

(2009) 10 MAD CK 0199

In the Madras High Court

Case No : Writ Petition No. 37384 of 2006 and (O.A. No. 6897 of 1998)

Smt. Minny Buelah Jose

APPELLANT

Vs

The Director of Social Welfare and Nutritious Meal
Programme, Administrative Officer, Social Welfare and
Nutritious and District Project Nutrition Officer

RESPONDENT

Date of Decision : 30-10-2009

Acts Referred:

Constitution of India, 1950 — Article 136, 14, 16

Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1955 — Rule 17

Citation : (2009) 10 MAD CK 0199

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : Muthappan, for D. Johnsamuel, for the Appellant; R. Neelakantan, GA, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The petitioner filed O.A. No. 6897 of 1998, seeking to challenge the order, dated 7.8.1998, by which she was removed from service.

2. Pending the OA, the Tribunal granted an interim order, dated 25.8.1998, staying the order of removal. It was stated by the Tribunal that the impugned proceedings initiated against the petitioner was vitiated since the petitioner was not given a copy of the enquiry report and opportunity of further representation was not given. Thus, the proceedings initiated was in violation of Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules. Though an application was filed by the respondents in M.A. No. 6783 of 2000, seeking to vacate the interim order passed by the Tribunal, the Tribunal for the reasons best known to it did not take up the said application.

3. In view of the abolition of the Tribunal, the matter stood transferred to this Court and was renumbered as W.P. No. 37384 of 2006.

4. On notice from the Tribunal, the respondents have filed a reply affidavit, dated 13.1.2000, justifying the termination. It is seen from the records that the petitioner's mother Tmt. G. Hepsial while working as a Taluk Project Nutrition Officer, Palayamkottai died on 1.9.1985. The petitioner being her daughter and legal heir sent applications, dated 3.11.1989, 16.11.1989 and 1.3.1990 for considering her case for appointment on compassionate ground. In those representations, she had stated that none of the family members of Tmt. Hepsial was in Government or in a private job and her family was suffering from poverty. Therefore, the petitioner was appointed as a Junior Assistant, by an order, dated 9.5.1990 by the first respondent. The petitioner also joined in the post on 21.5.1990.

5. When a proposal for approving the appointment of the petitioner was sent to the Government, it was informed by the Government by a letter, dated 12.12.1994 that from the nomination form for the Family Benefit Fund furnished by the petitioner's mother and found pasted in her service register, it was found that the petitioner's father A. Josiah was nominated by her as her legal heir and that he was then working as an Executive Officer at Thenthiruperaai Town Panchayat. Therefore, an Officer was deputed to verify these facts. The Assistant Director (Women Welfare) was appointed as the Enquiry Officer. By her report, dated 1.9.1995 she found that the petitioner's father had worked as an Executive Officer in Tirunelveli District Town Panchayat and got retired on 30.6.1989. Therefore, when the petitioner's mother died on 1.9.1985, her father was very much in Government's employment. The facts set out in the report was communicated to the State Government by a letter, dated 20.9.1995.

6. The State Government, by its letter, dated 13.12.1996 directed that the petitioner should be removed from service by initiating disciplinary proceedings under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules as she had secured appointment on compassionate ground by suppressing the fact of her father's employment. Accordingly, a charge memo under Rule 17(b) was framed. The petitioner had submitted her explanation, dated 26.9.1998. The Deputy Director of ICDS Scheme was appointed as an Enquiry Officer, who conducted enquiry on 26.11.1997. She gave a report on 27.11.1997 holding that the charges were proved. A copy of the report was also furnished to the petitioner to enable her to give a further representation and the same was received by the petitioner on 13.1.1998. She gave further representation on 26.2.1998. After considering all these documents, her removal was ordered.

7. Therefore, when the petitioner obtained an interim order before the Tribunal, staying the order of removal, once again the learned Counsel for the petitioner made an incorrect statement before the Tribunal, stating that the report of the enquiry officer was not given to her and hence the proceedings were vitiated.

8. In the reply affidavit filed by the first respondent, it was also pointed out that the petitioner herself revealed in her representation that she had earlier applied for an appointment on compassionate grounds and the same was rejected by the

respondents on 20.3.1987 for the reason that her father was in Government service at the time of the death of her mother and the members of her family were not entitled for the benefit as requested.

