

Afruja Sakia Yasmin Ahmed Vs District and Sessions Judge and Others

Court: Gauhati High Court

Date of Decision: Aug. 8, 2008

Acts Referred: Constitution of India, 1950 " Article 14, 16, 309

Citation: (2008) 119 FLR 371 : (2009) 1 GLR 82 : (2008) 4 GLT 140

Hon'ble Judges: Jasti Chelameswar, C.J; Asok Potsangbam, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Asok Potsangbam, J.

Heard Mr. H. Rahman, learned Counsel for the petitioner and Mrs. G. Goyal, learned Counsel as well as Mr. B.J.

Ghosh, learned Counsel appearing for the respondents.

2. The question involved in this writ petition is whether the compassionate appointments on the ground of medical invalidation satisfy the

requirements of Article 16 of the Constitution of India or not. Before advertng to the said question, the background facts leading to the riling of this

writ petition are stated in brief as follows:

3. Petitioner"s father, Shri Aftabuddin Ahmed, who was working as Head Assistant in the Office of the District and Sessions Judge, Golaghat, was

due to retire on superannuation w.e.f.31.3.2004. Two months before the due date of superannuation, Shri Aftabuddin Ahmed, on medical ground,

applied for voluntary retirement on 7.1.2004 and the learned District and Sessions Judge, Golaghat accepted the aforesaid application for

voluntary retirement on medical ground and allowed Shri Aftabuddin Ahmed to go on voluntary retirement w.e.f.7.1.2004. On the following day,

i.e. 8.1.2004, the petitioner submitted an application to the Secretary(Judicial), Govt. of Assam through the District and Sessions Judge, Golaghat

for consideration of her appointment as LDA in the Office of the District and Sessions Judge, Golaghat, on compassionate ground in accordance

with the Govt. O.M. under No. ABP-357/80/137 dated 9.9.1983. Para-9 of the aforesaid O.M., under which the appointment on compassionate

ground was sought by the petitioner, is reproduced hereinbelow:

9. The benefit of compassionate appointment may be extended to a son, daughter or other near relative of a Government servant retired on

medical grounds under the provisions of Rule 82 of the Assam Services (Pension Rules, 1969, if the appointing authority is satisfied that the family

is in indigent circumstances and in immediate need of assistance.

4. The Deputy Secretary, Judicial Department, Govt. of Assam, conveyed approval of the Government for appointment of the petitioner on

compassionate ground in the establishment of District and Sessions Judge, Golaghat, by a communication under No.JDJ-91/2000/102 dated

17.2.2004. On failing to get necessary appointment orders from the District and Sessions Judge, Golaghat, despite approval of the Government, as

discussed above, the petitioner placed two applications - one before the Registrar General of this court and another before the Administrative

Judge of this Court, with request to issue necessary directives for issuing the appointment order. By a letter dated 15.9.2005, the Registrar General

issued a communication under No.H.C.VII-54/92/4562/A requesting the District and Sessions Judge, Golaghat to do the needful as per rules, with

intimation to the Registry.

5. The grievance of the petitioner is that despite approval of the Government and request letter from the Registrar General of this court, as

mentioned above, the District and Sessions Judge, Golaghat has failed to issue the necessary appointment letter. Hence, this petition for a direction

from the court.

6. An affidavit-in-opposition has been filed by the District and Sessions Judge, Golaghat by narrating long sequence of events and also by referring

to various communications/correspondents and queries made by the District and Sessions Judge, but it is not discernible whether the above-

mentioned affidavit is supporting or opposing the case of the petitioner. Be that as it may, we are more concerned to adjudicate and resolve the

issue relating to compassionate appointment on medical invalidation.

