THE DISTRICT & SESSIONS JUDGE
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THE HIGH COURT OF ORISSA; CUTTACK.

Letter No 2220(30) **Date** 10/02/2022

LVII-02/2021

From

Shri Ashish Pattanaik, O.J.S.

Addl. Co-ordinator,

Arbitration Centre,

Orissa High Court, Cuttack.

To

The District & Sessions Judge (All)

Sub: Consideration of RA appointment under OCS(RA) Rules, 2020 matters regarding.

Sir,

I am directed to forward herewith copies of Letter No.1551 dated 18.01.2022 alongwith Judgment dated 26.10.2021 passed in W.A. No.367 of 2021 and WP (C) No.28023 of 2021 of the Hon'ble High Court, received from the Under Secretary to Government, in G.A. & P.G. Department, Government of Odisha for your kind information.

Yours faithfully,

10/02/2022

Addl.Co-ordinator

Encls: Eighteen sheets.

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92/c

Government of Odisha
General Administration and Public Grievance Department
****

No. 1551 (C) /Gen.
GAD-SC-RAS-0001-2022

Bhubaneswar, dated 18-Jan-2022

ADMN. DIARY SECTION
RECEIVED
24 JAN 2022
ORISSA HIGH COURT

From
Sri Kali Charan Hembram,
Under Secretary to Govt.

To
All Departments of Government/
All HoDs / All Collectors.

Sub:- Consideration of RA appointment under OCS(RA) Rules,2020- matters regarding.

The undersigned is directed to send herewith a copy of orders of Hon'ble High Court dated 26.12.2021 passed in W.A. No.367 of 2021 and W.P.(C) No.28023 of 2021 with regard to applicability of the OCS (RA) Rules and to say that a general advisory has been issued in this Department letter no. 27414 dated 11.10.2021 clarifying that in case RA applications were pending before coming into force of the Odisha Civil Services(RA) Rules, 2020 and RA applicants have obtained orders from the court of Law for consideration of his/ her applications as per Rules prevailing at the time of submission of the application/ prevailing at the time of date of death of the deceased, the said order may be challenged before the higher forum on obtaining orders of Government in their Department referring the latest judgement dated 04.03.2020 of the Hon'ble Apex Court reported in (2020)7 SCC 617 enclosed to the letter and in consultation with the Law Department instead of referring the cases to the G.A.& P.G. Department soliciting views in the matter.

It is therefore, requested that while challenging orders in such cases the above judgement of the Hon'ble High Court dated 26.12.2021 passed in both W.A. No.367 of 2021 and W.P.(C) No.28023 of 2021 may also be referred to.

18/01/2022
Under Secretary to Govt.

Memo No. 1552 /Gen., Bhubaneswar, Dated the 18th January, 2022

Copy forwarded to the OE-I, OE-II, CA-III, Services-II and FE Section of GA & PG Department for information & necessary action.

18/01/2022
Under Secretary to Govt.

SO(SC)
24/1/2022
Reg(L)

Dy/C.IV
25.1.22

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.A. No.367 of 2021 and W.P.(C) No.28023 of 2021

In W.A. No.367 of 2021

State of Odisha .... ***Appellant***

Mr. M.K. Khuntia, Additional Government Advocate

-versus-

Yagyansis Ray .... ***Respondent***

Mr. K.C. Pradhan, Advocate

In W.P.(C) No.28023 of 2021

Malaya Nanda Sethy .... ***Petitioner***

Mr. D.N. Rath, Advocate

-versus-

State of Orissa and others .... ***Opposite Parties***

Mr. M.K. Khuntia, Additional Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE B. P. ROUTRAY

JUDGMENT
26.10.2021

Dr. S. Muralidhar, CJ.

1. A common question of law arises for consideration in these two matters which are accordingly disposed of by this common judgment. That question is whether an application for compassionate appointment under the rehabilitation assistance scheme is to be considered in light of the rules/scheme prevalent at the time of such consideration or the rules/scheme

prevalent at the time the death of the government employee concerned?

2. W.A. No.367 of 2021 by the State of Odisha through the Commissioner of Excise is directed against an order dated 5th April 2021 passed by the learned Single Judge disposing of W.P.(C) No.9712 of 2021 filed by the Respondent. By the impugned order, the learned Single Judge followed the decision of the Supreme Court in ***Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412*** and set aside an order dated 31st December 2020 of the Commissioner of Excise i.e. the Appellant herein and directed the Appellant to evaluate the case of the Respondent in the matter of appointment under the Rehabilitation Assistance Scheme (RAS) and issue a necessary appointment order if the Petitioner satisfied the requirement in terms of the Orissa Civil Services (Rehabilitation Assistance) Rules, 1990 ('1990 Rules') within fifteen days from the date of communication of the order. In effect, learned Single Judge held that the Odisha Civil Services (Rehabilitation Assistance) Rules, 2020 (2020 Rules) would not be applicable and that since the date of death of the deceased government employee was 5th June 2013, it was the 1990 Rules that had to be applied.

