

Cases relating to Concurrence:

Parties : M. Sivashanmugam & Others Versus The Government of Tamilnadu, Rep by its Secretary, Chennai & Others

Court : High Court of Judicature at Madras

Case No : Writ Petition Nos.32062 to 32064 of 04 & 6457 & 6458 of 2005

Judges: THE HONOURABLE MR JUSTICE T. RAJA

Appearing Advocates : For the Appearing Parties: Mr. Balan Haridas, Mrs. Lita Srinivasan, Govt. Advocate. Ms. CNG.Ezhilarasi, Mr. R. Thiyagarajan, Sr. Counsel for Mr. M. Muthappan, Mr. G. Venkateswaramurthy, Ms. G. Arulselvi, Mr. R. Sureshkumar, Mr. R. Muthukannu, Mr. N. Subramaniyan, Mrs. Lita Srinivasan, Govt. Advocate, Ms. CNG. Ezhilarasi, Mr. G. Venkateswaramurthy, Mr. R. Thiyagarajan, Sr. Counsel, Mr. M. Muthappan, Ms. G. Arulselvi, Mr. R. Sureshkumar, Mr. R. Muthukannu, Advocates.

Date of Judgment : 15-07-2011

Head Note :-

Constitution of India – Articles 12, 14, 16, 16(1) & (2), 21, 31c, 39, 39(a) & (e), 226 & 309, Tamil Nadu Highways Engineering Service Rules - Rule 17, Tamil Nadu Subordinate Service Rules - Rule 35(a), General Rules for the Tamil Nadu State and Subordinate Services – Rule 48 - Indian Constitution is founded on the bed-rock of the balance between Parts III and IV.

Fundamental Rights and Directive Principles have to be balanced - can be tilted in favour of public good.

Both Fundamental Rights and Directive Principles are in fact equally fundamental and courts have therefore in recent times tried to harmonise them by importing Directive Principles in the construction of the Fundamental Rights.

Cases Referred:

State of Haryana & ors. v Rani Devi & anr. [AIR 1996 SC 2445] 1994 (4)

SCC 138 (Umesh Kumar Nagpal v State of Haryana & ors.) Secretary, State of Karnataka & ors. v Umadevi (2006 (4) SCC 1) Auditor General of India v G.Ananta Rajeswara Rao (1994 AIR 1521 = 1994 SCC (1) 192)

Jagdish Prasad v State of Bihar & anr. (1996 (1) SCC 301)

Minerva Mills Ltd. v Union of India (AIR 1980 SC 1789)

Indian Medical Association v UOI (2011 (6) Scale 86)

I.R.Coelho (Dead) By Lrs. v State Of Tamil Nadu (2007 (2) SCC 1)

Unni Krishnan, J.P. v State of A.P. (AIR 1993 SC 2178)

AIR 1976 SC 490 (State of Kerala v N.M.Thomas)

Comparative Citations:

2011 WLR 682, 2011 (7) MLJ 83

Judgment :-

(Prayer: W.P. No.32062 of 2004:- Petition under Article 226 of the Constitution of India for the issuance of a writ of certiorarified mandamus to call for the records relating to seniority list of Officers in Tamil Nadu Highways Engineering Service Rules (Category V) as on 1.1.2004 published by the 4th respondent vide memo no.22369/Nirvagam 3 (4)/2004, dated 15.06.2004, and quash the same insofar as placing the respondent No.5 to 33, who are appointed on compassionate grounds in serial no.172 to 181 and serial no.288 to 307 above the Direct Recruittee Engineers like the petitioners, who got selected through the Tamil Nadu Public Service Commission, as illegal, arbitrary and contrary to Article 14 and 16 of the Constitution of India and consequently direct the 4th respondent to place the petitioners above respondent Nos.5 to 33.

WP.No.32063/2004:- Petition under Article 226 of the Constitution of India for the issuance of a writ of certiorari to call for the concerned records from the second respondent, quash G.O.Ms.No.155, Labour and Employment Department, dated 16.07.1993, in so far as excluding Provident Fund accumulation, Family Benefit, Death-cum-Retirement Gratuity, Encashment of leave at credit at the time of death, interest earnings which accrue on deposit of amounts for consideration of indigent circumstances while considering for compassionate appointment and G.O.Ms.No.156, Labour and Employment Department, dated 16.07.1993, as illegal, arbitrary and contrary to Highways Service Rules.

W.P.No.32064/2004:- Petition under Article 226 of the Constitution of India for the issuance of a writ of declaration to declare that the appointment of respondents 5 to 33 as Assistant Engineers in the fourth respondent Highways Department is contrary to Highways Engineering Service Rules.

W.P.No.6457/2005:- Petition under Article 226 of the Constitution of India for the issuance of a writ of certiorarified mandamus to call for the records relating to G.O.Ms.No.156, Labour and Employment, dated 16.07.1993, issued by the first respondent and to quash the same and consequently to direct the respondents 1 to 3 to remove the respondents 5 to 37 from the post of Assistant Engineers in the service of the Tamil Nadu Highways Engineering Service as their appointment is not valid.

