



**AFR**

**Court No. - 29**

**Case :-** WRIT - A No. - 12844 of 2018

**Petitioner :-** Ankur Gautam And Another

**Respondent :-** State Of U.P. And 2 Others

**Counsel for Petitioner :-** Prabhakar Awasthi, Manvendra  
Pratap Singh

**Counsel for Respondent :-** C.S.C.

And

**Case :-** WRIT - A No. - 10601 of 2018

**Petitioner :-** Prasant Kumar Yadav And 23 Ors.

**Respondent :-** State Of U.P. And 2 Ors.

**Counsel for Petitioner :-** Seemant Singh

**Counsel for Respondent :-** C.S.C.

**Hon'ble Pankaj Mithal, J.**

**Hon'ble Prakash Padia, J.**

Heard Sri Prabhakar Awasthi and Sri Seemant Singh, learned counsel for the petitioners in the two writ petitions and the learned Standing counsel.

The petitioners are the applicants for compassionate appointment on the post of Sub-Inspector (Civil Police) U.P. They are all claiming appointments on the death of their father/husband who died in harness while in service of the police department.

The petitioners by these writ petitions are seeking quashing of Rule 5 (1) Part-III of U.P. Sub Inspector and Inspector (Civil Police) Service Rules, 2015 to the extent it puts restriction of 5% of the posts to be filled up by direct recruitment against the vacancies arising on sanctioned posts from the dependents of the police personnel and the G.O., dated 18.9.2015 issued by the Secretary, Government

of U.P., Lucknow in so far as it provides for conducting objective type examination for the recruitment of dependents of police personnel on compassionate basis if the number of applications are in excess to the number of the posts available for compassionate appointment.

The aforesaid service rules in part III provides for recruitment to various categories of posts ie. Sub-Inspector and Inspector in the police service of the State of U.P.

Rule 5 (1) of the Rules provides that 50% of the post of Sub-Inspectors shall be filled up by direct recruitment and the balance 50% by promotion through the Board on the basis of seniority subject to rejection of the unfit from amongst the substantively appointed Head Constables of the civil police. A note is appended to the aforesaid Rule which provides that out of the 50% posts to be filled up by direct recruitment, the dependents of the police personnel dying during service shall be recruited by the Board as per the policy of the Government subject to the restriction that every year such posts shall not exceed more than 5% of the posts to be filled up by direct recruitment as against the vacancies arising in the previously sanctioned posts of Sub-Inspector of police.

In the present writ petition we are basically concerned with the note which has been appended to Rule 5 (1) of the Rules.

Rule 5 (1) of the Rules along with the note is reproduced herein below for the sake of convenience:-

**Part-III Recruitment**

*“5. Recruitment to the various categories of posts in the service shall be made from the following sources:*

*(1) Sub-Inspector*

*(i) Fifty percent by direct recruitment through the*

Board.

**Note:-** Dependents of personnel of police department deceased during service who apply for the posts of Sub Inspector of Police in the dependent of deceased category shall be recruited by the Board as per the policy decided by the Government. Restriction being that every year such posts shall not be more than 5 percent of the posts to be filled by direct recruitment as against the vacancies arising in the previously sanctioned posts of Sub-Inspector of Police.

(ii) Fifty percent by promotion through the Board on the basis of seniority subject to the rejection of the unfit from amongst the substantively appointed Head Constables of Civil Police who have been found successful in physical efficiency test of qualifying nature and have completed three years of service as such on the first day of the year of recruitment.

(iii) Head Constables Civil Police promoted on the ex-cadre posts of Sub-Inspectors' civil police who fulfill the requirement mentioned in clause (ii) shall also be eligible for promotion for the post of Sub-Inspector.”

