It is directed that the petitioner's name shall be restored in the waiting list of the applicants seeking appointment on compassionate basis that was published on 14/07/2020.

15. Rule is made absolute in aforesaid terms with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A.S. CHANDURKAR, J.)

**Divya*