

CENTRAL ADMINISTRATIVE TRIBUNAL  
CALCUTTA BENCH

No.D.A.1092 of 1996

Present : Hon'ble Mr.D.Purkayastha, Judicial Member.

SMT.ARATI BANERJEE, widow  
of Late Nemai Chandra  
Banerjee C/o Bimal Chandra  
Mukherjee, Vill. & P.O.  
Buxarah (Panpara), backside  
of Tarun Sangha Library,  
Dist.Howrah.

... Applicant

Vs.

1. Union of India through General  
Manager, S.E.Railway, Garden  
Reach, Calcutta-700 043.
2. The Chief Personnel Officer,  
S.E.Railway, Garden Reach,  
Calcutta-700 043.
3. The Sr.Divisional Personnel  
Officer, S.E.Railway, P.O.  
Kharagpur, Dist.Midnapore.
4. The Divisional Personnel Officer,  
S.E.Railway, P.O.Kharagpur,  
Dist.Midnapore.

... Respondents

For the applicant : Mr.S.K.Das, counsel.

For the respondents: Mr.P.Chatterjee, counsel.

Heard on : 4.5.1998

Order on : 4.5.1998

ORDER

The applicant, Smt.Arati Mukherjee, widow of Late Nemai Chandra Banerjee, Switchman, who was posted at Jhargram under S.E.Railway, has filed this application being aggrieved by the act of deprivation of the benefit of compassionate appointment to her or to her son, Dibyendu Banerjee, as her husband was found missing from August, 1970. The applicant states that she intimated the police station at Jhargram and also the Railway authorities about the sudden missing of her husband. The applicant applied for employment on compassionate ground on the

basis of the presumption admissible under section 108 of the Evidence Act after a lapse of more than 7 years, on the presumption of her husband being dead, as he was unheard of for more than 7 years. But the respondents did not take any action in this regard for granting her the compassionate appointment though at that time she was in distress condition with a daughter aged 7 years and a son aged 5 years with no earning member in the family at that time. Since the department did not take any action in this regard, she made representation to the Hon'ble Minister In-Charge of the Railways on 12.6.1978 (annexure 'B' to the application). Thereafter, the Sr.Divisional Personnel Officer, Kharagpur, S.E.Railway, <sup>by his letter dt.11.7.1979</sup> /intimated the applicant to produce a certificate from the civil authority as an act of evidence in order to process her employment case further.(annexure 'C' to the application). Thereafter, by another letter dated 3.1.1980 (annexure 'D' to the application), the Sr.DPO, Kharagpur, intimated the applicant again to obtain a certificate from the civil authority and to produce the same as an act of evidence in support of her missing husband for the purpose of employment assistance as well as for payment of settlement dues of her husband, Nemai Chandra Banerjee. In the meantime, the applicant filed title suit no.308 of 1979 in which the railway-respondents were not made party. The applicant obtained declaration to the property of the deceased, Nemai Chandra Banerjee, from the civil court on the ground that her husband was found unheard of for more than 7 years and it is also found that the civil court also passed an order of injunction against defendants 1 and 2 of the title suit by permanently restraining them from claiming any property of Nemai Chandra Banerjee. The applicant also obtained a succession certificate upon filing succession case no.215/88 from the competent civil court (annexure 'G' to the application). It is found that the decree in the title suit was obtained on 5th June, 1981, and the succession certificate was obtained on 20th July, 1989. It is also found that the applicant made

representation to the Sr.DPO, S.E.Railway, Kharagpur, on 23.3.1990 for granting compassionate appointment on the ground stated therein. She has also produced the certificate obtained from the civil court as an act of evidence, as requested to her by the department, but no action has been taken by the respondents on her prayer even after the filing of Advocate's notice upon the respondents. Hence, the applicant has approached this Tribunal for granting compassionate appointment. It is also stated by the applicant that she is not getting family pension whatsoever on account of death of her husband till date and the applicant is still in distress and unable to survive for want of financial assistance as prayed for.

2. The respondents have filed a reply denying the claim of the applicant, stating inter alia that the claim of the applicant is not enforceable under the law and the applicant is not entitled to get any benefit in this case since the applicant's husband, Nemai Chandra Banerjee, was removed from service on 28.7.1972 for unauthorised absence since 1970. The respondents have produced a letter dated 3rd June, 1992 (annexure 'R/1' to the reply), which shows that a communication has been made to the Chief Personnel Officer (RP), S.E.Railway, Garden Reach, by the Divisional Railway Manager (P), S.E.Railway, Kharagpur, where it has been stated that no records are available at this distant date of over 22 years with the department and besides the case file of employment assistance shows that the case was investigated by PI in the month of March, 1984, and in his report it was stated that the <sup>applicant's husband</sup> ~~ex-employee~~ was removed from service w.e.f. 28.2.1972. In view of the fact, E.A. is not admissible. However, this decision of the respondents has not been communicated to the applicant till the date of filing of this application. The respondents have also produced a letter dated 15th July, 1997, which states that in terms of management of records (1969), the preservation period of the said voucher has already expired. However, efforts are still continuing to search out the same and intimation will be accordingly given when the same is available. The said letter is signed by the

Divl. Personnel Officer, S.E. Railway and is addressed to the Sr. Divl. Accounts Officer, S.E. Railway, Kharagpur. Relying on these two documents, the respondents have stated that the applicant is not entitled to get any relief.

