

AFR

HIGH COURT OF ORISSA : CUTTACK.

W.P.C. (OA) No. 1946 of 2014

(In the matter of an application under
Articles 226 and 227 of the Constitution of India, 1950)

SRI SHIBA SHANKAR JENA

SON OF

LATE CHITTARANJAN JENA

VILLAGE/P.O.: BARABATIA

P.S.: KAMARDA

DISTRICT: BALASORE

Petitioner

Mr. Sameer Kumar Das,
Advocate for
the petitioner

VERSUS

STATE OF ODISHA

REPRESENTED THROUGH

COMMISSIONER-CUM-

SECRETARY

DEPARTMENT OF SCHOOL AND

MASS EDUCATION

ODISHA – 751 001

& OTHERS

Opposite parties

Mr. Ramanath Acharya,
Standing Counsel
(School & Mass
Education)
for opposite party
Nos.1 to 3

This matter is taken up by virtual/physical mode.

Date of Hearing: 20.10.2022 :: Date of Judgment: 28.10.2022

CORAM:

MR. JUSTICE MURAHARI SRI RAMAN

JUDGMENT

P.T.O.

Murahari Sri Raman, J.—

1. The petitioner, being appointed as peon in Group-D post on consideration of application under the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990, approached the learned Odisha Administrative Tribunal, Principal Bench, Odisha, Bhubaneswar by way of Original Application bearing No.1946 of 2014 under Section 19 of the Administrative Tribunals Act, 1985, craving for the following relief(s):

“Under the above circumstances it is, therefore, humbly prayed that the Hon’ble Tribunal be graciously pleased to quash the allotment of candidates in respect of Balasore Education Circle in Class-III post under Rehabilitation Assistance Scheme by the respondent Nos.1 and 2 as at Annexure-10 so far it relates to the candidates belonging to different districts other than Balasore Education Circle;

And further the Hon’ble Tribunal be pleased to direct the respondents to issue appointment letter in respect of the applicant in Class-III vacancies under the administrative control of the respondent No.3 as he has been declared as a deserving candidate and eligible for Class-III post as much as he is within the seniority list keeping in view the vacancies;

And/or pass any other order/orders in the fact and circumstances of the case to give complete justice to the applicant.”

- 1.1. After abolition of the Odisha Administrative Tribunal, the Original Application has been transferred to this Court and it is converted to writ petition being renumbered as W.P.C. (OA) No.1946 of 2014.
2. The undisputed fact adumbrated by the petitioner in the Original Application/Writ Petition reveals that the petitioner being minor on 15.04.2007, i.e., the date of death of his father, namely

Chittaranjan Jena, a Trained Graduate Teacher in Janardan High School, Baripada, applied for consideration of his appointment under the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990 (for brevity, “RA Rules”) after attaining age of majority.

- 2.1. The Collector, Balasore having issued distress certificate, said application was considered and the petitioner, belonging to Balasore District, was allotted for appointment against Group-D post. It is averred that though there were available vacancies in Group-C post as per the district-wise vacancy position maintained by the Department, the petitioner ought to have been offered appointment in Group-C post, CLERK, instead of Group-D post, PEON.
- 2.2. In pursuance of Order No.8882/SME, dated 04.04.2012 of the Government of Odisha in School & Mass Education, Odisha, Bhubaneswar, as communicated *vide* Letter No.14786(19), dated 09.04.2012 by the Director, Secondary Education, Odisha, Bhubaneswar, the petitioner was appointed under Rule 9(7) of the RA Rules as PEON in Panchayat High School, Fulwar Kasaba against existing vacancy in the scale of pay Rs.4,440/- — Rs.14,680/- + Grade Pay Rs.1,300/- with usual D.A. and other allowances.
- 2.3. The petitioner has made the following submission at paragraphs 6.11 and 6.12 of the petition with reference to total vacancy position as on 09.12.2011:

“6.11. That a bare perusal of the list will indicate that as against the proposal of allotment of candidates numbering 34 for the Balasore Education Circle only 10 candidates from

