

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9538 OF 2016

1. Smt. Girija Suresh Borade,
Age : 46 years, w/o. Late Shri.
Suresh Shankar Borade, Residing
at RBI, 195, Room no.12, Railway
Colony 52 Chawl, Near Khapari
Baba Mandir, Thakurli (West) 421 202

2. Sagar Suresh Borade,
Age : 23 years, w/o. Late Shri. Suresh
Shankar Borade, Residing at RBI, 195
No.12, Railway Colony 52 Chawl,
Near Khapari Baba Mandir,
Thakurli West-421 202

....Petitioners

V/s.

1. Union of India, Through The General
Manager, Central Railway CST
Mumbai-400 001.

2. The Divisional Railway Manager (P)
Divisional Office, Personal Branch,
Central Railway, Mumbai-400 001.

3. Sr. Divisional Finance Manager,
Mumbai Division, CSTM,
Mumbai CST-400 001.

....Respondents

* * * * *

Mr. Sandeep V. Marne, Advocate for the petitioners.

Mr. T.J. Pandian, Advocate for the respondents.

CORAM : A.S. OKA, &

SANDEEP K. SHINDE, JJ.

Judgment Reserved On : 3rd December, 2018.

Judgment Pronounced On : 1st March, 2019.

JUDGMENT (PER : SANDEEP K. SHINDE, J) :

1. Vide order dated 11th October, 2018 parties were put to the notice that an endeavor shall be made to decide the petition finally at the stage of admission.

2. Heard learned Counsel for the parties.

3. The issue involved in this petition is, whether the children of second wife are entitled to be considered for compassionate employment.

4. Petitioner no.1 is the second wife of deceased, Suresh Shankar Borade. He was working as a Khalasi-Helper with respondent no.2. He died on 26th June, 2007 (“deceased” for

short). Petitioner no.2 is the son of petitioner no.1.

5. Vandana was first wife of the deceased. She withdrew herself from the company of the deceased soon after the marriage without cohabiting with him. That, seven years thereafter, deceased got married with petitioner no.1. The petitioner no.2 was a minor on the date of death of his father and thus on attaining the age of majority on 16th September, 2011, petitioner no.1 applied to and requested respondent no.1 for appointing petitioner no.2 on compassionate ground. The application was rejected on the ground that petitioner no.1 being the second wife, her son was not eligible for compassionate employment.

6. The respondents, while rejecting the request of the petitioners relied on Circular no.5 of Master Circular no.16, which reads as under :

“ It is clarified that in the case of Railway employees dying in harness etc. leaving more than one widow along with children born to the 2nd wife, while settlement dues may be

shared by both the widows due to Court orders or otherwise on merits of each case, be considered unless the administration has permitted the second marriage, in special circumstances, taken into account the personal law. etc.

2. The fact that the second marriage is not permissible is invariably clarified in the terms and conditions advised in the offer of initial appointment.

3. This may be kept in view and the cases for compassionate appointment to the second widow or her wards need not be forwarded to Railway Board.”

7. This rejection order was challenged before the Central Administrative Tribunal (CAT) vide O.A. No. 190 of 2014. The learned Member vide order dated 14th January, 2016 dismissed the Original Application by upholding the ground of rejection so much so, that the deceased was not permitted by the administration of respondent no.2 to perform the second marriage. Yet another ground on which the Original Application was rejected is that, merely

because legitimate child has been put up at par in the matter of inheritance in terms of the provisions of the Personnel law by which the deceased was governed but in absence of specific provision in the policy, benefits cannot be extended so as to put burden upon the employer since such right, if any, was outside the scheme framed by the respondent for appointment on compassionate ground.

8. The petitioners thereafter sought review of the order dated 2nd March, 2015 vide Review Application No. 23 of 2015 but it was dismissed vide order dated 14th January, 2016.

9. It is against the orders as aforesaid, this petition is preferred under Articles 226 and 227 of the Constitution of India.

10. In the case in hand, the petitioners were denied compassionate employment on two grounds, the first ground is that the petitioner no.1 being the second widow, she and her children are not eligible for grant of

employment on compassionate ground, in as much as, the deceased had not sought permission of the administration before contracting the second marriage. The second ground is that, the application for compassionate appointment was not preferred within one year but three and half years after the death of the deceased employee.

11. It appears from the record that, vide letter dated 11th September, 2009 respondent no.2 called upon the petitioner to obtain Succession Certificate from the Competent Court to settle the dues and pension claims of the petitioners. The Court of Joint Civil Judge Senior Division, Kalyan granted the Succession Certificate on 3rd November, 2009, and held that “whereas the usual citation & Proclamation was issued and all formalities have been complied with. No one came forward for oppose. This is therefore to certify that the above named applicants 1) Smt. Girija Suresh Borade, 2) Kum. Pradnya Suresh Borade, 3) Kum. Sagar Suresh Borade, are the legal heirs of the deceased late Shri. Suresh Shankar Borade in respect of the following movable property given in the schedule herein

below.”

. It may be stated that, in the application for obtaining Succession Certificate, petitioner no.1 had disclosed in para-4 that deceased had contracted the marriage with Vandana. The learned Court, issued the Succession Certificate after issuing citation and publication but since no one lodged objection, Certificate was issued, inter-alia, certifying the petitioner, petitioner no.2 and Pradnya Suresh Borade, as heirs of the deceased. It may also be stated that the respondent no.2 initially was not willing to accept the Succession Certificate but upon verifying the fact, that name of first wife was also disclosed in the Application for Succession Certificate, it was accepted and acted upon which is evident from the letter of respondent no.2 dated 1st July, 2010 which is at Exhibit-65A. It may also be stated that, the deceased had nominated petitioners to receive Provident Fund and other benefits under GIS & DCRG in his service record. Thus, the petitioner no.2 for all purposes was held and declared as legal heir of deceased, be it in the matter of inheritance or otherwise.