W.P. No.6458 of 2005:- Petition under Article 226 of the Constitution of India for the issuance of a writ of cetiorarified mandamus to call for the list of seniority of Assistant Engineers in the Tamilnadu Highways Engineering Service prepared by the third respondent in proceeding No.22369/Nirvagam 3 (4)-2004, dated 15.06.2004, and to quash the same insofar as respondents 5 to 37 herein and to direct the third respondent to draw the list of seniority among Assistant Engineers placing the appointees in accordance with Rule 17 of Tamilnadu State and Subordinate Service Rules to the vacancy notified for the particular year above all other appointees to the said post.

WP Nos.32062 to 32064 of 2004:-)

Common Judgment:

The present petitioners/Degree Holders in Civil Engineering, who came to be appointed as Assistant Engineers in the Highways Department in different spells during 1991-92, 1993-95 and 1995-96 through the Tamil Nadu Public Service Commission (referred hereinafter as the 'Commission/TNPSC') after emerging successful in various Tests and Exams conducted by the Commission, have approached this Court invoking its jurisdiction under Article 226 of the Constitution of India through the above writ petitions which, in all, contain prayers in three dimensions:

(a) challenging the Government Orders in G.O. Ms. Nos.155 and 156 dated 16.07.1993 whereby compassionate appointments and regularisation of such appointments in respect of respondents/compassionate appointees were allowed for Class-II Services in the Highways Department (vide prayer in WP Nos.32063/04 and 6457/06);

(b) questioning the Seniority List published on 15.06.2004 and seeking a consequential direction to the official respondents-1 to 4 to place the petitioners above the respondents-compassionate appointees (vide prayer in WP Nos.32062 of 2004 and 6458 of 2006); and

(c) to declare the appointments of the respondents/compassionate appointees as AEs in the Highways Department as illegal by holding that such appointments are contrary to the Highways Engineering Service Rules (as per the prayer in WP No.32064 of 2004).

Inasmuch as all the three inter-connected writ petitions require a joint disposal on common issues, they are dealt with and decided so.

2. The brief facts leading to filing of the present petitions are mentioned below for better appreciation of the case and cause: -The petitioners herein, in pursuant to the advertisements issued by the TNPSC in different spells during 1991-1995 for Direct Recruitment to the post of Assistant Engineers for Tamil Nadu Highway Engineering Service governed by the Special Rules framed under Article 309 of the Constitution of India, applied for the same and, after successfully passing through various levels of the Tests including preliminary examination, main examination and viva-voce, they came to be appointed as Assistant Engineers. The post in question being a 'Technical Post' under class-II services, the entire process of selection was commenced and concluded by the Commission. While so, the Chief Engineer, High Ways Department, issued a 'Seniority List' in Memo No.22369/Nirvagam 3 (4) 2004, dated 15.06.2004, where-from, for the first time, the petitioners came to know that a handful of persons were appointed to the post of Assistant Engineer by way of compassionate appointment even though there was no scheme for appointment by such course as the only mode for appointment for Class-II service is selection through the competitive exams conducted by the Commission, and that, deviating from the Rules and Procedure relating to selection, those compassionate appointees, whose appointment itself is illegal as it is contrary to the 'entry scheme' specified and provided in the Rules, were accommodated in the Seniority List to compete with the petitioners, who joined the services after undergoing due process of selection as set by the Commission.

Inasmuch as the governing rules were framed under Article 309 of the Constitution and it has been clearly stipulated that the appointment to the post of AEs under Class-II shall only be by two modes i.e., either by direct recruitment or by transfer, the petitioners made representations seeking clarification as to the status of the compassionate appointees and their legitimacy in competing with the petitioners in the Seniority List, but, there was no response. The enquiries revealed that those respondents were appointed on compassionate grounds on the demise of the Government Servant in harness and further, in some of the cases, at the time of appointment, the appointee did not even possess the requisite qualification/BE. The framework of G.O. Ms. Nos.155 and 156, (L&E), dated 16.07.1993 in providing compassionate appointment for class-II Services is illegal and such process can never be legally sustained much less under the Service Rules governing the Highways Engineering Services, therefore, those Government Orders cannot have any legal sanctity. The petitioners gained knowledge about the illegal appointment only from the Seniority List dated 15.06.2004 and in such case, the cause of action had arisen only on the said date. Since the request of the petitioners to remove the names of compassionate appointees, who cannot lawfully stand to compete with them, from the Seniority List was not considered, the present petitions have been filed to declare the appointment of all the compassionate appointees who have been appointed to the posts falling under Class-II as illegal and to quash G.O. Nos.155 and 156, dated 16.07.1993, as well as the Seniority List dated 15.06.2004 so that the Assistant Engineers, who were appointed through proper mode by the Commission, can compete for promotion on the basis of seniority amongst them.