Balasore have been considered whereas 10 candidates from Jajpur and 7 each from Koraput and Sundargarh Education Circle have been allotted against the Balasore Circle. It is important to note that there are 9 Class-III vacancies and 33 Class-IV are available at Jajpur. Similarly 5 Class-III vacancies and 9 Class-III vacancies are available at Koraput. In Sundargarh Education Circle 4 Class-III vacancies and 26 Class-IV vacancies are available. If for any reason the Class-III vacancies are not sufficiently available at Jajpur, Koraput or Sundargarh to accommodate the deserving candidates belonging to the respective Education District then it is open for the respondent No.3 to consider the case of such deserving candidates in Class-IV posts which are sufficiently available. The RA Rules does not create a right for the applicant to claim a post of Class-III or Class-IV. Subject to availability of vacancies under the administrative control of the appointing authority the deserving candidates shall get the appointment. In this manner the allotment of candidates of different Education Circles to Balasore Education Circle as at Annexure-10 is in gross violation to the statutory provision so also the clarifications issued by the competent authority in this regard. The respondent Nos.1 and 2 cannot direct the respondent No.3 to accommodate the candidates of other Education Circle to exhaust the vacancies available under Balasore Education Circle depriving the applicant and similar other situated candidates to get appointment under RA Scheme not only in Class-III post but also in their own district.

- 6.12. *That the applicant is within first 16 serial number in the master list prepared by the Government having all eligibility to get the Class-III post as a compassionate appointee under RA Rules as the respondents have decided to fill 34 numbers of vacancies in Balasore Education Circle. Since the authorities gave the preference to outsiders violating the provision of Rule 8(2) of OCS (RA) Rules, 1990 therefore the right of the applicant to get equality and equity has been affected being encroached by outsiders who are not equated with him but got the support of respondents for illegal means."*

- 2.4. Sri Sameer Kumar Das, learned Advocate for the petitioner, therefore, submitted that the petitioner is qualified and eligible to get appointment as “CLERK” against the vacancies in Class-III (Group-C) post within the jurisdiction of the District Education Circle, Balasore.
- 2.5. To buttress his argument, Sri Sameer Kumar Das has referred to following letters:

*“Government of Odisha
School & Mass Education Department
No.13753-VISME-(B) 7/06/SME, dated 23.06.2007*

From

*Sri P.K. Patnaik, IAS
Additional Secretary to Govt.*

To

All Inspector of Schools

Sub.: Appointment under R.A. Scheme

Sir,

I am directed to say that the Commissioner-cum-Director, Secondary Education in his L.No. 22392, dated 07.05.2007 has communicated the instructions as well as Inspectorate-wise list of eligible applicants to you for appointment under R.A. Scheme. Before giving appointment under the Scheme, there were certain doubts regarding preferential treatment of applicants having higher qualification. In this connection, clarification was sought from the G.A. Department vide their UOI No.748, dated 11.06.2007 had clarified the matter as follows:

‘The applicant for appointment to a particular post under R.A. Scheme, must have the requisite qualification as prescribed in the relevant recruitment rules, resolutions or

instructions regulating the recruitment to the said post. The rules do not permit for preferential treatment of applicants having higher qualification than that is required for the post. Appointment is given in order of the list maintained by the appointing authorities on the basis of the date of application. It is neither desirable nor permissible under the Rules to give appointment to a candidate having higher qualification ignoring the claim of the earlier applicant who possesses requisite qualification for appointment against the post.'

You are, therefore, requested to take appropriate action immediately under intimation to this Deptt. as well as DSE, Orissa.

*Your faithfully,
Sd/-
Additional Secretary
to Government
23.06.2007"*

*"Government of Odisha
School & Mass Education Department*

No.23554-IV-SME/E(II)-194/2011/SME, dated 01.12.2011

From

*Sri B.C. Patnaik, OAS (SAG)
Additional Secretary to Govt.*

To

*The Director, Secondary Education,
Odisha, Bhubaneswar.*

*The Director, Elementary Education,
Odisha, Bhubaneswar.*

Sub: Appointment under R.A. Scheme, 2011 (4th Phase).

Ref.: DSE Letter No.45065 dtd.17.09.2011.

