

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/12/2019

C O R A M

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.40373 of 2016

R.Durga

...Petitioner

Vs

1. State of Tamil Nadu,
Rep. by the Secretary to Government,
Department of Agriculture,
Secretariat, Fort St.George,
Chennai - 600 009.

2. The Agriculture Commissioner,
Department of Agriculture,
Chepauk, Chennai - 600 005.

3. The Director of Agriculture,
Department of Agriculture,
Chepauk, Chennai - 600 005.

4. The Joint Director of Agriculture
Integrated Agri Complex,
Tiruvannamalai - 606 604.

....Respondents

Prayer : Petition filed under Article 226 of the Constitution of India praying for the issuance of Certioararified Mandamus, calling for the records of the 2nd respondents culminated in Letter No. A.U.P.2/36601/2015 dated 17.05.2016 and quash the same and consequently direct the respondents to appoint the petitioner in the post of Junior Assistant with retrospective effect from the date of appointment along with all backwages, continuity of service and other benefits.

For petitioner ... Mr.P.V.Balasubramaniam

For respondents ... Mr.A.Shri Jayanthi, Spl.G.P.

O R D E R

The instant writ petition is for a Certioararified Mandamus, calling for the records of the Agriculture Commissioner, Department of Agriculture, Chennai, culminated in Letter No.

A.U.P.2/36601/2015 dated 17.05.2016 and quash the same and consequently direct the respondents to appoint the petitioner in the post of Junior Assistant with retrospective effect from the date of appointment along with all backwages, continuity of service and other benefits.

2. The petitioner's father was working as Depot Manager Grade-III, in the office of the Joint Director of Agriculture, Tiruvannamalai. He passed away on 25.04.2003, leaving behind the petitioner (daughter), his wife and his son. The petitioner's mother had submitted a representation dated 16.04.2004 within a year of the death of the petitioner's father, requesting suitable job on compassionate appointment. The petitioner completed her X standard in March 2005, i.e., one year after the application was made. The petitioner thereafter completed her XII Standard in March 2007. She also acquired junior grade certificate issued by the Technical Education for Typewriting. The petitioner acquired her B.B.A., degree from Bharathidasan University in the year 2011 and subsequently, completed M.B.A., degree from Bharathidasan University on 06.03.2013. The petitioner also did her Masters in Science in Information Technology and obtained certificate from Bharathidasan University.

3. On 20.11.2013, an appointment order was issued by the office of the Joint Director of Agriculture, Tiruvannamalai, appointing the petitioner as Office Assistant. After the petitioner was appointed as Office Assistant, the petitioner gave a representation requesting the respondents to consider the petitioner's qualification and to appoint her to the post of Junior Assistant. The petitioner placed reliance on G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989, which stipulates that appointment on compassionate basis should be made taking into account educational qualification of the applicant. The representation was rejected by an order dated 17.05.2016, on the ground that the G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989, is applicable only to such of those cases, wherein the person passed away before 03.08.1989.

4. The petitioner has filed the instant writ petition stating that the reason given for rejecting the representation is not fair.

5. The petitioner has placed reliance on G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989. The said G.O. states that under no circumstances, the Government should appoint a dependent to a lower post when the dependent possess qualifications required for appointment to the post of Junior

Assistant/Typist on the ground of non-availability of vacancy in the office or department or that the dependents was not willing to work in other departments. It is therefore contended that, in view of the said G.O., when the petitioner has M.B.A. degree, she was entitled to be appointed as Junior Assistant and should not have been appointed as Office Assistant.

6. The respondents have filed a counter. In the counter, the respondents have repeated that G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989, is applicable only to such persons who were appointed as Record Clerk / Office Assistant, prior to 03.08.1989. When the petitioner's father passed away, the petitioner was studying in 9th standard and she was possessing qualifications which would have entitled to be appointed as Office Assistant. It is stated that the petitioner cannot take advantage of the educational qualifications which she acquired after the death of her father.