3. Mr. Balan Haridas, learned counsel appearing for the petitioners in W.P. Nos.32062 to 32064 of 2004 and Mr. Subramanian, learned counsel appearing for the petitioners in WP Nos.6457 and 6458 of 2005, while advancing lengthy arguments questioning the validity of the aforesaid G.Os. of the year 1993 and the Seniority List as well as the legality of the compassionate appointment given to the respondents-compassionate appointees, made the following submissions: -a) Until the publication of the Seniority List on 15.06.2004, the petitioners were not aware of the compassionate appointment of the respondents/AEs based on G.O. Ms. Nos.155 and 156, in the year 1993. As soon as they became aware of such phenomenon, immediately, due representation was made to the Department questioning the legal status of those compassionate appointees to hold the post and their locus standi to compete in terms of seniority with the petitioners whose appointments were purely based on merits and ability assessed by the Commission. Therefore, when the Department did not respond to a serious issue, the petitioners immediately approached this court by way of present writ petitions and, at no stretch of imagination, slackness or laches can be attributed to the petitioners in questioning the above referred G.Os. which are nothing but executive instructions. The ground of delay and laches cannot be argued by the respondents particularly without specifically taking a plea in that regard, for, such plea is a mixed question of fact and law. At any rate, the Government Orders, which clearly violate Articles 14 and 16 of the Constitution of India, should be declared as illegal. To highlight the submission that the scheme of compassionate appointment should be made only in consonance with the yardstick outlined in Art.14 and 16 of the Constitution of

India, the following observation of the Apex Court In State of Haryana and others v. Rani Devi and another [AIR 1996 SC 2445] has been pressed into service:- „ It cannot be disputed that appointment on compassionate ground is an exception to the equality clause under Article 14 and can be upheld if such appointees can be held to form a class by themselves, otherwise any such appointment merely on the ground that the person concerned happens to be a dependant of an ex-employee of the State Government or the Central Government shall be violative of Articles 14 and 16 of the Constitution. But this Court has held that if an employee dies while in service then according to rule framed by the Central Government or the State Government to appoint one of the dependants shall not be violative of Articles 14 and 16 of the Constitution because it is to mitigate the hardship due to the death of the bread earner of the family and sudden misery faced by the members of the family of such employee who had served the Central Government or the State Government. It appears that this benefit has also been extended to the employees of the authorities which can be held to be a State within the meaning of Article 12 of the Constitution. But while framing any rule in respect of appointment on compassionate ground the authorities have to be conscious of the fact that this right which is being extended to a dependant of the deceased employee is an exception to the right granted to the citizen under Articles 14 and 16 of the Constitution. As such there should be a proper check and balance. „

b) Though compassionate appointment is the exclusive domain of the State which extends it to a family member of the deceased Government Servant to come out of the penurious situation and the crippling crisis that had arisen due to the sudden demise of the employee, the exercise to make such appointments is not routine in all cases and only in exceptional cases where the situation is such that grant of appointment is absolutely warranted, as otherwise, the family would sink down and collapse due to penury. Even in that situation, the compassionate appointment would be considered for class-III and IV irrespective of whatever high qualification the incumbent possesses. In other words, a person cannot be considered for compassionate appointment for those posts which ought to be filled up by open competition involving various levels of test to assess the merit and ability. If at all the State intended to extend compassionate appointment to the legal heirs of the deceased employees without exposure to any test or exam to assess their merit and ability, in law, they should have extended the benevolent gesture by posting them for Class-III and IV Services alone and not for Class-II Services for which the mode of selection is specifically provided in the Rules framed in terms of Article 309 of the Constitution. It is settled position of law that if executive instructions are contrary to statutory Rules, the Rules will prevail and not the executive instructions. Any deviation from the mandatory procedure for selection to a post which falls under open competition would undoubtedly run contrary to the recruitment rules.

c) The prescribed mode of entry to the post of Assistant Engineer which falls under Class-II Category in the Tamil Nadu Highways Services being Selection process through the Commission and when the relevant Rule ie., Rule 17 of the Tamil Nadu Highways Engineering Service Rules, mandates that any appointment to the said post should only be by way of direct recruitment though the Commission based on merits or recruitment through transfer, the executive

instructions in the form of G.O. Ms. Nos. 155 and 156, dated 16.07.1993 which, in effect, override the scheme for entry into service under class-II category and run repugnant to the statutory rule governing the post, thereby, illegally conferring lawful status to the compassionate appointees, whose appointment has no sanctity in the eye of law, should be declared void ab initio. As a consequence, whatever be the length of service such illegal entrants have, their entry being contrary to the rules and the scheme provided therein, the appointments should be set aside. In this regard, the decision of the Apex Court reported in 1994 (4) SCC 138 (Umesh Kumar Nagpal vs. State of Haryana and others) is very much stressed to fortify the submission that class II posts governed by rules cannot be brought within the purview of compassionate appointment, and to highlight that any policy of the State Government which allows compassionate appointment to the post above Classes-II and IV is clearly illegal.

