Ori.in OA 1013/96

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,

MUMBAI BENCH, MUMBAI.

(1) Original Application No.1016/96.

(2) Original Application No.1017/96.

(3) Original Application No.1018 /96.

(4) Original Application No.1019/96.

(5) Original Application No.1221/96.

Pronounced, this the 31st day of December 1997.

Coram: Hon'ble Shri M.R.Kolhatkar, Member(A).

(1) Sunanda Dalip Malodhe, and
Prakash Sudama Boradhe,
Village & Post Manur
Tehsil & District Nasik,
Maharashtra. .... Applicants in O.A. No.1016/96.

(2) Smt.Jankabai K.Khaire and
Sunil K.Khaire,
Moulana Azad Road,
Deolaligaon,
Nasik Road,
Nasik - 422 101. .... Applicants in O.A. No.1017/96.

(3) Mukundrao Bhimaji Naik and
Vijay Mukundrao Naik,
N-9/E 424,
Vir Sawarkar Path,
New CIDCO,
Nasik - 422 109. .... Applicants in O.A. No.1018/96.

(4) Smt.Jija Onkar Pawar and
Suresh Sopan Pawar,
At Post Mharsul,
Tal. & Dist. Nasik,
House No.35,
Mharsul - 422 004. .... Applicants in O.A. No.1019/96.

(5) Smt.Vazira Abubakar Shaikh,
and Shri Rassi Yasin Sayyad,
Shaburki, Behind Old ITI,
At-Post-Chandwad,Tal-Chandwad,
Dist. Nashik. .... Applicants in O.A. No.1221/96.

V/s.

(1) Union of India through
the Secretary, Ministry of
Finance, Department of
Expenditure, Govt. of India,
New Delhi.
(2) The General Manager
Currency Note Press
Nashik Road .... Respondents in all the O.As

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...cants by Shri D.V.Gangal and
Respondents by Shri V.S.Masurkar.)

ORDER

(Per Shri M.R.Kolhatkar, Member(A))

In these O.As. the parties are common in the sense that applicants have applied for compassionate appointment consequent on the death of employees of the Respondents (who are common viz. Security Press and Currency Note Press) and as issues are identical viz.eligibility of near relatives for compassionate appointment, these O.As. are being disposed of by a common order. The reasons for the order are given in O.A. No.1016/96 in which pleadings in complete form are available. Supplementary observations are made in relation to other O.As. as required.

O.A. No.1016/96 :

In this O.A. applicant No.1 is wife of the late government employee and applicant No.2 is nephew of the late government employee. There is no formal order which is challenged. The contention of the applicants is that they have been denied relief by application of orders which have been issued well after the relevant date. The husband of applicant No.1 expired on 22.9.1992 and applicant No.1 wrote on 16.8.1993 seeking employment for applicant No.2 on compassionate grounds, but the respondents appear to have proceeded on the basis that applicant No.2 was not eligible in the light of latest Government instructions viz. O.M. No.14014/20/90-Estt.(D) dt. 9.12.1993. This O.M. was issued consequent upon, and in order to implement, the decision of the Supreme Court dt. 8.4.1993 in the case of Auditor General of India and ors. Vs. Shri G.Ananta Rajeswara Rao. By these orders the Government decided to delete the provision in the existing scheme providing for appointment on compassionate ground of near relative and it was laid down that it will be only the widow, son or daughter of the deceased government employee who can be considered for appointment on compassionate grounds henceforth. The contention of the applicant is that the

