

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 3227 OF 2022

Musaddique Ahmad Khan s/o
Muqaddar Khan, Aged 24 years,
Occupation – Nil, R/o Qasadpura,
Achalpur, Tq. Achalpur, District -
Amravati.

.... **PETITIONER**

VERSUS

- 1) The State of Maharashtra,
through its Secretary, Rural
Development Department,
Mantralaya, Mumbai -32.
- 2) Divisional Commissioner,
Amravati Division, Amravati.
- 3) Chief Executive Officer,
Zilla Parishad Amravati, Camp,
Amravati.
- 4) Education Officer,
Zilla Parishad Amravati, District
Amravati.
- 5) Block Education Officer,
Panchayat Samitee, Achalpur,
District Amravati.

.... **RESPONDENTS**

Mr. Raheel Mirza, Counsel for the petitioner,
Mrs. Ketki Joshi, Addl.G.P. for respondents 1 and 2,

Mr. S.A. Mohta, Counsel for respondent 3.

CORAM : ROHIT B. DEO & MRS. VRUSHALI V. JOSHI, JJ.
DATED : 19th APRIL, 2023

ORAL JUDGMENT : (PER : R.B. DEO, J.)

Rule. Rule made returnable forthwith.

2. The petitioner is the son, and one of the legal heirs of Mr. Muqaddar Khan Mumtaz Khan who was working as Assistant Teacher at Urdu Primary School, Pathrot, Tahsil Achalpur, District Amravati, and who died in harness on 02-9-2015.

3. Petitioner's mother Mrs. Nusrat Afroz submitted application dated 05-1-2016 requesting the Chief Executive Officer of the Zilla Parishad, Amravati to appoint the petitioner on compassionate grounds. Request was reiterated vide application dated 24-1-2017, which the Education Officer (Primary) forwarded to the Deputy Chief Executive Officer.

4. The petitioner's mother addressed follow up communications dated 08-7-2019 and 29-8-2019, pursuant to which the petitioner was asked to submit certain documents *inter*

alia the birth certificates of the children born from the wedlock between Mrs. Nusrat Afroz and the deceased employee. The petitioner was also heard and by order dated 25-6-2020, the claim for appointment on compassionate grounds was rejected, in view of the Government Resolution dated 31-12-2001 which provides that if a third child is born to the employee after 31-12-2001, the family shall not be entitled to the benefit of the appointment on compassionate grounds scheme. The petitioner is assailing the order dated 25-6-2020 issued by respondent 3-Chief Executive Officer and Clause-E of the Government Resolution dated 28-3-2001, on the premise that the said clause is unconstitutional and falls foul of the mandate of Article 14 of the Constitution of India.

5. We have heard the learned Counsel for the petitioner Mr. Raheel Mirza, the learned Additional Government Pleader for respondents 1 and 2 Mrs. Ketki Joshi and the learned Counsel for respondent 3-Zilla Parishad Mr. S.A. Mohta.

6. The learned Counsel for the respondents would invite our

attention to the decision dated 08-3-2022 of the Coordinate Bench in Writ Petition 6819/2021 (Bhagyashree Pradeep Chopade v. MIDC and others) to buttress the submission that the issue is not *res integra*.

7. In view of the submission that the issue is covered, it would be necessary to note the facts which fell for consideration in *Bhagyashree Pradeep Chopade v. MIDC and others*. Mr. Pradeep Chopade died in harness on 14-10-2013 leaving behind him his widow, three daughters and son. One of the daughters Bhagyashree applied for appointment on compassionate grounds without disclosing that she has a younger sibling Atharva. The employer-MIDC learnt from enquiries that Atharva was born on 18-7-2008, and relying on the Government Resolution dated 28-3-2001, Bhagyashree's application seeking appointment on compassionate ground came to be rejected.

8. The Coordinate Bench considered the Government Resolution dated 28-3-2001, which is the Government Resolution on the basis of which the petitioner herein is denied employment,

thus :-

“8. The plea of adoption has been raised by the petitioner to paint the picture that the family of the deceased employee comprises of his widow and 3 (three) daughters of whom the last 2 (two) are twins. However, nothing turns on such adoption even if it were in accordance with the extant provisions of law. The underlying object of the relevant GR is to ensure that the employees who are bound thereby, namely the Government employees, do not have more than 2 (two) children. If in case a third child is born to a Government employee, such an employee would not be entitled to certain benefits which includes an appointment on compassionate ground if such a situation were to arise. As is well-known, compassionate appointment being an exception to the rule of equal opportunity in the matter of public employment, it is well within the powers of the employer to attach reasonable conditions on the fulfilment whereof such benefit of compassionate appointment can be availed of. The condition that the relevant GR brought about being in the nature of a policy decision, which has led to rejection of the petitioner’s application, is neither unreasonable nor violates any right of an employee. That apart, the disqualification for having an appointment on compassionate ground having occurred once the son, Atharva, was born to the

deceased employee and the petitioner's mother, it is absolutely irrelevant for the purpose of the present case whether Atharva was given in adoption lawfully or whether giving Atharva in adoption could make the terms of the relevant GR inapplicable. We are of the view that the Government policy embodied in the relevant GR cannot be read in such a manner that it gives scheming parties the chance to defeat it by taking recourse to adoption. Suffice it to record, the contingency on the occurrence whereof appointment on compassionate ground could be refused having set in with the birth of Atharva, we see no reason to hold the impugned rejection to be arbitrary or illegal."

