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Vakalatnama and allow him to address the case so far as the propriety of the order impugned passed by the learned Tribunal dated 16.02.2023 in OA No. 916 of 2019 is concerned.

3. There is no opposition by the learned counsel appearing for the petitioner-Railway, who is the respondent before the Tribunal. Hence, the instant interlocutory application is allowed.
4. The office is directed to accept the *Vakalatnama*.
5. The case has been heard with the consent of the parties.

W.P.(S) No. 6702 of 2023:

Prayer

6. The instant writ petition has been filed under Article 226 of the Constitution of India directed against the order dated 16.02.2023 passed in OA No. 916 of 2019 by the learned Central Administrative Tribunal, Circuit Bench, Ranchi whereby and whereunder while allowing the same, the decision taken by the authority dated 08.04.2019 by which the claim of the petitioner, who has taken birth from the wedlock of the second wife of the deceased employee for considering the appointment on compassionate ground was rejected, has been quashed and set aside with the direction to consider the case for appointment of the applicant(respondent herein) on compassionate ground afresh, ignoring the issue that he is the son of the second wife of the deceased employee and to take rational decision within four months from the date of the receipt of the copy of the order.

Brief Facts of the Case

7. The brief facts of the case as enumerated in the writ petition are referred herein which reads as under:

The respondent approached the learned Tribunal by filing an Original Application for quashing of the order dated 08.04.2019 by which the claim for compassionate appointment was rejected on the

ground that the second widow and her children does not come under the scheme of the compassionate appointment as per the scheme in vogue at the time of death of the employee.

The father of the respondent-applicant, Late Banwari Mistry, expired on 19.02.1998 while in service. Smt. Silema Devi, the second wife/widow of the deceased employee requested for appointment on compassionate ground in the year 1999.

The second widow of the late Banwari Mistry- Smt. Silema Devi again approached for appointment on compassionate ground of her son Ashok Kumar (Respondent/Applicant) in the year 2012 which was not considered and the competent authority has rejected the claim, and the same was informed to Smt. Silema Devi vide letter no. DSC-37/CI.III/Misc. dated 15.02.2012.

The respondent (herein) had preferred an application vide OA No. 152 of 2019 which was disposed of by the learned Tribunal on 15.02.2019 with a direction to the respondents (petitioners herein) to consider the case of the applicant (respondent herein) without being influenced by the earlier decision dated 15.02.2012 and to pass the reasoned and speaking order within the period of four months.

Pursuant to the direction passed in OA No. 152 of 2019, the Railway Authorities rejected the prayer of the respondent/applicant for compassionate appointment vide order dated 08.04.2019.

It is the case of the petitioners that in pursuance of the order passed by different Hon'ble High Courts and the Hon'ble Apex Court, the Railway Board has published a letter No. E (NG) 11/2016/RC-1/CR/12 (Pt) dated 30.12.2019 (RBE No. 218/2019) by which the compassionate appointment to a child born out of second wedlock has been directed to be considered but only after ascertaining that there is no objection to the aforesaid compassionate appointment from the first wife or her children.

The Railway Board has further clarified its earlier decision communicated by the Board's letter dated 30.12.2019 (RBE No. 218/2019) vide a separate letter dated 18.03.2021 in which the aforesaid decision of the Railway Board dated 30.12.2019 has been made effective from the date of issue which is evident from the Board's letter dated 18.03.2021 (Annexure-5).

Further, it is the case of the petitioners that after considering the aforesaid decision/circular of the Railway Board, it is quite clear that the cause of action which will arise for compassionate appointment for the children of the second widow shall be only on or after 30.12.2019 and therefore the cause of action which has occurred prior to the aforesaid cut-off date 30.12.2019, is not covered under the aforesaid two decisions of the Board by which the provision has been made for appointment of the children of the second widow.

Therefore, in the case of the respondent/applicant, the aforesaid two letters i.e letter dated 30.12.2019 and letter dated 18.03.2021 (Annexure-5), will not apply since the cause of action of the respondent/applicant has arisen on 19.02.1998 when the deceased employee namely late Banwari Mistry was expired leaving behind first wife, second wife and son and daughter of the second wife.

After the rejection of claim for compassionate appointment, the applicant/respondent has challenged the aforesaid order dated 08.04.2019 in OA No. 916 of 2019 which has been allowed by the learned Tribunal vide order dated 16.02.2023.

Being aggrieved by the order dated 16.02.2023, the petitioners approached the learned Tribunal by filing the Review Application being RA/051/00006/2023 which was also dismissed vide order dated 19.7.2023 with the following observation: -

"The plea taken by learned counsel for reviewing of the Order

does not fall within the scope of review jurisdiction. Whether the judgment is vulnerable on erroneous application of a decision or not, is something which can be assailed by the applicants in a higher forum of appeal, if so advised."

