

A.F.R.

Court No. - 66

Case :- WRIT - A No. - 10928 of 2020

Petitioner :- Manjul Srivastava

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Ghan Shyam Maurya

Counsel for Respondent :- C.S.C.

Hon'ble J.J. Munir,J.

1. The petitioner, Manjul Srivastava has impugned an order of June the 25th, 2020, passed by the District Basic Education Officer, Prayagraj, rejecting her claim for compassionate appointment under The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules).

2. A counter affidavit has been filed on behalf of respondent nos. 2 and 3, which is taken on record.

3. Mr. Sharad Chandra Upadhyay, learned State Law Officer, was granted time to file a short counter affidavit. He has not come up with any return.

4. Admit.

5. Heard forthwith.

6. Heard Mr. Ghan Shyam Maurya, learned Counsel for the petitioner, Mr. Arun Kumar, learned Counsel appearing on behalf of respondent nos.2 and 3 and Mr. Sharad Chandra Upadhyay, learned State Law Officer appearing on behalf of respondent no.1.

7. The question, that arises for consideration here, is: *"Whether the judgment of this Court in **Smt. Vimla Srivastava vs. State of U.P. and another**¹, striking down the word 'unmarried' in Rule 2(c) (iii) of the Rules, entitles a married daughter to a consideration of her claim for compassionate appointment without*

¹ 2016 (1) ADJ 21

an amendment to the Rules made by the State Government, expressly including 'married daughter' in the expression 'family', defined under Rule 2(c)?

8. The petitioner's mother, the late Pushpa Srivastava was inducted as an Assistant Teacher in the services of the Basic Education Board and appointed at the Primary School, Chaka, District Prayagraj. She was serving as the Headmistress of the School, last mentioned, when she passed away on 09.11.2016. She was a permanent employee and the sole bread winner of the family, comprising her husband, Vijay Kumar Srivastava, aged about 63 years and three married daughters: Parul Srivastava, Manjul Srivastava and Manshi Srivastava, aged about 32 years, 30 years and 28 years, in that order. The petitioner's mother died in harness, it is claimed on account of a heart attack.

9. It is the petitioner's case that their family have become financially crippled. They were totally dependent on the deceased teacher because the petitioner's father and the deceased's husband is an unemployed man. In consequence, the family have plunged into a sudden economic crisis. The petitioner is also unemployed. She, therefore, applied for compassionate appointment on the post of an Assistant Teacher in the Primary School, where her mother served. The petitioner asserts that she holds the necessary educational and other qualifications to be appointed as an Assistant Teacher. The petitioner holds degrees of Bachelor of Arts and Bachelor of Education. She has also passed the Uttar Pradesh Teacher Eligibility Test, 2018 for the Primary Level. The petitioner has placed on record photostat copies of her certificates and degrees, which the Court has perused.

10. It is the petitioner's further case that she submitted an application for consideration of her candidature under the Rules

on 17.07.2019 in the office of the District Basic Education Officer, Prayagraj. The application is accompanied by all requisite documents. It is duly certified by the Headmistress, Primary School, Chaka, Prayagraj. The petitioner's claim for compassionate appointment has come to be rejected by an order dated 25.06.2020 passed by the District Basic Education Officer, Prayagraj on the sole ground that a married daughter of a deceased Government servant is not included in the definition of the family of the deceased under the Rules, as amended by the 9th Amendment Rules, 2011, carried in the Government Order no.6/12/73/ कार्मिक-2/ 2011-TC, Lucknow, dated 22.12.2011, issued by the Government of U.P. in the Department of Personnel, Anubhag-2.

11. Aggrieved, this writ petition has been instituted.

12. Mr. Ghan Shyam Maurya, learned Counsel for the petitioner submits that the impugned order passed by the District Basic Education Officer is manifestly illegal as it denies the petitioner's claim in violation of this Court's judgment in **Smt. Vimla Srivastava** (*supra*). He has drawn the attention of this Court to the holding and the declaration in **Smt. Vimla Srivastava** by a Division Bench of this Court, where it was held that exclusion of married daughters from the definition of 'family' carried in Rule 2(c) of the Rules was unconstitutional and violative of Articles 14 and 15 of the Constitution. By the judgment in **Smt. Vimla Srivastava**, the word 'unmarried' occurring in Rule 2(c) (iii) of the Rules, was struck down by this Court. Mr. Maurya, learned Counsel says that once the word 'unmarried' occurring in Rule 2(c) (iii) of the Rules has been struck down as unconstitutional, it no longer survives on the Statute Book. According to him, the Rules, as they stand, do not require any further amendment to consider a married daughter's right to compassionate appointment. He urges, therefore, that the impugned order

founded on the definition of family, occurring in Rule 2(c) (iii) of the Rules, ignoring the judgment of this Court in **Smt. Vimla Srivastava**, which has struck down the word 'unmarried' qualifying the word 'daughter' is illegal, inasmuch as a provision of a statute, statutory rule or even a Government Order, that is struck down, cannot be treated as a subsisting provision to decide rights of citizens or parties by Authorities of the State.

