

(2022) 07 J&K CK 0016

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 1784 Of 2012

Gowhar Nazir Malla

APPELLANT

Vs

State And Others

RESPONDENT

Date of Decision : 08-07-2022

Acts Referred:

Jammu And Kashmir Compassionate Appointment Rules, 1994 — Rule 2, 3, 7
Indian Contract Act, 1872 — Section 11

Citation : (2022) 07 J&K CK 0016

Hon'ble Judges : Sanjeev Kumar, J;M.A.Chowdhary, J

Bench : Division Bench

Advocate : M.M.Dar, Asifa Padroo, M.I.Qadri, Naveed Gul, Aatir Javed Kawoosa

Final Decision : Disposed Of

Judgement

Sanjeev Kumar, J

1. The father of the petitioner, namely Nazir Ahmed Malla working as Sr. Assistant in the office of respondent No.4 died in harness on 10.12.2008 leaving behind, apart from the petitioner, following legal heirs:

- (i). Mst. Misra widow;
- (ii). Mahvesh Tabassum daughter;
- (iii). Gowhar Nazir son and;
- (iv). Rafiqa Nazir daughter .

2. The deceased during her lifetime had contracted two marriages. The first wife of the deceased, who was mother of the petitioner and his sister Mahvesh Tabassum, had already died and from the second marriage of the deceased employee with one Mst. Misra, Gowhar Nazir son and Rafiqa Nazir daughter were born. In this way, the deceased Nazir Ahmed Malla left behind as many as four legal heirs. After the death of Nazir Ahmed Malla and by way of consensus, it was

decided that petitioner would apply for compassionate appointment under the J&K Compassionate Appointment Rules, 1994 ['Rules of 1994'] issued vide SRO 43 of 1994.

3 After completing all the requisite formalities, the case of the petitioner was processed as is evident from the communication of Assistant Registrar in the Chief Justice's Secretariat bearing No. 6876/PSY-581 dated 27.01.2009. The case of the petitioner for appointment on compassionate basis in place of his deceased father Nazir Ahmad Malla was, however, not accepted by the respondents. Vide letter No. 2480/PSY dated 29.05.2009 issued by Joint Registrar in the Chief Justice's Secretariat, the Principal District and Sessions Judge, Budgam was informed that the petitioner was minor and, therefore, could not be considered for compassionate appointment, nor could he be recommended for relaxation of lower age limit. The petitioner, who, at the time of death of his father, was minor, however, attained majority in the year 2011-12. He submitted yet another application to the respondents for compassionate appointment stating therein that he had attained majority and, therefore, eligible under rules. The request of the petitioner for compassionate appointment came under consideration of the respondents, but, as is evident from the communication of Deputy Registrar in the Chief Justice's Secretariat bearing No. 2869/PSY-96 dated 07.04.2012 addressed to the Secretary to Government, Department of Law, Justice and Parliamentary Affairs, his case was again rejected on the ground that he was supposed to acquire prescribed eligibility within stipulated period in terms of Rule 3 of Rules of 1994. The respondents, therefore, refused to reopen the case of the petitioner for compassionate appointment. A decision in this regard was conveyed by the Deputy Registrar in the Chief Justice's Secretariat to the Principal District Judge Budgam vide communication No. dated 18.07.2012. This is how, the petitioner feeling aggrieved by the rejection of his case for compassionate appointment has filed the instant petition.

4 The petitioner has specifically called in question the communications dated 29.05.2009, 15.03.2020, 07.04.2012 and 18.07.2012 conveying the rejection of case of the petitioner for compassionate appointment to the Principal District Judge Budgam and the Secretary to the Government, Law Justice and Parliamentary Affairs, Government of Jammu and Kashmir. The petitioner seeks a direction to the respondents to accord consideration to his case for compassionate appointment in terms of SRO 43 of 1994 on a post commensurate with the qualification possessed by him.