The Government Order dated 18.9.2015 *inter alia* provides that in the event number of applications seeking compassionate appointments are more than the number of posts/vacancies determined to be to be filled up by compassionate appointments, the candidates shall be subjected to objective test and appointments would be made strictly in accordance with the merit of the marks obtained in the said test. The aforesaid offending part of the Government Order reads as under:-

“यदि मृत पुलिस कर्मियों के आश्रितों की श्रेणी के अंतर्गत भर्ती हेतु, किसी पद पर आवेदन देने वाले अभ्यर्थियों की संख्या, उस

पद के लिए मृतक आश्रित श्रेणी के निर्धारित पदों से अधिक हो, तो अभ्यर्थियों से वस्तुनिष्ठ प्रकार की परीक्षा में बैठने की अपेक्षा की जायेगी एवं इस पद के लिए अंतिम चयन सूची, उस पद के लिए मृतक आश्रित श्रेणी के अन्तर्गत भर्ती हेतु निर्धारित पदों की संख्या के अनुसार, इस परीक्षा में प्राप्त अंको के आधार पर, श्रेष्ठता क्रम के अनुसार बनाई जाएगी।”

The petitioners contend that the aforesaid provisions are *ultra vires* as there can be no embargo on the maximum number of appointments to be made on compassionate basis and subjecting the dependents of the deceased employee to any examination amounts to adopting the regular mode of recruitment which frustrates & nullifies the very purpose or object of compassionate appointment. It is contended that putting of such conditions not only militates with the object of compassionate appointment but is otherwise also arbitrary, discriminatory, unreasonable and unfair.

In short, what is contended is that the aforesaid offending provisions and the conditions of the Government Order are *ultra-vires* to Articles 14 and 16 of the Constitution of India and is against the very purpose of compassionate appointment, though it had not been pleaded in so many words in the writ petition.

It is settled in ***P. Krishnamurthy***<sup>1</sup> that a Statute or a law or a subordinate legislation can be declared to be invalid only if it is beyond the legislative competence, or is violative of the Constitution of India or the Fundamental

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1 State of TN Vs. P. Krishnamurthy (2006) 4 SCC 5172 also see Cellular Operators Association and others Vs. Telecom Regulatory Authority of India and others (2016) 7 SCC 703

Rights, or is repugnant to the laws of the land or otherwise do not conform to the Statute under which it is made or if the procedure prescribed for making it has not been followed. At the same time, the validity of any law has to be tested on the anvil of Article 14 and 16 of the Constitution.

None of the above grounds have been pleaded and canvassed before us so as to get the above provision of the Rules and the conditions of the Government Order declared to be *ultra-vires*, except that the aforesaid provision and condition is arbitrary in nature and is unfair & unreasonable. Therefore, what we have to test is whether the note appended to Rule 5 (1) of the Rules or the condition of the Government Order referred to above is unfair, arbitrary or unreasonable so as to render them invalid.

It is well recognized that appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit having regard to Articles 14 and 16 of the Constitution of India but compassionate appointment is one of the exception to the above rule which can not be claimed as of right. Its very purpose is only to meet out the sudden financial crisis which may occur in the family on account of death of the bread earner.

In this regard, it would be profitable to cite and quote from the case of **Sajad Ahmad Mir**<sup>2</sup>:-

*“ Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in*

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2 State of J & K and others Vs. Sajad Ahmad Mir, (2006) 5 SCC 766

*consonance with Article 14 of the Constitution. On the basis of the competitive merits, an appointment should be made to public office. This general rule should not be departed from except where compelling circumstances demand, such as, death of the sole breadwinner and likelihood of the family suffering because of the set back. Once it is proved that in spite of death of breadearner, the family survived and substantial period is over, **there is no necessity to say 'goodbye' to the normal rule of appointment and to show favour to one at the cost of interest of several others ignoring the mandate of Article 14 of the Constitution.**"*

A similar view was expressed by the Supreme Court in **MGB Gramin Bank**<sup>3</sup> which reads as under:-

*"Every appointment to public office must be made by strictly adhering to the mandatory requirements of Articles 14 and 16 of the Constitution. An exception by providing employment on compassionate grounds has been carved out in order to remove the financial constraints on the bereaved family, which has lost its bread-earner. Mere death of a Government employee in harness does not entitle the family to claim compassionate employment. The Competent Authority has to examine the financial condition of the family of the deceased employee and it is only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job is to be offered to the*

