

GAHC020004042020

undefined



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
KOHIMA BENCH

Case No. : WP(C)/141/2020

MOHAMMED ABDUL HAFIZ CHOUDHURY
S/O LATE MD.ABDUL RAHIM CHOUDHURY,
R/O OLD MINISTERS HILL, KOHIMA, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS
THROUGH THE CHIEF SECRETARY TO THE GOVT. OF NAGALAND,
NAGALAND, KOHIMA

2:THE HOME COMMISSIONER
GOVT. OF NAGALAND
HOME DEPARTMENT
NAGALAND
KOHIMA

3:THE DIRECTOR GENERAL OF POLICE
POLICE HEADQUARTERS
NAGALAND
KOHIMA

4:THE SUPERINTENDENT OF POLICE
MOKOKCHUNG
NAGALAND

5:THE DEPUTY INSPECTOR GENERAL OF POLICE (HQR)

NAGALAND
KOHIM

Advocate for the Petitioner : ALEMWAPANG AO, MOA JAMIR,MOASENLA,M

SOLO,K T SANGTAM

Advocate for the Respondent : GOVT ADV NL,

B E F O R E
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

Date of hearing : 12.11.2024.

Date of Judgment : 12.11.2024.

J U D G M E N T & O R D E R (Oral)

Heard Mr. Moa Jamir, learned counsel assisted by Ms. Shisa Jamir, learned counsel for the petitioner. Also heard Ms. Pichano, learned Government Advocate for the State respondents.

2] By way of this petition under Article 226 of the Constitution of India, the petitioner is seeking direction to appoint the petitioner to any Group "C" post on compassionate ground in terms of the Office Memorandum dated 17.09.2015 and is further seeking setting aside and quashing of the letter dated 16.08.2021 issued by the Deputy Inspector General of Police (Headquarter), Nagaland, Kohima.

3] The facts of the case is that the petitioner's father late Md. Abdul Rahim Choudhury, who was serving as NPTO Naik under DEF, Mokokchung, Nagaland attached to Police Control Room, Kohima expired on 12.01.2008, while on service leaving behind the petitioner, petitioner's mother and four daughters. The petitioner being eligible to be considered for appointment to either Group "C" or Group "D" in terms of Office

Memorandum dated 17.09.2015, by application dated February, 2008 applied for appointment on compassionate ground. Since the aforesaid application of the petitioner was not attended to by the respondents, reminders were also issued by letters dated 09.05.2013 and 17.06.2013. Despite repeated request since the application for appointment of the petitioner on compassionate ground was not attended to, the petitioner approached this Court by filing WP(C) No. 34(K) of 2017.

4] Pertinent that by Judgment and Order dated 06.04.2017, the aforesaid writ petition was disposed of by this Court. The relevant portion of the aforesaid Judgment and Order is reproduced hereunder for ready reference:-

“I have considered the prayer of the petitioner and perused the documents filed in support of his claim and I find that he is entitled to be appointed in the Department where his father served and died in harness, on compassionate ground. The respondents are therefore, directed to appoint the petitioner in any job to which he is eligible or suitable as per the scheme provided in the government office memorandum mentioned above.”

5] Despite this Court having found the petitioner to be entitled to be appointed in the Department where his father served and died in harness, and having directed the respondents to appoint the petitioner in any job to which he is eligible or suitable as per the scheme applicable as on that date, the respondent authorities did not comply with the aforesaid direction/writ issued by this Court for which the petitioner had to approach this Court for the second time by filing writ petition being WP(C) No. 291(K) of 2017, which was disposed of by Judgment and Order dated 16.08.2018. The relevant portion of the aforesaid Judgment and Order is

reproduced hereunder for ready reference:-

“Mr. V. Zhimoni, learned Government Advocate as directed by this Court order dated 09.05.2018, has submitted a copy of the letter written to him by Assistant Inspector General of Police (Admn.), Government of Nagaland on 31.07.2018, wherein it has been clearly stated that the petitioner is entitled to be in the waiting list of the persons awaiting appointment under compassionate ground. It is also stated in the letter that there are 6 post of constable lying vacant at the moment...”

