

(2005) 11 KL CK 0046
In the High Court Of Kerala
Case No : W.A. No. 860 of 2003

Priyesh Vasudevan

APPELLANT

Vs

Shameena

RESPONDENT

Date of Decision : 18-11-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Hindu Succession Act, 1956 — Section 20
Kerala Education Rules, 1959 — Rule 51A, 51B
Limitation Act, 1963 — Section 6, 7, 8
Majority Act, 1875 — Section 3
Penal Code, 1860 (IPC) — Section 187, 312, 313, 314, 315
Succession Act, 1925 — Section 112, 2, 7
Transfer of Property Act, 1882 — Section 13, 20

Citation : (2005) 4 KLT 1003

Hon'ble Judges : Kurian Joseph, J; K.T. Sankaran, J

Bench : Division Bench

Advocate : Benoy Thomas, for the Appellant; P.K. Suresh Kumar, K.P. Sudheer and Rajashree, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Sankaran, J.—The main question of law involved in this Writ Appeal is whether a posthumous child of a teacher in an aided School, who died in harness, is entitled to get appointment under the Compassionate Employment Scheme on his attaining majority.

2. Vasudevan, the father of the appellant, was a Sanskrit teacher in Punnur Cherupalam Aided Upper Primary School in Kozhikode District. Vasudevan died on 10.4.1980 while in service. Appellant, the child in the womb was born on 11.12.1980. He submitted an application for compassionate appointment under the Compassionate Employment Scheme as per G.O.(P)12/99/P&ARD dated 24.5.1999, which was made applicable to teachers of aided schools under Rule 51B of Chapter XIVA of the Kerala Education Rules. The application was made on

29.11.2000, within two years of his attaining majority. The appellant had the requisite qualification for appointment. The Manager of the School in Ext.P2 letter dated 10.1.2001, stated that the appellant is not eligible for appointment under the Dying-in-Harness Scheme as "he cannot be considered as a dependent on the teacher who expired". The Assistant Educational Officer, Balussery as per Ext.PS order dated 22.6.2002, held that the appellant is entitled to get appointment under the Dying-in-Harness Scheme. The Manager of the School (first respondent in the Writ Appeal) challenged Ext.P5 order in the Original Petition from which the above Writ Appeal arises. The learned single Judge allowed the Original Petition and held that the appellant herein was never a dependent on the deceased teacher and, therefore, the claim of the appellant cannot be considered under the Dying-in-Harness Scheme. The learned single Judge held that the Scheme dated 24.5.1999 is intended to provide employment assistance to the dependents of Government servants who die in harness and that it is intended to provide immediate relief to the family of the Government servant. It was held that as per the Government Order dated 24.5.1999, which is incorporated in Rule 51B of Chapter XIVA of the Kerala Education Rules, the appellant is not a dependent of the deceased teacher.

3. The Compassionate Employment Scheme was originally introduced as per the Government Order dated 21.1.1970. As per G.O.(P)7/95/P&ARD dated 30.3.1995, the Scheme was liberalized. Thereafter, Government Orders were issued on 21.10.1995, 25.3.1996, 10.7.1996, 29.11.1996, 12.2.1997 and 5.1.1998 and changes were brought out in the Scheme. It is stated in the order of the Compassionate Employment Scheme dated 24.5.1999, thus:

"As per the Government order read as 1st paper above Government have introduced a scheme to provide employment assistance to the dependents of Government Servants who die in harness. The intention of the scheme was to provide expeditious relief to the immediate family of the deceased Government Servants, who will suffer in the absence of such a relief. Several relaxations and restrictions have taken place over the past 29 years to the scheme and rules. This scheme was liberalized last as per G.O. read as 2nd paper above. While disposing O.P.No. 10287 of 1995, the Hon. High Court has observed that the provisions contained in G.O.(P)7/95 P & ARD, dated 30-3-1995 regulating the scheme contravene the instructions issued by the Hon. Supreme Court of India in two of their judgments and directed the Govt. to revise the scheme adhering to the rules enunciated by Supreme Court.

2. Government have considered in detail all the relevant aspects and are now pleased to issue the following orders, in supersession of all the existing orders, to regulate the appointment under the compassionate employment scheme.

Date of effect

3. Applications received on or after date of issue of this order shall be disposed of in accordance with these orders. Pending applications as on the date of this order

shall be dealt with as per the earlier orders."

Paragraph 14(a) of the Scheme reads as follows:

"14 (a). Only one dependent will be given employment assistance under the scheme in the event of the death of a Government Servant. Employment assistance shall be given to the widow/ widower, son, daughter in the said order of priority. Son and daughter shall include adopted son and adopted daughter respectively and will rank after son/daughter. However in the case of unmarried Govt. employee dying in harness father/mother, unmarried sister/ unmarried brother shall also be eligible for employment assistance. No other dependent shall be eligible or given appointment under the scheme."

