

terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. Para 38.2 and 38.3 are extracted:

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. ...

11. Applying the principles in the facts and circumstances of this case, termination of the respondent/petitioner was not held to be wrongful by the writ Court. Rather, the writ Court was of the opinion that a lesser punishment would suffice having regard to the guilt of the respondent/petitioner. Further, respondent nowhere pleaded that he was not gainfully employed or employed on lower wages during the period of dismissal of service. Accordingly, it cannot be said that the guilt of the respondent/petitioner stood wiped off while he was punished, rather, reinstatement was directed as a consequence of imposition of a lesser punishment, the respondent/petitioner would not be entitled to back wages, nor, consequential benefits as a consequence of such reinstatement.

12. On specific query, learned counsel for the respondent/petitioner fairly submits that the respondent has not assailed the impugned writ Court order, to the extent the learned Single Judge upheld the enquiry and the guilt of the petitioner.

13. In the circumstances, while imposing lesser punishment, in the opinion of the disciplinary authority the respondent is not entitled to wages for the period he has not performed his duties would be justified in view of Deepali Gundu (supra).

14. The impugned order is, accordingly, set aside to the extent it directs payment of back wages with all consequential benefits. Having regard to the fact that the respondent/petitioner was out of employment for eight long years, it would be equitable that 30% of back wages be paid to the respondent/petitioner for the period he was out of employment. The same shall be computed and released by the appellant-bank within three months from the date of filing of certified copy of this order.

15. No cost.

(2023) 5 ILRA 1581
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 1078 of 2023

Imran Khan ...Petitioner
State of U.P. & Ors. ...Respondents
Versus

Counsel for the Petitioner:
 Sri Akhilesh Kumar, Sri Akhilesh Chandra Shukla

Counsel for the Respondents:
C.S.C.

Civil Law - Service Matter - Compassionate Appointment - Married brother - Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - Rule 2 clause (c) sub-clause (iv), 'Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried' - Writ petition filed seeking to declare the expression 'unmarried' in the said Rule ultra vires. Held: Rule-making authority included brothers/sisters of the deceased Government servant in the definition of family provided they were unmarried, and at the same time, the Government servant was also unmarried. If the Government servant is married, then he has a dependent wife/children who are primarily his responsibility. The Court cannot sit in appeal over the judgment and wisdom of the employer in not including unmarried brothers and sisters within the definition of family of a married Government servant. Neither would the Court under Article 226 of the Constitution have any role in determining as to which family member should be included/excluded from the definition of family for the purpose of compassionate appointment. Court cannot suggest the manner in which the rule-making authority should structure or restructure the definition of family. Nothing to show as to how the exclusion of unmarried brothers/sisters from the definition of family of a married Government servant is manifestly arbitrary. Impugned Rule would not fall within the embargo of Article 14 of the Constitution of India. (Para 18, 19)

Dismissed. (E-5)

List of Cases cited:

1. Mohd Ikram Vs St. of U.P. & anr., Writ-A No. 59704 of 2012, decided on 19.11.2012

2. State of T.N. Vs P. Krishnamurthy, (2006) 4 SCC 517

3. Cellular Operators Association of India & ors. Vs Telecom Regulatory Authority of India & ors., (2016) 7 SCC 703

4. Indian Express Newspapers (Bombay) (P) Ltd. Vs U.O.I., (1985) 1 SCC 641

5. Shayara Bano Vs U.O.I. & ors., (2017) 9 SCC

6. Khoday Distilleries Ltd. & ors. Vs St. of Karn. & ors., (1996) 10 SCC 304

7. Sharma Transport Vs Government of A.P. & ors., (2002) 2 SCC 188

(Delivered by Hon'ble Suneet Kumar, J.
&
Hon'ble Rajendra Kumar-IV, J.)

1. Heard learned counsel for the parties.

2. By the instant petition, petitioner seeks to declare the expression '*unmarried*' ultra vires, in sub-clause (iv) of clause (c) of Rule 2 of Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. Further, petitioner seeks quashing of the order dated 7 September 2020, passed by the second respondent, Senior Superintendent of Police, Bulandshahar, rejecting the application submitted by the wife of the deceased-employee seeking appointment of the petitioner (brother-in-law) under the Rules, 1974.

