

Reserved
On 11.07.2019

**CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD**

Allahabad This the 31st day of July 2019

PRESENT:
HON'BLE MR. RAKESH SAGAR JAIN, MEMBER – J

Original Application No.870 of 2011

Smt. Paudhari Devi aged about 43 years, W/o Late Chandrama Ram, C/o Shri Ram Pati Ram, R/o Village Bhupati Pur, P.O. Semaur (Jahurabad), District Ghazipur.

..... Applicant

By Adv: Shri Shubhasis Halder

V E R S U S

1. Union of India through the General Manager, North Central Railway, Allahabad Zone, Allahabad.
2. The Divisional Railway Manager, North Central Railway, Allahabad Division, Allahabad.
3. Senior Divisional Personnel Officer, North Central Railway, Allahabad Division, Allahabad.

..... Respondents

By Adv: Ms. Shruti Malviya

ORDER

1. The present O.A. has been filed applicant Smt. Paudhari Devi seeking following reliefs:-

- "(i) Issue a writ, order or direction in the nature of certiorari calling for the records pursuant to which the order impugned dated 02.04.2011 (Annexure No. A-1 to the O.A) has been passed and quash the same.
- (ii) Issue a writ, order or direction in the nature of mandamus commanding the respondent No.2 to consider and grant compassionate appointment to the applicant against any Group 'D' post as early as possible.

- (iii) Issue any other and further writ, order or direction which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.
 - (iv) Award the cost of the original application to the applicant".
2. Case of applicant Paudhari Devi is that her husband Chandrama Ram working on the post of Assistant Electrical Driver at Railway Station Tundla in the respondents department, was found missing from the place of his duty on 18.2.2003 and is untraceable since then. Applicant filed report dated 11.10.2005 in Police Station Tundla regarding the missing of her husband, whereupon F.I.R. was registered in the Police Station. The true copy of the progress report dated 10.4.2008 (Annexure A-2) was filed by the Police.
3. It is the further case of applicant that she along with her four minor children were dependent upon the missing Chandrama Ram for their subsistence and she is not in a position to provide necessity of life to the minor children. Therefore, she filed application dated 17.1.2006 before Competent Authority to provide appointment on compassionate ground to her son. Receiving no response from the respondents, applicant under Right to Information Act 2005 was informed by respondents vide letter dated 2.1.2008 (Annexure A-5) informing her that her case for compassionate appointment as well as payment of post retiral benefits would be considered after getting final police report. The Police vide letter dated 10.4.2008 (Annexure A-7) informed the applicant that no information has been received about the whereabouts of Chandrama Ram and that the investigation is still going on.
4. The applicant on receipt of Police report (Annexure A-7) submitted application dated 30.5.2008 (Annexure A-8) to respondent No.2 along with copy of Police report dated 10.4.2008 requesting them to consider her case. Non consideration of her case by the respondents, led the

applicant to file O.A. 681/2009 seeking direction to respondents to consider her case.

5. In response to letter dated 23.09.2011 of respondent No.3, applicant submitted the copy of F.I.R. dated 11.10.2005, final report of Police dated 10.4.2008, order of Tribunal dated 12.8.2010 and application dated 26.10.2010 to consider the claim of applicant at the earliest. However, the case of applicant was rejected by the respondents vide impugned order dated 2.4.2011 on the ground that she is not entitled to compassionate appointment as service of her husband had already been terminated on 3.6.2005 which ground was never taken in the counter affidavit filed in the previous O.A. No. 681 of 2009. It is the case of applicant that the factum of termination of the services of the husband of petitioner is an afterthought and is illegal, arbitrary and malafide which needs to be set aside.
6. The impugned order dated 2.4.2011 reads as under:-

