

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.08.2017

CORAM :

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.33295 of 2016
and
W.M.P.No.28767 of 2016

S.Malathy

... Petitioner

Vs.

1. State of Tamil Nadu
Rep by its Secretary to Government
Health and Family Welfare Department
Fort St. George, Chennai - 600 009.

2. The Joint Director
Sanitary Works
Tiruvannamalai
Tiruvannamalai District.

... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records relating to the Order passed by the 2nd respondent in அ.தி. எண் 8374/அ2 /2014, dated 22-12-2014 and quash the same thereby directing the respondents to give compassionate appointment to the petitioner in any of the post in the Health Department based on the representation of the petitioner dated 28-10-2014.

For Petitioner : Mr.A.R.Nixon

For Respondents : Mr.K.Dhananjayan
Special Government Pleader

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O R D E R

The order of rejection issued by the second respondent in proceeding dated 22.12.2014 is under challenge in this writ petition.

2.The learned counsel appearing for the writ petitioner would submit that the father of the writ petitioner late G.Sakkru, who was employed in the second respondent department

as Health Inspector at Pondai Village, died in harness on 29.03.2010 leaving behind her mother Kalyani, brother Vijay Arun, elder sister Vijay Sanchana and the writ petitioner.

3.The learned counsel appearing for the writ petitioner further submits that an application was submitted on 06.07.2010 seeking for appointment to the elder sister of the writ petitioner on compassionate ground. However, as the elder sister of the writ petitioner got married, the application seeking for compassionate appointment to her was not urged.

4.While so, during the second occasion, the writ petitioner filed another application in the year 2014 seeking appointment to her on the ground of compassion. The respondents considered the application and rejected the same on the ground that though the first application was submitted seeking compassionate appointment for the elder sister of the writ petitioner on 06.07.2010, the same was not persuaded on account of the fact that the elder sister got married.

5.Thus, there is no provision under the scheme to entertain the application once again seeking appointment on compassionate ground for the second daughter. The application once submitted alone can be considered and no other application seeking appointment for other legal heirs can be entertained.

6.This Court has heard arguments advanced on both sides. Compassionate appointment is a scheme and an exception. Therefore the same is to be made in accordance with the instructions issued by the Government. The authorities competent are bound to follow the instructions in its strict sense and the reason stated in the case on hand for rejection cannot be interfered with.

7.This Court is of the opinion that consideration for appointment on compassionate ground is to be construed as violation of Articles 14 and 16 of the Constitution of India and is only in the nature of concession and therefore does not create a vested right in favour of the claimant. A compassionate appointment scheme is a non-statutory scheme and is in the form of a concession and it cannot be claimed as a matter of right by the claimant to be enforced through a writ proceeding. A compassionate appointment is justified when it is granted to provide immediate succour to the deceased employee. Mere death of a Government employee in his harness, it does not entitle the family to claim compassionate employment. The competent authority has to examine the financial condition of the family of the deceased employee and only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible

member of the family of the deceased employee.

8. The concept of compassionate appointment has been recognised as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve.

9. The philosophy behind giving compassionate appointment is just to help the family in harness to get over the immediate crisis due to the loss of sole breadwinner. This category of appointment cannot be claimed as a matter of right after certain period, when the crisis is over. More so, the financial status of the family is also to be looked into as per the scheme framed by the employer while giving compassionate appointment and such appointment cannot be conferred contrary to the parameters of the scheme.

10. It is pertinent to note the fact that in a liberalized world as of today, there are plenty of avenues of employment available to the general public. Most of the people are not entirely dependent on the income of a single member of the family. Keeping this new social structure in mind, it would be seemingly right for the Courts to ensure that there is no abuse of the scheme of compassionate appointment either by the employer or by the applicant/claimant.

11. The million dollar question is 'Whether offering 'appointment' on compassionate ground (i.e., sympathy) is the only option /solution to mitigate 'hardship and distress of the family of an employee dying in-harness? The answer is an emphatic 'No'. Firstly, the Rules, as such, contain no provision to ensure that the dependent who gets appointment shall continue to maintain other dependents.

12. A 'welfare state' like ours is free to initiate effective welfare scheme/s- and no one will be in a position to oppose. It is well settled that sympathy cannot be allowed to override statutory or Constitutional provisions, particularly when it is quality of the question of Welfare of the entire society and /or question of Governance. State like ours is free to wed the 'solemn object' to serve the society at large, purely according to the mandate under the Constitution of India. State cannot be allowed to look after 'welfare' of its own employees and their families alone.

13. In this view of the matter, this Court has to examine the scope of the scheme. The scheme being an exception, the authorities competent has to implement it in its strict terms. Equal opportunity in a public employment is a Constitution mandate.