3. The facts briefly giving rise to the instant writ petition is that the brother of the petitioner, namely, Javed Khan, working as constable in civil police, unfortunately died-in-harness on 27 August 2021, in an accident. The deceased-employee left behind his wife, aged about,

33 years and three minor sons, aged about, 10, 9 and 5 years, respectively. Apart from his family, the deceased-employee left behind his parents and three brothers, including, the petitioner. The third respondent/wife of the deceased-employee made an application on 12 August 2022, to the second respondent, requesting that petitioner be given compassionate appointment under Rules, 1974, in lieu of her, as he was looking after her minor children after the death of her husband. It is further stated that petitioner is unmarried and was dependent on her husband. The application came to be rejected by the impugned order dated 7 September 2022, passed by the second respondent, recording therein that petitioner does not fall within the definition of "family" under Rules, 1974, being unmarried brother of the deceased-employee who was married.

4. Reliance has been placed by the learned counsel for the petitioner on the decision rendered by the Single Judge in **Mohd Ikram Versus State of U.P. and another²**.

5. The definition of "family" reads thus:

"2(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons/adopted sons;

(iii).....

(iv) Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government

servant, if the deceased Government servant was unmarried."

6. Rules, 1974 came to be amended from time to time³. However, sub-clause (iv) continued as such. Accordingly, unmarried brothers/sisters of married government servant was not included in the definition of family.

7. In the given facts, the impugned Rule remains the same, insofar, it relates to the petitioner, prior to the amendment and thereafter. Sub-clause (iv) of Rule 2 (c), mandates that unmarried brothers dependent on the deceased Government servant, "if the deceased Government servant was unmarried" would fall within the definition of the expression "family". Petitioner is unmarried but as per his case, his brother/deceased employee was married having a wife and three sons. In other words, the deceased employee was not unmarried i.e. not having a family, but, otherwise.

8. Learned counsel for the petitioner submits that the expression "unmarried" brothers/sisters of the deceased "unmarried" Government servant in sub-clause (iv) is manifestly arbitrary, accordingly, violative of Article 14 of the Constitution of India.

9. It is submitted that unmarried brother can be dependent upon the married Government servant apart from his family i.e. wife and children. In this backdrop, it is submitted that sub-clause (iv) of Rule 2(c) is manifestly arbitrary while imposing the condition that "unmarried" brother cannot be dependent upon a married deceased employee.

10. The learned Standing Counsel for the State submits that a married Government servant has a separate and distinct family and the unmarried brothers/sisters cannot be said to be dependent upon of the married government servant. His first obligation is towards his own family. In the facts of the case petitioner has other brothers and parents. Petitioner is dependent upon them. The writ petition lacks merit.

11. Rival submissions fall for consideration.

12. The question that arises for consideration is as to whether the impugned Rule i.e. sub-clause (iv) of Rule 2(c) is manifestly arbitrary/unreasonable to render it violative of Article 14 of the Constitution of India.

13. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who challenges it to show that it is ultra vires/invalid. It is also well recognized that subordinate legislation can be challenged under any of the following grounds:

"(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the Court might well say that the legislature never intended to give authority to make such rules)."

(Refer: **State of T.N. vs. P. Krishnamurthy⁴ & Cellular Operators Association of India and others vs Telecom Regulatory Authority Of India and others⁵**)

14. One of the tests for challenging the constitutionality of subordinate legislation is that the subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available to challenge plenary legislation. (Refer: **Indian Express Newspapers (Bombay) (P) Ltd. vs. Union of India⁶**)

15. In **Shayara Bano Versus Union of India and others⁷**, Justice Rohinton Fali Nariman, upon examining the precedents, was of the opinion that there is no rational distinction between two types of legislation i.e. subordinate legislation and plenary legislation when it is challenged under Article 14. Para 101 reads thus:

"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would

apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

16. That takes us to consider the test of 'manifest arbitrariness'. It is well explained in **Khoday Distilleries Ltd. and others vs. State of Karnataka and others**⁸, which reads thus:

"13. . . . The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power. In the case of *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* [(1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287], this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. **A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary" . . . In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But**

subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution."
(emphasis supplied)

17. Also in **Sharma Transport vs. Government of A.P. and others**⁹, the Supreme Court held as follows:

"25. . . . The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. **In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. . . ."**

(emphasis supplied)

18. In the backdrop of the aforementioned proposition of law, the rule making authority included brothers/sisters of the deceased Government servant in the definition of family provided they were unmarried and at the same time the Government servant was also unmarried. In other words, if the Government Servant is married then he has a dependent wife/children who are primarily his responsibility. The expression 'unmarried' in the impugned Rule appears to have been incorporated with a purpose that a married Government servant would have a family of his own, therefore, in the opinion of the rule making authority the unmarried

brothers and sisters cannot be said to be dependent on the married Government servant in the sense that dependency of wife/children is primarily to the exclusion of brothers/sisters of the Government Servant. The married brothers/sisters certainly would have independent family from that of the Government servant.