“**mijkDr idj.k dk v/; ; u fd;k x; k ftI esik; k x; k fd vki ds ifr Jh plnzk jke H0 i0 I gk0 fo0 pkyd VwMyk fnukd 18-3-2003 Is vukf/kd'r : lk Is vuqfLFkr gks x;s FkA rnqjkUr fu;ek ds vrxi blga fnukd 3-6-2005 Is jy I ok Is c[kLr dj fn;k x; k FkA muds ukfjh Is fudky fn;s tkus ds dN egkuk ckn vki us muds yki rk gksus dh fji kfy[kok nhA ;g fji kfy muds vuqfLFkr ds yxHkx 2 o'kZ 6 eghus ckn fy[kokbZ x; hA**

ekuuh; dS bykgkckn ds I anfHk vknk ds I kFk I ayku vki ds vH;kosu fnukd 29-10-2010 dk voykdu fd;k x; k ftI ea vki us vi us ifr ds 18-2-2003 Is yki rk dk nkok fd;k gkA bl h vklkj ij vki us vi us i f Jh ftrUnz dEkj jke dh vupEik fu; Dr dh ekax dh gS ftI ds fy, fu;ek ds vrxi ekeys dh Nkuchu o dk; Zkgh tkjh gS vr% vfure fu.kz Is

“**vki dks voxr djk; k tk; skA eS vki dks I spr djuk pkgrk gW
fd bl rjg ds ekeyksa vuqEik fu; fDr vf/kdkj ugh gA
bl i dkj okn I @ 681@2009 es ekuuh; U; k; ky; }kj k
fn; s x;s vknksa ds vuqkyu ds vrxi vki dk vH; kosu
fnukd 29-10-2010 dks fuLrkfjr fd; k tkrk gA”**

7. In reply, the stand of respondents as per the counter affidavit dated 13.4.2012 is that as per the office report Chandrama Ram was absconding since 18.3.2003 and on 3.6.2005, Chandrama Ram was dismissed on account of authorized absence w.e.f. 18.3.2003 which was ordered after he was served notice dated 18.5.2004 to join his duty and issuance of charge-sheet on 22.5.2004 which was not replied by him. It is the further case of respondents that an F.I.R. was lodged by the applicant on 11.10.2005 informing the Police about her missing husband and no satisfactory explanation had been advanced by the applicant for such inordinate delay in lodging the FIR which shows that such an action was taken after the dismissal of applicant's husband from his services. Such action puts a question mark on the bonafide and genuineness of the matter therefore the impugned order dated 2.4.2011 passed by the respondents is just and does not suffer from any illegality.
8. It is the case of respondents that as per report of Senior Crew Controller, Tundla vide letter dated 12.5.2004 (Annexure CA-1), the Department was informed that Chandrama Ram went absconding from 18.3.2003 whereas claim of applicant is that he went missing since 18.2.2003. Annexure CA-1 avers that Chandrama Ram is absconding since 18.3.2003. The applicant being aware of the removal from service of Chandrama Ram lodged F.I.R. on 11.10.2005 after a delay of 2 years 7 months and no proper explanation has given for the delay in lodging the F.I.R.

9. In rejoinder, applicant averred that respondents never communicated the notice, chargesheet or the alleged dismissal order to the applicant. The applicant in the rejoinder affidavit has rebutted the averments in the counter affidavit in the following terms:-

"6. That the contents of para 5 to the counter reply misconceived and wrong hence denied. The applicant made repeated request to the Departmental Authorities after missing of her husband from the duty place. When she requested for considering her appointment under dying – in –harness rules in accordance with Rules, the officials of the Respondents establishment advised to lodge F.I.R. first about missing of her husband, and after coming policy report her claim for grant of compassionate appointment shall be considered. The applicant just lodged the FIR in question and when the Police report was came, the applicant again approached to the respondents authorities for grant of compassionate appointment. The respondents when did not consider her claim, the applicant taken shelter of the Hon'ble Court by filing OA No. 681 of 2009 before this Hon'ble Court. The respondents have filed counter affidavit in the aforementioned case and taken plea that the case of the applicant could not be considered until the police report comes. The Hon'ble Court due considering the facts and circumstances of the case finds that the police report has already been come in the matter. As such directed the respondents to look in to the matter and take suitable consideration in accordance with Rules in taking their mind the observations made under the order of Court dated 12.08.2010 and pass reasoned and speaking order within the period of three months. Under the circumstances, the respondents were under legal obligations to consider the case of the applicant for grant of

compassionate appointment due considering the financial distresses of the family of the applicant. However, the respondents have build up a new case and rejected the claim of the applicant on the frivolous grounds that services of the husband of the applicant have already been terminated. This type of action of the respondents is unjust, improper and appears to be contemptuous in nature; which amounts to futile exercise of power, nothing else.

