

RESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH ALLAHABAD

Dated: This the 15th day of February 2019

HON'BLE MR. RAKESH SAGAR JAIN, MEMBER – J

Original Application No. 199 of 2013

Satish Chaudhari, son of late Chottey Lal, resident of L/35-A, North Eastern Railway Colony, Anwarganj, Police Station Raipurwa, District Kanpur Nagar.

.....Applicant

By Advocate: Shri Dharmendra Tiwari

Versus

1. Union of India through Ministry of Railway Department, New Delhi.
2. General Manager, North Eastern Railway, Lucknow.
3. Chief Workshop Manager (Engineering) North Eastern Railway, Lucknow.

. . . Respondents

By Adv: Shri N.C. Srivastava

ORDER

1. The present Original Application has been filed by the applicant Satish Chaudhari under section 19 of Administrative Tribunals Act, 1985 seeking following reliefs:-

“That a declaration any issued directing the respondent considering for compassionate appointment under the dying in harness rules 1973, seeking appointment at the place of Late Chotey Lal son of Late Lallan, who has been died on 26.12.2010 during service period, leaving behind the applicant in harness”.

2. Case of applicant is that Chottey Lal (father of applicant) died in harness on 26.12.2010. It is the further case of applicant that deceased Chotey Lal solemnized first marriage with Kamla Devi but after passing a long time, no issue has come into existence and due to this reason, with the consent of first wife (Kamla Devi) applicant's

father contacted second marriage with Smt. Shakuntala Devi. Applicant is the son of second wife Shakuntala Devi, who filed an representation with respondents for compassionate appointment to the applicant which was rejected by respondents vide impugned order dated 18.10.2012. Hence, the present O.A.

3. Before proceeding further, reference may be made to the relevant portion of the impugned order, which reads as under:-

“vki dh mijDr fo’k; d l afhkr vkonu i= ij fopkj fd;k x; kj ft l ea i mZ ea fu.khr , oa fn;s x;s mRrj e& i dk’k ea vk;s rF; ks ea dkbZ ifjorZu fn0 10-9-2012 ds vkonu ea ugh ik; k x; kA

;s iRuh; ks dk ekeyk gA i fke iRuh ds thfor jgrh mls fcuk rykd fn;s nq jk fookg mDr jydeh us fd;kA ,d h voLFk ea fnrh; iRuh ds iq dh fu; Dr fu; ekuq kj ns ugh gA

vr%vki ds fn0 10-9-2012 ds vkonu ij vuqEik dkV ea Jh l rh’k pKjh fnrh; iRuh ds iq½ dh vuqEik dkV ea fu; Dr fopkj.kh; ugh gA”

4. In the counter Reply, the respondents have taken the stand that deceased Chhotey Lal had two wives who are alive. He solemnized his second marriage without divorce to his first wife and without permission of Railway Administration which is in violation of Railway Servants Conduct Rules and, therefore, applicant Shiv Kumar is not entitled to any benefit of compassionate appointment. Hence, the O.A. being meritless, deserves to be dismissed.
5. I have heard and considered the arguments of learned counsels for the parties and gone through the material on record.
6. As per the order dated 18.19.2012, respondent has rejected the application for compassionate appointment of the applicant on the ground that compassionate appointment cannot be given to the son of deceased Chhotey Lal as he is the son of second wife of deceased.

7. The Hon'ble Calcutta High Court has also decided the similar issue in the case of Smt. Namita Golder & Anr. Vs. Union Of India & Ors decided on 14 July, 2010 following the judgment of Hon'ble Supreme Court in the case of Rameshwari Devi vs. State of Bihar & Ors., reported in 2000(2) SCC 431, by holding that the children of the second wife cannot be treated as illegitimate. Hon'ble High Court of Calcutta in the case of Smt. Namita Golder & Anr. Vs. UOI & Ors in W.P.C.T. 102 of 2010 has held as under:- "The claim of the petitioner no. 3 for appointment on compassionate ground being the son of the second wife cannot be rejected on the basis of the circular issued by the Railway Board on 2nd January, 1992 since this Court while deciding the aforesaid case of Smt. Namita Goldar & Anr. (supra) already quashed the said circular issued by the Railway Board on 2nd January, 1992 to the extent it prevents the children of the second wife from being considered for appointment on compassionate ground.

"For the reasons discussed hereinabove, we are also of the opinion that the respondent authorities herein were not justified in rejecting the prayer of the petitioner no. 3 for compassionate appointment on the ground that the said petitioner No. 3 is the son of the second wife. Therefore, the decision of the respondent authorities as was communicated to the petitioner no. 1 by the written communication dated 20th August, 2007 cannot be sustained and the same is accordingly quashed."

8. The objection raised by the respondents that compassionate appointment cannot be considered for the children i.e. applicant-son of second wife Smt. Shakuntala Devi is to be rejected in view of the law laid down by the Hon'ble Apex Court in Civil Appeal No.12015 of 2018 titled Union of India and another v/s V.R. Tripathi dated 11.12.2018 (Source: sci.gov.in) wherein it was held that that the benefit of compassionate appointment scheme cannot be denied to the children born out of a second marriage. It was held that :-

“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.

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.