d) Even otherwise, unlike the petitioners whose appointment and regularisation had been duly notified in the publication of the Commission, the details of regularisation relating to the compassionate appointees were not notified. Coupled with that, respondents 21 to 27 were not even possessing the requisite qualification i.e., graduation in B.E., at the time of entry into service based on the compassionate appointment. That being so, upsetting the whole scheme relating to both in respect of appointment as well as seniority, the Department very unfortunately placed the illegal entrants, many of whom not even possessed requisite qualification at the time of appointments and whose regularisations were not properly notified by the Commission, top in the seniority rank above the petitioners. The said action clearly shows the arbitrariness and partisan attitude on the part of the Department from the inception and when an illegality is given premium, if this Court does not intervene to right the wrong, great prejudice would result to the petitioners, who entered the service legitimately and now exposed to prejudice at the hands of the Department in unduly favouring the illegal entrants.

e) Even if the appointment of compassionate appointees is held to be sustainable, they cannot stand to compete with the petitioners in the light of GO. Ms No.1119, dated 20.05.1981. The said G.O., while conferring the State with a right to appoint a person, who is the son of a deceased government servant, to the post of Assistant Engineer to tide over the crisis on the death of the employee, explicitly safeguards the selection rule, particularly in terms of Rule 17 of the Rules, by mandating that, for regular appointments, they should apply only through the TNPSC. Seemingly, Rule-17 contemplates that the appointment for class-II service can be made only by direct recruitment or recruitment through transfer. Coupled with the same, Rule 35(a) of the Tamil Nadu Subordinate Service Rules protect the seniority of a person who is selected on merits. In the same line, Rule 19(3) stipulates that all persons as that of the compassionate appointees, whose appointments were not based on merits and ability, shall be ranked below the candidates selected through competitive examinations conducted by the commission for the year to which they are allotted. Therefore, when the compassionate appointees were not recruited in terms of the Rules and their appointments were made by way of exemption to the general rules, legally, they cannot claim seniority over and above the directly recruited Assistant Engineers.

f) By way of summing up the arguments, both the counsels added that, in the light of the pronouncements of the Apex Court including Nag pal's case (cited supra) which still holds the field good, economic criterion cannot be the basis for classification and public appointments on compassionate basis that too for Class-I and II grade posts for which the selection process involves various modes of tests and exams by the Commission to assess the merit and ability of the candidates; that the illegal entrants cannot plead right to livelihood under Article 21 seeking regularisation of their appointments to class-II service; that G.O. Ms. Nos.155 and 156 cannot be allowed to stand as they are nothing but executive instructions and they go contrary to the TN Highways Service Rules framed under Article 309 of the Constitution of India; and that, at any rate, seniority can not be given to them with retrospective effect by regularising their appointments and overlooking the legitimate appointees. Thus, the entire three-fold prayer as sought for by the petitioners may be granted, as otherwise, great injustice would result to the petitioners.

4. Controverting the above submissions, Mr.R.Thiyagarajan, learned Senior Counsel appearing for some of the compassionate appointees/respondents-5, 7, 8, 10 and 21 in WP Nos.32062 to 32064 of 2004, by pointing out that their date of appointment being 14.12.1988, 09.09.1992, 25.04.1994 21.09.1994 and 25.3.1996 and that of the petitioners 1 to 5/direct recruits being 03.05.1995, 18.10.1995, 06.02.1998, 18.02.1998 and 29.01.1998 respectively, at the foremost, would stress that the law is well settled that if at all the Direct Recruits claim seniority, it can only be reckoned from the date on which they were appointed ie., even in the case of the senior-most person amongst the petitioners, the crucial year is 1995. According to him, irrespective of the fact that the respondents were appointed on compassionate basis in terms of G.O. Ms. No.156, dated 16.07.1993, regularisation of service having been given effect from 16.07.1993 for respondents-5, 7 and 8, from 21.09.1994 and 25.03.1996 for respondents-10 and 21, those respondents should be given seniority with effect from 1993, 1994 and 1996 as stated above. It follows that the petitioners who came to be recruited after 16.07.1993 cannot be heard to say that they have any claim much less legally enforceable claim as regards seniority over the compassionate appointees. According to him, the question over their appointment and regularisation is not open for debate at this point of time in view of the following dictum of the Apex Court laid down in Secretary, State of Karnataka and others vs. Umadevi (2006 (4) SCC 1): -"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that

require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

Placing much reliance on the above observation of the Apex Court, learned Senior Counsel argued that so far as the regularisation of those respondents is concerned, there cannot be any claim for the petitioners to uproot the compassionate appointees who have rendered a valuable service of about 13 years.

