
(2007) 05 AHC CK 0196
In the Allahabad High Court
Case No : Writ Petition No.7830 (S/S) of 2006

Sushma Mishra

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Constitution of India, 1950 — Article 226
Harness Rules, 1974 — Rule 7

Citation : (2007) 05 AHC CK 0196

Hon'ble Judges : Ranvijai Singh, J

Final Decision : Allowed

Judgement

Ran Vijai Singh, J.—The petitioner claiming herself wife of late Shitla Prasad has filed the present writ petition with the following prayer:

?I. Issue a writ, direction or order in the nature of certiorari to quash the order dated 20.9.1996 (Annexure No.5 to the writ petition) passed by opposite party No.3 after summoning the same.

II. Issue a writ, direction or order in the nature of mandamus commanding the opposite parties to reinstate the petitioner service with all consequential benefits w.e.f. 20.9.1996 and allow her to discharge her duties on the post of Assistant Teacher in Prathmic Kanya Pathshala, Jiamau, Lucknow.

III. Issue a writ, direction or order in the nature of mandamus commanding the opposite parties to make payment of salary on the post of Assistant Teacher in admissible grade w.e.f. 20.9.1996 and also regular salary as and when it falls due month to month along with other teachers of Vidyalaya.

IV. Issue a writ, direction or order in the nature of mandamus commanding the opposite parties to pay Family Pension and dues such as provident fund and gratuity etc. as indicated in the succession certificate with prevalent Bank interest to the petitioner.

V. Issue any other writ, direction or order as this Hon"ble Court deems just and proper in the circumstances of the case in the favour of the petitioner.

VI. Award the cost of the petition to the petitioner.?

2. The facts giving rise to this case are as under:

3. Husband of the petitioner late Shitla Prasad was Assistant teacher in Prathmik Kanya Pathshala, Udaiganj, Lucknow. He died in harness on 15.5.1996. He was appointed as Assistant Teacher in the year 1972 and when he died was in employment with the respondents. After the death of Shitla Prasad the petitioner claiming herself wife of late Shitla Prasad has moved an application on 20.8.1996 before District Basic Education Officer, Lucknow for appointing her under the Uttar Pradesh Recruitment of dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "Rule of 1974"). Pursuant to the same an appointment letter appointing the petitioner as Assistant teacher was issued by District Basic Education Officer on 29.8.1996. Thereafter petitioner has joined on 30.8.1996. After her joining, one Puranka alias Shyam Pata claiming herself wife of late Shitla Prasad filed Writ Petition No.5958/1996 in that writ petition on 18.9.1996 this Court has passed an interim order directing the respondents to not appoint anyone on compassionate ground under Dying in Harness Rules. It appears when this order was brought in the notice of District Basic Education Officer, Lucknow he has cancelled the appointment of the petitioner on 20.9.1996 without giving any opportunity of hearing to the petitioner. However, the petitioner has challenged the aforesaid order through Writ Petition No.6974/1996. Pending this writ petition Smt. Shyam Pata has got dismissed her writ petition as not pressed on 27.8.1998. The Court's order dated 27.8.1998 is reproduced below:

?Order as prayed Writ Petition is dismissed as not pressed. Interim order, if any, is vacated.?

4. It appears that thereafter petitioner has moved an application on 4.9.1998 for revival of her appointment. On the application of the petitioner the District Basic Education Officer has written a letter on 6.11.1998 informing the petitioner that since the matter is sub judice before the Court at the instance of the petitioner, therefore, unless that writ petition is disposed of no action can be taken. After receipt of the aforesaid letter the petitioner has moved an application before this Court for withdrawal of the writ petition. This writ petition was dismissed as withdrawn by this Court on 8.12.1998. After withdrawal of the aforesaid writ petition the petitioner has moved another application on 18.12.1998 along with certified copy of the order dated 8.12.1998 to the Basic Education Officer, Lucknow requesting for revival of her appointment. It appears from the record that pursuant to the above letter the District Basic Education Officer has written a letter dated 11.12.2000 after a long delay of two years requiring the petitioner to obtain a succession certificate for the purposes of appointment as dependant of the deceased on compassionate ground. It is thereafter, petitioner has moved

