(2006) 6 AWC 5409 : (2006) 3 UPLBEC 2268

Allahabad High Court

Case No: Special Appeal No. 858 of 2006

Ram Gopal and Somaru		APPELLANT
	Vs	
The Union of India (UOI) and Others		RESPONDENT

Date of Decision: Aug. 4, 2006

Citation: (2006) 6 AWC 5409 : (2006) 3 UPLBEC 2268

Hon'ble Judges: Ajoy Nath Ray, C.J; Ashok Bhushan, J

Bench: Division Bench

Advocate: R.C. Gupta, for the Appellant; Satya Prakash and Samar Bahadur and Addl. S.G. of India, for the Respondent

Final Decision: Allowed

Judgement

Ajoy Nath Ray, C.J. and Ashok Bhushan, J.
This is an appeal from an order dated 4.7.2006 passed by an Hon''ble Single Judge

dismissing the writ petition of the appellants-writ petitioners of whom the first is the son of the second.

2. The writ petitioners claim compassionate appointment in favour of the first, Since the second has voluntarily retired on medical grounds from the

services of the Food Corporation of India.

3. The scheme under which such compassionate appointment could be obtained is set out below in its material parts; ""dated 3.7.1996...

The benefit of compassionate ground appointment shall be extended to the dependant of the departmental workers who seek voluntary retirement

on medical grounds at their own request subject to the following conditions:

(i) The workers who seek voluntary retirement on medical ground should apply within the age limit of 55 years for the purpose of availing the

benefit of compassionate ground appointment.

(iii) The benefit of compassionate ground appointment shall be given only in Handling Labour Category that too for male dependent only.

(iv) The maximum age limit for such compassionate ground appointment should not exceed 30 years. The minimum age of 18 years should not in

any case be relaxed

(v) The compassionate shall be made only in deserving cases where there is no earning member in the family of the retired worker.

(vii) Application for such compassionate grounds appointment shall be made within 3 months from the date of retirement and this period may be

relaxed by the competent authority in exceptional and deserving cases.

4. Since the admitted fact is that the appellant No. 2 made an application for voluntary retirement on medical grounds after the age of 55, the first

issue is how Clause (i) above is to be interpreted. If the clause is inflexible and does not permit the Corporation to grant compassionate

appointment unless this clause is strictly fulfilled, then and in that event, the appeal would have to be dismissed.

5. There are several reasons why we are of the opinion that the said clause is not of an inflexible type.

First Reason

6. The word ''should'' by itself is of a considerably less mandatory character and meaning than the word ''shall'' although the first is only a past

tense of the second. Consider the following sentences:

7. You should not eat lunch after 2 O''clock ; if you are a student you should study in the evening; you should take morning walks for preserving

good health. Consider also the following sentences:

8. Thou shall not steal; you shall not drive on the right side of the road in India; you shall not behave improperly in Court.

9. The above sentences are all ordinary and normal uses of the words ''should'' and ''shall''. Yet the meaning carried by the word ''should'' is of a

directory and guiding kind and the meaning carried by the word ''shall'' is of a mandatory kind.

10. We are of the clear opinion that the word should'', taken by itself has a far less mandatory Content than the word ''shall''. We are also of the

opinion that the word ''may'' is then even less mandatory than the word ''should'' and the word ''should'' is less mandatory than the word ''shall''.

11. There are numerous cases, however, where the word ''may'' has been interpreted as being used in the strict sense and there are also numerous

cases where the word ''shall'' has been interpreted as being of a directory meaning only. The use of the word and the context are both material but

it is equally material to remember that the word ''should'' should not be accepted when it is made use of Within a statute or a rule or a circular as

having the same ordinary inflexible intent as the word ''shall''.

Second Reason

12. The clause mentions a reference to a choice of the worker who is seeking voluntary retirement on medical ground It is said that he should seek

such retirement before 55, if he wants a compassionate appointment for his dependant. Medical retirement cannot be obtained without an

appropriate certificate of an authorised Doctor certifying medical unfitness. Medical unfitness is not within one''s own control, at least, it is largely

not within ones own control. As such the Clause (i) will have meaning and applicability only in the case of such workers who are in such a physical

stage before attaining the age of 55 where they can both only continue to work or obtain a genuine certificate from a Doctor certifying his medical

unfitness. This will be a small category of cases; in the large majority of cases, medical unfitness will be the cause of seeking of voluntary retirement

as and when it occurs. It is not reasonable to interpret the Clause (i) in such manner as to rule out the possibility of compassionate appointment if a

worker happens to contract medical disablement just beyond the age of 55. If the clause had been strictly worded, then our consideration might

have been different. But once a comparatively dilute word like "should" has been used, it would be thoroughly unreasonable to construe the clause

as setting down an inflexible, single and determining limit without any possibility of relaxation.

Third Reason

13. Whenever the creators of the circular sought to make their mind clear as to whether there can or cannot be relaxation, they have specifically

made mentions in that regard. Clause (iv) contains an instance where specifically the possibility of relaxation has been ruled out. Clause (vii)

contains an instance where specifically relaxation has been permitted.

14. Since Clause (i) contains neither words excluding a possibility of relaxation nor words permitting a possibility of relaxation, the clause has to be

interpreted exactly as it is. Thus, the word "limit"used in the said clause cannot be read as importing specific words writing an of idea of

irrelaxability.

