

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL  
MUMBAI**

**ORIGINAL APPLICATION NO.1326 OF 2022**

**DISTRICT : MUMBAI**  
**Sub.:- Compassionate**  
**Appointment**

Shri Tanmay Sunil Gite. )  
Age : 19 Yrs, Occu.: Student, )  
Residing at Room No.515, B-4, )  
Sharadha Saburi Building No.5, )  
M.P. Mill Compound, Mumbai – 400 034. )...**Applicant**

**Versus**

1. The State of Maharashtra. )  
Through its Secretary, )  
Home Department, Mantralaya, )  
Mumbai – 400 032. )
2. The Commissioner of Police, Mumbai) )  
Office at Mumbai Police )  
Commissioner, L.T. Marg, )  
Opp. Crawford Market, Fort, )  
Mumbai – 400 001. )
3. The State of Maharashtra. )  
Through Principal Secretary, )  
General Administration Department,) )  
Mantralaya, Mumbai – 400 032. )...**Respondents**

**Smt. A.C. Kaladharan, Advocate for Applicant.**

**Shri A.J. Chougule, Presenting Officer for Respondents.**

**CORAM : A.P. KURHEKAR, MEMBER-J**

**DATE : 13.07.2023**

## **JUDGMENT**

1. The Applicant has challenged the communication dated 25.11.2022 issued by Respondent No.2 – Commissioner of Police, Mumbai thereby rejecting the claim for compassionate appointment on the ground of third child in the family born after cut-off date in terms of G.R. dated 28.03.2001, invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. The facts in brief giving rise to this O.A. are as under :-

The Applicant is son of deceased Government servant Sunil B. Gite (Police Constable) who died in harness on 23.04.2010. Shri Gite was firstly married to Surekha and have one daughter Komal from the said wedlock. Thereafter, Sunil Gite performed second marriage with Shivani during the subsistence of his marriage with first wife Surekha. Sunil Gite have two children viz. Tanmay (present Applicant) and Samiksha from second wife. Applicant's date of birth is 09.01.2003. Thus, at the time of death of father, he was 7 years' old minor child. He attained majority on 09.01.2021. Therefore, after attaining marriage, he made an application for compassionate appointment on 30.09.2022 in terms of scheme for compassionate appointment. He also tendered Affidavit of Surekha (step mother) and Komal (step sister) giving consent to the Applicant for compassionate appointment. However, Respondent No.2 – Commissioner of Police, Mumbai rejected his claim by communication dated 25.11.2022 on the ground that there being third child born in the family after cut-off date 31.12.2001, his claim for compassionate appointment is not maintainable in view of prohibition to that effect in G.R. dated 28.03.2001. Being aggrieved by it, the Applicant has filed the present O.A.

3. Smt. A.C. Kaladharan, learned Advocate for the Applicant sought to assail the legality of impugned communication *inter-alia* contending

that G.R. dated 28.03.2001 is held unconstitutional by Hon'ble High Court in ***Writ Petition No.7742/2014 [Ms. Kashibai Wagh Vs. Zilla Parishad, Nashik and Ors.] decided on 03.07.2019.*** She has pointed out that the facts of ***Kashibai's*** Judgment are similar, and therefore, once G.R. dated 28.03.2001 is quashed and set aside declaring it unconstitutional, it is not open to the Respondents to deny the claim on the basis of said G.R. She further placed reliance on the decision of Hon'ble Supreme Court in ***(2019) 14 SCC 646 [Union of India & Anr. Vs. V.R. Tripathi]*** to substantiate that the child born from 2<sup>nd</sup> marriage of deceased employee being legitimate is entitled to compassionate appointment. On this line of submission, she urged that the impugned communication rejecting the claim of the Applicant is totally arbitrary and unsustainable in law.

4. Per contra, Shri A.J. Chougule, learned Presenting Officer all that contends that in terms of G.R. dated 28.03.2001, the Government had taken policy decision prohibiting compassionate appointment to a family member if 3<sup>rd</sup> child is born after cut-off date i.e. 31.12.2001, as specifically mentioned in G.R. dated 28.03.2001. He tried to contend that the compassionate appointment is not a matter of right but it is by way of concession and Government is free to frame policy determining terms and conditions for providing compassionate appointment. Thus, according to him, since scheme for compassionate appointment does not permit such appointment where third child is born after cut-off date, the impugned communication needs no interference by the Tribunal.

5. During the course of hearing when specific query was raised by the Tribunal to the learned P.O. about the decision of Hon'ble Bombay High Court in ***Kashibai's*** case declaring G.R. dated 28.03.2001 unconstitutional, all that he submits that the Government has not withdrawn the said G.R.

6. In view of submissions, the issue posed for consideration is whether rejection of claim for compassionate appointment on the ground of G.R. dated 28.03.2001 is sustainable and emphatic answer is in negative.