before the Civil Court, Lucknow through Misc. Case No.9/2002 and succession certificate was granted on 8.9.2002. Thereafter the petitioner has again moved an application before the District Basic Education Officer, Lucknow. Copy of the succession certificate is on record of this writ petition as Annexure No.11. This is with respect to payment of amount of Provident Fund and Group Insurance Scheme to the petitioner.

5. It appears that one Sri Shankar Dayal Mishra has filed an objection to the succession certificate before the Senior Civil Judge, Lucknow somewhere in year 2003. However, the objection was not decided up to year 2005 and in the year 2006 Sri Mishra has moved an application for not pressing his objection on 31.5.2006 and thereafter learned Civil Judge, Senior Division, Lucknow has allowed his application on 7.7.2006 and the proceeding was dropped. Thereafter the petitioner has further moved another application on 7.8.2006 to the District Basic Education Officer requesting him to dispose of her representation with regard to the revival of her appointment. It is also alleged in the writ petition that after the order of learned Civil Judge allowing withdrawal of objection to succession certificate the District Basic Shiksha Adhikari has further required the copy of Ration Card, Voter list, Kutumb Register, Domicile certificate and Joint Bank Account, if any for the disposal of the petitioner's application. The above required material was also served in his office through letter dated 4.8.2006. Copy of this letter has been brought on record as Annexure No.14 to the writ petition. When no order has been passed by the District Basic Education Officer the present writ petition has been filed with the prayer detailed above.

6. A detailed counter affidavit has been filed by District Basic Education Officer. The main ground taken in the counter affidavit is that the petitioner is not the legally wedded wife of late Shitla Prasad, therefore, no appointment letter can be issued in her favour. The source of knowledge of second marriage has been inferred from an affidavit filed in the Sessions Court in the case under Section 498 A IPC read with Dowry Prohibition Act filed by the petitioner. In saying so the respondents have taken shelter of Section 5 and 11 of the Hindu Marriage Act, 1955. The delay in taking action for disposal of the petitioner's application dated 18.12.1998 for about two years when the District Basic Shiksha Adhikari has required the petitioner through letter dated 11.12.2000 to obtain Succession Certificate and further the delay after grant of Succession Certificate on 8.9.2002 and till date has not been explained in the counter affidavit.

7. It is also alleged in the counter affidavit that the dismissal of the writ petition filed by Puranka alias Shyam Pata and withdrawal of the objection to the succession certificate by Sri Shankar Dayal Mishra is collusive one and that can not give any right to the petitioner to seek her appointment under Dying in Harness Rules claiming herself wife of late Shitla Prasad. However, in the counter affidavit the factum of the appointment letter dated 29.8.1996 and cancellation order dated 20.9.1996 has not been denied it is noticeable that in the cancellation order no such ground has been taken as alleged in the counter

affidavit although the same were available before the District Basic Education Officer as the cancellation order was an outcome of an interim order of this Court in Writ Petition No.5998/1996 filed by late Shyam Pata.

8. A rejoinder affidavit has been filed in paragraph No.3 of the same the factum of the second marriage of the petitioner with her later husband has been explained. Relevant portion of the same is reproduced below:

?It is respectfully submitted that the deponent made a complaint against her late husband at the relevant time as she was being victimized by her husband for demand of dowry. Besides the aforesaid facts the deponent by that time also came across that her late husband was having illicit relation with different women. Accordingly she mentioned the aforesaid facts in the affidavit. After filing the aforesaid affidavit dated 27.1.2006 in the Court of Sessions Judge, her husband died on 15.5.1996. In the aforesaid circumstances no enquiry could be conducted in the matter. It is also pointed out that no person except the deponent has come forward to claim any right in the property of her late husband.?