16. The learned Additional Solicitor General submitted that the decision of this Court in *Rameshwari Devi* (supra) arose in the context of the grant of family pension to the minor children born from the second marriage of a deceased employee. That is correct. This Court, in that context, observed 11 that Section 16 of the Hindu Marriage Act, 1955 renders the children of a void marriage to be legitimate while upholding the entitlement to family pension. The learned Additional Solicitor General submitted that pension is a matter of right which accrues by virtue of the long years of service which is rendered by the employee, entitling the employee and after his death, their family to pension in accordance with the rules. Even if we do accept that submission, the principle which has been laid down by this Court on the basis of Section 16 of the Hindu Marriage Act, 1955 must find application in the present case as well. The exclusion of one class of legitimate children from seeking compassionate appointment merely on the ground that the mother of the applicant was a plural wife of the deceased employee would fail to meet the test of a 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.

17. We may note at this stage, that a Division Bench of the Calcutta High Court in *Namita Goldar* (supra) quashed the circular of the Railway Board dated 2 January 1992 to the extent that it prevented the children of the second wife from being considered for appointment on compassionate grounds. Subsequently, another Division Bench of the High Court in its decision in *Eastern Coalfields Ltd. v Dilip Singh* took a contrary view, (2013) 3 Cal.LT 379 12 without noticing the earlier decision. We may advert to the subsequent decision in *Eastern Coalfields Ltd.* (supra) for the reason that it proceeds on a construction of Section 16 which, in our view, is

inconsistent with the language of that provision. The Division Bench held thus:

“Section 16(1) of the aforesaid Act creates a legal fiction whereby a child born out of void marriage shall be held to be legitimate. Section 16(3) of the said act restricts such legal presumption to the rights of such a child only to the property of his parents and none else. It is, therefore, clear that Section 16 of Hindu Marriages Act, 1955 presumes a child born out of a void marriage as legitimate only for the purpose of entitling him to claim rights in or to the property of his parents but not to any other thing. It is settled law that public post is not a heritable property. In *State Bank of India v. Jaspal Kaur* reported in (2007) 9 SCC 571 the Apex Court held that it is clear that public post is not heritable, therefore, the right to compassionate appointment is not a heritable property. In fact it is an exception to the rule of regular appointment by open competition. Such exception to the rule of regular appointment is therefore a privilege extended by the employer in terms of the scheme for compassionate appointment itself. It is not a property of the deceased nor is it a heritable right. In *State of Chhattisgarh v. Dhirjo Kumar Sengar* reported in (2009) 13 SCC 600 the Apex Court held as follows: “Appointment on compassionate ground is an exception to the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India.” For the aforesaid reasons, we are of the opinion that the provisions of Section 16 of the Hindu Marriage Act, 1955 cannot come to the aid of the petitioner. Legal presumption of legitimacy in such provision is restricted only to the property of the deceased and not to other things. Hence, such provision of law cannot be pressed into service to expand the privilege of compassionate appointment extended by an employee under the scheme as the same can by no stretch of imagination

be held to be the property of the deceased employee.”
(Emphasis supplied).

18. The High Court has proceeded on the basis that the recognition of legitimacy in Section 16 is restricted only to the property of the deceased and for no other purpose. The High Court has missed the principle that Section 16(1) treats a child born from a marriage which is null and void as legitimate. Section 16(3), however, restricts the right of the child in respect of property only to the property of the parents. Section 16(3), however, does not in any manner affect the principle declared in sub-section (1) of Section 16 in regard to the legitimacy of the child. Our attention has also been drawn to a judgment of a learned Single Judge of the Madras High Court in *M Muthuraj v Deputy General of Police, Tamil Nadu* adopting the same position. In the view which we have taken, we have arrived at the conclusion 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. A Division Bench of the Madras High Court followed the view of the Calcutta High Court in *Namita Goldar in Union of India v M Karumbayee*. A Special leave petition filed against the judgment of the Division Bench was dismissed by this Court on 18 September 2017.

19. We may, however, clarify that the issue as to whether in a particular case, the applicant meets all the stipulations of the scheme including financial need and other requirements are matters which will be decided on the facts of each individual case.

20. Finally, it would be necessary to dwell on the submission which was urged on behalf of the respondent that once the circular dated 2 January 1992 was struck down by the Division Bench of the Calcutta High Court in *Namita Goldar* (supra) and which was accepted and has been implemented, it was not thereafter open to the railway authorities to rely upon the same circular which has all India force and effect. There is merit in the submission. Hence, we find it improper on the part

of the Railway Board to issue a fresh circular on 3 April 2013, reiterating the terms of the earlier circular dated 2 January, 1992 even after the decision in Namita Goldar (supra), which attained finality.

21. For the above reasons, we do not find any merit in the appeal. The authorities shall take a decision in terms of this judgment on the application for compassionate appointment in three months from today. The appeal stands dismissed. No costs.”

9. The question of giving appointment to the son of second wife has already been settled by the Hon’ble Apex Court in affirmative, as above and therefore, impugned order dated 18.10.2012 is quashed and set aside. The respondents are directed to consider the case of the applicant for appointment on compassionate ground under the rules framed for compassionate appointment within a period of three months from the date a certified copy of this order is received by the respondents. The applicant shall be informed about the outcome of this consideration as directed above immediately thereafter. Accordingly, O.A. is allowed. No order as to costs.

(RAKESH SAGAR JAIN)
MEMBER-J

Manish/-