

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 17.10.2024
Pronounced on: 25.10.2024

LPA No.111/2020

UT OF J&K & OTHERS

...APPELLANT(S)

Through: - Mr. Bikramdeep Singh, Dy. AG, with
Mr. Younis Hafiz, Assisting Counsel.

Vs.

SAJAD AHMAD SHAH & ANR.

...RESPONDENT(S)

Through:- Mr. Asif Ahmad Bhat, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

Per Sanjeev Kumar 'J'

1) The instant appeal by Union Territory of Jammu and Kashmir & others is directed against an order and judgment dated 2nd December, 2019, passed by learned Single Judge [Writ Court] of this Court in SWP No.1542/2016 titled "**Sajad Ahmad Shah and anr. vs. State of J&K & Ors.**" whereby the Writ Court has allowed the writ petition filed by the respondents and by a Writ of Certiorari, quashed an order dated 27.06.2016 impugned in the writ petition. The Writ Court has also directed the appellants herein to release the service benefits viz. salary, gratuity and other allied benefits that had accrued to the deceased father of respondent No.1 from the year 1989 till

his death. There is also a direction by the Writ Court to release the pensionary benefits in favour of respondent No.2 herein and a direction for considering the case of respondent No.1 for appointment on compassionate grounds.

2) Briefly stated, the facts leading to the filing of the instant appeal are that father of respondent No.1 and son of respondent No.2, namely, Habibullah Shah was in the service of Power Development Department and was holding the post of Lineman since 1st March, 1973. He continued to perform his duties as a Lineman till November, 1989 when he suddenly disappeared. The respondents lodged a missing report with Police Station, Pattan, but his whereabouts could not be traced. It was only on 24th January, 2012, the dead body of Habibullah Shah was recovered from Bus Stand, Jammu. Inquest proceedings were initiated by the appellants under Section 174 of the Criminal Procedure Code, which culminated in filing of the final report concluding that the deceased was mentally unsound and died a natural death on 24.01.2012 at Jammu Bus Stand.

3) The respondents herein, being the legal heirs of the deceased approached the appellants for release of service benefits and settlement of pension etc. and also requested

for providing employment to respondent No.1 on compassionate grounds. The said benefits were claimed by the respondents on the premise that the deceased was an employee of the Power Development Department who died in harness. The deceased was due to retire in the year 2013. When appellants did not respond, the respondents filed SWP No.2328/2013, which was disposed of by the Writ Court vide order and judgment dated 28.11.2013 by directing the appellants to take decision on the claim of respondent No.1 for appointment on compassionate grounds. The matter was considered by the appellants and vide communication No.CE/M&RE/Adm-II/13230/AS dated 27.06.2016, the claim of respondent No.1 for compassionate appointment, considered in terms of judgment of the Writ Court, was rejected. It is this order of rejection which was called in question by the respondents in SWP No.1542/2016. Additionally, the respondents in their writ petition also prayed for release of service benefits including post retiral benefits.

4) The impugned order of consideration was challenged by the respondents, primarily, on the ground that the appellants have justified the order of consideration rejecting the claim of the respondents by relying upon Regulation 113 of J&K Civil Service Regulations Vol.I, which on the

face of it was not applicable to the case of the respondents. It was pleaded that Regulation 113 of CSR was applicable only to a person who fails to join after five years continuous absence and in the instant case, the deceased employee had gone missing due to unsoundness of mind. It was, thus, submitted before the Writ Court that in the given facts and circumstances, the deceased was required to be treated as on duty till his death. It was also projected before the Writ Court that never before the death of the deceased any notice was ever issued to the deceased for joining back the services.

5) The writ petition was contested by the appellants. In the reply affidavit filed by Superintending Engineer, EM&RE Circle-II, Srinagar, Kashmir, it was stated that the deceased remained unauthorizedly absent from duties for more than two decades and, therefore, in terms of Regulation 113 of J&K CSR Vol.I, he was deemed to be out of service. It was submitted that since the deceased was not in active service, therefore, it could not be said that he died in harness giving right to respondent No.1 to seek compassionate appointment under SRO 43 of 1994.

