

WESTERN RAILWAY



Headquarter office,
Churchgate,
Mumbai-400 020.

PS No.41/2013

No.E(R&T) 890/60/Policy Vol.VII

Date: 29-05-2013

All DRMs/CWMs & Unit Incharge,
C/- G.S. - WREU-GTR/WRMS-BCT
C/- G.S. - All India SC/ST Rly. Empl. Asson. 'W' Zone Mumbai.
C/- G.S. - All India OBC Rly. Empl. Asson. Mumbai.

Sub: Appointment on compassionate ground - Case
of second widow and her children.

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A copy of Railway Board's letter No. E(NG)II/2012/RC-1/21 dt. 03/04/2013 alongwith enclosures are sent herewith for information, guidance and necessary action.

Railway Board's letter No.E(NG)II/91/RC-1/136 dt. 02/01/1992 referred to therein was circulated vide this office letter No.E(R&T) 890/60/Policy VOL.III dt. 27-01-1992/10-02-1992 (P.S. No.17/92).

Encl: As above.


(N.M.KAMATH) 31/5/13
APO(R&T)
For General Manager (E)

OS/E
WR
15/4/2013

GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)

No. E(NG)II/2012/RC-1/21

New Delhi, Dated: 2.04.2013

ADP/ACP
Sh. K. Singh
9/4

The General Manager (P),
All Zonal Railway's/PUs.

Sub: Appointment on compassionate grounds - case of second widow and her children.

A number of references have been received from Zonal Railways on the above subject. The matter has been examined by the Board and it has been decided that such cases may be dealt strictly in terms of Board's letter No. E(NG)II/91/RC-1/136 dated 02.01.1992. Further, whenever the judgement of the Hon'ble Courts are contradictory to Board's instructions, Railways may contest/file review petition in light of favorable judgement in such cases (copy enclosed).

not read.

Please acknowledge receipt.

(This also disposes of

- (i) East Central Railway's letter No. ECR/HRD/Court Cell/CG Apptt dated 22.08.11.
- (ii) South East Central Railway's letter No. P-HQ/RCT/208/4/1002 dated 28.06.11.
- (iii) Eastern Railway's letter No. CPO/SC/SA/Comp/CI.IV/3037 dated 20.09.11.
- (iv) Northeast Frontier Railway's letter No. E/208/2/QA/44/11 dated 16.12.11.)

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43/4/13
(Harsha Dass)
Director Estt.(N)
Railway Board.

LRST

copy of judgment
to be called for
in Board
213
09/4/2013



Am

In the matter of an application under Article 226 of the Constitution of India

Union of India through Senior Divisional
Personnel Officer, East Central Railway,
Dhanabad
..... Petitioner (in all cases)

Versus

1. Basanti Devi
2. Bijay Rabidas
..... Respondents (in WPS 4461/2008)

1. Shankar Thakur
2. Tukni Devi
..... Respondents (in WPS 4495/2008)

Samaullah Ansari @
Sanaullah Ansari
..... Respondent (in WPS 1083/2010)

For the petitioner : Mr. Mahesh Tiwari, Advocate (in all the cases)
For the Respondents : Mr. Pceyush Krishna Choudhary (in all the cases)

PRESENT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PRAKASH TATIA

By Court:- These three writ petitions have been preferred by the Union of India, East Central Railway, Dhanabad, challenging three separate orders passed by the Central Administrative Tribunal, Circuit Sitting of Patna Bench at Ranchi, dated 16th July, 2007 and 20th July, 2009 passed in O.A. Nos. 256 of 2005, 61 of 2006 and 60 of 2006, whereby the Central Administrative Tribunal (in short 'CAT') allowed the said Original Applications and held that the child of second wife of employee (married during the life time of first wife) also is entitled for compassionate appointment.

