

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

WPST 117 of 2022

**Milan Lohar
Vs.
The State of West Bengal & Ors.**

Appearance:

For the Petitioner	:	Mr. Krishna Deo Das, Adv. Mrs. Pampa Dey (Dhabal), Adv.
For the Respondent/State	:	Ms. Chaitali Bhattacharya, Adv. Mr. Kartik Chandra Kapas, Adv.
Judgment On	:	31.03.2023

PRASENJIT BISWAS, J.:

A question arises in this writ petition is whether an application for compassionate appointment at the behest of the dependent/petitioner shall be considered on the rules prevalent at the time of death of the employee or at the time of consideration of application.

Before dealing with the aforesaid question brief facts are narrated as follows:

The father of the petitioner namely Tarapada Lohar was an employee to the post of Krishi Sramik in Joypur Block Seed Farm and while in service he

expired on 06.03.2007 due to his illness. The marriage tie between the parents of the petitioner was dissolved by a decree of divorce passed in MAT Suit No. 104/2001 by the Ld. Additional District Judge, Fast Track Court, Bankura. It is stated that the petitioner and his sister were sole dependent upon his father and at the time of death of his father this petitioner was aged about 12 years. After attaining majority this petitioner made application before the authority for compassionate appointment on 19.06.2014 along with 'No Objection' certificate given by his sister which was forwarded to the Addl. Director of Agriculture by the Dy. Director of Agriculture on 08.08.2014. The application was rejected by the authority concerned on the ground that it was made after more than two years from the date of death of the employee and as such it is not maintainable as per notification issued by the Labour Department, Employment Cell, Government of West Bengal.

The petitioner knocked the door of the tribunal challenging the impugned order dated 25.09.2018 on the ground that he was minor at the time of death of his father and after attaining majority he filed the application for compassionate appointment. The tribunal disposed the application without interfering the impugned order passed by the authority.

Learned Advocate appearing on behalf of the petitioner submits that at the time of death of the father, this petitioner was aged about twelve years and was not eligible for compassionate appointment. The respondent authority has acted illegally which is violation of Article 14 of the Constitution. As per submission of the Ld. Advocate the respondents should have considered the prayer of the petitioner by giving him appointment on compassionate ground in died in harness category.

It is further submitted on behalf of the petitioner that heavy jerk was caused by sudden death of the bread earner employee which invited a destitute in the family. That owing to sudden death of his father the petitioner whose age was 12 years at that time overwhelmed with sorrows and he and his sister were put to starvation and after attaining majority he made application for compassionate appointment on 19.06.2014 in prescribed pro forma regarding employment of dependents of government employees dying while in service along with no objection certificate given by his sister.

Learned counsel appearing on behalf of the petitioner further submitted that enquiry was conducted by the committee and this petitioner was directed to specify the reason of submission of the application after so many years and he gave the reply to it on 22.02.2017 and the same was forwarded to the Additional Director of Agriculture (Admn.), West Bengal with recommendation given by the respondent No. 5. Ultimately this petitioner was intimated by the authority that his application for compassionate appointment was turned down having no merit at all vide memo no. 1437-Estab(Dte)/ AG/O/4P-122/2017 dated- 25.09.2018.

Learned counsel appearing on behalf of the petitioner submitted that the respondents authority should have considered the prayer of the representation of the petitioner and by giving appointment to his client on compassionate ground in died- in- harness category and they cannot reject the claim of the petitioner showing the scheme which is not at all in existence at the time of submitting the application for compassionate appointment.

Per contra learned counsel appearing on behalf of the respondents submitted before us that the application for compassionate appointment in died

in harness category was made after more than two years from the date of death of the deceased employee and as such it is not tenable under the provision of relevant rule prevailing at that time.

Learned Counsel Ms. Chaitali Bhattacharya draws our attention about the recent decision rendered by the Hon'ble Apex Court in ***Secretary to Govt. Department of Education (Primary) and Others vs Bheemesh alias Bheemappa reported in 2021 SCC OnLine SC 1264*** and submitted that Hon'ble Apex Court has proceeded to interpret the applicability of a new or modified scheme that comes into force after the death of the employee.

Appointment on compassionate ground is a concession and not a right and the object of granting such employment is to enable the affected family to tide over a sudden crisis. Appointment on compassionate ground is not a source of recruitment and that is an exception to the general rule that recruitment to public services should be on the basis of merit by an open invitation providing equal opportunity to all the eligible persons to participate in the selection process. The dependent of employee, who die-in-harness, do not have any special claim or right to employment, except by way of concession that may be extended by the employer under the rules by separate scheme, to enable the family of the deceased to get over the sudden family crisis. Compassionate appointment refers to the appointment of a family member of a deceased government employee on compassionate grounds. This provision is made to provide financial assistance and job security to the family of the deceased employee who may have been the sole bread earner of the family. There is no such rule or scheme which provides that the moment the employee

dies in harness the dependent shall automatically be absorbed without considering the other criteria as embodied therein.