4-a. In an endeavour to elaborate the circumstances that led to appointment and regularisation of the respondents, learned Senior Counsel next submitted that initially, the Government issued G.O. Ms. No.155, dated 16.07.1993, outlining the criterion as regards indigent circumstances to the effect that the family should not own any house or landed properties, etc. Consequently, for the genuine candidates, compassionate appointments were ordered only on temporary basis stating that those candidates, for regularisation of their appointments, should get themselves selected by applying before the TNPSC. Due to the risk factor involved in the said process i.e., possibility of non-selection and thereby, the purpose for which the compassionate appointment was given itself would get defeated, the Government with an intention to provide employment in terms of the educational qualification of the compassionate appointees, re-examined the procedure and addressed the Commission, which agreed to dispense with the process and in that perspective, G.O. Ms. No.156 came to be issued, regularising the services of the compassionate appointees with effect from 16.07.1993. Therefore, according to the learned Senior Counsel, the compassionate appointees are very well entitled for reckoning of their seniority from 16.07.1993.

4-b. It is next reiterated that the services of the respondents, except respondent No.21 whose seniority has to be reckoned from 25.03.1996, have been regularised with effect from 1993 whereas the appointment of the petitioners was only from 1995 onwards; that being so, the later entrants cannot question the seniority list which places the prior entrants top in seniority. According to the learned Senior Counsel, the seniority of the compassionate appointees shall depend on the date of initial appointment.

4-c. Epitomizing his arguments, learned Senior Counsel would further submit that the compassionate appointments have been admittedly made in accordance with the policy of the Government having regard to assessment of the exigency that had arisen due to the demise of the Government Servants; that regularization for the appointments made in the year 1988 onwards was given in the year 1993 to ensure that the benefit given to the crisis-stricken families should not be taken away; that the direct appointment given to these compassionate appointees as an exceptional case is in commensurate with the Educational Qualification possessed by them; that the writ petitioners, who joined services much later, cannot have any locus standi to question the inter se seniority list drawn in accordance with rules and procedure; and that the

writ petition challenging the G.Os. Of the year 1993 suffer from delay and laches. Therefore, there being no merit and ground to entertain the plea of the writ petitioners, their cases are liable to be dismissed at the threshold.

5. Learned Government Advocate appearing for the Official respondents would, by placing reliance on the observation of the Apex Court in Umadevi's case as extracted above, contend that now, there is a valid order for regularisation of the compassionate appointees and as on date, all of them possess the requisite qualification to hold the post and they have also served for more than a decade and under such circumstances, the plea of the petitioners to uproot them cannot even be considered for argument sake. According to her, the case on hand is distinct and peculiar on facts where the compassionate appointment given is well within the legal framework and it was meant to be extended by the State to retrieve the families of the deceased Government Employees from the indigent circumstances on their sudden demise in harness. She forcibly submitted that the entire case of the petitioners deserves to be rejected on the mere ground that they challenge the G.Os. Of the year 1993 with chronic default after a huge delay of 11 years. Moreover, by virtue of Rule 48 of the General Rules for the Tamil Nadu State and Subordinate Services, the State Government can make appointments to class-II categories. Also, in the case on hand, the Government duly sought the concurrence of the Commission, before regularisation, as stipulated in the latter part of Regulation 16(b) of the Tamil Nadu Public Service Commission Regulations, for making such appointment. Therefore, now, it cannot even be argued that the compassionate appointments in question were illegal and that the G.Os. permitting such appointments are liable to be quashed. She ultimately pleaded for dismissal of all the Writ Petitions as devoid of any merit.

5-A. Also heard the submissions made by the respective learned counsels appearing for rest of the respondents.

6. In these writ petitions arising in the background of rather a conventional rivalry for promotion and seniority between two group of Assistant Engineers viz., Direct Recruits/petitioners and Compassionate Appointees/respondents, two core issues stem for consideration viz.,

"a) whether compassionate appointment for Group-I and II Categories, in the given circumstances of the case, is wholly illegal; and

b) whether the direct recruits, despite the fact that they joined services about a decade after the appointment of the compassionate appointees, should be given preference in the matter of promotion over the compassionate appointees."

7. It is seen that, on the demise of the father/breadwinner, the respondents- compassionate appointees, who are the son/daughter of the deceased Government Servant and holders of B.E. Degree, based on the policy of the Government, were given appointments as Assistant Engineers on different dates viz., 14.12.1988, 09.09.1992, 25.04.1994, 21.01.1994 and 25.03.1996 and their services came to be regularised on 16.07.1993 and since then, they have been working

in the respective cadres as Assistant Engineer. Since the compassionate appointees so appointed satisfied the eligibility condition and fitted into the policy of the Government, after their appointment, the 3rd respondent/TNPSC, in terms of Regulation 16(b) of the Tamil Nadu Public Service Commission Regulations, 1954, accorded concurrence for their appointments; against which, it is the grievance of the petitioners that no compassionate appointment can be made for the posts falling under Class-II and I services.

8. Though the compassionate appointment was to a little extent justified by the learned counsels appearing for the petitioners by stating that such appointments can only be given to the families of the deceased government servant under indigent circumstances on his/her demise so as to tide over the crisis, it is strenuously contended that extending the compassionate appointment scheme to Class-II services, which are to be filled in only by way of selection mode through the TNPSC, is totally illegal.

9. Before proceeding to delve into the submission against the appointments given to the respondents/compassionate appointees, it is but relevant to take note of the evolution and object of the scheme of compassionate appointments and the rulings of the Apex Court enveloping its scope.

