



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
03-08-2018	05-09-2018

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Coram:

THE HON'BLE MR. JUSTICE M. DHANDAPANI

W.P.No.45835 of 2006

M. Ramesh

... Petitioner

Versus

The Government of Tamilnadu
represented by its Chief Secretary
Personnel and Administrative Department
Fort St. George,
Chennai 600009.

... Respondent

Writ Petition filed to issue a writ of certiorarified Mandamus calling for the records on the file of the respondent pertaining to the issue of G.O.Ms.No.154 Personnel Administrative Department dated 19.09.2006 and quash the same and consequently direct the respondent to fill up or cause filling up of all vacancies accrued in any post under the State or other authorities only by open competition giving equal opportunities to all the qualified citizen at an early date.

For Petitioner .. Mr. N. Subramaniam

For Respondent .. Mr. T.N.Rajagopalan
Government Pleader

ORDER

The Writ Petition has been filed to issue a Writ of Certiorarified Mandamus calling for the records on the file of the respondent pertaining to the order passed in G.O.Ms.No.154 Personnel Administrative Department dated 19.09.2006 and quash the same and consequently direct the respondent to fill up or cause filling up of all vacancies accrued in any post under the State or other authorities only by open competition giving equal opportunities to all the qualified citizen at an early date.

2. The writ petitioner challenges the order passed by the respondent in G.O.Ms.No.154 Personnel and Administrative Department dated 19.09.2006, by which 25% vacancies were ordered to be reserved for appointments under compassionate grounds in the category of Junior Assistant in the Tamil Nadu Ministerial Service/Tamil Nadu Judicial Ministerial Service. The sum and substance of the petitioner's case is as follows:



3.(a) The petitioner is M.A. Graduate. He did not get appointment in any public service for the past five years i.e., 2001 to 2006 in view of the ban order passed by the Government. Further, no admission was made by the Tamil Nadu Public Service Commission or other recruiting agency inviting applications from the qualified citizens. The petitioner further averred that opportunity for employment in public service to the unemployed Arts and Science graduates in Tamilnadu can be made to the posts under group C and D in the Tamil Nadu Ministerial Service / Tamil Nadu Judicial Ministerial Service, etc., However, due to the ban on direct recruitment, no recruitment was made to the Ministerial Service for the past five years. Subsequently, the Government passed an order in G.O.Ms.No.14 Personnel and Administrative Department, dated 07.02.2006, lifting the ban imposed for making direct recruitment by filling up vacancies in Ministerial Service under the State. However, the petitioner is specifically aggrieved by the order passed by the respondent in G.O.Ms.No.154 Public and Administrative Department dated 19.09.2006 reserving and/or earmarking 25% vacancies to be made by appointing persons who applied for compassionate appointment for the posts under C & D groups. It is further averred that the scheme of compassionate appointment was introduced by the respondent in G.O.Ms.No.225 dated 15.02.1972 only for the posts which falls outside the purview of TNPSC. In that scheme, it has been ordered that a son or daughter or relative, who would take care of the family of a Government Servant, who died in harness, leaving the family in indigent circumstances, shall be appointed on compassionate grounds in respect of posts coming outside the purview of TNPSC. Subsequently, within five years, in G.O.Ms.No.560 dated 03.08.1977, the scheme has been extended to posts coming within the purview of TNPSC and appointments were made without any restriction and the vacancies that were remaining vacant thereafter alone were notified by the Tamilnadu Public Service Commission for public recruitment.

3.(b) Initially unemployed engineering graduates challenged the same in W.P.No.7452 of 2008 and this Court refused to grant interim injunction restraining the authorities from making compassionate appointments. But on appeal, the first Bench of this Court granted interim injunction restraining the authorities from making compassionate appointments until further orders. Accordingly, appointments to group B posts were stopped without being made. After this, the Government reviewed the entire issue and now issued guidelines to make compassionate appointments only for the group C and D posts. The petitioner further averred that equal opportunity is a fundamental right guaranteed under Article 16(1) of the Constitution of India and reservation is permitted for Backward Classes under Article 16(4) of the Constitution of India. Further, the Honorable Supreme Court repeatedly held that even if the service of the temporary employees who were appointed de hors the recruitment rules is regularised, it is against the rule of equality and it is violative of Article 16(2) of the Constitution. Therefore, the scheme of reserving 25% of vacancies for compassionate appointments exclusively for heirs



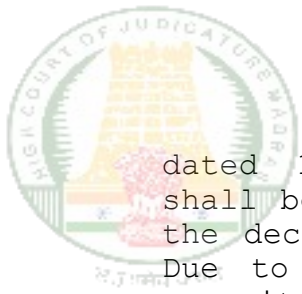
of a deceased Government Servant who died during the course of service under the impugned order is directly offending Article 16(2) of the Constitution. Therefore, according to the petitioner, the impugned G.O.Ms.No.154 P & AR Department dated 19.09.2006 is against the constitution and it is violative of Article 14 and 16 of the Constitution of India.

