

(2014) 07 JH CK 0041
In the Jharkhand High Court
Case No : W.P. (S) No. 16 of 2014

M.V.V. Prakash

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Hindu Marriage Act, 1955 — Section 5, 5(i)

Citation : (2015) 144 FLR 52

Hon'ble Judges : R. Banumathi, C.J.; Amitav Kumar Gupta, J

Bench : Division Bench

Advocate : M.M. Pal, Senior Advocate, R. Pandey, S.C. Roy and A.C. Mahata, Advocate for the Appellant; Vijay Kumar Sinha, ASC, Advocate for the Respondent

Judgement

R. Banumathi, C.J.—This writ petition is filed for quashing the order dated 1.11.2013 passed by the Central Administrative Tribunal (CAT), Circuit Bench at Ranchi, in O.A. No. 124/2012(R), whereby the CAT dismissed the original application filed by the petitioner holding that the petitioner is not legally entitled to be considered for compassionate appointment in view of the specific bar.

2. The father of the petitioner, Sri M. Narasinga Rao, was a permanent employee of the Railways and when he was posted as Tech. II under SSE(C&W) BNBM, he was missing on and from 11.12.2001 for which FIR dated 7.6.2002 was lodged and a certificate was issued on 15.1.2003, wherein it was certified by the Railway authorities that his father namely, M. Narasinga Rao, has been absenting himself from duty unauthorizedly from 11.12.2001 till date. M. Narasinga Rao had earlier married one Mylapalli Sokhubhayi and out of the first marriage, he had one daughter named Pukkalla Radha and the said Pukkalla Radha is married to one Suresh. The petitioner's mother, Uma Devi, is the second wife of M. Narasinga Rao. As per the documents submitted by Uma Devi, mother of the petitioner, all the payments of the ex-employee was drawn in her favour. However, after receipt of the application from the petitioner for compassionate appointment, during investigation of the case by the Senior Personnel Inspector, it was revealed that

Mylapalli Sokhubhayi was the first wife of M. Narasinga Rao and she expired on 20th December, 2005. In response to the Railways letter, mother of the petitioner submitted reply dated 20.1.2011 stating that only after her marriage, she came to know about her husband's earlier marriage with Mylapalli Sokhubhayi and their daughter, Pukkalla Radha. The employment assistance on compassionate ground was refused to the petitioner as per Railway Board's Circular RBE No. 01/92, which states that children through the second wife shall be entitled to the settlement dues but not for employment assistance on the ground that such marriage is to be considered null and void. Being aggrieved, the petitioner filed O.A. No. 124/2012.

3. Following the judgment of the Jharkhand High Court passed in W.P.(S) No. 4461/2008 (Basanti Devi & Ano.) and batch cases, the CAT dismissed O.A. No. 124/2012 holding that since the Railway administration issued Circular RBE No. 1/92 on 2.1.1992 that the children through the second wife shall not be eligible for compassionate appointment and since there is specific bar, the petitioner is not entitled to be considered for compassionate appointment.

4. Learned Senior Counsel, Ms. M.M. Pal, contended that the petitioner is fully covered by the judgment dated 4.5.2012 passed in O.A. No. 212/2011(R) but totally ignoring the said judgment, CAT dismissed the O.A. No. 124/2012 without application of mind. Learned Senior Counsel contended that on the same and identical facts of the case, in the case of Smt. Namita Goldar and Another Vs. Union of India and Others , Calcutta High Court quashed the Railway Circular RBE No. 01/92 dated 2.1.1992 and ordered employment to the son of the second wife and similar orders were passed by the various coordinate Benches of the CAT or High Court, which was within knowledge of the Railways but the Railways arbitrarily rejected the claim of the petitioner, which is unsustainable in law.

5. Learned counsel for the respondents submitted that as per the Railway Circular RBE No. 01/92 dated 2.1.1992, children through the second wife shall not be eligible for compassionate appointment unless the employee obtained permission for such second marriage from the Railways and the ex-employee, M. Narasinga Rao, had not obtained such permission and as per the said Circular, the petitioner is not eligible for compassionate appointment and the CAT dismissed O.A. No. 124/2012. Placing reliance upon State Bank of India and Another Vs. Raj Kumar, , it was submitted that the claim for compassionate appointment is traceable only to the Scheme framed by the employer and there is no right whatsoever outside the Scheme and therefore, CAT rightly followed the judgment of the Jharkhand High Court in the case of Basanti Devi's case and the order of the CAT does not suffer from any infirmity.

6. We have carefully considered the submissions of the learned counsel for the petitioner and the respondents, the impugned order of the CAT and various decisions relied upon by the parties.