Regarding the time limit for preferring an application, the Scheme provides in paragraph 19 thereof as follows:

"Time limit for preferring application

19. The time limit for preferring applications under the scheme will be 2 years from the date of death of Government servants. In the case of minor, the period will be within 3 years after attaining majority."

4. The Scheme specifically provides for employment assistance to a minor. The minor need submit his application within three years after attaining majority. Rule 51B of Chap.XIVA of the Kerala Education Rules reads thus:

"51B. The Manager shall give employment to a dependent of an aided school teacher dying in harness. Government orders relating to employment assistance to the dependents of Government servants dying in harness shall mutatis mutandis, apply in the matter of such appointments."

Rule 51B was inserted by S.R.O.484/90 published on 30.3.1990.

5. The word "minor" is not defined in the Scheme. The Kerala Education Act and Rules also do not define "minor". Therefore, we have to take the aid of other statutes to find out whether a minor includes "en ventre sa mere (in its mother's womb -- a term descriptive of an unborn child)."

6. As per Section 3 of the Indian Majority Act, a minor shall be deemed to have attained his majority on completion of the age of 21 years, where a guardian has been appointed or for whose property superintendence has been assumed by any court of wards. Every other person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before, as per Section 3 of the said Act. As per Section 4 of the Indian Majority Act, in computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the 21st anniversary of that day or at the beginning of 18th anniversary of that day, as the case may be.

7. Section 6 of the Limitation Act, 1963 provides that where a person entitled to

institute a suit or make an application for execution of the decree is, at the time from which the prescribed period is to be reckoned, a minor, he may institute the suit or make the application within the same period after the disability has ceased. Explanation to Section 6 reads thus:

"Explanation:-- For the purposes of this section, "minor" includes a child in the womb."

Section 8 of the Limitation Act provides an exception to Sections 6 and 7 and the maximum period that would be available from the cessation of disability would be three years. Under the employment assistance scheme also, the period provided for submitting an application in the case of a minor is three years after attaining majority. The cessation of disability u/s 6 of the Limitation Act in the case of a minor would take effect on the minor attaining majority, the majority to be reckoned with reference to the provisions of the Indian Majority Act.

8. Section 20 of the Hindu Succession Act, 1956 recognises the rights of a child in the womb. Section 20 reads thus:

20. Right of child in womb:-- A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born, before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate."

Mulla on Hindu Law, Fifteenth Edition, contains a commentary by the author while dealing with Section 20. The commentary reads thus:

"It is by fiction or indulgence of the law that the rights of a child born *justo matrimonio* are regarded by reference to the moment of conception and not of birth and the unborn child in the womb if born alive is treated as actually born for the purpose of conferring on him benefits of inheritance. The child in embryo is treated as *in esse* for various purposes when it is for his benefit to be so treated. This view is not peculiar to the ancient Hindu law but one which is adopted by all mature systems of jurisprudence. This section recognises that rule of beneficent indulgence and the child in utero although subsequently born is to be deemed to be born before the death of the intestate and inheritance is to be deemed to vest in the child with effect from the date of the death of the intestate."

9. In the Indian Succession Act, 1925, "minor" is defined u/s 2(e), which reads as follows:

"(e) "minor" means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and any other person who has not completed the age of eighteen years; and "minority" means the status of any such person;"

Section 7 of the Indian Succession Act provides that the domicile of origin of

every person of legitimate birth is in the country in which at the time of his birth his father was domiciled and in the case of a posthumous child, in the country in which his father was domiciled at the time of the father's death. Section 112 of the Indian Succession Act recognises the rights of a person coming into existence after the death of a testator.

10. Sections 13 and 20 of the Transfer of Property Act deal with situations in which on a transfer of property, an interest therein is created for the benefit of a person not in existence. As per Section 20, where on a transfer of property an interest therein is created for an unborn person, he acquires on his birth, a vested interest.

11. Sections 312 to 316 of the Indian Penal Code provide for punishment for the offence of miscarriage; for doing any act with intent to prevent child being born alive; for causing death of quick unborn child by act amounting to culpable homicide etc.