10. The scheme of compassionate appointments was conceived as far back as 1958 and since then, a number of welfare measures have been introduced by the Government which made a significant difference in the financial position of the families of the Government servants dying in harness/retired on medical grounds. The sole object of the scheme is to grant appointment to a dependant family member of a government servant dying in harness or who is retired on medical grounds, thereby leaving his family in penury and without any means of livelihood, to relieve the family of the deceased Government Servant concerned from financial destitution and to help it get over the emergency.

10-A. In *Umesh Kumar Nagpal vs. State of Haryana and others* (cited supra), the Hon'ble Apex Court defined the term "compassionate appointment" to mean the one given only to the dependants of an employee dying in harness leaving his family in penury and without any means of livelihood. It is added further that the whole object of granting compassionate appointment is to enable the family to tide over the sudden crisis and to relieve the family of the deceased from financial destitution and to help it get over the emergency.

10-B. In *Auditor General of India vs G.Ananta Rajeswara Rao* (1994 AIR 1521 = 1994 SCC (1) 192), though the Supreme Court held that appointments on the ground of descent clearly violates Article 16(2) of the Constitution of India, also made it clear that if the appointment is given to the son/daughter or widow of the deceased government employee who died in harness and who needs immediate appointment on grounds of immediate need of assistance in the event of there being no other earning member in the family to supplement the loss of income from the bread-winner to relieve the economic distress of the members of the family, it is unexceptionable.

10-C. In *Jagdish Prasad vs. State of Bihar and another* (1996 (1) SCC 301), it has been held that no person is entitled to claim compassionate appointment with a huge delay of 20 years since the object of compassionate appointment is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family. In the case of a person who was very much minor at the time of death of the government Servant, it cannot be said that he is entitled to be appointed after he attained majority long thereafter, for, if such contention is accepted, it would amount to another mode of recruitment of the dependant of a deceased government servant which cannot be encouraged de hors the recruitment rules.

10-D. Therefore, when the scheme of compassionate appointment has already been recognized by various judicial pronouncements of the Apex Court and such appointments are being made since 1958, ordinarily, it should not be rejected on the vague ground that the family of the government servant has received benefits under the welfare schemes. No doubt, while considering a request for appointment on compassionate grounds, a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities and also other relevant factors such as presence of an earning member, size of the family, age of the children and the essential needs of the family, etc.

11. Having seen that the scheme of compassionate appointment is justified and rendered to be genuine where circumstances suit, now, the argument of the learned counsel for the petitioners that, by virtue of the compassionate appointments made in the case on hand, the right of the petitioners guaranteed under Article 16(1)(2) is affected and therefore, no compassionate appointment can be made for class-II Posts and such action shall never be justified, has to be tested. In this regard, it is worthwhile to quote below Article 39 of the Constitution of India falling under Part-IV embracing Directive Principles of State Policy: -"39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against

exploitation and against moral and material abandonment.”

While Article 39 (a) states that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood, clause (e) thereof puts an obligation on the State to direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. This means, if father of a son/qualified B.E.-MBBS Graduate suddenly dies in harness leaving the entire family in penury, it would not be proper for the State, while implementing its compassionate appointment scheme to save the family from penurious and destitute financial position, to appoint the MBBS/BE Graduate son of the deceased Government Servant in class-III or IV posts on the ground that Class-II Services is to be considered only through the mode of direct recruitment. Such an endeavour would definitely go against the framework of Article 39(e) mandating the State to ensure that citizens are not forced by economic necessity to enter avocations unsuitable to them. Therefore, I am not in favour of the arguments advanced by the learned counsels for the petitioners that, in genuine and deserving cases also as the one in the given set of cases, the scheme of compassionate appointment should not be applied in respect of class-II Services and that, despite the professional qualification held by the incumbents, even if the post to be given is totally unsuitable to the high qualification held, at the most, class-III or IV posts alone should be given.

11-A. To further answer the arguments advanced by the learned counsels appearing for the petitioners, it is useful to borrow the following observations of the Apex Court made in *Minerva Mills Ltd. vs. Union of India* (AIR 1980 SC 1789):-

“60. Fundamental rights occupy a unique place in the lives of civilized societies and have been variously described in our Judgments as "transcendental", "inalienable" and "primordial". For us, it has been said in *Kesavananda Bharti* (p. 991), they constitute the ark of the constitution.

61. The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.

62. This is not mere semantics. The edifice of our Constitution is built upon the concepts

crystallised in the Preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice-social, economic and political. We, therefore, put part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part, III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Art III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our founding fathers was the purity of means. Indeed, under our law, even a dacoit who has committed a murder cannot be put to death in the exercise of right of self-defence after he has made good his escape. So great is the insistence of civilised laws on the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.

112. ... But merely because the Directive Principles are non-justiciable, it does not follow that they are in any way subservient or inferior to the Fundamental Rights.

