

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3927 of 2016

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Rahul Kumar, Son of Late Lal Bahadur Paswan, Resident of village - Aspatal
Tola, Bariarpur, P.O. Bariarpur, P.S. Muffasil, District - Munger

... .. Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna
2. The Director General of Police, B.M.P., Baily Road, Patna
3. The Additional Director General Police, B.M.P. Pant Bhawan, Patna
4. Dy. Inspector General of Police, B.M.P. Patna
5. Commandant, Bihar Military Police - 5, Patna
6. The District Magistrate Cum Chairman, District Compassionate Appointment Committee, Patna

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.Dinesh Jha, Advocate
		Mr. Nikhilesh Kumar, Advocate
For the Respondent/s	:	Mr. Ajay Kumar, AC to GP-4

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 26-08-2019

Petitioner is admittedly son of second wife of an employee in Bihar Military Police, who died in harness on 22.07.2009. He was minor on the date of the death of his father. He had applied for compassionate appointment by making an application on 24.02.2012. He had filed yet another representation on 01.05.2015 before the competent authority for considering his case for appointment on compassionate ground. His representation dated 01.05.2015 was rejected by the Commandant, BMP-5, Patna on the ground that his application seeking compassionate appointment was made five years after the death of the



Government servant. Referring to the policy of the State Government for compassionate appointment, as contained in letter dated 27.04.1995, the petitioner's application for appointment on compassionate ground was rejected.

2. It is the petitioner's case, however, that his application was not belated, as he had already filed application on 24.02.2012. The fact that petitioner had filed his application on 24.02.2012 has been found to be correct by the authorities, as stated in paragraph-7 of the counter affidavit filed on behalf of respondent no. 5. It has been stated that the matter was subsequently enquired into and it has been found that the petitioner had filed the application within five years. It has been stated in paragraph-14 of the counter affidavit that it was out of sheer mistake that the petitioner's application was dismissed as time barred, as the petitioner's original application was kept in an old file which was not available at the time of passing of the earlier order. His claim has, however, now been rejected on the ground that the petitioner, being son of second wife of the Government servant, is not entitled for the benefit of appointment on compassionate ground.

3. It has been stated in the counter affidavit that a departmental proceeding was initiated against the deceased Government servant for marrying another woman during the



lifetime of his first wife which had culminated into imposition of punishment. Relevant portion of the service book of the deceased employee has been brought on record to demonstrate that the Government servant was punished in a departmental proceeding for solemnising second marriage, his conduct having been found to be in violation of Rule 707(A) of the Police Manual.

4. Learned counsel appearing on behalf of the petitioner has placed reliance on a recent Full Bench decision of this Court in case of *The Bihar State Electricity Board & Ors. vs. Chadra Shekhar Paswan & Ors.* reported in **2019(2) PLJR 500** to bolster his plea that a son of second wife of a Government servant is eligible to get the benefit under the scheme of compassionate appointment.

5. Learned counsel for the petitioner is correct, in my view, in his submission to the extent that child of second marriage is also entitled for appointment on compassionate ground. Relying on Supreme Court's decision in case of *Union of India vs. V.R. Tripathi* since reported in **2019(1) SCALE 302**, the Full Bench of this Court in case of Bihar State Electricity Board vs. Chadra Shekhar Paswan (supra) has held in paragraphs 55 to 58 thus :

“55. Apparently, the judgment passed in Union of India Vs. V.R. Tripathi (Supra) by the Supreme Court is contrary to the Full Bench of this Court in Union of India Vs.



Sanjay Kumar (Supra) as it has acknowledged the right to the child of the second marriage and has also held that while designing a policy of compassionate appointment, the State can prescribe the terms on which it can be granted. However, it is not open to the State, while making the scheme or rules to lay down a condition, which is inconsistent with Article 14 of the Constitution. It has acknowledged the right to compassionate appointment to the child of second marriage under Section 16(1) and 16(3) of the Hindu Marriage Act. The principle laid down by the Supreme Court supersedes those taken by the Full Bench of this Court in Union of India Vs. Sanjay Kumar (Supra). The said principle having enunciated by the highest Court of the land has a binding force. The authoritative pronouncement of Apex Court on the point of compassionate appointment in V.R.Tripathi (Supra) eclipses the decision of the Full Bench of this Court in Union of India Vs. Sanjay Kumar (Supra), which was even based on misconstruction of Railway Board's circular dated 02.01.1992 as the said circular was not in existence after Namita Goldar's case.

