

HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

W.P.No.26926 of 2019

**ORDER:**

This Writ Petition is filed seeking the following relief:

“To issue a writ, order or direction more particularly a writ of Mandamus declaring the orders passed by respondent No.4 vide Memo No.CGM(HRD)/GM(Per)/AS(Per& SER)/PO-H/110-H1/2018, dt.24.08.2018 that the petitioners case cannot be considered for providing employment under compassionate grounds unless it is established by cogent evidence that he was born through the first wife and further observation of the 4<sup>th</sup> respondent that the children of second wife do not get the status of legitimate children as being illegal, arbitrary, highhanded and against the provisions of the Hindu Marriage Act, and against the rights guaranteed under Article 14 of the Constitution of India and consequentially direct the respondent Nos.2 to 4 to consider the case of the petitioner for appointment in any eligible post on compassionate grounds and pass such other order or orders as this Hon’ble Court may deem fit and proper in the circumstances of the case.”

Thereafter, I.A.No.1 of 2020 was filed seeking to amend the prayer and the same was amended *vide* order dated 04.11.2020, which reads as under:

.to issue a Writ order or direction more particularly a Writ of Mandamus declaring the orders passed by the 3<sup>rd</sup> respondent vide Memo No CGM(HRD)/GM(PER)/AS(Per&SER)/PO-H/110-H1/2018, dated 24/08/2018 that the petitioner’s case cannot be considered for providing employment under compassionate grounds unless it is established by cogent evidence that he was born through the first wife as well as the observation that the children of the second wife do not get the status of legitimate children as being illegal, arbitrary

highhanded and against the provisions of the Hindu Marriage Act, 1955 and further declare Sub Rule (1) of Rule 25 of the Andhra Pradesh Civil Services (Conduct) Rules, 1964 as well as Point 4 (xxi) of the APSEB Conduct Regulations as ultra vires and against the rights guaranteed under Article 14 of the Constitution of India and being contrary to the ratio laid down by the Hon'ble Apex Court in *Union of India vs. V.R Tripathi* reported in 2019 (14) SCC 646 and consequentially direct respondent Nos.2 to 4 to consider the case of the petitioner for appointment in any eligible post on compassionate grounds”

Heard Sri V.Murali Manohar, learned counsel appearing for the petitioner and Sri R.Vinod Reddy, learned Standing Counsel appearing for the respondents.

It is the case of the petitioner that his father was employed as Lineman and he was born out of the second marriage of his father and his father expired while in service on 27.07.2016. Thereafter, he submitted an application seeking appointment on compassionate grounds on 17.07.2018, but the respondents have rejected his case *vide* proceedings dated 24.08.2018 stating that he is an illegitimate child and he was born out of second marriage and his father was not obtained prior permission from the 1<sup>st</sup> wife for getting married her mother. Challenging the same, the present writ petition is filed.

Learned counsel appearing for the petitioner contended that though the father of the petitioner might not have obtained prior permission from the 1<sup>st</sup> wife before marrying the mother of the petitioner as second wife, but the children born out of second wife have to be treated as legal and legitimate children and cannot be

treated as illegitimate children and the order passed by the respondents is contrary to the law laid down by the Apex Court in *Union of India vs. V.R.Tripathi*<sup>1</sup>. Learned Counsel further contended that the Apex Court has elaborately considered the entire case law and held as under:

12. In *V. Sivamurthy v. State of A.P.*<sup>6</sup>, this Court summarised the principles relating to compassionate appointment as follows: (SCC pp. 741-42, para 18)

“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.”*

13. 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, 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

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<sup>1</sup> 2019 (14) SCC 646

but only an entitlement, where a scheme or rules envisaging it exist, to be considered in accordance with the provisions.

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 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 a 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~~<sup>553</sup> 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.”

15. 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.

18. The learned Additional Solicitor General submitted that the decision of this Court in *Rameshwari Devi*<sup>3</sup> 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.

In view of the law laid down by the Apex Court, the impugned rejection order is liable to be set aside and appropriate direction be given to the respondents to consider the case of the petitioner for appointment on compassionate grounds in view of the law laid down by the Apex Court in *Union of India vs. V.R.Tripathi* (referred to supra).

Learned Standing Counsel appearing for the respondents contended that the father of the petitioner has contravened Rule 25 of Telangana Civil Service Conduct Rules and the father of the petitioner has not obtained prior permission from his 1<sup>st</sup> wife before marrying the mother of the petitioner and father of the petitioner has married the mother of the petitioner during subsistence of the 1<sup>st</sup> marriage and without obtaining any divorce,

and therefore, the children born out of such an illegal and void marriages are not entitled for compassionate appointment. Learned Standing Counsel has placed reliance on the judgment of the Apex Court in *State Bank of India vs. Raj Kumar*<sup>2</sup>, whereunder the Apex Court has categorically held that there is no substitution to the regular recruitment process and every compassionate appointment has to be made only accordance with the scheme of the respondents. Learned Standing Counsel contended that the respondents have rightly considered and rejected the case of the petitioner *vide* impugned order dated 24.08.2018. There are no merits in the writ petition and the same is liable to be dismissed.

Having considered the rival submissions made by the learned counsel on either side, this Court is of the view that the judgment relied upon by the learned Standing Counsel in *State Bank of India vs. Raj Kumar* has no application in the present case because the Apex Court never dealt with the issue whether the children born out of second marriage are not entitled for compassionate appointment or not. The Apex Court has considered that compassionate appointment has to be made strictly in accordance with the scheme of compassionate appointment. Admittedly, the respondents have not filed scheme of compassionate appointment, which prohibits children born out of second marriage are not entitled for compassionate

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<sup>2</sup> 2010 (11) SCC 661

appointment. Learned counsel appearing for the petitioner has rightly contended that the Apex Court in *Union of India vs V.R.Tripathi* ((1)referred to supra) has considered all these issues and held that children born out of second marriage cannot be treated as illegitimate children, therefore, the impugned rejection order dated 24.04.2018 passed by the respondents is contrary to the law laid down by the Apex Court in *Union of India vs V.R.Tripathi* ((1) referred to supra).

Accordingly, the Writ Petition is allowed and the impugned rejection order dated 24.08.2018 is set aside. The respondents are directed to consider the case of the petitioner for compassionate appointment by duly taking into consideration the law laid down by the Apex Court in *Union of India vs V.R.Tripathi* ((1)referred to supra). No costs.

Miscellaneous petitions, pending, if any shall stand closed.

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JUSTICE ABHINAND KUMAR SHAVILI

*Date:09.07.2021*

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