9. Two issues arise for consideration. The first issue is whether in such cases, an elaborate enquiry is required especially when the finding is that there was suppression of fact by the petitioner and that she was ineligible to get appointment in terms of rules relating to compassionate appointment. This question was squarely answered by the Supreme Court vide its decision in Additional General Manager/Human Resource Bharat Heavy Electricals Ltd. Vs. Suresh Ramkrishna Burde, . The Supreme Court negated such claims. In paragraphs 12 to 14 of the said judgment, it was observed as follows:

12. In R. Vishwanatha Pillai v. State of Kerala which we have referred to earlier, the case of the employee's son, who got admission in an engineering college against a seat reserved for Scheduled Caste, was also considered. The admission in the engineering college was obtained in 1992 and he completed the course in 1996 though under the interim order of the High Court. The appeal was decided by this Court on 7-1-2004. Placing reliance upon para 38 of the judgment in Milind¹ this Court observed that no purpose would be served in withholding the declaration of the result on the basis of examination already taken by the student or depriving him of the degree in case he passes the examination. It was accordingly directed that the student's result be declared and he be allowed to take his degree with the condition that he will not be treated as Scheduled Caste candidate in future either in obtaining service or for any other benefits flowing from the caste certificate obtained by him and he shall be treated to be a person belonging to General category.

13. The principle, which seems to have been followed by this Court is, that, where a person secures an appointment on the basis of a false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated. However, where a person has got admission in a professional course like engineering or MBBS and has successfully completed the course after studying for the prescribed period and has passed the examination, his case may, on special facts, be considered on a different footing. Normally, huge amount of public money is spent in imparting education in a professional college and the student also acquires the necessary skill in the subjects which he has studied. The skill acquired by him can be gainfully utilised by the society. In such cases the professional degree obtained by the student may be protected though he may have got admission by producing a false caste certificate. Here again no hard-and-fast rule can be laid down. If the falsehood of the caste certificate submitted by the student is detected within a short period of his getting admission in the professional course, his admission would be liable to be cancelled. However, where he has completed the course and has passed all the examinations and acquired the degree, his case may be treated on a different footing. In such cases only a limited relief of protection of his

professional degree may be granted.

14. In the case in hand the respondent got appointment on 31-5-1982 on a post, which was reserved for a member of Scheduled Tribe. On receiving complaints the employer referred the matter to the District Collector, Nagpur and also to the Scrutiny Committee in March 1991. The subsequent period has been spent in making enquiry and in litigation as the respondent filed three writ petitions. In view of the principle laid down by this Court we are clearly of the opinion that his services were rightly terminated by the appellant and the High Court was in error in directing his reinstatement. The order passed by the High Court, therefore, has to be set aside.

10. The second issue posed by the petitioner was based upon the order of the Supreme Court in *Union of India (UOI) and Others Vs. K.P. Tiwari*, . In that case, the Supreme Court held that if a person is served for more than 5 years and even if his appointment is held to be irregular, such an appointment need not be disturbed and if done so, it will uproot the person from his livelihood.

11. The petitioner also relied upon the judgment of this Court in *R. Rajani v. The Government of Tamil Nadu and Anr.* in W.P. No. 26858 of 2006 , dated 17.7.2008. This Court, after following the *K.P. Tiwari's* case (cited supra), granted relief in a similar claim.

12. However, it must be noted that the *K.P. Tiwari's* case (cited supra) came to be considered by the Supreme Court subsequently and the reasoning found in that case was not followed. In fact, the reasoning found there, were explained by referring to all the other decisions arising out of matter relating to compassionate appointments vide decision in *State of Haryana and Another Vs. Ankur Gupta*, . In paragraphs 4 to 10, the Supreme Court observed as follows:

4. Learned Counsel for the appellant State submitted that the approach of the High Court is erroneous. When the appointment was made in violation of the policy, and by mistake the respondent had been appointed, that does not confer any legal right upon him. In response, learned Counsel for the respondent submitted that as rightly observed by the High Court, there was no misrepresentation or fraud practised by the respondent in gaining employment. The respondent has worked for more than 4 years and in view of what has been stated by this Court in *Union of India v. K.P. Tiwari*¹, jurisdiction under Article 136 of the Constitution of India, 1950 (in short "the Constitution") should not be exercised.

5. We find that the appointment, admittedly, was not permissible in view of the policy which came into force from 22-8-1996. The earlier policy was changed in view of a decision of the High Court. The correctness of the policy decision was not under challenge.

6. As was observed in *State of Haryana v. Rani Devi* it need not be pointed out that the claim of the person concerned for appointment on compassionate

ground is based on the premise 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 case² 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 LIC of India v. Asha Ramchandra Ambekar it was pointed out that the 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 v. State of Haryana that as a rule, in public service appointments 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.

7. In Director of Education (Secondary) v. Pushpendra Kumar it was observed that in the matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that 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 those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased employee. As it is in the nature of exception to the general provisions, it cannot substitute the provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision.

