Mahinder Dutt Sharma vs U.O.I & Ors on 11 April, 2014

Equivalent citations: 2014 AIR SCW 2458, 2014 (11) SCC 684, 2014 (4) AIR BOM R 28, (2014) 3 ALL WC 3167, (2014) 2 SCT 692, (2014) 142 FACLR 228, (2014) 2 CURLR 272, (2014) 3 LAB LN 606, (2014) 3 SERVLR 631, (2014) 4 SCALE 712, (2014) 2 ESC 189, (2014) 3 SERVLJ 278, 2014 (4) KCCR SN 382 (SC), 2014 (5) ADJ 46 NOC, AIR 2014 SUPREME COURT 2009, 2014 LAB. I. C. 2018

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Bench: M.Y. Eqbal, Jagdish Singh Khehar

"REPORTABLE"

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2111 OF 2009

Mahinder Dutt Sharma …. Appellant

versus

Union of India & others …. Respondents

J U D G M E N T

Jagdish Singh Khehar, J.

1. By an office memorandum dated 26.10.1995, departmental action was initiated against the appellant who was then holding the post of Constable. He was then posted in the IInd Battalion, Delhi Armed Police, Delhi. The aforesaid action was initiated against the appellant on account of his continuous absence from duty with effect from 18.1.1995. He was served with absentee notice dated 25.5.1995 on 10.6.1995, wherein he was required to resume his duty. Failing which, he was informed that departmental action would be taken against him. The appellant neither resumed his duties, nor responded to the above absentee notice dated 25.5.1995. He was thereupon, issued a second absentee notice dated 24.8.1995, which was served on him on 10.9.1995. It is not a matter of dispute, that after initiating the above departmental proceedings against the appellant, he resumed his duties on 5.12.1995. It is therefore alleged, that his unauthorized and willful absence, extended to a period of 320 days 18 hours and 30 minutes.

2. Inspector Hari Darshan was appointed as the enquiry officer. After culmination of the departmental proceedings, the enquiry officer arrived at the conclusion, that the presenting officer had been successful in substantiating the charges leveled against the appellant. The above enquiry report was furnished to the appellant on 22.3.1996. Despite being required to respond to the same, the appellant did not file any reply. In the absence of any written reply, the appellant was required to appear in the "orderly room" on three occasions, for affording him a personal hearing. He ignored all the above notices, by not reporting for personal hearing.

3. Finding his willful and unauthorized absence from duty intolerable, specially in a disciplined force, the punishing authority expressed the view, that not taking stern action against the appellant, would create a bad impression, on the new entrants into police service. Finding the behaviour of the appellant incorrigible, the Deputy Commissioner of Police, IInd Battalion, Delhi Armed Police, Delhi by an order dated 17.5.1996, dismissed the appellant from service, with immediate effect. In the punishment order dated 17.5.1996 the disciplinary authority further directed, that the period of the appellant's absence from 18.1.1995 to 4.12.1995 (of 320 days, 18 hours and 30 minutes) would be treated as leave without pay.

4. In the order of dismissal itself, the appellant was informed, that he could prefer an appeal (against the punishment order dated 17.5.1996), within 30 days, before the Senior Additional Commissioner of Police, Delhi. The instant information was furnished to the appellant in terms of the procedure contemplated under the Delhi Police (Punishment and Appeal) Rules, 1980. The pleadings before this Court reveal, that the appellant received the punishment order dated 17.5.1996 on 24.5.1996. It is therefore apparent, that he could legitimately prefer an appeal by 23.6.1996. The appellant factually preferred an appeal, more than five and half years after passing of the impugned order, on 21.2.2002. The Additional Commissioner of Police, Delhi Armed Police, Delhi, dismissed the appeal preferred by the appellant vide an order dated 13.6.2002, on the ground that the same was badly time barred.