(The date mentioned in the above paragraph i.e. 27.1.2006 is not correct, it should be 27.1.1996 as per record).

9. In paragraph No.8 of the rejoinder affidavit also this stand has been reiterated by saying that only the deponent (petitioner) is the legally wedded wife of late Shitla Prasad Mishra. It is also alleged that had Puranka been legally wedded wife of late Shitla Prasad she would have not got dismissed her writ petition as not pressed. It is also alleged that succession certificate has been issued by the competent Court of law in her favour and that has been not challenged in any Court by any person. In paragraph No.10 of the rejoinder affidavit this fact has again been reiterated that she is the only legally wedded wife of late Shitla Prasad Mishra which is evident from the succession certificate, PassBook Account, Photo copy of the Ration card, voter list and comicile certificate which have been brought on record. Apart from that photo copy of the joint Bank account with the name of the petitioner and her late husband has also been brought on record as Annexure No.1 to the rejoinder affidavit.

10. I have heard learned counsel for the petitioner Sri O.P.M. Tripathi, Sri V.K. Vajpayee for respondent Nos.3 and 4 and the learned Standing Counsel appearing for the other State respondents.

11. Learned counsel for the petitioner Sri Om Prakash Mani Tripathi has made following submissions:

?(I) The order cancelling the petitioner's appointment was exparte without giving any show cause notice to the petitioner, therefore, that is not sustainable in the eyes of law. However he has farther submitted that the basis of the cancellation order was the interim order of this Court dated 18.9.1996 whereas the petitioner's appointment was of 29.8.1996 and prior to the interim order of

this Court the petitioner has joined the service, therefore, the District Basic Education Officer must have given an opportunity to the petitioner before cancelling the appointment order. It is also argued that appointment under Dying in Harness Rules is permanent and that can not be cancelled without notice and opportunity.

(ii) It has further been submitted that so far as void character of the petitioner's marriage is concerned that needs declaration in view of Section 11 of the Hindu Marriage Act as no declaration has ever been sought by the alleged first wife, therefore, it can not be said that the marriage is void on instance of the first wife otherwise also the alleged first wife has got her writ petition dismissed by which an appointment was sought under the Dying in Harness Rules and further she is no more. Now, therefore, it is not open to raise any objection regarding genuineness of the marriage by any third party. Moreover, the petitioner is not seeking any right in any other's property but whatsoever right she is claiming under the shoes of her late husband.

12. Counsel for the petitioner has also invited the attention of the Court towards Section 16 of the Hindu Marriage Act which talks about the legitimacy of the children of a void marriage and in his submission considering the legitimacy of the minor children since there are two minor daughters born from consummation from her late husband, therefore, in view of Rule 7 of the U.P. Recruitment of Dependant of Government Servants Dying in Harness Rules, 1974 the appointment should be given to the petitioner. It has also been submitted by learned Counsel for the petitioner that right from 1996 the petitioner has been dragged into litigation which has defeated the very purpose and object of the Rules meant for appointment of dependants of the deceased on compassionate ground. Had there been such type of legal impediment the door must have been closed at the initial stage but instead of doing so at different stages right from 1996 to 2006 the authorities were demanding various papers like succession certificate, Bank account, voter list, disposal of the earlier writ petition challenging the cancellation order in which almost 11 years have been consumed and it has resulted in to a lot of financial loss, mental agony, torture and seriously affected the study of her two minor daughters which were born on 10.7.1992 and 11.9.1993 with the consummation of her late husband Sri Shitla Prasad. Attention of the Court has also been invited towards the cancellation order dated 20.9.1996 on the strength of the interim order passed in Writ Petition No.5958/1996 by the alleged first wife. In his submission the stand taken in the present counter affidavit was available before the respondents and that has not been taken and the appointment was cancelled only on the basis of interim order passed by the Court. Had the respondents been prompt and accurate in their decision making process the petitioner could not have been put at the verge of starvation as by now she has not been paid even a single penny of the post retrial dues of her husband in respect of which succession certificate has been issued in the year 2002 and the same was produced before the Basic Education Officer, Lucknow and has been dragged into litigation from lower Court

to higher Court and was compelled to move around the office of respondent Nos.3 and 4 for getting her employed and obtain post retiral dues. He has further submitted that while deciding the writ petition these aspects should also be weighed and appropriate orders imposing cost on respondents be passed.

