

A MUKESH KUMAR & ANR

v.

THE UNION OF INDIA & ORS.

(Civil Appeal No. 1620 of 2022)

B FEBRUARY 24, 2022

**[UDAY UMESH LALIT, S. RAVINDRA BHAT AND
PAMIDIGHANTAM SRI NARASIMHA, JJ.]**

Constitution of India: Art.16(2) – Condition imposed by the

C *Railway Board circular that compassionate appointment cannot be granted to children born from the second wife of a deceased employee – Held: Is not sustainable – Denial to grant compassionate appointment only on the ground of descent under Art.16(2) amounts to discrimination.*

D **Allowing the appeal, the Court**

E **HELD:** While compassionate appointment is an exception to the constitutional guarantee under Article 16, a policy for compassionate appointment must be consistent with the mandate of Articles 14 and 16. That is to say, a policy for compassionate appointment, which has the force of law, must not discriminate on any of the grounds mentioned in Article 16(2), including that of *descent*. In this regard, ‘*descent*’ must be understood to encompass the familial origins of a person. Familial origins include the validity of the marriage of the parents of a claimant of compassionate appointment and the claimant’s legitimacy as their child. The policy cannot discriminate against a person *only* on the ground of *descent* by classifying children of the deceased employee as legitimate and illegitimate and recognizing only the right of legitimate descendant. Apart from the fact that strict scrutiny would reveal that the classification is suspect, as demonstrated by this Court in *V.R. Tripathi*, it will instantly fall foul of the constitutional prohibition of discrimination on the ground of *descent*. Such a policy is violative of Article 16(2). As appellant No.1, cannot be denied consideration under the scheme of compassionate appointments only because he is the son of the

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second wife, there shall be a direction to consider his case as per the extant policy. The Authorities shall be entitled to scrutinize whether the application for compassionate appointment fulfils all other requirements in accordance with the law. [Paras 9, 11] [651-A-D; 652-C-D]

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Union of India v. V.R. Tripathi (2019) 14 SCC 646 : [2018] 13 SCR 281; *K. Santhosha v. Karnataka Power Transmission Corp Ltd.* 2022(1) Kant LJ 154 (Decided on 24.06.2021 by The High Court of Karnataka); *Yuvraj Dajee Khadake v. Union of India*: 2019 SCC OnLine Bom 299 (Decided on 21.02.2019 by The High Court of Bombay); *Union of India v Rohit Chand* 2020 SCC OnLine Del 157 (Decided on 24.01.2020 by The High Court of Delhi); *V. Sivamurthy v. State of A.P. and Ors.*, (2008) 13 SCC 730 : [2008] 11 SCR 1201; *Director General of Posts v. K. Chandrashekhar Rao*, (2013) 3 SCC 310 : [2012] 12 SCR 795; *State of Haryana v. Ankur Gupta* (2003) 7 SCC 704 : [2003] 3 Suppl. SCR 333; *Yogender Pal Singh v. Union of India* (1987) 1 SCC 631: [1987] 2 SCR 49; *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh and Ors.* [1961] 2 SCR 931– relied on.

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Namita Goldar and Anr. v. Union of India and Ors. (2010) 1 Cal. LJ 464 – approved.4 *Union of India v. Pankaj Kumar Sharma* MANU/DE/3959/2014, WP(C) No.9008/2014 dt 19.04.2014 – approved.

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<u>Case Law Reference</u>		
[2018] 13 SCR 281	relied on	Para 2
[2008] 11 SCR 1201	relied on	Para 8
[2012] 12 SCR 795	relied on	Para 8
[2003] 3 Suppl. SCR 333	relied on	Para 8
[1987] 2 SCR 49	relied on	Para 8
[1961] 2 SCR 931	relied on	Para 9

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- A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1620 of 2022.

From the Judgment and Order dated 18.01.2018 of the High Court of Judicature at Patna in Civil Writ Jurisdiction Case No.18153 of 2017.

- B Manish Kumar Saran, Satya Prakash Sharan, Advs. for the Appellants.

Ms. Meera Patel, B. K. Satija, Ms. Seema Bengani, Ms. Vaishali Verma, Raj Bahadur Yadav, Amrish Kumar, Advs. for the Respondents.