7. By reasons of Articles 14 and 16 of the Constitution of India, great hopes and aspirations are generated in the minds of the peoples of the

country that employment shall not be given on descent. Public employment is considered to be public wealth. All the public employment must

conform to the requirements of Article 14 and 16 of the Constitution of India, and as held by the Apex Court in State of Karnataka v. Uma Devi

reported in (2006) 4 SCC 7, any appointment in violation of the Constitutional scheme for employment would be a nullity. In other words, a public

employment should be made through public notice, competitive test and in accordance with the concerned service rules framed under Article 309

of the Constitution of India.

8. General object and purpose for compassionate appointment have been explained by the Apex Court in various cases and it may be appropriate

to reproduce one of such explanations made by the Apex Court in Director of Education (Secondary) and Another Vs. Pushpendra Kumar and

Others, and the same is reproduced below:

The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden

crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure 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,

a provision is made for giving gainful employment to one of the dependants of the deceased who may be eligible for such appointment. Such a

provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a

provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An

exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right

conferred by the main provision. Care has, therefore, to be taken that a 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 other persons who are eligible for appointment to seek

employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate

grounds of the dependant of a deceased employee.

9. An exception has been carved out to the doctrine of equality enshrined in Articles 14 and 16 of the Constitution of India, with the approval of

the court, for grant of compassionate appointment to the son, unmarried daughter, wife and husband of the deceased employee to enable them to

tide over the financial distress and hardship caused due to sudden death of the bread-earner. The question to be considered is how many

exceptions can be allowed to be made to Article 16 of the Constitution of India, having regards to the scope of employment and the plight of the

general unemployed class.

10. The constitutional validity of various schemes made by the State and the Union Government for affording compassionate appointment without

strictly following the procedure prescribed by the recruitment rules of the post came to be considered by the Apex Court in Auditor General of

India and others Vs. G. Ananta Rajeswara Rao, The only question that arose for decision before the Apex Court in the aforesaid case is whether

the memorandum (scheme for compassionate appointment) is violative of Article 16(2) of the Constitution of India, which is reproduced

hereinbelow:

16(2). No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or

discriminated against in respect of, any employment or office under the State.

11. In the aforesaid case, the High Court held that the appointment of son, daughter, near relatives of the erstwhile employee of the Government

tantamount to employment on descent and therefore, it is violative of Article 16(2). Appeal filed against the aforesaid findings of the High Court,

was partly allowed by the Apex Court and relevant para-5 of the judgment is reproduced below:

5. A reading of these various clauses in the Memorandum discloses that the appointment on compassionate grounds would not only be to a son,

daughter or widow but also to a near relative which was vague or undefined. A person who dies in harness and whose members of the family need

immediate relief of providing appointment to relieve economic distress from the loss of the bread-winner of the family need compassionate

treatment. But all possible eventualities have been enumerated to become a rule to avoid regular recruitment. It would appear that these

enumerated eventualities would be breeding ground for misuse of appointments on compassionate grounds. Articles 16(3) to 16(5) provided

exceptions. Further exception must be on continuously valid and permissible grounds. Therefore, the High Court is right in holding that the

appointment on grounds of descent clearly violates Article 16(2) of the Constitution. But, however it is made clear that if the appointments are

confined 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 breadwinner to relieve the economic distress of the members of the family, it is unexceptionable. But in other cases it cannot be a rule to take

advantage of the Memorandum to appoint the persons to these posts on the ground of compassion. Accordingly, we allow the appeal in part and

hold that the appointment in para 1 of the Memorandum is upheld and that appointment on compassionate ground to a son, daughter or widow to

assist the family to relieve economic distress by sudden demise in harness of government employee is valid. It is not on the ground of descent

simpliciter, but exceptional circumstance for the ground mentioned. It should be circumscribed with suitable modification by an appropriate

amendment to the Memorandum limiting to relieve the members of the deceased employee who died in harness from economic distress. In other

respects Article 16(2) is clearly attracted.