56. In the light of the authoritative pronouncement of the Supreme Court in Union of India Vs. V.R. Tripathi (Supra), we find that the condition imposed by the circular no. 937 dated 23.06.2005 issued under the signature of Joint Secretary, Personnel and Administrative Reforms Department, Government of Bihar, Patna, which inter alia bars compassionate appointment to the children born from second marriage of the deceased employee



cannot be held to be legal and justified. Once Section 16 of the Hindu Marriage Act, 1955 regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, the State cannot exclude such a child by issuing circular or letter from seeking the benefit of compassionate appointment. Such a condition of exclusion is arbitrary and ultra vires.

57. We are also of the opinion that in view of the ratio laid down by the Supreme Court in Union of India Vs. V.R.Tripathi (Supra), an employer, who is amenable to Part III of the Constitution cannot deny the benefit of compassionate appointment, which is available to the other legitimate children. The State cannot lay down a condition while making the scheme or rules inconsistent with Article 14 of the Constitution. In view of Section 16 of the Hindu Marriage Act, 1955, which regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, the condition of prior approval of the employer before the second marriage of the deceased employee cannot be sine qua non to the children born out of second marriage. Such a condition of exclusion would be arbitrary and ultra vires as it would bring out unconstitutional discrimination between legitimate children, who form one class.

58. In view of rule 23 of the 1976 Rules as also the decisions of this Court and the decision of the Supreme Court discussed above, we are of the opinion that if the second marriage was performed by the government servant while in service, the



same would amount to misconduct committed in service. In case, an employee is proceeded against for such misconduct while in service and misconduct is proved, the government may be free to take any action against such employee. In case of punishment awarded to the government employee, the same may be a relevant consideration for denying the prayer for compassionate appointment of dependents of the deceased employee. However, if no disciplinary proceeding is initiated for any misconduct against an employee while in service, after his death, his dependents cannot be denied compassionate appointment on the ground that while in service the employee had been guilty of misconduct. In other words, the claim for compassionate appointment to the dependents of the deceased employee can be denied only if the employee had committed illegalities and misconduct is proved and he is punished during his service career.” (Emphasis added)

6. It can be easily noticed from the observations made in case of Bihar State Electricity Board vs. Chadra Shekhar Paswan (supra) that if a Government servant is proceeded against for misconduct of marrying another woman during the subsistence of first marriage and is punished for the said misconduct, the same can be a relevant consideration for denying a prayer for compassionate appointment of the dependents of the deceased employee. This Court further held that if no disciplinary



proceeding is initiated for any misconduct against an employee while in service, after his death his dependents cannot be denied compassionate appointment on the ground that while in service the employee had been guilty of misconduct. Clarifying this opinion, the Full Bench has held that claim of compassionate appointment to the dependents of the deceased employee can be denied only if the misconduct of the employee is proved and he is punished during his service career.

7. In the aforesaid background, the Court has to consider the relief which the petitioner has sought in the present writ application. It is evident from the order dated 08.04.2016 that the petitioner's claim for appointment on compassionate ground has been rejected only on the ground of him being child of second marriage. The said decision, as communicated to the petitioner through letter dated 08.04.2016, has been brought on record by way of Annexure-B to the counter affidavit. The decision is apparently based on circular No. 937 dated 23.06.2005 which has been held to be invalid. The said communication dated 08.04.2016 is sought to be challenged by the petitioner by seeking amendment in the writ application through I.A. No. 3273 of 2017.

8. Considering the facts and circumstances, I.A. No. 3273 of 2017 is allowed. The pleadings in I.A. No. 3273 of 2017



and the relief being sought through the said amendment shall form part of the writ application.

9. In view of law laid down by the Supreme Court in case of **Union of India vs. V.R. Tripathi** (supra) and the Full Bench decision of this Court in case of **Bihar State Electricity Board vs. Chadra Shekhar Paswan** (supra), in my opinion, impugned communication dated 08.04.2016 of Commandant, BMP-5 rejecting the petitioner's claim for compassionate appointment cannot be sustained and is accordingly set aside.

10. The matter is remanded back to the Commandant, BMP-5 to consider the petitioner's case afresh and take a final decision on his claim for his appointment on compassionate ground within a period of three months from the date of receipt/production of a copy of this order in the light of the observation made by the Full Bench of this Court in case of **Bihar State Electricity Board vs. Chadra Shekhar Paswan** (supra) wherein the Court has held that claim of compassionate appointment to the dependents of the deceased employee can be denied only if his misconduct was proved and he was punished during his service career. The Full Bench has held that punishment awarded to the Government employee may be a relevant



consideration for denying the prayer for compassionate appointment of the dependents of the deceased employee.

11. This application is allowed with the observation and direction as above.

(Chakradhari Sharan Singh, J)

Rajesh/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	17.09.2019
Transmission Date	NA