8. These aspects have been highlighted by this Court in a recent decision in State of Manipur v. Md. Rajaodin.

9. Above being the legal position, the logic of the policy cannot be undermined. Coming to the question whether there was any fraud or misrepresentation, we find that right from the beginning, the officers concerned were acting in a manner contrary to the policy. When the Director of Industrial Training and Vocational Education, Haryana wrote to the Commissioner and Secretary, Industrial Training and Vocational Education Department, Haryana Government, on 22-5-1997, it was clearly indicated that the mother of the respondent was already in government service. It was also noted that according to the government instructions only those dependants of the deceased employee/officer whose family income is up to Rs2500 per month can be appointed. In the letter itself it is mentioned that the monthly salary of the respondent's mother was Rs5880 and, therefore, there was no scope for appointing the respondent. Having said so, it was indicated that relaxation may be given in his case. The High Court proceeded on the basis as if there was relaxation of the stipulations. No provision could be shown to us whereby relaxation is permissible, particularly when the policy in this respect was modified on the basis of and in implementation of the decision of the High Court. Though the learned Counsel for the respondent referred to the 1970 guidelines where there was scope for relaxation, the same does not assist the respondent because that was operative at a point of time when the policy dated 22-8-1996 notified to be in line with the High Court's judgment was not in operation.

10. Looked at from any angle, the view of the High Court is indefensible. The judgment of the High Court is, therefore, set aside. But while allowing the State's appeal, it cannot be lost sight of that the respondent was in government service for more than about four years. It is stated by the learned Counsel for the respondent that he has already become overaged for government employment. In the peculiar circumstances, in case the respondent applies for a job in the Government within a period of two years and is selected de hors the compassionate appointment scheme, the question of his having crossed the age bar, would not stand in his way and the service rendered by him shall be duly considered. The appeal is allowed subject to the aforesaid observations. Costs made easy.

13. The Supreme Court in similar circumstances vide its decision in *A.P. Social Welfare Residential Educational Institutions v. Pindiga Sridhar* reported in (2007) 13 SCC 352 held that securing compassionate appointment by playing fraud cannot be countenanced by the court. The following passage found in paragraph 7 of the said judgment may be usefully extracted below:

7. The High Court on the basis of the erroneous view upset the well-merited judgment of the learned Single Judge. By now, it is well-settled principle of law that the principles of natural justice cannot be applied in a straitjacket formula. Their application depends upon the facts and circumstances of each case. To sustain the complaint of the violation of principles of natural justice one must establish that he was prejudiced for non-observance of the principles of natural

justice. In the present case, the fact on which the appellant terminated the services of the respondent appointed on compassionate ground was admitted by the respondent himself that when he applied for the post on compassionate ground by his application dated 6-5-1996, his mother was in service. So also when he secured the appointment by an order dated 22-11-2002 his wife was in service since 3-8-1997 as Extension Officer in Rural Development and later on promoted as Mandal Parishad Development Officer at the time when he was appointed on compassionate ground. These facts clearly disclose that the appointment on compassionate ground was secured by playing fraud. Fraud cloaks everything. In such admitted facts, there was no necessity of issuing show-cause notice to him. The view of the High Court that termination suffers from the non-observance of the principles of natural justice is, therefore, clearly erroneous. In our view, in the given facts of this case, no prejudice whatsoever has been caused to the respondent. The respondent could not have improved his case even if a show-cause notice was issued to him.

14. The Supreme Court also rejected the contention of sympathy being shown for being in long service as ground for granting relief. In this context, it is therefore necessary to refer to the decision of the Supreme Court in *State of West Bengal and Others Vs. Banibrata Ghosh and Others*, . In paragraphs 31 and 32 of the said judgment, the contention raised similar to the present case has been rejected by the Supreme Court and hence it is necessary to reproduce those paragraphs:

31. Shri Ghosh, learned Senior Counsel, appearing for the respondents, at this stage, says that we should take a compassionate view of the matter, since as a result of this judgment, the respondent would be thrown in a state of unemployment. We are afraid, we cannot show any such misplaced sympathy, which was shown by the Division Bench. We are told at the Bar that this Court had issued directions to make the payment of salaries and some payments have been made to the respondent. We direct that such payments shall not be recovered from the respondent.

32. Considering that the writ petition remained pending for 10 years and thereby, the respondent might now have become barred by age for fresh employment, we recommend that the Government may consider the condonation of the age bar, if any, on the part of the respondent. We accordingly set aside the judgment of the Division Bench and restore that of the learned Single Judge and allow the appeal but without any order as to costs.

15. In the light of the above, the writ petition filed by the petitioner deserves to be dismissed and accordingly, the same stands dismissed. However, there will be no order as to costs.

16. But at the same time, this Court will have to grant the same relief as was done by the Supreme Court in *State of Haryana and Another Vs. Ankur Gupta*, , which is as follows:

10. ...In the peculiar circumstances, in case the respondent applies for a job in the Government within a period of two years and is selected de hors the compassionate appointment scheme, the question of his having crossed the age bar, would not stand in his way and the service rendered by him shall be duly considered. The appeal is allowed subject to the aforesaid observations.

The Supreme Court in State of West Bengal's case (cited supra) in paragraph 32 observed as follows:

32. Considering that the writ petition remained pending for 10 years and thereby, the respondent might now have become barred by age for fresh employment, we recommend that the Government may consider the condonation of the age bar, if any, on the part of the respondent....

The petitioner also will have the benefit of similar observation made by the Supreme Court while applying for a post in the Government.