4. The sum and substance of the counter filed by the respondent is as follows:

4.(a) The Government have issued instructions in Letter Ms.No.126, L&E Department dated 16.9.2006 and orders in G.O.Ms.No.154 P & AR (P) Department dated 19.09.2006 reserving 25% of the vacancies in the post of Junior Assistant for appointment on compassionate grounds leaving the rest to be filled by the direct recruitment from the open market on regular basis through the Tamil Nadu Public Service Commission by conducting competitive examination in Group IV Standard and as per the procedure in vogue as the post of Junior Assistant in the Tamil Nadu Ministerial Service/Tamil Nadu Judicial Ministerial Service is within the purview of Tamil Nadu Public Service Commission. No such instructions has been made in respect of other posts in Group C & D and accordingly compassionate appointment can be made in respect of all vacancies, provided candidates are available for appointment on compassionate grounds as such.

4.(b) The respondent further averred that the scheme of appointment on compassionate ground is in vogue in the State from 1972 onwards. Various instructions have been issued from time to time for the successful implementation of the said scheme. Originally the Government permitted the recruitment of son or unmarried daughter or near relative of the Government servant, who died in harness, for appointment in the posts outside the purview of the Tamil Nadu Public Service Commission subject to certain conditions. The above concession was extended later to the families of the deceased Government Servants who died in harness for appointment in the posts within the purview of the Tamil Nadu Public Service Commission also. The intention of the Government is to provide immediate means of livelihood when the breadwinner dies in harness. The scheme is applicable to all posts in Group C and D alone and as such no appointment on compassionate grounds could be made in respect of posts in Group A and B which is in tune with the Judgment of the Honourable Supreme Court of India reported in Umesh Kumar Nagpal Vs. State of Haryana and others [(1994) 4 SCC 138].

4.(c) According to the respondent, the appointment on compassionate grounds are made in C and D Groups only. Neither the qualification of the applicant nor the post held by the deceased employee is relevant for such appointment. Now the appointment to the posts in Group B cannot be made as laid down by the Honourable Supreme Court of India. The appointing authority shall, however, consider, if the dependent of the deceased employee wishes to accept employment in Group C and if he is otherwise eligible. In fact, prior to issue of G.O.Ms.No.154, Personnel and Administrative Reforms Department



dated 19.09.2006, the appointments on Compassionate ground shall be made to all vacancies, if the eligible legal heirs of the deceased Government Servants are available to that extent. Due to ban order, neither compassionate servants nor direct recruitment were made. Consequent to this, candidates eligible for the compassionate appointment have been put in the waiting list and if 100% of vacancy is filled with such candidates from the the waiting list, it would create hardship to the general public like the petitioner, who have qualified themselves and waiting to compete in open competition. Only in order to avoid such hardship, instructions have been issued in Letter Ms.No.126, L&E Department, dated 16.09.2006 and in impugned G.O.Ms.No.154, P&AR(P) Department, dated 19.09.2006 earmarking only 25% of vacancies approved in the Post of Junior Assistant in the Tamil Nadu Ministerial/TMJMS Service for appointment on compassionate grounds and leaving the remaining 75% of the vacancies for appointment on regular basis to be filled by conducting competitive examination in Group IV by the Tamil Nadu Public Service Commission as per the procedure in vogue. The above instruction was issued only to restrict the appointment on compassionate ground to that extent but for which, all vacancies in the post of Junior Assistant may be filled through appointment on compassionate ground, which is a concession extended by the Government to the legal heirs of Government Servant who died in harness leaving his family in indigent circumstances. According to the respondent, such earmarking of posts is not an adhoc arrangement. in any event, the petitioner cannot, as a matter of right, seek for appointment to any post on the basis of his registration in the employment exchange or he is entitled to question the decision taken by the respondents to earmark 25% of vacancies for appointment on compassionate grounds.