2. Facts of one case will serve the purpose for deciding all these writ petitions.

In O.A. No. 256 of 2005, Shankar Thakur and Tukni Devi submitted that Shankar Thakur is the son of the deceased employee working under the Railways and applicant no.2 is the wife of the deceased employee. It is not in dispute that deceased employee married with Tukni Devi while his first wife was alive. The first wife was issueless and applicant no.1- Shankar Thakur was born through the second wife. After the death of the employee, the first wife of the deceased employee applied before the respondent (petitioner herein) for appointment of the applicant no.1 on compassionate ground whereas he was son of second wife of the

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employee. The said prayer was rejected by the respondent vide communication dated 18th July, 2005 (Annexure-A/B filed alongwith O.A.). The prayer was rejected on the ground that in view of the Railway Board circular no. B(NC/VL/91/RC-I/136 dated 2nd January, 1992, the child of second wife cannot be given compassionate appointment.

3. The learned Tribunal relying upon two Division Bench judgments of Patna High Court, delivered in the case of *Union of India & ors. Vrs. Central Administrative Tribunals (2002 [2] PLJR, 636 and Purushottam Kumar Vs. State of Bihar [2005(3) PLJR, 458]* held that rejection of the prayer of the appellant in those cases for compassionate appointment to child of second wife of employees were illegal and, therefore, the respondents were directed to reconsider the cases of the applicants, who sought compassionate appointment.

4. The learned counsel for the petitioner vehemently submitted that compassionate appointment is not a right and is an exception to the rule of appointment and cannot be claimed by any dependent of employee otherwise than as provided under the rules and as per the policy of the appointment framed by the employer for this purpose. It is also submitted that as per the Railway Service (Conduct) Rules, 1996, during the life time of first wife, solemnizing of second marriage unless a permission has been obtained, from the concerned Railway authority for solemnizing the second marriage is not permissible and, therefore, the second marriage of the employee in cases before the court are nullity in the eye of law as being in contravention of Rule 21 of the Rules, 1996. In addition to above, there is a specific embargo contained in the policy decision of the Railway Board, given out in the above said Circular dated 2nd January, 1992 which specifically prohibits the appointment on compassionate ground to the children born out of the second marriage of an employee, obviously, which marriage has been solemnized or contracted without obtaining permission of concerned Railway Authority.

The learned counsel further submitted that the cases relied upon by the Tribunal do not lay down the correct proposition of law, inasmuch as in Purushottam Kumar's case (supra) the Division Bench of the Patna High Court proceeded to decide the claim on compassionate appointment as though such claim is a property and heritable right whereas the compassionate appointment is not a heritable right so as one can claim it as his heritable right under his personal law. Compassionate appointment has entirely different aims and objects and has nothing to do with the right of inheritance. Further, and in the case of *Union of India Vrs. Central Administrative Tribunal (supra)*, the Division Bench of the Patna High Court has not

taken into consideration the relevant rules as both the Division Benches were not apprised with the Circular issued by the Railway Board dated 2nd January, 1992 prohibiting compassionate appointment to the child of second marriage. It is also submitted that such restriction is reasonable restriction and it is not the case of the applicants, who sought appointment, that the said Circular is arbitrary and illegal in any manner.

5. Learned counsel appearing for the incumbents submitted that the child of employee out of second wedlock even if found to be illegitimate child, yet he remains the child of the father-employee and, therefore, rightly it has been held that such child shall be entitled to the same treatment as is available for child of first marriage. It is submitted that two Division Benches of Patna High Court have considered the relevant personal law and even after holding that second marriage in the life time of first wife of a person may be void but his son is entitled to all the benefits under personal law and if any employee had two wives at the time of his death, his both wives are entitled to share in pension.

6. We have considered the submissions of the learned counsel for the parties and perused the record and facts of the case and also considered the judgments relied upon by the learned counsel for the petitioner as referred to above.