12. The question whether a posthumous child would succeed to the estate of his father or a testator was a vexed one for the courts. In *Elliot v. Lord Joicey and Ors.* 1935 A.C. 209, it was held thus:

"From the earliest times the posthumous child has caused a certain embarrassment to the logic of the law, which is naturally disposed to insist that at any given moment of time a child must either be born or not born, living or not living. This literal realism was felt to bear hardly on the interests of posthumous children and was surmounted in the Civil Law by the invention of the fiction that in all matters affecting its interests the unborn child in utero should be deemed to be already born. The classical statement is to be found in the words of Paulus: "Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quaeritur: quanquam alii, antequam nascatur, nequaquam prosit" (Dig. Bk.I. Tit. v. De Statu Hominum, Section 7), thus rendered in Monro's translation: "An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes in question; though no one else can derive any benefit through the child before its birth." "There is indeed," says Craig, commenting on this passage, "no reason in the case of a posthumous child to aggravate the calamity it suffers by the premature death of the father, nor to make that event a ground for diminishing its rights" (*Jus Feudale*, Lib. II., Dig. 13, Section 15; Lord Clyde's translation II .p.643).

This fiction has undoubtedly been adopted in the law of Scotland....

It is satisfactory for the purposes of the present case to find that the law of England in this matter is to all intents and purposes the same as the law of Scotland. The same fiction, derived from the same source in the Civil Law, and qualified by the same condition, is common to both systems. In the English case of *Villar v. Gilbey* (1907) A.C. 139 your Lordships' House had occasion to emphasize that the limitation, which the Court of Appeal had there discarded,

was an essential part of "this peculiar rule of construction," which accordingly applies only where it is for the benefit of the unborn child to apply it."

In *Moore v. Wingfield* (1903) 2 Ch. 411, Justice Vaughan Williams L.J. held:

"In Blackstone's Commentaries, 4th ed. vol.i. 129, 130, it is stated that in contemplation of law life begins as soon as an infant is able to stir in the mother's womb: "For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child death in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter." Then the learned author goes on: "An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to it's use, and to take afterwards by such limitation, as if it were then actually born." And the rule as to a posthumous child being capable of taking in remainder (1) is stated in the same work, vol.ii, 169.1 merely mention this because part of Mr. Buckmaster's argument seems to have proceeded upon the assumption that although, according to Buckley J's judgment, there was a rule that a child during the period of gestation was to be treated as "a life in being," that was a rule of law applicable in some cases only. In my opinion, upon the authorities, that rule is applicable when you have to deal with the rule against perpetuities. For that purpose it is plain that, as soon as the child is born, that satisfies the limitation, and you retrospectively treat the life of that child as "a life in being" at the death of the testator."

In the same decision, Romer L.J., held thus:

"For the purpose of deciding questions of perpetuity arising upon gifts in a will of the kind we find in the will in the present case, there is, in my opinion, an established rule that a child en ventre sa mere at the time of the testator's death, who is subsequently born, must be treated as having been alive at the death of the testator. And I do not think that rule should be departed from merely because, for some reason, it is in the interest of the child to contend that the gift is void as infringing the rule against perpetuity."

13. In *Aswini Kumar Pan Vs. Sm. Parimal Debi and Others*, , a question arose whether a posthumous son, within three years of his attaining majority, could challenge an alienation made by his widowed mother. Holding in the affirmative, it was held:

"13. We put it on the short ground that, in law, a child in the mother's womb is deemed to be in existence, at least for purposes of inheritance, which alone are relevant here, and has thus a right to challenge any transaction, which affects its interest at the time. If so, it has a right of action or a cause of action in respect of the said transaction and is entitled to institute a suit upon the same and, as such a child, as aforesaid, cannot, under the Indian Majority Act, be held to be a major, it must be held to be a minor, that is, a person, suffering from disability,

as contemplated in the aforesaid Section 6 of the Indian Limitation Act. This, we may respectfully add, has been rightly pointed out in the above three decisions of the Madras, Bombay and Allahabad High Courts, namely, *B. Audhesh Singh Vs. B. Rajeshwari Singh and Others*, , already cited, and their Lordships have sufficiently demonstrated in those three decisions that there is nothing in the Indian Majority Act or in the Indian Limitation Act either, which conflicts with the view that a child in the mother's womb is a person in existence and is a minor. Indeed, so far as this latter part is concerned, namely, that such a child, if it be a person in existence, must be a minor, the relevant statute (the Indian Majority Act) carries its own confirmation, as, obviously on the terms of Section 3 and/or Section 4 of the said Act, a person is a minor until he attains the relevant age of majority, be it eighteen or twenty-one years, as the case may be, and as, so far as the theory of a child en ventre sa mere is concerned, if it otherwise applies to a particular case, as here, which is a case of inheritance, neither of the above two statutes would exclude it or render it inapplicable."

