IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 910 OF 2015

Union of India and anr. .. Petitioners.
V/s.
V.R. Tripathi .. Respondent

Mr. Suresh Kumar a/w. Ms Sangita Yadav for the petitioners.
Mr. Pravin H. Padave for the respondent.

CORAM: D.H. WAGHELA, C.J. AND
M.S.SONAK, J.
DATE : 01 APRIL 2016.

JUDGEMENT: (*Per M.S. SONAK, J.)*

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] The petitioners-Union of India (Railways) challenge the orders dated 6 March 2014 and 26 August 2014 made by the Central Administrative Tribunal (CAT) in Original Application No. 110 of 2014 and Review Petition No. 29 of 2014, merely directing that the case of respondent, the son of late Ramlakhan Tripati (Technician Grade-I) a permanent railway employee, who died in harness on 28 November 2009 be considered for compassionate appointment. The directions contained in the impugned orders, it must be noted, do not direct the appointment of the respondent on compassionate basis, but merely directs consideration of the respondent's case for appointment on compassionate basis, on its own merits and in accordance with law.

3] Mr. Suresh Kumar, learned counsel for the Union of India (Railways), has submitted that compassionate appointment, is not a regular source of appointment, but rather the same is an exception to the rule. Mr. Suresh Kumar submitted that such matters can be considered strictly in accordance with rules and the circulars, which hold the field and not otherwise. Mr. Suresh Kumar relied upon railway board's circular dated 2 January 1992, which *inter alia,* provides that where the deceased employee has contracted a second marriage during subsistence of the first marriage, without obtaining permission from the railways, such second wife or children from second wife will not be entitled to compassionate appointment. Mr. Suresh Kumar submitted that the position which flows from such circular, has in fact been accepted by the Division Bench of this Court in ***Pratibha D. Salve Vs. The Union of India and anr.***[1] and in ***Union of India and anr. Vs. Pradeep Uttam Gid***[2]**.** Mr. Suresh Kumar submitted that similar position has also been accepted by the Division Bench of Jharkhand High Court in ***Union of India Vs. Basanti Devi***[3]. In these circumstances, Mr. Suresh Kumar submitted that the CAT was not right in refusing to follow the railway board's circular dated 2 January 1992 on the ground that such circular has been struck down as unconstitutional by the Division Bench of the Calcutta High Court in case of ***Namita Goldar and anr. Vs. Union of India and ors.***[4]**.** For all these reasons, Mr. Suresh Kumar

1 Writ Petition No. 1156 of 2013 decided on 8/12/2014 (**Aurangabad Bench**)
2 Writ Petition No. 3374 of 2014 decided on 31/7/2015 (**Nagpur Bench**)
3 (2011) 3 AIR Jhar R 192
4 2010 LAB I.C. 1465

submitted that the impugned orders made by the CAT warrant interference.

4] Mr. Suresh Kumar, learned counsel for the Union of India (Railways), further submitted that Shri Ramlakhan Tripathi, the respondent's father, who died in harness was guilty of misconduct in marrying for second time during subsistence of his first marriage. Further, Mr. Suresh Kumar submitted that the respondent being an "*illegitimate child*" of late Shri. Ramlakhan Tripathi can claim no consideration in the matter of compassionate appointment. Mr. Suresh Kumar, therefore, submitted that even if the railway board's circular dated 2 January 1992 is held to be a nullity, the CAT has exceeded its jurisdiction in directing the Union of India (Railways) to consider the case of the respondent for compassionate appointment. For this reason also, Mr. Suresh Kumar submitted that the impugned orders made by the CAT deserve to be set aside.

5] Mr. Pravin Padave, learned advocate of the respondent, submitted that there is no jurisdictional error whatsoever in the making of impugned orders by the CAT. He submitted that the railway board's circular dated 2 January 1992 was struck down as unconstitutional by the Division Bench of the Calcutta High Court on 10 February 2010. The said judgment has not been appealed by Union of India. In fact, as noted by the CAT, the Union of India has complied with said judgment of the Calcutta High Court and granted compassionate appointment to Namita Goldar. He

