

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

WRIT PETITION No.32759 OF 2016

ORDER:

(Per Hon'ble Sri Justice SURESH KUMAR KAIT)

Vide the present petition, the petitioners have challenged the order dated 04.03.2016 passed in O.A.No.675 of 2015, whereby the petition filed by the 1st respondent has been allowed.

2. Learned counsel appearing on behalf of the petitioners submits that the first wife Chitramma had filed M.C.No.1 of 2005 before the Judicial Magistrate of First Class, Puttur, which was contested by her husband, railway employee (R.Govindaswamy). The learned Magistrate had delivered the judgment dated 13.06.2006 in favour of the wife Chitramma declaring her as wife and maintenance of Rs.1000/- per month was granted. R.Govindaswamy, father of 1st respondent, who was railway employee, died in harness on 04.09.2007. The deceased railway employee had declared Prabhavathi as his wife. After the death of the said railway employee, a representation dated 27.09.2007 was made by Prabhavathi, the second wife, for family pension and other benefits along with compassionate appointment for her son, the 1st respondent herein, who born on 16.05.1986.

3. Thereafter, the 1st respondent had arranged for settlement dues as well as family pension to his mother. However, the railways have rejected the claim for compassionate appointment on the ground that Railway Board letter dated 02.01.1992 stipulates that the appointments on compassionate grounds to the second wedded wife and her children are not to be considered unless the administration has permitted the second marriage, in special circumstances, taken into account the personal law etc.

4. Learned counsel for the petitioners further submits that late R. Govindaswamy, railway employee, did not take permission of the petitioners for the second marriage.

5. The petitioners have specifically stated in their counter-affidavit filed before the tribunal that the claim of the 1st respondent is not admissible in view of the Railway Board Serial Circular No.5/1992 that the second wife's children are not eligible for compassionate appointment. They have also taken the objection that O.A. is not within the limitation as her claim was rejected on 07.09.2012 itself and that she kept silent for two years between 07.09.2012 and 17.10.2014. However, she submitted an appeal on 17.10.2014 without bringing any new facts.

6. Learned counsel further submits that the High Court of Calcutta in **Namitha Goldar and another Vs Union of**

India and others¹ in W.P.C.T No.20 of 2009 dated 10.02.2012, quashed the above circular to the extent it prevents children of the second wife from being considered for appointments on compassionate grounds. However, the said Court does not stand in the way of the Railways for the following reasons:

a) As this Court is not bound by the judgment of the Calcutta High Court as the first respondent can only persuade this Court to rely on the said judgment of Namita Goldar's case supra.

b) Calcutta High Court judgment had interfered with the policy decision of the Railways in as much as policy decisions cannot be interfered with by the judiciary as held by the Supreme Court in a catena of judgments.

c) Before Calcutta High Court the circular was not challenged by the applicant therein. The Supreme Court held that the claim of compassionate appointment is traceable only to the scheme framed by the employer and there is no right whatsoever outside such scheme.

7. Learned counsel further submits that in view of the above, Calcutta High Court had erred in misinterpreting the law of inheritance in as much as compassionate appointment and right to inherit property has no co-relation in any manner. Hence, judgment of the Supreme Court in **Rameswari Devi Vs. Union of India**, does not apply in the case of compassionate appointments, which depends solely

¹ 2010 (3) SLR pages 57 to 59

upon the frame of contract between employer and employee and cannot be subject matter to be governed by the personal law, when employer has not provided so.

8. The case of the 1st respondent is that he is a son of late R.Govindaswamy, who died in harness on 04.09.2007. The settlement dues of his late father were not paid to the respondent's family and the same were withheld on the ground that there was a rival claim. The respondent's mother approached the I Additional Junior Civil Judge, Tirupati regarding her claim and the said Court passed a decree in favour of respondent's mother declaring her as the legally wedded wife and the 1st respondent as the son of late R. Govindaswamy. Thereafter, the petitioners arranged for the settlement dues as well as family pension to the 1st respondent's mother. However, the petitioners have rejected the claim for compassionate appointment on the ground that the Railway Board letter dated 02.01.1992 stipulates that the appointments on compassionate ground to the second wedded wife and her children are not to be considered unless the administration has permitted the second marriage in special circumstances taken into account the personal law etc. In this case, late R. Govindaswamy did not take the permission of the petitioners for the second marriage.

9. It is not in dispute that the Railway Board Serial Circular No.5/92, dated 02.01.1992 relied upon by the

petitioners for rejecting the application for compassionate appointment, in fact, has been quashed by Calcutta High Court in W.P.C.T.No.20/2009 decided on 10.02.2010. The said judgment has attained finality as not challenged by the petitioners.

10. 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 as the record shows that there is no rival and the first wife has given consent that the son of the second wife be employed.

11. 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.

12. It is also not in dispute that the judgment rendered by the Calcutta High Court, Bombay High Court has not been challenged. Thus, those judgments have already attained

² 2003 (5) SLR Page 266 to 267

finality. Hence, the petitioners have no justification to rely on a non-existent circular for rejection of 1st respondent's claim on compassionate appointment. Moreover, the case of the 1st respondent is squarely covered by the judgment passed by the tribunal in OA No.1104 of 2014 dated 01.10.2015.

13. It is pertinent to note that Mr Bhim Singh, learned Standing Counsel appeared on behalf of the petitioners before the tribunal conceded that the relief sought for in O.A.No.675 of 2015 is covered by O.A No.1104 of 2014 dated 01.10.2015.

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. It is trite, though the second marriage is not valid, if first marriage exists, but the children born from the second marriage are legitimate. If there is no other claimants from the first wife, the children born through second wife are legitimate and have all legal rights available under the law, until and unless specifically denied. Such children are entitled for the benefit which derives from the deceased father

or mother. Thus the petitioners have erred in relying on non-existent Railway Board Circular No.5/92, dated 02.01.1992 for rejecting the respondent's case for compassionate appointment on the ground that the children of second widow are not to be considered unless the administration has permitted the second marriage.

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

17. 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 reconsider 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.

18. In view of the above discussion and the legal position, we hereby find no merit in the instant petition and the same is accordingly dismissed.

19. 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