7. It is a settled law that appointment on compassionate ground is not a source of recruitment as held in various judgments and one of which was delivered by the Hon'ble Supreme Court in the case of *State Bank of India & anr. Vrs. Raj Kumar, reported in (2010) 11 SCC 661*, wherein the Hon'ble Supreme Court held that the compassionate appointment 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 Hon'ble Supreme Court thereafter held that the claim of 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.

8. So far this legal proposition of law is concerned, this is accepted legal position and if we examine the issue raised in these writ petitions, keeping in view the above legal position then the applicants will have to show their claim on the basis of the employer's

(ND)1191/RC-1436 dated 2nd January, 1992 is as follows:

"It is clarified that in the case of railway employees dying in harness etc. having 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.

The fact that the second marriage is not permissible is invariable clarified in the terms and conditions advised in the offer of initial appointment.

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. The said circular was not brought to the notice of the two Division Benches of the Patna High Court, who decided the cases of the *Union of India Vrs. Central Administrative Tribunal* (supra) and *Purushottam Kumar* (supra). The validity of this Circular has not been challenged, which is in existence from 2nd January, 1992. Therefore, so far the decision of the employer is concerned, it clearly provides that children of second marriage of the employee shall not be eligible for compassionate appointment unless the employee obtained the permission for second marriage which could have been granted only in special circumstances. Admittedly the employees in the cases did not obtain any permission for second marriage by showing special circumstances for second marriage and, therefore, in view of the said circular dated 2nd January, 1992 the incumbents were not entitled to compassionate appointment. Since the Circular dated 2nd January, 1992 was not brought to the notice of the two Division Benches referred above, therefore, both the Division Benches have no benefit of knowing the effect of the Circular, in the light of the settled law that compassionate appointment can be sought only when it is traceable to the scheme framed by the employer for such appointment.

10. So far as the case of *Union of India Vrs. Central Administrative Tribunal*, reported in 2002(2) PLJR 686, is concerned, the said judgment is a brief judgment, wherein it appears that sympathy more prevailed and therefore, the Division Bench held that stand of the Railway administration obviously denying the appointment to the children of second wife is too technical. In that case, it was submitted that first wife was admitted to mental asylum and in that situation the employee contracted second marriage and since there was no child from first wife, therefore, second wife's child, who was equally entitled to the retirement benefits and family

petitioner through the employer railway administration through his mother and, therefore, having split the pensionary benefits between the two wives, the Court observed that it is not difficult to provide a job under the rule of harness to the son of the second wife when as the record shows there is no rival and first wife has given consent that the son of the second wife be employed.

As we have already observed that neither the rules nor the above Circular was brought to the notice of the Division Bench and therefore that judgment has no application, in the facts and circumstances of the present case.

11. In *Purushottam Kumar's* case (supra), the Division Bench of the Patna High Court took into consideration Rule 23 of the Bihar Government's Conduct Rules regarding marriage of the employee, whereunder, under sub-rule (1), it has been provided that no Government servant shall enter into or contract a marriage with a person having a spouse living and sub-rule(2) says that no Government servant, having a spouse living shall enter into or contract a marriage with any person. Then it has been observed by the Division Bench that admittedly the second marriage of the employee was misconduct in terms of the Government Servant's Conduct Rules but the first wife or any other person did not raise any objection during the life of the father of the appellant i.e. in the life time of employee. Then the Division Bench considered the Government Circular contained in memo no. 3/C2-2067/90 KA.13293 dated 5th October, 1991. This Circular provided for employment in Class-III and Class-IV posts in case of death of a Government servant during service period. The said memo also lays down the categories/ persons entitled to the said appointment and other procedure for the same. According to the Circular, only dependent will be given employment on compassionate ground and under the category of dependents are widow of the deceased employee, son, unmarried daughter and the widow of predeceased son and the order of preference would, the widow of the deceased, son, unmarried daughter and the widow of predeceased son. In *Purushottam Kumar's* Case (supra), the aforesaid Circular was applicable and, therefore, the Division Bench held that since appellant, the son of the deceased, may be outcome of a void marriage, in terms of Section-5 read with Section 11 of the Hindu Marriage Act which provides that any marriage solemnized after the commencement of Hindu Marriage Act, 1955 in violation of Clause(1) of Section 5 shall be null and void. But even when such marriage is void, Section-16 of the Hindu marriage Act provides that notwithstanding that the 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 Marriage Laws (Amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under the Act. In addition, sub-section(3) of Section 16 provides that the child of a marriage which is null and void will have rights in or to the property of his parents only and not to the property of any other person.

