

Court No. - 7**Case :-** WRIT - A No. - 9041 of 2023**Petitioner :-** Ayush A.N Yadav**Respondent :-** State Of U.P. Thru. Addl. Chief Secy. Basic Education Lko. And 3 Others**Counsel for Petitioner :-** Abhishek Dwivedi, Mahendra Pratap Singh**Counsel for Respondent :-** C.S.C., Ran Vijay Singh, Uday Veer Singh**Hon'ble Abdul Moin, J.**

1. Heard the learned counsel for the petitioner, learned Standing counsel appearing on behalf of the respondents no. 1 & 3, Sri Ran Vijay Singh, learned counsel appearing on behalf of the respondent no. 2 and Dr. Uday Veer Singh, learned counsel appearing on behalf of the respondent no. 4.

2. Instant writ petition has been filed praying for quashing of the order dated 16.10.2023, a copy of which is annexure 1 to the writ petition whereby the appointment order of the petitioner made on compassionate grounds has been cancelled.

3. The contention of learned counsel for the petitioner is that the father of the petitioner namely Sri Amar Nath Yadav who was working as a Head Master under the respondent no. 4 i.e Basic Shiksha Adhikari, Barabanki died in harness on 28.07.2018. At that stretch of time, the mother of the petitioner was working in Bhartendu Natya Academy on a Class III post. As per the learned counsel for the petitioner, the petitioner chose not to apply for compassionate appointment immediately on the death of his father as he was pursuing Diploma in Elementary Education (hereinafter referred to as "D.El.Ed") which, upon completion, would have made the petitioner eligible for being appointed as an Assistant Teacher. For the first time the petitioner applied for compassionate appointment through his application dated 01.09.2022. The mother of the petitioner also gave an affidavit on 23.11.2022, a copy of which is annexure 6 to the writ petition indicating that as she is not well consequently, she is unable to take appointment and thus prayed for appointment of the petitioner on compassionate grounds.

4. In pursuance thereof, the petitioner was found eligible for being appointed on compassionate ground and he had been appointed on 20.12.2022. Copy of the said order is annexure 8 to the writ petition.

5. Subsequent thereto, upon the respondents coming to know that at the time of death of the petitioner's father, his mother was in employment, as such, a Show Cause Notice was issued to the petitioner requiring him to Show Cause as to why his order of appointment should not be cancelled. The petitioner claims to have submitted his reply which did not find favour and the respondents, by means of the order dated 16.10.2023, have cancelled the appointment of the petitioner. Raising a challenge to the said order, the instant writ petition has been filed.

6. The contention of learned counsel for the petitioner is that when the petitioner had applied for compassionate appointment on 20.12.2022, his mother was not in service, she having retired on attaining the age of superannuation on 31.08.2021 and consequently, the respondents while considering the provisions of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "Rules, 1974") have patently erred in indicating that the mother of the petitioner was in employment and consequently, have held the petitioner as ineligible for being appointed on compassionate grounds. It is thus contended that the order merits to be set aside on this ground alone.

7. The other argument is that keeping in view the settled proposition of law, a compassionate appointment can only be made on a permanent basis and as the petitioner had been appointed on 20.12.2022 as such, his appointment was on a permanent post and the respondents, in case, they found any error or illegality in the appointment of the petitioner should have resorted to disciplinary proceedings prior to terminating the appointment of the petitioner and removing him from service which not having been done, vitiates the order impugned and as such, the order impugned merits to be set aside on this ground also.

8. Another ground taken by the learned counsel for the petitioner as per averments made in paragraphs 6 & 24 of the writ petition are that the Bhartendu Natya Academy is a society registered under the provisions of the Societies Registration Act, 1860 and the service of the employee of the Bhartendu Natya Academy are non pensionable. It is also contended that the Rules, 1974 contemplate the employment of the spouse in Government service and as the Bhartendu Natya Academy is a society consequently, the service of the petitioner's mother cannot be considered to be in Government service so as to entail attracting of the bar as contained in sub-rule (1) of Rule 5 of Rules, 1974.

9. On the other hand, Dr. Uday Veer Singh, learned counsel appearing on behalf of the respondent no.4 argues that the compassionate appointments are governed by the Rules, 1974. Rule 5 (1) of the Rules, 1974 makes a clear bar of a compassionate appointment to be made where the spouse of deceased employee is in employment. Admittedly, at the time of the death of the petitioner's father i.e 28.07.2018, the mother of the petitioner was Class-III employee. This itself made the petitioner ineligible for being appointed on compassionate grounds. It is contended that the petitioner cleverly waited till such time his mother retired on attaining the age of superannuation on 31.08.2021 and thereafter staked his claim for being appointed on compassionate grounds through his application made in September, 2022 and on the basis of the affidavit given by the mother dated 31.08.2021, the petitioner was appointed.

10. It is only subsequent thereto that the respondents came to know that the mother of the petitioner was in fact employed at the time of death of the petitioner's father i.e on 28.07.2018 which thus entailed the specific bar as contained in Sub rule (1) of Rule 5 of the Rules, 1974 being attracted and thus after issuance of Show Cause Notice, the appointment of the petitioner itself has been cancelled. It is thus contended that there is no illegality and infirmity in the order impugned.

11. So far as the ground of the disciplinary proceedings not having been resorted to while cancelling the appointment of the petitioner. Dr. Uday Veer Singh, learned counsel, argues that there is difference between dismissal, removal or reduction in rank of an employee and imposition of minor or major penalty and cancellation of appointment inasmuch as it is only where a penalty is to be imposed upon an employee that the disciplinary proceedings are to be resorted.