Sir,

I am directed to invite reference on the subject cited above and to convey the approval of Government in respect of 72 nos. of applicants for appointment under RA. Scheme in different Field Offices/Primary Schools and Secondary Schools out of 795 list enclosed baring 23 applicants (separate list enclosed). It is pertinent to mention here that since certain allegations were received regarding the veracity of documents produced by the above 23 applicants the same is required to be further scrutinized by the screening committee. While giving appointment to the candidates under RA Scheme following conditions as well as guidelines of Finance Department Letter NO.54447/F dtd.05.12.2005 and guidelines for eligibility of appointment under RA Scheme issued by GA. Department from time to time need to be adhered to. Out of the above 795 applicants, the applicants who have applied late then statutory application period has been duly condoned by the Government as per Rule.

The Director, Secondary Education, Odisha, Bhubaneswar should recommend the names of first 266 candidates in order of seniority and eligibility to the concerned Inspector of Schools and Director, TE & SCERT for appointment in Class-III posts. The names of the candidates beyond the above 266 shall be recommended in similar manner to the Inspector of Schools and Director, TE & SCERT for appointment against Group-D posts. Since State is the unit for preparation of the master list, the surplus candidates of each circle are adjusted in other circles as per requirement as annexed herewith.

- (a) *Before sending the list to the concerned Inspectors of Schools and District Inspectors of Schools the approved list may be thoroughly checked regarding date of death invalidation, correctness of seniority maintained in the list, correctness of their jurisdiction i.e. Education Circle and Education District to which the applicant concerned belongs including other records and ensure that the correct list is sent to the concerned quarters. It should also be ensured that no applicant is included in the above approved list whose name has already been approved*

in the earlier phases. It should also be ensured that the benefits of appointment under the RA. Scheme has not been availed by any other beneficiary earlier in respect of the particular deceased / incapacitated employee.

- (b) The criteria as required under G.A. Department Notification NO.25585/Gen dtd.13.09.1990 and amendment thereof vide their letter NO.39937-SC-671/97(PL)/Gen., dated 30.11.1998 are to be strictly followed while giving such appointment.*
- (c) The candidates, who are given appointment under R.A. Scheme, should have to possess the requisite qualification, i.e. both academic and technical/professional required for the post.*
- (d) The appointment should be made according to order of preference in respect of the legal heirs of the deceased incapacitated according to the G.A. Department Notification No.25585/Gen, Dtd. 13.9.1990 and Resolution referred to in para-(b) above and in case there is any deviation in the order of preference, the applicant should provide necessary willingness supported by an affidavit of preceding legal heirs in preference, failing which no appointment should be given to the concerned applicant.*
- (e) Preference will be given for posting of the eligible candidates for Clerk/Peon under RA Scheme within the same circle to which he belongs.*
- (f) The eligible candidates for teaching posts having CT/B.Ed qualification with minimum academic qualification of +2 will be appointed as Level-V teachers only in Elementary Cadre under Director, Elementary Education and preference will be given to appoint them within the jurisdiction of Education District to which he/she belongs. As per provisions of RTE Act the candidates having no minimum qualification i.e. +2 with C.T. or B.Ed. are not*

considered for the post of teacher for appointment under RA Scheme.

- (g) Each eligible candidate irrespective of pasting in Class-III/IV and teaching post will submit an affidavit to the effect that none of his family members are in any kind of employment before issue of appointment order under RA Scheme.*
- (h) The priority of legal heir under RA. Scheme is the wife of deceased/ disabled persons then sons and daughters. While providing any employment to one of the members of the family, it is to be seen whether any of the family members of the affected family is in any employment or in income group by one way or other. In respect of daughters eligible for RA. Scheme, before issue of appointment order, it should be ensured that they are still unmarried as R.A. Scheme provides for extending employment to unmarried daughters.*
- (i) Ten (10) candidates who will be appointed as teachers in Level-V in Elementary Cadre shall be appointed in the Education District noted against their names.*
- (j) The appointing authorities will indicate the date line for reporting to the post assigned to the applicant and if he/she fails to join by that date line it will be assumed that such candidate is not interested and his/her order will be treated as cancelled.*
- (k) On the receipt of the list approved by the Government, concerned Directors will issue instructions to the concerned Appointing Authorities (CIs/DIs as the case may be), who will take immediate steps for verification of original certificates of the candidates and call all the candidates on 07.12.2011 unfailingly for counseling and issue the appointment orders. The vacancies in the Training Colleges and DIETS shall be filled up by the Director, TE & SCERT. While recommending names to the appointing authorities, the Director,*

Secondary Education shall take care to fill up the vacancies in the office of the Inspector of Schools, District Inspector of Schools, C.T. Schools, DIETS and Training Colleges in that order of preference.