13. Learned counsel for the respondents has made following submissions:

(i) He has submitted that since the Petitioner has got dismissed her writ petition as withdrawn through which quashing of cancellation order of the appointment was sought, without permission of the Court to file a fresh writ petition, therefore, the prayer for quashing the cancellation order in this writ petition is barred by principle of resjudicata and unless the cancellation order is quashed no appointment letter can be issued in faovur of the petitioner.

(ii) The petitioner's husband had died in the year 1996 and about 11 years have passed, therefore, it can not be said that the family is still in financial crunch and appointment after 11 years will be in derogation of the object of the rules ment for appointment on compassionate ground.

(iii) The petitioner is not legally wedded wife in view of the Section 11 of the Hindu Marriage Act, therefore, no appointment under Dying in Harness Rules can be given to the petitioner.?

14. For appreciation of law and facts both the relevant provisions of the Hindu Marriage Act i.e. Section 5, 11 and Section 16 and Rule 7 of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 are quoted below:

?Section 5: Conditions for a Hindu Marriage A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

(iii) the bridegroom has completed the age of twentyone years and the bride the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage

governing each of them permits of a marriage between the two;

Section 11: Void marriages Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

Section 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 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 subsection (1) or subsection (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.

THE UTTAR PRADESH RECRUITMENT OF DEPENDENTS OF GOVERNMENT SERVANTS DYING IN HARNESS RULES, 1974.

Rule 7: Procedure when more than one member of the family seeks employment
If more than one member of the family of the deceased Government servant seeks employment under these rules, the Head of Office shall decide about the suitability of the person for giving employment. The decision will be taken keeping in view also the overall interest of the welfare of the entire family, particularly the widow and the minor members thereof.?

15. After considering the submissions of learned counsel for the petitioner and learned counsel appearing for the respondents following points will require consideration:

(i) What will be the effect of delay in considering the petitioner's appointment at this stage under the provisions of U.P. Recruitment of Dependant of Government Servants Dying in Harness Rules, 1974.

(ii) What will be the effect of the dismissal of the writ petition filed by the petitioner challenging the cancellation order of the appointment without seeking

the permission of the Court to file fresh writ petition? Whether the present writ petition will not be maintainable being hit by the principle of resjudicata?

(iii) What will be the effect of cancellation of the appointment without show cause?

(iv) What will be the effect of Section 16 of Hindu Marriage Act read with Rule 7 of the U.P. Recruitment of Dependant of Government Servants Dyign in Harness Rules, 1974 for considering petitioner's appointment under Dying in Harness Rule?

16. Now coming to the first point i.e. delay in appointment on compassionate ground, although this point is not resintegra as this has been settled by the Hon"ble Apex Court that no appointment on compassionate ground be made after long lapse of time but this Court has got an occasion to consider this aspect of the matter in the Writ Petition No.11507/2006, Surendra Prasad Gond v. Union of India and Others, decided on 27.11.2006. In that case this Court has made following observation:

?Although it is well settled by numerous decision of this Court as well as of the Apex Court that no appointment on compassionate ground be made after lapse of long time but in the present case it has to be examined whether on any kind of lapse, (long delay in appointment) may be, on the part of the respondents. The appointment on compassionate ground can not be made, I am afraid that if the long lapse of time irrespective of lapse on whose part is taken into consideration for the purposes of ignoring the appointment on compassionate ground then it would lead to injustice as in each and every case the respondents may cause delay in considering the appointment on compassionate ground and than come with the case that long delay has occurred, therefore, it can not be said that family is still in financial crunch and no appointment on compassionate ground be offered to the dependent of the deceased.