In view of the submission of Mr. Supongwati and the contents of the letter of Assistant Inspector General of Police (Admn.), Government of Nagaland and the submission of Mr. V. Zhimomi, learned Government Advocate, I am of the considered view that the petitioner is eligible for appointment under compassionate ground under the die in harness scheme. Therefore, the respondents are directed to appoint him to one of the vacant post of Constable indicated in the letter if it falls under the quota of compassionate appointment and if not appoint him as soon as vacancy arises for that category”.

6] Despite the aforesaid clear direction of this Court, the respondents once again was sitting silent over the matter for which the petitioner was compelled to file a contempt petition being COP(C) No. 33 of 2019 before this Court. The Contempt Court however after observing that there is a contingency to the aforesaid direction as regards availability of vacancy and that there is no strict timeline provided by the Writ Court, closed the contempt petition by Order dated 02.12.2019.

7] Despite the aforesaid writ issued by the Court to the effect of directing the respondents to appoint the petitioner, to one of the vacant post of Constable as indicated in the letter dated 13.07.2018 written by the Assistant Inspector General of Police (Admn.), Government of Nagaland, if it falls under the quota of compassionate appointment and if not, to appoint him as soon as the post is available under the category,

the petitioner having been not appointed till date as directed, the petitioner was compelled to file the present writ petition for the third time before this Court.

8] Mr. Jamir, learned counsel for the petitioner submits that the third consecutive writ petition was compelled to be filed by the petitioner because of the non-action/non-compliance of the writ issued by this Court by Judgment and Order dated 16.08.2018. He further submits that despite the submission made by the learned Government Advocate before the Writ Court based on which the aforesaid writ/direction was passed earlier by this Court by Judgment and Order dated 16.08.2018, the respondents are sitting silent over the matter.

9] Per contra, Ms. Pichano, learned Government Advocate submits that in terms of the applicable scheme, non-locals are not eligible for employment against the reservation made for the indigenous inhabitants of the State.

In support of the aforesaid submission, she relies upon the Office Memorandum dated 19.04.1983. She further submits that however, the non-locals are eligible for appointment against 20% of the vacancies, relating to Gazetted technical post, and accordingly submits that though the petitioner is not an indigenous inhabitant of Nagaland, however, he can be considered in technical post of Grade-III & IV, where 20% is open for non-local. She further submits that however, the case of the petitioner cannot be considered as per the observation of the Personnel & Administrative Reforms (P&AR) Department in the office of Director General of Police as the petitioner does not have any technical

qualifications as required under the Office Memorandum dated 19.04.1983. She further draws the attention of this Court letter dated 16.08.2021, whereby it is communicated to the petitioner that since he is not an indigenous inhabitants of the State and since he does not have any technical qualifications, his case cannot be considered for appointment on the basis of compassionate appointment.

10] I have given my prudent considerations to the arguments made by both the contesting parties and I have perused the materials available on records.

11] It is apparent that this is the third occasion when the writ petitioner had to approach this Court under Article 226 of the Constitution of India, canvassing his grievance for not appointing him in terms of the earlier order passed by this Court on 16.08.2018 in WP(C) No. 291(K) of 2017.

12] Operative portion of the aforesaid Judgment and Order dated 16.08.2018 has already been extracted hereinabove which indicates that it was on the basis of the submission made by the learned Government Advocate in terms of the Court's direction passed on 09.05.2018 and the letter submitted by him written to him by the Assistant Inspector General of Police(Admn.), Government of Nagaland on 13.07.2018, wherein it has been clearly stated that the petitioner is entitled to be considered for appointment under the scheme and he has been placed at Serial No. 1 in the waiting list of persons awaiting appointment under compassionate ground, this Court earlier by Judgment and Order dated 16.08.2018 directed the respondents to appoint the petitioner to one of the vacant post of Constable indicated in the letter if it falls under the quota of

compassionate appointment and if not, to appoint him as soon as vacancy arises for that category. It is not the case of the respondents that there was no vacancy or the case of the petitioner does not fall under the quota for compassionate appointment, for which the writ issued by this Court earlier could not be complied. In fact, in the letter dated 13.07.2018, it is also clearly stated that there are six posts of Constable lying vacant at that relevant point of time.

