

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Special Appeal No. 7 of 2011

Uttarakhand Van Vikash Nigam
and anotherAppellants

Versus

Suresh Chandra Auli ...Respondent

Present : Ms. Seema Sah, Advocate for the appellants.
Mr. Anil Kumar Joshi, Advocate for the respondent.

Coram: Hon'ble Tarun Agarwala, J.
Hon'ble Prafulla C. Pant, J.
Hon'ble Sudhanshu Dhulia, J.

Hon'ble Sudhanshu Dhulia, J.

1. Heard Ms. Seema Sah, Advocate for the appellants and Mr. Anil Kumar Joshi, Advocate for the respondent.

2. This Special Appeal has been referred to this Full Bench by an order of the Division Bench of this Court, since it was the opinion of the Division Bench that the view of the learned Single Judge of this Court in Writ Petition (S/S) No. 88 of 2003 is contrary to the view of the Division Bench of Hon'ble Allahabad High Court on the issue as to whether the dependants of a daily wage employee can be given appointment on compassionate grounds under U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, (from hereinafter referred to as the Rules or "Dying in Harness Rules") and, therefore, according to the Division Bench the matter required reconsideration.

3. The brief facts of the present case are that the petitioner Suresh Chandra Auli (respondent in the present special appeal) filed a writ petition before this Court with the prayer that a direction be issued to the respondent to appoint him

on the compassionate ground as his father was a daily wage employee in the Forest Development Corporation and the petitioner being his dependant is entitled for compassionate appointment under the said rules. Learned Single Judge of this Court allowed the writ petition quashing the impugned order by which the concerned authorities have rejected the claim of the petitioner, and directed the authorities “to consider the appointment of the petitioner under Government Servant Dying in Harness Rules, 1974 within a period of three months from the filing of the certified copy of the order”. This order was challenged by the Forest Development Corporation in Special Appeal and the Division Bench in special appeal has referred the matter to the present Full Bench for the reasons already referred above.

4. Public appointments as a rule have to be made on the basis of “merit”. Nevertheless, certain exceptions have been created to this rule, such as reservation to certain class of people as given under the Constitution of India. There is another exception to this rule with which we are presently concerned i.e. appointment made in public service on “compassionate grounds”. The underlying principle for making appointment on compassionate grounds is that a Government servant who has died in harness leaves behind a family which has now to face hardship due to the death of its only bread-winner. This can be mitigated to some extent, if one of the dependants of the deceased employee is given appointment on “compassionate grounds”.

5. In the erstwhile State of Uttar Pradesh as well as in the State of Uttarakhand Rules have been framed under Article 309 of the Constitution of India for the above purposes, known as “U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974”. In the year 2002

these rules have been adopted in the State of Uttarakhand. Rule 5 of the said rules which is in fact the main provision reads as under :-

“5. Recruitment of a member of the family of the deceased. – (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person –

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant :

Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.]

[3) Each appointment under sub-rule (1) should be under the condition that the person appointed under sub-rule (1) shall upkeep those other family members of the deceased Government servant who are incapable for their own maintenance and were dependant of the abovesaid

deceased Government servant immediately before his death.]”

6. Two definitions here would be important i.e. (a) “family” and (b) “Government servant”. The word “family is defined in Rule 2 (c) of the Dying in Harness Rules, which reads as under :-

“2. Definitions. – In these rules, unless the context otherwise requires –

(a).....

(b)....

(c) “family” shall include the following relations of the deceased Government servant :

(i) Wife or husband;

(ii) Sons;

(iii) Unmarried and widowed daughters”

7. Most importantly and what is crucial for our present purposes is the definition of “Government servant”. “Government Servant” is defined under Rule 2 (a) of the Dying in Harness Rules, which reads as under :-

“2. Definitions. – In these rules, unless the context otherwise requires –

(a) “Government servant” means a Government servant employed in connection with the affairs of Uttar Pradesh who -

(i) was permanent in such employment; or

(ii) though temporary had been regularly appointed in such employment; or

(iii) though not regularly appointed, had put in three years’ continuous service in regular vacancy in such employment”.

