COMPASSIONATE APPOINTMENT ON MEDICAL INVALIDATION

DEATH IS a major human tragedy and a trauma to be lived with by those left behind. Having to live a bed ridden life either as a result of an incurable disease or of an accident, being maimed or becoming a paraplegic, is a greater human tragedy especially to the victim since he has to live with it for the rest of his life and for the family members who are to take care of him. For them it is a daily death and, in fact, they die a thousand deaths before the person actually dies. Thus, this situation is more pitiable than the former. Both the cases deserve one's sympathy, consideration and compassion. Compassionate appointment has to be viewed in the light of this context.

Realizing this gravity and urgency of the situation the Government of Andhra Pradesh formulated a scheme as early as 1980[1] for providing compassionate appointment to the immediate dependants – spouse/son/ daughter – of government servants who retired on medical invalidation. In 1985, the government, however, restricted the benefit of the scheme to those government employees who retired on medical invalidation at least five years prior to attaining superannuation.[2] Having noticed certain loopholes in the working of the scheme and exploitation of the same by some employees, the government in 1998 prescribed certain safeguards and procedures to prevent its misuse by constituting medical boards at district/state levels and also district/state level committees to examine and recommend the applications for compassionate appointment on the ground of medical invalidation.[3] It was provided that whenever a government employee sought retirement on medical grounds, the appointing authority would refer his case to the concerned medical board and on receipt of its opinion would forward the same to the district/state level committees, as the case may be, for its scrutiny and recommendations to be sent to the state government to take the final decision.

By way of clarification as to the date with reference to which the five year period should be reckoned for eligibility to be considered for compassionate appointment, it was stated that it was to be *from the date of issue of orders of retirement on medical invalidation*. Thus, there was to

1. *Vide* GO dated 30.7.1980.
2. *Vide* GO dated 4.7.1985
3. *Vide* GO dated 9.6.1998.

be a gap of five years between the date of the order and the age of superannuation. In those cases where this condition was not fulfilled, the respective committees would, after scrutiny of their medical invalidation certificates, recommend only for their retirement and not compassionate appointment on medical invalidation.[4]

Aggrieved by the clarification, some government employees approached the Andhra Pradesh Administrative Tribunal contending that even when the left over period was more than five years at the time of application, if there was delay by the medical board or by the respective committees to send their recommendation and for the state government to issue the order, the dependant of the employee would be denied the benefit of compassionate appointment for no fault of theirs and for reasons which were beyond their control. They, therefore, contended that the five year period prior to superannuation should be calculated with reference to the date of application for medical invalidation. The tribunal agreed with their contention and rejected the clarification.

This decision was challenged by the state government in the high court[5] contending that the clarification issued by it was a policy decision and the same should not have been interfered with by the tribunal. Thus, the sole issue before the high court was only whether the 'five years left over service' should be reckoned from the date of application by the government employee or from the date of sanction of retirement by the state government. The full bench of the high court, however, neither considered nor answered this question, which was posed before it. Instead, it chose to inquire into the whole question of constitutionality of compassionate appointments on the ground of medical invalidation, having regard to article 16 of the Constitution of India, a question which neither the state government nor the employees were interested in raising nor wanted an answer. The court, however, held that the policy offering appointment to a dependant on compassionate grounds on medical invalidation of the government servant did not satisfy the requirements of article 16 and hence was unconstitutional.

Subsequent to this decision by the full bench the state government dispensed with the whole scheme of compassionate appointments on medical invalidation altogether and also directed that appointments could not be made even in cases pending as on that date before the court/tribunal.

On appeal, a division bench of the Supreme Court consisting of R.V. Raveendran and Lokeshwar Singh Panta JJ in *V. Sivamurthy* v. *State of Andhra Pradesh*[6] framed the following three questions for decision:[7]

4. *Vide* Government Memo dated 25.6.1999.

5. *Government of Andhra Pradesh and Others* v. *D. Gopaiah*, 2002 I LLJ 475.

6. 2008 (11) SCALE 294. It may be noted that the appellant in this case is not the original respondent in the case decided by the full bench of the high court.

7. *Id.* at 302.

(a) Whether compassionate appointment of sons/daughters/spouses of government servants who retire on medical invalidation was unconstitutional and invalid?

(b) Whether the high court could have considered and decided an issue, which was not the subject matter of the writ petitions, particularly when neither party had raised it or canvassed it?

(c) Whether the government was justified in issuing a clarificatory order stating that the left over period of five years should be reckoned from the date of issue of order of retirement on medical invalidation, was unreasonable and arbitrary?