submitted that the Union of India did not point out the decision in ***Namita Goldar (supra),*** to the Division Bench of Jharkhand High Court. The decisions rendered by this Court are clearly distinguishable on facts and in any case, the provisions contained in Section 16 of the Hindu Marriage Act, 1955 (H.M.Act) were not considered by this Court. Similarly, the two decisions have also not taken into consideration the decision of the Hon'ble Supreme Court in ***Rameshwari Devi Vs. State of Bihar and ors.***[5]**.** Mr. Padave further submitted that no disciplinary proceedings were ever initiated against Shri. Ramlakhan Tripathi during his tenure of service. Rather, the railways have agreed to sharing of pension and other terminal benefits between the two wives. Mr. Padave submitted that in view of categorical provision contained in Section 16 of the H. M. Act, 1955, the contentions with regard to respondent's illegitimacy, is quite misconceived. For all the aforesaid reasons, Mr. Padave submitted that this petition may be dismissed.

6] Rival contentions now fall for determination.

7] There can be no dispute that with regard to the general proposition that the compassionate appointment is not a normal source of appointment. Rather, compassionate appointment is an exception to the general rule and therefore, consideration of the same has to be on the basis of rules, regulations or executive instructions, which may be in force in that regard. There is also no

5 (2000) 2 SCC 431

dispute that the railways have a scheme for compassionate appointment. The only reason, which had prompted the railways to decline even to consider the case of the Union of India (Railways) for compassionate appointment was the railway board's circular dated 2 January 1992, which had i*nter alia,* provided that where the employee dying in harness, had contracted a second marriage during subsistence of the first marriage, without obtaining the permission from the railways, such second wife or the children from such second wife will not be entitled to any compassionate appointment.

8] In ***Namita Goldar (supra),*** the Division Bench of the Calcutta High Court has held that the railway board's circular dated 2 January 1992 cannot be sustained in the eyes of law and has therefore, struck down the same to the extent the circular prevented the children of second wife for being considered for appointment on compassionate grounds. The relevant discussion contained in paragraphs 4 to 9, reads thus :

> *"4. Admittedly, in the present case, second marriage of the deceased employee was accepted by the first wife since she never challenged the said second marriage and did not even lodge any complaint before the railway authorities for taking appropriate action against the said deceased employee for contracting second marriage and therefore, we have no difficulty to accept that the deceased employee marriage for the second time upon obtaining specific consent from the first wife. There is also no dispute that the said deceased employee used to live with both the wives and the four children of the second wife. Since the first wife died shortly after the*

death of the deceased employee, family pension and other retiral benefits also disbursed to the second wife and his children. The compassionate appointment was claimed by the eldest son of the second wife, as the first wife was issueless and also died shortly after the death of the employee concerned.

4. 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.

5. 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.

6. 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.

7. 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 appoint-ment to the said son of the second wife, namely the petitioner No.2 herein and directed the General Manger, 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 he 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)

> *8. 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 appointments on compassionate ground."*
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> *(emphasis supplied)*

9] Admittedly, the Union of India (Railway) has not challenged the decision in ***Namita Goldar (supra)***. Subsequently, the said decision appears to have been consistently followed by the Calcutta High Court. The CAT, in its order dated 6 March 2014 has made reference to yet another decision of Calcutta High Court in ***Union of India and ors. Vs. Smt. Meena Oraon and anr.***[6]***,*** in which it is held as under:

> *"7. These submissions of Mr. Chakraborty are untenable. The Division Bench of this Court while deciding the case of Smt. Namita Goldar and Anr. Vs. Union of India & Ors. (supra) has already held that the circular of the Railway Board issued on 2nd January 1992 is ultra vires and has quashed it to the extent that it prevents the children of the second wife from being considered for appointment on compassionate grounds. Thus that provision on the basis of which the Railways refused appointment to the respondent no.2 is not in existence. It is a dead letter after February 10, 2010, when the Division Bench delivered its judgment in Smt. Namita Goldar & Anr. Vs. Union of India & Ors. (supra). We cannot, therefore, infuse life into a dead letter. If the Railways were aggrieved by the decision of the Division Bench they ought to have challenged the same before the Supreme Court. Not having done so, the Railways cannot reopen the issue before us by submitting that the judgment is per incuriam and sub silentio. Apart from this, the Railways have though it fit to grant*

