

Union Of India And Anr. vs V.R. Tripathi on 11 December, 2018

Equivalent citations: AIR 2019 SUPREME COURT 666, 2019 (14) SCC 646, AIR ONLINE 2018 SC 886, 2019 LAB IC 1119, 2019 (2) ABR 502, 2019 (4) AIR KANT HCR 415, (2019) 4 ALLMR 415 (SC), (2019) 160 FACLR 995, (2019) 1 CLR 696 (SC), (2019) 1 CURCC 45, (2019) 1 CURLR 612, (2019) 1 HINDULR 810, 2019 (1) KLT SN 62 (SC), (2019) 1 LAB LN 20, (2019) 1 ORISSA LR 318, (2019) 1 SCALE 302, (2019) 1 SCT 555, (2019) 2 ICC 55, 2019 (2) KLT SN 810 (SC), (2019) 2 PAT LJR 418, (2019) 2 SERVLR 169, (2019) 3 SERVLJ 285, (2019) 4 ALLMR 415, AIR 2019 SC (CIV) 980

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Bench: M.R. Shah, Dhananjaya Y Chandrachud

REPORTA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.12015 OF 2018
(Arising out of SLP(C) No.32004/2016)

UNION OF INDIA AND ANR.

Appella

VERSUS

V.R. TRIPATHI

Respondent

WITH
CIVIL APPEAL No.12016 OF 2018
(Arising out of SLP(C) No.34830/2016)

JUDGMENT

Dr Dhananjaya Y Chandrachud CIVIL APPEAL No.12015 OF 2018

1. Leave granted.
2. This appeal arises from a judgment of a Division Bench of the Bombay High Court dated 1 April 2016.
3. 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 November 2009. The deceased employee had contracted a 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 March 2012 by the Railway Authorities. Aggrieved by the denial of compassionate appointment, the respondent moved an Original Application before the Central Administrative Tribunal. The Tribunal having held in favour of the respondent and upon the dismissal of a petition seeking review, the Union of India and the Railway Authorities instituted writ proceedings before the Bombay High Court.
4. In support of the writ petition, the appellants relied upon a circular of the Railway Board dated 2 January 1992. The said circular is extracted below:

“Government of India Ministry of Railway (Railway Board) Supplementary Circular No.5 to Master CIRCULAR The General Manager(P) C. Rly. and others Sub: Appointment on Compassionate grounds cases of second widow and her wards.

It is clarified that in the case of railway employees dying in harness etc. leaving more than one widow along with children born to the 2 nd wife, while settlement dues may be shared by both the widows due to Court orders or otherwise on merits of each case, appointments on compassionate grounds to the second widow and her children are not to be considered unless the administration has permitted the second marriage, in special circumstances, taking into account the persons law etc.

2. The fact that the second marriage is not permissible is invariably clarified in the terms and conditions advised to the offer of initial appointment.
3. This may be kept in view and the cases for compassionate appointment to the second widow or her wards need not be forwarded to Railway Board.
4. Kindly acknowledge receipt.

Sd/-

(P.L.N. Sarma) Deputy Director, Estt. (N) Railway Board”

5. The High Court held that:

(i) Section 16 of the Hindu Marriage Act, 1955 recognizes the legitimacy of a child born from a marriage which is null and void under the provisions of Section 11;

(ii) The circular of the Railway Board dated 2 January 1992 has been set aside by a Division Bench of the Calcutta High Court in *Namita Goldar v Union of India*¹; and

(iii) In the decision of this Court in *Rameshwari Devi v State of Bihar*² the 1(2010) 1 Cal.LJ 464 2(2000) 2 SCC 431 entitlement of the family of a deceased employee to pensionary benefits has been upheld notwithstanding the fact that the deceased had, during his lifetime, contracted a second marriage.

6. Principally on the above foundation, the High Court found no reason to differ with the view of the Central Administrative Tribunal and observed that the direction to the railway authorities was only to consider the case of the respondent for compassionate appointment on its merits.

7. Assailing the judgment of the High Court, Mr. Aman Lekhi, learned Additional Solicitor General submitted that:

(i) Compassionate appointment is not an alternate source of employment or recruitment;

(ii) Compassionate appointment is not a matter of a heritable right and depends on the extant rules or schemes under which such benefits or facilities are envisaged;

(iii) Section 16(3) of the Hindu Marriage Act, 1955 envisages that a child born from a marriage which is void under Section 11 has a claim only in respect of the property of the parents and no further;

(iv) The decision of this Court in *Rameshwari Devi* (supra) is distinguishable since pension, it is well settled, is a matter of right as a result of the previous service of an employee and therefore represents an entitlement in the nature of property; and

(v) On the other hand, the heirs of a deceased employee have no right to compassionate appointment. Hence, it is open to the Union Government or its agencies and departments, while designing a policy of compassionate appointment to stipulate that such a facility will not be available either to the spouse of a second marriage or, for that matter, to the children who are born from that marriage. The State can do so as a legitimate instrument of its policy to discourage bigamy.

8. On the other hand, Mr. Arjun Singh Bhati and Mr. Apurv Parashar, the learned counsel appearing on behalf of the respondent, submitted that:

(i) Section 16 of the Hindu Marriage Act clearly enunciates that children who are born from a marriage which is null and void are legitimate;

(ii) While the Union Government may well assert that a second spouse is not entitled to compassionate appointment, such a facility cannot be denied to the children from a second marriage, once their legitimacy operates as a matter of law; and

(iii) The decision in *Namita Goldar* (supra) struck down the circular of the Railway Board dated 2 January 1992. The decision was not challenged and has in fact been implemented. Hence, the subsequent circular which was issued by the Railway Board on 3 April 2013, reiterating the earlier circular, is contrary to the decision of the Calcutta High Court in *Namita Goldar* (supra), which was rendered on 1 February 2010.