9. We have given due consideration to the submission canvassed by Mr. Raheel Mirza that Clause-E of the Government Resolution dated 28-3-2001 is unreasonable and arbitrary. Mr. Raheel Mirza would heavily rely on the judgment dated 03-7-2019 in Writ petition 7742/2014 (Ms. Kashabai Sheshrao Wagh v. Zilla Parishad, Nashik and others). Mr. Raheel Mirza would submit that Clause-E of the Government Resolution dated 28-3-2001 is already declared unconstitutional. Mr. Raheel Mirza would submit that the decision of the Coordinate Bench in

Kashabai Wagh is not noticed in *Bhagyashree Chopade*.

10. In *Kashabai Wagh*, the Coordinate Bench noticed that only one child was born to the petitioner from the wedlock with the deceased employee. The deceased employee had two children from the wedlock. Having noticed the factual position and the embargo on granting compassionate appointment to the family of the deceased employee if third child is born after 31-12-2001, the Coordinate Bench observed thus :

“7. Notwithstanding there being no prayer to quash the said condition as unconstitutional, we declare the same to be unconstitutional. For the reason in a given set of facts, as in the instant case, the Petitioner who has only one child would suffer the burnt of the public employment being denied on the reasoning that her deceased husband was blessed with two children from the previous marriage. The intention behind the policy is to control the exploding population and not to prohibit remarriage. The Petitioner was the second wife of the deceased employee of Zilla Parishad and as far as she was concerned, she bore only one child.”

11. With due respect to the observations extracted supra, we are not persuaded to hold that *Kashabai Wagh* is a binding precedent. The Coordinate Bench proceeded to declare the embargo unconstitutional, “notwithstanding there being no prayer to quash the said condition”. It is clear that there was neither any structured plea questioning the constitutional validity of the condition and obviously no response from the Zilla Parishad, in the absence of such plea. *Kashabai Wagh* makes no reference to the submissions which were canvassed. Indeed, it is not discernible from the judgment whether any submission was canvassed at all on the constitutional validity of the condition concerned. While paragraph 7 supra is the conclusion of the Coordinate Bench, we have not come across any reason or rationale other than the observation that the intention behind the policy is to control the exploring population and not to prohibit remarriages. The relief appears to have been granted to the petitioner in *Kashabai Wagh* since she was the second wife of the deceased employee and as far as she is concerned, she gave birth to only one child. In our considered view, the observations in *Kashabai Wagh* will have to be restricted to the facts of the case.

12. We have no hesitation in aligning with the view which is articulated in *Bhagyashree Chopade*. In our considered view, Condition-E serves a salutary purpose and is indubitably a population control measure. The appointment on compassionate grounds is not a right muchless a vested right. *Au contraire*, such appointments are an exception to the rule that every recruitment to public post must satisfy the test of Articles 14 and 16 of the Constitution of India. Appointment on compassionate grounds must be considered only within the four corners of the policy prevailing. The State Government is well justified in incorporating a condition in the policy for appointment on compassionate grounds that the benefit shall not be available to an employee if the third child is born after the relevant date. We find nothing unreasonable or arbitrary in such condition.

13. We are not persuaded to accept the submission of Mr. Raheel Mirza that the decisions in *Union of India and another v. V.R. Tripathi, 2019 (14) SCC 646* and *Mukesh Kumar and another v. The Union of India and others, Civil Appeal 1620/2022* cover the issue. The said decisions are rendered in the context of the

policy which denied employment to the child of a second wife of an employee.

14. In *VR. Tripathi*, the Hon'ble Apex Court considered the constitutional validity of the condition in the circular issued by the Railway Board which stipulated that appointments on compassionate grounds to the second widow and her children are not to be considered unless the administration has permitted the second marriage, in special circumstances, taking into account the personal law etc. The Hon'ble Apex Court noted the earlier decisions which emphasized that the object underlying the provision for grant of compassionate appointment is to provide immediate succour to the family of the deceased employee which may face penury and destitution in view of the death of the bread earner. Such appointments is not a source of recruitment, and *au contraire* is an exception to the general that recruitment to public services should be on the basis of merit, and after providing equal opportunity to all eligible persons to participate in the selection process. The dependents of employees who died in harness have no special right to employment except a concession

which may be extended under the rule or by separate scheme.