10. That the contents of para 10 to the Counter Reply are misconceived and wrong hence denied. The Respondents have never communicated about either the alleged notice dated 28.05.2004 or the alleged Charge Sheet dated 22.05.2014, or the undated alleged dismissal order, at any point of time. The alleged dismissal order does not bear any date. The alleged communication letter dated 03.06.2005 appears to have been passed under reference to the Show cause notice dated 26.04.2005; however, the alleged memorandum of Charge Sheet appears to have been issued under order dated 22.05.2005. The Respondents have to prove their version to whether the Show Cause Notice was issued first or the Memorandum of Charge Sheet. Even otherwise, after issuing Memorandum on SF-5, the Respondents have to initiate Departmental Proceeding by appointing Enquiry Officer. But nothing have been done in the matter. The entire documents annexed as Annexure No. CA-2 and CA-3 are appears to be forged and concocted one. The Respondents have to be called for criminal breach of trust for the same.

10. I have heard and considered the arguments of learned counsels for the parties and gone through the material on

record. During their arguments, both the learned counsels have reiterated the pleas raised by them in their pleadings.

11. The facts coming out in the pleadings of the parties can be summarized as under:-

- (i) Chandrama Ram missing on 18.2.2003.
- (ii) Missing report lodged in Police Station Tundla on 11.10.2005.
- (iii) Applicant filed application for compassionate appointment before respondent No.2 on 17.01.2006 (Annexure A-3) whereby respondents were informed that Chandrama Ram is missing since 18.2.2003.
- (iv) Applicant came to know that Chandrama Ram has been removed from services. In this regard, it is mentioned in the counter affidavit that on 3.6.2005 Chandrama Ram was dismissed on account of unauthorized absence from service w.e.f. 18.3.2003.
- (v) The delay in filing missing report with Police on 11.10.2005 was due to the fact that she was searching for Chandrama Ram. The final report has not been received as yet.
- (vi) Police letter dated 10.4.2008 informing that no information received about whereabouts about Chandrama Ram.

12. The aforementioned O.A. No. 681/09 was disposed of vide order dated 12.8.2010 by this Tribunal wherein it was observed as under:-

"5. Learned counsel for the applicant also referred to Annexure-R-1 of the counter reply being RBE No.164/1998 of 26.07.198 on the subject of Compassionate Appointment in the case of missing Railway Employees. Which in turn refers to the Supplementary Circular No.29 to master Circular No.16, as reads:-

- "i. A request to grant the benefit of compassionate appointment can be considered after a lapse of at least 2 years from the date from which the Railway employee has been missing, provided that an FIR has been lodged and the missing person is not traceable, and the competent authority feels that the case is genuine. "
6. Learned counsel for the applicant emphasized that all the conditions as stated in the said Rules are satisfied namely the lapse of 2 years of missing of employee, filing of the F.I.R., missing person not traceable and that the case is genuine and therefore her case should have been considered for Compassionate Appointment. No where it is contemplated in the rules that final report from the Police is a must.
7. Learned counsel for the respondents, on the other hand, argued that no doubt that the first two conditions are satisfied. With regard to the genuineness of the matter the only tool to available in the hand of the authorities is a final report from Police to enable them to arrive at a firm conclusion.
8. Heard learned counsel for the parties. Admittedly, first two conditions i.e. lapse of two years and lodging of F.I.R. are satisfied. The third condition i.e. the person is still missing is also satisfied till date of filing of interim report by the Police. As regards the genuineness of the case the authorities have exercise best judgment and conscientious application of mind by taking into

consideration the circumstantial evidence and material available on record.

