

THE SECRETARY TO GOVERNMENT,
DEPARTMENT OF CO-OPERATION,
FOOD AND CONSUMER PROTECTION AND OTHERS

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v.

A KINGSTON DAVID
(Civil Appeal Nos 7655-7656 of 2021)

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DECEMBER 11, 2021

**[DR. DHANANJAYA Y CHANDRACHUD AND
A. S. BOPANNA, JJ.]**

Service Law – Appointment – On Compassionate grounds – Father of respondent died in harness – Respondent applied for employment on compassionate grounds – Though respondent was qualified for the post of Junior Assistant since there was no vacancy in the post, he was given an option of either accepting the post of Record Clerk or of waiting his turn in seniority on compassionate grounds until a vacancy arose in the post of Junior Assistant – Respondent accepted the post of Record Clerk and was appointed with an undertaking that he would not claim the post of Junior Assistant – Subsequently however, the respondent instituted writ petition u/Art.226 of the Constitution seeking a revision of his appointment from the post of Record Clerk to the post of Junior Assistant with effect from the date of his initial appointment and for subsequent promotions by considering the service rendered in the cadre of Record Clerk – Respondent also sought back wages and other monetary benefits – The petition was dismissed by a Single Judge of the High Court – In writ appeal, Division Bench of the High Court reversed the judgment of the Single Judge – Challenge to – Held: The respondent took a conscious decision to avail of a public appointment on compassionate basis by opting to secure an appointment to the post of Record Clerk – Having accepted the appointment, it was not open to the respondent to challenge his appointment and to seek appointment as a Junior Assistant from the initial date of appointment – He was plainly estopped from doing so and could not have been appointed retrospectively to a post in which he had never worked – Division Bench of High Court ordered, in effect that though the respondent was appointed as a Record Clerk and served in that capacity, the appointment should

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- A *nonetheless be treated as an appointment made to the post of a Junior Assistant from the initial date of appointment as a Record Clerk though without any consequential monetary benefits – Appellants were directed to give promotion from the cadre of Junior Assistant on that basis – Such a course of action is unknown to service jurisprudence – As a result of this direction, others who are similarly circumstanced, those who waited for a vacancy in the Junior Assistant's post and those who opted another lower post, would be seriously affected by allowing the respondent to claim an undeserved benefit of this nature – Order of Division Bench of High Court set aside.*
- B *CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7655-7656 of 2021.*
- From the Judgment and Order dated 08.12.2016 and 31.01.2019 of the Madurai Bench of Madras High Court in W.A.(MD) No. 585 of 2016 and in Review Applications (MD) No. 14 of 2019.
- D Amit Anand Tiwari, D. Kumanan, Advs. for the Appellants.
S. Nagamuthu, Sr. Adv., M.P. Parthiban, Advs. for the Respondent.
The Judgment of the Court was delivered by
DR. DHANANJAYA Y CHANDRACHUD J.
- E 1. The office has reported a delay of 750 days in filing the Special Leave Petitions against the judgment and order of the High Court dated 8 December 2016. The delay has been explained on the ground that the appellants had moved a review petition before the High Court. The review petition was dismissed on 31 January 2019. The Special Leave Petitions were filed on 28 March 2019. Hence, sufficient cause for condoning the delay has been shown. The delay in filing the Special Leave Petitions is condoned.
- F 2. Leave granted.
- G 3. These appeals arise from a judgment of a Division Bench at the Madurai Bench of the Madras High Court dated 8 December 2016, and the judgment dated 31 January 2019 in review.
- H 4. The father of the respondent, who was working as a Senior Inspector in the Animal Husbandry Department of the Government of Tamil Nadu, died in harness on 29 March 2002. The respondent applied

for employment on compassionate grounds. According to the appellant, no direct recruitment had taken place between 2001 to 2006; there were backlog vacancies and in terms of GOMs No 154 (Personnel and Administrative Reforms Department) dated 19 September 2006, only 25% of the estimated vacancies in the post of Junior Assistant for a specific year can be filled up on compassionate grounds. The post of Junior Assistant falls within the purview of the Tamil Nadu Public Service Commission. It has been stated that under the terms of the above government order, the post can be filled up only by following a State level seniority from the list of candidates awaiting appointment on compassionate grounds. The respondent was at serial number 49 of this list.