The Judgment of the Court was delivered by

- C **PAMIDIGHANTAM SRI NARASIMHA, J.**

1. Leave granted.

2. The short issue arising for consideration, in this case, is whether the condition imposed by the Railway Board circular that compassionate

- D appointment cannot be granted to children born from the second wife of a deceased employee is legally sustainable. Having considered the matter, we have agreed with the counsel for the appellant that the issue is covered by the judgment of this Court in *Union of India v. V.R. Tripathi*.¹ We have allowed the appeal on this ground. We have also held that such a denial is discriminatory, being *only on the ground of descent* under

- E Article 16(2) of the Constitution of India. We shall first refer to the facts of the case before applying the law for disposal of this appeal.

Facts:

3. The facts, in brief, are that Jagdish Harijan was an employee of the Indian Railways appointed on 16.11.1977. In his lifetime, Shri

- F Jagdish Harijan had two wives, appellant No.2, Gayatri Devi, was his first wife and Konika Devi, since deceased, was his second wife. The appellant No.1 Mukesh Kumar is his son through his second wife. Shri Jagdish Harijan died in service on 24.02.2014. Shortly after that, the appellant No.2 made a representation dated 17.05.2014 seeking the

- G appointment of her step-son/appellant No.1 under the scheme for appointments on compassionate grounds. The Respondent-Union rejected the representation on 24.06.2014 because appellant No.1, being the second wife's son, is not entitled to such an appointment. The departmental appeal came to be dismissed on 30.12.2015. The appellants

H ¹ *Union of India v. V.R. Tripathi*, (2019) 14 SCC 646.

filed an original application before the Central Administrative Tribunal, Patna, which was dismissed on 19.07.2017. A writ petition was filed before the High Court of Patna questioning the correctness of the decision of the Tribunal by relying on two decisions of the Madras High Court, which followed the Calcutta High Court decision in the case of *Namita Goldar and Anr. v. Union of India and Ors.* (2010) 1 Cal. LJ 464 under which the very same circular of the railways dated 02.01.1992 was quashed. The Division Bench of the High Court, however, by the impugned order, dismissed the writ petition.

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Arguments of Counsel:

4. The learned Counsel for the Appellants, Shri Manish Kumar Saran, submitted that the issue is covered by the decision of this Court in *Union of India v. V.R. Tripathi* (supra) wherein, in the context of this very circular and policy of the railways, it held that a child of a second wife of an employee could not be denied compassionate appointment on that ground alone. He also relied on the judgment of the High Court of Calcutta in *Namita Goldar* (supra), which has been approved by this Court in *V.R. Tripathi*.

5. The learned Counsel for the Respondents, Smt. Meera Patel, representing the Union submitted based on the statement in the counter affidavit. The counter refers to Circular No. E(NG) II/2018/RC-1/5 dated 21.03.2018 issued in supersession of Circular dated 02.01.1992, which provides that if a legally wedded surviving widow does not want herself to be considered, she cannot nominate the illegitimate sons/daughters of her husband for compassionate appointment. She further submitted that the judgment of this Court relied on by the appellants does not direct appointment but merely provides for consideration of the application. Therefore, there cannot be a direction for appointment as prayed by the appellant.

Analysis:

6. It is true that the matter is no more *res integra*. This Court in *V.R. Tripathi* considered the very same policy and circular that arise for the consideration in the present case. The judgment covers the issue, as is evident from the following passages:

“14. 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

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- A *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....*
- B *16. 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.*
- C *17. 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*
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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.

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18. ...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.”

7. This Court held that the scheme and the rules of compassionate appointment cannot violate the mandate of Article 14 of the Constitution. Once Section 16 of the Hindu Marriage Act regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, it would violate Article 14 if the policy or rule excludes such a child from seeking the benefit of compassionate appointment. The circular creates two categories between one class, and it has no nexus to the objects sought to be achieved. Once the law has deemed them legitimate, it would be impermissible to exclude them from being considered under the policy. Exclusion of one class of legitimate children would fail to meet the test of nexus with the object, and it would defeat the purpose