5. Dissatisfied with the order of punishment dated 17.5.1996, as also the appellate order dated 13.6.2002, the appellant approached the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as, the Tribunal), by filing Original Application no. 3132 of 2002. In the Original Application preferred by him, the appellant narrated various reasons on account of which delay in filing the appeal had occurred (against the punishment order dated 17.5.1996) ought to have been condoned. Firstly, it was submitted that his wife was suffering from cancer. Secondly, the appellant asserted that he was involved in a criminal case, and therefore, was wholeheartedly attending to the same. Thirdly, it was stated that his brother had died, and thereafter, his father and brother's wife had also passed away. Lastly, it was submitted that he was suffering from hypertension, as also, diabetes, which added to the reasons already expressed hereinabove (for not being able to prefer the appeal within the period of limitation).

6. Since the events referred to by the appellant, as have been narrated in the foregoing paragraph, had taken place prior to the year 2000, the Tribunal found no justification in the explanation tendered by the appellant, for condoning delay in preferring the appeal filed against the order of punishment dated 17.5.1996, on 21.2.2002. Despite the above conclusion, the Tribunal examined

the veracity of the impugned order dated 17.5.1996, on the basis of the submissions advanced on behalf of the appellant and arrived at the conclusion, that the same required no interference.

7. Dissatisfied with the order passed by the Tribunal on 14.8.2003, the appellant preferred Writ Petition no. 10959 of 2004 before the High Court of Delhi at Delhi (hereinafter referred to as, the High Court). The appellant, however, withdrew the aforesaid writ petition on 15.10.2004, with liberty to seek compassionate allowance. The above order dated 15.10.2004, is being extracted hereunder:-

> "Learned counsel for the petitioner, on instructions, prays for withdrawal of this petition because petitioner wants to take some appropriate remedy for grant of compassionate allowance.
>
> Dismissed with liberty to petitioner to seek appropriate remedy for grant of allowance."
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> 8. On 22.3.2005, the appellant moved a representation to the Joint Commissioner of Police, Delhi Armed Police, Delhi, seeking compassionate allowance under Rule 41 of the Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as, the Pension Rules, 1972). Rule 41 of the Rules aforementioned, is being extracted hereunder:-
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> "41. Compassionate allowance (1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity:
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> Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.
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> (2) A compassionate allowance sanctioned under the proviso to sub-rule (1) shall not be less than the amount of Rupees three hundred and seventy-five per mensem." In his above representation dated 22.3.2005 the appellant asserted, that he had about 24 years of unblemished service during which he was granted 34 good entries, including 2 commendation rolls awarded by Commissioner of Police, 4 commendation certificates awarded by the Additional Commissioner of Police and 28 commendation cards awarded by the Deputy Commissioner of Police. He also placed reliance on his discharge certificate, whereunder the character of the appellant was described as 'very good'.

9. By an order dated 25.4.2005, the Deputy Commissioner of Police, IInd Battalion, Delhi Armed Police, Delhi, rejected the prayer made by the appellant for the grant of compassionate allowance. The operative part of the order dated 25.4.2005, rejecting the appellant's claim for compassionate allowance is being extracted hereunder:-

> "4. As regards your claim for compassionate allowance, you do not have unblemished record because you have been found absent on several occasions and your period was treated as 'Leave Without Pay'. You were also censured during the tenure of your service and certain other punishments also exist in your service record. Hence due to indifferent service record and the facts of the case no compassionate allowance can be granted."

10. Dissatisfied with the order dated 25.4.2005, the appellant again approached the Tribunal by filing Original Application no. 1581 of 2005, seeking annulment of the order dated 25.4.2005, as also, the directions of the authorities, not to release compassionate allowance to the appellant. The appellant's claim was, however, declined by the Tribunal vide an order dated 28.2.2006. It is necessary in the facts and circumstances of the case, as also, for an effective determination of the claim of the appellant under Rule 41 of the Pension Rules, 1972 to extract hereinbelow, the manner and the reasoning which had weighed with the Tribunal for rejecting the claim of the appellant. Accordingly, the operative part of the relevant consideration at the hands of the Tribunal is being reproduced hereunder:-