8. Being aggrieved with the aforesaid order dated 16.02.2023 the instant petition has been preferred by the petitioners.
9. It is evident from the factual aspect as available and pleaded in the writ petition and extracted from the pleading as available in the original application filed before the learned Tribunal and the written statement that the father of the respondent, the applicant to the Tribunal, while working under the respondent/petitioners had died in harness on 19.02.1998.
10. The father of the respondent-applicant, Late Banwari Mistry, expired on 19.02.1998 while in service. Smt. Silema Devi, the second wife/widow of the deceased employee requested for appointment on compassionate ground in the year 1999. Again in the year 2012, the representation has been filed for consideration of appointment on compassionate ground which was rejected vide letter dated 15.02.2012.
11. Thereafter, applicant/respondent herein preferred an application vide OA No. 152/2019 which was disposed of by the learned Tribunal on 15.02.2019 with direction to the respondents (petitioners herein) to consider the case of the application (respondent herein) without being influenced by earlier decision dated 15.02.2012. Pursuant thereto, the railway authorities (petitioners herein) rejected the prayer of applicant (respondent herein) for compassionate appointment vide order dated 08.04.2019.
12. Petitioners while passing the order dated 08.04.2019 stated therein that as per Rule 21 of Railway Service (Conduct) Rules, 1966, when first wife is alive, contracting of second marriage is not permissible

unless permission has been taken from government for contracting second marriage. Further, it has been stated by the petitioners that in the present case, both the widows were sanctioned family pension @ 50 % each as per extant rules. However, in view of Railway Board's letter No. E (NG) II/91/RC-1/136 dated 02.01.1992 providing appointment to Smt. Silema Devi and her son Sh. Ashok Kumar is not admissible.

13. The respondent-applicant being aggrieved with the order dated 08.04.2019 had preferred the original application being OA No. 916/2019, wherein the learned Tribunal vide order dated 16.02.2023 while taking note of the ratio as laid down by the Hon'ble Apex Court in *SLP (C) No. 1857 of 2018* dated 24.02.2022 (***Mukesh Kumar and Another V. Union of India and Others***) had quashed and set aside the order dated 08.04.2019 and had referred in the impugned order that the denial of the consideration of appointment on compassionate ground to son of the second wife is not legally sustainable.
14. Being aggrieved by the order of the learned Tribunal, the instant petition is being preferred by the employer/respondent (petitioners herein) on the ground that the letter/circular of the Railway Board in relation to the compassionate appointment to the children of second wife/widow vide circular dated 30.12.2019 and its clarificatory letter dated 18.03.2021 have not been taken into consideration by the learned Tribunal.

Submissions advanced by the learned counsel appearing on behalf of the Petitioners:

15. Learned counsel appearing for the writ petitioner has taken the following grounds in assailing the impugned order:
 - (1.) The order impugned is not sustainable in the eye of law on the ground that the issue which has already been decided by the authority concerned on the basis of existing

scheme/letters/circular at the relevant time cannot be reopened on the basis of the consequent judgment passed by the Court of law.

- (2.) The learned CAT has failed to consider the Railway Board's letter dated 18.03.2021 where it has been clarified that the RBE dated 30.12.2019 regarding appointment on compassionate ground to children born to the second wife of the deceased employee is effective from date 30.12.2019.
- (3.) The cause of action is of the year 1998 hence the policy prevailing at the relevant time i.e. **letter No. E (NG) II/91/RC-1/136 dated 02.01.1992** will be applicable in this matter and thereafter the decision was taken by apportioning the pension to the extent of 50% in between the two wives as per the policy decision taken by the respondent- Railway Board (petitioners herein).
- (4.) The learned CAT has further failed to consider that the appointment on compassionate ground is to be offered to eligible ward so that family can cope up with the instant financial crisis due to sudden death of employee. But in this case, no such situation exists as about 25 years have already been passed since the employee died.

16. Learned Senior Counsel appearing for the writ petitioner, based upon the aforesaid ground, had submitted that the learned Tribunal had not appreciated these legal issues coupled with the admitted factual aspect and hence the impugned order suffers from illegality and as such not sustainable in the eye of law.