4.(d) As per the scheme formulated in this regard, appointment may be made as per the rule applicable to the post concerned and other instructions issued in the matter. Hence, such appointments are not considered as irregular and the appointment on compassionate ground cannot be termed as unconstitutional or illegal. Accordingly, such appointments are not irregular and therefore, those who have been appointed on compassionate ground cannot be discriminated against those who have been recruited regularly on the basis of relevant rules and the decision relied upon in the affidavit by the petitioner is not relevant to the appointment on compassionate grounds. Similarly, principles of equality before law is also not relevant in the case. Earmarking 25% of vacancies in the post of Junior Assistant in the Tamil Nadu Ministerial Service / Tamil Nadu Judicial Ministerial Service is intended for appointment on compassionate grounds and it cannot be said to be a reservation within reservation.

4.(e) In the counter affidavit, it is further averred that granting appointment on compassionate ground considering the indigent circumstances may not be against Article 16 of the Constitution. Article 16(2) of the Constitution of India prohibits discrimination against a citizen on the ground of



religion, race, caste, sex, descent, place of birth and residence. As such providing appointment on compassionate ground to the legal heir of a Government servant who dies in harness and the reasonable allocation of 25% of vacancies in a particular post with a view to extend the remaining vacancies in the post of appointment from open market may not be construed as ultravires of the Constitution of India.

5. Mr.N.Subramaniam, learned counsel appearing for the petitioner submitted that each and every department have a scheme for compassionate appointment and the candidates satisfied the conditions incorporated in the scheme are eligible for compassionate appointment. However, earmarking 25% for compassionate appointment is contrary to the public recruitment policy and it has affected the rights of equality to get appointment in public employment and the same is a clear violation of Articles 14 and 16 of the Constitution of India. In the present case, there was a ban for recruitment from 2001-2006. Immediately after lifting the ban, the unemployed youth like the petitioner were eagerly waiting for public employment. At this stage, the respondent passed the impugned G.O. reserving 25% vacancies for compassionate appointment and it is unreasonable besides it is a clear case of discrimination among the eligible candidates who are standing outside the employment exchange and the same is violation of Article 16 of the Constitution of India.

6. Mr.T.N.Rajagopal, learned Government Pleader appearing for the State would submit that the ban imposed by the Government was lifted the ban in the year 2006. After lifting the ban, there was a huge number of vacancies accumulated for compassionate appointment. In order to safe guard the interest of the unemployed youth like the petitioner 75% of vacancies were allotted for public employment and 25% were allotted for compassionate appointment that too only to the posts which fall within the ambit of C & D groups. Hence, there is no discrimination and it is not violation of Article 16 of the Constitution of India.

7. The issue center around in the present case is whether 25% percentage of reservation can be given exclusively for making compassionate appointments. Before venturing to the issue the relevant portion of the impugned G.O.Ms.No.154 Personnel and Administrative Reforms Department dated 19.09.2006 is as follows:

"Consequent on issue of orders lifting the ban on direct recruitment in the Government Order first read above, the ban on compassionate ground appointment was also cancelled in the Government Order second read above. In the Government Order third read above, necessary orders have also been issued for appointment on compassionate ground to the posts in C & D groups.

2. Government now, direct that 25% of the vacancies in the post of Junior Assistant



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(Group C) to be filled by direct recruitment in the Tamil Nadu Ministerial Service / Tamil Nadu Judicial Ministerial Service be reserved for appointment on compassionate ground subject to the fulfillment of the other conditions prescribed by Government for such appointment from time to time.

3. The Head of Departments are hereby requested to issue necessary instructions to the competent authorities for making appointment on compassionate grounds accordingly."

8. A bare perusal of the said G.O. reveals that consequent upon the lifting of the ban on direct recruitment, including ban for appointment on compassionate ground appointment, the Government received enormous claim made by the heirs of the government servant seeking appointment on compassionate grounds. Accordingly necessary orders were issued for appointment on compassionate ground to the posts of C & D Groups. Thereafter, the Government considered that 75% of the vacancies for the post of Junior Assistant in Group C shall be filled by direct recruitment in Tamilnadu Ministerial Service / Tamil Nadu Judicial Ministerial Service and 25% shall be reserved for appointment on compassionate ground subject to fulfillment of the other conditions prescribed by the Government for such appointment.