6 WPCT No.24 of 2012 decided on 27.04.2012

> *employment in the case of Smt. Namita Goldar & Anr. Vs. Union of India & Ors. (supra) on compassionate grounds. However, in the case of respondent no.2 they have decided to challenge the decision of the Tribunal which has merely followed the decision in Smt. Namita Goldar & anr. Vs. Union of Iida & Ors. (supra)*
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> *8. We, therefore, do not think it necessary to consider the submission of Mr. Chakraborty for the petitioners as the Railway Board's circular has already been set aside by the Division Bench of this Court and the Railways have taken no steps to challenge that decision, for reasons best known to them".*
>
> *(emphasis supplied)*

10] Therefore, at least on and from 10 February 2010, there is no rule, regulation or executive instruction, which bars the children of a second wife from being considered for compassionate appointment, provided of course, such children, comply with other rules, regulations and executive instructions in the matter of compassionate appointment. There is material on record, as noted by the Calcutta High Court, that the railways have granted compassionate appointment to the son of second wife. In such circumstances, the Union of India (Railways) was not justified in rejecting the respondent's claim to even be considered for compassionate appointment, once again, by relying upon the railway board's circular dated 2 January 1992.

11] In ***Kusum Ingots and Alloy Ltd. vs. Union of India and anr.***[7]***,*** the Hon'ble Supreme Court has held that any order

7 (2004) 6 SCC 254

passed on writ petition questioning the constitutionality of a parliamentary Act, whether interim or final, keeping in view of the provisions contained in clause (2) of Article 226 of Constitution of India, will have effect throughout the territory of India, subject of course to the applicability of the Act. In the present case, the Division Bench of Calcutta High Court in ***Namita Goldar (supra),*** has already set aside the railway board's circular dated 2 January 1992. The Union of India has not challenged the decision in ***Namita Goldar (supra),*** but rather, has given compassionate appointment to him, even though, he was the son of second wife. In these circumstances, we fail to understand as to how the Union of India can insist upon relying upon the railway board's circular dated 2 January 1992 and in some instances, without even disclosing the circumstance was that the circular has been already struck down by the Division Bench of the Calcutta High Court to the extent it denies consideration for compassionate appointment to the children of second wife. In any case, on basis of railway board's circular dated 2 January 1992, which has already been struck down, there is no question of the Union of India rejecting the application of the respondent to be considered for compassionate appointment at the threshold.

12] The second contention of Mr. Suresh Kumar that late Shri. Ramlakhan Tripathi was guilty of misconduct in marrying for second time during the subsistence of first marriage cannot be accepted. In the first place, late Shri. Ramlakhan Tripathi was neither charged nor were any disciplinary proceedings initiated

against him during his service tenure. Further, the Union of India (Railways), relying upon a memorandum of understanding entered into between the two wives of late Ramlakhan Tripathi have permitted sharing of retiral and terminal benefits between the two wives *inter se.* One S.M. Borkar, S & W Inspector in his Report dated 15 September 2012, has stated that the deceased Ramlakhan has, upon verification, stated that the deceased Ramlakhan Tripathi had no issues from out of his marriage with Smt. Kusum (first wife) and was therefore, persuaded by said Kusum to marry Kanchan (second wife). The report states that the two wives and two children from the second marriage, i.e., Vivek and Abhishek, are all staying together and the two wives have no objection to sharing the pension and terminal benefits *inter se.* The report dated 15 September 2012 and the memo of understanding accompanying the same was in fact produced by Mr. Suresh Kumar, learned counsel for the Union of India (Railways) in support of his contention that the respondent Vivek Tripathi is the son from second wife. The memorandum of understanding, incidentally records that the two wives desire that the respondent-Vivek obtains the railway service as legal legal representative of late Shri. Ramlakhan Tripathi, who has died in harness.

13] Whilst we entirely agree with Mr. Suresh Kumar, learned counsel for the Union of India (Railways), that such memorandum of understanding does not bind the Union of India (Railways), we only wish to state that the Union of India (Railways) has in fact acted on the basis of such memorandum of

understanding, in the matter of payment of pension and terminal benefits. In ***Rameshwari Devi (supra),*** to which reference will be made in details hereinafter, in some what similar circumstances, the contention that the deceased employee had committed misconduct came to be rejected by the Hon'ble Supreme Court. Accordingly, we are unable to accept the second contention of Mr. Suresh Kumar, learned counsel for the Union of India (Railways).

