

(2018) 08 J&K CK 0030

In the Jammu And Kashmir High Court

Case No : Secvice Writ Petition No. No 1662 Of 2016

Ghulam Mohammad Banday @APPELLANT@Hash State And Others

Date of Decision : 09-08-2018

Acts Referred:

Citation : (2018) 08 J&K CK 0030

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1. By the present writ petition, the petitioner is challenging and seeking reversal of the Government Order No. 274-PW (R&B) of 2016 dated

05.09.2016, whereby the case of the petitioner, seeking compassionate appointment, has been rejected for the second time. The further relief

sought is in the nature of writ of mandamus to the effect that respondents be directed to appoint the petitioner on any post retrospectively from

1997 in terms of the Rules as were in existence at the time of the death of his father.

2. The petitioner is in the second round of litigation. Earlier he had filed a writ petition, SWP no. 120/1999 seeking a direction in the name of

respondents to appoint him on compassionate basis on the ground that his father, namely Gh. Nabi Banday, who was a Road Supervisor with

respondent department, died in harness on 24.9.1987.

3. The petitioner, a dependent of the late Gh. Nabi Banday, Road Supervisor, who died in harness on 24.9.1987, claims the compassionate

appointment in terms of the applicable Rules. The petitioner is stated to have passed the class 8th only and discontinued the studies for the

untimely death of his father when he was only eight years old. The income of the

petitioner is also certified to be less than Rs. 500/- per month

as per the certificate issued by the Tehsildar Handwara.

4. The petitioner applied for appointment on compassionate grounds in terms of the Rules in vogue at the time of death of his father which

was processed and the material placed on record would demonstrate that the post of the deceased employee, father of the petitioner, was

vacant and has been reserved for the petitioner. It also transpires from the file that during the time the case of the petitioner was in process,

SRO 43 of 1994 came to be issued. The respondent no. 2 by a communication dated 24.01.1997 conveyed the whole case history of the

petitioner to the respondent no. 1 with the request that it may be examined.

5. The petitioner was constrained to file a writ petition, SWP no. 120/99 when the respondents did not appoint him. The writ petition, upon

consideration, was dismissed by the learned Single Judge on the ground that petitioner has not acquired the minimum qualification within six

months from the time his father died, besides being under age with reference to application of SRO 43 of 1994.

6. Feeling aggrieved of the judgment, the petitioner challenged the same before the Division Bench of this Court in a Letters Patent Appeal,

LPA no. 118/2014. The Division Bench of this Court considered the plea of the petitioner that his case requires to be considered in terms of

the rules as were in vogue at the time of the death of the deceased and not as per SRO 43/1994. The petitioner had referred to a similar case

considered by the Division Bench reported as 2013 (2) JKJ 126 (HC) (S. Vikram Singh v. State of J&K and ors). The judgment of the

learned Single Judge was thus set-aside by the Division Bench for having not followed the mandate of the Division Bench judgment supra.

7. The paragraphs 5 and 6 of the Division Bench judgment, being relevant are taken note of as under:-

5. The fact that the appellant's father was employed permanently and he died while in service and the fact that appellant was a minor

on the date of death of his father and his educational qualification is 8th standard, are not disputed. The fact that application was submitted by

the appellant in the year 1993 and recommendations were also made to consider his case, as stated in the affidavit, has not been denied. SRO

43 of 1994 is relied on to reject the claim of the appellant. Which rule is applicable to consider the claim of the appellant as his father died

prior to issuance of SRO 43 of 1994, was already considered by the Division Bench of this Court in 2013 (2) JKJ 126 (HC) (S. Vikram Singh

v. State of J&K and ors). In the said judgment it is held that the rule applicable is the rule when cause of action has accrued i.e. the time of

death of the Government employee and, as per the earlier Rules prior to issuance of SRO 43 of 1994, even a minor is entitled to

compassionate appointment on attaining majority and only fact which has to be ascertained is to find out whether the family of the deceased

Government employee continues to be in penury and compassionate appointment would mitigate such hardship. In paragraph nos. 15 and 16 of

the judgment it is held thus:-

15. The litmus test in all such cases is whether the person claiming benefit of appointment on compassionate grounds continues to be

exposed to the hardship that befell him because of the sudden demise of Govt. employee on whom he was dependent. The appellant lost his

father when he was one and half years old. The accident that claimed life of his father, left him permanently disabled for rest of his life. Only

because the appellant has lived on handouts and hand-ups during his childhood and somehow kept his head above water, must not persuade us to

believe that he has survived the worst years and does not face hardship because of the tragic demise of his father at the time he was a

suckling baby. When we assess whether a family or a member thereof that has lost the only breadwinner has been able to tide over the crisis,

we should not only be influenced by the fact that the members of the family because of one or the other reason have been able to survive.