6) The Writ Court considered the rival contentions and came to the conclusion that neither Regulation 113 of J&K CSR Vol. I was attracted to the facts and circumstances of

the case nor were the services of the deceased ever terminated by the appellants by following a due process of law. The Writ Court agreed with the contentions of the respondents and concluded that in the given facts and circumstances, the deceased should be deemed to be in service till his death and, therefore, the respondents, who are his legal heirs, are entitled to all the service benefits including appointment on compassionate grounds under SRO 43 of 1994. With the above directions, the writ petition filed by the respondents herein was disposed of vide order and judgment impugned in this appeal.

7) Heard learned counsel for the parties and perused the material on record.

8) Indisputably, deceased Habibullah Shah was a regular government employee serving in Power Development Department. As is claimed by the respondents herein, the deceased went missing in November, 1989, though the stand of the appellants herein is that the deceased unauthorizedly absented from duties and was not heard of for more than two decades. Without entering into determination of this disputed question of fact, suffice it to say that if the deceased was unauthorizedly absent since November, 1989, what action was taken by the employer (the appellants herein). Whether any notice was issued to

the deceased before his death calling upon him to join back his service and whether any departmental enquiry was envisaged and actually conducted, are some of the questions that beg answer in these proceedings. With a view to come to a correct conclusion, we have perused the official record produced by Mr. Bikramdeep Singh, Dy. AG, appearing for the appellants. We, however, could not find any record relevant to the determination of issue on hand. One of the communications on record suggests that the relevant record was not available in the office having been lost in 2014 floods.

9) Be that as it may, in the absence of relevant record, we have no option but to conclude that neither a notice directing the deceased employee to join back service was ever issued and served on the deceased during his lifetime nor any enquiry, worth the name, was conducted. The appellants have solely relied on the provisions contained in Regulation 113 of J&K CSR Vol. I, which, for facility of reference is set out below:

“113. After five years continuous absence on leave,
an officer is considered to be out of State employ.”

10) Regulation 113 (supra) fell for interpretation before a Division Bench of this Court in LPA No.46/2004 titled “**Mushtaq Ahmad Khan vs. State of J&K & Ors.**”2004(3) JKJ 10 [HC(DB)], in which the Division Bench of this court,

while relying upon judgments of the Hon'ble Supreme Court and other High Courts on the issue, held that absence from duty, howsoever long, cannot result in automatic cessation of employment. In all such cases, the person concerned has to be given an opportunity of hearing and depending on the nature of defence taken by him, further action should be taken. Whether a full-fledged enquiry as envisaged under Rule 33 of the J&K civil Services (Classification, Control and Appeal) Rules, 1956, should be held or not, will depend upon the facts of the case and be left to be discretion of the authority, subject to scrutiny and judicial review in future if such an occasion would arise.

11) Relying upon the aforesaid judgment, the Writ court rejected the sole contention raised by the appellants that the deceased had ceased to be the employee of the appellants in terms of Regulation 113 (supra).

12) We see no reason or justification to take a view different from the one taken by the Division Bench of this court in **Mushtaq Ahmad Khan's** case (supra) nor do we find that the case of the deceased was covered by Regulation 113 of the J&K CSR Vol. I. It was essentially not a case of absence without leave or overstaying of leave beyond the period of five years. Rather, it was a case where an employee had gone missing. The least that was expected

of the employer was to make an effort to find out the whereabouts of its employee or, at least, issue a notice on his home address calling upon him to join the duties. This has not happened in the instant case. Regulation 113 was clearly not applicable and even if it was applicable, as is held in **Mushtaq Ahmad Khan's** case (supra), an enquiry in the matter was necessitated. In the instant case, even the principles of natural justice were not adhered to before declaring the deceased to have ceased in the employment of the State.