- (l) Soon after issuing the appointment orders, the concerned CIs/DIs will submit a compliance report to their respective Directorates.*
- (m) It should be ensured that no vacancies in respect of schools other than Govt. Schools are included in the vacancies position and no person excepting the case of death/ invalid Govt. employees are included in the list.*

You are, therefore, requested to take immediate necessary action at your level as per above decision of Govt. under intimation to this Department.

Yours faithfully,

Sd/-

Additional Secretary to Gov.

28.11.2011

Enclosures:

- 1. Combined teaching and non-teaching list of 795 applicants.*
- 2. List of 23 applicants whose cases are under further scrutiny by the Screening Committee.*
- 3. List of 266 applicants to be appointed against Class-III posts.*
- 4. Inspectorate wise vacancy of non-teaching posts.*
- 5. List of vacancies under Directorate of TE & SCERT.*
- 6. List of 10 applicants for appointment as teachers.*
- 7. List of 88 applicants who have applied late from the statutory application period whose cases are condoned by the Govt.”*

- 2.6. The counsel for the petitioner referring to aforesaid letters submitted that when the total vacancy position shows that vacancy in Group-C was available in Balasore Circle, instead of giving preferential treatment to outsiders, the case of the petitioner ought to have been considered.
- 2.7. In this regard Sri Sameer Kumar Das, learned Advocate has referred to a decision of learned Odisha Administrative Tribunal rendered in the case of *Rama Krushna Singha Vrs. State of Odisha, Original Application No.1537 of 2011, vide Order dated 03.09.2013* and asserted that the fact situation therein is akin to the present facts, as such, the decision is applicable to the present circumstances.
3. *Per contra*, Sri Ramanath Acharya, learned Standing Counsel (School & Mass Education Department) would urge that since the appointment sought for was under the RA Rules, no occasion arises for the petitioner to have choice of post. The competent authority, having taken a decision based on data prepared on rationalization of posts available in the State, has directed to issue appointment letter to the petitioner. Furthermore, in pursuance of Order No.8882/SME, dated 04.04.2012 of the Government of Odisha, School & Mass Education, Odisha, Bhubaneswar, communicated *vide* Letter No.14786(19), dated 09.04.2012 of the Director, Secondary Education, Odisha, Bhubaneswar, the petitioner has been appointed as per the provision contained in Rule 9(7) of the RA Rules as peon in Panchayat High School, Fulwar Kasaba against existing vacancy. As directed in the communication *vide* Memo No.5505, dated 03.05.2012 issued by

the District Education Officer, Balasore, the petitioner has joined the service. Sri Ramanath Acharya placed reliance on the letter dated 04.05.2012 of Shiba Shankar Jena-petitioner which reads as follows:

“To

*The Headmistress, Panchayat High School
Fulwar Kasaba*

Sub.: Joining report

Sir,

As per appointed Memo No.5505, dtd. 04.05.2012 and Order No.8882/SME, dtd. 04.04.2012 of Govt. of Odisha, School and Mass Education Department, myself Shiba Shankar Jena, C/o. Late Chittranjan Jena, At/P.O.: Barabatia, P.S.: Kamarda, Dist.: Balasore joined in your institution today at time 10am Group-D (Peon) employee.

This is for favour of your kind information and necessary acceptance.

Your faithfully

Sd/-

(Shiba Shankar Jena)

Date: 04.05.2012.”

- 3.1. It is, therefore, with vehemence submitted by Sri Acharya that having joined the post of peon in Group-D with eyes open, the petitioner cannot be permitted to seek for a post of his choice and, thereby he is estopped from raising any grievance.
- 3.2. Referring to paragraph 5 of the counter dated 29.01.2015, Sri Acharya submitted that when the Government has taken a policy decision to the effect that entire State has been taken as a unit in the 4th phase with respect to filling up the vacancies in

consideration of applications under the RA Rules. He laid emphasis on the following portion of the letter dated 01.12.2011 (which has already been extracted herein above):

*“*** Since State is the unit for preparation of the master list, the surplus candidates of each circle are adjusted in other circles as per requirement as annexed herewith. ***”*