> "7. Reading of the above rules show that in normal circumstances when a Government servant is removed or dismissed from service, he forfeits his past service, including pension and gratuity but it is only by way of an exception that a proviso is added in Rule 41 which states, the competent authority may, if the case is deserving of special consideration, sanction a compassionate allowance. From this, it would further emerge that compassionate allowance can be given only in exceptional circumstances where case is found to be deserving of special consideration. The person, who has to decide, whether it is a deserving case or not, is the competent authority. Under the Government of India's decisions, poverty is not an essential condition precedent to the grant of a compassionate allowance, but special regard is also occasionally paid to the fact that the officer has a wife and children dependent upon him, though the factor by itself is not, except perhaps in the most exceptional circumstances, sufficient for the grant of a compassionate allowance. In other words, there has to be some mitigating factor which makes the competent authority to come to the conclusion that even though the person has to be dismissed or removed from service but looking at the special mitigating circumstances, the person may be given compassionate allowance. It goes without saying when it is an exception, it cannot be given as matter of course in every case where Government servant has been dismissed or removed, otherwise it will defeat the main rule itself which can never be the intention of the legislature. Provisos are added to deal with a particular situation only to avoid undue hardship to a deserving case where mitigating circumstances are existing.
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> 8. With this background, if the facts of this case are examined, as stated by the applicant in his representation, I find only three grounds have been taken by the applicant namely, he had put in 24 years of unblemished service, there were three deaths in the family after he was dismissed and he has become a diabetic patient and

is in a pathetic condition. His ground for condoning the delay was not considered by the appellate authority in the right spirit. Let me examine all these three points. When applicant had challenged his dismissal and appellate order before the Tribunal in OA 3132/2002, the question of delay was specifically dealt with by the Tribunal in Para 8 (Page 19 to 22). It was specifically stated as undedr:-

"On this count, we need not prove further in detail. Even if we accept the contention of the applicant to be gospel truth, still he has to explain each day's delay after the period of limitation expired. As per his own showing, all these unfortunate incidents took place before the year 2000. He was also acquitted by the Court of competent jurisdiction in the same year. Still he did not deem it necessary to file an appeal within the period of limitation from that date." His contention was thus rejected.

9. In view of above, the contention that there was a valid ground for not filing the appeal within time cannot even be allowed to be agitated again as the judgment of Tribunal has not been upset by Hon'ble High Court. Similarly, applicant had also challenged before Tribunal the use of word "incorrigible" for him by the authorities but even that contention was rejected by the Tribunal. The order dated 14.8.2003 passed by the Tribunal in O.A. 3132/2002 was further carried by the applicant to Hon'ble High Court of Delhi by filing Writ Petition no. 10959/2004 but the said order of Tribunal was not interfered with. On the contrary, the order passed by Hon'ble High Court reads as under:-

"Learned counsel for the petitioner, on instructions, prays for withdrawal of this petition because petitioner wants to take some appropriate remedy for grant of compassionate allowance.

Dismissed with liberty to petitioner to seek appropriate remedy for grant of this allowance.'" which clearly shows that the judgment of Tribunal has attained finality. Counsel for the applicant submitted that the writ petition was withdrawn on directions from the Hon'ble High Court, but I cannot with this contention because words cannot be added in the order passed by Hon'ble High Court. Order has to be read, as it is, which shows that applicant had withdrawn the case because he wanted to take some appropriate remedy for grant of compassionate allowance. In other words, the order passed by the Tribunal was not interfered with and was upheld. Therefore, in these circumstances, applicant cannot be allowed to state to the contrary, therefore, the contention that there was valid reason for not filing the appeal in time or that he had unblemished record is rejected. Since the findings that he was found to be incorrigible in this case when he was dismissed, whereas the foremost requirement for grant of compassionate allowance under Rule 41 of the CCS (Pension) Rules is that of extenuating circumstances.