7. Heard the counsel for the parties.

8. Since the entire case of the petitioner revolves around with the eligibility as per G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989, the entire G.O., has been reproduced:-

"Abstract Public Services - Employment Assistance to families of deceased Government Servants - Procedure of recruitment - clarification- issued.

READ:

1.G.O.Ms.No.225, Labour dated 15.2.72

2.G.O.Ms.No.560, Labour and Employment dated 3.8.77.

3.G.O.Ms.No.444, Labour and Employment, dated 23.2.81.

ORDER:

According to the orders issued in the G.O. first read above, a dependent of the deceased Government servant can be appointed on compassionate grounds to a post which falls outside the purview <http://www.judis.nic.in> of TNPSC. In the G.O. second read above, the concession has been extended to posts falling within the purview of TNPSC also. According to the G.O. third read above, record clerks already appointed on compassionate grounds if they are qualified for appointments as Junior Assistants at the time of initial appointment can be appointed as Junior Assistants by direct recruitment after obtaining the concurrence of the TNPSC under the latter part of Regulation 16(b) of the TNPSC Regulations, 1954.

2. Based on the orders issued in the G.O. third read above, a dependent appointed as Record Clerk on compassionate ground is eligible for appointment as Junior Assistant, but a dependent appointed as Office Assistant is not considered for appointment as Junior Assistant, even though both were having the qualification for Junior Assistant at the time of appointment to a lower posts. This amounts to discrimination. Therefore, the Government have examined the proposal, in detail to remove the discontent among the dependents appointed as Basic Servants and accordingly issue the following clarification.-

i) A dependent appointed to a lower post like Record Clerk, Office Assistant and Sweeper on Compassionate Grounds but possess the qualification required for the post of Junior Assistant at the time of initial appointment to a lowest post may be appointed as Junior Assistant/Typist.

ii) This concession is allowed only to those who have already been appointed to a lower post like Record Clerk, Office Assistant, Sweeper, etc. The dependents should satisfy the conditions prescribed for consideration of appointment under Compassionate Grounds at the time of their appointment as Junior Assistant, Typist etc.

iii) If the dependents who are appointed to lower posts like sweeper. Office Assistant and Record Clerk with ref. to their qualifications possessed at the time of their initial appointment and subsequently acquire qualifications prescribed for appointment as Junior Assistant/Typist they can be considered for appointment as Junior Assistant/Typist only with reference to Special Rules governing the post of Junior Assistant/Typist and not with reference to the scheme of providing employment, assistance on compassionate grounds.

iv) The appointing authorities under no circumstances should appoint a dependent to a lower post when the dependant possess the qualifications required for the post of Junior Assistant/Typist on the ground of non availability of vacancies in the office or department or the dependents not willing to work in other Departments. In such circumstance they should follow the existing procedure of approaching the Collector of District for providing a suitable vacancy as suggested in G.O.Ms.No.1179, P&A.R., dated 17.10.79.

(BY ORDER OF THE GOVERNOR)

N.Venkatachalam

SECRETARY TO GOVERNMENT"

9. The question which arises for consideration is as to whether the qualification of the applicant should be seen on the date of death of the employee or on the date of which the compassionate appointment is offered ?. It is well settled that compassionate appointment is an exemption to the general rules of recruitment. The general rule is that an appointment to any public post service of the State should be made on the basis of the principles which is in accordance with Article 14 and 16 of the Constitution of India. Appointments should be made only and strictly in accordance with recruitment rules framed by the State. The basis of the policy is that it recognises that the family of the deceased employee may be placed in a position of financial hardships upon the untimely death of the employee while in service. It is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment (refer State of Himachal Pradesh & Another. Vs. shashi kumar), reported in 2019 (3) SCC 653.

10. The compassionate appointment is therefore to be considered on the date and which the application is made. In this case, when the application was made, the petitioner had not yet cleared the X Standard examination. The fact that petitioner has got a job after 15 years cannot lead to the conclusion that the State must offer a job commensurate on her qualification on the date of which the appointment is made. The appointment is made only on the basis of the representation and the qualification on the date of death of the deceased employee.