3. While issuing notice in the present appeal on 26th August 2021, this Court stayed the operation of the impugned order of the learned Single Judge.

4. In the connected writ petition, the same question arises for consideration. By an order of the learned Single Judge in the said writ petition, it has been asked to be heard along with the present writ appeal.

5. This Court has heard the submissions of Mr. M.K. Khuntia, learned Additional Government Advocate (AGA) for the Appellant in W.A. No.367 of 2021 and for the Opposite Parties in the writ petition. The Court has also heard the submissions of Mr. K.C. Pradhan, learned counsel for the Respondent in W.A. No.367 of 2021 and Mr. D.N. Rath, learned counsel for the Petitioner in W.P.(C) No.28023 of 2021.

6. As far as W.A. No.367 of 2021 is concerned, the background facts are that the father of the Respondent was working as an Excise Constable and while in service expired on 5th June 2013. On 17th July 2013, Respondent applied for appointment as Junior Clerk under the RAS. This application was forwarded to the Government in Excise Department. By a letter dated 20th September 2017 the Government asked The Superintendent of Excise, Jagatsinghpur to resubmit the RAS application along with the required documents as per the G.A. Department Notification dated 5th November, 2016. The Superintendent of Excise, Jagatsinghpur then resubmitted the application of the Respondent under cover of letters dated 3rd November 2017 and 11th June, 2018.

7. Meanwhile, the Respondent filed O.A. No.2415 (C) of 2017 in the Odisha Administrative Tribunal, Cuttack Bench, Cuttack (OAT). The said application was disposed of by the OAT on 18th October 2017 with a direction to the present Appellant to consider the case of the Respondent within a period of three months.

8. On 17th February 2020, the 2020 Rules were issued in supersession of the 1990 Rules. The relevant provisions of 2020 Rules reads as under:

> "3. **Compassionate appointment:**
>
> **(**1) Subject to provisions contained in these rules, in deserving cases, one family member of the deceased Government Servant shall be appointed on compassionate ground to Group-D base level post only by the appointing authority of that deceased Government servant which shall not be claimed as a matter of right."
>
> 6. **Mode of Appointment:**
>
> (1) Application for appointment under these rules shall be submitted by the eligible family member of the deceased Government employee, in Form A of these rules along with the following documents, to the Appointing Authority, namely:
>
> (2) to (8)…..
>
> (9)All pending cases as on the date of publication of these rules in the Odisha Gazette shall be dealt in accordance with the provisions of these rules."

9. The stand of the Appellant-State is that in terms of Rule 6 (9) of the 2020 Rules, all pending cases of employment under the RAS had to be considered in accordance with the 2020 Rules. Therefore, in terms of Rule 3 of the 2020 Rules, employment could be provided under the RAS only in Group-D base level post and not in any other post.

10. The Respondent thereafter filed W.P.(C) No.8958 of 2020 in this Court. The said writ petition was disposed of on 4th June 2020 with a direction to the Appellant to take a decision on the Respondent's representation and pass an appropriate order within a period of three months from the date of production of a copy of the order.

11. The Respondent thereafter filed contempt petition i.e. CONTC No.4983 of 2020 which was disposed of on 23rd November 2020 by this Court with a direction to comply with the Court's order within a period of three months.

12. In compliance with the above order, the Appellant passed a reasoned order on 31st December 2020 disposing of the representation of the Respondent with the following observations:

> "Govt. in G.A. & P.G. Department has meanwhile revised the R.A. scheme by Odisha Civil Service (Rehabilitation Assistance) Amendment Rules, 2016 vide Notification No.23345/Gen., dt.

05.11.2016 published in Odisha Gazette bearing No.1995, dt.07.11.2016 whereby a maximum 10% of the total vacancies in a year should be earmarked to be filled up by applicants under R.A. scheme after completion of all formalities with check list as per Para-9 of the said Rules. Besides Govt. in G.A. & P.G. Department have clarified vide Circular No.16138/Gen., dt.26.07.2017 that the cases prior to 07.11.2016 should be scrutinized and evaluated as per Rules as amended by Notification No.23345/Gen., dt.05.11.2016. Further Govt. in G.A. & P.G. Department vide Notification No.5651/Gen. dt.17.02.2020 (published in the Odisha Gazette Extraordinary No.395, dt.27.02.2020), in supersession of the OCS (Rehabilitation Assistance) Rules, 1990, have made the OCS (Rehabilitation Assistance) Rules, 2020 which came into force on the date of its publication in the Odisha Gazette, i.e. on 27.02.2020. Under Rule-3 of this new Rule, in deserving cases one family member of the deceased Govt. servant shall be appointed on compassionate ground to Group-D base level post only (subject to provisions contained in these rules) by the appointing authority of that deceased Govt. servant which shall not be claimed as matter of right.