It is noticeable that this kind of appointment is offered to a person in exception of normal mode of recruitment of service. This is special kind of benefit extended by the (legislator) employer in favour of the dependents of the deceased employee who had been serving in the department with the utmost devotion and contributed in the smooth working of the department. Like the duty of the disciplined parent to their dependents the employers are also supposed to behave/ act, quickly, promptly and softly with the dependents of the deceased of their own department within four corners of law, where a person seeking appointment is in crisis after the death of the employee. Their act has to be transparent reasonable and prompt while considering this kind of matter, otherwise the purpose of the legislature will be defeated. To my mind every care and caution as required under law has to be weighed and followed in its true prospective promptly without any delay.

While considering the aspect of long lapse of time, it has to be seen that during this long time how the family has survived. The distress, the pain, the misery

and the mental agony which the family has faced during this time has also to be weighed by the authorities particularly in the circumstances where the lapse is on their part. Mere survival for a long time is not sufficient for the purposes of ignoring the appointment under dying in harness Rules. The survival is the law of nature, a person will survive irrespective of the fact whether he is employed or not. It is very often said that time and tide wait for none. It will pass away in its own way. There are many persons who are not in employment and without means even then they are surviving. To my mind, while considering this type of a problem the paramount consideration should be the following of law in its true, letters and spirit meaning thereby the quick and prompt steps has to be taken by the responsible persons under the Rules while considering the appointment under dying in harness Rule. The delay in considering such appointment will defeat the purpose of the Rule and put the family of deceased in distress which is not the spirit of rule and intention of the legislature (the maker of the Rule).?

17. The present case is the glaring example of inaction and nonapplication of mind of the respondents in not deciding the petitioner's case to appoint on compassionate ground it is not in dispute that late husband of the petitioner died in harness on 15.5.1996 and after three months of the death of the husband, the petitioner has moved an application on 20.8.1996 before the District Basic Shiksha Adhikari, Lucknow for appointing her on the compassionate ground under the Rules of 1974 and thereafter petitioner was appointed as Assistant Teacher and joined also, but pursuant to the interim order dated 18.9.1996 passed in Writ Petition No.5958/1996 the petitioner's appointment was cancelled on 20.9.1996 without giving any opportunity of hearing to the petitioner only on the ground of interim order passed by the Court. However, this writ petition was dismissed on 27.8.1998 and interim order was vacated on that very date, thereafter, the petitioner has moved an application for revival of her appointment and she was required to get disposed of her writ petition challenging the cancellation order. It has been argued by the learned counsel for the petitioner that the then Basic Shiksha Adhikari has verbally passed the petitioner to get her writ petition withdrawn. However, whether she was pressed to withdraw the writ petition or not it is not the paramount consideration of the Court and it will be dealt with later on but in fact the writ petition was got dismissed as withdrawn by the petitioner on 8.12.1998. After dismissal of the writ petition the petitioner has again approached the District Basic Education Officer saying that now the writ petition filed by Puranka Pata alias Shyam Pata alleged first wife has been dismissed and the writ petition filed by the petitioner challenging the cancellation order is also withdrawn, therefore, her appointment should be revived. The Basic Shiksha Adhikari did not take any action prior to 11.12.2000 (no steps were taken since 8.12.1998 to 11.12.2000) and after two years he has written a letter on 11.12.2000 requiring the petitioner to obtain a succession certificate and the petitioner has been compelled to file a case before the Civil Judge (Senior Division) Lucknow for obtaining succession certificate. The succession certificate was granted in her favour in September 2002. Even thereafter neither her earlier

