

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPS No. 1206 of 2005

Laxmi Narayan Pradhan and Others

---- **Petitioners**

Versus

The State of Madhya Pradesh (now Chhattisgarh) and Others

---- **Respondents**

For Petitioners : Shri Abhishek Sinha, Shri Ghanshyam Patel and
Shri Amit Buxy, Advocates
For Respondent/State : Shri B. Gop Kumar, Dy. Advocate General

Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

08/02/2017

1. The petitioners in this petition have prayed for quashing of order dated 30/08/1995, 17/08/1995 and also challenged the order dated 03/01/1995, by way of amendment by which their services have been terminated.
2. Necessary facts are stated as below:-

The petitioners are wards of government employee. It is not in dispute that father of respective petitioners were employed and working in government service, working as Teacher in School Education Department. While they were continuing in service, the government came out with a new policy of compassionate appointment vide its order dated 10th June 1994. Amongst various provisions, the policy of compassionate appointment provided in

clause 10 that in the case of those government servants who are declared medically unfit to continue in service and retired on that ground, one member of the dependent family would be entitled to compassionate appointment. Thereafter, the father of respective petitioners were retired on medical grounds on the dates which is mentioned as below :-

(i) Laxmi Narayan Pradhan	26/12/1994
(ii) Bodhram Sao	02/01/1995
(iii) Banwali Prasad Nishad	12/12/1994
(iv) Ramesh Kumar Patel	26/12/1994
(v) Arvind Kumar Patel	12/12/1994

The petitioners thereafter applied for grant of compassionate appointment and were granted compassionate appointment by order passed on various dates, details of which are given below :-

Name of applicant	Date of appointment
(i) Laxmi Narayan Pradhan	09/01/1995
(ii) Bodhram Sao	10/01/1995
(iii) Banwali Prasad Nishad	12/01/1995
(iv) Ramesh Kumar Patel	09/01/1995
(v) Arvind Kumar Patel	09/01/1995

Thus, all the petitioners were appointed by various orders passed up to 12/01/1995.

3. In the meantime, Deputy Secretary, General Administration Department issued a circular on 03/01/1995 by which the policy of granting compassionate appointment to dependents of those

government employees who voluntarily retired on medical ground, was withdrawn. It appears that this order was endorsed to Department of Public Instructions only on 14/06/1995, which percolated down to the appointing authority of the petitioners long after the appointment of the petitioners because the Directorate, Public Instructions itself issued instructions on 17/08/1995, as is clear from impugned order of termination. In view of the above direction dated 03/01/1995, the services of the petitioners were terminated by impugned order giving rise to these petitions. As all the petitioners have raised common ground in the petition and identical issue arise for consideration.

4. Learned counsel for the petitioners raised three submissions to assail the legality and validity of the order :-

- (i) That, the earlier policy of compassionate appointment was issued on 10/06/1994 by order and in the name of Governor, it, therefore, being an order passed by the Governor in exercise of power conferred under Article 166 of the Constitution of India, whereas subsequent circular dated 03/01/1995, was issued by the Deputy Secretary not expressed to be taken in the name of Governor, therefore, this order, in the eye of law, would not nullify the effect of the earlier policy dated 10/06/1994 in the matter of grant of compassionate appointment in cases of retirement on medical grounds. In support of this contention reliance has been placed in the matter of **State of Uttaranchal and another v. Sunil Kumar Vaish and others, (2011) 8 SCC 670, Order dated 24/01/2017 passed in W.P. (S) No. 5780/2016 (Smt.**

Shitala Diwan Vs. State of Chhattisgarh and others), order dated 11/11/2014 passed in W.P. No. 4786 of 2004 (Ajay Nand Bahadur Vs. State of Chhattisgarh and others).

- (ii) That, during the period, the policy dated 10/06/1994 in the matter of grant of compassionate appointment on medical grounds was in force, father of respective petitioners were permitted to retire on medical grounds prior to circular dated 03/01/1995, therefore, in such cases, the petitioners right to seek compassionate appointment crystallized and subsequent circular dated 03/01/1995, even accepted to be effective, could not take away the right to seek compassionate appointment in those cases where the government servant was permitted to retire voluntarily on medical grounds.
 - (iii) That, the impugned order has been passed without affording any opportunity of hearing to the petitioner, therefore, only on the ground of violation of principles of natural justice, the petition deserves to be allowed.
5. Per contra, learned State counsel contended that the order was issued by a senior and responsible officer of the rank of Deputy Secretary in the Department of General Administration of the State Government. Omission of the words “by order and in the name of Governor” would not invalidate the order, because the officer had full authority to authenticate the order in the name of the Governor, therefore, this would only be an irregularity but for all legal purposes, it would constitute an order under Article 166 of the Constitution of

India. It is next submitted that even though the father of respective petitioners were permitted to retire prior to 03/01/1995, the appointment orders of the petitioners were issued only subsequent to 03/01/1995 though, the said order was communicated belatedly to subordinate authority. According to him, once circular was issued on 03/01/1995, after that date, no compassionate appointment could be granted irrespective of the whether or not, it was communicated to the appointing authority. He further submits that policy of compassionate appointment does not confer any right to seek appointment. Compassionate appointment could be claimed only under the policy. Though, the petitioner's father had retired voluntarily on medical grounds, applications may have been filed, before any order could be passed, the policy was withdrawn, therefore, there was no occasion for the appointing authority to extend the benefit of compassionate appointment to the petitioners. Lastly, it is submitted that as the fact relating to issuance of order dated 03/01/1995 is not in dispute and that appointment order was issued after this date are admitted, it is a case of foregone conclusion, therefore, only on the ground of violation of principles of natural justice, no relief could be granted to the petitioners.