Submissions advanced by the learned counsel appearing for the Respondent:

17. Mr. Birendra Kumar, learned counsel for the respondent the applicant before the Tribunal, has taken the following grounds by defending the order passed by the learned Tribunal:

- (1.) The Tribunal has taken into consideration law laid down by Hon'ble Apex Court dated 24.02.2022 passed in *SLP (C) No. 1857 of 2018 (Mukesh Kumar and Another V. Union of India and Others)* it cannot be denied that once the issue has been decided by the Hon'ble Apex Court it will be binding upon all the parties in view of the provision of Article 141 of the Constitution of India.
- (2.) The ground has been taken in response to the argument advanced on behalf of the writ petitioner that contrary to the provision of scheme no appointment on compassionate ground can be provided but the appointment on compassionate ground since is to be provided by way of welfare security measure and as such the technicality is not to come in the way rather the object and intent of the scheme to provide appointment on compassionate ground is to be taken into consideration which has been taken into consideration by the learned Tribunal which led the learned Tribunal in passing the impugned order, even though the claim of the writ petitioner was rejected on earlier occasion.
- (3.) The learned counsel has relied upon the judgment passed by the Hon'ble Apex Court in the case of *Union of India & Another versus V.R. Tripathi* reported in *(2019) 14 SCC 646*.

18. Learned Counsel appearing for the applicant/respondent, based upon the aforesaid grounds, had submitted that the learned Tribunal had rightly appreciated these legal issues coupled with the admitted factual aspect and hence the impugned order may not be interfered with.

Analysis

19. We have heard the learned counsel for the parties, gone across the finding recorded by the learned Tribunal in the impugned order as also the pleading made in the writ petition.

20. This Court is conscious with the law that the order passed by the Tribunal is to be looked into under the power of judicial review in view of the judgment rendered by Hon'ble Apex Court in the case of ***L. Chandra Kumar v. Union of India & Others*** reported in **(1997) 3 SCC 261** wherein at **Paragraph-99** it has been held that the order passed by the learned Tribunal i.e., the Court of first instance is to be looked into by the High Court under Article 226 of the Constitution of India in exercise of power of judicial review. For ready reference the relevant paragraph of the aforesaid judgment is being quoted as under:

“99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases

where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.”
[emphasis supplied]

21. This Court, on the basis of the aforesaid legal proposition as has been settled by Constitution Bench of the Hon'ble Apex Court is now proceeding to decide the issues involved in the instant case by going through the factual aspects but before advertng to the factual aspects, this Court is further of the view that the reference of the law laid down by the Hon'ble Apex Court in the matter of appointment on compassionate ground also needs to be referred herein.
22. In the case of ***Indian Bank v. Promila*, (2020) 2 SCC 729** the Hon'ble Apex Court has observed that the basic principles applicable to the cases of compassionate employment i.e. succour being provided at the stage of unfortunate demise, coupled with compassionate employment not being an alternate method of public employment. If these factors are kept in mind, it would be noticed that the respondents had the wherewithal at the relevant stage of time, as per the norms, to deal with the unfortunate situation which they were faced with. Thus, looked under any Schemes, the respondents cannot claim benefit, though, as clarified aforesaid, it is only the relevant Scheme prevalent on the date of demise of the employee, which could have been considered to be applicable. The relevant paragraph of the aforesaid judgment is being quoted as under:

20. We have to keep in mind the basic principles applicable to the cases of compassionate employment i.e. succour being provided at the stage of unfortunate demise, coupled with compassionate employment not being an alternate method of public

employment. If these factors are kept in mind, it would be noticed that the respondents had the wherewithal at the relevant stage of time, as per the norms, to deal with the unfortunate situation which they were faced with. Thus, looked under any Schemes, the respondents cannot claim benefit, though, as clarified aforesaid, it is only the relevant Scheme prevalent on the date of demise of the employee, which could have been considered to be applicable, in view of the judgment of this Court in Canara Bank [Canara Bank v. M. Mahesh Kumar, (2015) 7 SCC 412 : (2015) 2 SCC (L&S) 539]. It is not for the courts to substitute a Scheme or add or subtract from the terms thereof in judicial review, as has been recently emphasised by this Court in State of H.P. v. Parkash Chand [State of H.P. v. Parkash Chand, (2019) 4 SCC 285 : (2019) 1 SCC (L&S) 621].

23. Further, the Full Bench of the Hon'ble Apex Court in the case of ***State of M.P. v. Amit Shrivastava, (2020) 10 SCC 496*** has categorically observed that there cannot be any inherent right to compassionate appointment but rather, it is a right based on certain criteria, especially to provide succor to a needy family. This has to be in terms of the applicable policy as existing on the date of demise, unless a subsequent policy is made applicable retrospectively. For ready reference the relevant paragraph of the aforesaid judgment is being quoted as under:

16. It is trite to say that there cannot be any inherent right to compassionate appointment but rather, it is a right based on certain criteria, especially to provide succor to a needy family. This has to be in terms of the applicable policy as existing on the date of demise, unless a subsequent policy is made applicable retrospectively. Insofar as providing succor is concerned, unfortunately, since the demise of the late father of the respondent, 11 years have passed and really speaking, the aspect of providing succor to the family immediately does not survive. We have still examined the matter in the conspectus of the applicable policy. It is not in question that the Policy prevailing was one dated 18-8-2008. Clause 12.1 clearly proscribes work-charge/contingency fund and daily wage employees from

compassionate appointment. The gravamen of the submission of the respondent is based on the classification of his late father as a permanent employee on account of having worked for more than 15 years and the consequent regularisation of his service.