113. The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.

117. it is not correct to say that under our constitutional scheme, Fundamental Rights are superior to Directive Principles or that Directive Principles must yield to Fundamental Rights. Both are in fact equally fundamental and the courts have therefore in recent times tried to harmonise them by importing the Directive Principles in the construction of the Fundamental Rights. if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving

effect to a Directive Principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice

118. Parliament therefore amended Article 31C with a view to providing that in case of conflict Directive Principles shall have precedence over the Fundamental Rights in Articles 14 and 19 and the latter shall yield place to the former. The positive constitutional command to make laws for giving effect to the Directive Principles shall prevail over the negative constitutional obligation not to encroach on the Fundamental Rights embodied in Articles 14 and 19 "

Similarly, in a recent decision of the Apex Court in *Indian Medical Association vs. UOI* (2011 (6) Scale 86), the following observation rendered in *I.R.Coelho (Dead) By Lrs vs State Of Tamil Nadu* (2007 (2) SCC 1) has been very much highlighted and reiterated for the proposition that harmony and balance between fundamental rights and the Directive Principles is an essential feature of the basic feature of the Constitution: -"Regarding the status and stature in respect of fundamental rights in Constitutional scheme, it is to be remembered that Fundamental Rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. The object of the Fundamental Rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting Fundamental Rights and Directive Principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental Rights and Directive Principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution."

A careful reading of the above two rulings shows that harmony and balance between fundamental rights and directive principles is an essential feature of the Basis Structure of the Constitution. While so, giving primacy to one over the other is to disturb the harmony of the Constitution. The Apex Court has made it explicitly clear that both Fundamental Rights and Directive Principles are in fact equally fundamental and the courts have therefore in recent times tried to harmonise them by importing the Directive Principles in the construction of the Fundamental Rights. Further, if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. That is exactly the case herein. When the State Government had issued G.O. Ms. No.1119, dated 20.05.1981, which also states that the Government, after carefully examining the suggestions and recommendations of the Tamil Nadu Public Service Commission, found it proper and fair to appoint the candidate with

reference to the qualifications possessed by him/her and that it will not be administrative expedient to appoint the candidate possessing technical/professional qualifications like B.E., M.B.B.S., etc., to the post of Junior Assistant, this Court, as held by the Apex Court in *Minerva Mills* case, cannot condemn such restrictions contained in the G.O. as unreasonable for the reason that the said G.O. enables qualified professional degree holders MBBS/BE Graduates to be appointed in Class-II Posts. Therefore, it is not fair for the learned counsels for the petitioners to say that even candidates possessing technical and professional qualifications like BE and MBBS should be given the post of Junior Engineer or posts under Group-III and IV. This would not only work against the scheme of Article 39 (e) of the Constitution of India but also against the solemn rulings in the above case-laws of the Hon'ble Apex Court *Minerva Mills & Indian Medical Association Cases*. The positive command ordained by the Hon'ble Apex Court in *Minerva Mills* case clearly answers the argument of the learned counsels for the petitioner that, if a law is enacted for the purpose of giving effect to a Directive Principle and it imposes a restriction on a Fundamental Right, it would be difficult to condemn such restriction as unreasonable or not in public interest. It follows that the argument of the learned counsels for the petitioners stating that there is violation of Articles 14 and 16 in this case shall fall to ground in the light of another Judgment of the Apex Court rendered in *Unni Krishnan, J.P. v. State of A.P.* (AIR 1993 SC 2178), wherein, the Apex Court stressed much on the following observation made by it in its earlier decision reported in AIR 1976 SC 490 (*State of Kerala v. N.M.Thomas*): - "So far as the courts are concerned where there is no apparent inconsistency between the directive principles contained in Part 111, which in fact supplement each other, there is no difficulty in putting a harmonious construction, which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day. "

12. The other aspect of the matter is, while the petitioners herein challenge G.O. Ms. Nos.155 and 156, dated 16.07.1993, they seemingly failed to challenge the root and radix viz., G.O. Ms.No.1119, dated 20.05.1981, which states that the Government, after carefully examining the suggestions and recommendations of the Tamil Nadu Public Service Commission, found it proper and fair to appoint the candidate with reference to the qualifications possessed by him/her and that it will not be administrative expedient to appoint the candidate possessing technical/professional qualifications like B.E., M.B.B.S., etc., to the post of Junior Assistant. Therefore, when the Government have also taken a decision by issuing the aforesaid G.O. directing that the dependant of the deceased government servant who possesses the technical and professional qualification be appointed temporarily without referring to Employment Exchange and Tamil Nadu Public Service Commission to the initial or starting category of post for which his qualifications are the minimum prescribed, either in the department where the parent at the time of his/her death or in any departments in which such posts exist, for appointment of even diploma holders and Engineering Graduates in Group-II Services as Assistant Engineer, the petitioners are not entitled to challenge the subsequent G.Os. impugned herein, arising from the aforesaid G.O.