5. The qualification for the post of Junior Assistant is Secondary School Leaving Certification. The qualification for the post of Record Clerks was passing the 8th standard. At the time of appointment, the respondent held a Bachelor's degree in Arts. On 27 March 2009, the respondent was informed that appointments for the post of Junior Assistant would be issued based on seniority. On 15 March 2010, he was requested to opt whether he would willing to be appointed as a Record Clerk/ Office Assistant under the Registrar of Cooperative Societies. As there was no vacancy in the post of Junior Assistant, the respondent furnished an option letter dated 23 June 2010 accepting the post of Record Clerk with an undertaking not to claim the post of Junior Assistant in the future. In view of his undertaking and option, he joined as a Record Clerk in the office of the Joint Registrar of Cooperative Societies, Sivagangai region on 19 January 2011.

6. The respondent instituted a writ petition under Article 226 of the Constitution, seeking a revision of his appointment from the post of Record Clerk to the post of Junior Assistant with effect from 19 January 2011, the date of initial appointment and for subsequent promotions by considering the service rendered in the cadre of Record Clerk. The respondent also sought back wages and other monetary benefits. The petition was dismissed by a Single Judge at the Madurai Bench of the High Court on the ground that appointment on compassionate grounds is not a matter of right. In a writ appeal, the Division Bench of the High Court has reversed the judgment of the learned Single Judge.

7. The principal ground which has weighed with the Division Bench of the High Court in reversing the judgment of the Single Judge is based

- A on GO Ms No 1499, issued by the Labour and Employment (Q1) Department dated 3 August 1989. Paragraph 2 clause (iii) of the GO Ms which has been extracted in the judgment of the High Court, reads as follows:
- B “(iii) The appointing authorities under no circumstances should appoint a dependent to a lower post when the dependent possesses the qualifications required for the post of junior Assistant/Typist on the ground of non availability of vacancy in the office or department or the dependents not willing to work in other departments. In such circumstances, they should follow the existing procedure of approaching the Collector of the District concerned for providing a suitable vacancy, as suggested in G.O. Ms.No.1179, P & AR, dated 17.10.1979.”
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- D 8. The Division Bench held that in terms of the above GO Ms, the authorities ought to have followed the procedure of moving the competent authority for sanctioning of a suitable vacancy in case of the unavailability of a vacancy in the post of Junior Assistant/Typist. Hence, it came to the conclusion that the appointment of the respondent as a Record Clerk instead of as a Junior Assistant was due to the fault of the authorities. In the circumstances, the writ appeal was disposed of by directing the appellants to revive the appointment of the respondent to the post of
- E Junior Assistant with effect from the date of his original appointment to the post of Record Clerk, and to provide subsequent promotions from the cadre of Junior Assistant by considering the service rendered in the cadre of Record Clerk as service rendered in the cadre of Junior Assistant. However, no back wages have been granted on the ground that it was in pursuance of his option letter and undertaking that the
- F respondent was appointed as a Record Clerk.
- G 9. Mr Amit Anand Tiwari, learned counsel appearing on behalf of the appellants has urged two submissions : firstly, it has been submitted that GO Ms No 1499 dated 3 August 1989 will have no application in a situation such as a present, where in view of the absence of suitable
- H vacancy in the post of Junior Assistant, the candidate seeking compassionate appointment was appointed on the post of Record Clerk at his request, on his letter of option and on an undertaking that he would not claim the post of Junior Assistant in the future. Secondly, it has been submitted that as a result of the directions of the High Court, the respondent will steal a march over other candidates who like him would

have been appointed to the post of Record Clerk on their request as well as candidates who did not furnish such an undertaking but preferred to wait in their turn of seniority for appointment to the post of Junior Assistant.