Constitutionality of compassionate appointments on medical invalidation

Even before the constitutionality of compassionate appointment on medical invalidation was considered by the apex court, it undertook a thorough analysis of the important cases dealing with compassionate appointment, its purpose and objective and summarized the principles as under:[8] (i) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to articles 14 and 16 of the Constitution. Though no other mode of appointment is permissible, appointments on compassionate grounds are well recognized exception to the said general rule, carved out in the interest of justice to meet certain contingencies. (ii) Two well recognized contingencies which are carved out as exceptions to the general rule are : (a) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the bread-winner while in service; and (b) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the bread winner. Another contingency, though less recognized, is where land holders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project affected persons. (iii) Compassionate appointment can neither be claimed, nor be granted unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies. (iv) Compassionate appointments are permissible only in the case of a dependant member of family of the employee concerned, that is, spouse, son or daughter and not other relatives.

8. *Id.* at 305.

Such appointments should be only to posts in the lower category, that is, class III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in class I or II posts.

The full bench of the high court, while invalidating the scheme of compassionate appointment on medical invalidation being hit by article 16 of the Constitution, had based its reasons on several counts. First, by relying on *Auditor General of India* v. *G. Ananta Rajeswara Rao*[9] the court had inferred a proposition therefrom that there could be no compassionate appointment in cases other than death in harness. And as a corollary, that appointments on compassionate grounds on medical invalidation were contrary to the principles underlying article 16 and therefore, unconstitutional. According to the apex court, it had nowhere laid down either of these propositions in *Ananta Rajeswara Rao*. The court in that case was only considering the validity of a scheme which contemplated appointments on compassionate grounds being made not only in the case of sons and daughters, but also near relatives of a government servant who died in harness, and the further provision that in deserving cases even where there is an earning member in the family, compassionate appointment to another member was permissible. Therefore, whether compassionate appointment could be granted in cases of medical invalidation was not considered in that case at all. Distinguishing the facts and issues in *Ananta Rajeswara Rao* from that of the instant case the court held that the observations made in the former case that compassionate appointments should be confined to the son/daughter or widow of the deceased government employee who dies in harness, was not made in contradistinction from the position relating to compassionate appointments in medical invalidation cases. The court in that case had not even considered the other several contingencies in which compassionate appointments could be made, especially the one on medical invalidation. Neither did it exclude compassionate appointment on medical invalidation.

Besides, the observations made by the court in several cases that the general rule that appointments in public service should strictly be on the basis of open invitation of applications and merit, was subject to "*some exceptions carved out in the interest of justice and to meet certain contingencies*"[10] and that "*there are a few exceptions to the said rule which have been evolved to meet certain contingencies*"[11] show that compassionate appointment is not confined to only one contingency of

9. (1994) 1 SCC 192.

10. *Umesh Kumar Nagpal* v. *State of Haryana*, (1994) 4 SCC 138.

11. *Haryana State Electricity Board* v. *Hakim Singh*, (1997) 8 SCC 85. Also see *Yogender Pal Singh* v. *Union of India*, (1987) 1 SCC 631.

death in harness but includes other contingencies as well, including medical invalidation. If the intention was to restrict compassionate appointment to only death in harness cases, the words used would have been 'exception' and 'contingency' rather than 'exceptions' and 'contingencies'.

Therefore, the assumption of the high court that compassionate appointments should only be confined to death in harness cases and not in retirement on medical invalidation cases was not correct.[12]

Second, the high court had held that when compared to medical invalidity, death stood on a higher footing. The inference being that compassionate appointment in case of medical invalidation could not be equated with death in harness cases, since the degree of gravity is different in both and exception could be made only in cases of death. Disagreeing, the apex court observed that the fact remains that when an employee is totally incapacitated[13] and his services are terminated on that ground, the consequences on the family may be much more than a person dying in harness. In the latter case not only the income stops but also there incurs huge additional expenses by way of enhanced medical bills and hospitalization expenses. Thus, though death stands on a higher footing than medical invalidation due to blindness, paraplegia or any other incapacitating illnesses, the hardship and misery the family is put to when compared to death in harness cases is in no way less.[14]

Third, the high court had reasoned that 'while considering the cases of sick employees, the court cannot lose sight of cases of sick unemployed,' meaning thereby that if an exemption was to be made for compassionate appointments in medically invalidated cases, it might amount to hostile discrimination, since the same was not extended to others who were equally sick but were not government employees. The apex court countered this argument by stating that the same logic could be applied to death in harness cases also. When a person belonging to the poorer sections of the society dies, the hardship being faced by his family is much more than that of a government employee who dies. The reason being that in the latter case the family would be entitled to family pension and other terminal benefits which the other family is not entitled to. Does that mean that compassionate appointments should be stopped in death in harness cases also? The court,

12. The court also referred to *WB State Electricity Board* v. *Samir K. Sarkar*, (1999) 7 SCC 672 and *Food Corporation of India* v. *Ram Kesh Yadav*, (2007) 9 SCC 531, both holding that provisions relating to compassionate appointments on medical invalidation were not violative of Art. 16.

