IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.28966 of 2011

An application under Articles 226 and 227 of the Constitution of India

Urbashi Sahoo .... ***Petitioner***

Mr. Sidheswar Mallick, Advocate

-versus-

State of Orissa and another .... ***Opposite Parties***

Mr. A.R. Dash, AGA

Mr. B.N. Sarangi, Advocate
(for opposite party no.5)

CORAM:
JUSTICE S.K. MISHRA
JUSTICE SAVITRI RATHO

Date of Hearing:-06.04.2021 and 11.08.2021
Date of Order:- 11.08.2021

S.K. Mishra,J.

1. In this writ petition filed under Article 226 read with Article 227 of the Constitution of India, 1950, the petitioner-Urbashi Sahoo

assails the final order passed by the Orissa Administrative Tribunal (OAT), Cuttack Bench, Cuttack on 29.07.2011 in O.A. No.3395(C)/2009 dismissing her prayer of quashing the order of disengagement on 07.12.2009 i.e. Annexure-6 to the O.A.

2. The petitioner happens to be the only child of one Anandananda Sahoo, a fire man working under respondent no.1. He died in harness on 24.07.1983 while working as a fire man. At that time, the petitioner was only four years old. On attaining 18 years age, she applied on 05.04.1999 for Rehabilitation Assistance Scheme (RAS) as per the Orissa Civil Services (Rehabilitation Assistance) Rules, 1990. Her case was rejected alleging delay in filing the application.

She thereafter, submitted a representation to the D.G. & I.G. of Police, respondent no.2 for condonation of delay and after condonation of such delay and on production of distress certificate, she was appointed as a Junior Clerk vide order dated 10.04.2008, Annexure-2 to the O.A.

At the time of submission of application she was a unmarried girl, but as unreasonable delay was occasioned, she was married before the order of appointment was made. She has intimated about her marital status before the competent authority before joining in the post as a Junior Clerk in the Fire Services Department. As per Annexure-3 to the O.A., it is clear that she has intimated this fact to the authority before joining in her services. Moreover, the service book, copy of which has been annexed to the writ petition, as at

Annexure-4, reveals that while preparing the service book of the petitioner in the office of the Superintendent of Police, Angul, the name of her husband Sri Sangram Roul has been mentioned as one of the hairs of the petitioner.

After joining the post of Junior Clerk, she worked for one year. On completion of satisfactory qualifying service of one year, she was made regular by the Department. However, without any notice, all on a sudden, by virtue of State Police Headquarters letter No.46598, dated 07.12.2009, Annexure-6 to the O.A., she was discharged from service. She challenged the discharge before the State Administrative Tribunal, Cuttack Bench, Cuttack on 08.01.2010. Her application was disposed of by the Tribunal on 29.07.2011 giving a direction to the Opposite Party Nos. 1 and 2 to reconsider her case. However, the order of discharge was not quashed by the Tribunal. Such order is assailed in this case.

3. In course of hearing, the learned counsel for the petitioner Mr. Sidheswar Mallik would argue that the order of discharge, i.e. Annexure-6, passed by the opposite parties is liable to be quashed on the ground of violation of principles of natural justice. The 2nd ground on which he assails is that non-inclusion of married daughter in the Rehabilitation Assistance Scheme is violative of Article 14 of the Constitution of India. Alternatively, he submits that as per Rule 16 of the Orissa Civil Services (Rehabilitation Assistance) Rules, 1990, a relaxation could have been given by the authorities on the ground that prior to her appointment, at the time of submitting her application, she was not married and that she is the only child of the

Government servant, who died in harness. Therefore, Sri Mallick would argue that writ petition should be allowed, the order passed the Tribunal should be quashed and a writ of mandamus should be issued to the opposite parties, especially opposite party nos. 1 and 2 to re-engage the petitioner in the Police Department.

4. The learned Addl. Government Advocate, on the other hand, would argue that as per the definition 'family' provided in Rule-22 of the Orissa District Police Ministerial Officers Cadre (Method of Recruitment and Conditions of Services) Rules, 1995 and Rule 2(b) of the OCS (Rehabilitation Assistance) Rules, 1990, she is not included in the family of late Anandananda Sahoo and therefore, her employment has been rightly terminated.

