

\$-1

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 19.12.2014**

% **W.P.(C.) No.9008/2014**

UNION OF INDIA

..... Petitioner

Through: Mr. Malaya Kumar Chand with
Ms.Shivani Singh, Advocate

versus

PANKAJ KUMAR SHARMA

.....Respondent

Through: Mr. Sanjay Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The petitioner/Union of India has preferred the present writ petition under Article 226 of the Constitution of India to assail the order dated 29.01.2014 passed by the Central Administrative Tribunal (CAT/ Tribunal) in O.A. No.3424/2012 and the order in review being R.A. No.188/2014 dated 10.10.2014. By the first order dated 29.01.2014, the Tribunal quashed the petitioners communication dated 09.05.2012 – rejecting the respondents application for compassionate appointment and directed the petitioner to consider the respondent/applicants case for grant of compassionate appointment under the scheme. By the second order dated 10.10.2014, the aforesaid review application preferred by the petitioner was dismissed.

2. The respondent/applicants father Late Shri Suresh Chand Sharma died in harness on 15.08.2008. During his service, the respondent's father had two wives. The respondent/applicant is the son of the second wife. After the demise of his father, the applicant made an application for grant of compassionate appointment on 10.10.2008, followed by two reminders. The petitioner rejected the respondents application vide order dated 18.09.2009 on the ground that the deceased railway servant married the applicant's mother Smt. Vijaya Kumari without taking any permission from the petitioner. The petitioner further stated that the first wife of the deceased railway servant viz. Smt. Raj Kumari had also applied for appointment on compassionate grounds and her claim had to be considered.

3. The applicant challenged the order dated 18.09.2009 before the CAT by filing O.A. No.2426/2010 which was disposed of on 17.08.2010 with the observation that the first wife Smt. Raj Kumari being over 60 years of age, was not eligible for compassionate appointment. The CAT directed the petitioner to finalise the matter within two months.

4. The petitioner, thereafter, passed the order dated 16.12.2010 rejecting the applicants claim for compassionate appointment on the ground that where a railway employee died in harness leaving more than one widow and their children, the settlement dues have to be shared by both the widows in terms of the Court orders, or otherwise on merits of each case. The petitioner also stated that so far as appointment on compassionate ground to the second widow and/or her children is concerned, the same could not be considered unless the administration had permitted the second marriage in special circumstances taking into account the personal law, etc. The

petitioner further stated that in the case of the applicant's father, no such permission had been granted and, therefore, the second marriage with the applicant's mother had not been recognized.

5. The applicant preferred O.A. No.1533/2011 to assail the order dated 16.12.2010. The same was disposed of on 06.05.2011 requiring the applicant to submit a fresh representation, which was required to be decided within a period a four weeks. In compliance with the said order dated 06.05.2011, the petitioner passed a speaking order on 18.07.2011, holding that the applicants application for compassionate appointment was not covered by the railway board circular.

6. Once again, the applicant preferred O.A. No.2902/2011 to assail the order dated 18.07.2011. The CAT granted an opportunity to the applicant to establish that the marriage of his mother with the deceased railway servant was recognized by the railways, and that the railways had acted in accordance with the same for other purposes like payment of terminal benefits as well as CGEIS and provident fund. If that were the case, the CAT held that it was immaterial whether they had given permission for the second marriage in writing, or not. The petitioner again rejected the respondents claim vide order dated 09.05.2012, leading to the filing of the aforesaid OA by the applicant.