12. In the instant case, as the very appointment of the petitioner was *void ab initio* taking into consideration the specific bar as contained in Sub Rule (1) of Rule 5 of the Rules, 1974 consequently, there was no occasion to resort to disciplinary proceedings and the appointment of the petitioner has itself been cancelled.

13. Heard the learned counsel appearing on behalf of the contesting parties and perused the records.

14. From a perusal of records it emerges that the father of the petitioner died in harness while working on the post of Head Master on 28.07.2018. Despite the petitioner being eligible for compassionate appointment, he did not stake his claim for compassionate appointment. Admittedly, at the time of death of the petitioner's father, his mother was working on a Class-III post. Considering Sub rule (1) of Rule, 5 of the Rules, 1974 there is a clear bar in a compassionate appointment being made where the spouse of the deceased employee is in employment. Thus, the bar of Sub rule (1) of Rule, 5 of the Rules, 1974 itself made the petitioner ineligible for being appointed on compassionate ground upon the death of his father. Cleverly, the petitioner continued to wait till such time his mother retired on attaining the age of superannuation on 31.08.2021. The petitioner for the first time applied for compassionate appointment on 01.09.2022 and his application found favour with the respondents and the petitioner was appointed on compassionate grounds on 20.12.2022. Subsequent thereto, upon the respondents coming to know that the petitioner was ineligible for being appointed on compassionate

ground upon the death of his father as his mother was in employment, issued a Show Cause Notice to the petitioner and considering the explanation of the petitioner and the specific bar as contained in Sub rule (1) of Rule 5 of the Rules, 1974, the appointment order of the petitioner has been cancelled.

15. Sub rule (1) of Rule, 5 of the Rules, 1974 gives a clear bar in the compassionate appointment of a dependent of deceased government servant where the spouse of deceased Government servant is in employment. Once admittedly, the mother of the petitioner was in employment on the date of death of his father i.e on 28.07.2018, his mother having only retired on 31.08.2021, consequently, the petitioner was ineligible for being appointed on compassionate grounds. The mere fact that the petitioner applied for compassionate appointment only through his application in September, 2022 upon he having acquired the qualification of D.El.Ed which would make him eligible for being appointed on compassionate ground on the post of Assistant Teacher and by that time, his mother had already retired cannot resile from the fact that Sub rule (1) of Rule 5 of the Rules, 1974 itself makes the petitioner ineligible for being appointed on compassionate ground as his mother was in employment on the death of the petitioner's father. Although Sub rule (1) of Rule 5 of the Rules, 1974 has not explicitly indicated as to when the factum of the spouse being in employment is to be considered yet needless to mention that once it is a compassionate appointment which is to be made under the provisions of Rules, 1974, the employment of the spouse would obviously have to be seen at the time of the death of the Government servant. Any other interpretation would thus give rise to a mischief, as appears to have occurred in the instant case, inasmuch as a dependent could continue to wait till the other spouse, who is in employment on the death of the deceased Government servant, retires and then files an application. Obviously, this cannot be the intention of the legislature in framing the rules.

16. So far as the ground of not resorting to disciplinary proceedings is concerned on the ground that the appointment on compassionate ground is always on permanent basis, needless to mention that the disciplinary proceedings are to be followed where a penalty is to be imposed upon a person. In the instant case, once the very appointment of the petitioner is *void ab initio* considering that the petitioner was ineligible for being appointed on compassionate grounds when his mother was in employment at the time of the death of his father consequently, this Court does not find any error being committed by the respondents while cancelling the appointment of the petitioner as no penalty has been imposed on the petitioner.

17. As regards the argument of learned counsel for the petitioner that the Bhartendu Natya Academy is only a society and the services of the Bhartendu Natya Academy staff are non pensionable, suffice it to state that the Rules, 1974 do not indicate that the spouse in employment should hold a pensionable post.

18. A further perusal of the bye-laws of the Academy, a copy of which has been filed as Annexure-3 to the writ petition, would indicate that the Chairman and five members are to be nominated by the State Government; the Executive Chairman is the Secretary of State Government; the Director himself is to be appointed by the Society with the prior approval of the State Government; one of the member is the Secretary to Government of U.P. or his nominee, while the other member i.e. the Treasurer is to be appointed by the State Government. The duration of the members can be terminated earlier also by the State Government as every member holds office on the pleasure of the State Government; the bye-laws of the Academy can be amended from time to time subject to approval of the State Government where additional expenditure is involved; the Financial Advisor is to be the Secretary to the State Government; the Treasurer and cheques are to be drawn from the Bank and the account in the Bank will be appointed by the State Government; the State Government can appoint one or more persons to

review the work and progress of the Society; the State Government may issue the directions as it considers necessary for furtherance of the objects of the Society; the income and property of the Society has to be applied towards the promotion of the objects as set forth in the memorandum of association subject to conditions or limitations as the State Government may impose; the State Government may at any time dissolve the Society or any Committee; the State Government may take over the administration of the Society at any time; the State Government may amend the rules of the Society; the rules and regulations of the Society may be altered at any time with the sanction of the State Government etc., are all stipulations in the bye-laws to indicate the deep and pervasive control over the Academy by the State Government. Obviously, the intention of sub rule (1) of Rule 5 of the Rules, 1974 is to bar compassionate appointment where the spouse of the deceased government servant is working at the time of death and such working should be under the Central or State Government or a Corporation owned or controlled by the Central or State Government, meaning thereby that it is only strictly private employment which has been excluded from the ambit of employment. However, where from a perusal of the bye-laws of the Academy it emerges that the Academy has got deep and pervasive control of the State Government consequently the appointment of mother of the petitioner can be said to be such appointment which excluded the petitioner from being appointed on compassionate ground upon the death of his father.

19. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the writ petition is dismissed.

Order Date :- 23.11.2023
Pachhere/-