5. As far as the violation of principles of natural justice is concerned, the learned Addl. Government Advocate submits that the principles natural justice is not attracted in a case like this. Therefore, he argues to dismiss the writ application. Mr. Bibekananda Sarangi, learned counsel for the opposite party no.5 submits that the application should be allowed as the petitioner happens to be the only child of the late Government employee, who died in harness.

6. Taking up the question of applicability of the Rules to the case in hand, we are of the opinion that since the petitioner was unmarried at the time of submitting her application on 05.04.1999 and she was given appointment as a Junior Clerk on 10.04.2008, after lapse of 9 years of her application, the authorities should have considered her case as per Rule 16 of the O.C.S. (Rehabilitation Assistance) Rules,

1990 and should have opined that this is not a case fit for termination of her employment. It is also borne out from the record that the petitioner has not suppressed the fact of her marriage at the time of joining the post. In fact, she has given in writing that in the meantime she has married. This fact is also reflected in the service book maintained by the Department. There appears to be no reasonable ground not to consider her case by relaxing the rigors of the provisions of the O.C.S. (Rehabilitation Assistance) Rules, 1990. Moreover, the ratio decided by this Court in the case of ***Chakradhar Das vrs. Orissa Bridge Construction Corporation***, 81 (1996) CLT 423, should have considered by the authorities. Therefore, we are of the opinion that the petitioner is entitled to the relief she has prayed for.

7. It is also borne out from the records that the petitioner was given employment. She joined in Service. After completion of satisfactory discharge of duty for one year, she was regularized in her post. Thereafter, the authorities issued an order of termination without giving a notice of show-cause to her. So, this is a clear violation of principles of natural justice as well as the Provision of Article 311 of the Constitution of India. It is not the case of the opposite parties that it comes within the exception of Clause-2 of Article 311 of the Constitution of India in which case they can dispense with principles of natural justice and issuance of show-cause notice and opportunity of hearing before passing an order of discharge. Hence, we are of the view that this is a meritorious case and it should be allowed.

8. In the result, we hereby allow the writ application and the order of discharge dated 07.12.2009, as at Annexure-6, to the O.A. and the final order passed by the Tribunal on 29.07.2011, as at Annexure-8, are hereby quashed. Issue a writ mandamus to the opposite party nos. 1 to 4 to immediately re-instate her in her post as Junior Clerk within two weeks from the date of receipt of notice of this order or production of certified copy of this order. She is entitled to all service benefits from the date of her discharge on 07.12.2009 till re-instatement, except the salaries and other allowances, etc; as she has not worked for that period. However, her case for notional increments for the entire period, seniority and consideration for promotion shall be considered by the authorities as early as possible, within a period of four months from the date of her re-instatement. There shall be no orders as to the costs.

This order be communicated to the opposite parties at the cost of the petitioner. Let him file requisites within 30 days hence.

(S.K. Mishra)
Judge

W.P.(C) No.28966 of 2011

9. I have gone through the order passed by my esteemed brother S.K Mishra, J. and whole heartedly agree with it.

10. But I have decided to supplement the order for three reasons:

A. The definition of "*family members*" in Rule 2 (1) (d) of the Odisha Civil Service (Rehabilitation Assistance) Rules ,1990 (in short "1990 Rules"), is offensive of gender equality and the right to equality enshrined in Article 14 , 15 and 16 of the Constitution and the Directive Principles of State policy. The *pari materia provision* in the Odisha Civil Services (Rehabilitation Assistance) Rules , 2020 (in short " the 2020 Rules") continues to exclude a married daughter from the zone of consideration in the matter of compassionate appointment .

B. It has been brought to our notice that even though the Tribunal vide order dated 29.07.2011 had directed the Respondents to consider the case of the petitioner as a special case under Rules-16 of the Orissa Civil Service (Rehabilitation Assistance) Rules 1990 and decide her case of appointment in accordance with the decision of the High Court in the case of **Chakradhar Das vs Orissa Bridge Construction Corporation** reported in **81 (1996) CLT 423**, the same has not been done in spite of elapse of 10 years. Though Mr.Khuntia, learned Addl. Government

Advocate submits that this has not been done in view of the pendency of this writ application, we find this submission unacceptable because although notice in this writ application had been issued on 03.11.2011, no interim order has been passed staying operation of the order of the Tribunal. Hence, there was no justification for the Respondents not to consider the case of the petitioner as a special case, more so when they have not challenged the decision of the Tribunal. It is therefore apparent that without making a provision for compassionate appointment of a married daughter in the statute, and expecting the State Government to exercise its discretion in her favour is like adding salt to injury as because when a matter if left to the discretion of the officials of the State Government, more often than not, they do not exercise such discretion even if it is a deserving case .