14. The view taken in *Firm huni Lal-Rali Ram v. Altaf-ul-Rahman* AIR 1939 Lah.290 was different, wherein it was held that although under certain system of law, such as Hindu law, a child en ventre sa mere is by a legal fiction and for certain purposes considered to be born in the sense that he has a right of inheritance in his father's property, such a fiction does not govern the rule laid down by the law of limitation. It was further held that under the law of limitation, minority begins at the date of birth and not at the date of conception.

15. Counsel for the Manager relied on the decision of this Court in *Balakrishna Kurup v. State of Kerala and Anr.* 1976 KLT 421, which was affirmed by the Supreme Court in *Mathew and Ors. v. Taluk Land Board* 1979 KLT 601. It was held by the Supreme Court that a child en ventre sa mere cannot be treated as a person "in being" for the purpose of Section 82 of the Land Reforms Act. The requirements to be satisfied under the Land Reforms Act in respect of ceiling proceedings are quite different from those required for the benefits that could be claimed by a child in womb who was subsequently born alive, in order to get appointment under the Compassionate Employment Scheme.

16. In *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, , the Supreme Court considered the question whether a child adopted by the widow could succeed to the estate of the child's adoptive father and whether such a child is in the position of a posthumous child. It was held:

"16. Considering the question on principle, the ground on which an adopted son is held entitled to take in defeasance of the rights acquired prior to his adoption is that in the eye of law his adoption relates back, by a legal fiction to the date of the death of his adoptive father, he being put in the position of a posthumous son. As observed by Ameer Ali J., in - "*Pratapsing Shivsingh v. Agarsinghji Raisingji*" AIR 1918 PC 192.

"Again it is to be remembered that an adopted son is the continuator of his

adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line. In fact, as West and Bubler point out in their learned treatise on Hindu Law, the Hindu lawyers do not regard the male line to be extinct until the death of the widow renders the continuation of the line by adoption impossible."

It is on this principle that when a widow succeeds to her husband's estate as heir and then makes an adoption, the adopted son is held entitled, as preferential heir, to divest her of the estate. It is on the same principle that when a son dies unmarried and his mother succeeds to his estate as his heir, and then makes an adoption to her husband, that adopted son is held entitled to divest her of the estate. Vide - Vellanki Venkata v. Venkatarama 4 Ind. App. 1 (PC) and Verabhai v. Bai Hiraba 30 Ind. App.234 (PC)."

17. Minor is "an infant or person who is under the age of legal competence" (Black's Law Dictionary 6th Edition, page 997) child: children: "progeny; offspring of parentage. Unborn or recently born human being. Wilson v. Weaver 358 Supp. 1147. At common law one who had not attained the age of fourteen years, though the meaning now varies in different statutes; e.g. child labor, support, criminal etc. statutes. The term "child" or "children" may include and apply to: adopted, after born, or illegitimate child; step child; child by second or former marriage; issue." (Black's Law Dictionary, 6th Edition, page 239).

18. Black's Law Dictionary refers to "rights of unborn child", thus: "The rights of an unborn child are recognised in various different legal contexts; e.g. in criminal law, murder includes the unlawful killing of a foetus (Cal. Penal Code Section 187), and the law of property considers the unborn child in being for all purposes which are to its benefit, such as taking by will or descent. After its birth, it has been held that it may maintain a statutory action for the wrongful death of the parent. In addition, the child, if born alive, is permitted to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth, an action will lie for his wrongful death. While certain States have allowed recovery even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick, Sinkler v. Kneale, 401 Pa.267,167 A.2d.93; Smith v. Brennan, 31 N.J.353, 157 A.2d.497, other States require that the foetus be viable before a civil damage action can be brought on behalf of the unborn child."

19. The legal status of unborn persons is discussed in Salmond on Jurisprudence, 11th Edition, at pages 354 and 355, the relevant portion of which reads as follows:

"Though the dead possess no legal personality, it is otherwise with the unborn. There is nothing in law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all;

but it is none the less a real and present ownership.

A child in its mother's womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim, *Nasciturus pro jam nato habetur*. In the words of Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth". Thus, in the law of property, there is a fiction that a child *en ventre sa mere* is a person in being for the purposes of (1) the acquisition of property by the child itself, or (2) being a life chosen to form part of the period in the rule against perpetuities."

20. The Kerala Service Rules provides for certain benefits to be granted to posthumous children. For example, Note 3 to Rule 67 of Section IV of Part III of the Kerala Service Rules provides thus:

"The after born child of a deceased employee is also eligible to get his/her share of Death-cum-Retirement Gratuity."

Rule 71 of Section V of Part III of the Kerala Service Rules defines "family" for the purpose of granting Death-cum-Retirement Gratuity. Clause (c) and (d) of Rule 71 are:

"(c) Sons;

(d) Unmarried/divorced/widowed daughters"

Note 1 of Rule 71 provides that Clause (c) and (d) will include step children, adopted children and posthumous children.