9. In view of the above, the respondent no.2 himself or through any other authorities competent in this behalf is directed to pass a reasoned and speaking order as per rules on the applicant's petitioner for compassionate appointment, keeping in mind the observations made above within a period of three months from the date of receipt of certified copy of this order.
10. With the above observations O.A. stands finally disposed of. No costs".
13. From the judgment passed in the O.A. No. 681 of 2009, respondents were directed to pass a reasoned order keeping in mind the observation made in the said order. It was argued by learned counsel for the applicant that this plea of dismissal from service of Chandrama Ram was never raised in the O.A. No. 681 of 2009. In this regard, the original file of O.A. No. 681 of 2009 was perused by me. Undoubtedly the plea of dismissal of Chandrama Ram vide order dated 3.6.2005 was not raised by the respondents in their counter affidavit of said O.A.
14. The absence of the plea of dismissal of Chandrama Ram in the counter affidavit of O.A. No. 681 of 2009 reflects adversely on efficiency of the respondents' administration and their apathetic attitude towards the respondents and to be deprecated. Surely if the respondents had taken this plea of dismissal of service of Chandrama Ram when they had filed their counter affidavit in O.A. No. 681 of 2009, the applicant might have very well challenged the order of dismissal in the year 2009 instead of filing the present O.A. in the year 2011 seeking the relief of compassionate appointment being ignorant of order of dismissal of service as alleged by the applicant.

15. In the O.A., number of grounds have been taken against the validity of the dismissal order. However, no relief has been sought and no O.A. has been filed challenging the order of dismissal.
16. However, as the facts stand today, the order dated 3.6.2005 for dismissal from service of Chandrama Ram exists today and staring at the face of the applicant and in the absence of successful challenge to set aside the dismissal order, I am of the opinion that as on today no relief of compassionate appointment can be granted to the applicant.
17. Therefore, looking to the facts of the case as detailed above, it is clear that in the face of the dismissal order of Chandrama Ram, the relief of compassionate appointment cannot be given to the applicant, since respondents cannot be expected to do something which is impossibility – they cannot give appointment on compassionate ground since on the date of filing of the application for compassionate appointment, Chandrama Ram was no longer in service since he had been dismissed from service vide order dated 3.6.2005. In this regard, reference may be to Shah Alam vs Central Administrative, 2006 (1) ESC 296 (All) DB wherein the Hon'ble High Court held that:

“5. The Court has to consider the scope and application of doctrine of "lex non cogit at impossibilia" (the law does not compel a man to do what he cannot possibly perform) and "impossibilium nulla obligatio est" (the law does not expect the party to do the impossible). The scope of the said doctrines have elaborately been considered and applied by the Hon'ble Supreme Court in Chandra Kishore Jha v. Mahaveer Prasad and Ors. ; and Mohammed Gazi v. State of M.P. and Ors. (2000) 4 SCC 342. These maxims which have also been expressed as *impotentia excusat lege* must be understood in the

qualified sense that *impotentia excusas* when there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory. These maxims are akin to the maxim of Roman Law *Nemo Tenetur ad Impossibilia* (no one is bound to an impossibility) which is derived from common sense and natural equity and has been adopted and applied in law from time immemorial. (Vide *Eagar v. Furnivall* 17 Ch. D. 115).

6. In Gujarat Assembly Election Matter, the Hon'ble Apex Court observed as under:-

The maxim of law *impotentia excusat legem* is intimately connected with another maxim of law *lex non cogit ad impossibilia*. *Impotentia excusat legem* is that when there is a necessary or invincible disability to perform the mandatory part of the law that *impotentia excusas*. The law does not compel one to do that which one cannot possibly perform. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse.

7. The law is understood to disclaim all intention of compelling to impossibilities and the administration of laws must adopt that general exception in the consideration of all particular cases. Therefore, there are implied obligations not to force a person to do something which is rendered impossible by causes beyond his control. (Vide *Hick v. Rodocanachi* 1899 (2) QB 626)"

18. Applying the law enunciated in the *Shah Alam* case (Supra) and looking to the facts of the case, respondents cannot be directed to do something which is an impossibility i.e. give

appointment on compassionate ground to heir of employee whose services have been terminated.

19. Learned counsel for the applicant had relied on Ajai Kumar Tewari Vs. Deputy Inspector General of Police & Ors, 2005 (6) AWC 5209 and Ramakant Singh Vs. State of U.P and others, in Special Appeal Defective No. 896 of 2010, decided on 18th April 2011. However, the facts of the aforementioned case are different and therefore are distinguishable from the facts of the present case.
20. In view of the facts and circumstances of the case as detailed above, I am of the view that the relief sought by the applicant cannot be granted, as such, the O.A. is dismissed. No order as to costs.

(RAKESH SAGAR JAIN)
MEMBER-J

Manish/-