

Court No. - 1**Case :-** WRIT - A No. - 4597 of 2024**Petitioner :-** Smt Sugandha Upadhyay**Respondent :-** State Of Up And 2 Others**Counsel for Petitioner :-** Ashok Kumar Dwivedi, Kedar Nath Mishra, Virendra Kumar Yadav**Counsel for Respondent :-** C.S.C.**Hon'ble Salil Kumar Rai, J.**

The facts of the case as evident from the pleadings of the parties and the documents annexed with the affidavits are that Anil Kumar Upadhyay, the father of the petitioner, was posted in the office of the Additional Labour Commissioner, Uttar Pradesh, Lohia Nagar, Ghaziabad on the post of Welfare Assistant and died on 02.05.2012 while still in service. The petitioner was unmarried when her father died and it has been stated that she was dependent on her father. The case of the petitioner is that the relationship between her parents was not cordial and they lived separately and the petitioner was living with her father at the time of his death. On 07.11.2012, the petitioner filed an application giving the details of her educational qualifications and occupational skills and seeking compassionate appointment on the post of Clerk. In her application, the petitioner had stated that she had passed her intermediate examinations and knew typing. With her application, the petitioner annexed her High School and Intermediate mark-sheets and also the certificate showing her typing skills. It appears from the records that along with her application, the petitioner also filed the affidavit of her mother

(2)

in which her mother declared her no-objection to the petitioner being given compassionate appointment in place of the deceased. The Aadhaar card of the petitioner and her High School certificate annexed with the writ petition show that the date of birth of the petitioner is 06.11.1994. Apparently, the petitioner was just 18 years old on the date she filed her application seeking compassionate appointment. By order dated 26.10.2013 passed by the Additional Labour Commissioner, Uttar Pradesh, Ghaziabad, a selection committee was constituted to consider the petitioner for appointment on compassionate grounds and on the recommendations of the Selection Committee, an appointment letter dated 13.12.2013 was issued by the Additional Labour Commissioner appointing the petitioner as Junior Assistant in the office of the Additional Labour Commissioner. The petitioner joined in pursuance to the aforesaid order and subsequently by order dated 21.06.2021 passed by the Deputy Labour Commissioner, Uttar Pradesh, Ghaziabad, the petitioner was promoted to the post of Senior Assistant.

A complaint was made by a retired Senior Assistant, previously employed in the office of Deputy Labour Commissioner, that the petitioner was not the daughter of the deceased and further, Smt. Meena Upadhyay, the mother of the petitioner and wife of the deceased was also employed as a Class - IV employee in the Labour Department, therefore, the petitioner was not entitled to be appointed on compassionate grounds in light of the prohibition incorporated in Rule 5 of the Uttar Pradesh Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred to as, 'Rules, 1974'). On the said complaint, the Deputy Labour Commissioner, Uttar Pradesh, Ghaziabad issued a show cause notice dated 19.04.2022 to the

(3)

petitioner. The petitioner submitted her reply stating that she had not concealed any fact while seeking compassionate appointment and also stated that the relationship between her parents were not cordial and they were living separately and the petitioner was living with her father at the time of his death. In her reply, the petitioner also stated that her mother had nothing to do with the petitioner and the petitioner was dependent on her father at the time of his death.

The Deputy Labour Commissioner, Uttar Pradesh, Ghaziabad, who was the appointing authority of the petitioner, vide his order dated 20.07.2022 rejected the reply of the petitioner and dismissed her from service on the ground that the appointment of the petitioner was not in accordance with the Rules, 1974 because at the time of the death of her father, the mother of the petitioner was already employed as a Class - IV employee in the Labour Department. In his order dated 20.07.2022, the Deputy Labour Commissioner held that while seeking compassionate appointment after the death of her father, the petitioner had concealed the fact regarding employment of her mother and her appointment was, therefore, liable to be cancelled. Incidentally, in his order dated 20.07.2022, the Deputy Labour Commissioner did not cancel the appointment of the petitioner but passed an order dismissing the petitioner from service, i.e., from the post of Senior Assistant in the office of Deputy Labour Commissioner, Ghaziabad. Because the order dated 20.07.2022 was purportedly passed under the Rules, 1999, the petitioner filed an appeal before the Labour Commissioner, Uttar Pradesh, Kanpur under Rule 11 of the Rules, 1999. The appeal filed by the petitioner was rejected by the Labour Commissioner vide his order dated 16.01.2024. The orders dated 20.07.2022 and

(4)

16.01.2024 have been challenged in the present petition.