7. There is no dispute that the petitioner's mother, Uma Devi, is the second wife

of Narasinga Rao. The said Narasinga Rao had the first wife Mylapalli Sokhubhayi and through her he had a daughter. According to the respondents, when the mother of the petitioner claimed settlement dues of Narasinga Rao, she has suppressed material fact that she was the second wife of Narasinga Rao and as per the documents submitted by her, all the settlement dues of the ex-employee, Narasinga Rao, were drawn in her favour and only on receipt of the application from the petitioner for employment assistance on compassionate ground, on enquiry it was revealed that Narasinga Rao had first wife, Mylapalli Sokhubhayi and they had a daughter named Pukkalla Radha and that the mother of the petitioner was the second wife of Narasinga Rao. The mother of the petitioner was advised to submit a declaration of the actual family position of Narasinga Rao. In response to the said letter dated 22.1.2011, the mother of the petitioner submitted a reply stating that only after her marriage, she came to know about her husband's earlier marriage with Mylapalli Sokhubhayi and their daughter. According to the respondents, in none of the family records, the name of the mother of the petitioner has been recorded, nor she had been made nominee.

8. As per the Railway Circular, children through the second wife shall not be eligible for employment assistance on the ground that such marriage is to be considered null and void. The Circular RBE No. 01/92 reads as under:-

R.B.E. No. 1/92

(Supplementary Circular No. 5 to Master Circular No. 16)

Subject: Appointment on compassionate grounds-Cases of second widow and her wards.

No. E(NG)11/91/RC-1/136, dated 2.1.1992

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 2nd 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 personal law etc.

2. The fact that the second marriage is not permissible is invariably clarified in the terms and conditions advised in 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.

9. Section 5 of the Hindu Marriage Act, 1955 provides that a marriage may be solemnized between two Hindus, subject to the conditions indicated thereon. Section 5(i) stipulates that neither party has spouse living at the time of marriage. Rule 21 of the Railway Service Conduct Rules 1966 stipulates a restriction regarding the marriage status that no Railway servant shall enter into

or contract a marriage with a person having a spouse living. As per the Rule 21(2), no Railway servant having spouse living shall enter into or contract a marriage with any other person. As per proviso to Rule 21, the Government may permit a Railway servant to enter into second marriage if it is satisfied that such marriage is permissible under the personnel law applicable to such Railway servant and other party to the marriage and (b) there are other grounds for so doing. Vide the above Circular dated 2.1.1992, it has been clarified that in case of a Railway servant died in harness having more than one widow, children through the second marriage should not be considered for compassionate appointment unless the administration has permitted the second marriage in special circumstances taking into account the personnel law.

10. The compassionate appointment is traceable only to the Scheme framed by the employer for such employment and there is no right to be considered outside such Scheme. In *State Bank of India and Another Vs. Raj Kumar*, the Hon'ble Supreme Court held as under:-

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.

11. On identical facts, while considering the eligibility of the children through the second wife, following the judgment in the case of *Raj Kumar's* case the Division Bench of this Court in *Basanti Devi's* case held that the son of the second wife is not entitled to the benefit of compassionate appointment. We fully agree with the said judgment of the Division Bench of this Court in *Basanti Devi's* case.

12. Learned Senior Counsel for the petitioner mainly relied upon *Smt. Namita Goldar and Another Vs. Union of India and Others*, wherein while considering the appointment of the son of the second wife on compassionate appointment, Calcutta High Court quashed the Railway Circular dated 2.1.1992. Learned Senior Counsel contended that the judgment of the Calcutta High Court was followed by the CAT, Circuit Bench at Ranchi, in O.A. No. 212/12 and the said judgment had been passed by the CAT after considering all the judgments passed by the

Principal Bench of CAT, New Delhi and also by the Calcutta High Court and while so, the respondents and the CAT erred in brushing aside the judgment in Smt. Namita Goldar and Another Vs. Union of India and Others . We have perused the judgment of Smt. Namita Goldar. The said case is clearly distinguishable on facts. In the said case, the first wife of the Railway employee was issueless and the second marriage was accepted by the first wife without any protest and the first wife did not challenge the second marriage of her husband, nor the first wife lodged any compliant before the authorities. That apart, the first wife died issueless soon after the death of the Railway employee and in those facts and circumstances of the case, Calcutta High Court held that the son of the second wife is eligible to be considered for job on compassionate ground. The facts of the present case is clearly distinguishable from that of Smt. Namita Goldar's case.

13. Learned Senior Counsel for the petitioner contended that the petitioner is fully covered by the judgment dated 4th May, 2012 passed in O.A. No. 212/2012(R) but totally ignoring the judgment passed in O.A. No. 212/2012(R), the CAT dismissed O.A. No. 124/2012 without application of mind. Learned Senior Counsel further contended that as per the reported judgments in Rameshwari Devi Vs. State of Bihar and others, , Purushottam Kumar @ Puroshattam Kumar Vs. The State of Bihar and Others, , Union of India (UOI) and Others Vs. The Central Administrative Tribunals and Others, and other judgments, children born out of the second marriage are legitimate and are entitled to appointment on compassionate ground. It was submitted that even illegitimate child is entitled to share of the property of his father and there cannot be any distinction between a son of first wife or the second wife though such marriage may be void and hence, the claim of the petitioner cannot be turned down on the grounds recorded by the CAT.