5 The writ petition is contested by respondents 2 to 6. In their reply affidavit, they have taken a plea that the compassionate appointment to the petitioner was denied on the ground that, at the relevant point of time, he was minor and could not attained eligibility within prescribed period. It is submitted that the competent authority did consider the relaxation of lower age limit in favour of the petitioner, but found that grant of relaxation of lower age limit would be in conflict with Section 11 of the Contract Act, in that, a person who is minor, is not

competent to enter into contract. It is in these circumstances, the family of the deceased employee was informed to submit fresh application, either on behalf of wife of the deceased employee or his major daughter. However, none of them opted to apply. The other reason pressed into service by the respondents to deny the compassionate appointment, as pleaded in the reply affidavit, is that the petitioner, at the time of death of deceased employee, was minor and could not attain majority and eligibility within the stipulated period as per Rule 3 of Rules of 1994.

6 Having heard learned counsel for the parties and perused the material on record, it is relevant to set out Rule 3 of the Rules of 1994 which, at the time of death of Nazir Ahmed Malla, were applicable.

"3. Appointment under these rules:

(1) Notwithstanding anything contained in any rule or order for the time being in force regulating the procedure for recruitment in any service or post under the Government, an eligible family member of a person specified in rule 2 may be appointed against a vacancy in the lowest rank of non-gazetted service or Class-IV post having qualification as prescribed under the relevant Recruitment Rules.

Provided that the applicant is eligible and qualified for such post or acquires such eligibility and qualification within a period of one year from the date of death of the deceased person specified in rule 2:

Provided further that no application for compassionate appointment under these rules shall be entertained after the expiry of one year from the date of death of the deceased person."

(2) Nothing in sub-rule (1) shall derogate from the powers of the Government in General Administration Department to appoint at its discretion, a family member of a person specified in rule 2, to a higher post in the non-gazetted service if he/she is eligible and qualified in terms of the recruitment rules prescribed for that post

(3) Notwithstanding the provisions of the rules contained herein for compassionate appointment, the family members of the civilians killed in militancy related action, or a civilian who dies as a result of law and order situated and is not found directly involved in the actually violence, or due to enemy action on the line of Actual Control/International Border within the State of Jammu and Kashmir as specified in clause (iii) of rule 2 shall be entitled to a cash compensation in lieu of appointment in government service of an amount specified by the government which shall be payable in their favour in a manner to be notified by the government.

Provided that if any one among the family members of the deceased civilian fulfills the eligibility criteria prescribed under the aforesaid Rules for appointment into the government service or acquires such eligibility within one year from the date of death of the deceased person, then they shall have the option either to

choose the government service or the cash compensation”.

7 From a plain reading of Rule 3, it is evident that only an eligible family member of the deceased Government employee is entitled to be appointed against the vacancy in the lowest rank of non-gazetted service or class-IV post having qualification as prescribed under the relevant Recruitment Rules. If such member, applying for compassionate appointment, is not eligible and qualified for such post, he/she must acquire such eligibility and qualification within a period of one year from the date of death of the deceased specified in Rule 2.

8 Rule 7 of the Rules of 1994, however, provides for relaxation of lower or upper age limits or educational/technical qualification, as the case may be, in deserving cases. This power of relaxation is reserved in the Government. For facility of reference Rule 7 is also reproduced hereunder:

“Power to relax:

The Government may relax the lower or upper age limits or education/technical qualification, as the case may be, in deserving cases. All such cases shall be processed through General Administration Department in coordination.

9 Rule 3 and Rule 7 of the Rules of 1994, when construed harmoniously, would lead to only one logical conclusion i.e a person seeking compassionate appointment must be eligible and qualified for the post in the lowest rank of non-gazetted service or class-IV post as laid down under the relevant Recruitment Rules or must acquire such eligibility and qualification within a period of one year from the date of death of the deceased person specified in Rule 2 of Rules of 1994. Needless to say that amongst the persons, who are specified in Rule 2 is included a Government employee who dies in harness other than due to militancy related action. However, in terms of Rule 7, the power is reserved in the Government to relax the lower or upper age limits or educational/technical qualification, as the case may be, in deserving cases. All such cases are to be processed through GAD in coordination.