24. At this juncture this Court also deems it fit and proper to consider herein the very object and intent of appointment on compassionate ground in case of death of deceased-employee. The purpose of appointment on compassionate ground is to provide immediate succor to the bereaved family. The Hon'ble Apex Court has considered the very object and intent of appointment on compassionate ground in the case of ***Umesh Kumar Nagpal v. State of Haryana [(1994) 4 SCC 138]*** wherein it has been held that the consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over. The relevant paragraphs of the aforesaid judgment are being quoted as under:

4. It is for these reasons that we have not been in a position to appreciate judgments of some of the High Courts which have justified and even directed compassionate employment either as a matter of course or in posts above Classes III and IV. We are also dismayed to find that the decision of this Court in Sushma Gosain v. Union of India [(1989) 4 SCC 468 : 1989 SCC (L&S) 662 : (1989) 11 ATC 878 : (1989) 4 SLR 327] has been misinterpreted to the point of distortion. The decision does not justify compassionate employment either as a matter of course or in employment in posts above Classes III and IV. In the present case, the High Court has rightly pointed out that the State Government's instructions in question did not justify compassionate employment in Class II posts. However, it appears from the judgment that the State Government had made at least one exception and provided compassionate employment in Class II post on the specious

ground that the person concerned had technical qualifications such as M.B.B.S., B.E., B.Tech. etc. Such exception, as pointed out above, is illegal, since it is contrary to the object of making exception to the general rule. The only ground which can justify compassionate employment is the penurious condition of the deceased's family. Neither the qualifications of his dependant nor the post which he held is relevant. It is for this reason that we are unable to understand the following observations of the High Court in the impugned judgment: "We are of the view that the extraordinary situations require extraordinary remedies and it is open to the Government in real hard cases to deviate from the letter and spirit of the instructions and to provide relief in cases where it is so warranted. To hold as a matter of law that the Government cannot deviate even minutely from the policy of providing appointment only against Class III and Class IV posts, would be to ignore the reality of life these days. It would be ridiculous to expect that a dependant of a deceased Class I Officer, should be offered appointment against a Class III or IV post. While we leave it to the Government to exercise its discretion judiciously in making appointments to Class I or II posts on compassionate grounds, yet a word of caution needs to be struck. It is to be noted that such appointments should be ordered in the rarest of rare cases, and in very exceptional circumstances. As a matter of fact, we would recommend that the Government should frame a policy even for such appointments."

6. For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over.

- 25.** Further it is also settled proposition of law that appointment on compassionate ground is in the teeth of Article 14 and 16 of the

Constitution of India. For ready reference the law laid down by Hon'ble Apex Court in the judgment rendered in ***Commissioner of Public Instructions and Others v. K.R. Vishwanath [(2005) 7 SCC 206]***, at paragraph 9 is quoted as under:

"9. As was observed in State of Haryana v. Rani Devi [(1996) 5 SCC 308] , it need not be pointed out that the claim of person concerned for appointment on compassionate ground is based on the premises that he was dependant on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Articles 14 or 16 of the Constitution. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-inharness scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. In Rani Devi case [(1996) 5 SCC 308] it was held that scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. In LIC of India v. Asha Ramchandra Ambekar [(1994) 2 SCC 718] it was pointed out that High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplates such appointments. It was noted in Umesh Kumar Nagpal v. State of Haryana [(1994) 4 SCC 138] that as a rule in public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial

crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.”

26. Further, the Hon’ble Apex Court in the judgment rendered in ***State of Himachal Pradesh & Anr. Vs Shashi Kumar [(2019) 3 SCC 653]*** had an occasion to consider the object and intent of appointment on compassionate ground and considering the judgment rendered by Hon’ble Apex Court in ***Govind Prakash Verma Vs. LIC [(2005) 10 SCC 289]***, at paragraph 21 and 26 it has been held as under:

“21. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been considered subsequently in several decisions. But, before we advert to those decisions, it is necessary to note that the nature of compassionate appointment had been considered by this Court in Umesh Kumar Nagpal v. State of Haryana [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] . The principles which have been laid down in Umesh Kumar Nagpal [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] have been subsequently followed in a consistent line of precedents in this Court. These principles are encapsulated in the following extract: (Umesh Kumar Nagpal case [Umesh Kumar Nagpal v. State of Haryana, (1994) 4 SCC 138 : 1994 SCC (L&S) 930] , SCC pp. 139-40, para 2)

“2. ... As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his

family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile

employment which are suddenly upturned.”

