

**THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
THE HON'BLE DR. JUSTICE SHAMEEM AKTHER**

WRIT PETITION No.29900 OF 2015

ORDER:

(Per Hon'ble Sri Justice SURESH KUMAR KAIT)

Vide the present petition, the petitioners have challenged the order dated 18.06.2015 passed in O.A.No.1527 of 2012, whereby the petition filed by the 1st respondent has been allowed.

2. The brief facts of the case are that:

The 1st respondent's father died on 23.01.1998. At the time of death of his father, the respondent was a minor. He being the legal heir of the deceased father is entitled to the compassionate appointment, as his father died in harness. Though the representations have been made by his mother, the same was not considered till the date of order passed by the learned tribunal. Since the father of the 1st respondent married his mother during the subsistence of the first marriage, the petitioners instructed the 1st respondent's mother to obtain a succession certificate. Accordingly, the mother of the 1st respondent and the first wife of the deceased had filed O.P.No.02 of 2011 for grant of succession certificate. On the basis of said certificate and also in view of the fact that she was nominated as per Service Register to receive the benefits, his mother has been receiving pension since 2006

onwards. After becoming a major, his mother and also Smt Bandi Padma, the first wife of the deceased employee made representations to the petitioners seeking compassionate appointment in favour of the 1st respondent. The petitioners replied vide letter dated 08.09.2009 saying that 1st respondent's mother being second widow, her children cannot be considered for appointment. The petitioners also pointed out that Smt B Padma had already been conveyed that her request was not admissible vide letter dated 10.03.2008.

3. The stand of the petitioners before the tribunal was that in terms of judgment of High Court of **Jharkhand in Union of India Vs. Basanthi Devi** dated 13.04.2011 whereby held that the appointment on compassionate grounds is not a source of recruitment. Also relied upon the judgment of Supreme Court reported in **State Bank of India Vs. Raj Kumar**¹ whereby held that the compassionate appointment is an exception to the general rule and that recruitment to public services should not be on the basis of merit that dependents of employees who died in harness do not have a special claim or right to employment, but are being considered for appointment under the rules to enable the family of the deceased to get over the sudden financial crisis arising from the loss of the breadwinner. It is further held that the claim of the compassionate appointment is traceable only to the scheme framed by the employer for such

¹ (2010) 11 SCC 661

employment and there is no right whatsoever outside such scheme.

4. The case of the petitioners is that the Ministry of Railway has a defined policy on contracting second marriage by its employees. **Rule 21** of Railway Services (Conduct) Rules 1968, states as follows:

“(1) No railway servant shall enter into, or contract, a marriage with a person having a spouse living; and

(2) No railway servant, having a spouse living shall enter into, or contract, a marriage with any person.

(3) A railway servant who has married or married a person other than of Indian Nationality shall forthwith intimate the fact to the government. Provided that the government may permit a railway servant to enter into, or contract, any such marriage as is referred to in clause (1) or clause (2), if is satisfied that...

(a) such marriage is permissible under the personal law applicable to such railway servant and other party to the marriage; and

(b) there are other grounds for so doing.

5. Further case of the petitioners is that the Railway Board Circular No.5/92, dated 02.01.1992 clearly provided that children of second marriage of the employee shall not be eligible for compassionate appointment.

6. The similar issue has been raised before this Court in W.P.No.24366 of 2015 and W.P.No.32759 of 2016, whereby held as under:

“7. It is pertinent to mention here that High Court of Calcutta in W.P.C.T.No.20 of 2009 dated 10.02.2010 quashed the Railway Board circular dated 02.01.1992 to the extent that it prevents the children of the second wife from being considered for appointments on compassionate grounds. Admittedly, the said order has not been challenged before the higher Court, thus, attained finality.

8. Moreover, the High Court of Patna in **Union of India and Others vs The Central Administrative Tribunals**² held that having split the pensionary benefit between the two wives, the Court fails to understand where is the difficulty in providing a job under the rule of harness to the son of the second wife when the record shows that there is no rival and the first wife has given consent that the son of the second wife may be employed. Admittedly, this judgment has attained finality as not challenged before the higher Court.

9. The judgment rendered in **Km. Priti Vs. State of Uttar Pradesh** vide LAWS (ALL)-2004-12-167/TLALL-2004-0-4336, dated 22nd December 2004 in C.M.W.P.No. 55348 of 2012, held that children born out of second marriage, even though the deceased employee is a Hindu and has contracted

second wife during subsistence of his first marriage, shall be entitled for consideration for grant of compassionate appointment.

10. As discussed above, the High Court of Calcutta in **Namita Goldar and another Vs Union of India and others** in W.P.C.T.No.20 of 2009 dated 10.02.2010³, quashed the Railway Board Circular No.5/92, dated 02.01.1992 to the extent it prevents the children of the second wife from being considered for appointments on compassionate grounds. Thus, the circular relied upon by the petitioners was not in existence at the time of issuance of first rejection letter dated 18.04.2011. The petitioners have, therefore, erred in rejecting the application on the ground that “compassionate appointment is not permissible to other than the first wife and her wards”.

11. We note, after considering this report, the petitioners relied on the instructions of Serial Circular No.5/92, dated 02.01.1992 and rejected the request for compassionate appointment in view of the fact that only first wife and wards are eligible for compassionate appointment.

12. It is clear that no inquiry at all has been conducted by the petitioners into the financial conditions of the family of the deceased employee immediately after his death. Thereafter also, the petitioners have not made any attempt to assess the financial conditions of the applicant. In the absence

³ 2010 (3) SLR pages 57 to 59

of an independent assessment, the petitioners are not justified in rejecting the application for compassionate appointment.

13. *In view of the facts and circumstances recorded above, learned tribunal quashed and set aside the impugned rejection order and the 1st petitioner was directed to re-consider the applicant for compassionate appointment as per the delegation given in Serial Circular No.77/2011, dated 15.6.2011 and also in view of the fact that Serial Circular No.5/92 dated 02.01.1992 relied upon was not in force at the time of issuance of rejections letters. Further directed to cause inquiry and make an objective assessment of the financial condition of the applicant and consider his case as per rules.*

14. *It is relevant to mention here that in case of **Union of India and others vs. V.R Tripathi** in W.P.No.910/2015 dated 1st April, 2016, a Division Bench of Bombay High Court, considering the case of High Court of Calcutta, High Court of Jharkhand (relied upon by the petitioners) and the Hon'ble Supreme Court, held that in any case, on the basis of railway circular dated 2nd January 1992, which has already been struck down, there is no occasion before the Union of India rejecting the application of the respondents, to be considered for compassionate appointment at threshold, which reads as under:*

*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 10 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.*

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."

15. Keeping in view taken by this Court in the above petitions, we hereby find no merit in the instant petition and the same is accordingly dismissed. There shall be no order as to costs.

16. We hereby direct the petitioners to complete the exercise as directed by the learned tribunal within eight (08) weeks from the date of receipt of a copy of this order.

Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE SURESH KUMAR KAIT.

Dr. JUSTICE SHAMEEM AKTHER.

Date : 17-07-2017
Gvl