12. The Division Bench in Purushottam 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 Vrs. The State of Bihar & ors., as reported in AIR 2000 SC 735*, wherein the Apex court held that children of the void marriage are legitimate and the property of a male Hindu dying intestate devolve firstly on heirs in Class I 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 correlation, 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.

17. In view of above discussions, the orders passed by the Tribunal in O.A. Nos. 256 of 2005, 61 of 2006 and 60 of 2006 dated 16th July, 2007 & 20th July, 2009 are liable to be set aside and hence the orders impugned are set aside. O.A. No. 256 of 2005, O.A. No. 61 of 2006 and O.A. No. 60 of 2006 are dismissed.

sd/- Bhagwati Prasad, C.J.
sd/- Prakash Tatia, J.

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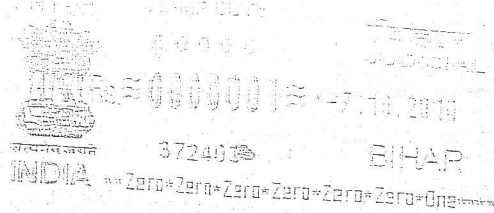
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Designated under Rule 252 of J.J.C. Rules
Authorized under Section 107 of 1972

Jharkhand High Court, Ranchi
Dated: the 13th April, 2011
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CIVIL WRIT JURISDICTION CASE No.2592 OF 2007

(In the matter of an application under Articles 226 of the Constitution of India)

1. The Union of India through the General Manager, East Railway, Fairlie Place, 17 Netaji Subhash Road, Kolkata.
2. General Manager, Eastern Railway, Kolkata.
3. Chief Works Manager, Eastern Railway, Jamalpur Workshop, Munger.
4. Deputy Chief Personnel Officer, Eastern Railway, Jamalpur Workshop, Munger.

--- Petitioners.

Versus -

1. Uma Devi W/o Late Bhim Mandal, Ex-T No. 23157 of B.R.S. Workshop, Jamalpur, resident of Mohalla-Nayagaon, Baddipara, P.O. Jamalpur, Dist. Munger (Bihar).
2. Kumari Reena, D/o Late Bhim Mandal, resident of Mohalla-Nayagaon, Baddipara, P.O. Jamalpur, Dist. - Munger (Bihar).

--- Respondents

For the Petitioners - Mr. Bindhachal Singh, Advocate.
 For the Respondents - Mr. Krishna Prasad, Advocate.

PRESENT

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR
 THE HON'BLE MR. JUSTICE KISHORE KUMAR MANDAL

S.K.Katriar & K.K.Mandal, J.J.

This writ petition is directed against the order dated 14.07.2006 (Annexure-3), passed by the Central Administrative Tribunal, Patna Bench, in O.A.No. 739 of 2005 (Uma Devi & Anr. Vs. The Union of India & Ors.), whereby the original application preferred by respondent no.1 herein has been allowed, and the authorities (petitioners herein) have been directed to consider her daughter's claim for appointment on compassionate ground.