9. Thus, it is evident that due to the ban imposed for compassionate grounds, the Government was in receipt of mounting claim made by the heirs of the deceased government servant, who could not be considered for being appointed for a period of five years. Thus, when the ban was lifted, equally, there were huge number of vacancies arisen to be filled. In order to off set the huge vacancies, by direct recruitment as well as through appointing the wards of the government servants, who sought for appointment on compassionate grounds, the government thought it fit to earmark 25% of the total number of vacancies for appointment on compassionate grounds. In this back ground it is useful to refer the following decisions of the Honourable Apex Court in case of compassionate appointment and in respect of reservation to the compassionate appointment. The decisions are as follows:

(i) for no appointment based on descent - violative of Article 16 the Honourable Apex Court in Yogender Pal Singh vs. Union of India [1987 (1) SCC 631] has held as follows:

"While it may be permissible to appoint a person who is the son of a police officer who dies in service or who is incapacitated while rendering service in the Police Department, a provision which confers a preferential right to appointment on the children or wards or other relatives of the police officers either in Service or retired merely because they happen to be children or wards or other relatives of such police officers would be



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contrary to Article 16 of the Constitution. Opportunity to get into public service should be extended to all the citizens equally and should not be confined to any extent to the descendants or relatives of a person already in the service of the State or who has retired from the service..... Any preference shown in the matter of public employment on the ground of descent only has to be declared as unconstitutional...."

(ii) In Auditor General of India and others v. G. Ananta Rajeswara Rao [(1994) 1 Supreme Court Cases 192] the Honourable Apex Court has observed as follows:

"6. The Division Bench of the Andhra Pradesh High Court relied upon in the judgment in P.S. Geeta v. Central Bank of India, Bombay'. Therein the circulars issued under the Banking Companies (Acquisition and Transfer of Undertakings) Act for appointment of the sons of the employees were sought to be implemented. The vires thereof had come up for consideration and the Division Bench held that reservation of 25% to the sons of the employees of the banks and relaxation of the educational qualifications and relaxation of the percentage of marks for appointment were held to be violative of Article 16(2) of the Constitution. We agree with the reasoning and ratio of the above judgment."

(iii) for the Provision for compassionate appointment is an exception to Article 14 & 16, the Honourable Supreme Court in its decision in Haryana State Electricity Board v. Hakim Singh [1997 (8) SCC 85] has held as follows:

"The rule of appointments to public service is that they should be on merits and through open invitation. It is the normal route through which one can get into a public employment. However, as every rule can have exceptions, there are a few exceptions to the said rule also which have been evolved to meet certain contingencies. As per one such exception relief is provided to the bereaved family of a deceased employee by accommodating one of his dependants in a vacancy. The object is to give succour to the family which has been suddenly plunged into penury due to the untimely death of its sole breadwinner. This Court has observed time and again that the object of providing such ameliorating relief should not be taken as opening an alternative mode of recruitment to public employment."



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(iv) In State of Haryana vs. Ankur Gupta [2003 (7) SCC 704] it is held as follows:

"As was observed in State of Haryana v. Rani Devi (1996) 5 SCC 308 it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India.

(v) for there cannot be reservation of a vacancy for making compassionate appointment the Honourable Apex Court in Sanjay Kumar vs. State Of Bihar And Ors, [2000 (7) SCC 192] has held as follows:

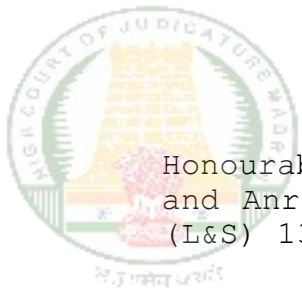
"There cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there is some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

Only for reserved categories the question of filling up backlog vacancies will arise and this was guaranteed by Article 16 (4-B). There is no reservation made for compassionate appointments.

In the above citation of Honourable Supreme Court, it is also observed thus:

"16. Equality of opportunity in matters of public employment:-

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."



Honourable Supreme Court in Director of Education (Secondary) and Anr. v. Pushpendra Kumar and Ors. (Short Notes 35-1998 SCC (L&S) 1302) has categorically held as follows:

"Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment of seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee. In Umesh Kumar Nagpal v. State of Haryana, 1994 (4) SCC 138, this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of 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. In that case the Court was considering the question whether appointment on compassionate grounds could be made against posts higher than posts in classes III and IV. It was held that such appointment could only be made against the lowest posts in non-manual and manual categories. It was observed :-

"The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz, relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception 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 status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned." (p. 140) In the said case, this Court has considered the earlier Judgment in Smt. Sushma Gosain & Ors. v. Union of India & Ors., 1989 (4) SCC 468. It has been observed that said judgment has been misinterpreted to the point of



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to uphold the direction given by the High Court in the impugned judgments whereby the respondents have been directed to be appointed on a class III post if they possess the requisite qualifications for such a post and in case no Class III post is available then a supernumerary class III post be created for the purpose of such appointment.""