That a provision for compassionate appointment makes a departure from the general provisions providing for appointment to a post by following a particular procedure of recruitment. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions and must be resorted to only in order to achieve the stated objectives, i.e., to enable the family of the deceased to get over the sudden financial crisis. Compassionate appointment should be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years. In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family, its liabilities, the terminal benefits if any, received by the family, the age, dependency and medical status of its members, together with the income from any other source.

We are not unmindful that the object underlying a provision for grant of compassionate employment enables the family of the deceased employee to tide over the sudden crisis due to the death of the bread earner which has left the family in penury and without any means of livelihood. Having regard to such an object, it would be up no avail to grant compassionate appointment to the dependents of the deceased employee, after the crisis which arose on account of death of a bread earner has been overcome. Thus, there is also a compelling need to act with a sense of immediacy in matters concerning compassionate appointment because on failure to do so, the object of the scheme of compassionate would be frustrated.

In this case the father of the petitioner died on 06.03.2007 while he was in service and the application for compassionate appointment was submitted on 19.06.2014 after more than two years of death of the employee. Existing clause being 10(a) of Notification No.25 I-Emp dated 03.12.2013 speaks that if the family of the deceased or the employee retired on being permanently incapacitated is in need of financial assistance and the same is absolutely necessary to support the family, application for employment is to be submitted within two years from the date of death or retirement on permanent incapacitation. If no application is submitted within the said period it will be presumed that the family does not require any financial assistance.

It is also profitable to quote new clause being 10(aa) added to Notification No.25 I-Emp dated 03.12.2013 which speaks about belated requests in respect to application for compassionate appointment and it says that in exceptional cases such as (i) death during action (ii) where none in family is eligible etc. departments can consider requests for compassionate appointment even where the death or retirement on medical grounds of a Govt. servant took place up to 5 years ago. While considering such belated request the 3 member screening-cum-enquiry committee should, however, keep in view that the concept of compassionate appointment is largely related to the need for immediate assistance to the family of the Govt. Servant in order to relieve it from economic distress. The very fact that the family has been able to manage somehow all these years should normally be taken as adequate proof that the family had some dependable means of subsistence. Therefore, examination of such cases could call for a great deal of circumspection at all levels. The dependent member

must invariably attain the minimum age of appointment at the time of consideration.

The question that arises in this appeal is whether an application for compassionate appointment at the behest of a dependent shall be considered on the rules prevalent at the time of the death of the employee or at the time of consideration of an application.

It is profitable to quote the following paragraphs as observed by the Hon'ble Apex Court in **N.C. Santosh Vs. state of Karnataka and Ors.**, reported in **(2020) 7 SCC 617**.

“(14) This Court in SBI vs. Raj Kumar while reiterating that no aspirant has a vested right to claim compassionate appointment, declared that the norms that are in force, when the application is actually considered, will be applicable. The employer’s right to modify the scheme depending on its policies was recognized in this judgment. Similarly, in MGB Gramin Bank vs. Chakrawarti Singh this Court reiterated that compassionate appointment has to be considered in accordance with the prevalent scheme and no aspirant can claim that his case should be considered as per the scheme existing on the date of death of the government employee.

15. However in *Canara Bank. v. M. Mahesh Kumar* in the context of major shift in policy, whereunder, instead of compassionate appointment (envisaged by the scheme dated 8.5.1993), ex gratia payment was proposed (under the Circular dated 14.02.2005), the Court adopted a different approach. Noticing the extinguishment of the right to claim appointment, this Court held the “dying in

harness scheme” which was prevalent on the death of the employee, be the basis for consideration.

16. A two Judge Bench headed by Uday U. Lalit, J. noticed the Supreme Court’s view in SBI vs. Raj Kumar and MCB Gramin Bank vs. Chakrawarti Singh on one side and the contrary view in Canara Bank v. M. Mahesh Kumar (supra) and felt the necessity of resolution of the conflicting question on whether the norms applicable on the date of death or on the date of consideration of application should apply. Accordingly, in SBI v. Sheo Shankar Tewari the Court referred the matter for consideration by a larger Bench so that the conflicting views could be reconciled.

17. The above discussion suggest that the view taken in Canara Bank v. M. Mahesh Kumar is to be reconciled with the contrary view of the coordinate Bench, in the two earlier judgments. Therefore, notwithstanding the strong reliance placed by the appellant’s counsel on Canara Bank. v. M. Mahesh Kumar as also the opinion of the learned Single Judge of the Karnataka High Court in Uday Krishna Naik v. State of Karnataka , it cannot be said that the appellant’s claim should be considered under the unamended provisions of the Rules prevailing on the date of death of the government employee.”