13] It is further observed that no appeal or review has also been filed against the aforesaid Judgment and Order passed by this Court. In such event, the Judgment and Order dated 16.08.2018 having attained finality, it was imperative on the part of the respondent authorities to comply with the directions passed by this Court earlier. It is unfortunate that because of the failure of the respondent authorities to comply with the clear and unambiguous order passed by this Court, the writ petitioner has to file writ petition before this Court for enforcing the writ/direction passed earlier by this Court.

14] In the present case, the respondent Nos. 1, 2, 3 and 4 have filed an affidavit-in-opposition on 26.04.2022 where under paragraph 4, it is stated as hereunder:-

“4. That with regard to the statements made in paragraphs - 2 & 3, of the Writ petition, the answering deponent admits to the extent borne by records. However, it is further states that the government has issued the Office Memorandum No. AR-8/08/1978 dated 17/09/2015 with regard to the revised appointment on compassionate scheme which has to be read along with the Office Memorandum NO. AR-8/8/76 dated 19/04/1983 which clearly stipulated that non-locals are not eligible for employment against the reservation made for the indigenous inhabitants of the State. They are however, eligible for appointment against 20% of the vacancy relating to gazetted technical posts. Therefore, the petitioner not being an indigenous inhabitant of Nagaland cannot

be appointed under 100% reserved in Grade-III & IV post of the office memorandum dated 17.09.2015. However, the petitioner can be considered in Technical post of Grade - III & IV, where 20% is open for non- local.

It is however pertinent to mentioned herein that by letter dated 16.08.2021 informing him that in view of the observation of the P & AR Department the Office of the Director General of Police on perusal of his documents, the case of the petitioner cannot be considered, since, the petitioner does not have any technical qualification as required by the Office Memorandum NO. AR- 8/8/76 dated 19.4.1983. Therefore, in compliance to the Hon'ble court order the authority has communicated to the petitioner."

15] Reading of the aforesaid averments made in the affidavit-in-opposition, it appears that the stand of the State Government now is that in terms of the Office Memorandum dated 19.04.1983, the petitioner is not entitled to be appointed for employment against the reservation made for the indigenous inhabitants of the State as he is not an indigenous inhabitant of the State. That apart, it appears that though under Office Memorandum dated 17.09.2015, the case of the petitioner can be considered in technical posts of Grade-III and IV, where 20% is open for non-local, the petitioner does not having the requisite technical qualifications, cannot be considered for appointment.

16] Furthermore, the State respondents in terms of the Order dated 13.09.2024 passed by this Court filed an additional affidavit on 06.11.2024. Paragraph 2 of the aforesaid affidavit is also reproduced hereunder for ready reference:-

"2. That this Hon'ble Court by order dated 30-09-2024 has directed the government advocate for the State respondents to produce the following instructions:

1). Notification issued by the Government stating that the Scheme for Compassionate Appointment is not applicable to non-indigenous persons,

and

2). The latest list of the person eligible to be appointed on compassionate appointment in the Department, which will also include the name of the petitioner.

With regard to the query No.1, there is no Notification issued by the Government stating that the scheme for compassionate appointment is not applicable to the non-indigenous persons. The Office Memorandum dated 17-09-2015 provides that compassionate appointment may be made to the posts falling under the combined direct recruitment quota of Group C and D which shall not exceed 50% of the vacancies during a year. The O.M dated 17-09-2015 has to be read along with the O.M dated 19-04-1983 whereby it has reserved 100% vacancies for direct appointment to non-technical grade III & IV posts are reserved for indigenous inhabitants of the State. The non-locals are not eligible for employment against the reservation made for the indigenous inhabitants of the State but they are however eligible for appointment against 20% of the vacancies to gazette technical posts. The petitioner being a non-local, his case cannot be considered for appointment in terms of the O.M dated 19-04-1983.