21. The Compassionate Employment Scheme recognises the rights of a minor to get employment assistance. A minor is treated as a dependent under the scheme. A child born one day before the death of the government servant would also be treated as a dependent. The scheme would apply in favour of the family of the deceased Government servant if the annual income of the family does not exceed Rs. 1,50,000/-. Dependency is determined mainly with reference to the income of the family. No enquiry is contemplated whether the minor was being looked after by the deceased Government servant. The minor need not prove that he was depending on his deceased father for his livelihood. Instances of father neglecting to maintain his minor children are many. If we were to hold that such a child is not a dependent, it would be disastrous and it would be against the scheme itself. If so, how could we hold that a child in the womb is not a dependant? The rights of the child in the womb, in the matter of succession, are well protected by laws of the land. If so, how could it justifiably be held that a subsequent born child should suffer because of the calamity of his father's death having taken place before he was born? Is there any difference, in the matter of dependency, between a child born one day before and a child born one day after the death of his father or mother? The only answer would be in the negative. It will not be altogether out of context to note that in the matter of dependency a Division Bench of this Court in *St. Ignatius High School Vs. State of Kerala and Others*, , has held that a married daughter is also entitled to be

considered for being appointed under the dying-in-harness scheme.

22. With respect, we do not agree with the view taken in AIR 1939 Lah 290 and we accept the view taken by the Calcutta High Court in *Aswini Kumar Pan Vs. Sm. Parimal Debi and Others*, wherein the Calcutta High Court relied on the decisions of the Madras, Bombay and Allahabad High Courts. It is to be noted that a provision similar to the "Explanation" in Section 6 of the Limitation Act, 1963 was not available in the Indian Limitation Act, 1908.

23. Therefore, we are of the view that a child in the womb would be a "dependent" under the Scheme and that a posthumous child is entitled to the benefit of the Compassionate Employment Scheme on his attaining majority, provided, the application is filed within the period provided in Clause 19 of the scheme.

24. Sri. P.K. Suresh Kumar, learned Counsel for the Manager contended that Clause 19 of the Scheme providing a period of three years after attaining majority as time for applying under the scheme is contrary to the decisions of the Supreme Court. He submitted that the principles laid down by the Supreme Court in various cases, in the matter of compassionate appointment, should be read into the scheme and Rule 51B of Chap.XI VA of the Kerala Education Rules. Sri. Benoy Thomas, learned Counsel for the appellant, on the other hand, contended that the scheme constitutes a statutory rule; Rule 51B of Chap. XIVA makes applicable the Government Orders relating to employment assistance to the dependents of the Government servants dying in harness, to the dependents of an aided school teacher dying in harness as well. He contended that the decisions of the Supreme Court were with reference to particular situations where there were no laws or rules making specific provisions and that the Supreme Court decisions would apply only in cases where there are no specific provisions. The scheme having been incorporated by way of Rule 51B of Chap.XIVA, the general principles laid down by the Supreme Court cannot be read into the specific provisions made in Rule 51B. Counsel for the appellant also submitted that the minor children formed a class by themselves and the classification made in the scheme is a permissible classification having an intelligible differentia and nexus with the object of classification and, therefore, does not offend Article 14 of the Constitution of India. Counsel contended that validity of Rule 51B of Chap.XIVA and Clause 19 of the scheme having been not challenged by the Manager, the contentions raised do not deserve to be scrutinised. Clause 19 of the scheme was introduced by G.O.(P) No. 12/99/P&ARD dated 24.5.1999. Before 24.5.1999, there was no provision for the time limit within which the application could be filed. The scheme was revised in the light of the decisions of the Honourable Supreme Court. Rule 51B of Chap.XIVA was introduced on 30.3.1990. The Government Orders providing for employment assistance to the dependents of Government servants dying in harness were not directly applicable to the teachers of aided private schools governed by the Kerala Education Act and Rules. Rule 51B was introduced in this background. By

Rule 51B a liability is cast on the Managers to give employment to a dependent of an aided school teacher dying in harness. The constitutional validity of Rule 51B of Chap.XIVA of the Kerala Education Rules is not under challenge in the Writ Petition. There is no challenge against the scheme for compassionate appointment as well. Therefore, as held in *Osram Surya (P) Ltd. Vs. Commissioner of Central Excise, Indore*, , any argument which in effect questions the validity of the Rule or Scheme cannot be permitted to be raised.