In the above referred case of N.C. Santosh (*supra*) Hon’ble Court even after noticing that the point whether an application for compassionate appointment should be considered on the basis the rule prevalent at the time of death of the employer or at the time of consideration of an application, the court proceed to decide such point taking into consideration the earlier judgments opining differently and held that the rule which was applicable at the time of

consideration of an application and not the rule prevalent at the time of the death shall apply.

It is to be noticed that decisions rendered in *N. C. Santosh (supra)* was considered by the Hon'ble Apex Court in case of ***Secretary to Govt. Department of Education (Primary) and Others vs. Bheemesh Alias Bheemappa***, reported in **2021 SCC Online SC 1264**. The facts were to effect that the appointment on compassionate ground in the State of Karnataka was governed by a set of Rules known as Karnataka Civil Services (Appointment on Compassionate Grounds) Rules, 1996 issued in exercise of the powers conferred by section 3(1) read with section 8 of the Karnataka State Civil Services Act, 1978. On the date on which the sister of the respondent died in harness i.e. 08.12.2020 the rules did not include an unmarried brother, within the definition of the expression "dependent of a deceased government servants" under rule 2(1)(a) of the said rules *vis-a-vis* a deceased female unmarried government servant. By a notification dated 11.07.2012, an unmarried brother of a deceased female unmarried government servant was included within the definition. The Hon'ble Supreme Court, after noticing the difference made in *Sheo Shankar Tewari (supra)*, observed that the apparent conflict between those two lines of decisions was on account of the difference between an amendment by which an existing benefit was withdrawn or diluted and an amendment by which the existing benefit was enhanced and that the interpretation adopted by the Hon'ble Supreme Court varied depending upon the nature of the amendment.

In *Bheemesh Alias Bheemappa (supra)*, the two Judge bench of the Hon'ble Supreme Court at paragraph 19 observed inter alia that-

The important aspect about the conflict of opinion is that it revolves around two dates, namely, (i) date of death of the employee; and (ii) date of consideration of the application of the dependant. Out of these two dates, only one, namely, the date of death alone is a fixed factor that does not change. The next date namely the date of consideration of the claim, is something that depends upon many variables such as the date of filing of application, the date of attaining of majority of the claimant and the date on which the file is put up to the competent authority. There is no principle of statutory interpretation which permits a decision on the applicability of a rule, to be based upon an indeterminate or variable factor. Let us take for instance a hypothetical case where 2 Government servants die in harness on January 01, 2020. Let us assume that the dependants of these 2 deceased Government servants make applications for appointment on 2 different dates say 29.05.2020 and 02.06.2020 and a modified Scheme comes into force on June 01, 2020. If the date of consideration of the claim is taken to be the criteria for determining whether the modified Scheme applies or not, it will lead to two different results, one in respect of the person who made the application before June 1, 2020 and another in respect of the person who applied after June 01, 2020. In other words, if two employees die on the same date and the dependants of those employees apply on two different dates, one before the modified Scheme comes into force and another thereafter, they will come in for differential treatment if the date of application and the date of consideration of the same are taken to be the deciding factor. A rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable. This is why, the managements of a few banks, in the cases tabulated above, have introduced a rule in the modified scheme itself, which provides for all pending applications to be decided under the new/modified scheme. Therefore, we are of

the considered view that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor.

The Hon'ble Supreme Court in Bheemesh Alias Bheemappa (*supra*), proceeded to hold that the date of death alone is a fixed factor and therefore, interpretation as to the applicability of the modified scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor. The Hon'ble Apex Court further held in the light of the facts as obtained in the case that only because of the fact that the application for compassionate appointment was taken up for consideration after the amendment was incorporated, the respondent could not have sought the benefit of the amendment and resultantly, the application of the respondent for compassionate appointment was dismissed while allowing the appeal.

It is seen that there is a divergence of opinion with regard to the question as to whether the policy in force on the date of death of the government employee is to be applied or the policy at the time of consideration of the application for compassionate appointment is to be considered. It is to be noticed that a three Judges Bench of the Hon'ble Supreme Court in case of **N.C. Santosh (*supra*)** had observed that it is the scheme that is holding the field on the date of consideration of the application for compassionate appointment has to be applied. After noticing the judgement delivered in N.C. Santosh (*supra*) by a three-Judge Bench, a two-Judge Bench of Hon'ble Supreme Court in Bheemesh Alias Bheemappa (*supra*) had observed that the policy which was in force on the date of death of the government employee should be taken for consideration of a claim for compassionate appointment. The Hon'ble Supreme

Court further observed in the aforesaid case that where the benefit under the existing policy was taken away or substituted with a lesser benefit, the Court directed the application of the new policy and in cases where the benefit under the existing policy were enlarged by a modified policy after the date of the employee, the court applied only the policy that was in force on the date of death of the employee. The same is also explained to the effect that such interpretation was fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon the lesser compassion for the individual and greater concern for the rule of law.