It is pertinent to state herein that under Clause 10 of the O.M dated 17-09-2015 it is provided that "Any dispute arising out of the provisions of this scheme or any clarification shall be referred to the Department of P&AR for decision of the government". As provided under clause 10 of the O.M dated 17-09-2015, the Department has referred the matter to the P&AR for clarification in respect of the petitioner and in response, the P&AR vide U.O No.55, dated 28-04-2021 has rendered its opinion as under:

"The Office Memorandum No.AR-8-08/708 Dated 17-09-2015 (copy placed at P50/c to P51/c) regarding revised Compassionate Appointment Scheme may be read alongwith Office Memorandum No.AR-8-8/76, Dated 19-04-1983 (copy enclosed at P5/c) regarding reservation of posts of all categories in the State of Nagaland. Office Memorandum No.AR-8-08/78, Dated 17-09-2015 does not speak about any category of persons who can benefit Compassionate Appointment Scheme, however Office Memorandum No.AR-8-8/76 Dated 19-04-1983 clearly says that the Grade-III and IV posts are 100% reserved for the indigenous inhabitants of the State, whereas, the applicant Sheri. Mohammed Abdul Hafiz Chowdhury is not an indigenous inhabitant of the State hence cannot be appointed under the 100% reserved in Grade-III and IV post, however,

there is a grey area where his case can be considered in technical post of Grade-III or IV where 20% is for open category".

Therefore, basing on the clarification rendered by the P&AR in terms of the O.M dated 17-09-2015, the petitioner being a non-local and also does not possess the technical Qualification, his case for appointment on compassionate ground cannot be considered.

With regard to the query No.2, as per the latest centralized list of Compassionate Applicants maintained by the PHQ, the name of the petitioner is figured at serial No. 16 and the petitioner is already over aged for appointment.

Photo copies of the letter dated 28-04-2021 and compassionate list are annexed and marked as ANNEXURE A & B respectively."

17] It further appears that the stand of the State respondents is that under the Office Memorandum dated 17.09.2015, Clause 10 provides that in the event there is dispute arising out of the provisions of the aforesaid scheme or any clarification, the matter shall be referred to the Department of P&AR for the decision of the Government. It is the further stand of the respondents that the said Office Memorandum dated 17.09.2015 has to be read alongwith Office Memorandum dated 19.04.1983 which provides 100% reservation for appointment to Grade-III and IV post for the indigenous inhabitants of the State. The petitioner being not an indigenous inhabitant, a dispute having arisen the matter was placed before the Department of P&AR.

18] It appears that the said Department after considering the case has taken the decision that since the petitioner is not an indigenous inhabitants of the State, he cannot be appointed under the 100%

reserved in Grade-III & IV post and further that since he does not possess the technical qualifications, his case for appointment on compassionate ground also cannot be considered against the 20% which is reserved for open category in technical post of Grade-III & IV post.

19] The aforesaid stands of the respondents appears to be contradictory to the stand taken before the Writ Court in the earlier round of proceeding i.e. WP(C) No. 291(K) of 2017, wherein the Government Advocate by placing a written letter of the Assistant Inspector General of Police (Admn.), Nagaland has submitted that the petitioner is entitled to be considered for appointment under the scheme and he has been placed at Serial No. 1 in the waiting list of persons and awaiting appointment under compassionate ground.

20] In fact, this Court issued the writ earlier by Judgment and Order dated 16.08.2018, to appoint the petitioner to one of the vacant post of Constable indicated in this aforesaid letter if it falls under the compassionate appointment category and if not to appoint him as soon as the vacancy arises in the category. The said Judgment and Order of this Court having attained finality, it is not open to the respondents to consider as whether the petitioner is entitled to be appointed or not under the scheme of compassionate appointment. In the event, the State respondents were aggrieved by the aforesaid Judgment and Order dated 16.08.2018, it was open for the State respondents to file an appeal or a review petition. However, neither of the two remedies available before the State respondents was availed of.