- 3.3. In pursuance to said Letter dated 01.12.2011, a Letter dated 03.12.2011 was issued from Directorate of Secondary Education, Odisha, Bhubaneswar addressed to all the Inspectors of Schools for taking immediate steps to issue appointment orders by holding a camp. Said letter is reproduced hereunder:

*“Directorate of Secondary Education,
Odisha, Bhubaneswar.*

No-44-11-278-11-5562) (19)/Dt. 3-12.2011

To

*The Inspector of Schools,
Balasore/Bhadrak/Bolangir/Cuttack/
Dhenkanal/Ganjam/Jagatsinghpur/
Jajpur/Jeypore/Kalahandi/Kendrapara/
Keonjhar/Khurda/Koraput/Mayurbhanj/
Phulbani /Puri/Sambalpur/Sundargarh
Circle.*

Sub: Appointment under R.A. Scheme as per Government approval- (4th phase eligible list).

Sir,

Government letter No. 23554/SME dt.1.12.2011 along with the list of 266 candidates eligible for appointment under R.A. Scheme duly approved by Govt. relating to your circle against Class— Non teaching base level posts is enclosed.

You are requested to follow the instructions contained in the Govt. letter cited above strictly. Besides, instructions given below should also be followed scrupulously before issue of posting order.

- a) The appointing authority shall ensure that the application in the prescribed form has been received within the stipulated period i.e., one year from the date of death/invalidation, in accordance with the Rule 9(6) & (7) of the OCS (RA) Rules, 1990.*
- b) In case of 'C.A. all Ok' (Charge of Applicant) it should be ensured that the first application made by the legal heir earlier has been submitted in prescribed format within the prescribed time limit against which the present applicant has been considered for appointment under R.A. Scheme.*
- c) The annual income shall be calculated as per Letter No. 845/Gen dt. 13.01.2009 communicated to you earlier.*
- d) The statement showing the circle wise vacancy position as on 31.12.2010 (including non-joining & left out vacancies from 3.4.2004 to 31.12.2009) approved by Govt. for the purpose along with the name of the eligible candidate relating to your circle is enclosed herewith.*
- e) Before appointment orders are issued, the physical abolition of 75% base level vacant post as on 1.4.04 should be ensured by you with reference to this Directorate letter No.56623 dt. 16.12.04 and appointment in the vacant post should be taken up only after such abolition. At the time of filling of the vacant posts, the prescribed yardstick within the sanctioned post of each respective Institution should be taken into account. No vacancy in respect of schools other than Old and New Govt. Schools and Govt. Secondary Training Schools are included in the vacancy position. No post should be filled up other than the posts reported by you as the same has been approved by Govt.*

- f) *No application of the legal heir of the deceased / invalid employee of the Non-Govt. Aided Institutions (under 610 Plan, 48 Non-Plan, Block Grant Schools and prior to taken over of the School) shall be entertained. Cases found if any, out of the list supplied herewith, should be brought to the notice of the Director, Secondary Education/Director, Elementary Education and Govt. Immediately. In this connection Para (m) of the aforesaid Govt. letter shall strictly be adhered to. The Instruction contained at Para No.(h) In Govt. letter No.23554/SME dt.1.12.2011 should strictly be adhered to relating to priority of legal heir under RA Scheme.*
- g) *Suppression of correct information or furnishing of false Information/document in the application shall render the applicant liable for removal from service in addition to other legal action to which he/she may be liable under the existing Law and this will also debar other members of his family from getting appointment as per the provision under Rule 10 of the OCS (RA) Rules, 1990. The appointing authority/forwarding authority shall also be responsible if any deviation is noticed as per rule.*
- h) *No candidate should be appointed beyond yardstick of the institution.*
- i) *As per the Govt. Instruction, the appointment will be given to the eligible candidate as per the date of death/disability seniority of the Government employee.*
- j) *Any discrepancy regarding date of death/invalidation/correctness of seniority maintained in the list and correctness of their jurisdiction i.e. Education Circle/Education District to which the applicant concerned belongs including other records should be brought to the notice of Director, Secondary Education, Odisha immediately for further action at this end.*

You are therefore requested to take immediate steps to appoint the eligible candidates under R.A. Scheme at your level as per above decision of Govt. as well as the Instructions of the undersigned on or before 9.12.2011 by fixing a camp on a particular date for issue of appointment order, joining and report compliance in respect of each candidate in the enclosed format as given below along with a soft copy of the same through special messenger on or before 10.12.2011.