14. All the recruitment process under the rules are made by the Competent Authorities by implementing the rules of reservation under the Constitution of India. This apart the regular competitive process has got a method of screening the candidates on merits even for the reserved categories. These two aspects are vital in regular recruitment process:

- First is adherence of the Rules of Reservation under the Constitution of India;
- Second is the comparative merit amongst the candidates who are participating in the regular competitive process.

15. In case of compassionate appointments, no such constitutional mandated requirements have been followed. Thus, very scheme itself is an exception and not in accord with the constitutional scheme. Compassionate appointment scheme as a special one necessarily to be restricted to the extent possible, so as to provide appointment only to the genuine and warranting families. This apart, the over all strength of the compassionate appointees should not exceed more than the restricted level and if such a kind of special appointments are increased in the public posts, this Court is of the view that the efficiency level in the public administration will certainly be affected.

16. In respect of the Rules of Reservation, the same has not been followed in compassionate appointment. Thus large number of compassionate appointments will have certain implication on the Rules of Reservation and the same will certainly have an impact on the Constitution of India, more specifically, on the principles of reservation. In respect of the merit aspect, no competitive examination or interview are conducted for compassionate appointees. Thus the very capability of the candidates in performing the administrative duties itself will be in question. Certain amount of merit assessment is certainly required for appointing a candidate in any public posts.

17. Thus, the concept of compassionate appointment itself is to be reconsidered by the Government and it should be restricted so as to provide appointment only to the legal heirs of the deceased in genuine circumstances. Otherwise, the scheme of compassionate appointment will have a negative impacts on the good governance and further, it will affect the chances of the meritorious candidates, who can participate in the public administration in the better manner.

18. Rules of Reservation being a constitutional mandate any scheme violating the same has to be implemented cautiously and restrictedly. Thus, genuineness of the claim made by the person on compassionate grounds to be strictly in accordance with the terms and conditions and further, the State cannot be going on extending the scope of compassionate appointment so as to dilute the principles of reservation under the Constitution.

19. Such being the scope of the scheme, Courts are also to be cautious, while extending the benefit of compassionate appointment in favour of the legal heirs of the deceased employee and the legal presumption in this regard is that the indigent circumstances certainly vanishes after a lapse of long years.

20. In *Sanjay Kumar vs. State of Bihar and Others* {(2000) 7 SCC 192}, wherein the Hon'ble Supreme Court, in paragraph-3 of its judgment, held as under:-

"3. We are unable to agree with the submissions of the learned senior counsel for the petitioner. This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner who had left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner in *Director of Education and another v. Pushpendra Kumar and others* (supra). It is also significant to notice that on the date when the first application was made by the petitioner on 2.6.1988, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there is some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

21. In *Umesh Kumar Nagpal vs. State of Haryana and Others* {(1994) 4 SCC 138}, the Hon'ble Supreme Court, in paragraph 6 of its judgment, held as under:-

"6. For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get

over the financial crisis which it faces at the time of the death of the sole bread-winner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

22. In State of Manipur vs. Md. Rajaodin {(2003) 7 SCC 511}, wherein the Hon'ble Supreme Court, in paragraph 11 of its judgment, held as under:-

"In Smt. Sushma Gosain and others vs. Union of India and others (1989 (4) SCC 468) it was observed that in all claims of appointments on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress. The fact that the ward was a minor at the time of death of his father is no ground, unless the scheme itself envisage specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit. The above view was re-iterated in Phoolwati (Smt.) vs. Union of India and others (1991) Supp. (2) SCC 689 and Union of India and others vs. Bhagwan Singh (1995 (6) SCC 476). In Director of Education (Secondary) and Anr. vs. Pushpendra Kumar and others (1998 (5) SCC 192) it was observed that in matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends, meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for ground of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependent of the deceased employee. As it is in the nature of exception to the general provisions it cannot substitute the provision to which it is an exception and there nullity the main provision by taking away completely the right conferred by the main provision."

23. In Steel Authority of India Limited vs. Madhusudan Das and Others {(2008) 15 SCC 560}, wherein the Hon'ble Supreme Court, in paragraph 15 of its judgment, held as under:-

"This Court in a large number of decisions has held that the appointment on compassionate ground cannot be claimed as a matter of right. It must be provided for in the rules. The criteria laid down therefor, viz., that the death of the sole bread earner of the family, must be established. It is meant to provide for a minimum relief. When such contentions are raised, the constitutional philosophy of equality behind making such a scheme be taken into consideration. Articles 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right. [See General Manager, State Bank of India and Others vs. Anju Jain (2008) 8 SCC 475, para 33]"

24. In MGB Gramin Bank vs. Chakrawarti Singh {(2014) 13 SCC 583}, the Hon'ble Supreme Court, in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of its judgment, held as under:-

"6. Every appointment to public office must be made by strictly adhering to the mandatory requirements of Articles 14 and 16 of the Constitution. An exception by providing employment on compassionate grounds has been carved out in order to remove the financial constraints on the bereaved family, which has lost its bread-earner. Mere death of a Government employee in harness does not entitle the family to claim compassionate employment. The Competent Authority has to examine the financial condition of the family of the deceased employee and it is only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family. More so, the person claiming such appointment must possess required eligibility for the post. The consistent view that has been taken by the Court is that compassionate employment cannot be claimed as a matter of right, as it is not a vested right. The Court should not stretch the provision by liberal

interpretation beyond permissible limits on humanitarian grounds. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years.

