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Court : Patna

Decided On : Feb-12-1999

Judge : Ashok Kumar Ganguly, J.

Appeal No. : C.W.J.C. No. 10217 of 1998

Appellant : Rupendra Kumar Singh

Respondent : The State of Bihar and ors.

Disposition : Petition Dismissed

Judgement :

Ashok Kumar Ganguly, J.

1. This Writ Petition has been filed for issuance of a writ of mandamus directing the authorities of Patna University (hereinafter called the said University) to consider the petitioner's case for appointment to Class III post in place of the post to which he has been appointed which is a Class IV post in view of the petitioner's educational qualification.

2. Though in this case notice was sent to respondent No. 5 pursuant to the order of this Court, the respondent No. 5 did not appear. This Court, having regard to the order which it is passing, need not wait for the appearance of respondent No. 5.

3. The facts of the case, shortly put are that the petitioner's father Banwari Rai was an employee in the Patna College on a Class IV post of Peon. The father of the petitioner died in harness on 5.6.1998. Thereupon the petitioner applied for appointment on compassionate ground in the prescribed proforma. Then it appears that his application for compassionate appointment was considered by the compassionate Committee and the petitioner was appointed to the post of Peon as would appear from Annexure. The petitioner submits that respondent No. 5 Md, Eqbal Ahsan has been appointed on the post of routine clerk whose educational qualification is that of a graduate. The petitioner's main grievances are that he should have been appointed on the post of Clerk having regard to his higher qualification than respondent No. 5, who even without having a post graduate degree has been appointed to the post of Clerk.

4. In this matter learned Counsel for the respondent Patna University has appeared and filed a counter affidavit. The stand of the respondent University is that appointments have been made on compassionate ground to the posts where vacancies have been created as a result of death. In other words, it has been contended that in the case of the petitioner vacancy was created as a result of the death of his father Sri Banwari Rai. Such vacancy was created in the post of peon and the petitioner was appointed as a Peon. In so far as respondent No. 5 is concerned, vacancy was created on the death of Mr. Ansari, father of respondent No. 5 and such vacancy was created in the Ministerial Post and as such respondent No. 5 was appointed on a ministerial post. It has also been stated that Annexure-2 will show that appointments have been made only where the vacancies have been created as a result of the death of the father/guardian of the employees who have been appointed on compassionate consideration.

5. Assailing this stand of the University learned Counsel for the petitioner submits that the appointment of respondent No. 5 to the post which has been created as a result of death of his father is violative of the provisions contained under Article 16(2) of the Constitution of India. In support of this contention, learned Counsel for the petitioner has relied on two judgments of the Supreme Court, The first of these judgments is in the case of *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh and Ors.* reported in : [1961]2SCR931 and the second judgment on which

reliance has been placed is in the case of Smt. Phoolwati v. Union of India and Ors. reported in : AIR 1991 SC469 .

6. Learned Counsel for the University, on the other hand, has relied on two Judgments of the Supreme Court in the case of Umesh Kumar Nagpalv. State of Haryana and Ors. reported in : [1994]3SCR893 and also in the case of State of Bihar and Ors. v. Samsuz Zoha, reported in : (1996)IILLJ647SC .

7. It is not in dispute that both the appointees in this case, namely, the petitioner and respondent No. 5 are appointees on compassionate ground. They have not been appointed on the basis of open competition and selection. Appointment on compassionate ground itself is an exception to the provisions of Articles 14 and 16 of the Constitution. Strictly speaking if the provisions of Articles 14 and 16 are followed, then appointment on compassionate ground cannot be permitted. Learned Judges of the Supreme Court has held it so in the case of State of Haryana and Ors. v. Rani Devi and Anr. reported in : AIR 1996 SC2445 . Considering several case on the point, the learned Judges came to the conclusion in paragraph 5 of the judgment that 'this right which is being extended to a dependent of the deceased employee is an exception to the right granted to the citizens under Articles 14 and 16 of the Constitution.' Therefore, an appointes on compassionate ground cannot raise the plea that the appointment of other appointee is violative of Article 16(2) of the Constitution of India.

8. Article 16(2) of the Constitution of India does nothing but affirms, in a negative way, the guarantee which has been given under Sub-Article (1) of Article 16 of the Constitution of India which speaks of equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The same is nothing but a fact equality clause under Article 14. The said guarantee of equality has been reiterated in Sub-Article (2) of Article 16 of the Constitution, though cast in a negative form. The question of reservation under Article 16 of the Constitution comes under Sub-Articles (3) and (4) of Article 16. Sub-Articles (1) and (2) of Article 16 of the Constitution are totally silent on that matter. But the Hon'ble Supreme Court has held in the case of Auditor General of India and Ors. v. G. Ananta Rajeswara Rao reported in : (1994)IILLJ812SC , that appointment on

compassionate ground is not violative of Article 16(2) of the Constitution of India. Therefore, this question has already been considered by the Supreme Court. The rationale for this finding of the Supreme Court is that when exceptional circumstance do exist as a result of sudden death of the bread earner, such appointment are made in order to relieve the family of the deceased of the economic distress and such appointment is not an given on merit but out of compassion. So a person who has got such an appointments on compassion which is a favour, in view of his economic distress, cannot assail the appointment of another person on compassionate ground as being in violation of Article 16(2) of the Constitution of India.