25. In view of the contentions raised by the counsel on either side, it would be apposite to consider the decisions of the Supreme Court and of this Court on the point for a proper disposal of the Writ Appeal. In *Sanjay Kumar Vs. The State of Bihar and Others*, , the Supreme Court held thus:

"We are unable to agree with the submissions of the learned Senior Counsellor the petitioner. 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 breadearner who had left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner in *Director of Education v. Pushpendra Kumar*. It is also significant to notice that on the date when the first application was made by the petitioner on 2.6.1988, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief.

(emphasis supplied)

26. In *Punjab National Bank and Others Vs. Ashwini Kumar Taneja*, , the Supreme Court held thus:

"5. As was observed in *State of Haryana and Others Vs. Rani Devi and Another*, it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premises that he was dependent on the deceased employee. Strictly, this 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. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in-harness Scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. In *Rani Devi* case it was held that the Scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In *Life*

Insurance Corporation of India Vs. Mrs. Asha Ramachandra Ambekar and another, it was pointed out that High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments. It was noted in Umesh Kumar Nagpal Vs. State of Haryana and Others, that 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. But such 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.

6. In Sushma Gosain v. Union of India (1989) 4 SCC 488 it was observed that in all claims of appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress. The fact that the ward was a minor at the time of death of his father is no ground, unless the Scheme itself envisages specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit. The above view was reiterated in Smt. Phoolwati Vs. Union of India and Others, and Union of India (UOI) and Others Vs. Bhagwan Singh,"

(emphasis supplied)

27. In Smt. Sushma Gosain and Others Vs. Union of India (UOI) and Others, , the Supreme Court held that in all claims for appointment on compassionate grounds, there should not be any delay in appointment and that the purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family.

28. In Sajeesh Babu v. State (1996 (2) KLT 542), this Court referred to the decisions of the Supreme Court in Umesh Kumar Nagpal v. State of Haryana and Ors. ((1994) 2 SCC 138), Jagdish Prasad Vs. State of Bihar and Another, and Haryana State Electricity Board Vs. Naresh Tanwar and Another, and held thus:

"All these are cases relating to employment assistance to be given in government service or in the statutory Boards. All these cases relate to employment in public service or the service of the "State" covered by Article 14 and 16 of the Constitution of India. In all these cases, the scheme for employment assistance are non-statutory, by way of concession. Therefore, those decisions do not apply to the case on hand because in aided schools, the employment assistance is

governed by a statutory provision. So, a valid right is created in a dependant. That statute does not contemplate any time limit. Therefore, the Manager cannot avoid his liability arising out of Rule 51B stating that six years have elapsed since the death of father of the petitioner."

In Sajeesh Babu's case this Court was considering the scheme as in force prior to 1999 and at that time Clause 19 of the present scheme was not available in the Scheme. In that case, it was also held that Rule 51B of Chap.XIVA creates a right in the dependent and a corresponding liability on the Manager that he shall give employment to a dependent of an aided school teacher who died in harness.

29. Counsel for the Manager contended that the single bench decision in 1996 (2) KLT 542 is not approved by the Division Bench of this Court in Manager, Parli High School v. Narayanan 2002 (3) KLT 912. In 2002 (3) KLT 912, the Division Bench considered a batch of Writ Appeals. From the facts narrated, it is clear that the cases arose before the introduction of the scheme in 1999. In one of the cases, a person who was a minor at the time of his father's death, applied sixteen years after attaining majority. Though 1996 (2) KLT 542 was referred to, it was not overruled or distinguished. At paragraph 11 of the decision, the Division Bench referred to the decision of another Division Bench in Deepak v. Secretary, General Education Department 2002 (3) KLT 288 and held that there must be some proximity between the date of death and the date of application for compassionate appointment. It was also held that in the light of the decisions of the Supreme Court, there cannot be any doubt that right conferred on the dependents of the deceased employee for compassionate appointment is neither absolute nor unlimited and that the said principle has to be read into the executive orders and also the statutory provisions. The question whether a minor could apply within three years after attaining majority was not considered in Parli High School's case (supra) and it was not the point in issue in those cases. The decision in Ganesan v. State of Kerala 1995 (2) KLT 700 was also relied on. Relying on the Supreme Court decisions, it was held thus:

"In that view of the matter a provision which does not prescribe a time limit may not stand the test of law. Hence considering the object of a statutory provision like Rule 51B we are of the view that requirement of the time limit has to be read into the said Rule, as it stood prior to the date of issuance of the modified Govt. Order in G.O.(P) No. 12/99/ P & ARD dated 24.5.1999."