11. In this case, the petitioner who is seeking compassionate appointment had studies upto 9th standard and therefore was only eligible for being appointment only as an Office Assistant. The regular mode of appointment is only in accordance with the recruitment rules in force. Compassionate appointment therefore cannot be taken as a bonanza by the family of the deceased employee. The Compassionate appointment has to be made strictly in accordance with the scheme.

12. The petitioner has placed reliance on a judgment dated 06.12.2018 passed by this Court in WP(MD).No.13354 & 13355 of 2013, C.Prabakaran Vs. The Secretary to Government, Department of Commercial Taxes and Registration, wherein this Court was relied on G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989, and observed as under:-

"4.It is submitted that unaware of the Government Regulation, the petitioners' accepted the employment as a Record Clerk on Compassionate Ground even though both of them had passed S.S.L.C. which was the qualification prescribed for the post of Junior Assistant. In this connection, they referred to para 2(iii) of G.O.(Ms).

No.1499, dated 03.08.1989 which reads as under:-

"The appointing authorities under no circumstances should appoint a dependent to a lower post when the dependent possess the qualifications required for the post of Junior Assistant/Typist on the ground of non availability of vacancy in the office or department or the dependents not willing to work in other departments. In such circumstances they should follow the existing procedure of approaching the collector of District for providing a suitable vacancy as suggested in G.O.(Ms).No.1179, P&AR, dated 14.10.1979."

5.The learned counsel for the petitioners submitted that under similar circumstances, the two of the employee like the petitioners had filed W.P.(MD)No.69 of 2010 and W.P.(MD)No.1685 of 2010 and had obtained an order dated 22.04.2010 and 06.08.2010 for treating his initial date of appointment as Junior Assistant with consequential relief. 6.Against the order, the respondents also preferred an appeal before the Division Bench which were disposed vide orders, dated 21.02.2011 in W.A.(MD)No.641 of 2010 and W.A.(MD)No.908 of 2010 without backwages. Similar relief was also granted to another employee in W.P. (MD)No.7896 of 2011. "

13. In this case, the facts do not reveal as to what was the qualification which the dependant possessed on the date of the death of the deceased employee. This case is therefore distinguishable on facts. The learned counsel for the petitioner also placed reliance on another judgment of this Court dated 22.04.2010 in W.P.(MD).No.69 of 2010, M.H.Abdul Rahman Vs. The Secretary to Government, Department of Commercial Taxes and Registrtaion, after quoting the G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989, observed as under:-

"8.It is made clear that this concession is allowed only to those who have already been appointed to the lower post. As per clause(ii) if the dependents,who are appointed to the lower post with reference to the qualification possessed at the time of their appointment, they can be considered for the appointment of Junior Assistant/ Typist with reference to special rules governing the post of Junior Assistant/Typist and not with reference to the scheme of providing employment assistant on compassionate grounds. As per clause (iii), the appointing authority under no circumstances should appoint a dependent to a

lower post when the dependent possess the qualifications required to the post of Junior Assistant. Therefore, as per the above Government Order, on the date of passing of that G.O. if a person is working as "Record Clerk" and he was having the qualification for appointing himself as "Junior Assistant" he can be appointed as "Junior Assistant" from the date of that G.O. As per clause (iii), there is a prohibition from appointing the petitioner who possess the qualification for being appointed as "Junior Assistant" or Record clerk. Therefore, considering the various clauses stated in G.O.Ms.No.1499, after the date of that G.O. nobody should be appointed on compassionate grounds to a lower post of Record Clerk, Office Assistant and Sweeper, if they possess the qualification for the post of Junior Assistant. Therefore, when there is a prohibition for appointing a person to the post if he possess the qualification for the higher post, he ought to have been appointed for the higher post and if he had been appointed to the lower post when his services are regularised to the higher post, it must be given retrospective effect from the date of appointment, Therefore, the first respondent committed an error in regularising the service of the petitioner as "Junior Assistant" from the date of passing of the G.O.Ms.No.66, Commercial Tax & Registration(A2) Department, dated 01.07.2008 and the first respondent ought to have been regularised the service of the petitioner as "Junior Assistant" from 26.03.2000 i.e. from the date of his initial appointment and the petitioner is also entitled to claim promotion as if he was appointed as "Junior Assistant" from 26.03.2000."

