

Director of Education (Secondary) and Another

Vs

Pushpendra Kumar and Others

Civil Appeals Nos. 2709 to 2722 of 1998

(S. Saghir Ahmed, M. Srinivasan, S. C. Agrawal JJ)

13.05.1998

JUDGMENT

S. C. AGRAWAL, J. –

1. Special leave granted.
2. These appeals relate to appointment on compassionate grounds of dependants of teaching/non-teaching staff employed in non-government recognised aided schools and intermediate colleges in the State of Uttar Pradesh who have died in harness.
3. In relation to government employees, the Government of Uttar Pradesh has made the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "the 1974 Rules"), wherein provision is made for recruitment of a dependant of the deceased government servant dying in harness, who is not already employed by the Central Government, by the State Government or by any corporation which comes under the Central Government or the State Government. For that purpose, the normal recruitment rules are relaxed. The said Rules are, however, not applicable to the staff employed in government recognised aided institutions since they are not government servants. With regard to appointment of dependants of teaching/non-teaching staff of such institutions, provision was made for the first time by circular dated 23-9-1981 whereby it was directed that where any teaching/non-teaching employee of the non-government aided secondary schools dies in harness untimely and who was appointed permanent/regularly in his post, one member of his family having qualifications prescribed for non-teaching post, will be given employment as early as possible, if he so desires. It was further directed that the procedure prescribed for appointment for these posts shall not be strictly adhered to but it should be necessarily considered that the person concerned is qualified to be appointed on the non-teaching post under the relevant rules/orders for this purpose. In the said circular, it was also laid down that a person to be appointed must have completed the age of 18 years at the time of his appointment and as far as possible the person shall be considered for the appointment in the same institution in which the employee at the time of his death was working and if difficulty is faced in giving appointment due to non-availability of vacancies in the non-teaching post, then the appointment can be made in any other similar secondary school, where such vacancy is available and the criteria will be that any one member of the family of the employee dying in harness and possessing requisite qualifications is given employment without any delay. Subsequently, by notification dated 30-7-1992, the State Government amended the Regulations made in exercise of the powers conferred on it under sub-section (4) of Section 9 of the U.P. Intermediate Education Act, 1921, and inserted Regulations 101 to 107 after Regulation 100 in Chapter III of the Regulations. Regulations 101 to 107 were in these terms :

"101. The appointing authority shall not fill any vacancy in the non-teaching staff of a recognised aided institution except with the prior approval of the Inspector.

102. A vacancy to be caused on account of retirement of an employee holding non-teaching post in a recognised aided institution shall be intimated three months before the date of his retirement and any vacancy occurring due to death, resignation or for any other reasons shall be intimated within seven days from the date of its occurrence to the Inspector by the appointing authority.

103. In case an employee of teaching or non-teaching staff of a recognised aided institution who has been duly appointed in accordance with the prescribed procedure, dies in harness, one member of his family not below the age of 18 years shall be given appointment to a non-teaching post notwithstanding anything contrary in the prescribed procedure for recruitment if such member possesses requisite educational qualifications prescribed for the post and is otherwise suitable for appointment.

Explanation. - For the purposes of this regulation 'member of family' shall mean widow/widower, son, unmarried or widowed daughter of the deceased.

NOTE. - This Regulation and Regulations 104 to 107 shall apply in respect of those deceased employees also who die on or after 1-1-1981.

104. The Management or Principal or the Headmaster, as the case may be, of the recognised aided institution shall submit a report giving the name, post held, scale of pay, date of appointment, date of death, name of the employer institution of the deceased and the name, educational qualifications and age etc. of the family members thereof to the Inspector within seven days from the date of occurrence of death. The Inspector shall register the particulars of the deceased in a register to be maintained by him.

105. A member of the family of the deceased employee referred to in Regulation 104 shall submit an application to the Inspector concerned for appointment to a post in the non-teaching cadre. The application shall be considered by a Committee and after the Committee has recommended his appointment, the Inspector shall send the application to the Management or the Principal or the Headmaster, as the case may be, of the institution where the applicant is to be employed in accordance with the provisions contained in Regulation 106 for issuing appointment order. The Committee shall comprise :

#1. Inspector Chairman
#2. Accounts Officer Member in the Office of District Inspector of Schools
#3. District Basic Member Shiksha Adhikari##

106. The appointment of the family member of the deceased employee shall be made, as far as possible, in the same institution where the deceased employee was serving at the time of his death. If there is no vacancy in non-teaching cadre in such institution, the appointment shall be made in another recognised aided institution of the district where there is such vacancy :

Provided that if such vacancy for the time being does not exist in any recognised aided institution of the district concerned, the appointment shall be made against a

supernumerary post in the institution where the deceased was working at the time of his death. Such supernumerary post shall be deemed to have been created for this purpose and be continued till a vacancy becomes available in that institution or in any other recognised aided institution in the district and in such case the service rendered by the incumbent of the supernumerary post shall be counted for the fixation of pay and retirement benefits.