15. For the above three reasons, we are of the opinion that clause (i) is not inflexible and it can and should be relaxed in appropriate circumstances

although the relaxability is not of such high a degree as in circumstances of Clause (vii) where specifically relaxation is permitted. In any event, if an

authority labours under the misapprehension that Clause (i) is irrelaxable then the authority has clearly erred in law and in interpretation.

16. In the instant case, the first petitioner was medically examined; nothing was found against him; nothing was found against his father during the

time he rendered services as a loader. As such, the dismissal of the application for compassionate appointment on the sole and single ground that

the application by the second appellant had been made beyond the age of 55 years is erroneous in law on the face of the record of the order and it

is therefore quashed and set aside. The How single Judge has also (sic) so, and we respectfully disgrace.

17. There will be cases in these matters where the authority might have to be compelled to take a reasonable action or be compelled to act in a

particular way under The principles of estoppel or principles similar thereto. In a case which had come before us some time earlier being the case

of Nizamuddin and another in Special Appeal No. 579 of 2005, we have stated as follows, and the quotation has been extracted by the Hon''ble

Single Judge also. The said portion of our judgment which was delivered on 11.5.2005 is set out below:

It was a writ petition of father and son. The son was writ petitioner No. 1 and the father was the second one. They had come to the respondents

under a Scheme which permitted an employee to retire below the age of 55 years on medical ground and if he did that his dependant would be

entitled to be considered for a compassionate appointment. The father was medically found unfit and duly granted retirement. The son was found

medically fit but not granted the employment. The only reason put forward by the authorities is that the father had put in the application for

voluntary retirement eight days after he attained the age of 55 years; according to the writ petitioners it was only two days and not eight days.

Be that as it may, the authorities took an inconsistent stand in allowing medical retirement for the father and disallowing compassionate appointment

for the son. It has never been the case of the authorities that in any event they would have to retire the father as he had made an application for

retirement on medical grounds. Since the scheme of retirement and new employment was sought to be implemented both by the father and the son

and the authorities had acceded to such an approach by the two writ petitioners, they had to apply the scheme to both of them on reasonable

basis. They failed to do so in allowing the scheme to operate for the father and in stopping the operation of the scheme for the son, although the

cause for non application or application of the scheme was the same for both father and son as far as the authorities were concerned.

18. Although in that case the delay in appointment could be counted on the fingers of one"s hand, we did not proceed to grant compassionate

appointment on that basis. The judgment shows that we had held the authorities as being bound to act in the manner in which they had acceded to

act during the material time when the lieu event took place. This was enforcing compassionate appointment on the grounds of estoppels, or

principles similar thereto or on the grounds of enforcing reasonable action on the part of statutory authorities.

19. There have been other Division Benches also where compassionate appointment has been permitted to dependants of persons who have

applied for obtaining voluntary medical retirement after the age of 55 years, under the same scheme. One such judgment was delivered on the 19th

of September, 2005 by a Division Bench of our High Court in the case of Ram Kesh Yadwa in Special Appeal No. 615 of 2005. Another such

instance is the decision of the Division Bench given in Special Appeal No. 1029 of 2002, the case of Food Corporation of India v. Raj Nath

Yadav delivered on the 8th of January, 2003.

20. We make it clear that it is not our judgment that in any and every case, the Food Corporation must as of necessity grant compassionate

appointment whenever voluntary medical retirement is taken by an employee. They would be well advised to make their stand clear to the person

seeking such retirement that it is being accepted after the age of 55 and this debars him and his dependants from seeking any compassionate

appointment. This should be done at the first possible opportunity so as to stop the raising of expectation to the contrary. After all, the issue is one

of 5 years only, i.e., between the ages of 55 and 60. When fine tuning like this is sought to be enforced, the Food Corporation should in all cases,

where a joint application for medical retirement and compassionate appointment is made, make it explicit that either the joint application is

entertained, thereby raising expectations or the joint application should be asked to be taken back and the simple application for voluntary medical

retirement should be invited.

21. These are all guiding factors and the matter of dealing with each and every different case on the facts and circumstances of it as the justice of

the case might require can never be ruled out.

22. The respondents sought to place reliance on the case of Commissioner of Public Instructions and Others Vs. K.R. Vishwanath, The rule in that

case was interpreted by the Court as a mandatory one. we interpreted Clause (i) as a mandatory one and had the said clause had as strong a

statutory flavour as the rules in the case of K.R. Vishwanath had, no doubt, our decision would have gone another way. But the rule is by way of a

circular. This is a situation where an estoppel can operate. The rule being not very strict or very mandatory, the authorities have to exercise their

discretion reasonably in every case and in any event never go wrong in law by labouring under the misapprehension that the rule is inflexible. We

would have directed the authorities to reconsider the case of the appellant. Wad the authorities not progressed at all in this matter but they have

gone ahead quite a bit and the first appellant has been medically examined and found fit. In these circumstances, we are not minded to prolong the

matter any further because the appellant is a load bearer and therefore not very well stationed to bear further load of litigation.

23. In these circumstances, the appeal is allowed; the order under appeal is set aside; the writ petition is allowed. Employment shall be granted to

the first appellant within a fortnight from the date hereof.