21] Shockingly, the State respondents instead reconsidered the case of

the petitioner and placed the same before the P&AR Department and based on the decision of the P&AR Department rejected the case of the petitioner for appointment on compassionate ground by letter dated 16.08.2021. The aforesaid letter rejecting the case of the petitioner for appointment on compassionate ground is in total contravention of the judgment and Order passed by this Court earlier on 16.08.2018. The Judgment and Order passed by the Court mandates strict compliance and implementation thereof unless the same is set aside or reversed by a competent Court of law. The State Government cannot act like a Judge and cannot sit over the Judgment and Order passed by the Court and reopen the issue settled by the Court. It would be a sordid state of affairs if the State Government without filing appeal at its whim and caprice sit in appeal against the Judgment and Order passed by the Court and re-opens the issue settled by the Court which has attained finality. In fact, this is exactly what the State authorities have done in the present case. Despite the Judgment and Order dated 16.08.2018 having attained finality, reopened the issue involved therein and decided the same in total contravention of the direction passed in the aforesaid Judgment and Order. The said action of the State authorities is totally contemptuous. This Court depreciates such action of the State respondents and directs the Chief Secretary of the State of Nagaland to issue necessary direction for sensitization of the departments in this regard.

22] Apt to refer to the Office Memorandum dated 17.09.2015 under which scheme, the petitioner had applied for appointment on compassionate ground, which is reproduced hereunder for ready reference:-

“OFFICE MEMORANDUM

No. AR-8/8/78

Dated, Kohima, the 17th September, 2015

Sub:- Revised Compassionate Appointment Scheme for State Government employees who die in harness.

In supersession of this Department's Office Memorandum of even number dated 16/01/2012, the Governor of Nagaland is pleased to revise the existing scheme for appointment, on compassionate ground, of family member of the State Government employees who die in harness as per guidelines enumerated below.

2. *Appointment on compassionate grounds shall be given only to one of the following members of deceased employee's family:*

- (a) spouse, or*
- (b) son, or*
- (c) daughter, only.*

3. *Appointment on compassionate grounds shall be made only on a regular basis to direct recruitment posts and only if regular vacancies meant for that purpose are available in that Department where the deceased Government employee was serving. Applicants shall have no claim to appointment under this scheme in any other Department other than the Department where the deceased employee was serving. However, for the NCS officers, the appointment may be considered under the establishment of the Commissioner, Nagaland, or the Nagaland Civil Secretariat.*

4. *Compassionate appointments may be made to the posts falling under the combined direct recruitment quota of Group C or D. The ceiling for compassionate appointments of 5% of the direct recruitment vacancies in Group C and Group D posts has been done away with provided such appointments do not exceed 50% of the vacancies during a year. The appointment against posts for direct recruitment in Group C should be in the entry grade only. Further, appointment against any post for direct recruitment in Group C should be limited to those posts which are outside the purview of NPSC for recruitment.*

5. *The inter-se seniority of person appointed under this scheme shall be fixed with reference to their date of appointment and their interpolation with the direct recruits/promotees shall be made with reference to their dates of*

appointment without disturbing the inter-se seniority of direct recruits/promotees.

6. The scheme will be available to family of the deceased employee provided no surviving member of the family holds any regular post in the State Government. The benefit of such appointment shall be available to only one family member. The scheme will be applicable only to dependents of deceased Government servants appointed and serving on regular basis at the time of death and will not be applicable to those who were working on daily wage or casual or ad-hoc or contract or re-employment/extension/consultant basis. A spouse once appointed under this scheme shall be allowed to continue in service even after re-marriage. Appointments made under this scheme shall not be transferable to any other person in any circumstance and any request for the same shall be invariably rejected.

7. Applicants under this scheme should be eligible and qualified for the posts in all respects under the provisions of the relevant Recruitment Rules. No relaxation in eligibility will be made in any circumstance, except to the extent provided under this scheme. Date of joining by a person appointed under this scheme shall be treated as the date of his/her regular appointment. All Departments shall maintain a waiting list in chronological order for compassionate appointments. An applicant will be given the waiting list number on receipt of the application, if there are no regular posts available.

8. The upper age limit of applicants under this scheme may be relaxed in exceptional cases up to a maximum of 5 years in addition to existing relaxation, if any. The lower age limit shall, however, in no case be relaxed below 18 years of age.