107. The appointment letter shall be issued under intimation to the Inspector by the recognised aided institution to which the application for issuing appointment letter is sent by the Inspector within a period of one month from the date of receipt of the application."

4. The respondents in these appeals are dependants of persons who were employed as teaching/non-teaching staff in non-government recognised aided schools/intermediate colleges in Uttar Pradesh. The said employees died in harness. Applications were submitted by the respondents in these appeals, who are the dependants of deceased employees, before the District Inspector of Schools for giving appointment on compassionate grounds. In most of these appeals the District Inspector of Schools passed order for their being appointed on a Class IV post and on that basis orders of appointment were issued. After their appointment on a Class IV post, they filed writ petitions in the Allahabad High Court seeking appropriate writ direction/order for being appointed on a Class III post on the ground that they possess the requisite qualifications for appointment on Class III post of Clerk. In civil appeal arising out of SLP (C) No. 1186 of 1994, the District Inspector of Schools had offered a Class IV post to the applicant and dissatisfied with the said offer, he filed a writ petition in the Allahabad High Court for a direction for being appointed on a Class III post of Clerk. In civil appeal arising out of SLP (C) No. 2734 of 1993, no decision was taken by the District Inspector of Schools on the application of the applicant and he filed a writ petition in the Allahabad High Court wherein he sought a direction from the High Court directing the District Inspector of Schools to appoint him on the post of Clerk. All the writ petitions have been allowed by the High Court by the impugned judgments. In cases where appointment had been made on a Class IV post, the High Court has quashed such orders and has directed that the appointment of the applicant be made on a Class III post provided he possesses the necessary qualifications for such post and that such appointment may be made in any institution in the district and if there is no such vacancy, then a supernumerary post should be created. In the other two appeals where the appointment had not been made, the High Court while allowing the writ petitions has directed that the appointment be made on a Class III post provided the applicant possesses the qualifications for the post and that if no post is available in any institution in the district, a supernumerary post should be created for that purpose.

5. Feeling aggrieved by the said judgments of the High Court, the State has filed these appeals.

6. The learned counsel for the appellants has pointed out that the aforesaid directions given by the High Court regarding the appointment of dependants of teaching/non-teaching staff in non-government recognised aided schools and colleges on a Class III post and for creating a supernumerary post for that purpose has given rise to immense practical problems. It has been submitted that in the State of U.P., about 4500 non-government recognised aided institutions are running and there are about 1,25,000 teaching and non-teaching employees, out of which the number of clerks working in these institutions is approximately 11,000. The number of clerks in an institution is between 1 to 3. It has been submitted that based on the mortality rate of 1%, the number of persons dying in harness in each year would come to 1250 approximately. It has also

been pointed out that the number of vacancies occurring on the post of Clerk due to retirement and death (at the rate of 2% and 1% respectively) comes to 330 in a year. The learned counsel has invited our attention to the conditions of service as contained in clause 2(2) of Chapter 3 of the Regulations made under Section 16-6 of the U.P. Intermediate Act, which provides that fifty per cent of all sanctioned posts of Head Clerk and Clerk grade will be filled by promotion amongst the working clerk and Class IV employees in the institution. It is submitted that out of 330 vacancies on the post of Clerk occurring in a year on account of retirement and death, 165 will have to be set apart for promotion of working clerk and Class IV employees and only 165 posts would be available for making appointment by direct recruitment. Appointment of dependants of deceased teaching/non-teaching staff on compassionate grounds can be made only on these posts which can be filled by direct recruitment and as a result all the vacancies occurring in a year would be taken by such dependants of deceased teaching/non-teaching staff dying in harness. Since supernumerary posts would have to be created for making such appointment, no post would ever be available for direct recruitment of other persons who are eligible for appointment. It has also been pointed out that during the pendency of these matters in this Court, Regulations 101, 103, 104, 106 and 107 have been amended and Regulation 105-A has been inserted in the Regulations by notification dated 2-2-1995. In Regulation 106, as amended, it has been prescribed that if vacancy in nonteaching cadre for the time being does not exist in any recognised aided institution of the district concerned, then the appointment shall be made against a supernumerary non-teaching post of Class IV category and such supernumerary post shall be deemed to have been created for this purpose and be continued till a vacancy becomes available in that institution or in any other recognised aided institution of the district and in such case, the service rendered by the incumbent of the supernumerary post shall be counted for fixation of pay and retirement benefits. As a result of the amendment made by notification dated 2-2-1995, in the event of a non-teaching post being not available, the appointment of the dependant of a deceased member of the teaching/non-teaching staff dying in harness, can be made only on a Class IV post by creating a supernumerary post.