All the above process should be completed by 9.12.2011 without fail.

The date of holding camp may be intimated over telephone.

*Yours faithfully,
Deputy Director (GS) ”*

- 3.4. Sri Acharya, Standing Counsel, therefore, submitted that there has been rationality in allotment of candidates and the petitioner was found eligible to be taken into Group-D category of post after exhaustion of posts in Group-C as required to be filled up. The petitioner after having accepted the appointment letter and joined the post of peon (Group-D) on 04.05.2012 cannot turn around to question the same in the year 2014 by filing Original Application before the Odisha Administrative Tribunal on 10.09.2014, *i.e.*, around two and half years after joining.
- 3.5. On the principle of estoppel, the preference as finds mentioned in Letter No.23554-IV-SME/E(II)-194/2011/SME, dated 01.12.2011 cannot be read as mandatory.
- 3.6. The sum and substance of the argument advanced by Sri Acharya, Standing Counsel, School and Mass Education is that it is not the totality of vacancies, but in terms of proviso to Rule 5 of the RA Rules which is to be filled up and the adjustments have been made

in the present case taking into consideration entire State as one unit.

4. Excursion into RA Rules leads one to understand that the assistance is given as a compassionate measure of saving the family of a Government servant from immediate distress when the Government servant dies while in service [*vide* Rule 4]. The concept is based on the premise that in case of sudden death his family would not face starvation. The scheme has a direct relationship with the economic condition of the family of the Government servant. Appointment of the family member of the Government servant under these rules shall be subject to the provisions contained in Rule 9. So far as the present case is concerned, relevant provision is contained in Rule 9(7) which speaks that if at the time of death of the Government servant, there is a ward who is minor and who alone is available in the family of the deceased Government servant for employment, he shall apply for job under these rules on attaining the age of eighteen years and in no case beyond three years from the date of attaining the age of eighteen years. Further, Rule 4 unambiguously spells out the object that compassionate appointment cannot be claimed as a matter of right.

- 4.1. Following observation of the Supreme Court in the case of *Balbir Kaur Vrs. Steel Authority of India Ltd.*, AIR 2000 SC 1596 = (2000) 6 SCC 493, is notable:

*“*** The sudden jerk in the family by reason of the death of the bread earner can only be absorbed by some lump-sum amount being made available to the family— this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death*

*of the bread earner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the bread earner, but that would undoubtedly bring some solace to the situation. ***”*

- 4.2. Reference may be made to the judgment of the Hon’ble Supreme Court in the case of *Umesh Kumar Nagpal Vrs. State of Haryana and others*, reported in (1994) 4 SCC 138, wherein it has been observed as follows:

“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, 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.”

4.3. In the case of *General Manager (D&PB) and others Vrs. Kunti Tiwary and another*, (2004) 7 SCC 271 the Hon'ble Supreme Court has held that criteria of "penury" is to be applied only by judging the condition of the petitioner-applicant, who is without any means of livelihood, and living hand to mouth so that compassionate appointment is required to be accorded.

4.4. In *Union of India and another Vrs. Shashank Goswami and another*, reported in (2012) 11 SCC 307 following are the observations at paragraphs 9 and 10:

"9. *There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate ground is based on the premises that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right.*

10. *As a rule, public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, applicant cannot claim appointment in a particular class/group of post. Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased."*

- 4.5. Aforesaid legal position makes it clear that there cannot be choice of class/group of post as a matter of right. The consideration for compassionate 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.
- 4.6. Though the father of the petitioner died on 15.04.2007, the application for compassionate appointment was considered much thereafter in terms of Rule 9(7) of the RA Rules and consequent upon which the petitioner on attaining age of majority joined the Government service as “peon” in Group-D post on 04.05.2012. This Court advertent to these facts considers that the penury/distress condition of the family of the petitioner has been alleviated. Therefore, after accepting the position as offered by the competent authority, the petitioner cannot claim for better post.
- 4.7. Thus, this Court is not inclined to entertain the writ petition.
5. The list of persons allotted to different circles for appointment against Group-D Posts enclosed to the writ petition at Annexure-3 indicates that the qualification of the petitioner-Sri Shiba Shankar Jena appearing at Serial No.16 shows as “HSC” (High School Certificate). There are many other persons, who are shown to be more qualified than the petitioner, whose names find place in the said list eligible for Group-D posts.