8. Under these Rules, one member of a “family” of a Government servant can be given employment. Now what we have to see is as to what actually constitute a “Government servant” under these rules. There is no difficulty in defining

“Government servant” where he was permanent in such employment or though temporary had been regularly appointed in such employment which covers definition under Rules 2 (a) (i) and 2 (a) (ii). The difficulty is created under definition 2 (a) (iii) (for which the matter has presently been referred).

9. Rule 2 (a) (iii) reads as under :-

“2. Definitions. -

(a)...

(i)

(ii)....

(iii) though not regularly appointed, had put in three years’ continuous service in regular vacancy in such employment”.

10. The only difficulty here would be in defining the phrase “in regular vacancy in such employment” and more particularly the words “regular vacancy”. This aspect, however, now stands settled by the Hon’ble Apex Court in **General Manager, Uttaranchal Jal Sansthan v. Laxmi Devi and others (2009) 7 SCC, 205**, where the Hon’ble Apex Court has defined “regular vacancy” to mean a vacancy which occurs in the “existing cadre”.

11. The Hon’ble Apex Court in the above referred judgment, observed that the legal implication of the phrase “regular vacancy”, would mean “a vacancy which occurred in a post sanctioned by the competent authority. For the said purpose the cadre strength of the category to which the post belongs is required to be taken into consideration. A regular vacancy is which arises within the cadre strength.”

12. Hence, what constitutes a “regular vacancy” would mean a vacancy which has occurred in the cadre strength of the service. The issue before the Hon’ble Apex Court in the

said judgment was the same as it is before this Court i.e. whether the dependants of such daily wage employees who have though put in long years of service, are entitled for compassionate appointment under the Dying in Harness Rules. The answer given by the Hon'ble Apex Court was in the negative after discussing the entire law on the subject, and more particularly the Constitution Bench Judgment of **State of Karnataka v. Umadevi (2006) 4 SCC 1**, where the Constitution Bench had held that "the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee".

13. The Hon'ble Apex Court in the Uttaranchal Jal Sansthan case (supra) had therefore held that daily wage workers do not work on a post and in fact a daily wage employee cannot work on a regular vacancy. The Hon'ble Apex Court in the above case has held as under :-

"19. It is trite law that a regular vacancy cannot be filled up except in terms of the recruitment rules as also upon compliance with the constitutional scheme of equality. In view of the Explanation appended to Rule 2 (a), for the purpose of this case we would, however, assume that such regular appointment was not necessarily to be taken recourse to. In such an event sub-clause (iii) of clause (a) as also the Explanation appended thereto would be rendered unconstitutional."

14. The said judgment of the Hon'ble Apex Court has subsequently been followed by a Full Bench of Allahabad High Court in **Pawan Kumar Yadav v. State of U.P. and others** reported in **2010 (4) UPLBEC 2633** while deciding an issue which reads as under :

“1. Whether a daily wager and work charge employee, employed in connection with the affairs of Uttar Pradesh, who is not holding any post whether substantive or temporary is a ‘Government Servant’ within the meaning of Rule 2 (a) of U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974?”

15. The answer given by the Full Bench of three Judges to the said question referred to before it was as follows :-

“1. A daily wager and workcharge employee employed in connection with the affairs of the Uttar Pradesh, who is not holding any post, whether substantive or temporary, and is not appointed in any regular vacancy, even if he was working for more than 3 years, is not a ‘Government Servant’ within the meaning of Rule 2 (a) of U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974, and thus his dependants on his death in harness are not entitled to compassionate appointment under these Rules.”

16. In other words, it was held that a daily wage worker is not a “Government Servant” as defined under the Dying in Harness Rules.

17. We must understand that though compassionate appointment can be made of a dependant of a deceased Government servant who has died in harness under Rule 5 of the said Rules but such a person who has to be given an appointment must first be a dependant of a “Government servant”. Clearly, a daily rated employee is not a Government servant as visualized under the Dying in Harness Rules, and more particularly under Rule 2 (a) (iii). Therefore, he is not

eligible for employment under the Dying in Harness Rules. Broad principles on which appointments under the Dying in Harness Rules can be made, have been reiterated by the Hon'ble Apex Court in a catena of decisions.