7. The question for consideration is whether in the absence of the amendment that was made in the Regulations vide notification dated 2-2-1995, it was incumbent for the authorities to appoint the dependants of a member of the teaching/non-teaching staff in a non-government recognised aided institution dying in harness on a Class III post even though no post was available for such appointment in the institution in which the deceased employee was employed or any other institution in the district and for that purpose a supernumerary post in Class III post was required to be created. In the impugned judgments, the High Court has taken the view that under the Regulations as they stood prior to amendment by notification dated 2-2-1995, a supernumerary post in Class III was required to be created for appointing the dependant of a member of the teaching/non-teaching staff in a non-government aided institution dying in harness. The said view of the High Court has been assailed by the appellants in these appeals.

8. 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 appointment 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. In *Umesh Kumar Nagpal v. State of Haryana* ((1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537) this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. In that case the Court was considering the question whether appointment on compassionate grounds could be made against posts higher than posts in Classes III and IV. It was held that such appointment could only be made against the lowest posts in non-manual categories. It was observed : (SCC p. 140, para 2)

"The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

9. In the said case, this Court has considered the earlier judgment in *Sushma Gosain v. Union of India*. ((1989) 4 SCC 468 : 1989 SCC (L&S) 662 : (1989) 11 ATC 878). It has been observed that the said judgment "has been misinterpreted to the point of distortion" and that it does not justify compassionate employment as a matter of course.

10. The construction placed by the High Court on the Regulations governing appointment of dependants of teaching/non-teaching staff in non-government recognised aided institutions dying in harness would result in all the vacancies in Class III posts in non-government recognised aided institutions which are required to be filled by direct recruitment being made available to the dependants of persons employed on the teaching/non-teaching staff of such institutions who die in harness and the right of other persons who are eligible for appointment to seek employment on those posts by direct recruitment would be completely excluded. On such a construction, the said provision in the Regulations would be open to challenge on the ground of being violative of the right to equality in the matter of employment inasmuch as other persons who are eligible for appointment and who may be more meritorious than the dependants of deceased employees would be deprived of their right of being considered for such appointment under the rules. A construction which leads to such a result has to be avoided. Having regard to the fact that there are a large number of posts falling vacant in Class IV and, appointment on these posts is made by direct recruitment, the object underlying the provision for giving employment to a dependant of a person employed on teaching/non-teaching staff who dies in harness would be achieved if the said provision in the Regulations is construed to mean that in the matter of appointment of a dependant

of a teaching/non-teaching staff in a non-government recognised aided institution dying in harness if a post in Class III is not available in the institution in which the deceased employee was employed or in any other institution in the district, the dependant would be appointed on a Class IV post in the institution in which the deceased employee was employed and for that purpose a supernumerary post in Class IV may be created. If the Regulations are thus construed, the respondent-applicants could only be appointed on a Class IV post and they could not seek a direction for being appointed on a Class III post and for creation of supernumerary post in Class III for that purpose. We are, therefore, unable to uphold the direction given by the High Court in the impugned judgments whereby the respondents have been directed to be appointed on a Class III post if they possess the requisite qualifications for such a post and in case no Class III post is available, then a supernumerary Class III post be created for the purpose of such appointment.

11. In the result, the appeals are allowed, the impugned judgments of the High Court are set aside and writ petitions of the respondent-applicants are disposed of with the direction that if no Class III post is available in the institution in which the deceased employee was employed or in any other institution in the district, the said respondent would be appointed against a Class IV post in the institution in which the deceased employee was employed and a supernumerary post in Class IV be created for that purpose. The orders passed by the District Inspectors of Schools for appointment of the respondent-applicants in appeals, other than appeal arising out of SLP (C) No. 2734 of 1992, are restored and the respondent-applicants in the said appeal should be treated as having been appointed on a Class IV post as per the orders for such appointment that were issued by the District Inspector of Schools. In appeals arising out of SLP (C) No. 2734 of 1993 the District Inspector of Schools concerned shall consider the application of the respondent-applicant for appointment and if no Class III post was available on the date of the passing of the impugned judgment of the High Court, the said respondent-applicant should be appointed on a Class IV post in the institution in which the deceased employee was employed with effect from the date of the impugned judgment of the High Court. No order as to costs.