9. The rival submissions fall for our consideration.

10. Certain basic principles in regard to the grant of compassionate appointment are settled by the decisions of this Court. In *Director of Education (Secondary) v Pushpendra Kumar*,³ this Court while discussing the object of compassionate appointment observed thus:

“8. The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to 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 for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment...” In *State Bank of India v Raj Kumar*,⁴ this Court while discussing the claim over compassionate appointment held as follows:

“8. It is now well settled that appointment on compassionate grounds is not a source of recruitment. On the other hand it is an exception to the general rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. The dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant.” (Emphasis supplied) 3 (1998) 5 SCC 192 4 (2010) 11 SCC 661 In *V Sivamurthy v State of Andhra Pradesh*,⁵ this Court summarised the principles relating to compassionate

appointment as follows:

“18. (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...

(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...” (Emphasis supplied)

11. The policy of compassionate appointment is premised on the death of an employee while in harness. The death of an employee is liable to render the family in a position of financial hardship and need. Compassionate appointment is intended to alleviate the hardship that the family of a deceased employee may face upon premature death while in service. Compassionate appointment, in other words, is not founded merely on parentage or descent, for public employment must be consistent with equality of opportunity which Article 16 of the Constitution guarantees. Hence, before a claim for compassionate appointment is asserted by the family of a deceased employee or is granted by the State, the employer must have rules or a scheme which envisage such appointment. It is in that sense that it is a trite principle of law that there is no right to compassionate appointment. Even where there is a scheme of compassionate appointment, 5 (2008) 13 SCC 730 an application for engagement can only be considered in accordance with and subject to fulfilling the conditions of the rules or the scheme. The submission which has been urged on behalf of the Union of India by the learned Additional Solicitor General is premised on the basis that there is no right to compassionate appointment. There can be no doubt about the principle that there is no right as such to compassionate appointment but only an entitlement, where a scheme or rules envisaging it exist, to be considered in accordance with the provisions.

12. The real issue in the present case, however, is whether the condition which has been imposed by the circular of the Railway Board under which compassionate appointment cannot be granted to the children born from a second marriage of a deceased employee (except where the marriage was permitted by the administration taking into account personal law, etc) accords with basic notions of fairness and equal treatment, so as to be consistent with Article 14 of the Constitution. While answering this issue, it would be necessary to advert to the provisions of Section 16 of the Hindu Marriage Act, 1955 which provide thus:

“16. Legitimacy of children of void and voidable marriages.-(1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of

that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”

13. In sub-section (1) of Section 16, the legislature has stipulated that a child born from a marriage which is null and void under Section 11 is legitimate, regardless of whether the birth has taken place before or after the commencement of Amending Act 68 of 1976. Legitimacy of a child born from a marriage which is null and void, is a matter of public policy so as to protect a child born from such a marriage from suffering the consequences of illegitimacy. Hence, though the marriage may be null and void, a child who is born from the marriage is nonetheless treated as legitimate by sub-section (1) of Section 16. One of the grounds on which a marriage is null and void under Section 11 read with clause (i) of Section 5 is that the marriage has been contracted when one of the parties had a spouse living at the time of marriage. A second marriage contracted by a Hindu during the subsistence of the first marriage is, therefore, null and void. However, the legislature has stepped in by enacting Section 16(1) to protect the legitimacy of a child born from such a marriage. Sub-section (3) of Section 16, however, stipulates that such a child who is born from a marriage which is null and void, will have a right in the property only of the parents and none other than the parents.

14. The issue essentially is whether it is open to an employer, who is amenable to Part III of the Constitution to deny the benefit of compassionate appointment which is available to other legitimate children. Undoubtedly, while designing a policy of compassionate appointment, the State can prescribe the terms on which it can be granted. However, it is not open to the State, while making the scheme or rules, to lay down a condition which is inconsistent with Article 14 of the Constitution. The purpose of compassionate appointment is to prevent destitution and penury in the family of a deceased employee. The effect of the circular is that irrespective of the destitution which a child born from a second marriage of a deceased employee may face, compassionate appointment is to be refused unless the second marriage was contracted with the permission of the administration. Once Section 16 of the Hindu Marriage Act, 1955 regards a child born from a marriage entered into while the earlier marriage is subsisting to be legitimate, it would not be open to the State, consistent with Article 14 to exclude such a child from seeking the benefit of compassionate appointment. Such a condition of exclusion is arbitrary and ultra vires.

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 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*⁶ took a contrary view, 6 (2013) 3 Cal.LT 379 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*⁷ 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.⁸ 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.

7(2016) 5 CTC 50 82017 Lab. IC (NOC 237) 69 9SLP(C) arising out of Diary No.27352 of 2017

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.

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22. Leave granted.

23. In view of the judgment delivered today in companion Civil Appeal No.12015 of 2018 and since the second marriage was in any event permissible under Muslim Personal Law, there is no merit in the appeal. The authorities shall be entitled to scrutinize whether the application for compassionate appointment fulfills all other requirements, in accordance with law. The process of consideration of the application shall be completed within a period of three months from today.

24. The appeal is accordingly disposed of. No costs.

.....J. (Dr DHANANJAYA Y CHANDRACHUD)
.....J. (M.R. SHAH) New Delhi December 11, 2018