7. In *Umesh Kumar Nagpal v State of Haryana & Ors.*, (1994) 4 SCC 138, this Court has considered the nature of the right which a dependant can claim while seeking employment on compassionate ground. The Court observed as under:-

"2. ... The whole object of granting compassionate employment is, thus, to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased.... The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs of the family engendered by the erstwhile employment which are suddenly upturned.

4. ... The only ground which can justify compassionate employment is the penurious condition of the deceased's family.

* * * * *

6. ... The consideration for such employment is not a vested right. The object being to enable the family to get over the financial crisis....." (Emphasis added)

8. An 'ameliorating relief' should not be taken as opening an alternative mode of recruitment to public employment. Furthermore, an application made at a belated stage cannot be entertained for the reason that by lapse of time, the purpose of making such appointment stands evaporated.

9. The Courts and the Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulation framed in respect thereof did not cover and contemplate such appointments.

10. In *A. Umarani v Registrar, Co-operative Societies & Ors.*, AIR 2004 SC 4504, while dealing with the issue, this Court held that even the Supreme Court should not exercise the extraordinary jurisdiction under Article 142 issuing a direction to give compassionate appointment in contravention of the provisions of the Scheme/Rules etc., as the provisions have to be complied with mandatorily and any appointment given or ordered to be given in violation of the scheme would be illegal.

11. The word 'vested' is defined in Black's Law Dictionary (6th Edition) at page 1563, as:

"vested.----fixed; accrued; settled; absolute; complete. Having the character or given in the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent. Rights are 'vested' when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute "vested rights".

12. In Webster's Comprehensive Dictionary (International Edition) at page 1397, 'vested' is defined as Law held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interest. (Vide: *Bibi Sayeeda v State of Bihar* AIR 1996 SC 516; and *J.S. Yadav v State of Uttar Pradesh* (2011) 6 SCC 570)

13. Thus, vested right is a right independent of any contingency and it cannot be taken away without consent of the person concerned. Vested right can arise from contract, statute or by operation of law. Unless an accrued or vested right has been derived by a party, the policy decision/ scheme could be changed. (Vide: *Kuldip Singh v Government, NCT Delhi* AIR 2006 SC 2652).

14. A scheme containing an in pari materia clause, as is involved in this

case was considered by this Court in State Bank of India & Anr. vs. Raj Kumar (2010) 11 SCC 661. Clause 14 of the said Scheme is verbatim to clause 14 of the scheme involved herein, which reads as under:

"14. Date of effect of the scheme and disposal of pending applications.--The Scheme will come into force with effect from the date it is approved by the Board of Directors. Applications pending under the Compassionate Appointment Scheme as on the date on which this new Scheme is approved by the Board will be dealt with in accordance with Scheme for payment of ex-gratia lump sum amount provided they fulfill all the terms and conditions of this scheme."

15. The Court considered various aspects of service jurisprudence and came to the conclusion that as the appointment on compassionate ground may not be claimed as a matter of right nor an applicant becomes entitled automatically for appointment, rather it depends on various other circumstances i.e. eligibility and financial conditions of the family, etc., the application has to be considered in accordance with the scheme. In case the Scheme does not create any legal right, a candidate cannot claim that his case is to be considered as per the Scheme existing on the date the cause of action had arisen i.e. death of the incumbent on the post. In State Bank of India & Anr. (supra), this Court held that in such a situation, the case under the new Scheme has to be considered."

25. This Court in a judgment in W.P.No. 8773 of 2015 dated 27.07.2017 held as follows:-

" 11. India being a socialistic republic, keeps evolving various schemes to further the objectives enshrined in Part IV of our Constitution. It is relevant to take note of the fact that State is required to endeavour for promoting the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political should prevail. The State is also

required to make effective provisions for securing the right to work and to public assistance in case of unemployment, old age, sickness, disablement and any other causes of undeserved want. As a part of promotion of the welfare of those recruited by the State to various services established by it, the necessity to provide for employment opportunities to the members of the family of the deceased Government servants has arisen.