C. A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (1) (d) . But a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. Her exclusion operates by reason of marriage and, whether or not she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is discriminatory . The only basis of the exclusion of married daughter is marriage. But for her marriage, a daughter would

not be excluded from the definition of the expression "family". This , in effect , marriage in case of a daughter is taken to be a disqualification which is perse unreasonable and arbitrary as it would also exclude a married daughter who has been deserted by her husband , even if she was staying with and was dependent on the deceased parent .

11. The world has changed and women have achieved so many milestones and stormed into what was traditionally considered to be the male bastions. Women in our country have become President , Prime Minister, Defence Minister, Finance Minister, won Olympic medals, climbed Mt. Everest , can join the armed forces . Daughters are giving "*mukha agni*" to the pyres of their parents, looking after their aged parents and/or their orphaned siblings while their brothers often do not. In this pandemic one daughter carried her father across the country on a bicycle. As legal heirs of their parents, they are held liable to discharge the debts of their parents and are considered to be coparceners in ancestral property . They are liable under Section – 125 (1) (d) of the Code of Criminal Procedure to pay maintenance to their parents and have equal responsibility/duty (with their brothers) to maintain their parents under the provisions of Maintenance and Welfare of Parents and Senior Citizens Act., 2007. In these cases , marriage of a daughter is not considered to be a disqualification .

In fact , the Hon'ble Supreme Court in the case of **Dr.(Mrs.) Vijaya Manohar Arbat v. Kashi Rao Rajaram Sawai and another** reported in

(1987) 2 SCC 278 while repelling the argument, that married daughter has no obligation to maintain her parents, have held that a daughter after her marriage does not cease to be a daughter of her father or mother and observed as under:-

> *..."12. We are unable to accept the contention of the appellant that a married daughter has no obligation to maintain her parents even if they are unable to maintain themselves. It has been rightly pointed out by the High Court that a daughter after her marriage does not cease to be a daughter of the father or mother. It has been earlier noticed that it is the moral obligation of the children to maintain their parents. In case the contention of the appellant that the daughter has no liability whatsoever to maintain her parents is accepted, in that case, parents having no son but only daughters and unable to maintain themselves, would go destitute, if the daughters even though they have sufficient means refuse to maintain their parents.*
>
> *13. After giving our best consideration to the question, we are of the view that Section 125(1)(d) has imposed a liability on both the son and the daughter to maintain their father or mother who is unable to maintain himself or herself. Section 488 of the old Criminal Procedure Code did not contain a provision like clause (d) Section 125(1). The legislature in enacting Criminal Procedure Code, 1973 thought it wise to provide for the maintenance of the parents of a person when such*

parents are unable to maintain themselves. The purpose of such enactment is to enforce social obligation and we do not think why the daughter should be excluded from such obligation to maintain their (sic her) parents."

This decision also brings to mind Emily Griffith's well known quote :

"*A son is a son till he is gets a wife but a daughter is a daughter all her life*"

Then why this continued discrimination towards a married daughter when it comes to compassionate appointment , especially when the object of the appointment is for the purpose of maintaining the family when the bread earner (whether it is the mother or father) is snatched away untimely leaving the family in distress .

12. Rule-2 (b) of the Orissa Civil Service (Rehabilitation Assistance) Rules 1990 is extracted below:-

"2. Definitions.- In these rules, unless the context otherwise requires:-

(a) xxx xxx xxx

*(b) "**Family Members**" shall mean and include the following members in order of preference-*

(i) Wife/Husband;

(ii) Sons or step sons or sons legally adopted through a registered deed;

(iii) Unmarried daughters and unmarried step daughters;

(iv) [Widowed daughter or daughter-in-law residing permanently with the affected family.]

(v) Unmarried or widowed sister permanently residing with the affected family;

[(vi) Brother of unmarried Government servant who was wholly dependant on such Government servant at the time of death.].....

(c)	*xxx*	*xxx*	*xxx*
(d)	*xxx*	*xxx*	*xxx*
(e)	*xxx*	*xxx*	*xxx*
(f)	*xxx*	*xxx*	*xxx"*

There is differentiation between a son and a daughter in the sense that step sons and adopted sons have been included alongwith sons but in case of a daughter, only unmarried daughters and unmarried step daughters, widowed daughter residing permanently with the affected family have been included.