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<sup>3</sup> MGB Gramin Bank Vs. Chakrawarti Singh AIR 2013 SC 3365

*eligible member of the family. More so, the person claiming such appointment must possess required eligibility for the post. The consistent view that has been taken by the Court is that compassionate employment cannot be claimed as a matter of right, as it is not a vested right.”*

In **V. Shivamurthi**<sup>4</sup> it has been laid down as under:-

*“(a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are a well-recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.*

*(b) Two well-recognized contingencies which are carved out as exceptions to the general rule are;*

*(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the breadwinner while in service.*

*(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the breadwinner.*

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4 V. Shivamurthi Vs. State of Adhra Pradesh & Others (2008)  
13 SCC 730

*Another contingency, though less recognized, is where land holders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project-affected persons. (Particularly where the law under which the acquisition is made does not provide for market value and solatium, as compensation).*

***(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.***

*(d) Compassionate appointments are permissible only in the case of a dependent member of the family of the employee concerned, that is, spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, Classes III and IV posts and the crisis cannot be permitted to be converted into a boon by seeking employment in class I or II posts.”*

A Full Bench of this Court in the case of **Shiv Kumar Dubey**<sup>5</sup> laid down the principles governing the compassionate appointment under the U.P. Recruitment Dependents of Government Servants Dying In Harness Rules, 1974 and held that there is no general or vested right for compassionate appointment which can be claimed

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5 Shiv Kumar Dubey Vs. State of U.P. & Others 2014 AWC

only where the scheme or the Rules provide and that too according to said scheme/Rules.

The relevant observation of the Full Bench is as under:-

*“We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:*

*(i)A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;*

*(ii)There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;”*

It is well established that the appointments on compassionate basis has to be made conforming to the Rules and Regulations or the administrative instructions issued in that regard.

In this connection, a reference may be had to the decision of the Supreme Court in the case of **Shashank**

**Goswami & Another**<sup>6</sup> wherein it has been observed as under:-

*“There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate grounds is based on the premise that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right.*

*As a rule public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate grounds is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, the applicant cannot claim appointment in a particular class/group of post. **Appointments on compassionate grounds have to be made in accordance with the rules, regulations or administrative instructions taking into***

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6 Union of India & Another Vs. Shashank Goswami & Another (2012) 11 SCC 307

***consideration the financial condition of the family of the deceased.”***

Once again the Supreme Court in the case of **Prabhat Singh**<sup>7</sup> held that compassionate appointment is not a gift to all those who seeks court's intervention and the Court may issue directions in the case where appointment on compassionate ground, could deprive a really needy family requiring financial support, and thereby, push into penury a truly indigent, destitute and impoverished family. Relevant paragraphs of the aforesaid judgment are quoted below:-

*"We are constrained to record that even compassionate appointments are regulated by norms. Where such norms have been laid down, the same have to be strictly followed....The very object of making provision for appointment on compassionate grounds, is to provide succor to a family dependent on a government employee, who has unfortunately died in harness. On such death, the family suddenly finds itself in dire straits, on account of the absence of its sole bread winner. Delay in seeking such a claim, is an anti thesis, for the purpose for which compassionate appointment was conceived. Delay in raising such a claim, is contradictory to the object sought to be achieved...The Courts and Tribunals should not fall prey to any sympathy syndrome, so as to issue directions for compassionate appointments, without reference to the prescribed norms. The Courts are not supposed to carry Santa Claus's big bag on Christmas eve, to disburse the gift of*

<sup>7</sup> Chief Commissioner, Central Excise and Customs, Lucknow & Ors. Vs. Prabhat Singh (2012) 13 SCC 412