Circular dt. 9.12.1993 was issued after the relevant event viz. the date of death and the date of filing of the application, on which date a near relative was eligible to be considered for compassionate appointment and therefore the respondents ought to have considered their case in terms of earlier orders. Alternatively, the applicants state that even assuming that the Circular dt. 9.12.1993 is held to be applicable, still it was open to the respondents to ask the applicant No.1 to apply and consider the case as per rules; The respondents did nothing of that kind. On the other hand, the respondents have given appointments in terms of old Circular to the near relatives in at least three cases as enumerated in the Rejoinder of the applicant dt. 1.10.1997. The contention of the respondents is that the applicant No.2 in whose favour the appointment was sought is not a near relative i.e. related to the government servant either by blood or marriage. Moreover, the applicant had in her affidavit given a list of her family members in which the name of the applicant does not figure. Therefore, the applicant No.2 could not have been considered to be a dependent of the late government employee. In regard to employment of three persons, to whom employment was given as alleged by the applicant in her Rejoinder, the respondents have conceded that the three persons named therein were interviewed by Board on 14.5.1994 and were appointed as Mazdoors in Industrial cadre w.e.f. 16.8.1994, 3.10.1994 and 14.12.1994 respectively, whereas, the Government of India Memorandum dt.9.12.1993 was received by the department only on 5.9.1995. Thus the compassionate appointment provided to these

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three persons was in the absence of receipt of any modified orders issued by the Government of India. The counsel for the applicant has pointed out that in O.A. No.1018/96 (M.B.Naik) there is a letter dt. 10.7.1995 from Respondents stating that as per the new Regulations, there is no provision for the nearest relative of the deceased to get appointment on mercy basis and therefore the contention of the respondents that the Circular was received by them only on 5.9.1995 cannot be accepted.

3. The basic contention of the counsel for the applicant is that the Circular dt. 9.12.1993 cannot be given retrospective effect and therefore the least that the respondents are required to do is to consider the cases of the applicants all of whom are near relatives in terms of earlier instructions for appointment on compassionate grounds [illegible] viz. instructions dt. 30.6.1987. Alternatively the respondents should give an opportunity to the persons who are eligible in terms of revised instructions to apply and to consider their cases. Thirdly, it is contended that respondents have not come to the Tribunal with clean hands. The respondents have admittedly appointed three employees in violation of revised instructions in 1994, this per se is discriminatory and since the respondents have not expressed regret for the wrong action taken by them, they should be held, out of Court, in equity.

4. The counsel for the respondents argued that there is no right to appointment. The instructions relating to compassionate appointment are only a

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welfare measure. Successive Supreme Court decisions have shown that strict tests of immediate need are required to be applied while considering the cases for grant of compassionate appointment. There is also considerable delay in some applications. What is material is the situation obtaining at the time of examination of the case and when there is considerable lapse of time from the date of death which in some cases extends to six or seven years, then there can be no case for compassionate appointment. In this connection, the learned counsel has relied on the following decisions of the Supreme Court :

(1) Haryana State Electricity Board & Anr. V/s. Hakim Singh (1997(5) SLR 598) in which the Supreme Court has observed that "The object of appointment of a dependant of the deceased employee who dies in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family - The object is to give succour to the family to tide over the sudden financial crisis befalling on the dependants on account of the untimely demise of its sole earning member - It cannot be treated as having created a lien in favour of dependant of a deceased employee."

(2) Jagdish Prasad V/s. The State of Bihar & Anr. (1996(1) SC SLJ 93) in which the Supreme Court was considering the case of appointment on compassionate ground in the case of an appellant who was minor (4 years old) when his father died in harness. His claim for compassionate appointment after attaining major

was repelled on the ground that if that contention is accepted it amounts to another mode of recruitment of the dependent of the deceased Government servant which cannot be encouraged, d'hors the Recruitment Rules.

(3) State of Haryana & Another V/s. Dhan Singh (1996(1) SC SLJ 303). It was held that a brother who was major could not be said to be dependent and he cannot claim compassionate appointment in terms of Punjab Civil Service Rules.

(4) Auditor General of India and Ors. V/s. G.Ananta Rajeswara Rao ((1994) 26 ATC 580) which led to the issue of the revised O.M. dt. 9.12.1993. It was observed that various enumerated eventualities would be breeding ground for misuse of appointments on compassionate grounds.