9. Appointments under this scheme, irrespective of the appointing authority specified under the rules, shall be made only with the approval of the respective Heads of Administrative Departments with the prior clearance of the Department of Personnel & Administrative Reforms. The Departments should send proposal for appointment on compassionate ground as per the format enclosed.

10. All Departments shall amend their respective Service Rules/Recruitment Rules to make a provision for compassionate appointment. Any dispute arising out of the provisions of this scheme or any clarification shall be referred to the Department of P&AR for decision of the Government.

Sd/- PANKAJ KUMAR
Chief Secretary to the Government of Nagaland

23] Apparent that the aforesaid revised compassionate appointment scheme vide Office Memorandum dated 17.09.2015 was in suppression of earlier Office Memorandum dated 16.01.2012. Under the aforesaid scheme, there is no bar for appointment of non-local persons. It is clearly provided under the aforesaid scheme that the appointment on compassionate ground shall be made only on a regular basis to direct recruitment post and only if regular vacancies made for that purpose are available in that Department where the deceased Government employee was serving. It is further clearly stated in the aforesaid scheme that the same is available to family of deceased employee. However, the person seeking employment under the aforesaid scheme should be eligible and qualified in all respect under the provisions of the relevant recruitment rules. Therefore, the said Office Memorandum cannot be restricted by the Office Memorandum dated 19.04.1983 which provides 100% reservation for direct appointment to non-technical Grade-III and IV post for indigenous inhabitants of the State of Nagaland. Further, there is no technical or non-technical posts mentioned in the said revised scheme. As such, it cannot be said that a dispute has arisen for which the same in terms of Clause 10 of the Office Memorandum dated 17.09.2015 has to be referred to the Department of P&AR.

24] In fact, the State respondents had clearly taken the stand before the first two rounds of litigations that the petitioner is entitled under the subject revised compassionate appointment scheme and based on the aforesaid submission of the State counsel, the Writ Court had earlier

directed appointment of the petitioner. The State authorities cannot blow hot and cold and change their stand at their own sweet will at different point of time of Court proceedings relating to the same issue.

25] The Office Memorandum dated 19.04.1983 being available when this Court disposed of the second writ petition by Judgment and Order dated 16.08.2018, the State respondents are estopped to contend otherwise.

26] Be that as it may, this Court is not sitting in appeal against the Judgment & Order dated 16.08.2018 passed by the Co-ordinate Bench of this Court. Therefore, the grounds argued by Ms. Pichano, learned Government Advocate for the State respondents as regards the petitioner is not eligible under the scheme of compassionate appointment being not an indigenous person and not having the technical qualifications cannot be gone into by this Court at this stage where there is already a judicial order of this Court directing appointment of the petitioner based on the written instructions submitted by the State Counsel at that point of time.

27] Furthermore, it is apparent that the petitioner at that relevant point of time was entitled for appointment on compassionate ground under the Office Memorandum dated 17.09.2015.

28] In view of the above, I am of the considered view that the direction issued by the Co-ordinate Bench of this Court by Judgment and Order dated 16.08.2018 is to be enforced. Ordered accordingly.

29] It is clarified that the direction issued by this Court earlier shall be completed by the State respondents within a period of 2 (two) months from the date of receipt of the certified copy of this order.

30] Pertinent that in the written instructions submitted before this Court earlier in WP(C) No. 291(K) of 2017, it is indicated that there are six posts of Constable lying vacant at that point of time and the petitioner was at serial No. 1 in the waiting list of persons awaiting appointment under the compassionate ground. That being so, the direction of this Court passed earlier on 16.08.2018 and the observations and directions as contained hereinabove, shall be strictly complied by the respondent authorities within the stipulated period of time.

31] It is needless to be clarified that due to efflux of time, the petitioner has attained the age of 38 years, the same shall be relaxed in terms of the applicable relaxation clause in order to effectuate the direction passed earlier by this Court on 16.08.2018.

32] With the above observations and directions, the writ petition stands allowed.

33] A copy of this order be delivered to the office of the Addl. Advocate General, Nagaland for information.

Disposed of.

JUDGE

Comparing Assistant