7. The CAT while allowing the OA placed reliance, *inter alia*, on ***Rameshwari Devi v. State of Bihar & Ors.***, (2002) 2 SCC 431, and the judgment of the Calcutta High Court in ***Namita Goldar & Anr. V. Union of India & Ors.***, 2010 (3) SLR 57. In ***Rameshwari Devi*** (supra), the Supreme Court held that the second marriage during the subsistence of the first

marriage may be illegal, but the children born out of such second marriage are legitimate and are entitled to the estate of the father. The Supreme Court placed reliance on Section 16 of the Hindu Marriage Act. In para 14 of the said decision, the Supreme Court held as follows:

“It cannot be disputed that the marriage between Narain Lal and Yogamaya Devi was in contravention of Clause (i) of section 5 of the Hindu Marriage Act and was a void marriage. Under Section 16 of this Act children of a void marriage are legitimate. Under the Hindu Succession Act, 1956, property of a male Hindu dying intestate devolves firstly on heirs in Clause (1) which include the widow and son. Among the widow and son, they all get shares (See: Sections 8,10, ad the Schedule to the Hindu Succession Act, 1956). Yogamaya Devi cannot be described as a widow of Narain Lal, her marriage with Narain Lal being void. The sons of the marriage between Narain Lal and Yogamaya Devi being the legitimate sons of Narain Lal would be entitled to the property of Narain Lal in equal shares along with that of Rameshwari Devi and the son born from the marriage of Rameshwari Devi with Narain Lal. That is, however, the legal position when a Hindu male dies intestate....”

8. In ***Namita Goldar*** (supra), the deceased employee married for the second time during the lifetime of the first wife, as there was no issue from the first marriage. The employee died in harness leaving behind two widows and four children of the second wife. The first wife died shortly after the death of the deceased employee, and the family pension and other retiral benefits were disbursed to the second wife and her children. Compassionate appointment was claimed by the eldest son of the second wife, as the first wife was issueless. Following the decision in ***Rameshwari Devi*** (supra), the Calcutta High Court allowed the claim and, *inter alia*, observed as follows:

“5. In view of the decision of the Apex Court in the case of *Rameshwari Devi (supra)*, the children of the second wife cannot be treated as illegitimate and referring to Section 16 of the Hindu Marriage Act specifically held that children of a void marriage are legitimate.

6. In view of the law as settled by the Supreme Court, no distinction can be made amongst the children of the first and second wife of a deceased employee. In the present case, however, first wife was issueless and died shortly after the death of the employee concerned.

7. Therefore, the eldest son of the second wife, namely the petitioner No.2 herein is entitled to claim appointment of compassionate ground on account of the sudden death of the employee concerned.

8. The learned Tribunal, in our opinion, has rightly held that the claim of the petitioner No.2 herein for compassionate appointment cannot be turned down on the ground it was done although the learned Tribunal did not issue any mandatory direction on the respondents authorities for granting compassionate appointment to the said son of the second wife, namely the petitioner No.2 herein and directed the General Manager, Eastern Railway to refer the matter to the Railway Board for taking decision. We are, however, of the opinion that the circular issued by the Railway Board on 2nd January, 1992 preventing the children of the second wife from being considered for appointments on compassionate ground cannot be sustained in the eye of law in view of the specific provision of the Hindu Marriage Act, 1955 and pursuant to the decision of the Hon'ble Supreme Court in the case of *Rameshwari Devi (supra)*.

9. In the aforesaid circumstances, the aforesaid circular issued by the Railway Board on 2nd January, 1992 stands quashed to the extent it prevents the children of the second wife from being considered for appointment on compassionate ground.”

9. Thus, the Calcutta High Court rejected the reliance placed by the Railways on its circular, which denied consideration for compassionate appointment to the child of the second wife on the ground that such marriage was not authorized.

10. The submission of learned counsel for the petitioner is that the second marriage of the deceased railway employee, namely, late Sh. Suresh Chand Sharma was not permitted in terms of the railway board circular bearing no.E(NG)H/91/RC-1/136 dated 02.01.1992, RBB 1/92 and, consequently, the compassionate appointment could not be granted to the child of the second wife. He has also placed strong reliance on the judgment of the Jharkand High Court in *M.V.V. Prakash v. Union of India & Ors* in WP (S) No.16/2014 dated 24.07.2014.