A counter affidavit and a supplementary counter affidavit have been filed by the Standing Counsel annexing the applications of the petitioner noted above and also the affidavit of her mother to bring on record the fact that in their affidavits, the petitioner and her mother had not disclosed the fact that the mother of the petitioner, i.e., the widow of the deceased employee, was already employed as a Peon in the Labour Department, therefore, the petitioner had obtained employment by concealing material fact and her appointment was liable to be cancelled and the petitioner has been rightly dismissed from service.

Challenging the orders dated 20.07.2022 and 16.01.2024, the counsel for the petitioner has argued that that the mother of the petitioner was posted as Peon, a Class - IV employee, in the Labour Department in Ghaziabad itself, therefore, the fact that the mother of the petitioner was employed with the Labour Department was known to the selection committee constituted to consider the petitioner for appointment. It was argued that, in the circumstances, the petitioner had not committed any fraud or made any misrepresentation while seeking compassionate appointment in place of her father. It was further argued that in her reply to the show cause notice, the petitioner had specifically stated that her parents were living separately and the petitioner was living with her father and dependent on him at the time of his death but in their impugned orders, the Deputy Labour Commissioner and the Labour Commissioner have not considered the said fact. It was argued that because the parents of the petitioner were living separately and the petitioner was dependent on her father when he died, therefore, the petitioner was entitled to compassionate appointment under the Rules,

(5)

1974 and the requirement in Rule 5 of the Rules, 1974 that compassionate appointment shall be given only if the spouse of the deceased is not already employed under the Central Government or State Government or a corporation owned or controlled by the Central or the State Government was not applicable in the case of the petitioner. It was argued that the time and length of service is relevant in matters of cancellation of appointment on the ground that the initial appointment is contrary to the provisions of Rules or Government orders. It was argued that petitioner had been confirmed in service and had been working in the Labour Department since the last ten years, therefore, the respondents could not have reopened the issue regarding the appointment of the petitioner. It was argued that for the aforesaid reasons, the orders dated 20.07.2022 and 16.01.2024 are contrary to law and liable to be quashed and the writ petition is to be allowed. In support of his contention, the counsel for the petitioner has relied on the judgment and order dated 08.08.2023 passed by a Single Judge of this Court in Writ - A No. 2134 of 2023 (*Uday Pratap Singh vs. District Basic Education Officer, Basti and 2 Ors.*), on the judgment and order dated 19.01.2024 passed by the Division Bench of this Court in Special Appeal (Defective) No. 870 of 2023 (*Basic Shiksha Adhikari & Anr. vs. Uday Pratap Singh & Anr.*) and also the judgment of the Supreme Court reported in *Md. Zamil Ahmed vs. State of Bihar and Ors. (2016) 12 SCC 342*.

Rebutting the arguments of the counsel for the petitioner, the Standing Counsel has supported the orders dated 20.07.2022 and 16.01.2024 and the reasons given in the same. It was argued by the Standing Counsel that in view of the prohibition prescribed in Rule 5 of the Rules, 1974, the petitioner was not entitled for compassionate appointment and her appointment

(6)

was *void ab initio*. It was argued that the petitioner and her mother had not disclosed the fact that the mother of the petitioner was already employed as a Class - IV employee in the Labour Department which was necessary in light of Rule 6 of the Rules, 1974 and the petitioner got appointment by concealing material facts. It was argued that for the aforesaid reasons, the petitioner has obtained her appointment fraudulently and this Court may not interfere in favour of the petitioner in its equitable jurisdiction under Article 226 of the Constitution of India. It was argued that for the aforesaid reasons, there is no illegality in the orders dated 20.07.2022 and 16.01.2024 and the writ petition lacks merit and is liable to be dismissed. In support of his contention, the Standing Counsel has relied on the judgment of this Court delivered in **Anoop Kumar Srivastava vs. State of U.P. and Others 2021 (10) ADJ 622**.

I have considered the submissions of counsel for the parties.

Rule 5 (1) and Rule 6 of the Rules, 1974 which are relevant for a decision of the present case are reproduced below:-

“5. Recruitment of a member of the family of the deceased. – (i) In case a Government servant dies in harness after the commencement of these rules **and the spouse of the deceased Government servant is not already employed** under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

...

...

...