(5) So far as the ground of discrimination is concerned the counsel has cited State of Haryana and Others Vs. Ram Kumar Mann ((1997) 3 SCC 321) where it is stated as below :

> "It may be that the Government for their own reasons, had given permission in similar case to some of the employees to withdraw their resignations and had appointed them. The doctrine of discrimination is founded upon existence of an enforceable right. The respondent felt that he was discriminated and denied equality as some similarly situated persons had been given the relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right whatsoever and cannot be given the relief wrongly given to the others. There is no invidious

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discrimination in this case. Wrong order cannot be the foundation for claiming equality. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right."

4. The counsel also cited this Tribunal's Judgment in Smt.Shubhangi Prabhu V/s. Dy. Regional Director, ESIC, Bombay (reported at 1994(2) ATJ 46). This Judgment which was subsequent to the Judgment of the Supreme Court in Auditor General of India's case but was delivered without that Judgment having been cited before it, had surveyed the case law cited before it and had summarised the propositions emerging from the case-law as below :

"(1) There is a constitutional mandate of equality of opportunity in the matter of public employment subject to reservations in favour of persons of backward class.

(2) Constitution provides machinery to enforce this mandate by way of public service commission, staff selection commission etc. which conduct examination to test merit.

(3) Compassionate appointment which partakes of the characteristic of hereditary appointment is an exception to the mandate of equality of opportunity. Hence, there can be no such thing as a right to compassionate appointment.

(4) Compassionate appointments being an exception, Government instructions in this regard must be strictly construed.

(5) The tests of (a) "immediate need of assistance when there is no other earning member in the family" and (b) "distress test" when there is an earning member of family must be satisfied before compassionate appointment can be granted.

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(6) When the tests are satisfied, Department should take expeditious decision and if there is no post, even a supernumerary post may be created.

(7) When compassionate appointment is validly ordered, the Court may also order regularization of Government quarter in favour of dependents of the deceased Govt. employee.

(8) The role of judicial review of compassionate appointment matters must, therefore be correspondingly construed."

He therefore, argued that the scope for judicial review of the Government Orders rejecting compassionate appointment is very limited and that the OAs may be dismissed.

5. The counsel for the applicant, on the other hand, relies on the well settled legal propositions recognised in Sabharwal V/s. State of Punjab, Ramzan Khan and E.Karunakaran and contends that Govt. instructions dt.9.12.93 cannot take retrospective effect. Even in the cases cited by the counsel for the respondents, it is seen that in the case of State of Haryana and Another V/s. Dhan Singh (supra) for example, the Supreme Court had directed that the widow of respondent's brother if eligible for employment, it would be open to her to make an application and the department is directed to consider her application according to the rules. As for discrimination, the counsel for the applicant argues that since the applicants are placed in the same category as the persons who were given compassionate appointment in 1994 though near relatives, there is hostile discrimination and therefore, the applicants are entitled to reliefs.

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5. I have considered the matter. Coming first of all to the contention of the respondents that they had not received the revised Circular till September, 1995 it appears, as a matter of fact, that the Circular was received in the Currency Note Press earlier in which reliance is placed on the revised Circular (M.B.Naik O.A. No.1018/96), whereas, the Circular was not received in the India Security Press (S.D.Malodhe O.A. No.1016/96). However, as ignorance of law is no excuse, I consider it as self-evident that irrespective of when the respondents received the Circular dt. 9.12.1993, the Circular takes effect from the date of issue. The respondents' action in appointing three employees even though near relatives, on the ground that at that time they did not receive the Circular can in no way be justified. At the same time, the contention of the counsel for the respondents that the wrong committed by the respondents does not create a right in favour of the applicants is also correct. There is no doubt that the law on the subject is laid down in the Auditor General's case and subsequent Judgments are really an elaborations of basic propositions laid down in that Judgment. The Judgment in Prabhu's case was fully in consonance with the law laid down by the Supreme Court in Auditor General's case. However, the grievance of the applicants is that their cases have been considered in accordance with the Circular dt. 9.12.1993 which was not applicable to them. This basic grievance, in my view, is valid and the applicants are therefore, entitled to the relief on