In view of what are stated above the case of the applicant for appointment as Junior Clerk under the current Odisha Civil Services (Rehabilitation Assistance) Rules, 2020 merits no consideration as the Rule stipulates, *inter alia*, compassionate appointment by the Appointing Authority (in this case Collector, Jagatsinghpur) to any base level Group-D Post limited to 50% of the Sanctioned Strength, following due procedure under the said Rules.

Under Rule-6(3) of the said Rules:-"In the event the applicant meets the standard as per the criteria outlined under rule-6 (2), the Appointing Authority shall appoint the applicant in a suitable available base level Group "D" vacant post under his control, but if a vacancy does not exist under his administrative control, the Appointing Authority shall forwarded the application to the Head of the Department with request for his suitable appointment against such vacant posts available in his control and the Head of the Department shall locate vacancies in his own Office or other offices under his administrative control and direct Head of the Office where there is such vacant posts to appoint the applicant, and also if no vacancy is immediately available, the application shall be considered for the subsequent vacancy arising in the offices of Heads of Departments and the Head of the Department shall appoint the candidate in the Office or in the offices subordinate thereto."

Statutory Provision under the extant Odisha Civil Service (Rehabilitation Assistance) Rules, 2020 remaining so, it is open for the applicant to apply afresh before the Collector, Jagatsinghpur for compassionate appointment under R.A. scheme for any Group-D Post in the District. The latter may consider his case following due procedure and if he is found eligible he may be appointed in vacant Group-D Post in the District and if no vacancy is available in the District, Collector may take recourse to follow the procedure under Rule-6 (3) of the aforesaid Rules.

With this observation, the case of the petitioner is disposed of and order dt.23.11.2020 in CONTC No.4983/2020 (arising out of W.P.(C) No.8958 of 2020 is complied with."

13. Questioning the above order, the Respondent filed W.P.(C) No.9712 of 2021 additionally praying that a direction should be issued to the Appellant herein to pass an order offering the Respondent employment against a Class-III post under the RAS. It is the aforementioned writ petition that was disposed of by the learned Single Judge by the impugned order dated 5th April 2021 in the manner indicated hereinbefore.

14. The short question therefore arises for consideration in the appeal is whether the 2020 Rules that were in force at the time of considering the application of the Respondent under the RAS should be applied or whether the 1990 Rules that were prevalent at the time of the death of the father of the Respondent should apply?

15. Turning now to W.P.(C) No.28023 of 2021, the background facts are that the father of the Petitioner was working as Assistant Sub-Inspector of Excise in Ganjam District. He expired on 2nd January 2010 while still in service. The Petitioner then applied for appointment as a Junior Clerk under the RAS in July, 2010 on the ground that his mother was due to her medical condition unable to undertake a government job. This application was forwarded to the Additional Secretary to the Government in the Excise Department on 22nd September, 2011.

16. On 9th September 2016, the Additional Secretary issued a letter to the Collector asking him to furnish a fresh report regarding the financial condition of the family of the deceased government servant. Simultaneously, a report was also called for from the CDMO, Ganjam to place the matter of the mother of the Petitioner before the Medical Board for a proper examination whether her inability to perform a government job still continued.

17. The CDMO constituted a Medical Board, examined the mother of the Petitioner and furnished a report to Opposite Party No.2 on 1st November 2016 stating that she was unfit for a government job. The CDMO, Cuttack furnished another report on 6th February 2017 the same effect. On 26th April 2021, the Excise Commissioner, Odisha wrote to the Additional Secretary stating that since in the meanwhile 1990 Rules had been replaced by the 2020 Rules in terms of which one family member of the deceased government servant could be appointed on compassionate ground to Group-D base level post, the RAS application of the Petitioner was being sent to the Collector (Opposite Party No.4) for taking necessary action. Challenging this communication, the present writ petition has been filed contending that it is unfair to apply the 2020 Rules to an application made by the Petitioner way back in 2010.

18. Therefore, both in W.A. No.367 of 2021 and W.P.(C) No.28023 of 2021, the same question of law arises viz., whether the 2020 Rules that were prevalent at the time of deciding the application of the person seeking appointment under the RAS would apply or the 1990 Rules that were prevalent at the time of death of the concerned government servant would apply?