26. The judgment of a Bench of two Judges in Mumtaz Yunus Mulani v. State of Maharashtra [Mumtaz Yunus Mulani v. State of Maharashtra, (2008) 11 SCC 384 : (2008) 2 SCC (L&S) 1077] has adopted the principle that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis. The financial position of the family would need to be evaluated on the basis of the provisions contained in the scheme. The decision in Govind Prakash Verma [Govind Prakash Verma v. LIC, (2005) 10 SCC 289 : 2005 SCC (L&S) 590] has been duly considered, but the Court observed that it did not appear that the earlier binding precedents of this Court have been taken note of in that case.

- 27.** It is evident from the aforesaid proposition of law as has been settled by the Hon'ble Apex Court wherein the applicability of the scheme was the subject-matter in one of the cases that is in the case of ***Canara Bank & Another versus M. Mahesh Kumar(supra)*** wherein the Hon'ble Apex Court has hold that the scheme which is in-vogue at the time of the death of the concerned employee will be applicable. The relevant paragraph of the aforesaid judgment is being quoted as under:

24. In the result, all the appeals preferred by the appellant Bank are dismissed and the appellant Bank is directed to consider the case of the respondents for compassionate appointment as per the Scheme which was in vogue at the time of death of the employee concerned. In the facts and circumstances of the case, we make no order as to costs.

- 28.** The law, therefore, is settled that the appointment on compassionate ground is to be considered on the basis of the policy decision which is available at the time of the death of the concerned employee or if there is any period to make an application is available.

- 29.** From the aforesaid discussion it is further evident that

compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible.

- 30.** Nevertheless, the concept of compassionate appointment has been recognised as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve.
- 31.** Admittedly, herein the fact about the period to make an application has not been referred before the Tribunal as since the same is not referred in the order impugned. Therefore, this Court is to consider the issue on the basis of the applicability of the scheme which was in-vogue at the time of the death of the employee. Herein, the scheme dated 02.01.1992 was in-vogue at the time of the death of the employee.
- 32.** The admitted case herein is that after the death took place of the bread earner, i.e., the father of the respondent herein, the representation has been filed by second wife of the deceased employee which has been rejected by the Railway authorities (petitioners herein) in the light of letter dated 02.01.1992, which prohibits the appointment of the children born out of second wedlock.

33. The Hon'ble Apex Court since has laid down the proposition that there cannot be any appointment on compassionate ground deviating from the rules and it is the admitted fact herein that the applicant was minor at the time of death of his father(employee) and in the year 2012, the representation has been filed for consideration of appointment on compassionate ground which was rejected vide letter dated 15.02.2012.
34. Thereafter, respondent herein preferred an application vide OA No. 152/2019 which was disposed of by the learned Tribunal on 15.02.2019 with direction to the respondents (petitioners herein) to consider the case of the application (respondent herein) without being influenced by earlier decision dated 15.02.2012. Pursuant thereto, the railway authorities (petitioners herein) rejected the prayer of applicant (respondent herein) for compassionate appointment vide order dated 08.04.2019.
35. Further, it has been stated by the petitioners that in the present case, both the widows were sanctioned family pension @ 50 % each as per extant rules. However, in view of Railway Board's letter No. E (NG) II/91/RC-1/136 dated 02.01.1992 providing appoint to Smt. Silema Devi and her son Sh. Ashok Kumar is not admissible.
36. The respondent-applicant being aggrieved with the order dated 08.04.2019 had preferred the original application being OA No. 916/2019, wherein the order dated 08.04.2019 had been quashed and set aside on the ground of the law laid down by the Hon'ble Apex Court in SLP (C) No. 1857 of 2018 (***Mukesh Kumar and Another V. Union of India and Ors.*** dated 24.02.2022 by which it has been referred in the order impugned that the controversy has been set at rest by laying the law that the denial of the consideration of appointment on compassionate ground to son of the second wife is not legally sustainable.
37. This Court on the basis of the aforesaid factual aspects is now

proceeding to consider the rival submissions made on behalf of the parties.