13. Mr. Sharad Chandra Upadhyay, learned State Law Officer, on the other hand, has taken a stand, in which he is wholeheartedly joined by Mr. Arun Kumar, learned Counsel appearing for the Secretary, Basic Education Board, U.P., Prayagraj and the District Basic Education Officer, Prayagraj, that the impugned order proceeds on valid ground and ought not to be disturbed. Mr. Upadhyay and Mr. Arun Kumar submit that notwithstanding the declaration made by this Court that Section 2(c) (iii) is unconstitutional and void to the extent that it carries the word 'unmarried', qualifying the word 'daughter', an unmarried daughter cannot be considered for compassionate appointment, unless the State appropriately amends the provisions of Rule 2(c) in accordance with the judgment of this Court.

14. What in substance Mr. Upadhyay and Mr. Arun Kumar submit is that a decision of this Court, striking down a particular provision as unconstitutional, would not *ipso facto* operate unless suitably given effect to by amending the relevant statutory provision. They do not dispute the fact that the State is under an obligation to amend the Rules to bring it in accord with this Court's judgment in **Smt. Vimla Srivastava** (*supra*), but say that so long as an appropriate amendment is not made, no rights can be founded by the petitioner on the Rules, as if the Rules stand amended by this Court's judgment.

15. This Court has keenly considered the matter. The decision of their Lordships of the Division Bench in **Smt. Vimla Srivastava** (*supra*) held the provisions of Rule 2(c) (iii) of the Rules to be unconstitutional and struck it down in the following terms:

“In conclusion, we hold that the exclusion of married daughters from the ambit of the expression “family” in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules.”

16. The order in that decision, that was made *inter partes* reads thus:

“In consequence, we direct that the claim of the petitioners for compassionate appointment shall be reconsidered. We clarify that the competent authority would be at liberty to consider the claim for compassionate appointment on the basis of all the relevant facts and circumstances and the petitioners shall not be excluded from consideration only on the ground of their marital status.”

17. The decision of the Division Bench in **Smt. Vimla Srivastava** was followed by another Division Bench of this Court in **Smt. Neha Srivastava v. State of U.P. & Another**².

18. The Rules are framed under the proviso to Article 309 of the Constitution and confer on the family members of a Government servant, who has died in harness, a right to be considered for compassionate appointment. There is no cavil about the issue that the Rules, including Rule 2(c) (iii) is law within the meaning of Article 13(2) of the Constitution. The judgment of this Court in **Smt. Vimla Srivastava** (*supra*), makes an unqualified declaration “that the exclusion of married daughters from the ambit of the expression “family” in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of

² Special Appeal (Defective) No. 863 of 2015, decided on 23.12.2015

the Constitution” to borrow the words of their Lordships of the Division Bench. This declaration has not been disturbed by the Supreme Court in Petition(s) for Special Leave to Appeal (C) No(s). 22646/2016 (carried from the decision in **Smt. Neha Srivastava** (*supra*)), where Leave to Appeal has been denied *vide* order dated 23.07.2019. The declaration is wholesome and unqualified, followed by a formal order striking down the word ‘unmarried’ occurring in Rule 2(c) (iii) of the Rules. The principle is well settled that once a statute, particularly, a post Constitution Statute, governed by Clause (2) of Article 13, is declared unconstitutional for the violation of a fundamental right, it is rendered void. It is for all purposes rendered completely ineffectual, even if it lingers on, on the Statute Book as a dead letter. This issue has been the subject matter of pronouncement by high authority in the Constitution Bench decisions of the Supreme Court in **Saghir Ahmad v. State of U.P. & Others**³, **Deep Chand & Others v. State of U.P. & Others**⁴, **Mahendra Lal Jaini v. State of U.P. & Others**⁵ and **The State of Gujarat & Another v. Shri Ambica Mills Ltd., Ahmedabad & Another**⁶. It has also engaged attention of the Full Bench of Delhi High Court in **Sh. P.L. Mehra v. Sh. D.R. Khanna**⁷. The broad principle deducible is that a post Constitution statute declared void for contravening a Part III right is rendered completely unenforceable. These subtle aspects, if any, about the difference in the statute (a post Constitution law) being declared void on account of violation of a fundamental right on one hand and legislative competence on the other, need not trouble this Court, for they do not arise on the facts here.