14. We do not propose to go deep into the merits of the above contention. Suffice it to note that the same decisions relied upon by the petitioner and same arguments advanced were considered by the Division Bench of this Court in Basanti Devi's case in W.P. (S) No. 4461/2008 and W.P. (S) No. 4495/2008 and W.P. (S) No. 1083/2010. Rejecting the contention of the petitioners thereon and observing that the compassionate appointment and right to inherit cannot be equated in any manner and in view of the Railway Circular RBE No. 1/92, son of the second wife of the employee is not eligible for compassionate appointment, the Division Bench of this Court in Basanti Devi's case in W.P. (S) No. 4461/2008 and W.P. (S) No. 4495/2008 and W.P. (S) No. 1083/2010 held as under:-

12. The Division Bench in Purushotam Kumar's case, after considering the above provisions of law reached to the conclusion that though the marriage is void but the child born is a legitimate one and they will share the property equally with the legitimate children in their parents property and by a deeming provision illegitimate children of a second marriage have been treated to be legitimate and he will inherit the property in the same manner as a legitimate son of a valid

marriage.

13. Then the Division Bench proceeded to consider the effect of Hindu Succession Act and observed that in the parents property the son of the second wife also have the same right as the legitimate son of the first wife and there is no distinction and differentiation can be made with regard to share in the property of the parents. The Division Bench also considered the Apex Court decision given in the case of Rameshwari Devi Vs. State of Bihar and others, , wherein the Apex Court held that children of the void marriage are legitimate and the property of a male Hindu dying intestate devolve first on heirs in Class 1 which include widow and son. A son of the second wife being legitimate son will be entitled to the property of the deceased in equal share along with the first wife and her sons. Then the Division Bench of the Patna High Court considered a policy decision of the State Government for compassionate appointment which speaks about "son" only and in the opinion of the Division Bench since son of the second marriage is also legitimate son, and therefore, the employee's second wife's son cannot be denied benefit of compassionate appointment.

14. With respect, we are unable to subscribe the view expressed in Purushottam Kumar's case. Firstly, the compassionate appointment and right to inherit property have no co-relation, nor can be equated in any manner. The compassionate appointment is not a property which can be subject matter of alienation and can be bequeathed whereas the devolving of property of a person is governed by the law, may it be customary or may it be statutory law, whereas the service and benefit arising out of services are governed by the frame of the contract of service or the rules governing the service of the employees and by the scheme, if framed by the employer. The compassionate appointment depends solely upon the frame of contract between the employer and employee and cannot be made subject matter to be governed by the personal law, when the employer has not provided so. The Hon'ble Supreme Court in the case of State Bank of India Vrs. Raj Kumar (supra) clearly held that compassionate appointment is traceable only to the scheme framed by the employer for such appointment and there is no right whatsoever outside such scheme. Therefore, in our humble opinion, merely because illegitimate child has been put at par in the matter of inheritance, by specific and statutory provision, its benefit cannot be extended, so as to put a burden upon the employer when the employer specifically has disallowed such benefit to such successor of the employee.

15. We may again observe here that the said decision of Railway Board, not providing compassionate appointment to the child of second wife of the employee who contracted second marriage in the life time of the first wife, is neither under challenge, nor has been shown to be unreasonable, rather it appears to be in consonance with the public policy of the monogamy. Therefore, on this count also, in our humble opinion, the view expressed by the Tribunal does not appeal to us.

16. In addition to above, in Purushottam Kumar's case also the fact and

situation was entirely different. In Purushottam Kumar's case, there was a specific provision for providing employment to the dependent of the Government servant, who died while in service and it provided appointment to the employees' "son" without any restriction against appointment to the son of second wife. Therefore, on facts also Purushottam Kumar's case has no application as in the present case there is specific restriction against the appointment to the son of second wife of the employee who contracted marriage in the life time of first wife.

We fully agree with the above view taken by the Division Bench.

15. Compassionate appointment is a matter of policy of the employer and the employer cannot be compelled to provide compassionate appointment contrary to its policy/scheme. When there is specific circular which clearly provides that the children of second marriage of the employee shall not be eligible for compassionate appointment, no direction can be issued to the respondents to consider the case of the petitioner. Following the judgment of the Division Bench of this Court in Basanti Devi (W.P. (S) No. 4461/2008 and W.P. (S) No. 4495/2008 and W.P. (S) No. 1083/2010), the CAT has rightly dismissed O.A. No. 124/2012 and we do not find any reason to interfere with the same.

16. In the result, this writ petition is dismissed.