19. In ***Canara Bank v. M. Mahesh Kumar*** (*supra*), it was held by y a two Judge Bench of the Supreme Court that the case of applicant for compassionate appointment was to be considered taking into account a Rule that was in existence at the time of filing of the application for compassionate appointment and that any subsequent Rule would have no application. However, this position has undergone a change since. In ***State Bank of India v. Sheo Shankar Tewari (2019) 5 SCC 600***, noting the conflicting views between ***Canara Bank v. M. Mahesh Kumar*** (*supra*) and decisions of other coordinate Benches of the Supreme Court of India, the issue was referred to a larger Bench of three learned Judges.

20. In ***N.C. Santhosh v. State of Karnataka (2020) 7 SCC 617*** a three-Judge Bench of the Supreme Court reviewed the entire case law including the earlier judgments in ***State Bank of India v. Raj Kumar (2010) 11 SCC 661*** and ***MGB Gramin Bank v. Chakrawarti Singh (2014) 13 SCC 583***. The unanimous view of the three-Judge Bench in ***N.C. Santhosh***

was that the claim should be considered as per the amended Rules that were prevalent at the time of consideration of the application and not the Rules that were prevalent on the death of the government servant. The Supreme Court in ***N.C. Santhosh*** also took note of the recent judgment in ***State of Himachal Pradesh v. Shashi Kumar (2019) 3 SCC 653*** where the Court reiterated that appointment to a public post has to be made acknowledging the principles consistent with Articles 14 and 16 of the Constitution of India and that compassionate appointment is an exception to the general rule. In ***N.C. Santhosh*** (*supra*), the conclusion of three judge Bench was as under:

> "19. Applying the law governing compassionate appointment culled out from the above cited judgments, our opinion on the point at issue is that the norms, prevailing on the date of consideration of the application, should be the basis for consideration of claim for compassionate appointment. A dependant of a government employee, in the absence of any vested right accruing on the death of the government employee, can only demand consideration of his/her application. He is, however, disentitled to seek consideration in accordance with the norms as applicable, on the day of death of the government employee."

21. The three judge Bench in ***N.C. Santhosh*** (*supra*) held that the decision in ***Canara Bank v. M. Mahesh Kumar*** (*supra*) was inconsistent with the earlier views of other coordinate

Benches. The relevant discussions in this regard in ***N.C. Santhosh*** reads thus:

> "14. This Court in *SBI vs. Raj Kumar (2010) 11 SCC 661* while reiterating that no aspirant has a vested right to claim compassionate appointment, declared that the norms that are in force, when the application is actually considered, will be applicable. The employer's right to modify the scheme depending on its policies was recognized in this judgment. Similarly, in *MGB Gramin Bank vs. Chakrawarti Singh (2014) 13 SCC 583* this Court reiterated that compassionate appointment has to be considered in accordance with the prevalent scheme and no aspirant can claim that his case should be considered as per the scheme existing on the date of death of the Government employee.
>
> 15. However, in *Canara Bank & Anr. vs. M. Mahesh Kumar (2015) 7 SCC 412* in the context of major shift in policy, whereunder, instead of compassionate appointment (envisaged by the scheme dated 8.5.1993), ex gratia payment was proposed (under the circular dated 14.02.2005), the Court adopted a different approach. Noticing the extinguishment of the right to claim appointment, this Court held the "dying in harness scheme" which was prevalent on the death of the employee, be the basis for consideration.
>
> 16. A two Judge bench headed by Justice Uday U. Lalit, J. noticed the Supreme Court's view in *SBI vs. Raj Kumar* (supra) and *MGB Gramin*

Bank vs. Chakrawarti Singh (supra) on one side and the contrary view in *Canara Bank & Anr. vs. M. Mahesh Kumar* (supra) and felt the necessity of resolution of the conflicting question on whether the norms applicable on the date of death or on the date of consideration of application should apply. Accordingly, in *SBI v. Sheo Shankar Tewari (2019) 5 SCC 600,* the Court referred the matter for consideration by a larger Bench so that the conflicting views could be reconciled.

17. The above discussion suggest that the view taken in *Canara Bank v. M. Mahesh Kumar* (supra) is to be reconciled with the contrary view of the coordinate bench, in the two earlier judgments. Therefore, notwithstanding the strong reliance placed by the appellants counsel on *Canara Bank v. M. Mahesh Kuma*r (supra) as also the opinion of the learned Single Judge of the Karnataka High Court in *Uday Krishna Naik v. State of Karnataka (1999) SCC OnLine Kar 209*, it cannot be said that the appellants claim should be considered under the unamended provisions of the Rules prevailing on the date of death of the Government employee."