12. The learned Counsel for the petitioner has relied upon the judgment of this Court in the case of **Union of India V/s. V.R. Tripathi, 2016 (3) Mh.L.J. 914**, wherein identical issue fell for consideration before the Division Bench of this Court, wherein the Union of India (Railways) had challenged the order of the Central Administrative Tribunal which had directed the Railways to consider the case of son of the late employee for compassionate appointment. In the said case, compassionate appointment was sought by the children of the second wife of the deceased employee and it was refused on the ground that public post is not heritable. Employment was refused on the ground that, where employee dying in harness had contracted a second marriage during the subsistence of the first marriage without obtaining the permission from the Railways, the second wife or the children from the second wife were not entitled for any compassionate employment.

. Thus, the issue involved in the *Tripathi's* case (supra) and the issue in the present case is identical.

13. The Division Bench of this Court, in the said case

has held that a marriage solemnised between two Hindus during the subsistence of first marriage shall be null and void but children of second marriage, shall nevertheless be legitimate. Thus, in view of the provisions of Section 16 of the Hindu Marriage Act, the Division Bench rejected the contention of Railways with regard to the so called illegitimacy of the respondent therein. In paras-14 and 15, the Division Bench has held thus :-

“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 :

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."

14. The learned Counsel appearing for the respondent, urged that appointment on compassionate ground is governed by policy. He thus relied on Circulars of Railway Board dated 21st March, 2018 and submitted that this Circular was not issued when the decision of this Court

in the case of *V.R. Tripathi* (supra) was rendered. He has also relied on the judgment of Division Bench of this Court at Nagpur in the case of **Union of India V/s. Pradip Uttam Gid (judgment and order dated 31st July, 2015 in Writ Petition No. 3374 of 2014)**. He would therefore submit that, order of the CAT may not be interfered with.

. In the case of *Pradeep Uttam Gid* (supra), the Division Bench of this Court has taken a view that daughter or son of second wife cannot claim compassionate appointment. Thus, it appears the subsequent decision of the co-ordinate Division Bench in the case of *V.R. Tripathi* (supra) has taken a contrary view.

. However, this controversy has been settled by the Apex Court by judgment and order dated 11th December, 2018 in Civil Appeal No. 12015 of 2018. This Appeal was preferred by the Union of India challenging the decision of this Court in the case of *V.R. Tripathi* (supra). We have perused the said decision. In para-12, the issue in the said case was, "Whether the condition which has been imposed by the Circular of the Railway Board under which compassionate appointment cannot be granted to the

children born from a second marriage of the deceased employee (except where marriage was permitted by administration taking into account personal law etc.) accords with basic notions of fairness and equal treatment, so as to be consistent with Article 14 of the Constitution.”

. That in para-14 of the said judgment, the Apex Court has held :

“Undoubtedly 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.”

. The Apex Court while concluding the issue has held thus :

“the exclusion of one class of legitimate children from seeking compassionate appointment merely on the ground that mother of the applicant was a plural wife of the deceased employee would fail to meet the test of reasonable nexus with the object sought to be achieved. It would be offensive to and defeat the whole object of ensuring the

dignity of the family of a deceased employee who has died in harness. It brings about unconstitutional discrimination between one class of legitimate beneficiaries-legitimate children.”

. Accordingly, Appeal preferred by the Union of India was dismissed by the Court.

15. Therefore, in our considered view, the respondent was not justified in rejecting the petitioner's request for grant of employment on the ground that, he is the son of second wife of the deceased. In view of this, the issue raised in this petition is answered accordingly.

16. The second ground on which request was declined is that, the application was preferred three and half years after the death of the employee. It may be stated that, when the deceased employee died, the petitioner was a minor and after attaining majority, his mother had applied on 2nd November, 2007 alongwith an affidavit dated 16th September, 2011 seeking employment on compassionate ground. The application dated 2nd November, 2007 is at

page no.56 and Affidavit dated 16th September, 2011 at page-73. These documents establish the fact that employment on compassionate ground was requested within five months from the death of Shankar. The application was duly received by respondent no.2 on 10th November, 2007. It may also be noted that, Succession Certificate was granted in November, 2009. The petitioner no.2 attained the age of majority in 2010, Succession Certificate was accepted in July, 2010 and acted upon in March, 2011, when the pension order was issued. Thus, taking into account the chronology of events and the fact that first application for grant of employment on compassionate ground was made in November, 2007 it cannot be said that application was not made within one year from the date of attaining majority.

17. Thus, taking into consideration the peculiar facts of the case and the law laid down by the Apex Court in the case of *V.K. Tripathi* (supra), we set aside the impugned judgment dated 2nd March, 2015 passed in O.A. No. 190 of 2015 and the order dated 14th January, 2016 passed in

Review Petition No. 23 of 2015 and hence the following order :

O R D E R

(i) The petition is allowed in aforesaid terms.

(ii) The respondents are directed to consider the application of the petitioners for the appointment of petitioner no.2 on compassionate ground in light of what is held in this judgment and appropriate decision shall be taken within a period of two months from today.

(iii) Rule is made absolute on above terms.

(SANDEEP K. SHINDE, J)

(A.S. OKA, J)