Death of a dependent of a Govt. servant who has died in harness, is not the test to satisfy ourselves that such dependent has not survived the

crisis in which he was plunged because of sudden demise of the Government servant. We have to be compassionate in the matter as the law

given to the Rules would suggest and examine whether the dependent of a Government servant who died in harness claiming appointment on

compassionate grounds would have been better off had the Government servant not lost his life.

16. In the present case, the appellant before use, was an infant on the date of he lost his father. His will power did not allow the tragedy that

befell him, to dampen his spirit and blunt hisw urge to pursue his academic career. He with his 75% permanent disability continues to be

exposed to the hardship with which he was visited on death of his father. The appellant therefore, is entitled to be considered for appointment

on compassionate grounds in terms of Rules occupying the field on the date of death of his father.â??

6. Honâ??ble the Supreme Court in the decisions reported in (2007) 9 SCC 571 (State Bank of India and ors v. Jaspal Kaur) and (2009) 7

SCC 295 (Maharani Devi and anr v. Union of India &ors) considered similar issue as to the claim of the compassionate appointment of a

candidate and the Rule which will apply for considering such claim. Honâ??ble the Supreme Court held that the effect of subsequent policy

decision will not affect the accrued right of a candidate seeking compassionate appointment and the consideration of the claim should be under

the Rules which prevailed on the date of death of the Government servant as the right of the legal heir got crystalized on the death of the

Government servant. It is also to be noted at this juncture that retrospectively amending Rule, fixing strict norms, is also not valid as accrued

vested right under the scheme in vogue cannot be taken away as reported in (1997) 6 SCC 623 (Railway Board v. C.R. Rangadhamaiah). If

the amended scheme is beneficial to the candidate the same can be considered as hld by Honâ??ble the Supreme Court in the decision

reported in (2015) 3 SCC 399 (Vijaya UkardaAthor (Athwale) v. State of Maharashtra and ors).â??

8. The respondents were accordingly directed to consider the case of petitioner for compassionate appointment based on rules which were

prevailing at the relevant point of time i.e. at the time of death of the petitionerâ??s father and pass orders within a period of eight weeks.

9. Having failed to implement the judgment, the petitioner filed a contempt petition No. 3/2016 and the Division Bench while noticing that the

respondents have already passed the rejection order granted liberty to petitioner to challenge the same before the appropriate proceedings.

This is how the instant petition is filed to challenge the rejection order.

10. Heard learned counsel for the parties and perused the records.

11. Mr Wani, learned counsel for the petitioner, submits that the impugned rejection order issued by the Government is not in tune with the

mandate of the judgment of the Division Bench of this Court as the Division Bench while noticing the claim of the petitioner on the strength of

the applicable rules in vogue as discussed in the judgment rendered by the Division Bench reported in 2013 (2) JKJ 126 (HC) (S. Vikram

Singh v. State of J&K and others, have categorically mentioned that the case of the petitioner, seeking compassionate appointment, is required

to be considered in terms of the Rules which were prevailing at the relevant point of time i.e. date of death of petitioner's father and pass

fresh orders within a period of 8 weeks.

12. It is submitted that the father of the petitioner died on 24.9.1987, therefore, it is only SRO 122 of 1983 and not SRO 43 of 1994 which has

to be applied to the case of petitioner for considering his case for compassionate appointment. Mr Wani, further invited attention of this Court

to the judgment rendered by the Division Bench supra in which the parents and sister of the petitioner had died in a tragic road accident on

13.6.1986 and the claim for compassionate appointment was directed to be considered by applying the rules of 1969 read with SRO 122 of

1983.

13. Paragraph 10 of the judgment being relevant, is taken note of:

10. The State Government in the year 1969 made Jammu & Kashmir Civil Services (Decentralization and Recruitment to Non-Gazetted

Cadres) Rules 1969 notified as SRO 588 on 21.10.1969. The Rules of 1969 made a provision for compassionate grounds. The provision for

compassionate appointments in Rules of 1969, was followed by J&K Employees (Death in harness) Dependents Rules 1989 notified as SRO

194 of 1989. The Rules of 1989 were replaced by J&K Compassionate Appointment Rules 1991 notified vide SRO 283 of 1991. J&K

Compassionate Appointment Rules of 1994 notified vide SRO 43 of 1994 repealed the Rules of 1991. The Rules of 1994 presently occupy the

field. However, for the present controversy, Rule 5 (1) (viii) added by SRO 122 dated 24.3.1983 to the Rules of 1969, needs to be noticed. It

reads:

5(1) i

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viii, A vacancy occurring in a department due to the death of a Government employee in harness may be filled up in accordance with the

prescribed rules, subject to the condition that son/ adopted son daughter/ adopted daughter/ wife or dependent sister brother of a deceased

government employee is provided employment in the Department on any vacancy in the non gazette cadre in the lowest rank or against any

post for which he/ she may be fully qualified:

Provided that:-

(I) The appointing authority shall satisfy itself through personal enquiries or otherwise and after obtaining a report from the concerned

Revenue Officer not below the rank of Assistant Commissioner that the grant of concession is justified having regard to the number of

dependents left by the deceased Government servant, the assets and liabilities left by him, the income of the earning member(s) if any, and

also his liabilities.