38. The first ground which has been taken by the learned Tribunal in interfering with the decision taken by the authority is based upon the judgment by Hon'ble Apex Court in the case SLP (C) No. 1857 of 2018 (***Mukesh Kumar and Another V. Union of India and Ors.*** dated 24.02.2022.
39. It needs to refer herein settled position of law that any judgment passed by the Hon'ble Apex Court will have the prospective overruling and will not have any retrospective effect. Reference in this regard is made in the judgment rendered in the case of ***Ramesh Kumar Soni v. State of M.P reported in (2013) 14 SCC 696.*** The relevant paragraphs of the judgment are quoted hereinbelow:

22. The principle of prospective overruling has been invoked by this Court, no matter sparingly, to avoid unnecessary hardship and anomalies. That doctrine was first invoked by this Court in Golak Nath v. State of Punjab [AIR 1967 SC 1643] followed by the decision of this Court in Ashok Kumar Gupta v. State of U.P. [(1997) 5 SCC 201 : 1997 SCC (L&S) 1299]

23. In Baburam v. C.C. Jacob [(1999) 3 SCC 362 : 1999 SCC (Cri) 433 : 1999 SCC (L&S) 682] , this Court invoked and adopted a device for avoiding reopening of settled issues, multiplicity of proceedings and avoidable litigation. The Court said: (SCC pp. 364-65, para 5)

"5. The prospective declaration of law is a device innovated by the Apex Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a devise adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this Court are also duty-bound to apply such dictum to cases which would arise in future only. In matters where decisions opposed to the said principle have been taken prior

to such declaration of law cannot be interfered with on the basis of such declaration of law.”

(emphasis supplied)

24. *To the same effect is the decision of this Court in Harsh Dhingra v. State of Haryana [(2001) 9 SCC 550] where this Court observed: (SCC p. 556, para 7)*

“7. The prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty-bound to apply such dictum to cases which would arise in future. Since it is indisputable that a court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation.”

(emphasis supplied)

25. *In Sarwan Kumar v. Madan Lal Aggarwal [(2003) 4 SCC 147] , this Court held that though the doctrine of prospective overruling was initially made applicable to the matters arising under the Constitution but subsequent decisions have made the same applicable even to cases under different statutes. The Court observed: (SCC p. 157, para 15)*

“15. ... The doctrine of ‘prospective overruling’ was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of ‘prospective overruling’ the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of the doctrine of ‘prospective overruling’ is left to the discretion of the court to mould with the justice of the cause or the matter before the court.”

(emphasis supplied)

40. However, the judgment can have the retrospective overruling if there is any specific direction so passed by the Hon'ble Apex Court, in this regard reference be made to the judgment passed by the Hon'ble Apex Court in the case of ***M. Nagaraj and Ors. versus Union of India and Ors.*** reported in ***(2006) 8 SCC 212*** wherein the issue was with respect to the validity of the 85th amendment to the Constitution of India and the cut-off date had been decided to be there to assess the consequential seniority with the effect of 17.06.1995, meaning thereby, the Hon'ble Apex Court by way of judicial pronouncement has extended the period of 85th Amendment up to the cut-off date by giving the effect of that judgment with retrospective effect.
41. The reference of the aforesaid judgments is to be made in the light of the settled proposition of law that the judicial pronouncement of the Hon'ble Apex Court can also have the retrospective effect, if any specific finding is there to that effect, otherwise on the judgment of the Hon'ble Apex Court will have the prospective overruling.
42. The further proposition is that if the decision has not been taken by the authority and, in the meanwhile, law has been laid down that certainly the consideration is to be given on the basis of the judgment passed by Hon'ble Apex Court but in the matter of appointment on compassionate ground certainly the question would be of primary importance to consider the claim on the basis of the scheme prevalent the day when the death took place and further also taking in to consideration that the appointment on the basis of compassionate ground is not vested right rather the object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner.

If the matter has been set at rest by taking decision by the authority on the basis of the date of death herein, is much prior to the judgment passed by the Court of law striking down the

statutory provision, the same is not to be reopened after lapse of time, otherwise, the same will be unending process and the moment, the new judgment will come, the exercise will be reinitiated by one or the other in order to ventilate his grievance.

43. This Court, based upon the aforesaid discussion as also judgment passed by the Hon'ble Apex Court regarding the interpretation of error apparent on the face of record has been judgment rendered in the case of ***L. Chandra Kumar v. Union of India & Others (supra)***, is of the view that the learned Tribunal has not taken into consideration all these underlying aspect of the matter as has been discussed and referred herein particularly the settled position of law that the consideration for such employment is not a vested right which can be exercised at any time in future and the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over, hence according to our considered view it is the case where the power of judicial review is to be exercised to interfere with the impugned order dated 16.02.2023.
44. Since, the reliance has been placed by the learned counsel for the respondent upon the judgment rendered by Hon'ble Apex Court in the case of ***Union of India & Another versus V.R. Tripathi (supra)*** hence, it is bounden duty of this Court to see the applicability of the said judgment in the fact and circumstances of the instant case.
45. However, before entering into the aforesaid issue, it needs to refer herein the settled position of law that each case has to be decided on its own facts and circumstances of the case. Reference in this regard may be made to the judgment rendered by the Hon'ble Apex Court in the case of ***Dr. Subramanian Swamy Vs. State of TamilNadu and Others (2014) 5 SCC 75***, for ready reference the relevant paragraph is being quoted as under:

47. It is a settled legal proposition that the ratio of any decision must be understood in the background of the facts of that case

and the case is only an authority for what it actually decides, and not what logically follows from it. "The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed."