10. Apart from it, applicant remained unauthorizedly absent on six occasions, as reflected in counter affidavit:

> "1. 3 days leave without pay w.e.f. 30.9.79 to 2.10.79 vide O.B. no. 656/80.
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> 2. 66 days leave without pay w.e.f. 15.10.79 to 19.12.79 vide O.B. no. 656/80.
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> 3. 19 days leave without pay w.e.f. 6.2.81 to 24.2.81 vide order no. 15417-21/ASIP/North dated 8.9.1981.
>
> 4. 20 days leave without pay w.e.f. 29.8.84 to 17.9.84 vide O.B. no. 682/85.
>
> 5. 83 days leave without pay w.e.f. 20.9.84 to 11.12.84 vide O.B. no. 682/85.
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> 6. 110 days leave without pay w.e.f. 3.1.96 to 22.4.96 vide order no. 2934-37/ASIP-II, DAP, dated 22.5.96." Applicant has not even bothered to controvert it, which means these averments stand admitted in law. These facts clearly show that applicant cannot be said to be having unblemished record as stated by him, therefore, this contention also has to be rejected. Applicant was dismissed in 1996. If after 9 years applicant states he is in a pathetic condition, he cannot be allowed to claim compassionate allowance in 2005 w.e.f. 1996 i.e. date of his dismissal, that too with interest. This request is definitely an after thought, nothing more need be said on this point. If such a contention is allowed, employees will not bother to maintain discipline or follow rules because they would think ultimately even if they are dismissed, they can always claim compassionate allowance. Compassionate allowance cannot be sought as a matter of right unless there are some exceptional circumstances.

11. According to me, no case has been made out by applicant for grant of compassionate allowance." (emphasis is ours)

11. Aggrieved with the order of the Tribunal dated 28.2.2006, the appellant filed Writ Petition no. 14924 of 2006 before the High Court. The High Court examined the submissions advanced on behalf of the appellant. It dismissed the claim of the appellant for compassionate allowance, on the following consideration:-

> "Considering the aforesaid plea, we had directed the petitioner to file an additional affidavit to give particulars and details of the reasons which constrained him to avail leave without pay and to set out other special circumstances in support of his plea for compassionate allowance. The additional affidavit was not filed within two weeks as directed. However, further time was granted by us to the petitioner for filing the additional affidavit vide order dated 11.10.2006. The additional affidavit that has been preferred by the petitioner, unfortunately, apart from mentioning in para 6 that the petitioner's condition was pathetic and his wife has suffered from cancer and that he was apprehending amputation of his left leg below the knee, does not contain any averments with regard to the various bereavements suffered or the illness of his wife or the treatment thereof and the respective deaths which came into the way of the

> petitioner from taking legal remedies. He has not brought forward any extenuating and special circumstances which had continued since then which had prevented him from taking timely remedies or would entitle him to compassionate allowance. The medical certificate of the petitioner no doubt shows that he is diabetic and under treatment, therefor. However, it also shows that the petitioner has been a chronic alcoholic and drug addict. Considering the aforesaid factors, while one may sympathize with the petitioner's present condition, we are not satisfied that the petitioner has succeeded in making out a case for grant of compassionate allowance and the discretion exercised by the authorities cannot be said to have been vitiated by any extraneous or irrelevant factors." (emphasis is ours)
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> 12. We are of the considered view, that the adjudication by the Courts below with reference to Rule 41 of the Pension Rules, 1972, is clearly misdirected. The Rule itself contemplates, payment of compassionate allowance to an employee who has been dismissed or removed from service.

Under the punishment rules, the above punishments are of the severest magnitude. These punishments can be inflicted, only for an act of extreme wrongdoing. It is on account of such wrongdoing, that the employee concerned, has already been subjected to the severest form of punishment. Sometimes even for being incorrigible. Despite that, the rule contemplates sanction of a compassionate allowance of, upto two-thirds of the pension or gratuity (or both), which would have been drawn by the punished employee, if he had retired on compassionate pension. The entire consideration upto the present juncture, by the Courts below, is directly or indirectly aimed at determining, whether the delinquency committed by the appellant, was sufficient and appropriate, for the infliction of the punishment of dismissal from service. This determination is relevant for examining the veracity of the punishment order itself. That, however, is not the scope of the exercise contemplated in the present consideration. Insofar as the determination of the admissibility of the benefits contemplated under Rule 41 of the Pension Rules, 1972 is concerned, the same has to be by accepting, that the delinquency committed by the punished employee was of a magnitude which is sufficient for the imposition of the most severe punishments. As in the present case, unauthorized and willful absence of the appellant for a period of 320 days, has resulted in the passing of the order of dismissal from service. The punishment inflicted on the appellant, has been found to be legitimate and genuine, as also, commensurate to the delinquency of the appellant. The issue now is the evaluation of claim of the punished employee under Rule 41 of the Pension Rules, 1972.