9. The ratio of the Constitution Bench judgment of the Supreme Court in the case of Gazula Dasratha Rama Rao (supra) is not applicable to the facts of this case. In that Constitution Bench what came up for consideration before the Supreme Court was the constitutional validity of Section 6(1) of the Madras Hereditary Village Offices Act, 1895. Section 6(1) of the said Act is not out below-

Section 6(1) In any local area in which this Act is in force the Board of Revenue may, subject to rules made in this behalf under Section 20, group or amalgamate any two or more villages or portions thereof so as to form a single new village or divide any village into two or more villages and, thereupon, all hereditary village offices (of the classes defined in Section 3, Clause (1) of this Act) in the villages or portions of villages or village grouped, amalgamated or divided as aforesaid, shall cease to exist and new offices, which shall also be hereditary shall be created for the new village of villages. In choosing persons to fill such new offices, the Collector shall select the persons whom he may consider the best qualified from among the families of the last holders of the offices which have been abolished.

(emphasis added)

10. From the underlined portion of the said section it will appear that while exercising the power of selection, the Act casts an obligation upon the Collector to select persons only from among the family members of the last holders and, therefore, in that case the selection was confined only from the members of the particular family and the members of public had not right to be selected for such

appointment under Section 6(1) of the said Act. The learned Judges of the Constitution Bench of the Supreme Court held that the said office is an office under the State and the citizens have an equal opportunity to appointment to such office. Therefore, the aforesaid reservation is not permissible under the Constitution and on that ground the same was struck down. But in the instant case the factual position is totally different. Here the petitioner has got his appointment as a result of a sort of reservation which is created out of economic reality of life and in order to enable him to tide over the sudden economical distress in which the family is thrown as a result of the premature demise of the bread earner. The Apex Court has accepted that as an exception to the equality clause. Therefore, a person getting an appointment on such exceptional circumstances cannot complain against similar appointment being obtained by another fellow employee of his.

11. The main grievance of the petitioner seems to be that he has better academic qualification and as such he should be appointed in Class III post. It is well known that appointment on compassionate ground is not an appointment on merit and here respective merits of the candidates are not considered. In this context the observation made in the Supreme Court judgment in the case of Smt. Phulwati (supra) cannot be construed as the part of the ratio of that judgment. The Supreme Court while directing appointment on compassionate ground observed that appointment on compassionate ground be made commensurate with the educational qualification of the candidate. This direction of the Apex Court was by way of guidelines in the facts of that case and cannot be treated as any statement of law. On the other hand from the other decision cited by the learned Counsel for the respondents in the case of Umesh Kumar Nagpal (supra) it appears from paragraph Nos. 4 and 5 that this question came up for consideration before the Supreme Court and the Supreme Court observed that 'if the dependent of the deceased employee finds it below his dignity to accept the post offered, he is free not to do so and the Supreme Court was very much clear that this post is not offered to cater to his status but to see the family through the economic calamity. And the view of the Supreme Court is that appointment on compassionate ground is not on merit but in order to help the family in question which has fallen on bad days. Therefore, the aforesaid observation in the case of Smt. Phoolwati (supra)

cannot be construed as part of the ratio of the judgment in the case.

12. In fact it has been very categorically laid down by the Supreme Court in the case of *Madhav Rao Scindia v. Union of India* reported in : [1971]3SCR9 , that it is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.

13. Therefore, considering all these aspects of the matter, this Court is unable to grant any relief to the petitioner by directing the respondent University to appoint the petitioner on Class III post on compassionate ground. The stand of the University that just because there are vacancies in Class III post, all such vacancies cannot be filled up on compassionate ground is also justified.

14. In that view of the matter, this Court does not pass any order in favour of the petitioner save and except observing that if there is any open selection for appointment to Class III post and if the petitioner applies pursuant to such selection, in that case the petitioner's case may be considered on merits and in accordance with law. It is, however, made clear that if the petitioner appears in such selection process for recruitment to the post of Clerk, in that case his candidature should not be debarred on the ground of age and his age should be suitably relaxed for the period during which he worked on Class IV post.

15. With the above observation, this Writ Petition is dismissed. There will be no order as to cost.

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