

**Case relating to Concurrence:**

**Parties :** L. Anthony Muthu Versus The State of Tamil Nadu, Represented by its Secretary to Government & Others

**Court :** High Court of Judicature at Madras

**Case No :** W.P.No.913 of 2011

**Judges:** THE HONOURABLE MR. JUSTICE K. CHANDRU

**Appearing Advocates :** For the Petitioner: S.N. Ravichandran, Advocate. For the Respondents: A. Suresh, GA.

**Date of Judgment :** 11-04-2011

**Head Note :-**

Constitution of India - Article 226 –Tamil Nadu Public Service Commission Regulations, 1954 - Regulation 16(b) - writ of certiorarified mandamus filed - to direct the respondents to provide any suitable post to the petitioner on compassionate ground - petitioner could not survive without an employment gave an undertaking in a non-judicial stamp paper that he will accept any post of basic service and that he will not go to any Court challenging such grant of the post - impugned order came to be passed declining grant of appointment under class IV post - Challenging the said order, writ petition is filed -impugned order of the respondents is set aside and writ petition stands allowed.

Case Referred:

Mohd. Riazul Usman Gani v. District & Sessions Judge (2000) 2 SCC 606.

**Judgment :-**

(Prayer: This writ petition is preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorarified mandamus to call for the records made in the impugned order of the second respondent in Na.Ka.No.133846/PTho.4/2010/Iru3 dated 22.11.2010 and quash the same and to direct the respondents to provide any suitable post to the petitioner on compassionate ground.

1. The petitioner has come forward to challenge an order dated 22.11.2010 sent by the Public Information Officer attached to the office of the second respondent Director of Public Health and Preventive Medicine Department, Chennai.

2. By the impugned order, the petitioner's mother M.Chinnammal was informed that her complaint made to the Chief Minister's Grievance Cell dated 21.10.2010 was sent to them for appropriate reply by the Department. She was informed that her husband late A.Lourdusamy, Sanitary Inspector attached to the Government Primary Health Center, Karapattu died while in service on 10.03.2001. When she sought for an employment on compassionate ground on account of his death for her son, who is the petitioner herein, she was informed that if any of the legal heirs who were eligible for compassionate appointment are having the minimum educational qualification for getting the post of Junior Assistant, they should not be appointed under any circumstances to a lower post. Therefore, her request for compassionate appointment for her son for the post of Record Clerk or Office Assistant or Night Watchman cannot be considered as there is no rules available in this regard.

3. It is necessary to set out the following admitted facts in this case. The petitioner's father who was working as a Sanitary Inspector died on 10.03.2001. On 07.09.2001, the petitioner sent a representation to the second respondent enclosing all the necessary documents including his elder brother's No Objection Certificate, who was serving in the Indian Army. While the application was under consideration by the respondents, the petitioner informed the respondents that as he is not getting the post of Junior Assistant all these years, he is made to do odd jobs including working in a hotel and that his family is suffering from acute economic circumstances. Hence, he requested that his case may be considered for any post under basic service.

4. On receipt of his request, the third respondent sent a letter to the second respondent dated 09.01.2009 stating that the case of the petitioner was in the waiting list. But in the meanwhile, his request for appointment in any post in basic service can be considered. In response to the request made by the third respondent, the second respondent negated the said claim in the light of G.O.Ms.No.1499 Labour and Employment Department, dated, 03.08.1989, wherein, it was stated that a person who is eligible to be appointed as Junior Assistant should not be appointed to any basic service.

5. The petitioner was informed by the second respondent by a further letter dated 08.12.2009 stating that he cannot be granted any appointment even in the post of Driver quoting the very same G.O.Ms.No.1499 dated 03.08.1989. The petitioner in the meanwhile as he could not survive without an employment gave an undertaking in a non-judicial stamp paper that he will accept any post of basic service and that he will not go to any Court challenging such grant of the post. It is for this letter, the impugned order dated 22.11.2010 came to be passed declining grant of appointment under class IV post. Challenging the said order, the present writ petition is filed.

6. When the matter came up on 19.01.2011, the learned Government was directed to take notice. On such notice, the second respondent had filed a counter affidavit dated 24.02.2011. In the counter affidavit, it was claimed that the dependents of the deceased government servants who died upto 1998 while in service have been granted employment upto Serial.No.194. The petitioner's serial number is 313. His turn for grant of appointment has not reached. In paragraph 6 of the counter, it was averred as follows: -"6. It is respectfully submitted that as per the orders issued in G.O.Ms.No.1499, Labour and Employment (Q1) Department dated 3.8.1989, the appointing authorities under no circumstances should appoint a dependent to a lower post when the dependent possess the qualifications required for the post of Junior Assistant/Typist."

7. Since the stand of the respondents was solely based upon G.O.Ms.No.1499, Labour and Employment Department, dated 03.08.1989, it is necessary to refer to the entire Government Order:

"According to the orders issued in the G.O first read above, a dependent of the deceased Govt. servant can be appointed on compassionate grounds to a post which falls outside the purview of TNPSC. In the G.O. Second read above, the concession has been extended to posts falling within the purview of TNPSC also. According to the G.O third read above, Record Clerks already appointed on compassionate grounds if they are qualified for appointments as Junior Assistants at the time of initial appointment can be appointed as Junior Assistants by direct recruitment after obtaining the concurrence of the TNPSC under the latter part of Regulation 16(b) of the Tamil Nadu Public Service Commission Regulations,

1954.

2. Based on the orders issued in the G.O. third read above a dependent appointed as Record Clerk on compassionate grounds is eligible for appointment as Junior Assistant, but a dependent appointed as Office Assistant is not considered for appointment as Junior Assistant even though both were having the qualification for Junior Assistant at the time of appointment to a lower post. This amounts to discrimination. Therefore, the Government have examined the proposal in detail to remove the discontent among the dependents appointed as Basic servants and accordingly issue the following clarifications.