In the above said judgment also, it is not clear as to what was the qualification dependant possessed on the date when the employee passed away.

14. The Hon'ble Supreme Court in Umesh Kumar Nagpal v. State of Haryana, reported in 1994 (4) SCC 138, has observed as under:-

"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 : 1989 SCC (L&S) 662 : (1989) 11 ATC 878 : (1989) 4 SLR

327] 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 Government's instructions in question did not justify compassionate employment in Class II posts. However, it appears from the judgment that the State Government had made at least one exception and provided compassionate employment in Class II post on the specious ground that the person concerned had technical qualifications such as M.B.B.S., B.E., B.Tech. etc. Such exception, as pointed out above, is illegal, since it is contrary to the object of making exception to the general rule. The only ground which can justify compassionate employment is the penurious condition of the deceased's family. Neither the qualifications of his dependant nor the post which he held is relevant. It is for this reason that we are unable to understand the following observations of the High Court in the impugned judgment:

"We are of the view that the extraordinary situations require extraordinary remedies and it is open to the Government in real hard cases to deviate from the letter and spirit of the instructions and to provide relief in cases where it is so warranted. To hold as a matter of law that the Government cannot deviate even minutely from the policy of providing appointment only against Class III and Class IV posts, would be to ignore the reality of life these days. It would be ridiculous to expect that a dependant of a deceased Class I Officer, should be offered appointment against a Class III or IV post. While we leave it to the Government to exercise its discretion judiciously in making appointments to Class I or II posts on compassionate grounds, yet a word of caution needs to be struck. It is to be noted that such appointments should be ordered in the rarest of rare cases, and in very exceptional circumstances. As a matter of fact, we would recommend that the Government should frame a policy even for such appointments."

5. It is obvious from the above observations that the High Court endorses the policy of the State Government to make compassionate appointment in posts equivalent to the posts held by the deceased employees and above Classes III and IV. It is unnecessary to

reiterate that these observations are contrary to law. If the dependant of the deceased employee finds it below his dignity to accept the post offered, he is free not to do so. The post is not offered to cater to his status but to see the family through the economic calamity.

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 breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over.

7. It is needless to emphasise that the provisions for compassionate employment have necessarily to be made by the rules or by the executive instructions issued by the Government or the public authority concerned. The employment cannot be offered by an individual functionary on an ad hoc basis."

15. Similarly, in State Bank of India Vs. Somvir Singh, 2007 (4) SCC 778, the Hon'ble Supreme Court held as under:-

"10. There is no dispute whatsoever that the appellant Bank is required to consider the request for compassionate appointment only in accordance with the scheme framed by it and no discretion as such is left with any of the authorities to make compassionate appointment dehors the scheme. In our considered opinion the claim for compassionate appointment and the right, if any, is traceable only to the scheme, executive instructions, rules, etc. framed by the employer in the matter of providing employment on compassionate grounds. There is no right of whatsoever nature to claim compassionate appointment on any ground other than the one, if any, conferred by the employer by way of scheme or instructions as the case may be.

11. The scheme for appointment of dependants of deceased employee on compassionate grounds framed by the appellant Bank inter alia provides that in making assessment of the financial condition of the family which is an important criterion for determining the eligibility to compassionate appointment, the following factors are required to be taken into consideration:

(a) Family pension;

- (b) Gratuity amount received;
- (c) Employee's/employer's contribution to provident fund;
- (d) Any compensation paid by the Bank or its welfare fund;
- (e) Proceeds of LIC policy and other investments of the deceased employee;
- (f) Income for family from other sources;
- (g) Income of other family members from employment or otherwise;
- (h) Size of the family and liabilities, if any.