13. In our considered view, the determination of a claim based under Rule 41 of the Pension Rules, 1972, will necessarily have to be sieved through an evaluation based on a series of distinct considerations, some of which are illustratively being expressed hereunder:-

> (i) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of moral turpitude? An act of moral turpitude, is an act which has an inherent quality of baseness, vileness or depravity with respect to a concerned person's duty towards another, or to the society in general. In criminal law, the phrase is used generally to describe a conduct which is

contrary to community standards of justice, honesty and good morals. Any debauched, degenerate or evil behaviour would fall in this classification.

(ii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of dishonesty towards his employer? Such an action of dishonesty would emerge from a behaviour which is untrustworthy, deceitful and insincere, resulting in prejudice to the interest of the employer. This could emerge from an unscrupulous, untrustworthy and crooked behaviour, which aims at cheating the employer. Such an act may or may not be aimed at personal gains. It may be aimed at benefiting a third party, to the prejudice of the employer.

(iii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act designed for personal gains, from the employer? This would involve acts of corruption, fraud or personal profiteering, through impermissible means by misusing the responsibility bestowed in an employee by an employer. And would include, acts of double dealing or racketeering, or the like. Such an act may or may not be aimed at causing loss to the employer. The benefit of the delinquent, could be at the peril and prejudice of a third party.

(iv) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, aimed at deliberately harming a third party interest? Situations hereunder would emerge out of acts of disservice causing damage, loss, prejudice or even anguish to third parties, on account of misuse of the employee's authority to control, regulate or administer activities of third parties. Actions of dealing with similar issues differently, or in an iniquitous manner, by adopting double standards or by foul play, would fall in this category.

(v) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, otherwise unacceptable, for the conferment of the benefits flowing out of Rule 41 of the Pension Rules, 1972? Illustratively, any action which is considered as depraved, perverted, wicked, treacherous or the like, as would disentitle an employee for such compassionate consideration.

14. While evaluating the claim of a dismissed (or removed from service) employee, for the grant of compassionate allowance, the rule postulates a window for hope, "...if the case is deserving of special consideration...". Where the delinquency leading to punishment, falls in one of the five classifications delineated in the foregoing paragraph, it would ordinarily disentitle an employee from such compassionate consideration. An employee who falls in any of the above five categories, would therefore ordinarily not be a deserving employee, for the grant of compassionate allowance. In a situation like this, the deserving special consideration, will have to be momentous. It is not possible to effectively define the term "deserving special consideration" used in Rule 41 of the Pension Rules, 1972. We shall therefore not endeavour any attempt in the said direction. Circumstances deserving special consideration, would ordinarily be unlimited, keeping in mind unlimited variability of human environment. But surely where the delinquency leveled and proved

against the punished employee, does not fall in the realm of misdemeanour illustratively categorized in the foregoing paragraph, it would be easier than otherwise, to extend such benefit to the punished employee, of course, subject to availability of factors of compassionate consideration.