There is no change as regards the right of married daughters in the pari material provision in the Odisha Civil Service (Rehabilitation Assistance) Rules 2020 (in short "2020 Rules"), which is Rule-2 (d) and is extracted below:-

"2. Definitions- (1) In these rules, unless the context otherwise requires-

(a)	*xxx*	*xxx*	*xxx*
(b)	*xxx*	*xxx*	*xxx*
(c)	*Xxx*	*xxx*	*xxx*

*(d) "**Family Members**" means and include the following members:-*

(i) Spouse of the deceased Government servant .

(ii) Sons or step sons or sons legally adopted through a registered deed executed before the death of the Government servant .

(iii) Un-married daughters and Un-married step daughters .

(iv) Widowed daughter or daughters-in-law residing permanently with the family of the deceased Government employee .

(v) Legally divorced daughter".....

(v) Unmarried or widowed sister permanently residing with the affected family;

[(vi) Brother of unmarried Government servant who was wholly dependant on such Government servant at the time of death.].....

In the 1990 Rules, discretion had been given to the State Government by virtue of Rule 16 to relax the provisions in a particular deserving case. Rule 16 of the 1990 Rules is extracted below :

"16. (1) The State Government where satisfied that the operation of all or any provisions of these rules causes undue hardship in any particular case, it may dispense with or relax the provisions to such extent as it may consider necessary for dealing with the case in a just and equitable manner.

(2) Such cases shall be examined in General Administration Department and orders of Chief minister shall be obtained."

There is no *pari materia* provision in the 2020 Rules but Rule 10 which is extracted below deals with interpretation :

*"10. **Interpretation**:- If any question arises relating to the interpretation of any provision of these rules , it shall be referred to the Government in the General Administration and Public Grievance Department for decision."*

In other words , while some relaxation in respect of deserving cases including a married daughter could be considered by the Government by exercising and with the consent of the Chief Minister, that relaxation is no longer available in the 2020 Rules. The doors for compassionate appointment of a married daughter have been completely closed.

13. As a result of this discrimination against a married daughter in the definition of "*family member*", in the present case the services of the only child of the deceased government servant - a daughter who was a minor at the time of his death and after attaining majority in the year 1999 had applied for appointment and was given appointment as Junior Clerk in the year 2008, were terminated after one year in 2009 because she got married before her appointment as it took the State Government nine long years to give her appointment. Thereafter, in spite of the order of the tribunal to consider her case, ten years have elapsed, but the Government has not considered her case under section 16 of the 1990 Rules. As stated earlier , , the 1990 Rules have been replaced by the 2020 Rules.

14. Both in the 1990 Rules and 2020 Rules, while there is no differentiation between a son and a married son , discrimination has been made between a daughter and a married daughter which is discriminatory and offends gender equality. A legally divorced daughter who was earlier not included in the 1990 Rules has now been included in the definition of "family Members" in the 2020 Rules , but a married daughter continues to be excluded.

15. It would be apposite to refer to the **Convention on the Elimination of All Forms of Discrimination against Women** (in short "**CEDAW**"), adopted in 1979 by the UN General Assembly, which is often described as an international bill of rights for women (emphasis supplied). Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.(emphasis supplied)

The Convention defines discrimination against women as:

> *"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*

The Preamble of CEDAW reiterates that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity. By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including:

to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;

to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and

to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

The Government of India was an active participant to CEDAW , ratified it on 19-6-1993 and acceded to CEDAW on 8-8-1993 with reservation on Articles 5(e), 16(1), 16(2) and 29.

The principle of "gender equality" is enshrined in the Indian Constitution and in its Preamble and Fundamental Rights. It also finds mention in the Fundamental duties as well as directive Principles. Our Constitution grants equality to women, ensures their equality before the law, and prohibits discrimination against any citizen on the basis of religion, race, caste, sex or place of birth. So it is expected that the Government should make endeavour to eliminate obstacles, prohibit all gender-based discriminations which is also mandated by Articles 14 and 15 of the Constitution of India. It should also take all steps possible to modify law and its policies in order to do away with gender-based discrimination in the existing laws and regulations. Unfortunately , everyday , we come across

instances of discrimination on the basis of gender in all fields including legislation. This is only one such instance.