12. A Government servant is expected to give his full time attention and energy and render his very best of attention for securing faithful implementation of various schemes and welfare measures brought in place by the State Government, he is termed as a round the clock servant of the State and he should devote and dedicate himself for providing good quality services to the citizens. Should, unfortunately, any such employee die in harness, his family members cannot be left behind in distressful conditions, unattended to and uncared for. With the sudden departure of a breadwinner, we should be alive to the fact that most of the Indian families lose the very source of their sustenance. It is not at all difficult for us to imagine that inspite of rapid strides of progress, the country has been making in all Sectors, still there are several lakhs of families having a single breadwinner and on an average 4 or 5 hungry persons depend on him for their sustenance and survival. In such a scenario, if that breadwinner vanishes suddenly, it is not at all difficult for us to visualise the harrowing plight to which the family would be reduced to overnight. The savings made by the public servant would be hardly enough to see them through the next six months, at best. During the best days of a man, he might have contributed meaningfully, given the fact that whatever marginally that would make a difference, to the States 'Service and consequently the State Government would have earned the goodwill from its grateful citizens for the quality of services rendered to them, by those servants including the deceased employee'.

13. Apart from the civil servant enjoying the status as such, upon his death, if his family members who are surviving are not to be taken care of by the State, the prospects are such that a negative image can be spread in the Society that the State never bothers for the well being of the dependents of the Government servants. It is to avoid any such negative image gaining ground, the State Government as a socio welfare measure, has put in place a mechanism for

providing employment to one of the eligible dependents of the family of the deceased Government servant. Several meaningful conditions are attached to be complied with before hand for securing the benefit of the said scheme. The reason being that opportunities of public employment have to be thrown open to competition for one and all. All members who are eligible to be so recruited should be permitted to compete and the best amongst them found suitable can alone get employment. Therefore, an exception is sought to be carved out from this constitutionally assured mechanism of filling up public employment while providing for making appointments on compassionate grounds. Possibly, conditions can be stipulated such as that at the time of death, the left over service of the deceased employee before he attains the age of superannuation should not be less than a reasonable period, say three years or at best five years. Similarly, a stipulation that appointment on compassionate grounds should be claimed as quickly as possible after the death of the civil servant, a duration in this regard can be prescribed not to exceed by a reasonable length of time of say three years or at best five years. If the surviving members of the civil servant who died, can get along and carry on their show for considerable length of time after the departure of the breadwinner, by far, in a reasonable manner, interference can be drawn from that the family of the deceased civil servant is able to feed for itself, notwithstanding the loss of the breadwinner. The period of endurance of such a family holds out an assurance that the family has got over the trauma caused by the departure of the breadwinner, and it has the necessary social resources to carry on with the show in his absence as well.

14. In these set of circumstances, the State Government is certainly justified in directing that no claim for compassionate appointment should be entertained beyond a reasonable period of say three years or five years, as the case may be. If a family of the deceased civil servant can survive for long periods entirely on their own, it presupposes that the surviving members have the necessary wherewithal to survive, notwithstanding the departure of the breadwinner.

15. When we keep these factors in mind and also in view of the fact that making appointments on compassionate grounds is not one of the

identified/marked sources of recruitment to civil service--rather it is an exception to the normal constitutional norm of allowing all people to contest and compete--appointments on compassionate grounds cannot be made after long years have gone by, from the date of the death of the civil servant.

16. It may be a different matter if the employee concerned died in service while trying to protect the property of the Court/State Government as the case may be and while trying to save it from any accidental hazards such as fire, flooding, etc., or while trying to save the record or property of the Court/Government from the hands of miscreants who are trying to destroy the same, as those cases, require greater amount of compassion to be shown as the individual concerned has made the highest sacrifice of his own life, for the cause of the State. In such cases, perhaps a longer duration of even ten or fifteen years can be considered as reasonable. Those, who lay down their lives while trying to save/protect the interest of the State Government/Court, stand on a lofty pedestal in comparison to those who met with either natural or self inflicted unnatural death. In no case, the time limit prescribed for entertaining the claims for compassionate appointment should be kept open like in the instant case for more than two decades. Any attempt to entertain any such claim, would convert the scheme of making compassionate appointments into a different form of hereditary employment. It would also tend to convert the scheme of compassionate appointments into a source of recruitment altogether and both the aforementioned factors are not the pursuits, which should be allowed to be undertaken or encouraged by the State Government and its organs."

26. Considering the facts of the present case in the light of the decisions cited supra, I do not see any merits in the writ petition and the same is liable to be dismissed, even on the ground of laches. Accordingly, the writ petition is dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government
Health and Family Welfare Department
Fort St. George, Chennai - 600 009.
2. The Joint Director
Sanitary Works
Tiruvannamalai
Tiruvannamalai District.

+1cc to Mr.A.R.Nixon, Advocate, S.R.No.63590

+1cc to the Government Pleader, S.R.No.63557

W.P.No.33295 of 2016

GN(05/10/2017)



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