30. In Deepak v. Secretary, General Education Department (2002 (3) KLT 288), the application was filed by the dependent on 5.1.1999, before the introduction of the new scheme dated 24.5.1999. The mother of the dependent died in harness on 7.2.1978. It is not clear whether the applicant was a minor at the time of the death of his mother. But it is clear that the application was filed after twenty years of the death of the mother who was working as teacher. This Court considered the Scheme as applicable before 24.5.1999 in Deepak's case. Relying on the decisions of the Supreme Court in Haryana State Electricity Board and another Vs. Hakim Singh, , Life Insurance Corporation of India Vs. Mrs. Asha

Ramachandra Ambekar and another, , Umesh Kumar Nagpal Vs. State of Haryana and Others, , Union of India (UOI) and Others Vs. Bhagwan Singh, , State of Bihar and others etc. Vs. Samsuz Zoha etc., and in Director of Education (Secondary) and Another Vs. Pushpendra Kumar and Others, , this Court held that compassionate appointment can be granted only to tide over the immediate financial crisis resulting from the employee's death and the same cannot be insisted upon as a matter of course. In paragraph 7 of the decision it is stated thus:

"We may indicate in this connection that learned Single Judge of this Court in Sajeesh Babu v. State (1996 (2) KLT 542) expressed the necessity of laying down time limit for submitting application for appointment on compassionate ground under Rule 51B. We are informed that Government has issued order dated 24.5.1999 recently fixing two years as the time limit for making application for appointment on compassionate ground...."

Thus, it is clear that in Deepak's case the question of a minor dependant applying after attaining majority was not considered. Clause 19 of the Scheme dated 24.5.1999 was also not considered.

31. In Sarada Vs. Pradeep Kumar, , a Division Bench of this Court considered the question whether the dependent who made the application twenty three years after the death of his father is entitled to compassionate appointment. Pre 1999 Scheme was under consideration, the dependent having filed the application on 3.7.1993. At the time of death of the father of the applicant, he was a minor. In paragraph 11 of the judgment, this Court held thus:

".. The fact that the ward was a minor at the time of death of his father is no ground, unless the scheme itself envisage specifically otherwise, to state that and when such minor becomes a major he can be appointed without any time consciousness or limit."

(emphasissupplied)

This view of the Division Bench indicates that if the Scheme provides for an application by a minor on his attaining majority, it could be entertained and such a provision in the Scheme could be enforced.

32. In Ayisakkutty Vs. Abdul Samad, , a learned single Judge of this Court considered the question of compassionate appointment of a dependant who was a minor short only one year to attain majority, at the time of the death of her father. After attaining majority, she applied for appointment under Rule 51B of Chap. XIVA. The application was submitted after the commencement of the Scheme, dated 24.5.1999. The learned single Judge held in paragraph 12 thus:

"The object of the entire scheme for compassionate appointment is therefore abundantly clear and there is no room for any doubt. A person who cannot demonstrate a need for an immediate succour cannot be appointed under Rule 51B, for such appointment obviously encroaches into the fundamental rights of

the open market candidates which also flows directly out of Article 16 of the Constitution of India. The executive orders as also statutory provisions governing such appointments will have to be read subject to the law laid by the Apex Court as also the decisions of this Court. To put it in other words, the principles contained in the judgments will have to be read into the statutory provisions and executive orders and schemes as regards such appointments."

The question whether Clause 19 of the Scheme, which is statutorily incorporated under Rule 51B of Chapter XIVA, could be enforced by a minor on his attaining majority was not specifically considered by the learned single Judge. The view expressed by the Supreme Court in *Sanjay Kumar Vs. The State of Bihar and Others*, and in *Punjab National Bank and Others Vs. Ashwini Kumar Taneja*, and a Division Bench of this Court in *Sarada Vs. Pradeep Kumar*, that if there is a specific provision, it stands on a different footing was not noticed and considered in the *Muslim Vocational Higher Secondary School's* case. Therefore, we are of the view that the findings in paragraph 12 of the judgment do not lay down the correct law. The learned single Judge relied on some of the decisions of the Supreme Court which we have mentioned earlier and also the decision of the Supreme Court in *National Hydroelectric Power Corporation and Another Vs. Nanak Chand and Another*, . In *Nanak Chand's* case, the applicant's father died on 1.0.12.1978 and the application for appointment by the dependant was filed ten years thereafter. As per the guidelines issued by the National Hydroelectric Power Corporation, the application for compassionate appointment was to be made within six months of the occurrence of the death of the employee. The Writ Petition was filed by the dependant seven years after the rejection of his application. The decision in *National Hydroelectric Power Corporation's* case would indicate the view of the Supreme Court that if the Scheme for appointment on compassionate ground provides for specific relief to a minor to make application for compassionate appointment after attaining majority, it could be entertained. It could safely be said that in none of the cases referred to earlier the Supreme Court was considering a case where the Scheme for compassionate appointment specifically provided for an application by a minor being submitted within a specific period on his attaining majority. So, we are of the view that the decisions of the Supreme Court mentioned above cannot be taken as a bar in entertaining the application of a minor-- dependant on his attaining majority as provided in Clause 19 of the Scheme.