(vii) for mere Death of an employee does not entitle his family to compassionate appointment the Honourable Supreme Court in Umesh Kumar Nagpal v. State of Haryana [(1994) 4 Supreme Court Cases 138] has held as follows:-

"2.The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. 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. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied,



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that but for the provision of 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. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. 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.

3. Unmindful of this legal position, some Governments and public authorities have been offering compassionate employment sometimes as a matter of course irrespective of the financial condition of the family of the deceased and sometimes even in posts above Classes III and IV. That is legally impermissible.

4. It is for these reasons that we have not been in a position to appreciate judgments of some of the High Courts which have justified and even directed compassionate employment either as a matter of course or in posts above Classes III and IV. We are also dismayed to find that the decision of this Court in *Sushma Gosain v. Union of India* [(1989) 4 SCC 468] has been misinterpreted to the point of distortion. The decision does not justify compassionate employment either as a matter of course or in employment in posts above Classes III and IV. In the present case, the High Court has rightly pointed out that the State



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resourcefulness of the deceased family in each and every case independently and decide the case based on merits available to the respective candidates. Thus, the scheme for compassionate appointment cannot be given unless the family of the deceased Government servant is proved to be in penurious living condition. Further, it must be shown that the family is without any means for livelihood and unless an appointment on compassionate ground is made, the Family will not be in a position to get itself redeemed from penurious circumstances. The avowed object with which a scheme for appointment on compassionate ground is made is to provide some financial assistance in the form of employment so that the family of the deceased government servant will get succor for livelihood. The State has an obligation to provide appointment on compassionate grounds to ensure that the wards of the government servant, who earlier served the government, could maintain a descent living even after the death of the bread winner. At the same time, such appointment cannot be made automatically. It is also to be noted that appointment on compassionate ground is subject to fulfilment of certain conditions and it cannot be made mechanically or a ward of a government servant, who died in harness, will automatically get appointed to a post in any one of the government departments. In such circumstances, by earmarking 25% of the vacancies for the wards of the deceased government servant, the appointees under the compassionate grounds, in the garb of getting appointment under compassionate ground, will muffle in the queue over the direct recruitees and they will get priority over the direct recruitees. This will certainly offend Article 14 and 16 of The Constitution of India and thereby persons who are waiting for employment in government departments will be prejudiced. The appointment on compassionate grounds is not a mode for employment on regular basis and therefore, earmarking a percentage of the available vacancies for appointment on compassionate grounds is against the statutory spirit of the scheme with which the scheme for appointment on compassionate ground is made.

11. The Honourable Apex Court held that compassionate appointment is not a source or mode of appointment and there cannot be a quota reserving for compassionate appointment, as in this case, reserving 25%. It is in clear violation of Article 16 of the Constitution of India. The Government filed a detailed counter however, no records were placed before this Court to show as to how many persons are waiting for being appointed on compassionate grounds and how many persons were given appointment on compassionate grounds pursuant to the impugned order. Thus, it is evident that the Government, without taking any steps to collect the number of persons waiting to be appointed under the compassionate grounds or how many of them have fulfilled the conditions for such appointment, had mechanically passed the impugned government order earmarking 25% for the wards of the government servant, under the compassionate appointment scheme and it is legally impermissible.



12. In view of the above decisions more particularly the decision reported in Sanjay Kumar vs. State of Bihar and Others [2000 (7) SCC 192] the Honourable Apex Court wherein it was clearly held that class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up or determining the ceiling of fifty percent reservation on total number of vacancies of that year and it is clearly in violation of constitutional provisions. Accordingly this Court has no hesitation to set aside the orders impugned in this writ petition. Accordingly the writ petition is allowed. No costs. It is made clear that any appointments made pursuant to the above Government Order till the date of this order will not affect the persons who have got employment. The decision of this Court is only prospective.

Sd/--

Assistant Registrar(CS IX)

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Sub Assistant Registrar

ggs.

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+1cc to Mr.N.Subramaniyan, Advocate SR.NO.61435

RJ(CO)
sm:26.9.2018

W.P.No.45835 of 2006