³ AIR 1954 SC 728

⁴ AIR 1959 SC 648

⁵ AIR 1963 SC 1019

⁶ (1974) 4 SCC 656

⁷ AIR 1970 Del 1

19. If Mr. Upadhyay's submissions were to be regarded as one's advanced to bring home the distinction between the effect of a statute declared void for the violation of a fundamental right on one hand and legislative competence on the other, this Court has found it not to arise on facts because the petitioner here is also a citizen of India, whose fundamental right against discrimination on the ground of sex alone is equally infringed as that of the petitioners in **Smt. Vimla Srivastava** and **Neha Srivastava**. To all intents and purposes, Rule 2(c) (iii) of the Rules has been declared void in **Smt. Vimla Srivastava** and followed in **Neha Srivastava**. That declaration operates *in rem*. Thus, in the definition of 'family' occurring under Section 2(c) (iii), the word 'daughter' is to be read without the pre-fixed qualification 'unmarried'. The effect of the declaration, therefore, is that the Rule is to be read as one including 'daughter' in Rule 2(c) (iii), whether married or unmarried.

20. The submission of Mr. Upadhyay, if it were to deserve any serious consideration, would amount to accepting an almost insurmountable inhibition on the jurisdiction of this Court to declare an unconstitutional statute or statutory provision void for contravening a Part III right. A judgment of the Court declaring a statute void for the contravention of a fundamental right works to grant a declaration *proprio vigore*, rendering the provision invalidated; effaced for all intents and purposes. It does not certainly require a legislative compliance to give it effect. There could be some sense to that submission if after ignoring the word 'unmarried' occurring in Rule 2 (c) (iii) of the Rules, the provision had become workable. But, that it has not become. The word 'unmarried' has been struck down, applying the reputed doctrine of severability, that has always had approval of their Lordships of the Supreme Court. That doctrine has been accepted in **A.K.**

Gopalan vs. State of Madras⁸, D.S. Nakara and others vs. Union of India⁹, State of Bombay and another vs. F.N. Balsara¹⁰, and, in later years, in Minerva Mills Ltd. and others vs. Union of India and others¹¹ and Kihoto Hollohan vs. Zachillhu and others¹².

21. The severance of the offending part has made the remainder of Section 2(c) (iii) *intra vires*, purging it of the vice of discrimination on the ground of sex alone. What has remained back is a workable provision and is to be understood in the manner that a daughter, irrespective of her marital status, is to be regarded as a member of the deceased government servant's family, in the same manner as a son, whether married or unmarried. This Court, therefore, holds that in the definition of the deceased's family, the word 'daughter' has to be read unqualified by the marital status of the daughter and it requires no further amendment to the Rules by the Government to make the right of a daughter of the deceased government servant effective under the Rules. The impugned order, therefore, passed on the basis of a reading of Rule 2(c) (iii) of the Rules with the word 'daughter' qualified by the word 'unmarried' since struck down by this Court in **Smt. Vimla Srivastava** (and followed in **Neha Srivastava**), is manifestly illegal. It is so as it proceeds on the basis of a statutory provision, that has been declared unconstitutional and void by this Court.

22. In the result, the writ petition succeeds and is **allowed**.

23. The impugned order dated 25.06.2020 passed by the District Basic Education Officer, Prayagraj, rejecting the

8 AIR 1950 SC 27

9 AIR 1983 SC 130

10 AIR 1951 SC 318

11 (1980) 3 SCC 625

12 1992 Supp (2) SCC 651

petitioner's claim for compassionate appointment, is hereby **quashed**. A *mandamus* is issued to the District Basic Education Officer, Prayagraj to consider the petitioner's claim for compassionate appointment, in accordance with law, which shall mean without reference to her marital status, within a period of **two months** from the date of communication of a copy of this order.

24. There shall, however, be no order as to costs.

25. Let this order be communicated to the District Basic Education Officer, Prayagraj by the Joint Registrar (Compliance).

Order Date :- 15.12.2020

Anoop/ I. Batabyal