6. Contents of application for employment. – *An application for appointment under these rules shall be addressed to the appointing authority in respect of the post for which appointment is sought but it shall be sent to the Head of Office where the deceased Government servant was serving prior to his death. The application shall, inter alia, contain the following information:*

(a) the date of the death of the deceased Government servant; the department in which he was working and the post which he was holding prior to his death;

*(b) **names, age and other details pertaining to all the members of the family of the deceased, particularly about their marriage, employment and income***

(c) details of the financial condition of the family; and

(d) the educational and other qualifications, if any, of the applicant.”

A reading of Rules 5 and 6 of the Rules, 1974 shows that the dependent of a deceased Government servant would not be entitled for compassionate appointment if the spouse of the deceased employee is already employed either with the State Government or the Central Government or any corporation owned or controlled by the State Government or the Central Government. Further, Rule 6 requires that the dependent of the deceased employee while seeking compassionate appointment has to give the details pertaining to all members of the family of the deceased particularly about their marriage, employment and income.

The petitioner was appointed by order dated 13.12.2013 issued by the Additional Labour Commissioner, Uttar Pradesh, Ghaziabad and the issue in the present petition is as to whether after ten years of her appointment, the appointment of the petitioner can be cancelled or the petitioner can be dismissed from service taking recourse to the prohibition prescribed in Rule 5 or on ground of non-disclosure of facts as required in Rule 6(b).

The petitioner had submitted her application seeking

(8)

appointment on 07.11.2012, i.e., when the petitioner was merely 18 years of age. The petitioner, at that age, cannot be expected to have read the Rules, 1974. The petitioner submitted a simple application which was not on any prescribed proforma stating her relationship with the deceased, her occupational skills and educational qualifications and sought compassionate appointment in place of the deceased claiming herself to be a family member and dependent of the deceased employee. The mother of the petitioner also submitted an affidavit declaring her no-objection to the appointment of the petitioner in place of the deceased. There was no misrepresentation by the petitioner regarding the employment status of her mother in the sense that the petitioner had not represented in her application that her mother was not employed with the State Government or Central Government or any corporation owned or controlled either by the State Government or the Central Government. The mother of the petitioner was employed as Class - IV employee in the Labour Department itself. It cannot be believed that the selection committee and the appointing authority had no knowledge or information regarding the fact that the mother of the petitioner was already employed with the State Government. There is nothing on record to show that the department had sought from the petitioner the details of the family members of the deceased, especially as to whether any family member or the spouse of the deceased was already employed. By order dated 07.05.2024, this Court had asked the Standing Counsel to annex the application form submitted by the petitioner seeking employment and also to explain as to whether the details regarding other dependents of the deceased employee were sought from the petitioner while considering her application for compassionate appointment. In response to the said order, the

(9)

Standing Counsel has filed the supplementary counter affidavit annexing the application form submitted by the petitioner which is handwritten and the contents of which have already been noted above. It has been stated in paragraph no. 9 of the supplementary counter affidavit that no details regarding other dependents of the deceased employee were sought from the petitioner. In view of the aforesaid, it cannot be presumed that the petitioner had intentionally or purposely concealed the status of her mother as an employee of the Labour Department. Apparently, the compassionate appointment given to the petitioner was not a result of any fraud or misrepresentation committed by the petitioner but was a mistake on the part of the respondents.

In *Md. Zamil Ahmed (supra)* wherein also, compassionate appointment was given by the State respondents to a person who was not dependent on the deceased, therefore, was not entitled to compassionate appointment in place of the deceased employee, the Supreme Court held that even though, the appointment was contrary to the policy of the State Government, the State by its own conduct had condoned their lapse due to passage of time and it was too late on the part of the State to have raised the said ground for cancelling the appointment and terminating the service of the appointee more so when the appointee himself was not responsible for making any false declaration. It was held by the Supreme Court that the State was not empowered to take advantage of its own mistake and the position would have been different if the appointee had committed some kind of fraud or manipulation or suppression of material fact in securing the appointment. The relevant observations of the Supreme Court in paragraph nos. 15 and 16 of the aforesaid judgment are reproduced below:-

“15. In these circumstances, we are of the view that there was no justification on the part of the State to wake up after the lapse of 15 years and terminate the services of the appellant on such ground. In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant’s appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State.

16. It is for this reason, we are of the view that action on the part of welfare State in terminating the appellant's service on such ground cannot be countenanced. We, therefore, disapprove the action taken by the State.”