10. On the other hand, Mr S Nagamuthu, learned senior counsel appearing on behalf of the respondent submitted that:

- (i) The failure of the appellants to appoint the respondent to the post of Junior Assistant arose because they did not follow the procedure which was prescribed in GO Ms No 1499 dated 3 August 1989;
- (ii) If the procedure which was envisaged in the above GO Ms was followed, it would have been possible for the Collector to ascertain whether vacancies were available in any other department;
- (iii) The respondent has, in fact, suffered as a consequence since though his father who was in the Animal Husbandry Department died on 29 March 2002, he was appointed only in January 2011; and
- (iv) In any event, in 2019, the respondent has received promotion as a Junior Assistant in the normal channel of promotion.

11. There is no dispute about the fact that though the respondent was qualified for the post of Junior Assistant. Since there was no vacancy in the post, the respondent was given an option of either accepting the post of Record Clerk or of waiting his turn in seniority on compassionate grounds until a vacancy arose in the post of Junior Assistant. The State has indicated in its pleadings that in terms of GO Ms No 154 (Personnel and Administrative Reforms Department) dated 19 September 2006, only 25% of the estimated vacancies in the post of Junior Assistant for a specified year can be filled up on compassionate grounds. The respondent was ranked at serial number 49 in the seniority list for appointment. The decision of accepting the post of Record Clerk was entirely at the option of the respondent. Having accepted the post and being appointed on 19 January 2011 with an undertaking that he would not claim the post of Junior Assistant, the respondent moved proceedings under Article 226 of the Constitution seeking appointment from the initial date as a Junior Assistant. The learned Single Judge was justified in coming to the conclusion that such a course of action was not open to the respondent,

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- A having accepted the post of Record Clerk. He was plainly estopped from doing so and could not have been appointed retrospectively to a post in which he had never worked. This is exactly what the Division Bench has directed. The Division Bench interfered with the judgment of the Single Judge purely on the basis of GO Ms No 1499, Labour and Employment Department (Q1) dated 3 August 1989. Paragraph 2 clause (iii) which has been extracted earlier, indicates that appointing authorities were directed not to appoint a dependent to a lower post when a dependent possesses the qualifications required for Junior Assistant/Typist on the ground of non-availability of vacancy or in the event that the dependent is not willing to work in any other department. The above stipulation also states that the Collector of the District should be approached for providing a suitable vacancy as suggested in GO Ms No 1179 dated 17 October 1979. If at all, the above stipulation would indicate that the Collector would have to be approached for ascertaining whether any other suitable vacancy is available. If no vacancy was available, the respondent could not have been appointed at all.
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12. In this backdrop, the respondent took a conscious decision to avail of a public appointment on a compassionate basis by opting to secure an appointment to the post of Record Clerk. Having accepted the appointment, it was not open to the respondent to challenge his appointment and to seek appointment as a Junior Assistant from the initial date of appointment. The Division Bench has ordered, in effect that though the respondent was appointed as a Record Clerk and served in that capacity, the appointment should nonetheless be treated as an appointment made to the post of a Junior Assistant from the initial date of appointment as a Record Clerk though without any consequential monetary benefits. The appellants have been directed to give promotion from the cadre of Junior Assistant on that basis. Such a course of action is unknown to service jurisprudence. As a result of this direction, others who are similarly circumstanced, those who waited for a vacancy in the Junior Assistant's post and those who opted another lower post, would be seriously affected by allowing the respondent to claim an undeserved benefit of this nature.
13. For the above reason, we are of the view that the judgment of the Division Bench of the High Court and the ultimate direction is unsustainable. We accordingly allow the appeals and set aside the impugned judgment and order of the Division Bench of the High Court

of Madras at its Madurai Bench dated 8 December 2016. The writ petition filed by the respondent shall stand dismissed. However, we clarify that this will have no bearing on the promotion to which the respondent may be entitled to be considered or which he may have been granted in the ordinary course, independent of the impugned direction of the High Court.

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14. The appeals are disposed of in the above terms.
15. Pending applications, if any, stand disposed of.

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Bibhuti Bhushan Bose

Appeals disposed of.