(II) In most deserving cases, the concerned Head of the Department may recommend to the competent authority-

(a) for relaxation of his/ her age bar not beyond 40 years in the case of upper age limit and by not more than four years in the case of lower

age limit.

(b) for relaxation of qualification in the case of posts for which minimum qualification prescribed is Matriculation or its equivalent subject to

the condition that the beneficiary at the time of such appointment is not below the level of Middle Standard and that he/ she acquires such

qualification within a period of not more than two years failing which his/ her services shall be terminated;

(c) for grant of suitable scholarship not less than Rs. 100 per month in each case by the Education Department to the minor children left

behind by the deceased Government employee till such time as they pass the Matriculation examination and thereafter be considered for

appointment.

(III) Benefit of compassionate appointment shall not be granted to more than

one dependent of the deceased Government employee.

(IV) In case of beneficiaries being illiterate, the concerned Head of the Department may consider his/ her case for employment on any post

defined in Schedule II of J&K CSRs subject to the age limitation prescribed above.

(V) Cases of those beneficiaries who are better qualified but are not in a position to find suitable posts in the Engineering and other technical

Departments be considered for appointment against suitable posts in other Departments under the orders of the Chief Minister in co-

ordination.

(VI) No benefit will be admissible under this scheme in a case in which the monthly income reported by the Assistant Commissioner exceeds

Rs. 1000 per month.

Provided further that the case of compassionate appointment shall be finalized within a period of three months from the date of death of

Government employee under the orders of the Minister-in-charge.â??

14. It is noticed that the judgment of Division Bench rendered in case titled Vikram Singh supra has reference to the claim of the petitioner

who was only 1 Â½ years old at the time of the death of deceased employee and the Division Bench directed the respondents to consider

appellantâ??s appointment on compassionate basis in accordance with the Rules in vogue at the time of the death of the deceased.

15. Mr Wani, learned counsel for petitioner, further submits that the respondent no. 1 has ignored the claim of the petitioner merely on the

ground that the petitioner does not fulfill the requirement of Rule 4(a) of SRO 194/1989 being only 8 years old at the time of death of his

father.

16. Mr M. A. Chashoo, learned State Counsel, submits that the claim of the petitioner has been considered in tune with the Rules enshrined in

times of SRO 194 of 1989 because the death of the deceased has taken place in 1987.

17. Considered the submissions made.

18. Respondents, very apparently, have ignored the claim of the petitioner in disregard of the judgment rendered by the Division Bench of this

Court by applying Rules of 1989 which was already forbidden by the Division

Bench while deciding the LPA. The Division Bench has very categorically held petitioner entitled to the relief of compassionate appointment and directed consideration of his case in terms of the Rules as were in vogue at the time of the death of petitioner's father i.e., 24.09.1987. At the relevant point of time SRO 122 of 1983 was in vogue read with Decentralization Rules of 1969. The SRO 194 of 1989 is a subsequent enactment which had no application to the petitioner's case in terms of the directions of the Division Bench. The impugned order, in such circumstances, appears to be an outcome of non-application of mind; an arbitrary exercise of power aimed at to deprive the petitioner from a legally vested right, the benefit of compassionate appointment to which he has been held entitled to by the Division Bench of this Court. Needless to mention that the scope of relaxation in respect of age or qualification is not open to be seen in the present case because the petitioner's case has to be considered in tune with the Rules which were in vogue at the relevant point of time i.e. at the time of death of petitioner's father. It needs to be recorded herein that in terms of the Rules of 1983 the minimum qualification required for the absorption in the Government service under compassionate appointment rules was 8th Standard only, the qualification possessed by the petitioner.

19. It would be appropriate to mention herein that the respondents have issued the impugned order of rejection in implementation of the Division Bench judgment, which suggests, in unambiguous terms that, the respondents have chosen to implement rather than challenging the judgment of the Division Bench. In that view of the matter, the judgment of the Division Bench of this Court has attained finality.

20. For all what has been said hereinbefore, the writ petition of the petitioner succeeds and is allowed as such. The impugned order of rejection, Government Order No. 274-PW (R&B) of 2016 dated 05.09.2016 is quashed by a writ of certiorari and by a writ of mandamus the respondents are directed to appoint the petitioner on any Class IV post on compassionate basis within a period of six weeks from the date copy of the judgment is furnished to them. The Court hopes that the miseries of the petitioner would end with this verdict only and the

respondents would not put him to unnecessary hardships anymore.

21. Disposed of along with connected MP. Â