Almost half a century back, Justice V.R Krishna Iyer in the case of **C. B. Muthamma vs Union Of India & Ors reported in 1979 SCC (4) 260,** where the petitioner a lady I.F.S officer had challenged two draconian provisions in the service rules; one - which required a woman member of the service to obtain permission in writing of the Government before marriage and the woman member may be required to resign any time after marriage if the Government is satisfied that her family and domestic commitments will hamper her duties as a member of the service and the second – that no married woman shall be entitled as of right to be appointed to the service. She had also stated that she was not being given promotion and had been superseded by male officers because of discrimination against women in the service. The petition was ultimately dismissed as during pendency of the writ petition, the petitioner was promoted, one of the offensive provisions was deleted and another was in the process of being deleted; and the government had agreed to review the seniority of the petitioner. But not before Justice V Krishna Iyer in his inimitable style and without mincing any words had observed a follows :

> *"... 6. At the first blush this rule is in defiance of Article 16 , iIf a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex*

forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in Action. And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of die-hard allergy to gender parity is inevitable.

7. We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern…".

In the case of ***Anuj Garg* v. *Hotel Association of India*, (2008) 3 SCC 1,** the provisions of section 30 of the Punjab Excise Act 1914, prohibiting employment of males below the age of 25 years and women on the premises where liquor is sold, were under challenge . Some of the observations of the Hon'ble Apex Court are very pertinent . They are extracted below :

"… 7. The Act is a pre-constitutional legislation. Although it is saved in terms of Article 372 of the Constitution, challenge to its validity on the touchstone of Articles 14, 15 and 19 of the Constitution of India, is permissible in law. While embarking on the questions raised, it may be pertinent to know that a statute although could have been held to

be a valid piece of legislation keeping in view the societal condition of those times, but with the changes occurring therein both in the domestic as also international arena, such a law can also be declared invalid."….

"21. When the original Act was enacted, the concept of equality between two sexes was unknown. The makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of a legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefoer would be on the State. While considering validity of a legislation of this nature, the Court was to take notice of the other provisions of the Constitution including those contained in Part IV-A of the Constitution."

"25……. Right to be considered for employment subject to just exceptions is recognized by Article 16 of the Constitution. Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life.

They have also been representing people at grass root democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriage, pilots et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a Multinational Company. They are now widely accepted both in police as also army services." .....

In the case of **A. *Satyanarayana* v. *S. Purushotham*, (2008) 5 SCC 416**, the Hon'ble Supreme Court has observed as under :

"34. A statutory rule, it is trite law, must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. The Legislature, it is presumed, would be a reasonable one.

Indisputably, the subordinate legislation may reflect the experience of the rulemaker, but the same must be capable of being taken to a logical conclusion."....

The Hon'ble Supreme Court recently , in the case of ***Secretary, Ministry of Defence v. Babita Puniya*** *reported in* ***2020 SCC OnLine SC 200*** *while dealing with appointment of women in short service commissions in the Army has observed as follows : -*

"67. The policy decision of the Union Government is a recognition of the right of women officers to equality of opportunity. One facet of that right is the principle of non discrimination on the ground of sex which is embodied in Article 15(1) of the Constitution. The second facet of the right is equality of opportunity for all citizens in matters of public employment under Article 16 (1)....."

"....

E Stereotypes and women in the Armed Forces

53. Seventy years after the birth of a post-colonial independent state, there is still a need for change in attitudes and mindsets to recognize the commitment to the values of the Constitution....."

16. But Odisha is not the only state whose Rules reek of gender discrimination such discrimination against a married daughter in the matter of compassionate appointment . In many other states of our country, similar discrimination is writ large in the Rules framed for compassionate appointment, for which different High Courts have examined the provisions and there are a catena of decisions pronounced by various High courts which have decried such discrimination and have held that any action/clause of the policy/ Rules/ Regulation which deprive a married daughter from being considered for compassionate appointment runs contrary to Articles 14, 15, 16 and also Article - 39(a) of the Constitution .

17. While in some cases the offensive clause/provision have been struck down, in others it has been read down to save the provision from being declared unconstitutional, so that a married daughter is included within the definition of Family of family member members and/or held entitled to be considered for compassionate appointment and/or directed to be given appointment.

Some High Courts have ruled that if the daughter was unmarried and dependent on the deceased Government servant at the time of his/her death and the only child, she has a right to be considered for appointment.