As of now, there is only one three-Judge Bench decision on the aforesaid issue i.e., in *N.C. Santosh (supra)* while the other judgment delivered in *Bheemesh Alias Bheemappa (supra)* are of two Judge Bench of the Hon'ble Apex Court.

At this junction it is profitable to quote the observation of the Hon'ble Supreme Court in case of ***Gregory Patrao and Others Vs. Mangalore Refinery Petrochemicals Limited and Others***, reported in **(2022) 10 SCC 461** with regard to the determination of binding precedent.

In *Gregory Patrao and Others (supra)* Hon'ble Court observed *inter alia* that-

"16. This Court thereafter had considered the decisions in the case of UP Awas Evam Vikas Parishad (supra) and Himalayan Tiles and Marble (P) Ltd. (supra) and has distinguished the same and has observed and held that the decisions in the case of UP Awas Evam Vikas Parishad (supra) and Himalayan Tiles and Marble (P) Ltd. (supra) shall not be applicable with respect to the

acquisition under the KIAD Act, 1966. Once, this Court in the subsequent decision in the case of Peerappa Hanmantha Harijan (supra) dealt with and considered the earlier decisions in the case of UP Awas Evam Vikas Parishad (supra) and Himalayan Tiles and Marble (P) Ltd. (supra) and distinguished the same and observed and held with respect to the acquisition under the KIAD Act, 1966 that the allottee company can neither be said to be a “person interested” nor entitled for hearing before determination of compensation, the said ratio was binding upon the High Court. Thus, it was not open for the High Court to not follow the binding decision of this Court in the case of Peerappa Hanmantha Harijan (supra) by observing that in the subsequent decision in the case of Peerappa Hanmantha Harijan (supra), the earlier decisions in the case of UP Awas Evam Vikas Parishad (supra) and Himalayan Tiles and Marble (P) Ltd. (supra) have not been considered. The High Court has not noted that as such while deciding the case of Peerappa Hanmantha Harijan (supra), this Court did consider the earlier decisions in the case of UP Awas Evam Vikas Parishad (supra) and Himalayan Tiles and Marble (P) Ltd. (supra) and had clearly distinguished the same. Not following the binding precedents of this Court by the High Court is contrary to Article 141 of the Constitution of India. Being a subsequent decision, in which the earlier decisions were considered and distinguished by this Court, the subsequent decision of this Court was binding upon the High Court and not the earlier decisions, which were distinguished by this Court.”

It is seen that in Gregory Patrao and Others (supra) the Hon’ble Supreme Court observed that subsequent decision of Supreme Court specifically rendering a ruling on the issue in question, in which earlier decisions were considered and distinguished by the Supreme Court and it is such subsequent

decision of Supreme Court which is binding on that specific issue, and not earlier decisions which were distinguished by the Supreme Court.

The compassionate appointment was restricted to the dependent of an employee who suffered death as a result of accident or permanently incapacitated in course of the performance of the duties. By a notification dated-03.12.2013 a scheme was formulated which is called as a comprehensive scheme regarding appointment on compassionate ground imposing the condition that the application for employment is to be submitted within six months from the date of death or retirement on permanent incapacitation of the employee and if no application is submitted within the said period it will be presumed that the family does not require any financial assistance. In view of the law expounded in Bheemesh alias Bheemappa (*supra*) since the subsequent scheme dilutes the existing benefit and does not enlarge such benefits we do not find any infirmity or illegality in the decision of the authority concerned in rejecting an application of the petitioner on the ground that it was not made within the period as mentioned in the notification dated 03.12.2013. Hence, we do not find any illegality or irregularity in the order passed by the authority as well as the tribunal.

Thus, the policy in force at the time of death of the employee is relevant and not the policy in force at the time of consideration of the application of the petitioner for compassionate appointment and this court deems it appropriate to follow the principles laid down in Bheemesh Alias Bheemappa by the Hon'ble Apex Court. The dead cause of action cannot rise like a phoenix and the mere submission of representation to the competent authority does not arrest time.

We are, thus unable to give any relief to the petitioner in view of legal position as rendered by the Hon'ble Apex Court in case of Bheemesh Alias Bheemappa.

In view of the findings made hereinabove the writ petition is hereby dismissed.

Impugned order dated 28.07.2022 passed by the Tribunal in connection with Case No. O.A 999 of 2018 is hereby affirmed.

No order as to costs.

Urgent photostat certified copies of this judgement, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)