46. We have gone through the judgment passed by Hon'ble Apex Court in the case of ***Union of India & Another versus V.R. Tripathi (supra)*** which has been decided on 11th December, 2018 wherein the father of the respondent, Ramlakhan Tripathi was employed as a Technician, Grade I in Central Railways at Mumbai. He died in harness on 28-11-2009. The deceased employee had contracted second marriage during the subsistence of his first marriage. The respondent is the son born from the second marriage of the employee. The second marriage, as it appears, was contracted in 1987. The respondent applied for compassionate appointment on the death of his father. The application was rejected on 6-3-2012 by the railway authorities.
47. Thereafter, matter went before the Hon'ble Apex Court wherein while dismissing the appeal the Hon'ble Apex Court has taken into consideration the fact that the circular dated 2-1-1992 was struck down by the Division Bench of the Calcutta High Court in ***Namita Goldar [Namita Goldar v. Union of India, 2010 SCC OnLine Cal 266]*** and accordingly the Hon'ble Apex Court has held that the exclusion of a child born from a second marriage from seeking compassionate appointment under the terms of the circular of the Railway Board is ultra vires.
48. It is evident from the aforesaid factual aspects that father of respondent died in harness in year 2009 and the respondent is the son born from the second marriage of the employee which was solemnized in 1987. Further, the respondent applied for compassionate appointment on the death of his father and the same was rejected on 6-3-2012 by the railway authorities. Further, it is

nowhere come that the at the time of filing of application for compassionate appointment the said respondent was minor.

49. In the instant case admittedly the applicant/respondent herein was minor at the time of death of his father and again in the year 2012, the representation has been filed for consideration of appointment on compassionate ground which was rejected vide letter dated 15.02. 2012. From the aforesaid fact it is evident that the family of deceased survived on its own means for such a long period. Thus, from the factual aspect it is evident that the judgment rendered by the Hon'ble Apex Court in the Union ***of India & Another versus V.R. Tripathi(supra)*** is not applicable in the fact and circumstances of the instant case.

Reason being that the death in the case of B.R. Tripathi is dated 28.11.2009 and the application which was made for appointment on compassionate ground, was rejected immediately on 06.03. 2012. It is also not apparent from the fact that on the date of death of deceased employee in the case of B.R. Tripathi, the dependent, appellant was minor. But herein, the death of the deceased employee, the father of the writ petitioner took place in year 1998 and at that time admittedly, the writ petitioner was minor.

50. Further it is settled position of law as per the judgment rendered by the Hon'ble Apex Court in the case of ***Umesh Kumar Nagpal V. State of Haryana (supra)*** that the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over.

51. Further it has come on record that in pursuance of the order passed by different High Courts and the Hon'ble Apex Court, the Railway Board has published a letter No. E (NG) 11/2016/RC-1/CR/12 (Pt) dated 30.12.2019 (RBE No. 218/2019) by which the compassionate appointment to a child born out of second wedlock has been directed to be considered but only after ascertaining that there is no objection to the aforesaid compassionate appointment from the first wife or her children. Further, vide a separate letter dated 18.03.2021 it has been clarified that the aforesaid decision of the Railway Board dated 30.12.2019 has been made effective from the date of issue.

It is evident that the letter issued by the Railway Board has been made effective from 30.12.2019. The validity of the said letter has not been questioned ever and hence, on that count also, the case of the writ petitioner is not fit to be considered along with the issue of delay.

Conclusion

52. As discussed hereinabove, it is admitted position that when the father of applicant died in the year 1998, the said scheme as per Railway Board vide letter No. E (NG) II/91/RC-1/136 dated 02.01.1992 was in vogue and as per the settled position of law as rendered by the Hon'ble Apex Court in the case of ***State of M.P. v. Amit Shrivastava (supra)*** that there cannot be any inherent right to compassionate appointment but rather, it is a right based on certain criteria, especially to provide succor to a needy family and this has to be in terms of the applicable policy as existing on the date of demise, unless a subsequent policy is made applicable retrospectively.