13. Further, when the Government in tune with Article 39 (a) & (e) of the Constitution of India,

by foreseeing the future exigency that the compassionate appointees, after their appointment, if for any reason, fail to qualify the selection process prescribed by the TNPSC, would lose forever the permanent solution given by way of compassionate appointment, re-examined the procedure and addressed the Commission, which agreed to dispense with the usual process; the appointments made under special circumstances cannot be said to be unjust. Therefore, G.O. Ms. No.156 stemming from G.O. No.1119 regularising the compassionate appointments squarely falls within the realm of Article 39

(e). Consequently, the argument of the petitioners that at least enabling the petitioners to take march over the compassionate appointees, who joined in service earlier to them about 11 years ago, the impugned G.Os. may be interfered with cannot be espoused.

14. Yet another argument advanced by Mr. Subramanian, learned counsel for the petitioners, is that the action of the respondents/Department in placing the compassionate appointees, who never underwent the examinations conducted by the TNPSC, above the direct recruits in the seniority list is totally unjustified, does not weigh much before this Court for the reason that G.O. No.156 came to be issued with a double object viz., (a) to help the genuine candidates, whose family's breadwinner died in harness, and (b) after appointment, to avoid the situation of being qualified in the TNPSC examination, as otherwise, the very purpose of extending the benefit through compassionate appointment would stand defeated.

15. Further, Rule-48 of the General Rules for the Tamil Nadu State and Subordinate Services empower the State Government to make compassionate appointments. The post of Assistant Engineers in the Highways Department is governed by the Highway Engineering Service Rules and, for appointment to the same, there are two modes prescribed viz., (a) Direct Recruitment and (b) Recruitment by Transfer. Undoubtedly, the said post falls within the purview of the Tamil Nadu Public Service Commission for the purpose of selection to the post by Direct Recruitment. The appointing authority being the Chief Engineer would furnish the estimate of vacancies to the Commission in the post of Assistant Engineer for every year to make direct recruitments to the said posts, whereupon, the Commission would complete the selection process and communicate the list of selected candidates to the appointing authority within a reasonable period of time. While so, in the case of respondents/compassionate appointees who came to be appointed as Assistant Engineers during 1988, 1992, 1994 and 1996, after their appointments, when the appointing authority submitted their names for regularisation, the Government by exercising Rule 48 of the General Rules of the Tamil Nadu State and Subordinate Services issued orders, regularising their services with effect from 16.7.1993. Also, on seeking concurrence of the TNPSC by the State Government as required under Regulation 16 (b) of the Tamil Nadu Public Service Commission Regulations, 1954, for making their appointments, the Commission, after verifying all the relevant records pertaining to the compassionate appointees, found that all of them are educationally qualified to hold the post of Assistant Engineer and that they had also satisfied the other requirements like indigent circumstances of the family, and so finding, ultimately, the TNPSC, in terms of Regulation 16 (b) of the Tamil Nadu Public Service Commission Regulations, 1954, accorded its concurrence. Therefore, applying the scheme of compassionate appointment in this particular set of cases in

terms of the professional qualification of the candidates and the indigent circumstances of the family of the deceased Government Servant, based on G.O. Ms. Nos.155 and 156, stemming from G.O. Ms. No.1119, dated 20.5.1981, can never be found fault with or criticised by the petitioners under the pretext that the said G.Os interfere with their rights guaranteed under Article 16 (1) and (2) of the Constitution of India. Further, even 11 years prior to the appointment of the petitioners through Direct Recruitment, the respondents/compassionate appointees joined the services of the Highways Department, therefore, at this point of time, the prayer made to deprive them of their legal right for promotion is legally not sustainable and also, the petitions containing such prayer are clearly barred by limitation.

16. Therefore, the consequential relief sought for by the petitioners that the compassionate appointees, who were serving in the Department even before their recruitment, should be sidelined allowing the petitioners to take march over them, in the peculiar set of facts of the instant case, cannot be granted. It follows that the argument advanced by the learned counsel for the petitioners that the impugned G.Os. were issued contrary to the scheme of Article 309 of the Constitution does not merit consideration.

17. Consequently, this Court holds that the prayer sought for by the petitioners to declare that the compassionate appointments given to the respondents/compassionate appointees are illegal and that the petitioners should be given preference over them in the matter of promotion cannot be granted for the reason that the petitions are hopelessly barred by limitation in challenging the G.Os. of the year 1991 as well as 1981 and further, in the given set of facts, all the compassionate appointees possessed requisite professional qualification to hold the post and to grant such appointment, the Government not only considered all relevant aspects in terms of relevant rules but also proceeded to regularise the appointments in terms of the concurrence of the TNPSC through which the appointing authority of the Highways Department recruit the Assistant Engineers. It follows that, at this point of time, it is too vague to stretch a prayer to deprive the prior entrants so that the later entrants could have a march over them, which course would only work against the settled principles of law.

For the foregoing reasons, this court does not find any merit whatsoever in the writ petitions to grant the prayers sought for and accordingly, they are dismissed. However, there will be no order as to costs. Connected Miscellaneous Petitions are closed.