14] Mr. Suresh Kumar's third contention with regard to the so called *"illegitimacy"* of the respondent, also does not deserve any acceptance. Section 5 (i) read with Section 11 of the H. M. Act, no doubt provides that a marriage solemnized between two Hindus, during subsistence of previous marriage shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity. However, notwithstanding all this, Section 16 of the H. M. Act, in terms provides that the children of such void marriage shall, nevertheless, be legitimate. Section 16 of the H.M. Act reads thus:

> ***Section 16*** *-* ***Legitimacy of children of void and a voidable marriages :***
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> 1. *Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void*

otherwise than on petition under this Act.

2. *Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity,*
3. *Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents."*

15] From the aforesaid, it is quite clear that notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate, if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of that marriage under the H. M. Act and whether or not the marriage is held to be void otherwise than on a petition under the H. M. Act. Thus the very provisions contained in Section 16 of the H. M. Act are sufficient to reject Mr. Suresh Kumar's contention with regard to so called "*illegitimacy*" of the respondent.

16] In ***Rameshwari Devi (supra),*** the dispute concerned payment of family of pension and death-cum-retirement gratuity to the two wifes of Narain Lal, who died in 1987 while posted as Managing Director, Rural Development Authority of the State of Bihar. The first wife Rameshwari Devi had contended that the second wife Yogmaya Devi and her children were not entitled to share the family pension and death-cum-retirement gratuity as the marriage between Narain Lal and Yogmaya Devi was against the provisions of law as contained in Sections 5 and 11 of the H. M. Act and was therefore, a void marriage. The Hon'ble Supreme Court rejected the contention raised on behalf of State of Bihar that Narain Lal had indulged in a misconduct by marrying second time by observing that the State had never charged Narain Lal with such misconduct whilst he was in service and no disciplinary proceedings were ever held against him during his lifetime (para 13 of the judgment and order). The Hon'ble Supreme Court, even after accepting Rameswhari Devi's contention that the marriage between Narain Lal and Yogmaya Devi was void, nevertheless, ruled that the children of second marriage were legitimate children, in view of the legal provisions contained in Section 16 of the H. M. Act and therefore, they could never be denied the share in family pension and death-cum-retirement gratuity. In paragraphs 13 and 14, the Hon'ble Supreme Court has observed thus:

> ***"13.*** *But then it is not necessary for us to consider if Narain Lal could have been charged of misconduct having contracted a second marriage when his first wife*

was living as no disciplinary proceedings were held against him during his lifetime. In the present case, we are concerned only with the question as to who is entitled to the family pension and death-cum-retirement gratuity on the death of Narain Lal. When there are two claimants to the pensionary benefits of a deceased employee and there is no nomination wherever required the State Government has to hold an inquiry as to the rightful claimant. Disbursement of pension cannot wait till a civil court pronounces upon the respective rights of the parties. That would certainly be a long-drawn affair. The doors of civil courts are always open to any party after and even before a decision is reached by the State Government as to who is entitled to pensionary benefits. Of course, inquiry conducted by the State Government cannot be a sham affair and it could also not be arbitrary. The decision has to be taken in a bona fide, reasonable and rational manner. In the present case an inquiry was held which cannot be termed as a sham. The result of the inquiry was that Yogmaya Devi and Narain Lal lived as husband and wife since 1963. A presumption does arise, therefore, that the marriage of Yogmaya Devi with Narain Lal was in accordance with Hindu rites and all ceremonies connected with a valid Hindu marriage were performed. This presumption Rameshwari Devi has been unable to rebut. Nevertheless, that, however, does not make the marriage between Yogmaya Devi and Narain Lal as legal. Of course, when there is a charge of bigamy under Section 494 IPC strict proof of solemnisation of the second marriage with due observance of rituals and ceremonies has been insisted upon.