15. We shall now venture to apply the aforesaid criterion, to the facts and circumstances of the case in hand, and decipher therefrom, whether the appellant before this Court ought to have been granted compassionate allowance under Rule 41 of the Pension Rules, 1972. The appellant was punished by an order dated 17.5.1996 with dismissal from service. The accusations levelled against the appellant were limited to his unauthorized and willful absence from service from 18.1.1995 to 4.12.1995 (i.e., for a period of 320 days, 18 hours and 30 minutes). The above order of punishment also notices, that not taking stern action against the appellant, would create a bad impression, on the new entrants in the police service. The punishing authority while making a choice of the punishment imposed on the appellant, also recorded, that the appellant's behaviour was incorrigible. Thus viewed, there can be no doubt, that the order of dismissal from service imposed on the appellant was fully justified. For determining the question of compassionate allowance, so as to bring it within the realm of the parameters laid down in Rule 41 of the Pension Rules, 1972, it is first necessary to evaluate, whether the wrongdoing alleged against the appellant, was of a nature expressed in paragraph 13 of the instant judgment. Having given our thoughtful consideration on the above aspect of the matter, we do not find the delinquency for which the appellant was punished, as being one which can be described as an act of moral turpitude, nor can it be concluded that the allegations made against the appellant constituted acts of dishonesty towards his employer. The appellant's behaviour, was not one which can be expressed as an act designed for illegitimate personal gains, from his employer. The appellant, cannot also be stated to have indulged in an activity to harm a third party interest, based on the authority vested in him, nor was the behaviour of the appellant depraved, perverted, wicked or treacherous. Accordingly, even though the delinquency alleged and proved against the appellant was sufficient for imposition of punishment of dismissal from service, it does not fall in any of the classifications/categories depicted in paragraph 13 of the instant judgment. Therefore, the availability of compassionate consideration, even of a lesser degree should ordinarily satisfy the competent authority, about the appellant's deservedness for an affirmative consideration.

16. We shall only endeavour to delineate a few of the considerations which ought to have been considered, in the present case for determining whether or not, the appellant was entitled to compassionate allowance under Rule 41 of the Pension Rules, 1972. In this behalf it may be noticed, that the appellant had rendered about 24 years of service, prior to his dismissal from service, vide order dated 17.5.1996. During the above tenure, he was granted 34 good entries, including 2 commendation rolls awarded by Commissioner of Police, 4 commendation certificates awarded by the Additional Commissioner of Police and 28 commendation cards awarded by the Deputy Commissioner of Police. Even though the charge proved against the appellant pertains to his unauthorized and willful absence from service, there is nothing on the record to reveal, that his absence from service was aimed at seeking better pastures elsewhere. No such inference is even otherwise possible, keeping in view the length of service rendered by the appellant. There is no denial, that the appellant was involved, during the period under consideration, in a criminal case, from which he was subsequently acquitted. One of his brothers died, and thereafter, his father and

brother's wife also passed away. His own wife was suffering from cancer. All these tribulations led to his own ill-health, decipherable from the fact that he was suffering from hypertension and diabetes. It is these considerations, which ought to have been evaluated by the competent authority, to determine whether the claim of the appellant deserved special consideration, as would entitle him to compassionate allowance under Rule 41 of the Pension Rules, 1972.

17. None of the authorities on the administrative side, not even the Tribunal or the High Court, applied the above parameters to determine the claim of the appellant for compassionate allowance. We are of the view, that the consideration of the appellant's claim, was clearly misdirected. All the authorities merely examined the legitimacy of the order of dismissal. And also, whether the delay by the appellant, in filing the appeal against the punishment order dated 17.5.1996, was legitimate. The basis, as well as, the manner of consideration, for a claim for compassionate allowance, has nothing to do with the above aspects. Accordingly, while accepting the instant appeal, we set aside the order dated 25.4.2005 (passed by the Deputy Commissioner of Police, IInd Battalion, Delhi Armed Police, Delhi), rejecting the prayer made by the appellant for grant of compassionate allowance. The order passed by the Tribunal dated 28.2.2006, and the order passed by the High Court dated 13.11.2006, are also accordingly hereby set aside. Having held as above, we direct the competent authority to reconsider the claim of the appellant, for the grant of compassionate allowance under Rule 41 of the Pension Rules, 1972, based on the parameters laid down hereinabove.

18. Allowed in the aforesaid terms.

.....J. (Jagdish Singh Khehar) .....J. (M.Y. Eqbal) New Delhi;

April 11, 2014.