15. Having noted that there is no right as such to compassionate appointment, and the entitlement is subject to the rules or schemes, the Hon'ble Apex Court observes thus :

“12. The real issue in the present case, however, is 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 a deceased employee (except where the marriage was permitted by the 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. While answering this issue, it would be necessary to advert to the provisions of Section 16 of the Hindu Marriage Act, 1955 which provide thus:

*“16. **Legitimacy of children of void and 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 a*

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.”

13. In sub-section (1) of [Section 16](#), the legislature has stipulated that a child born from a marriage which is null and void under [Section 11](#) is legitimate, regardless of whether the birth has taken place before or after the commencement of [Amending Act 68](#) of 1976. Legitimacy of a child born from a marriage which is null and void, is a matter of public policy so as to protect a child born from such a marriage from suffering the consequences of illegitimacy. Hence, though the marriage may be null and void, a child who is born from the marriage is nonetheless treated as legitimate by sub-section (1) of [Section 16](#). One of the grounds on which a marriage is

null and void under [Section 11](#) read with clause (i) of [Section 5](#) is that the marriage has been contracted when one of the parties had a spouse living at the time of marriage. A second marriage contracted by a Hindu during the subsistence of the first marriage is, therefore, null and void. However, the legislature has stepped in by enacting [Section 16\(1\)](#) to protect the legitimacy of a child born from such a marriage. Sub-section (3) of [Section 16](#), however, stipulates that such a child who is born from a marriage which is null and void, will have a right in the property only of the parents and none other than the parents.

14. *The issue essentially is whether it is open to an employer, who is amenable to Part III of the Constitution to deny the benefit of compassionate appointment which is available to other legitimate children. 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 purpose of compassionate appointment is to prevent destitution and penury in the family of a deceased employee. The effect of the circular is that irrespective of the destitution which a child born from a second marriage of a deceased employee may face,*

compassionate appointment is to be refused unless the second marriage was contracted with the permission of the administration. 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, it would not be open to the State, consistent with [Article 14](#) to exclude such a child from seeking the benefit of compassionate appointment. Such a condition of exclusion is arbitrary and ultra vires.”

16. The Hon’ble Apex Court held the condition that the children of the second wife shall not be entitled to appointment on compassionate grounds violative of the Article 14 of the Constitution of India since there is an invidious discrimination between children born from the first marriage and the children born from the second marriage of the deceased employee.

17. The Hon’ble Apex Court further observes that even if the narrow classification test is adopted, the Circular of the Railway Board creates two categories between one class of legitimate children. It is articulated that by excluding a class of beneficiaries who have been deemed legitimate by the operation

of law, the condition imposed is disproportionate the object sought to be adopted. It would be apposite to extract the relevant observations of the Hon'ble Apex Court.

“15. Even if the narrow classification test is adopted, the circular of the Railway Board creates two categories between one class of legitimate children. Though the law has regarded a child born from a second marriage as legitimate, a child born from the first marriage of a deceased employee is alone made entitled to the benefit of compassionate appointment. The salutary purpose underlying the grant of compassionate appointment, which is to prevent destitution and penury in the family of a deceased employee requires that any stipulation or condition which is imposed must have or bear a reasonable nexus to the object which is sought to be achieved. The learned Additional Solicitor General has urged that it is open to the State, as part of its policy of discouraging bigamy to restrict the benefit of compassionate appointment, only to the spouse and children of the first marriage and to deny it to the spouse of a subsequent marriage and the children. We are here concerned with the exclusion of children born from a second marriage. By excluding a class of beneficiaries who have been deemed legitimate by the operation of law, the condition imposed is disproportionate to the

object sought to be achieved. Having regard to the purpose and object of a scheme of compassionate appointment, once the law has treated such children as legitimate, it would be impermissible to exclude them from being considered for compassionate appointment. Children do not choose their parents. To deny compassionate appointment though the law treats a child of a void marriage as legitimate is deeply offensive to their dignity and is offensive to the constitutional guarantee against discrimination.

18. *Mukesh Kumar* considers the same circular which fell for consideration in *VR. Tripathi* and holds that the issue is covered by the said judgment.

19. Both the decisions *supra* are rendered in the context of the condition which treated legitimate and illegitimate children of the deceased employee differently. On the premise that by operation of law, legitimate and illegitimate children of the deceased form the same class, the Hon'ble Apex Court held that the different treatment to the members of the same class is violative of Article 14 of the Constitution of India.

20. In our considered view, the enunciation in *V.R. Tripathi* and *Mukesh Kumar* does not take the case of the petitioner any further.

21. The petition is dismissed.

(Mrs. Vrushali V. Joshi, J.)

(Rohit B. Deo, J.)

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