14. *It cannot be disputed that the marriage between Narain Lal and Yogmaya 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 and the Schedule to the Hindu Succession Act, 1956). Yogmaya 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 Yogmaya 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. Here, however, we are concerned with the family pension and death-cum-retirement gratuity payments which are governed by the relevant rules. It is not disputed before us that if the legal position as aforesaid is correct, there is no error with the directions issued by the learned Single Judge in the judgment which is upheld by the Division Bench in LPA by the impugned judgment."*
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> ***(emphasis supplied)***

17] The provisions contained in Section 16 of the H.M. Act, as interpreted by the Hon'ble Supreme Court in ***Rameshwari Devi (surpa),*** therefore, afford a complete answer to Mr. Suresh Kumar's contention with regard to the so called "*illegitimacy*" of the respondent. Such contention, therefore, deserves rejection and is hereby rejected.

18] Insofar as case of ***Basanti Devi (supra)*** is concerned, we must note that the Union of India (Railways) failed to even bring to notice of Jharkhand High Court, decision of the Calcutta High Court in ***Namita Goldar (supra),*** wherein the railway

board's circular dated 2 January 1992, was specifically struck down, to the extent it related to children of second marriage. The railway board's circular dated 2 January 1992 was struck down by the Calcutta High Court in ***Namita Goldar (supra)*** on 10 February 2010. Therefore, in terms of the law laid down by the Hon'ble Supreme Court in ***Kusum Ingots and Alloy Ltd. (supra),*** such circular was not at all in existence on the date,i.e., 13 April 2011, when the Jharkhand High Court, relying upon the same, decided the case of ***Basanti Devi (supra).*** In any case, with utmost respect we do not agree with the view taken by the Jharkhand High Court in ***Basanti Devi (supra).***

19] In ***Pratibha Salve (supra),*** the Division Bench of this Court was dealing with the claim of second wife for compassionate appointment, after admitting that her marriage was solemnized whilst the marriage with first wife was in subsistence. The provisions contained Section 5(i) read with Section 11 of the H.M. Act, declare such second marriage as void. There is no protection accorded to such second marriage under Section 16 of the H.M. Act. In ***Namita Goldar (supra),*** the railway board's circular dated 2 January 1993 was not interfered with to the extent it applied to the second wife. In such circumstances, the Division Bench of this Court, naturally, denied the benefit of compassionate appointment to the second wife. The decision is clearly distinguishable and does not apply to the fact situation in the present case, where, the claim for compassionate

appointment is raised, not by second wife, but by the son from such second wife. The decision in ***Pratibha Salve (supra),*** is therefore, of no assistance to the Union of India (Railways) in the present case.

20] The decision in ***Pradeep Uttam Gid (supra),*** delivered by the Division Bench of this Court mainly proceeds upon the circumstance that there was unreasonable delay in the matter of demand of compassionate appointment. In the said case, the employee Uttam Gid had expired in harness on 6 February 1999. At the time of his demise, his son Pradeep was a minor. Pradeep attained majority on 22 October 2013 and the application seeking compassionate appointment was made only in the year 2011, i.e., after delay of eight years. In this fact situation, the Division bench of this Court has held that the directions of the CAT to consider Pradeep's case for compassionate appointment came to be set aside. The Division Bench of this Court observed that after lapse of over ten years, there was no question of considering the Pradeep's case for compassionate appointment merely on the ground that railway board's circular dated 2 January 1992 had been set aside by the Calcutta High Court. The observations in paragraph '6' of the said judgment and order are therefore, to be construed in the light of fact situation in the said case. Even otherwise, the Division Bench has not made any reference to the provisions contained in Section 16 of the H. M. Act as interpreted by the Hon'ble Supreme Court in ***Rameshwari Devi (supra).*** The provisions make it clear that even though the marriage with second wife may be void,

nevertheless, the children of such marriage are legitimate.

21] For all the aforesaid reasons, we see no ground to interfere with the impugned orders made by the CAT. However, we once again clarify that the impugned orders merely direct the Union of India (Railways) to consider the case of the respondent for compassionate appointment on its own merits and in accordance with existing rules and regulations, without adverting to railway board's circular dated 2 January 1992. We therefore, direct the Union of India (Railways) to take a decision in this regard, as expeditiously as possible and in any case within a period of three months from today and thereafter, to communicate the such decision to the respondent.

22] Rule is accordingly, discharged. There shall be no order as to costs.

23] All concerned to act on the basis of authenticated copy of this order.

(**CHIEF JUSTICE)**

(M.S.SONAK, J.)