6. Even if it is accepted that the Deputy Secretary had issued the order on 03/01/1995, prior to issuance of order of appointment, in view of the decision of this Court in the case of Smt. Shitala Diwan (supra) decided on 24/01/2017, it has to be held that the order did not have the effect of overriding the earlier order dated 10th June 1994. In the present case, the petitioners were permitted to amend the petition

and take a specific ground of challenge to the impugned order dated 03/01/1995 on the pleadings that it does not have the effect of superseding/policy dated 10/01/1994 because the policy dated 10/06/1994 was issued in the name of the Governor, it being an order under Article 166 of the Constitution of India, which could not be changed by an inferior authority Secretary/Deputy Secretary of the Government. The State was granted opportunity to file additional return, however, there is nothing to show that the file was actually placed before the Governor. There is no material on record to satisfy the Court that the Deputy Secretary was authorized under the business rules to authenticate the order in the name of Governor. The order in any case does, not refer to the name of the Governor and there is nothing in the order to reflect that it was issued under the orders of the Governor. In this factual premise, the legal position is very well settled by the Supreme Court and this Court in catena of decision, which are discussed herein-below :-

As early as in the case of **Gullapalli Nageswara Rao and others v. Andhra Pradesh State Road Transport Corporation and another, AIR 1959 SC 308** the constitutional scheme of vesting of executive power of the State in the Governor was explained thus :

“A State Government means the Governor; the executive power of the State vests in the Governor; it is exercised by him directly or by officers subordinate to him in accordance with the provisions of the Constitution; the Ministers headed by the Chief Minister advise him in the exercise of his functions”

In a later Constitution Bench decision in the case of '**Bachhittar Singh v. State of Punjab and another**', AIR 1963 SC 395 the constitutional requirement to clothe an order with the status of an order under Article 166 of the Constitution of India, was explained in following words :-

“(9).....Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by cl. (1) of Art. 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file. As long as the matter rested with him the Revenue Minister could well score out his remarks or minutes on the file and write fresh ones.

(10) The business of State is a complicated one and has necessarily to be conducted through the agency of a large number of officials and authorities. The Constitution, therefore, requires and so did the Rules of Business framed by the Rajpramukh of Pepsu provide, that the action must be taken by the authority concerned in the name of the Raj- pramukh. It is not till this formality is observed that the action can be regarded as that of the State or here, by the Rajpramukh.....”

In the case of **State of Bihar and others v. Kripalu Shankar and others**, (1987) 3 SCC 34 the constitutional requirement was again explained as below :-

“15. Articles 166(1) requires that all executive action of

the State Government shall be expressed to be taken in the name of the Governor. This clause relates to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which an executive action has to be expressed. Noting by an official in the departmental file will not, therefore, come within this Article nor even noting by a Minister. Every executive decision need not be as laid down under Article 166(1) but when it takes the form of an order it has to comply with Article 166(1). Article 166(2) states that orders and other instruments made and executed under Article 166(1), shall be authenticated in the manner prescribed. While clause (1) relates to the mode of expression, clause (2) lays down the manner in which the order is to be authenticated and clause (3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the Government. A study of this Article, therefore, makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner provided in Article 166(2)."

In the case of **State of Uttaranchal and another v. Sunil Kumar Vaish and others**, (2011) 8 SCC 670, constitutional scheme was explained thus:-

"24. The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2)....."

In the case of ***Jaipur Development Authority and others v. Vijay Kumar Data and another, (2011) 12 SCC 94*** legal position was further observed which is as below :-

“53. It is thus clear that unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order made on behalf of the Government. A reading of letter dated 6.12.2001 shows that it was neither expressed in the name of the Governor nor it was authenticated manner prescribed by the Rules. That letter merely speaks of the discussion made by the Committee and the decision taken by it. By no stretch of imagination the same can be treated as a policy decision of the Government within the meaning of Article 166 of the Constitution.”

Aforesaid decisions clearly settle the legal position that the Constitutional requirement that in order to become an executive order under Article 166 of the Constitution of India, the requirement that it must be expressed to have been issued in the name of Governor, is mandatory and if that is not done, it cannot be said to an executive order of the constitutional sanctity under Article 166 of the Constitution of India. Therefore, it would not have the effect of nullifying what has been earlier said in policy dated 10th June 1994, which was issued by order and in name of the Governor and therefore, having the sanctity of Constitution under Article 166 of the Constitution of India.

8. On facts, it has not been established before this Court that the officer who issued circular dated 03/01/1995 was authorized under the

business rules to authenticate the order in the name of the Governor. In the absence of foundational fact raising any such dispute by the respondents in their return, it is unnecessary for this Court to go into other issues as to whether absence of expression 'in the name of Governor', the order could be said to have been passed in accordance with Article 166 of the Constitution of India, having sanctity and force as the order passed earlier on 10/06/1994.

9. Having examined the matter on the issue of jurisdiction itself, I need not decide any other issue because in view of the above discussion, the impugned order of termination of petitioners services cannot be held legal. Even on the day termination order was issued, circular dated 10/06/1994 for grant of compassionate appointment in case of retirement or medical grounds continued to exist in the eye of law and circular dated 03/01/1995 did not have the effect of altering, modifying or nullifying the aforesaid policy of compassionate appointment in case of retirement on medical grounds.
10. In the result, the petition is allowed. No further orders are required to be passed as the petitioners are continuing in service by virtue of interim order. No order as to costs.

Sd/-
(Manindra Mohan Shrivastava)
Judge