11. Learned counsel for the respondent, who appears on advance notice, supports the impugned order. He submits that the impugned order is fair, just and reasonable and does not call for interference by this Court in exercise of its power of judicial review over the orders of the Tribunal. He places strong reliance on the aforesaid decisions, namely, *Rameshwari Devi* (supra) and *Namita Goldar* (supra).

12. Admittedly, the first widow of the deceased being over aged was not granted compassionate appointment. The applicant was the eldest son of the second wife. Merely because the marriage between the deceased government employee and the applicant's mother was not blessed by the petitioner – by granting prior permission, does not mean that the respondent/applicant ceased to be a legitimate child of his late father. In the light of Section 16 of the Hindu Marriage Act, the status of children born out

of invalid marriage is protected, and they are considered as legitimate children of their father. Such children derive all the rights of succession, as children born out of a legal and legitimate wedlock. This position is abundantly clear from the decision in *Rameshwari Devi* (supra).

13. The submission that the marriage between the deceased government servant and the applicant's mother was not solemnized after prior permission, is neither here nor there. Since the deceased railway servant was already married to his first wife, the petitioner could possibly not have granted permission for his second marriage to the mother of the applicant. Grant of such permission in a given case would not validate the second marriage, if the same is in contravention of the law.

14. The decision in *Namita Goldar* (supra) squarely applies in the facts of the present case. The Calcutta High Court has held that the circular of the Railways – relied upon by the petitioner in the present case as well, cannot be sustained in the light of the provisions of the Hindu Marriage Act, 1956. That decision, apparently, has attained finality and binds the petitioner. The petitioner is precluded from re-agitating the same issue again and again.

15. The decision in *M.V.V. Prakash* (supra) is founded upon an earlier judgment of a Division Bench of the same Court in the case of *Basanti Devi* in WP (S) No.4461/2008. In *Basanti Devi* (supra), the Division Bench of the Jharkand High Court differed from the view taken by the Division Bench of the Patna High Court in the case of *Purushottam Kumar v. State of Bihar*, 2005 (3) PLJR 458. While doing so, the Division Bench in *Basanti Devi* (supra) observed as follows:

“14. With respect, we are unable to subscribe the view expressed in Purushottam Kumar’s case. Firstly, the compassionate appointment and right to inherit property have no co-relation, nor can be equated in any manner. The compassionate appointment is not a property which can be subject matter of alienation and can be bequeathed whereas the devolving of property of a person is governed by the law, may it be customary or may it be statutory law, whereas the service and benefit arising out of services are governed by the frame of the contract of service or the rules governing the service of the employees and by the scheme, if framed by the employer. The compassionate appointment depends solely upon the frame of contract between the employer and employee and cannot be made subject matter to be governed by the personal law, when the employer has not provided so. The Hon’ble Supreme Court in the case of State Bank of India Vrs. Raj Kumar (supra) clearly held that compassionate appointment is traceable only to the scheme framed by the employer for such appointment and there is no right whatsoever outside such scheme. Therefore, in our humble opinion, merely because illegitimate child has been put at par in the matter of inheritance, by specific and statutory provision, its benefit cannot be extended, so as to put a burden upon the employer when the employer specifically has disallowed such benefit to such successor of the employee.

15. We may again observe here that the said decision of Railway Board, not providing compassionate appointment to the child of second wife of the employee who contracted second marriage in the life time of the first wife, is neither under challenge, nor has been shown to be unreasonable, rather it appears to be in consonance with the public policy of the monogamy. Therefore, on this count also, in our humble opinion, the view expressed by the Tribunal does not appeal to us.

16. In addition to above, in Purushottam Kumar’s case also the fact and situation was entirely different. In Purushottam Kumar’s case, there was a specific provision for providing employment to the dependent of the Government servant, who died while in service and it provided appointment to the

employees” “son” without any restriction against appointment to the son of second wife. Therefore, on facts also Purushottam Kumar’s case has no application as in the present case there is specific restriction against the appointment to the son of second wife of the employee who contracted marriage in the life time of first wife.”