3.     Ld. counsel, Mr. S. Das, appearing on behalf of the applicant submits that it is a fit case for granting compassionate appointment on the existing facts and circumstances of the case since the applicant is still under starvation and unable to maintain her family without any financial assistance as prayed for. It is submitted by Mr. Das that the applicant is now 46 years old and her daughter and son are also major, the daughter being now married and the son being 27 years old. Mr. Das further submits that the son has passed B.Com in the meantime. He further submits that the reason for the delay in filing this application is that the applicant was handicapped in view of the provision of section 108 of the Evidence Act since no declaration had been given by any competent court regarding presumption of death of the applicant's husband missing since 1970. Since no declaration has been made by the railway-respondents, as required under the rules, nor any declaration could be obtained from the civil court before 1981, the applicant could not produce any act of evidence in support of her claim though she applied for compassionate appointment in the year 1978 i.e. after expiry of 7 years from the date of missing of her husband. However, ld. counsel for the applicant submits that since the applicant is still in distress condition and unable to survive without any employment assistance from the respondents on account of the presumptive death of her husband, the scheme for compassionate appointment can be applied even now and such delay cannot deny the applicant the benefit of compassionate appointment since the applicant had no other source of income till this date. He has also drawn my attention to the decision rendered by this Tribunal in the case of Dr. Narendra Kumar Jhampety vs. UOI & Ors. on 21.8.1995. Ld. counsel for the applicant submits that since the applicant has not got any pensionary benefits and has no income from any source, thereby either she may be appointed on compa-

ssionate ground or her son may be given such appointment, to meet the situation of economic hardship felt by the applicant.

4. Mr.P.Chatterjee, appearing on behalf of the respondents submits that since the applicant was found removed from service for unauthorised absence, thereby the scheme for compassionate appointment cannot be enforced as per the application of the applicant. He further submits that this case is a belated one having been filed after a lapse of 27 years and as such, the applicant is not entitled to get any benefit of compassionate appointment. Regarding production of documents and service records, Mr.Chatterjee strongly relies on the letter dated 15th July, 1997 (annexure 'R/5' to the reply) and also to the office note marked annexure 'R/3' to the reply. But on perusal of annexure 'R/3' it is found that the same is very indistinct.

5. I have considered the submissions of the ld.counsel for both the parties. It is to be considered by me whether the applicant is entitled to get benefit of compassionate appointment after a lapse of 27 years from the date of missing of her husband as stated in the grounds in the application. In this connection, before entering into the merits of the case, I like to refer to the judgment of the Hon'ble Apex Court where their Lordships have said that as a rule, appointment in public service should be made strictly on the basis of open invitation of applications and on merit. In the case of Umesh Chandra Nagpal vs. State of Haryana (1994 SCC (L&S) 909), the Hon'ble Apex Court has held that the whole object of granting compassionate appointment or employment is to enable the family to tide over the sudden crises. Similarly in the case of Sushma Gosai, the Apex Court has held that all claims for appointment on compassionate ground should not be delayed. The purpose of providing employment on compassionate ground is to mitigate the hardship due to the death of the breadearner in the family. Such appointment should, therefore, be given immediately to redeem the family in distress. In the instant case, the

applicant is now 46 years old and her son who was a miner at the time of missing of her husband, is now 27 years old. None of the family members is engaged in the department for any financial gain. From this undisputed fact it can be safely presumed that the applicant is still in distress condition and unable to maintain the family without any financial assistance on employment under the respondents. The sole ground of refusal for giving compassionate appointment from the side of the respondents is that they have taken the plea that the husband of the applicant had been removed from service, as it appears from annexure 'R/1' to the reply. The letter at annexure 'R/1' is dated 3.6.1992 but it does not show that the decision as contained in the said letter has been communicated to the applicant <sup>or her husband</sup> by the respondents. In the reply the respondents have not categorically stated that the decision has been communicated to the applicant in due course. On receipt of the reply from the railway-respondents, the applicant filed a rejoinder, challenging the alleged validity of the order of removal stating inter alia that no notice of such disciplinary action was ever sent to the last address or any address of the applicant available in the office records and nothing was done by the railway authorities in respect of missing of the husband of the applicant and the applicant being the wife of the deceased employee, the authorities did not even think to intimate the applicant in any way about the alleged drastic step taken by them by way of such removal.