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on the finding that the respondents have rejected the applications on the strength of a Circular which had no retrospective effect or have not taken any action to formally reject it, taking it that in those particular cases there was no case for consideration. So far as the definition of near relative is concerned, there is no guidance in rules in this regard. The definition of family in Dhan Singh's case applies only to employees governed by Punjab Civil Services Rules. The contention of the respondents that near relative means a person who is related to Government servant either by blood or by marriage and only includes husband, wife, brother and sister cannot be accepted. The term near relative has to be taken in its common-sensical meaning as applied prior to the issue of the Circular dt. 9.12.1993 viz. a relative who is perceived as near relative by the applicant and who is willing to support the family of the deceased employee. From this point of view, brother, nephew, brother's son etc. are required to be treated as near relatives. The O.A. is therefore disposed of by directing the respondents to consider the case of applicant No.2 for compassionate appointment in accordance with the Circular dt. 30.6.1987.

6. The alternative relief viz. to consider the case of applicant No.1 cannot be given. The analogy of State of Haryana Vs. Dhan Singh does not apply since in that case the main relief was refused. Since I am granting the main relief, the question of grant of alternative relief does not arise.

7. The O.A. is allowed in these terms with no orders as to costs.

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Supplementary observations in related cases :

O.A. No.1017/96.

8. In this case, the applicant No.1 is the mother of the deceased government employee and applicant No.2 is the brother of the deceased employee. The employee died on 8.6.1992. She applied for compassionate appointment in favour of her son viz. the brother of the deceased employee. She was informed by the letter dt. 11.7.1995 that the brother was not entitled in terms of the latest instructions. In this case the respondents are directed to consider the case of applicant No.2 for compassionate appointment as prayed.

O.A. No.1018/96.

9. In this case, the Government employee died on 11.5.1989. The brother of the Government employee applied on 20.8.1993 for compassionate appointment to his son Vijay. Thus the application is by nephew (Putanya) of the deceased government employee. It is contended by the counsel for the respondents that apart from anything else, this case may be considered as being time barred. This contention cannot be accepted, because a rejection letter dt. 10.7.1995 has been issued and O.A. has been filed on 25.9.1996 and thus the delay if any is marginal viz. about two months and the same is condoned and the respondents are directed to consider the case of applicant No.2 for appointment in terms of government instructions dt. 30.6.1987.

O.A. No.1019/96.

10. In this case the government employee expired on

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30.12.1989. His widow applied on 26.2.1990 for compassionate appointment in favour of her brother-in-law that is the brother of the deceased government employee and the same was turned down by the letter dt.12.11.1994. The respondents are directed to consider the case of applicant No.2 in terms of Circular dt. 30.6.1987 as prayed for.

O.A. No.1221/96.

11. In this case, the government employee died on 14.8.1987. His widow was informed on 29.3.1988 that no post in which woman can be employed is available and that there is no likelihood of any post in which a woman can be employed becoming available. She, therefore, continued to make representations for giving appointment vide representations dt. 9.8.1990, 16.2.1991, 25.5.1992. Thereafter on 16.4.1993 she applied for appointment in favour of applicant No.2 i.e. the brother of the deceased government employee and kept on reminding in regard to this case vide letter dt. 26.9.1995 and others. The contention of the counsel for the respondents is that this case is hopelessly time barred because the death occurred in 1987 and the O.A. has been filed on 19.7.1996. In the facts of the case viz. that the widow belongs to weaker sections of society and that she would have been given compassionate appointment but for the fact that no vacancy as for a woman employee was available and that it was only thereafter though she applied for compassionate appointment in favour of her brother-in-law, that is the brother of the deceased government employee and that there has been no reply, I am inclined to condone the delay in this O.A. under section 21(3) of the

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Administrative Tribunals Act, 1985 holding that the applicant has satisfied the Tribunal that she had sufficient cause for not making the representation within the stipulated limitation period. The O.A is disposed of by directing the respondents to consider the case of applicant No.2 as per Circular dt.30.6.1987.