(1) A dependent appointed to a lower post like record clerk, Office Assistant and Sweeper on compassionate grounds but possess the qualification required for the post of Junior Assistant at the time of initial appointment to a lower post may be appointed as Junior Assistant/Typist. This concession is allowed only to those who have already been appointed to a lower post like Record Clerk, Office Assistant, Sweeper etc. The dependents should satisfy the conditions prescribed for consideration of appointment under compassionate grounds at the time of their appointment as Junior Assistant, Typist etc.

(ii) If the dependents who are appointed to lower posts like Sweeper, Office Assistant and Record Clerk with ref. to their qualifications possessed at the time of their initial appointment and subsequently acquire qualifications prescribed for appointment as Junior Assistant/Typist they can be considered for appointment as Junior Assistant/Typist only with reference to Special Rules governing the post of Junior Assistant/Typist and not with reference to the scheme of providing employment assistance on compassionate grounds.

(ii)The appointing authorities under no circumstances should appoint a dependent to a lower post when the dependent possess the qualifications required for the post of Junior Assistant/Typist on the ground of non availability of vacancy in the office or department or the dependents not willing to work in other departments. In such circumstances they should follow the existing procedure of approaching the Collector of district for providing a suitable vacancy as suggested in G.O.Ms.No1179 P & AR dt.17.10.79."

(Emphasis added)

8. It is not clear as to how the said Government Order stands in the way of respondents in considering the case of the petitioner especially when he had given an undertaking that even though he has higher qualification, he will not challenge the grant of such appointment to a lower post since he is in dire need of employment due to poverty. It is not stated that the petitioner suffers from any other disqualification even on the ground that his elder brother was serving in Indian Army.

9. Mr.S.N.Ravichandran, learned counsel for the petitioner produced an order of the Government in G.O.Ms.No.1044 Labour and Employment Department dated 23.11.1990 wherein an amendment has been made to the earlier GO which reads as follows:-"The following paragraph shall be incorporated to para 3(i) in G.O.Ms.No.998, Labour and Employment dated 02.05.1981.

"3(i) Provided, that if any of the dependent/Dependents of deceased Government servant is/are

employed in Military service, any one of the other dependents is eligible for appointment in Government Departments and Government Undertaking under compassionate Grounds".

Therefore, what stands in the way of the petitioner getting an employment is the so called higher qualification obtained by him, which is only an SSLC pass.

10. The Supreme Court while considering the scheme for employment on compassionate grounds in respect of the Rule made by the UP Government vide its judgment in Director of Education (Secondary) and another v. Pushpendra Kumar and others reported in (1998) 5 SCC 192 in Paragraph 10, observed as follows: -

"10. ... Having regard to the fact that there are a large number of posts falling vacant in Class IV and appointment on these posts is made by direct recruitment, the object underlying the provision for giving employment to a dependant of a person employed on teaching/non-teaching staff who dies in harness would be achieved if the said provision in the Regulations is construed to mean that in the matter of appointment of a dependant of a teaching/non-teaching staff in a non-government recognised aided institution dying in harness if a post in Class III is not available in the institution in which the deceased employee was employed or in any other institution in the district, the dependant would be appointed on a Class IV post in the institution in which the deceased employee was employed and for that purpose a supernumerary post in Class IV may be created. If the Regulations are thus construed, the respondent-applicants could only be appointed on a Class IV post and they could not seek a direction for being appointed on a Class III post and for creation of supernumerary post in Class III for that purpose..."

(Emphasis added)

11. Though in that case, the Supreme Court did not deal with the issue raised in the case on hand, but yet the Supreme Court observed that if a person is holding a higher qualification and if a post commensurate with his qualification was not available, then there was no impediment for such candidate to be appointed against a lower post also.

12. The learned counsel also referred to a judgment of the Supreme Court in Mohd. Riazul Usman Gani v. District & Sessions Judge reported in (2000) 2 SCC 606, for contending that a higher qualification should not be a ground to deny an employment to a lower post. In this context, he placed reliance upon paragraphs 20 and 21, which reads as follows: -

"20. If an employee does not perform the duties attached to the post disciplinary proceedings can certainly be taken against him. An employer cannot throw up his hands in despair and devise a method denying appointments to a person who otherwise meets the requisite qualifications on the ground that if appointed, he would not perform his duties. Qualification prescribed is minimum. Higher qualification cannot become a disadvantage to the candidate.

21. A criterion which has the effect of denying a candidate his right to be considered for the

post on the principle that he is having higher qualification than prescribed cannot be rational. We have not been able to appreciate as to why those candidates who possessed qualifications equivalent to SSC Examination could also not be considered. We are saying this on the facts of the case in hand and should not be understood as laying down a rule of universal application."

(Emphasis added)

13. In view of the above, the impugned order of the respondents is liable to be set aside. Accordingly, it is set aside. The writ petition stands allowed. No costs.

14. The second respondent is directed to consider the case of the petitioner for grant of appointment in any of the subordinate post other than Junior Assistant on compassionate ground without reference to G.O.Ms.No.1499, Labour and Employment Department, dated 03.08.1989 and a decision in this regard shall be taken within eight weeks from the date of this order. It is also made clear that the petitioner having given an undertaking cannot seek for the post of Junior Assistant as soon as the vacancy arises only on the ground that he was appointed for a subordinate post as there was no vacancy for the post of Junior Assistant at the relevant time. The petitioner will get his chances of promotion only as per the order of his seniority in the lower post.