18. The Hon'ble Apex Court in **Director of Education (Secondary) v. Pushpendra Kumar, (1998) 5 SCC 192** has discussed the object of the said Rules, which was to enable a family of the deceased employee to tide over the sudden crisis resulting due to death of the only bread-winner of the family. However, such a nature of appointment is an exception to the general rule of appointment and an exception cannot subsume the main provision to which it is an exception and therefore nullifying the main provision by taking away completely the right conferred by the main provision. The Hon'ble Apex Court observed 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 to seek employment against the provision enabling appointment being made on compassionate grounds of the dependant of a deceased employee. In *Umesh Kumar Nagpal v. State of Haryana* 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.”

19. In another case, namely, **National Hydroelectric Power Corpn. Vs. Nanak Chand (2004) 12 SCC 487**, the Hon'ble Apex Court reiterated the above decision by stating as follows :-

“It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crises.” (para 5)

20. The object of making appointment on compassionate ground, as we have already noticed above, is an exception to the general rule. The exception is that the family may be able to tide over the sudden difficulty befallen upon it with the death of its only breadwinner, a family which is now left in penury. However, the Hon’ble Apex Court in **Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138** has cautioned as follows :

“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”.

21. The same position was again reiterated by the Hon’ble Apex Court in **Jagdish Prasad v. State of Bihar, (1996) 1 SCC 301**, where the Hon’ble Apex Court has observed as under :-

“The very object of appointment of a dependent of the deceased employees who die-in-harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family.” (para 3)

22. In **MMTC Ltd. v. Pramoda Dei, (1997) 11 SCC 390**, the Hon’ble Apex Court has held as under :-

“As pointed out by this Court, the object of compassionate appointment is to enable the penurious family of the deceased employee to tide over the sudden financial crisis and not to provide employment, and that mere death of an employee does not entitle his family to compassionate appointment.” (para 4)

23. The Hon’ble Apex Court in **S. Mohan v. Government of T.N., (1998) 9 SCC 485** has again reiterated the above position by stating as under :-

“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.” (para 4)

24. In the case of **Sanjay Kumar v. State of Bihar, (2000) 7 SCC 192**, the Hon’ble Apex Court stated as under :-

“This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner who had left the family in penury and without any means of livelihood.” (para 3)

25. The Hon’ble Apex Court in the case of **Punjab National Bank v. Ashwini Kumar Taneja, (2004) 7 SCC 265** has observed as under :-

“It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointment being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crisis.” (para 4)

26. Undoubtedly, “Compassionate appointments” as the very name suggests are appointments based on “sympathy”. All the same, it would mean sympathy in a given contingency.

While making such appointments on sympathetic grounds, the Courts cannot lose sight of the facts that where there is one person before the Court who may need a sympathetic view of the Court, yet there are many others who though are not before the Court yet are waiting in the long queue, seeking public employment and an unjust appointment to one would mean violating the rights of hundreds of others, who may have a greater hardship than the petitioner. This is precisely what has been observed by the Hon'ble Apex Court in **Ramakrishna Kamat and others v. State of Karnataka (2003) 3 SCC 374**. The Hon'ble Apex Court has stated :

“7....While being sympathetic to the persons who come before the court the courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment.”

27. This Court therefore holds that the dependants of a daily wage employee are not covered under the definition of a “Government Servant” as defined under Section 2 (a)(iii) of the Dying in Harness Rules. Hence, they are not liable to be given employment on compassionate ground under the Rules, irrespective of the numbers of the years such an employee had put in service, prior to his death.

28. Consequently, special appeal is allowed. The order of the learned Single Judge dated 6.9.2010 is hereby set aside. Writ Petition (S/S) No. 778 of 2006 also fails and is hereby dismissed.

29. No order as to costs.

(Sudhanshu Dhulia, J.) (Prafulla C. Pant, J.) (Tarun Agarwala, J.)

21.12.2011

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