12. The five O.As. are disposed of in terms of the above directions with no orders as to costs.

(M.R.KOLHATKAR)
MEMBER(A).

B.

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

R.P.No. 32/98 in OA.NO.1016/96
R.P.No. 35/98 in OA.NO.1017/96
R.P.No. 31/98 in OA.NO.1018/96
R.P.NO. 33/98 in OA.NO.1019/96
R.P.No. 34/98 in OA.NO.1221/96

Pronounced this the 8th day of October 1998

CORAM: Hon'ble Shri D.S.Baweja, Member (A)

Smt.Sunanda D.Malode & Ors.

By Advocate Shri D.V.Gangal ... Applicants

V/S.

Union of India & Ors. ... Respondents (Review Petitioners)

By Advocate Shri V.S.Masurkar

Tribunal's Order

Original Applications No. 1016/96, 1017/96, 1018/96, 1019/96 and 1221/96 have been disposed of by a common order dated 31.12.1997. Review Petitions No. 32/98, 35/98, 31/98, 33/98, 34/98 respectively have been filed by the respondents seeking the review of the order dated 31.12.1997. The Member who constituted the Single Member Bench and pronounced the order has since reitred. In view of this, another Bench has been constituted and therefore the Review Petitions were taken up for preliminary hearing. Heard the arguments of Shri D.V.Gangal, learned counsel for the applicants and Shri V.S.Masurkar, learned counsel for the respondents.

2. A copy of the order dated 31.12.1997 has been furnished to the respondents on 14.1.1998. However, the review petitions in all the cases have been filed on 27.4.1998. In terms of provisions of Rule 17 of

Central Administrative Tribunal (Procedure) Rules, 1987, the review petition is required to be filed within a period of 30 days of the order of which the review is sought. Keeping this in view, all the review petitions have been filed late. The respondents have filed Misc. Applications in all the review petitions making a prayer to condone the delay. The learned counsel for the applicants, during the hearing, strongly opposed the prayer of the respondents to condone the delay on the plea that the respondents have not explained the delay of two months which they have taken in seeking the legal opinion. The counsel for the respondents, on the other hand, submitted that the delay had taken place for consideration on various level with regard to the implementation of the order or filing of review petition. He contended that the delay had taken place due to the procedure to be followed in an administrative set up and a very strict view of delay should not be taken in respect of the dealings by the department as held by the Hon'ble Supreme Court in the case of The Special Tehsildar, Land Acquisition, Kerala vs. K.V.Ayisumma, JT 1996 (7) S.C. 204. Keeping in view what is held by the Supreme Court in this judgement and also the reasons advanced by the respondents in the Misc.Applications, I am inclined to condone the delay. The Misc. Applications are, therefore, allowed and the delay in filing the review petitions in all the OAs. is condoned.

3. The grounds on which the power of review can be exercised have been laid down by the Hon'ble Supreme Court through several judgements. In this connection, it would be appropriate to refer to some of the judgements. In the case of Aribam Tuleshwar Sharma vs. Aribam Pishak Sharma & Ors., AIR 1979 SC 1047, the Hon'ble Supreme Court has observed in Para 3 as under :-

> "... But there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the sub-ordinate Court."

In the judgement of M/s. Thungabhadra Industries Ltd. vs. The Government of Andhra Pradesh, AIR 1964 SC 1372, their Lordships of Supreme Court have observed as under :-

> "There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

In the recent judgement in the case of K.A.Mohammed Ali vs. C.N.Prasannan, AIR 1995 SC 454, the Hon'ble Supreme Court has held that review proceedings are not by way of any appeal and review court may not act as appellate court. It is also held that error apparent on record means an error which strikes on looking at record and would not require mere any long drawn process of reasoning on points where there may be conceivably two opinions.