33. It is relevant to note here that in many of the Supreme Court decisions referred to above, the Scheme for compassionate appointment could not be availed by the dependents in case they had received certain benefits from the employer. The Scheme for compassionate appointment under consideration by us not only specifically provides for entertaining a minor's application submitted within three years on his attaining majority, but also indicates that the family of the deceased would be disentitled for claiming the benefit only if the annual income of the family is not below Rs. 1,50,000/-. It is apposite to note here that the following provisions in the Scheme would also indicate that the Scheme is

beneficial in nature:

"7. Dependents of Government servants who die in harness irrespective of the circumstances of the death (including suicide) will be eligible for employment assistance under the scheme.

8. Dependents of Government Servants who have availed themselves of invalid pension and in whose case death takes place before the normal date of superannuation shall also be eligible for employment assistance under the scheme.

...

10(b). The dependents of the teaching staff of all educational institutions (including Principals of Colleges) who on completion of the age of 55 years during the course of an academic year continue in service, under Rule 60(C) of Kerala Service Rules, Part I, till the last day of the month in which the academic year ends and who die during the period of such continuance will be eligible for the employment assistance under the scheme.

...

25. Appointment once offered and the post once applied for shall be allowed to be changed, if the request for change is made within the time limit prescribed in para 19 above.

26. Applicant will have the right to withdraw his/her application at any time before the job is accepted, so as to enable another dependent of the family to make his/her application for employment assistance.

...

35.5% vacancies of Assistant Grade II including Legal Assistant Grade II in the Secretariat (Administrative Secretariat), Finance Secretariat, Law Secretariat and office of the Advocate General, and 5% vacancies of Auditor Grade II in the Local Fund Audit Department will be reserved and reported to the General Administration (C.E. Cell) Department for allotment of vacancies to the candidates possessing graduation and post graduation qualifications. The dependents of Govt. servants in Secretariat, Office of the Advocate General and Local Fund Audit Department having the requisite qualification will be appointed as Assistant Grade II/Legal Assistant Grade II/Auditor Grade II in an existing or arising vacancy in the concerned department and such appointment shall not be set off against the 5% vacancies reserved and reported to the General Administration (CE Cell) Department.

36.5% vacancies of Village Extension Officer and Lady Village Extension Officer in the Rural Development Department and 5% vacancies of L.D. Compiler in Bureau of Economics and Statistics Department will be reserved and reported to the General Administration (C.E.Cell) Department for allotment under the scheme to qualified dependents.

37.10% vacancies of Police Constable, Excise Guard, Forest Guard and Jail Warden will be reserved and reported to the General Administration (C.E.Cell) Department for allotment to qualified hands.

...

41. As the scheme is intended to help the bereaved family of the deceased Government servant, the application for employment assistance should be processed at all stages and at all levels with a sense of urgency. Enquiry reports of the District Collectorates should be finalized and submitted within six weeks. A register in the proforma in Appendix C will be maintained in the Collectorates to watch the receipt and disposal of applications."

34. It would not be hence proper to restrict the scope and application of the scheme on the basis of the law laid down by the Supreme Court with reference to the Schemes which are quite different from the Scheme in force in the State of Kerala. More over, the specific mention made in Sanjay Kumar Vs. The State of Bihar and Others, and Punjab National Bank and Others Vs. Ashwini Kumar Taneja, F that when there are specific provisions in the Scheme those provisions should be applied, would make it clear that the general principles laid down by the Supreme Court while considering the schemes in force in other States cannot be read into Rule 51B of Chap. XIVA of the Kerala Education Rules and the Scheme as applicable in the State of Kerala where specific and beneficial reliefs are provided to the minor dependents of Government servants and aided school teachers dying in harness.

Therefore, we hold that the appellant is entitled to the benefit under the Compassionate Employment Scheme. Though the management has made several appointments, those affected parties are not before us. However, we find from order dated 18.10.2004 in I.A.No. 132 of 2003 in the Writ Appeal that the approval of appointments, if any, given would be subject to the final decision in the Writ Appeal. Therefore, we direct the first respondent Manager and the Assistant Educational Officer, Balussery to see that the appellant is given a deemed appointment in the first vacancy against which approval is granted by the Assistant Educational Officer after the order dated 18.10.2004 referred to above, so that the appellant could be considered under Rule 51-A Chap.XIVA of the Kerala Education Rules as per that slot. We set aside the judgment of the learned single Judge, the Writ Petition is dismissed and the Writ Appeal is allowed as above.