appointment was revived nor fresh appointment letter has been issued in her favour on the pretext that some objection has been filed by the brother of the deceased to the succession certificate. It is noticeable that objection to succession certificate was filed in the year 2003. However, the brother of the deceased namely Sri Shankar Dayal Mishra has moved application for withdrawal of his objection and that was allowed by the Civil Judge on 7.7.2006. The petitioner has again given representation to the District Basic Education Officer on 7.8.2006 to dispose of her earlier applications. On that petitioner has been required to give more proof proving herself to be the wife of late Shitla Prasad Mishra like voter list, ration card, Bank account and Domicile Certificate etc. it is noticeable that this was asked in addition to the succession certificate after four years of the grant of the succession certificate. The petitioner has also supplied copy of the voter list, ration card, and the Bank Accounts in addition to that she has also supplied the photo copy of the joint Bank Account with her name and name of her late husband but no decision till date has been taken by the respondents and the petitioner has been further compelled to knock the doors of this Court under Article 226 of Constitution. The jurisdiction of this Court under Article 226 is the extraordinary and equitable jurisdiction and while deciding this type of controversy apart from the legal aspect of the matter the Court is supposed to look into the inaction and changing stand of the respondents according to their convenience like the seasonal change. The Court has to see that the respondents who are the statutory authorities are acting fairly in accordance with law or not and also to see whether every action is in conformity with statutory provision and within four corners the rule of law or not.

18. Looking into the facts of the present case I am of the view that it is the glaring example of inaction arbitrary action of the respondents in not considering the case of the petitioner at the relevant time, if they have acted promptly in accordance with law then situation would have been different. If they were of the view that petitioners marriage is void the order to that effect should have been passed on the first date when the cancellation of her appointment order was passed in the year 1996. At that relevant time all the materials were available before the respondents about the alleged second marriage but in spite of doing so they had been giving lure and assurance for appointment by their action by asking different papers at different stages e.g. in the year 2000 they have required the succession certificate when the succession certificate was produced in the year 2002 they have further taken the pretext that there is some objection to the succession certificate although there was no interim order but matter has been kept pending on the instance of the nephew who has ultimately got his objection withdrawn on 7.7.2006. Even thereafter no positive order rejecting or accepting the claim of the petitioner has been passed by the respondents and she was further required to produce the copy of the ration card, voter list, Bank Account etc. and that too was supplied to them but the result is zero. A question would arise whether at this belated stage the ground of second marriage can be raised in the counter affidavit and respondents be permitted to take advantage of

their own inaction as has been observed in the case of Surendra Prasad Gond (supra). The respondents can not be permitted to take advantage of their own inaction. In fact they should be penalized and a heavy cost to be awarded to the petitioner as the poor widow lady, who was in need of employment at the very threshold at the time of death of her husband, has been dragged into litigation and put to financial loss, mental agony which has affected the career of two minor daughters. It is very surprising that respondents are still not realizing their mistakes, their inactions and again raising objection in considering the case of the petitioner taking shelter of the long delay in appointment and void nature of marriage. To my mind it does not find beauty from the mouth of the respondent and it appears that their stand is very apathetic and their conduct is very cruel. I am of the view that the delay will not come in the way of the respondents in considering the petitioner's appointment on compassionate ground. So far as the payment of cost and damage is concerned looking into the complex mechanism of State functioning by pushing life from one table to another and transfer of the authorities at different level, the responsibility can not be fixed on one person and ultimately whatever cost is awarded that have to be paid from the State exchequer which will ultimately result into public loss, therefore, I am not awarding any cost at this stage but leaving it open to the higher authorities to take action against those persons who are responsible for delay in not considering the petitioners case at the relevant time and keeping the matter pending for about 11 years.