53. In the instant case the Railway Board has published a letter No. E (NG) 11/2016/RC-1/CR/12 (Pt) dated 30.12.2019 (RBE No. 218/2019) by which the compassionate appointment to a child

born out of second wedlock has been directed to be considered and further, vide a separate letter dated 18.03.2021 it has been clarified that the aforesaid decision of the Railway Board dated 30.12.2019 has been made effective from the date of issue.

54. Further, it is also settled proposition of law that if any rule/statute has been formulated and if not specifically provided about its retrospective application, the same is to be applied prospectively. Reference in this regard may be made to the judgment passed by the Hon'ble Apex Court in the case of ***P. Mahendran & Ors. v. State of Karnataka & Ors., [(1990) 1 SCC 411]***, wherein the Hon'ble Supreme Court held as under:

“5. It is well settled rule of construction that every statute or statutory rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the rule must be held to be prospective. If a rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the rule cannot be given retrospective effect except in matter of procedure. The amending Rules of 1987 do not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary intendment for enforcing the rule with retrospective effect. Since the 8 amending Rules were not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force, the amended Rules could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter.”

55. In another judgment rendered by Hon'ble Apex Court in ***K.S. Paripoornan v. State of Kerala & Ors., (1994) 5 SCC 593***, it has been held which reads as hereunder:

“92. A substantive law is held to be prospective as a matter of legal policy since it is founded on public policy that no right be so

created as to work to the disadvantage for whom it is created as it if be so, "it would be betrayal of what the law stands for."

56. In the instant case by virtue of letter dated 18.03.2021 it has been specifically clarified that the aforesaid decision of the Railway Board dated 30.12.2019 has been made effective from the date of issue, therefore the decision of the Railway Board dated 30.12.2019 wherein the compassionate appointment to a child born out of second wedlock has been directed to be considered cannot have retrospective application.
57. Further as discussed herein above and as per the ratio rendered by the Hon'ble Apex Court in the case of ***Umesh Kumar Nagpal v. State of Haryana(supra)*** the object of the compassionate appointment being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over.
58. Further in the case of ***Eastern Coalfields Ltd. V. Anil Badyakar & Ors.*** reported in ***(2009) 13 SCC 112*** the Hon'ble Apex Court has held that compassionate appointment is not a vested right which can be exercised at any time in future. The compassionate appointment cannot be claimed and offered after lapse of time and after the crisis is over.
59. Further, the Hon'ble Apex Court in the case of ***Central Coalfields Ltd. v. Parden Oraon, (2021) 16 SCC 384*** has categorically held that as the object of compassionate appointment is for providing immediate succour to the family of a deceased employee, the respondent's son is not entitled for compassionate appointment after the passage of a long period of time since his father has gone missing.
60. In the instant case father of the respondent, the applicant to the Tribunal, while working under the respondent/petitioners had died

in harness on 19.02.1998. The second wife of deceased employee has made an application for consideration of her son for appointment on compassionate ground which was rejected on the basis of the letter of the Railway Board dated 02.01.1992. In the year 2012, the representation has been filed for consideration of appointment on compassionate ground which was rejected vide letter dated 15.02.2012. Further vide order dated 08.04.2019 the claim for compassionate appointment was rejected as per the scheme in vogue at the time of death of the employee.

61. The Court, after having discussed the aforesaid aspect of the matter and advertent to the order passed by the learned Tribunal is also of the view that the learned Tribunal has not considered the very spirit to provide an appointment on compassionate ground that the consideration for such employment is not a vested right which can be exercised at any time in future rather it is meant to provide immediate succor to the bereaved family.
62. In the instant case admittedly the applicant/respondent herein was minor at the time of death of his father and again in the year 2012, the representation was filed for consideration of appointment on compassionate ground which was rejected vide letter dated 15.02.2012. From the aforesaid fact it is evident that the family of deceased survived on its own means for such a long period.
63. Further it is settled position of law as per the judgment rendered by the Hon'ble Apex Court in the case of ***Umesh Kumar Nagpal V. State of Haryana (supra)*** that the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered

whatever the lapse of time and after the crisis is over.

64. since admittedly the death took place sometime in the year 1998 but the direction has been passed by the learned Tribunal to reconsider the claim of the writ petitioner after lapse of 25 years which according to our considered view is said to be contrary to the object and intent of the appointment on compassionate ground as discussed herein above.
65. Accordingly, the impugned order dated 16.02.2023 is hereby quashed and set aside, consequently, the instant writ petition is hereby allowed.
66. Pending interlocutory application(s), if any, also stands disposed of.

(Sujit Narayan Prasad, J.)

(Navneet Kumar, J.)

Samarth/**A.F.R.**