16. It is trite law that the situation of the family at the time of the death of the Government employee is the most relevant criteria which has to be considered while giving compassionate appointment, which is a mode of appointment other than the service rules on which appointments are generally made. G.O.Ms.No.1499, Labour & Employment Department dated 03.08.1989, therefore should be interpreted in such a way that if on the death of the employee, the dependant has got a higher qualification which would entitle him/her for appointment to the post of Junior Assistant / Typist, then the dependant should be considered for that post. This G.O. cannot be interpreted to include the qualifications which has been acquired by the applicant, subsequent to the date of death of the employee.

17. In the result, the Writ petition is dismissed. No Costs.

-s/d-

Assistant Registrar (CS-I)

True Copy

Sub-Assistant Registrar

सत्यमेव जयते

Pkn.

To

1. The Secretary,
State of Tamil Nadu,
Department of Agriculture,
Secretariat, Fort St. George,
Chennai - 600 009.

2. The Agriculture Commissioner,
Department of Agriculture,
Chepauk, Chennai - 600 005.

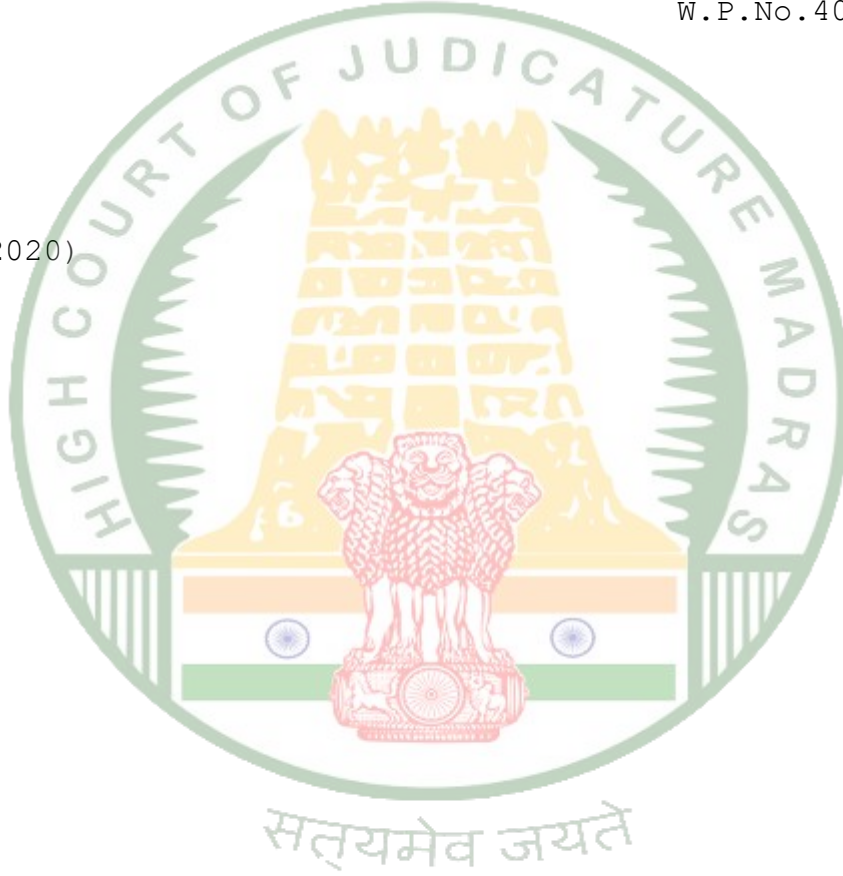
3. The Director of Agriculture,
Department of Agriculture,
Chepauk, Chennai - 600 005.

4. The Joint Director of Agriculture
Integrated Agri Complex,
Tiruvannamalai - 606 604.

+1 CC to Govt. Pleader sr 106717.

W.P.No.40373 of 2016

BS (CO)
SP (07/02/2020)



WEB COPY