19. So far as the second point regarding the plea of principle of resjudicata on the ground of the dismissal of the writ petition challenging the cancellation order without permission of the Court to file a fresh writ petition is concerned it is not resintegra as the Hon''ble Apex Court in the case of Sargula Transport Service v. State Transport Appellate Tribunal, Gwalior and Others; reported in AIR 1987 Supreme Court 188 has held that this type of dismissal will not fall under the category of resjudicata but in view of the public policy as contained in Order 23 Rule 1 CPC second writ petition will not be maintainable under Article 226 of the Constitution of India on the same cause of action but in the present case the cause of action has now changed and under the facts and circumstances of the present case it will not be open for the petitioner to raise such plea as by their own action the order of cancellation has become ineffective and inoperative. Had they been of this view why they have required succession certificate in the year 2002 whereas the dismissal order was passed in year 1998. Further in year 2006 they have required the copy of the ration card, voter list, Bank Account in order to show her entitlement. Here again the action of the respondents is not bonafide and their stand is not sustainable in the eyes of law. They must know where to stop. They are the statutory authorities and their act should be transparent and in accordance with law. They can not be pointed to change their stand at any time according to their convenience otherwise there will be no end to the litigation and the basic problem will remain unsolved and persons entitled for something will pass away with empty hands. In this case their inaction have

spoiled almost 11 years of the poor widow lady in the litigation and due to their inaction the study of the minor daughters have also suffered. As has been observed by the action of the respondents even after the cancellation order of the appointment demanding succession certificate and other proofs like ration card, voter list etc. for the last 8 years has rendered the cancellation order ineffective and it has given a fresh cause of action to the petitioner for issuing a writ of mandamus directing the authorities to perform their statutory function as required under the Rules of 1974 to consider the petitioner's case for appointment on compassionate ground. Technically the cancellation of the appointment order dated 20.9.1996 has neither been withdrawn by the District Basic Shiksha Adhikari nor quashed by this Court but as has been observed the same has been made ineffective and inoperative by the respondent themselves and it will be open for the District Basic Education Officer to recall the same at the earliest as the reason recorded in the cancellation order is not of the void marriage of the petitioner with late husband but the interim order passed by this Court and the interim order has been vacated and writ petition itself was dismissed. Therefore, respondents can not be permitted to change their stand in the counter affidavit as it is well settled that the executive orders can not be supplemented by the counter affidavit as has been held by the Apex Court in the case of Mohinder Singh Gill v. The Chief Election Commissioner, reported in AIR 1978 SC 851, where the Hon'ble Apex Court has made following observation:

???????When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise??????

20. So far as point No.3 is concerned in view of the Division Bench of this Court reported in 1999 Vol. 3 UPLBEC page 2263, Ravi Kiran Singh v. State of U.P. and Others, this Court has held that appointment under Dying in Harness Rules is a permanent one. The relevant paragraph is quoted below:

?2. In our opinion, an appointment under the Dying in Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment then it will follow that soon after the appointment the service can be terminated and this will nullify the very purpose of the Dying in Harness Rule because such appointment is intended to provide immediate relief to the family on the sudden death of the breadearner. We, therefore, hold that the appointment under Dying in Harness Rule is a permanent appointment and not a temporary appointment and hence the provisions of U.P. Temporary Government Service (Termination of Services) Rules, 1975 will not apply to such appointments.?

21. To my mind before passing cancellation order opportunity must have been given to the petitioner as permanent appointment can not be cancelled in this manner.

22. In view of the above the order of cancellation dated 20.9.1996 has lost its

sanctity and has vanished and died to its natural death after vacation of the interim order on which basis it was passed but this Court can not inter into shoes of statutory authorities unless it exercises power under Article 226 of the Constitution to issue a writ of certiorari for quashing the order but this Court is conscious of the decision of the Hon''ble Apex Court in Sarguja Transport Company, therefore, is not issuing a writ of certiorari but leaving this point open to District Basic Education Office to consider the withdrawal of the cancellation order.