6. So the primary consideration in this case is whether this removal order can be said to be illegal in this proceeding when the applicant has come up with a rejoinder on receipt of a reply from the respondents on the ground that the removal order is violative of Article 14 of the Constitution and Rule 14 of Railway Servants (Discipline & Appeal) Rules, 1968. In order to justify the non-availability of records, the respondents have produced the letter dated 15th July, 1997 (annexure 'R/5' to the reply), but the said letter does not indicate that the authority had finally closed the exercise of searching the documents called

for regarding settlement of the claim of the applicant. It is found from the letter that efforts are continuing to search out the documents and information will be given if the same is available at a later date. From this statement in the letter, it cannot be said that the documents, after due search, could not be made available. However, the service records of a Govt. employee are valuable documents and that should be preserved carefully by the department. So I cannot accept the contention of the respondents that documents relating to the service of the applicant are not available in the department since the letter dated 15th July, 1997, speaks about the missing of one voucher which could not be preserved in terms of management of records (1969). No explanation whatsoever has been given from the side of the respondents why the records of the applicant which are valuable documents <sup>✓ / has required</sup> to be maintained by the respondents, could not be produced before this Tribunal for proper adjudication and decision of the claim of the applicant. It is also found that the applicant made an application in the year 1978 for compassionate appointment and the matter is pending before the authority for decision. So from the date of missing of the husband of the applicant and the date of application for appointment on compassionate ground, it is a period of 8 years. The department could then have taken proper steps for preservation of documents for the purpose of disposal of the representation of the applicant. In the absence of any material annexed to the reply regarding non-availability of service record of the applicant, I have no hesitation but to hold that the impugned order of removal was not passed in accordance with the rules, as the applicant in her rejoinder has denied that any communication relating to the removal of her husband from service was ever sent to her <sup>or her husband</sup> at her address nor was this fact conveyed to her after filing of her application for compassionate appointment. As I have already discussed, the plea of removal from service has been taken by the respondents only in their reply. The respondents also could not produce any document to satisfy me that they have ever communicated the decision of removal from

service of the applicant's husband even after filing of the representation by her to the Minister Incharge for Railways (annexure 'B' to the application). The respondents also did not produce the report of the enquiry officer on which basis of which action was taken and it was stated by the letter dated 3rd June, 1992, that E.A. is not admissible. If the report of the PI was produced before the court, the court could <sup>have</sup> appreciated how the PI came to the conclusion that the applicant's husband was removed from service.

7. I have no hesitation to hold that the order of removal is not sustainable in view of the non-following of the required procedure for the purpose of removal from service for unauthorised absence. According to the respondents, the applicant's husband was found missing from 1970, but it is not understood why no struck off order of his name has been issued from the establishment by the authorities even after the order of removal from service. It is to be mentioned that mere absence from duty may not amount to misconduct under discipline and appeal rules. In order to remove a person from service for unauthorised absence, a conclusion must be drawn that he remained absent intentionally or voluntarily and that absence amounts to misconduct. Respondents also could not show any paper whether any decision was taken in this regard or not and whether the applicant/<sup>husband</sup> was guilty of misconduct as alleged in the letter dated 3.6.1992. There is no doubt in my mind that a wife has a legal right to challenge the removal order of her husband who has been presumed to be dead after being unheard of for 7 years for getting pensionary benefits and other legal benefits under service jurisprudence.

8. In view of the aforesaid circumstances, since the respondents failed to produce any material or cogent evidence before me that the order of removal of the husband of the applicant was passed in accordance with law, the same cannot be accepted. Regarding appointment of the applicant or her son on compassionate ground under the present circumstances, I have already held that the applicant is still in distress since




no one is earning in her family. The scheme for compassionate appointment was framed by the Railway authorities to give some benefit to the family members of a deceased employee who died in harness, leaving the family in distress. Since the present applicant is still in financial hardship, I held that such delay would not disentitle the applicant to get appropriate relief in this case. On a perusal of ~~page 10~~ of annexure 'R/4' to the reply relating to scheme for compassionate appointment, it is found that it has been mentioned in the scheme that "when offering appointment on compassionate ground to a widow, son, daughter, etc., it need not be checked up whether another son/daughter is already working but in no case should there be more than one appointment against one death/medical incapacitation. It should not be permitted where the family wants another son or daughter to be employed in lieu or in addition to an appointment already made on compassionate grounds. Once an appointment on compassionate ground of the ward/widow has been made in a particular category, no change of category is subsequently permissible." From the aforesaid provision of the scheme it is found that the applicant is entitled to claim compassionate appointment till date, since nobody is earning in her family nor was her son and daughter employed after the death of her husband. Therefore, I think this a fit case to issue a direction upon the respondents to consider the case of the applicant sympathetically for giving compassionate appointment to her or to her son, Dibyendu Banerjee, if the son has already filed any application before the authority for giving compassionate appointment to him.

9. The Hon'ble Apex Court in the case of S.R. Barnala vs. UOI AIR 1997 SC 27 has opined that the bar of limitation cannot be pleaded by the Government when the department have themselves defaulted to the request made <sup>by the applicant</sup> ~~for compassionate appointment~~.

10. For the aforesaid reasons, respondents are directed to consider the case of the applicant or her son, Dibyendu Banerjee

for the purpose of giving compassionate appointment and the decision taken by them be conveyed to the applicant. The entire exercise be completed by the respondents within a period of four months from the date of communication of this order. If a vacancy is available in the department, <sup>It is held that</sup> ~~since it has already been held~~ ~~by me that~~ the order of removal from service of the applicant's husband is not sustainable under the law.

11. Application stands disposed of. No order is passed as to costs.

  
(D. Purkayastha)  
Judicial Member