Following the judgment of the Supreme Court in ***Md. Zamil Ahmed (supra)***, a Single Judge of this Court in his judgment and order dated 08.08.2023 passed in Writ A No. 2135 of 2023, while considering other judgments of the Supreme Court where appointments obtained by misrepresentation and fraud had been set aside and rights under equity were denied by the Courts, the Single Judge observed that in matters of cancellation of appointment on the ground that the initial appointment is contrary to the provisions of Rules or Government Orders, time and length of service is of paramount importance and the authorities are empowered to act immediately after the appointment and cancel the same if it was contrary to the Rules and no interference by this Court would be warranted, but where there was no concealment of fact at the time of appointment, the appointment cannot be cancelled after

a lapse of nineteen years on the ground that the initial appointment was made in violation of some provisions of Government Order. The observations of the learned Single Judge in paragraph no. 48 of the aforesaid judgment are reproduced below:-

“48. Essence of the time and length of service is of paramount importance in the matters of cancellation of appointment on the ground that the initial appointment is contrary to the provisions of rules or government orders. If immediately after the appointment, authorities would have acted upon and the appointment of the petitioner was cancelled, then definitely no interference by this Court was warranted but where initial compassionate appointment was made 19 years back and there was no concealment of facts at the time of the said appointment, the same cannot be cancelled after elapse of 19 years on the ground that the initial appointment was made in violation of some provision of government order. Even further, in the present case departmental authorities, at no point of time, ever noticed that petitioner’s appointment on compassionate ground was made contrary to the provisions of Government Order dated 04.09.2000 rather the exercise of cancellation of the petitioner’s appointment has been done after elapse of 19 years on the behest of private complainant, therefore, in the given facts and circumstances of the case, the order dated 30.12.2022 whereby appointment of the petitioner has been cancelled, cannot sustain in the eyes of law.”

The judgment of the learned Single Judge has been affirmed by the Division Bench in its judgment and order dated 19.01.2024 passed in Special Appeal (Defective) No. 870 of 2023 (**Basic Shiksha Adhikari (supra)**) and the Special Leave Petition (Civil) Diary No. 7348 of 2024 (**Basic Shiksha Adhikari, District Basti and Anr. vs. Uday Pratap Singh & Anr.**), filed against the orders of the Single Judge and the Division Bench has been dismissed by the Supreme Court by its order dated 16.04.2024. The order dated 16.04.2024 passed by the Supreme Court dismissing the Special Leave Petition has been annexed with the rejoinder affidavit of the petitioner.

So far as the judgment of another Single Judge of this

Court in **Anoop Kumar Srivastava (supra)** relied upon by the Standing Counsel is concerned, it is true that in **Anoop Kumar Srivastava (supra)**, the Single Judge of this Court held that the plea of length of service would not condone fraud, misrepresentation and deceit and any appointment obtained by fraud, misrepresentation and deceit is liable to be quashed and such an order shall not be interfered with under Article 226 of the Constitution of India.

I have already held that no fraud, misrepresentation or deceit can be attributed to the petitioner. Further, the opinion of the learned Single Judge in **Anoop Kumar Srivastava (supra)** that length of service was not relevant is in conflict with the law laid down by another Single Judge in his judgment and order dated 08.08.2023 passed in **Uday Pratap Singh (supra)**. The judgment of the learned Single judge in **Uday Pratap Singh (supra)** has been affirmed by a Division Bench of this Court in Special Appeal and the Special Leave Petition filed by the State has been dismissed by the Supreme Court. In view of the aforesaid, I am inclined to follow the judgment in **Uday Pratap Singh (supra)** and not the judgment in **Anoop Kumar Srivastava (supra)**.

In the present case, the petitioner was appointed ten years back and had been confirmed in service. Considering the length of service of the petitioner, it is too late for the respondents to cancel the appointment of the petitioner on the ground of the prohibition incorporated in Rule 5 and the employment status of her mother.

For the aforesaid reasons, the orders dated 20.07.2022 and 16.01.2024 passed by the Deputy Labour Commissioner and the Labour Commissioner cancelling the appointment of the petitioner and also rejecting her appeal are contrary to law

and are liable to be quashed.

The orders dated 20.07.2022 and 16.01.2024 passed by the Deputy Labour Commissioner and the Labour Commissioner, respectively are, hereby, quashed.

The petition is ***allowed***.

The petitioner shall be reinstated in service w.e.f. 20.07.2022 and shall be entitled to all consequential service benefits including arrears of salary. Appropriate orders reinstating the petitioner in service and for payment of arrears of salary shall be passed by the respondents within two months from today.

Order Date :- 23.8.2024
Vipasha