7. True, as per G.R. dated 28.03.2001 issued by the Government where third child is born in the family after cut-off date i.e.31.12.2001, the member of family of deceased Government servant would not be entitled for compassionate appointment. The intention behind is to control the population. However, there is no denying that G.R. dated 28.03.2001 is held unconstitutional by Hon'ble High Court in **Kashibai's** case. The said decision seems to have attained finality, since there is nothing on record to show that it is challenged by the Government before Hon'ble Supreme Court. In that case also, deceased had two children from first wife and one child from second wife. Hon'ble High Court held that the Petitioner who was the only child born from second wife would suffer brunt of public employment being denied on the reasoning that her deceased husband was blessed with two children from the previous marriage. It would be apposite to reproduce Para Nos.2 to 8 of the Judgment in **Kashibai's** case, which are as under :-

*“2. At the outset we record our displeasure to the fact that in the counter affidavit filed by Respondent No.3 in paragraph 6 a false statement of fact has been pleaded that there is a family dispute amongst the family of Sheshrao Trambak Wagh, an Assistant teacher under the first Respondent - Zilla Parishad, Nashik who died in harness, on 22 June 2007.*

*3. From his first pre-deceased wife he was blessed with two children. From the wedlock with the Petitioner a third child was born.*

*4. Under the policy of appointment on compassionate basis the Petitioner sought appointment which has been declined to her on the reason that the policy of the State Government prohibits public employment to a person who has begotten a third child after the cut-off date i.e. 31 December 2001. The policy decision concerning appointment on compassionate basis is dated 28 March 2001 and it also contains a stipulation that appointment on compassionate basis would not be granted to the dependent of deceased a government servant who had more than three children.*

*5. Aforesaid facts bring out that as regards the Petitioner she gave birth to only one child. Her deceased husband had two children from the previous wedlock.*

*6. The conditions in the policy decisions for grant of appointment on compassionate basis contains an embargo to the applicant being disentitled on the fact of the deceased government servant having 3 children.*

*7. Notwithstanding there being no prayer to quash the said condition as unconstitutional, we declare the same to be unconstitutional. For the reason in a given set of facts, as in the instant case, the Petitioner who has only one child would suffer the brunt of public employment being denied on the reasoning that her deceased husband was blessed with two children from the previous marriage. The intention behind the policy is to control the exploding population and not to prohibit remarriages. The Petitioner was the second wife of the deceased employee of Zilla Parishad and as far as she was concerned, she bore only one child.*

*8. Declaring the Petitioner to be eligible to be considered for grant of appointment on compassionate basis, we direct the Respondents to consider her entitlement as per policy, meaning thereby, the Respondents would consider whether the Petitioner is in such state of penury that she needs an appointment on compassionate basis so that she and her family can survive.”*

8. As such, once G.R. dated 28.03.2001 is declared unconstitutional, the Respondents ought to have taken note of it while deciding the claim of the Applicant. Indeed, Government ought to have taken remedial measures, but it failed to do so. On the contrary, G.R. is relied upon to reject the claim of the Applicant which is totally arbitrary and unsustainable in law.

9. Next question comes about entitlement to compassionate appointment to a son born from second wife, the learned Advocate for the Applicant fairly stated that the deceased Government servant during his life time was married, firstly with Surekha and during the subsistence of first marriage performed second marriage with Shivani. She, therefore, fairly concedes that in the eye of law, the second marriage is void. However, as regard status of the Applicant who was born from second marriage, she submits that his status is of legitimate child as provided under Section 16 of Hindu Marriage Act, 1955. In this behalf, she placed reliance on the decision in **V.R. Tripathi's** case (cited supra) in which

child born from second wife is held entitled to compassionate appointment though the marriage of his mother being performed during the subsistence of first wife of deceased Government servant was void. In that case also, the claim for compassionate appointment was rejected by Railway Board on the basis of Circular which prohibits compassionate appointment to the child born from second marriage of deceased employee. Para Nos.14 to 17 of the Judgment are as under :-

*“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 marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.*

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

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

**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.*

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

**17.** *Even if the narrow classification test is adopted, the circular of the Railway Board creates two categories between one class of legitimate children. Though the law has regarded a child born from a second marriage as legitimate, a child born from the first marriage of a deceased employee is alone made entitled to the benefit of compassionate appointment. The salutary purpose underlying the grant of compassionate appointment, which is to prevent destitution and penury in the family of a deceased employee requires that any stipulation or condition which is imposed must have or bear a reasonable nexus to the object which is sought to be achieved. The learned Additional Solicitor General has urged that it is open to the State, as part of its policy of discouraging bigamy to restrict the benefit of compassionate appointment, only to the spouse and children of the first marriage and to deny it to the spouse of a subsequent marriage and the children. We are here concerned with the exclusion of children born from a second marriage. By excluding a class of beneficiaries who have been deemed legitimate by the operation of law, the condition imposed is disproportionate to the object sought to be achieved. Having regard to the purpose and object of a scheme of compassionate appointment, once the law has treated such children as legitimate, it would be impermissible to exclude them from being considered for*

*compassionate appointment. Children do not choose their parents. To deny compassionate appointment though the law treats a child of a void marriage as legitimate is deeply offensive to their dignity and is offensive to the constitutional guarantee against discrimination.”*

10. Hon'ble Supreme Court directed to provide compassionate appointment, subject to fulfillment of other requirements. Thus, the judgment of Hon'ble Supreme Court in **V.R. Tripathi's** case is squarely attracted and Applicant cannot be denied compassionate appointment on the ground of void marriage of mother.

11. The totality of aforesaid discussion leads me to conclude that the impugned communication dated 25.11.2022 is totally arbitrary and unsustainable and liable to be quashed and set aside. The Respondents are required to consider the claim of the Applicant for compassionate appointment on suitable post, subject to compliance of the terms and conditions of the scheme. Hence, the order.

### **ORDER**

- (A) Original Application is allowed.
- (B) The impugned communication dated 25.11.2022 is quashed and set aside.
- (C) The Respondents are directed to consider the claim of the Applicant for compassionate appointment and shall take his name in waiting list on suitable post, subject to fulfillment of terms and conditions within six weeks from today.
- (D) No order as to costs.

Sd/-  
**(A.P. KURHEKAR)**  
**Member-J**

Mumbai

Date : 13.07.2023

Dictation taken by :

S.K. Wamanse.

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