5.1. In the case of *Damayanti Jagat Vrs. State of Odisha & Ors., WPC (OA) No.121 of 2009*, this Court under similar circumstance declined to entertain the writ petition *vide* Order dated 12.01.2022 and has passed the following order:

“3. *The petitioner files this writ petition seeking for quashing of the order under Annexure-8 and to direct opposite party No.4 to issue appointment in her favour against any Class-III non-teaching post forthwith under the administrative control of opposite party no.4, in view of recommendation made by opposite party No.3.*

4. *Mr. L. Samal, learned counsel for the petitioner contended that the petitioner applied for her appointment under the Rehabilitation Assistance Scheme and considering the same, the petitioner was issued with appointment under Class-IV post though vacancies in Class-III post were lying vacant. Therefore, the petitioner claimed for her appointment under Class-III non-teaching post so as to mitigate her hardship.*
5. *Mr. B. Mohanty, learned Standing Counsel for the School & Mass Education Department contended that since the petitioner has already accepted Class-IV post and continuing in the said post, now the question of consideration of her appointment in Class-III non-teaching post, does not arise and as such, there is also no vacancy available in Class-III non-teaching post, so as to consider her case for such appointment. It is further contended that the petitioner has approached various authorities including the Lokpal, Orissa, but since the vacancy is not available in Class-III post the question of consideration of her case in Class-III non-teaching post does not arise.*
6. *Having heard learned counsel for the parties and after going through the record, it is evident that the petitioner being the widow of Late Sankar Prasad Jagat, who was working as the Primary School Teacher under the D.I. of Schools, Titlagarh, applied for her appointment under*

Rehabilitation Assistance Scheme after the death of her husband. The Deputy Director, (F.E.) recommended her case vide order dated 08.03.2002 to the Director, Secondary Education, Orissa to include the name of the petitioner in the priority list for consideration and appointment against Class-III non-teaching post keeping in view the letter of the Government in School & Mass Education Department dated 07.09.2000 and the restriction imposed by the Finance Department in filling up the vacancies. The Government of Orissa in School & Mass Education Department vide order dated 24.04.2007 allotted 41 number of approved posts, i.e. 14 number of Junior Clerks and 27 number of Class-IV posts for appointment under Rehabilitation Assistance Scheme. The Director, Secondary Education in his letter dated 07.05.2007 sponsored 53 number of eligible candidates to Bolangir Circle prepared on priority basis for appointment under Rehabilitation Assistance Scheme. The petitioner's name found place at Sl. No. 42 for giving her posting under Class-IV post. Even if the petitioner possesses the higher qualification that does not and cannot be ground for her appointment as Junior clerk as per the government letter dated 23.06.2007. Fourteen (14) number of candidate from Sl. Nos. 1 to 14 of the eligible list had been considered for appointment as Junior Clerk and twenty seven (27) number of candidates from Sl. Nos. 15 to 44 had been considered for appointment against Class-IV post under Rehabilitation Assistance Scheme except some ineligible candidates. The candidates whose name finds place from Sl. No.15 to 41 having secured higher qualification and having accepted the appointment as against Class-IV post and the petitioner also having accepted her appointment against Class-IV post, she cannot now claim for her appointment against Class-III post.

7. *In that view of the matter, this Court is not inclined to entertain the writ petition since the same merits no consideration.*
8. *The writ petition thus stands dismissed."*

5.2. This Court is conscious of what has been laid down in *State Bank of India Vrs. Somvir Singh*, (2007) 4 SCC 778. In the said reported case it has been stated thus:

“13. *In our considered opinion, the High Court itself could not have undertaken any exercise to decide as to what would be the reasonable income which would be sufficient for the family for its survival and whether it had been left in penury or without any means of livelihood. The only question the High Court could have adverted itself to is whether the decision-making process rejecting the claim of the respondent for compassionate appointment is vitiated? Whether the order is not in conformity with the scheme framed by the appellant-Bank? It is not even urged that the order passed by the competent authority is not in accordance with the scheme. It is well settled that the hardship of the dependant does not entitle one to compassionate appointment dehors the scheme or the statutory provisions as the case may be. The income of the family from all sources is required to be taken into consideration according to the scheme which the High Court altogether ignored while remitting the matter for fresh consideration by the appellant Bank. It is not a case where the dependants of the deceased employee are left “without any means of livelihood” and unable to make both ends meet. The High Court ought not to have disturbed the finding and the conclusion arrived at by the appellant-Bank that the respondent was not living hand-to-mouth. As observed by this Court in G.M. (D&PB) Vrs. Kunti Tiwary, (2004) 7 SCC 271 the High Court cannot dilute the criterion of penury to one of “not very well-to-do”. The view taken by the Division Bench of the High Court may amount to varying the existing scheme framed by the appellant-Bank. Such a course is impermissible in law.”*

5.3. In all the matters of compassionate appointment it must be noticed that it is basically a way out for the family which is financially in difficulties on account of the death of the bread earner. It is not an avenue for a regular employment as such. This is, in fact, an

exception to the provisions under Article 16 of the Constitution of India. That being so, if an employer points out that the financial arrangement made for the family subsequent to the death of the employee is adequate, the members of the family cannot insist that one of them ought to be provided a comparable appointment. Reference may be had to Judgment dated 5th September, 2019 of Hon'ble Madras High Court delivered in the case of *A. Anitha Viji Vrs. The Secretary, School Education Department, W.A. No.3080 of 2019*.

5.4. It is noticed in the present case that the petitioner is shown to have qualified High School Certificate Examination whereas certain other persons are shown to be better qualified than the petitioner in the list under the Balasore Circle *vide* Annexure-3. Furthermore, the petitioner has accepted the post in Group-D since 2012. Now, therefore, the petitioner is estopped from raising the objection by urging that he ought to have been offered post under Group-C. This Court, hence, prefers to accept the reasoning of this Court contained in *Damayanti Jagat Vrs. State of Odisha & Ors., WPC (OA) No.121 of 2009, vide Order dated 12.01.2022* and thereby emphasis laid by the counsel for the petitioner, Sri Sameer Kumar Das, claiming parity of treatment as per *Rama Krushna Singha Vrs. State of Odisha, Original Application No.1537 of 2011, vide Order dated 03.09.2013* passed by the Odisha Administrative Tribunal does not aid to the benefit of the petitioner.

5.5. While discarding the contention of the counsel for the petitioner to extend benefit of choice of post in the present case by adhering to

similarity of fact in *Rama Krushna Singha Vrs. State of Odisha, Original Application No.1537 of 2011, vide Order dated 03.09.2013* passed by the Odisha Administrative Tribunal, this Court takes cognizance of avowed purport of Rule 4 as envisioned in the RA Rules as also well-settled enunciation of position of law by the Hon'ble Supreme Court of India as discussed in foregoing paragraphs, and deems it suffice to keep in mind that:

- i. compassionate employment, being not vested right, cannot be claimed as matter of right;
- ii. on acceptance of post of peon (Group-D) since 2012, the distress condition of the family is treated to be mitigated;
- iii. mere available vacancy does not entail the petitioner to claim desired employment in Group-C post under the RA Rules.

Therefore, the petitioner is not liable to have the choice of post.

- 5.6. In the referred case, *Rama Krushna Singha (supra)*, rendered by the learned Odisha Administrative Tribunal, the cases of petitioners therein were considered in 2013. Nonetheless, finding similitude of fact-situation as discussed in *Damayanti Jagat Vrs. State of Odisha & Ors., WPC (OA) No.121 of 2009 (supra)*, at this distance of time this Court is not inclined to accede to the prayer of the petitioner. Noteworthy here that no post in Class-III (Group-C) is kept reserved by way of interim order since 2014 in terms of prayer made in paragraph 8 of the Original Application filed against the decision taken by the competent authority for “ALLOTMENT OF CANDIDATES FOR APPOINTMENT UNDER RA

SCHEME AS CLERK” *vide* Annexure-10. Thus far the list of the candidates appearing in Annexure-10 has already been given effect to.

6. In the result, the claim of the petitioner in the writ petition/original application is disallowed on the above reasoning and, therefore, the writ petition is dismissed. Parties are to bear their respective costs.

(M.S. RAMAN)
JUDGE



Laxmikant

High Court of Orissa, Cuttack
October 28, 2022