4. Keeping in view the parameters laid down by the Hon'ble Supreme Court within which the review peititon is admissible, I shall examine the contentions raised by the respondents as to whether the present review applications are sustainable. On careful consideration of the averments made in review peititons, it is noted that prayer for review of the order under reference centres on two grounds. The first ground is that irrespective of the dates of death, the relevant rules as prevailing at the time of consideration of the cases for compassionate appointments of the applicants would be applicable. In view of this, the cases of the applicants are to be governed by the rules laid down in Office Memorandum dated 30.6.1987. The counsel for respondents has cited a number of judgements during hearing to support this contention. The second ground is that the rules laid down in O.M. dated 30.6.1987 are nothing but reiteration of the rules laid down as per the O.M. dated 25.1.1978 which have been held as violative of Article 16(2) of the Constitution of India by the Hon'ble Supreme Court in the case of Auditor General of India & Ors. vs. G. Ananta Rajeswara Rao, (1994) 26 ATC 580. In view of this, the respondents contend that the O.M. dated

30.6.1987 does not have any legal validity. The averments made in the review petition neither bringout any mistake or error apparent on the record or any new material which has been discovered/subsequently and could not be brought on record at the time of passing of the order. The grounds advanced for seeking the review of the order make an effort to bring out that the order suffers from error of law and therefore the decision is erroneous. Though in the Review Petitions, no mention has been made but during the arguments, the learned counsel for the respondents repeatedly mentioned that the Bench has misinterpreted the judgement of the Hon'ble Supreme Court in the case of Auditor General of India & Ors.. The learned counsel for the respondents also/argued that if the order suffers from error of law, the Tribunal can review the order as is held by the Hon'ble Supreme Court in the case of Surjit Singh & Ors. vs. Union of India & Ors., JT 1997 (6) S.C. 32. I have carefully gone through this judgement. The Hon'ble Supreme Court has held that where there is a patent mistake brought to the notice of the Tribunal, the Tribunal is bound to correct the same. This observation of the Hon'ble Supreme Court is to be considered in the background/of the facts and circumstances of the case under reference. It is noted that in this case, the Tribunal's decision fell into error as the earlier decision of the Hon'ble Supreme Court with regard to the seniority criteria/had not been taken note of. In the present case, on going through the order, it is noted that the contentions raised by the respondents in the review petitions have been already considered by the Bench. After going through the various judgements cited by the either party and the arguments advanced, the Bench had come to the conclusion

that the case of the applicants in all the OAs. will be governed by the instructions as laid down as per O.M. dated 30.6.1987. It is also noted that the judgement of the Hon'ble Supreme Court in the case of Auditor General of India & Ors. had been also taken note of. In this background, the grounds advanced in the review petitions only strive to bring out that the order is erroneous and the review of the same is sought through the hearing of the matter again. The review petitions are therefore more of an appeal in disguise. As held by the Hon'ble Supreme Court in various judgements as referred to earlier, the power of review cannot be availed of for correction of a decision which is stated as erroneous through rehearing of the matter. Considering all the facts and circumstances, I have no hesitation to hold that the present review petitions are in the nature of an appeal and not petitions for seeking review in the terms of the parameters laid down by the Hon'ble Supreme Court.

5. In the result of the above, I find no merit in the review petitions and the same are dismissed accordingly.

(D.S. BAWEJA)
MEMBER (A)

mrj.

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

C.P. NO.: 26/98, 27/98, 28/98 AND 29/98 IN

O.A. NOS.: 1017/96, 1018/96. 1019/96 AND 1221/96

Respectively.

TRIBUNAL'S ORDER : DATED : 04.12.1998.

Shri D.V. Gangal for the petitioners

The case is called out for hearing.

Shri V.S. Masurkar tenders proceedings of the Committee for compassionate appointment dated 25.11.1998, which shows that applicants' caseshave been considered. They also say that other process like police verification, etc. are still being processed. In our view, the proceedings of the Committee dated 25.11.1998 substantially complies with the direction given in the O.A. Therefore, no question of contempt arises. Accordingly, the above mentioned contempt petitions are discharged. No costs.

(D.S. Baweja)
M(A).

(R.G. Vaidyanatha)
Vice-Chairman.

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