13. That is, when a person is permanently bed-ridden may be due to paralysis or becoming a paraplegic due to an accident or becoming blind, etc.

14. *Supra* note 6 at 308.

therefore, held that the high court's comparing an employed government servant with a non-employed person was neither logical nor sound.[15]

The apex court further held that if compassionate appointment of a dependant of the government servant who died in harness was an accepted exception to the general rule, there was no reason or justification in not applying the same rule and not extending the same benefit to the dependant of a medically invalidated government employee. That itself might amount to hostile discrimination.[16]

The court, thus, held that compassionate appointment in case of medical invalidity was *intra vires* article 16 of the Constitution.

Consideration by court an issue not raised by parties

Relying on *M. Purandara* v. *Mahadesh S.*[17] and *Som Mittal* v. *State of Karnataka*[18] it was argued by the appellants that though rational classification was permissible both under articles 14 and 16, unless the same was challenged by the parties either on the ground of hostile discrimination or denial of equal opportunity, the court *suo motu* was not to consider whether a policy relating to an affirmative action was valid or not. The court agreed that where an issue was not before the court and none had raised it, adjudication on such issue was not proper; and that issues in question alone and not matters at large should be considered by it. It also agreed that the court should only deal with the subject matter of the case and the issues involved therein and it should desist from issuing directions affecting executive or legislative policy or general directions unconnected with the subject mater of the case. However, in the instant case, the court reasoned that having regard to the importance of the issue and considering the fact that it was not totally unconnected with the subject matter of the writ petitions, the high court was justified in deliberating on the constitutional validity of the scheme. Also since the counsel for the parties *had permitted the said question to be raised* and they were heard in great detail, the contention of the appellants that the decision of the high court should be set aside on the ground that it was a decision on a non-issue was rejected by the court.[19]

15. *Ibid.*
16. *Ibid.*
17. (2005) 6 SCC 791.
18. 2008 (8) SCALE 717.
19. *Supra* note 6 at 309.

Reckoning of the left over period of five years

Before the apex court also the appellants raised the same contentions as were successfully canvassed by them before the state administrative tribunal as regards reckoning the date of left over period of five years. The court, however, identified four probable dates which could be considered for that purpose: (i) the date of application by the government servant for medical invalidation; (ii) the date of report of the medical board certifying that the government servant required to be medically invalidated; (iii) the date of recommendation by the state/district level committee in regard to medical invalidation; and (iv) the date of issue of orders of retirement on medical invalidation.[20]

After an analysis of the scheme, the court held that the benefit of compassionate appointment was available to a son/daughter/spouse of a government servant *who retired from service on medical invalidation five years before attaining the age of superannuation*. Therefore, the material date, as clarified by the government memorandum was *the date of sanction of retirement by the state government,* and not the date of application by the employee. According to the court the question that it should consider is not what would be most advantageous to the employee but what is the actual term of the scheme; not whether it should adopt an interpretation which is more advantageous or beneficial to the employee; but whether the policy is clear and unambiguous or arbitrary and unreasonable warranting an interpretation other than the plain one. A policy is not open to interference merely because the court feels that it is less advantageous for government employees for whose benefit it is made or because it considers that a fairer alternative is possible. While processing the application if certain delays occur and an employee loses the benefit of the scheme, that is no reason to relax the terms of the scheme. If processing of an application is deliberately delayed to deny him the benefit of the scheme the same may be challenged on the ground of want of *bona fide* or ulterior motive. But where the time taken is reasonable there is no scope for the employee to contend that the relief should be extended to him even when the left over period was less than five years.[21]

Since the scheme was withdrawn by the government in pursuance of the decision of the full bench of the high court holding compassionate appointment on medical invalidation as unconstitutional, the court left it to the government to revive the scheme *with or without modification.*

The case is an excellent exposition by the apex court of the constitutionality of compassionate appointment on medical invalidation.

20. *Id.* at 309.
21. *Id.* at 310.

The court has very ably cleared the cob webs and ironed out the creases. The observations of the court that when an employee is totally incapacitated and his services are terminated on that ground, the consequences on the family may be much more than a person dying in harness shows its humane approach. But the fact remains that the appellants never approached the court for a decision on the constitutionality of compassionate appointment on medical invalidation as the same was presumed to be constitutional since the scheme was floated by the government as a social welfare measure. Be that as it may, what has the appellants achieved at the end of the day? Practically nothing. So much so that the court has left it to the government to revive the scheme with or without modification. The minimum that the court could have done was to direct the state to revive the scheme since it had upheld the constitutionality of the same.

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