23. Now coming to the fourth point undisputedly if the second marriage has been solemnized in the lifetime of the first wife then the same is void Ipso Jure but in the present case as has been discussed above the stand of the petitioner before this Court is that Smt. Puranka alias Shyam Pata was not legally wedded wife but her husband was having illicit relation with her, therefore, it can not be said that the factum of first marriage is established and the second marriage of the petitioner is void in view of Section 11 of the Hindu Marriage Act as there is a provision for seeking declaration of the void nature of the marriage on instance of the either party. In the present case neither during the lifetime of her husband nor after the death of her husband the alleged first wife Smt. Puranka alias Shyam Pata has filed suit seeking declaration of the alleged second marriage void. Unfortunately, in view of the averments made in paragraph 16 of the writ petition she is no more and died long back on 25.11.1999 and prior to that she has withdrawn her writ petition. This fact has not been controverted in the counter affidavit filed by the respondents, therefore, at present there appears to be no hurdle in considering the case of the petitioner for appointment on compassionate ground as the marriage of the petitioner has never been declared void. In view of the succession certificate, ration card, voter list, joint Bank account also there is sufficient proof in favour of the petitioner of her being wife of late Shitla Prasad and in the case of disputed fact declaration must have been sought and that is not there. In this view of the matter the stand of the respondent of the void nature of marriage is not sustainable in the eyes of law.

24. Otherwise also assuming the petitioner's marriage was second marriage during the lifetime of his first wife even then the factum of the two minor daughters from the petitioner with her late husband Shitla Prasad has not been disputed anywhere and in view of the Section 16 of the Hindu Marriage Act the children of a void marriage are legitimate and are entitled every rights in the property of their late father. Although their legitimacy is limited to the right and property of their parents and not to the property of the Hindu Joint Family but here this is not the case of claiming any right in the property of joint Hindu family but whatever right is being demanded is accrued in their favour after the death of their late father under the Rules of 1974. Had the children were major, there was no impediment under the rules to seek appointment on compassionate ground after the death of their father but since the children are minor then it has to be seen who will be the proper person to watch the well being and welfare of the minor children. Undoubtedly the mother is the natural guardian and even

without being in any service she is nursing her children within the means whatever are available to her although the respondents by their action has spoiled her economical status and made her almost bankrupt and put her almost on the verge of starvation by dragging her in litigation. Had they closed their door at the very outset in the year 1998 perhaps she would not have been put in such misery and her condition should not have been so pitiable as has been detailed in the writ petition.

25. However, looking into the provisions of Section 17 of the Hindu Marriage Act and object of the Rule 7 of the Rules of 1974 although there is no rival claimant but it is clear that while considering the case of compassionate appointment the authority has to ensure the well being of the entire family particularly the widow and minor members. In the present case the poor widow is only harping for the welfare of their minor children, therefore, it can be safely hold that revival of her earlier appointment or fresh consideration can very well be considered keeping in view Section 17 of the Hindu Marriage Act read with Rule 7 of the Dying in Harness Rules 1974.

26. Although in the prayer clause of the writ petition number of reliefs have been sought but I am not inclined to grant those reliefs except prayer No.IV as prayed for. However, considering the facts and circumstances of the case and in view of the observation made in this judgment it is directed that the District Basic Shiksha Adhikari, Lucknow, shall immediately consider the case of the petitioner for appointment on compassionate ground without further delay and pass appropriate orders in view of the observation made in the judgment in accordance with the law within a period of one month from the date of production of certified copy of the judgment of this Court. In case District Basic Education Officer decides to revive her earlier appointment then the petitioner shall not be entitled for any arrears of salary but only be entitled for the current salary. However, that period shall be treated as a part of service for other purposes. In case he decides to provide the fresh appointment then the petitioner shall be entitled for current salary. The District Basic Education Officer is directed to record reasons while passing the appropriate order.

27. It is further provided that post retiral dues as admissible to also given in accordance with law along with interest within the period of two months.

28. In view of the above discussion the writ petition succeeds and is partly allowed. There shall be no order to costs.

(Petition allowed)