22. The net result is that the decision in ***Canara Bank v. M. Mahesh Kumar*** (*supra*) is no longer good law. However, learned counsel for the Respondent in W.A. No.367 of 2021 and the Petitioner in W.P.(C) No.28023 of 2021 urged that post the decision in ***N.C. Santhosh*** (*supra*), a two-Judge Bench of the Supreme Court had again held in ***State of***

Madhya Pradesh v. Amit Shrivas AIR 2020 SC 4541 as under:

> "It is trite to say that there cannot be any inherent right to compassionate appointment but rather, it is a right based on certain criteria, especially to provide succor to a needy family. This has to be in terms of the applicable policy as existing on the date of demise, unless a subsequent policy is made applicable retrospectively."

23. Reliance is also placed on the decision dated 6th September 2021 of a two-Judge Bench of the Supreme Court of India in SLP (C) No.19252 of 2018 (***Seema Kausar v. State of Maharashtra***) where it has been held as under:

> "It cannot be disputed that the appointment on compassionate ground is required to be made only as per the policy of the Government and only in the case where the eligibility criteria under the Scheme has been satisfied.
>
> It also cannot be disputed that the policy which was prevailing at the time when the deceased employee died/the application was made only is required is to be considered."

24. The decision in ***Amit Shrivas*** (*supra*) is dated 29th September 2020 whereas the decision in ***N.C. Santhosh*** (*supra*) is dated 4th March, 2020. Yet the decision in ***Amit Shrivas*** (*supra*) does not appear to have taken note of the larger Bench decision in ***N.C. Santhosh*** (*supra*). In any event, on a careful perusal of the said decision in ***Amit Shrivas***, it appears that it did not turn on the

question whether the application for compassionate appointment had to be considered in terms of the policy prevalent at the time of the death of the government employee. It envisages that there could be a subsequent policy which is made applicable retrospectively. However, the case itself did not turn on that issue because it was found on facts that the father of the Respondent had not attained 'regular status' and therefore the applicant (the son) would not be eligible under the scheme in question.

25. Turning to ***Seema Kausar*** (supra), it was a short two paragraph order by a two-Judge Bench dismissing the SLP, with no reference made to ***N.C. Santhosh*** (*supra*) which is by a three Judge Bench.

26. Learned counsel for the Respondent in writ appeal and the Petitioner in writ petition then referred to the decision in ***the Director of Treasuries in Karnataka v. V. Somyashree*** (decision dated 13th September 2021 in Civil Appeal No.5122 of 2021). The said decision in fact acknowledges that after ***N.C. Santhosh*** (*supra*), it is clear that "the norms prevailing on the date of consideration of the application should be the basis for consideration of claims for compassionate appointment." Therefore, the decision is also of no assistance to the Applicants for compassionate appointment in the present case.

27. Reference is next made to the decision dated 28th September 2021 of a two-Judge Bench of the Supreme Court in Civil Appeal

No. 6019 of 2021 (***The Chief General Manager, Telecommunication, BSNL v. Vidya Prasad***). The Court finds that there is no reference in the said judgment to the decision in ***N.C. Santhosh*** (*supra*). The question turned on the delay in considering the entertaining the application seeking compassionate appointment. In the present case, there is no prayer made in either of the petitions in that regard.

28. This Court has also examined the decision dated 5th October 2021 of a two judge Bench of the Supreme Court in Civil Appeal No.6003 of 2021 (***State of Uttar Pradesh v. Premlata)*** where again the decision of the larger Bench in ***N.C. Santhosh*** (*supra)* has been summarized and reiterated. Consequently, the said decision is also of no assistance to the applicants for compassionate appointment before this Court.

29. For the aforementioned reasons, this Court holds that the learned Single Judge was in error in setting aside the decision dated 31st December 2020 passed by the Commissioner of Excise rejecting the application under the RAS of the Respondent in W.A. No.367 of 2021. Accordingly, the impugned order dated 5th April 2021 of the learned Single Judge in W.P.(C) No.9712 of 2021 is hereby set aside. W.A. No.367 of 2021 is allowed.

30. For the same reasons, this Court upholds the order dated 26th April 2021 issued by the Excise Deputy Commissioner, Odisha.

W.P.(C) No. 28023 of 2021 is accordingly dismissed, but in the circumstances, no order as to costs.

31. An urgent certified copy of this judgment be issued as per Rules.

(S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K. Guin

HIGH COURT
सत्यमेव जयते
ORISSA