*compassionate appointment, to all those who seek a court's intervention. The Courts and Tribunals must understand, that every such act of sympathy, compassion and discretion, wherein directions are issued for appointment on compassionate grounds, could deprive a really needy family requiring financial support, and thereby, push into penury a truly indigent, destitute and impoverished family. Discretion is therefore ruled out. So are, misplaced sympathy and compassion."*

Now considering the aforesaid offending provisions vis-a-vis the legal position as stated above, we find that the aforesaid Rules/provisions are not in conflict with any statutory or constitutional provision and at the same time are neither arbitrary or discriminatory, they are rather fair and reasonable. They only places a reasonable restriction on compassionate appointment for the reason that if a very large number of posts/vacancies are allowed to be filled up on compassionate basis circumventing the competitive process it would deprive the candidates of the open market from getting recruited and a stage would come when almost all vacancies would stand filled up without adopting the statutory provision of holding a competitive examination. Therefore, necessity to fix an upper limit for filling vacancies through compassionate appointment is not unreasonable or arbitrary.

The condition to face the objective test is limited only in the event when there are large number of candidates seeking compassionate appointment in comparison to the limited posts meant to be filled up on compassion so that best of them may be selected and appointed. It only provides for *inter se* selection amongst

those claiming compassionate appointment. The said selection in no way compels the candidates for compassionate appointment to face competition with those seeking regular direct appointment. Thus, it in no way offends the object of compassionate appointment.

It must be remembered that there is always a presumption in favour of Constitutionality or the validity of a subordinate legislation. It is the burden upon the person attacking the validity of the legislation to establish that it is invalid. The petitioners herein this petition have not pleaded specifically as to how the aforesaid provisions offends Articles 14 and 16 of the Constitution of India and as such have failed to discharge their burden in this regard.

In view of the above, we are of the opinion that note appended to Rule 5 (1) of the aforesaid Rules as regards the maximum number of persons to be given compassionate appointment in a year and the condition referred to above of the Government Order dated 18.9.2015 to subject the candidates for compassionate appointment to objective test in case their number exceeds the number of vacancies required to be filled up on the basis of compassion, are in no way unfair and unreasonable or violative of Articles 14 and 16 of the Constitution of India.

It may be important to observe here that as seen from the repeated decisions of the Apex Court, compassionate appointment is not a normal mode of appointment rather an exception to Rule of recruitment from open market through competition. In one form it provides for a kind of reservation in favour of the dependents of the deceased employees. Such kind of reservation is not envisaged in the Constitution but is by way of social justice which in practice gives rise to back-

door appointments avoiding competition and can not be countenanced with Article 14 and 16 of the Constitution of India.

In view of the above and looking to the very large number of the cases of compassionate appointment coming before the Court regularly from all departments we are of the opinion that either some very stringent restrictions have to be placed or some alternative methods have to be found out so that the aforesaid social purpose is achieved without substantially offending the selection of meritorious candidates. In other words, it is essential to device a method which may maintain an equilibrium between the substantive law and the social justice.

In this regard one suggestion may be to allow the dependents of employees dying during service to continue receiving salary and emoluments as the family was receiving during the life time of the deceased employee for a particular period say for 3 or 5 years or till his due retirement whichever is earlier to meet out the sudden financial crisis due to the loss of the bread earner instead of giving any compassionate appointment so that the appointments on the posts be made in the regular manner by the process of selection provided in the Statute and at the same time the family concerned may not be deprived of the financial assistance which was otherwise available to it. This would promote harmony of social justice with the service jurisprudence without compromising with the quality/standard of appointments.

With the aforesaid suggestion and with the hope that the legislature would revisit the Rules and Regulations regarding compassionate appointment through out the State in all departments and come out with a better policy or legislation which may harmonize the need of such

families without defeating the statutory provisions of making regular appointments on the basis of competition/selection, we dismiss the writ petition as devoid of merit.

The Registry is directed to send a copy of this judgment to the Chief Secretary, Government of U.P., Lucknow for circulation to all government departments of the State, local bodies and corporations for necessary revisiting their Rules/scheme/policy of compassionate appointment.

29.4.2019

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