2. A brief statement of facts essential for the disposal of the writ petition may be indicated. Bhim Mandal was in the

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services of the Eastern Railways. He had married one Uma Devi. While the marriage was subsisting, and after promulgation of the Hindu Marriage Act, 1955, (hereinafter referred to as the 'Act'), he married respondent no.1 herein. Three daughters were born out of this combination. Respondent no.2 is one of them. The employer died on 02.02.1997, while still in harness, leaving behind two widows and three children. The post-retirement benefits were distributed among the two widows. Dispute arose as to payment of the post-retirement benefits leading to O.A.No. 572 of 2004 (Annexure-1), at the instance of respondent no.1 herein. The same was allowed by the Central Administrative Tribunal, Patna Bench, by order dated 27.05.2005 (Annexure-1), and it was directed that Uma Devi (respondent no.1) shall be paid the post-retirement benefits.

3. Respondent no.1 staked her claim for appointment on compassionate ground also, and desired that respondent no.2, her daughter from Bhim Mandal, may be given appointment on compassionate ground leading to present O.A.No. 739 of 2005, which has been disposed of by the impugned order, and the authorities have been directed to consider the case of respondent no.2 for appointment on compassionate ground. Hence this writ petition at the instance of the authorities.

4. We have perused the materials on record and considered the submissions of the learned counsel for the parties. The admitted position is that the employer died leaving behind two widows, and both of whom had married the employee after

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promulgation of the Hindu Marriage Act. It is further the admitted position that respondent no.1 claimed payment of post-retirement benefits. Such course of action, to our mind, is permissible in terms of Section 16 of the Hindu Marriage Act, and is also supported by the judgment of the Supreme Court in AIR 2000 SC 735 in the case of Rameshwari Devi vs. State of Bihar & Ors. The provision of Section 125 of the Code of Criminal Procedure also comes to the aid of such illegitimate children.

5. The present writ petition deals with claims for appointment on compassionate ground. It appears to us on a perusal of Section 16 of the Act the same is confined to property rights of the father of the illegitimate children who, by fiction of law, are treated to be illegitimate children.

6. The spirit of Section 125 Cr. P.C. in favour of such children is to the same effect. This is possibly for two reasons. The legitimate children have arrived in this world for no fault of theirs and, therefore, they cannot be indicted for no fault of theirs.

Secondly, the substance of Section 16 of the Act, as well as Section 125 Cr. P.C., is that the illegitimate children by fiction of law are entitled to draughts from the properties of the father. We are not aware of any provisions of law which permits such draughts on the resources of the employer. Any direction for appointment on compassionate ground will be a draught on the resources of the employer, which, in our opinion, would be impermissible in law, and would be exceeding the limits of benefits conferred by law on such children. No provisions of law

has been brought to our notice, or any cognate provision of law, which confers any such benefit on such children.

7. We must also notice the circular dated 24.01.1992 (Annexure-2), issued by the Eastern Railway, wherein this aspect of the matter has been dealt with. The entire text of the same is reproduced hereinbelow:-

"Sub: Appointment of compassionate grounds-cases of second widow and her wards"

1. *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.*
4. *Kindly acknowledge receipt."*

It is evident that Eastern Railways were mindful of the legal position indicated hereinabove and have, therefore, rightly provided in their administrative instructions that the claims set up by children born out of such unholy combination cannot be given the benefit of compassionate appointment. We agree with the administrative instructions.

8. Law is well-settled that public employment in this

Country is a national wealth, and every citizen should have unrestricted access to the same which is possible only after the vacancies are advertised, and given wide publicity. Appointment on compassionate ground is based on descent, and the court have generally set their faces against the same, subject to exceptional circumstances to be found in legislation, or policy decision or executive instruction of the employer. The position in the present case is just to the contrary with respect to children born out of an unholy combination.

9. We, therefore, disagree with the order of the learned Tribunal, and is accordingly set aside. In the facts and circumstances of the case, there shall be no order as to costs.

sdt (S.K.Katriar, J.)

sdt (Kishore K. Mandal, J.)

Patna High Court
Dated the 22nd April, 2010
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For Joint Registrar (3)
Patna High Court

U/S 76 Act 1 of 1973

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Handwritten signatures and dates: 26/04/2010, 29/04/2010