16. We have considered the submission of learned counsel for the petitioner as also the decision of the Division Bench of the Jharkand High Court in *M.V.V. Prakash* (supra) in the light of the judgment of the Supreme Court in *Rameshwari Devi* (supra) and that of the Calcutta High Court in *Namita Goldar* (supra). It clearly emerges that there is difference of opinion between the Calcutta High Court and the Patna High Court on the one hand, and that expressed by the Jharkand High Court on the other hand. Once the law declares children born out of a void or illegitimate marriage to be legitimate, no policy or circular of the State can seek to create a distinction or discriminate on the basis of the status of the wedlock (i.e. valid or invalid), out of which a child is born. To permit the same would be to bring in distinction and discrimination through the backdoor, and nullify the effect of Section 16 of the Hindu Marriage Act.

17. The purpose of grant of compassionate appointment is to provide immediate succor to the dependant family of the deceased government servant. It does not matter whether the family of the deceased government servant stems from a legitimate or an illegitimate wedlock. The factum of dependence, and the need for urgent relief – in the form of compassionate appointment, to the dependants of the deceased government servant is in no manner diminished, merely because the wedlock of the deceased government servant with his spouse may be illegitimate or void. At the

highest, what could be said is that the spouse of the deceased government servant, whose marriage may be illegitimate or void, would not be in a position to stake a claim for himself or herself to claim compassionate appointment. But that cannot be said about a child born out of such wedlock since, in law, he is a legitimate/valid child – though born out of an illegitimate or void marriage.

18. In our view, therefore, the judgment of the Calcutta High Court in *Namita Goldar* (supra), which follows the decision of the Supreme Court in *Rameshwari Devi* (supra) lays down the correct position in law, and we prefer to follow the same over the decisions of the Jharkand High Court, aforesaid.

19. Article 16(2) prohibits discrimination in matters of public employment on various grounds, including “descent”.

“16.(1) Equality of opportunity in matters of public employment - There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

XXXXXX

XXXXXX

XXXXXX”

20. While the Supreme Court decisions on Article 16(2) were in the context of rules which restricted employment opportunities within families, or in the context of the constitutionality and scope of compassionate appointment itself, we find that there is nothing in the *text* of Article 16(2) that precludes its application to the present case. In fact, textually, the provision suggests that discrimination against the children born to a second wife amounts to discrimination on the basis of ‘descent’, since children born to the first wife are not disadvantaged in a similar way.

21. This interpretation is supported by a contextual understanding of Article 16(2). The prohibited grounds under Article 16(2) include “religion, race, caste, sex, descent, place of birth, residence.” There are two common threads running through these terms, which explain the principle underlying framers’ choice. The first is that they form markers of personal identity that an individual is either born into and are beyond his control to change. Secondly, these markers of group identity, such as sex or caste were historically the reasons for widespread and pervasive discrimination in Indian society, especially in the context of equality of opportunity in the economic and social sphere. In specifying that these grounds could no longer serve as justifications for unequal distribution of benefits and burdens, the framers were trying to remedy centuries of historical wrongs.

22. The Court is of opinion that – apart from being textually sound – understanding ‘descent’ in terms of prohibiting discrimination against a person on the basis of legitimacy, or on the basis of his mother’s status as a first or second wife, fits within the principles underlying Article 16(2). Not only is one’s descent, in this sense, entirely beyond one’s control (and

therefore, ought not to become a ground of State-sanctioned disadvantage), but it is also an established fact that children of ‘second’ wives, whether counted as illegitimate or legitimate, have often suffered severe social disadvantage. Another significant observation here is that at the entry level – “legitimacy” is and cannot be a ground for denial of public employment. For these reasons, this Court is of the opinion that the Petitioner’s regulation violates Article 16(2).

23. For the aforesaid reasons, we find no merit in the petition, which is accordingly dismissed.

VIPIN SANGHI, J.

S. RAVINDRA BHAT, J

DECEMBER 19, 2014

sr