- A of ensuring the dignity of the family of the deceased employee. This judgment has now been followed by a number of High Courts as well.²
8. Apart from the discrimination ensuing from treating equals unequally, which is writ large as demonstrated in the judgment of this Court referred to above, there is also discrimination on the ground of *descent*, which is expressly prohibited under Article 16(2). In *V. Sivamurthy v. State of A.P.*³, this Court observed that appointments made only on the basis of *descent* is impermissible. However, compassionate appointments are a well-recognized exception to the general rule if they are carved out in the interest of justice to meet public policy considerations.⁴ It lends justification only that far and no further.
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- ²See, *K. Santhosha v. Karnataka Power Transmission Corp Ltd.* 2022(1) Kant LJ 154 (Decided on 24.06.2021 by The High Court of Karnataka); *Yuvraj DajeeKhadake v. Union of India*: 2019 SCC OnLine Bom 299 (Decided on 21.02.2019 by The High Court of Bombay); *Union of India v Rohit Chand* 2020 SCC OnLine Del 157. (Decided on 24.01.2020 by The High Court of Delhi)
- ³*V. Sivamurthy v. State of A.P. and Ors.*, (2008) 13 SCC 730:
- D “18. *The principles relating to compassionate appointments may be summarised thus;*
- (a) *Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are a well-recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.*
- E *(b) Two well-recognised contingencies which are carved out as exceptions to the general rule are:*
- F *(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the breadwinner while in service.*
- (ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the breadwinner.*
- G *Another contingency, though less recognised, is where landholders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project-affected persons. (Particularly where the law under which the acquisition is made does not provide for market value and solatium, as compensation).*
- H *(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.*
- (d) Compassionate appointments are permissible only in the case of a dependant member of the family of the employee concerned, that is, spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, Classes III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in Class I or II posts.”*

9. While compassionate appointment is an exception to the constitutional guarantee under Article 16, a policy for compassionate appointment must be consistent with the mandate of Articles 14 and 16. That is to say, a policy for compassionate appointment, which has the force of law, must not discriminate on any of the grounds mentioned in Article 16(2), including that of *descent*. In this regard, '*descent*' must be understood to encompass the familial origins of a person.⁵ Familial origins include the validity of the marriage of the parents of a claimant of compassionate appointment and the claimant's legitimacy as their child. The policy cannot discriminate against a person *only* on the ground of *descent* by classifying children of the deceased employee as legitimate and illegitimate and recognizing only the right of legitimate descendant. Apart from the fact that strict scrutiny would reveal that the classification is suspect, as demonstrated by this Court in *V.R. Tripathi*, it will instantly fall foul of the constitutional prohibition of discrimination on the ground of *descent*. Such a policy is violative of Article 16(2). A

10. We note with approval the decision of the Delhi High Court in *Union of India v. Pankaj Kumar Sharma*,⁶ to which one of us (Justice S. Ravindra Bhat) was a party, which held that *descent* cannot be a ground for denying employment under the scheme of compassionate appointments. Speaking through Sanghi J., the Court held:

“22. *The Court is of opinion that - apart from being textually sound - understanding ‘descent’ in terms of prohibiting discrimination against a person on the basis of legitimacy, or on the basis of his mother’s status as a first or second wife, fits within the principles underlying Article 16(2). Not only is one’s descent, in this sense, entirely beyond one’s control (and therefore, ought not to become a ground of State-sanctioned disadvantage), but it is also an established fact that children of ‘second’ wives, whether counted as illegitimate or legitimate, have often suffered severe social disadvantage. Another* E

⁴ *Director General of Posts v. K. Chandrashekhar Rao*, (2013) 3 SCC 310 (at para 18); Further, constitutionality of compassionate appointments was upheld in *State of Haryana v. Ankur Gupta* (2003) 7 SCC 704 (at para 6); *Yogender Pal Singh v. Union of India* (1987) 1 SCC 631 (at para 17). G

⁵ See, *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh and Ors.* (1961) 2 SCR 931.

⁶ *Union of India v. Pankaj Kumar Sharma* MANU/DE/3959/2014, WP(C) No.9008/2014 dt 19.04.2014 H

- A *significant observation here is that at the entry level - "legitimacy" is and cannot be a ground for denial of public employment. For these reasons, this Court is of the opinion that the Petitioner's regulation violates Article 16(2).*"
- B 11. Given the above, we hold that the issue arising for consideration, in this case, is covered by the judgment of this Court in ***Union of India and Ors. v. V.K. Tripathi*** and consequently the judgment and order dated 18.01.2018 of the High Court of Judicature at Patna passed in CWJC No. 18153 of 2017 is set aside. As we have held that appellant No.1, Shri Mukesh* Kumar, cannot be denied consideration under the scheme of compassionate appointments only because he is the son of the second wife, there shall be a direction to consider his case as per the extant policy. The Authorities shall be entitled to scrutinize whether the application for compassionate appointment fulfils all other requirements in accordance with the law. The process of consideration of the application shall be completed within a period of three months from today.
- C 12. The appeal is accordingly allowed. Parties shall bear their own costs.

Devika Gujral

Appeal allowed.