10. Rules of 1994, which are adopted by this High Court in relation to the employees working in the District Judiciary, are to be applied mutatis mutandis i.e with necessary modification and adaptation wherever required. There is, thus, no doubt that the power to relax the lower or upper age limits or education/technical qualification reserved in the Government under Rule 7 of the aforesaid Rules is required to be exercised by the Lord Chief Justice in relation to the employees working in the District Judiciary.

11 The argument of the respondents that the minimum age prescribed for appointment in the judicial service cannot be relaxed under Rule 7, defies logic. If Rule 7 is not to be applied to a person, who seeks relaxation of lower age limit for seeking his compassionate appointment under Rule 3, Rule 7 would be rendered redundant. The Legislature or for that matter, Rule making authority cannot be presumed to have made a redundant provision of the like of Rule 7, if

it was not intended to be given effect to. A conjoint reading and harmonious construction of Rule 3 and 7 would denote unequivocally that ordinarily, to seek compassionate appointment, a candidate ought to be eligible and qualified for the post applied for or must acquire such eligibility and qualification within a period of one year from the date of death of deceased person, however, in deserving cases, the competent authority can relax the lower or upper age limits or educational/technical qualification to pave the way for appointment of such candidate on compassionate basis. The logic put forth by the respondents in their reply affidavit that, a minor, in terms of Section 11 of the Contract Act, is not competent to enter contract and, therefore, could not be appointed on compassionate basis, also does not appeal to logic. The moment the competent authority gives relaxation in lower age limit, the candidate, who is offered appointment upon such relaxation, shall be deemed to be major and competent to accept the appointment when offered by the employer. That apart, in the instant case, the petitioner had acquired eligibility when his case came up for consideration again in the year 2013 and the relaxation in the lower age limit was required for the reason that, at the time of death of the deceased, the petitioner was minor and, thus, ineligible to apply. In that situation, the logic of Section 11 of the Contract Act also would not be attracted or applicable. The contract of service is entered when a person is appointed. And to save such appointment made in relaxation of lower age limit from being hit by Section 11 of the Contract Act, it is appropriate if the appointment is offered when the person given relaxation attains majority.

12. Admittedly, as is borne out from the record, the petitioner was 15 years old at the time of death of the deceased. This is evident from the enquiry conducted by the Tehsildar Chadoora and the certificate issued by the Assistant Commissioner, Budgam dated 28.02.2009 wherein the date of birth of the petitioner is clearly indicated as 16 years. That being the admitted position, undoubtedly, the petitioner was neither eligible to apply for compassionate appointment on the date of death of the deceased, nor did he acquire such eligibility qua the age within a period of one year from the date of death of the deceased. He claims to have attained the age of majority in the year 2011-12 and, therefore, when the petitioner sought reconsideration of his case, the respondents ought to have placed his case before the Lord Chief Justice for considering relaxation of his lower age in terms of Rule 7 of the Rules of 1994. It was, however, for the Lord Chief Justice to take a call as to whether the case of the petitioner was one that deserved the relaxation of lower age limit prescribed under the Rules of 1994 or not.

13. At the cost of repetition, we may point out that in the year 2011-12, the petitioner had attained the majority, therefore, was competent in law to enter into contract with the employer. The respondents have failed to comply with the mandate of Rule 7 and have, thus, infringed the vital right of the petitioner to seek relaxation from the competent authority under Rule 7 of the Rules of 1994.

14 For the foregoing reasons, we allow this petition and quash the impugned communications issued from time to time. A direction is issued to the respondents, in particular, respondents 3, 5 and 6 to place the entire matter before the Lord Chief Justice for considering relaxation in the lower age limit under Rule 7 of the Rules of 1994. It shall, however, be for the Lord Chief Justice to take a call and pass appropriate orders for relaxation or otherwise having regard to the mandate of Rule 7 of the Rules of 1994. In case, the Lord Chief Justice or any other competent authority finds it a deserving case and allows the relaxation of lower age limit, the petitioner shall be offered compassionate appointment without any further delay. A decision in this regard shall be taken by the respondents within a period of two months from the date copy of the judgment is served upon them.

Disposed of accordingly.