12. The Apex Court, therefore, clearly held that the appointment on compassionate ground in favour of son/daughter or widow of a government

servant, who died in harness, to assist the family to relieve economic distress by sudden demise of the employee is valid and it is not the ground of

descent simpliciter, but exceptional circumstance for the grounds mentioned. The Apex Court has also observed that in other respects Article

16(2) is clearly attracted.

13. There cannot, therefore, be any doubt whatsoever that the Apex Court has put its seal in the matter of grant of compassionate appointment on

any ground other than death.

14. Similar question, now being considered by this court, came to be considered by the Full Bench of the Andhra Pradesh High Court in

Government of Andhra Pradesh and Others Vs. D. Gopaiah, . The Full Bench of A.P. High Court, after having considered various judgments

rendered by the Apex Court, in respect of compassionate appointment including Auditor General of India and Ors. (supra), came to the conclusion

and held that compassionate appointment on the ground of medical invalidation does not satisfy the requirements of Article 16 of the Constitution

of India and any policy decision taken by the State in this regard was also held unconstitutional. Paras-13 to 15 of the judgment reads as follows:

13. The schemes for grant of compassionate appointment on medical invalidation, as noticed hereinbefore, had been made wider and wider. The

State has for one reason or the other compromised with the basic principles underlying grant of public employment and has deviated from the

constitutional norms; sometimes it widened the scope and ambit of grant of appointment on compassionate ground to such an extent that it had to

backtrack its steps. The State's policy decision in this regard had never been on firm root. They took different steps at different times depending

on the whims and caprice of the concerned officer or acted on pressure of the Employees' Union.

14. The law interpreting Articles 14 and 16 of the Constitution of India in this regard has also undergone ups and downs.

15. All employees one day or the other have to retire on superannuation on attaining the age prescribed therefore. Some persons may be

unfortunately forced to take voluntary retirement on medical grounds. Can sympathy for those few unfortunate permit the State to evolve a scheme,

which would be violative of Article 16(2) of the Constitution of India? Should the society tolerate such schemes, which are observed more in their

breach? Abuse or misuse of such scheme is for all intent and support stands admitted.

15. The aforesaid judgment of the Full Bench of the A.P. High Court was approvingly quoted in the recent judgment of the Apex Court, reported

in National Institute of Technology and Others Vs. Niraj Kumar Singh,

16. In the instant case, as noticed above, the petitioner claims that she should be appointed under the scheme for compassionate appointment on

the ground that her father, Shri Aftabuddin Ahmed, had taken voluntary retirement on medical ground w.e.f. 7.1.2004, two months before his

retirement on superannuation, and it is on record that on the next day, i.e. 8.1.2004, the application for compassionate appointment under the

compassionate appointment scheme was made by the petitioner. It is nothing but perpetuation of descent in office, which is prohibited by Article

16(2) of the Constitution of India, as discussed above. As already discussed above, with the approval of the court only an exception has been

carved out to Article 16 of the Constitution of India for appointment of son and daughter, wife and husband, etc. of a deceased employee for the

purpose of enabling the family in distress to overcome the crisis or the financial hardship caused in the family due to the sudden death of the bread-

earner and no further exception can be read into Article 16. Reading of further exception to Article 16 is not only prohibited but it will also violate

the general provisions for employment under the constitutional scheme of employment.

17. Having considered the law laid down by the Apex court and also the findings of the Full Bench of A.P. High Court, which has directly dealt

with the issue in question, as discussed above, we are of the opinion that para-9 of the office memorandum No. ABP.357/80/137 dated 9.9.1983

(for appointment on compassionate ground), as extracted above, does not satisfy the requirements of Article 16 of the Constitution of India and as

such same is declared as illegal and unconstitutional. Since writ of mandamus can be issued only for enforcement of legal obligation and in view of

the conclusion above, writ, as prayed for, cannot be issued.

18. In view of the above findings, the writ petition is dismissed.

19. No. costs.

20. Registry is directed to send a copy of the judgment and order to the Secretary (Judicial), Govt. of Assam for doing the needful.