19. The Court cannot sit in appeal over the judgment and wisdom of the employer in not including unmarried brothers and sisters within the definition of family of a married Government servant. Neither, the Court under Article 226 of the Constitution would have any role in determining as to which family member should be included/excluded from the definition of family for the purpose of compassionate appointment. The Court cannot suggest the manner in which the rule making authority should structure or restructure the definition of family. The learned counsel for the petitioner is unable to show as to how exclusion of unmarried brothers/sisters from the definition of family of married Government servant is manifestly arbitrary.

20. In the given facts, it is not in dispute that the petitioner is having brothers, as well as, his parents. Further, the deceased employee has left behind his wife and three minor children. In the circumstances, it cannot be said having regard to the definition of family that petitioner was dependent upon the deceased government servant. There is a distinction between someone being dependent and the other person receiving financial assistance. Petitioner was aged about 25 years at the death of the Government servant and presently aged about 29 years. Petitioner may have been receiving financial assistance intermittently but that would not

make him dependent on his brother, having regard to the fact that the deceased Government servant has a family of his own.

21. The impugned Rule may appear to be arbitrary by excluding the unmarried brothers/sisters from the definition of family of a married Government servant but that is not sufficient to make the Rule manifestly arbitrary so as to declare the Rule arbitrary under Article 14. The Rule is neither irrational, and/or, without adequate determining the principle or capricious to exclude unmarried brothers/sisters. Neither the impugned Rule is unreasonable in the sense of not being reasonable or rational. Merely alleging that the Rule is arbitrary would not be a sufficient ground to bring it within the embargo of Article 14 of the Constitution of India. The subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution i.e. not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will of the authority alone. The impugned Rule cannot be held to be manifestly arbitrary merely for the reason that it is not of universal application to the siblings of the Government servant but only confined to unmarried Government servant and unmarried brothers/sisters.

22. **Mohd Ikram** (supra) while observing "there is no embargo that the deceased Government servant should be an unmarried person is on misreading of sub-clause (iv) of Rule 2(c). In the facts arising therein, the deceased/Government servant was a married person, therefore, the unmarried brother of the deceased Government servant stands excluded from

the definition of family. The decision, in **Mohd Ikram** (supra), is per incuriam, accordingly overruled.

23. Having regard to the discussions hereinabove, the writ petition being devoid of merit is, accordingly, **dismissed**. The impugned Rule would not fall within the embargo of Article 14 of Constitution of India.

24. The dismissal of the writ petition, however, would not preclude the respondent-wife of the deceased Government servant from making an application for compassionate appointment. In case such an application is made, the same shall be considered by the competent authority on merit.

25. No cost.

(2023) 5 ILRA 1587
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.04.2023

BEFORE

THE HON'BLE SUNEET KUMAR, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Writ-A No. 6062 of 2023

Prabhat Kumar Tiwari **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Seemat Singh

Counsel for the Respondents:
C.S.C.

Civil Law - Service Matter - Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service (Second Amendment) Rules, 2016 - Rule 10

provides 'Age-10. A candidate for direct recruitment must have attained the age of 21 years and must not have attained the age of 28 years on the first day of July of a calendar year in which vacancies for direct recruitment are advertised'. Petitioner challenged the validity of Rule 10. Petitioner, was born on 01 July, consequently attained the age of 28 years and one day on the cutoff date; hence, he was hit by Rule 10. Held: Petitioner was unable to show how the amendment in the Rules of 2016 makes Rule 10 manifestly arbitrary, merely because the rule-making authority does not want a candidate for the post of Sub-Inspector who has attained the age of 28 years on the cutoff date to be considered eligible for the post. (Para 24)

Dismissed. (E-5)

List of Cases cited:

1. State of T.N. Vs P. Krishnamurthy, (2006) 4 SCC 517
2. Cellular Operators Association of India & ors. Vs Telecom Regulatory Authority of India & ors., (2016) 7 SCC 703
3. Indian Express Newspapers (Bombay) (P) Ltd. Vs U.O.I., (1985) 1 SCC 641
4. Khoday Distilleries Ltd. & ors. Vs State of Karnataka & ors., (1996) 10 SCC 304
5. Sharma Transport Vs Government of A.P. & ors., (2002) 2 SCC 188
6. U.O.I. Vs Pushpa Rani & ors., (2019) 9 SCC 242
7. Chandigarh Administration Vs Usha Kheterpal Waie & ors., (2011) 9 SCC 645
8. Maharashtra Public Service Commission Vs Sandeep Shriram Warade, (2019) 6 SCC 362
9. Punjab National Bank Vs Anit Kumar Das, 2020 SCC Online SC 897