13) Viewed from the above angle, we do not find any legal infirmity in the impugned judgment passed by the Writ Court. However, there is one aspect that needs consideration by this Court. There is nothing on record placed by the respondents or in the record of the appellants which would substantiate the contention of the respondents that in November, 1989, itself when the deceased allegedly went missing, a report was lodged in the concerned Police Station. Rather communication No.CRB/Missing-Pttn/2012-265-85 dated 14.09.2012, issued by District Superintendent of Police, Baramulla, indicates that Police Station, Pattan, had not received any missing report with regard to the deceased. The contention of the respondents that the deceased was suffering from

unsound mind is also not substantiated by any documentary evidence on record. There is not a single document appended by the respondents with the writ petition which would demonstrate that prior to the recovery of the dead body of the deceased from Bus Stand, Jammu, any communication was made by the respondents with the employer of the deceased or any other authority of the government. It, therefore, remains to be explained as to why the respondents, in particular, respondent No.2, remained silent till the dead body of the deceased was recovered and all claims for his salary, pension and compassionate appointment were lodged thereafter. Apparently, the deceased remained abandoned by the respondents during his lifetime.

14) The object of providing compassionate appointment, which in any case is an exception to the general principle that government employment should be offered by way of advertisement and proper selection, is to enable the family in distress to tide over the sudden financial crises in which it has plunged due to untimely death of their bread winner. The Supreme Court in the case of **State of West Bengal vs. Debabrata Tiwari & Ors.** 2023 LiveLaw (SC) 175, has held that the compassionate appointment is not a vested right and the same is related to the financial condition and

hardship faced by the dependents of the deceased government employee as a consequence of his death. A claim for compassionate appointment may not be entertained after lapse of a considerable period of time since the death of the government employee. Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and, thus, it loses significance and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for grant of compassionate appointment has been made out for consideration. In the instant case, Habibullah Shah went missing in the year 1989. After a considerable delay of twenty-four years, the respondents filed SWP No.2328/2013 seeking compassionate appointment in favour of respondent No.1. Having regard to the object of compassionate appointment, the purpose thereof cannot be said to be surviving even after more than two decades. There is no material placed on record by the respondents, either before the Writ Court or before us, to demonstrate that the family of the deceased despite lapse of so many years continues to be in distress and financial crisis.

15) Apart from the above, before filing SWP No.1542/2016, the respondents had filed SWP No.2328/2013 for similar reliefs. However, the Writ Court while disposing the said writ petition vide order dated 28th November, 2013, directed the appellants herein to consider and take decision on the claim of respondent No.1 for his appointment on compassionate grounds in terms of SRO 43 of 1994, meaning thereby other reliefs were not granted. It is in pursuance of this order dated 28th November, 2013, passed in SWP No.2328/2013, impugned consideration rejecting claim of the respondents was passed. It, therefore, needs to be seen whether in the face of earlier order dated 28th November, 2013, restricting consideration only to the compassionate appointment, the Writ Court in the subsequent writ petition could have travelled beyond the relief granted in the earlier round of litigation and direct the appellants herein to pay the service benefits including the pensionary benefits in favour of the respondents herein. That apart, during the pendency of this appeal, respondent No.2 has also died. Should we agree with the observations of the Writ Court with regard to payment of service benefits and post retiral benefits, the respondent No.1, being a major, otherwise also is not entitled to pension.

16) For the foregoing reasons, the instant appeal is partly allowed by providing as under:

- (I) The impugned judgment to the extent of directing the appellants to release the service benefits viz. salary of the deceased since the year 1989 till his death and to consider the case of respondent No.1, for compassionate appointment, is set aside.
- (II) Although the order passed in the earlier petition to the extent of service benefits would operate as *res judicata*, yet we, in the larger interests of justice, direct the respondents to release gratuity and other post retiral benefits excluding pension in favour of respondent No.1, within a period of two months from the date of receipt of this judgment.

17) The impugned order and judgment of the Writ Court is modified to the aforesaid extent.

(RAJESH SEKHRI)
JUDGE

(SANJEEV KUMAR)
JUDGE

Srinagar,
25.10.2024
"Bhat Altaf-Secy"

Whether the order is reportable: **Yes/No**