A few High Court have held that keeping in view the object of the scheme/rules, irrespective of the number of dependent children of the deceased employee at the time of his death, a married daughter has the right to be considered for employment.

In the case of **Udham Singh Nagar District Cooperative Bank Ltd. & another vs Anjula Singh and Others: Special Appeal No.187 of 2017** reported in **AIR 2019 Utr 69,** the following questions had been referred to the Full Bench of the Uttarakhand high Court :

> *"(i) Whether any of the members, referred to in the definition of a "family" in Rule 2(c) of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short "the 1974 Rules") and in the note below Regulation 104 of the U.P. Co- operative Committee Employees Service Regulations, 1975 (for short "the 1975 Regulations") would be entitled for compassionate appointment even if they were not dependent on the Government servant at the time of his death?*
>
> *(ii) Whether non-inclusion of a "married daughter" in the definition of "family", under Rule 2(c) of the 1974 Rules, and in the note below Regulation 104 of the 1975 Regulations, is discriminatory, and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India?"*

After referring to a number of decisions, the reference was answered as follows :

> *"…66. We answer the reference holding that:-*

i. Question No.1 should be answered in the affirmative. It is only a dependent member of the family, of the Government servant who died in harness, who is entitled to be considered for appointment, on compassionate grounds, both under the 1974 Rules and the 1975 Regulations.

ii. Question No.2 should also be answered in the affirmative. Non- inclusion of "a married daughter" in the definition of a "family", under Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though she was dependent on the Government servant at the time of his death, is discriminatory and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India.

iii. We, however, read down the definition of "family", in Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, to save it from being held unconstitutional. As a result a "married daughter" shall also be held to fall within the inclusive definition of the "family" of the deceased Government servant, for the purpose of being provided compassionate appointment under the 1974 Rules and the 1975 Regulations"

A Full Bench of the Madhya Pradesh High Court in the case **of Meenakshi Dubey vs. M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. and others reported in AIR 2020 MP 60 : SCC Online MP 383** had been called upon to decide the following issue :

"*Whether in the matter of compassionate appointment covered by Policy framed by the State Government wherein, certain class of dependent which includes unmarried daughter a widowed daughter and a divorced daughter and in case of a deceased Govt. servant who only has daughter, such married daughter who was*

wholly dependent on Govt. servant subject to she giving her undertaking of bearing responsibility of other dependents of the deceased Govt. servant, Clause 2.2 and 2.4 can be said to be violative of Article 14, 15, 25 and 51A (e) of the Constitution."

It held as follows :

" ....17 We are not oblivious of the settled legal position that compassionate appointment is an exception to general rule. As per the policy of compassionate appointment, State has already decided to consider claims of the married daughters (Clause 2.4) for compassionate appointment but such consideration was confined to such daughters who have no brothers. After the death of government servant, it is open to the spouse to decide and opt whether his/her son or daughter is best suited for compassionate appointment and take responsibilities towards family which were being discharged by the deceased government servant earlier."

18. xxx xxx xxx

19. xxx xxx xxx

20....."..... In view of catena of judgments referred hereinabove, it can be safely concluded that Clause 2.2 to the extent it deprives married woman from right of consideration for compassionate appointment violates equality clause and cannot be countenanced. By introducing Clause 2.4, the Government partially recognised the right of consideration of married daughter but such consideration was confined to such daughters who have no brothers. Clause 2.2, as noticed, gives option to the living spouse of deceased government servant to nominate son or unmarried daughter. There is no condition imposed while considering a son relating to marital status. Adjective/condition of "unmarried" is

affixed for the daughter. This condition is without there being any justification and; therefore, arbitrary and discriminatory in nature.

21. Looking from any angle, it is crystal clear that clause 2.2 which deprives the married daughter from right of consideration cannot sustain judicial scrutiny. Thus, for different reasons, we are inclined to hold that Indore Bench has rightly interfered with Clause 2.2 of the said policy in the case of ***Smt. Meenakshi*** *(Supra).*

22. In nutshell, broadly, we are in agreement with the conclusion drawn by Indore Bench in ***Smt. Meenakshi*** *(Supra) and deem it proper to answer the reference as under:*

"Clause 2.2 of the policy dated 29.09.2014 is violative of Articles 14, 15, 16 and 39(a) of the Constitution of India to the extent it deprives the married daughter from right of consideration for compassionate appointment. We find no reason to declare Clause 2.4 of the policy as ultra vires. To this extent, we overrule the judgment of Indore Bench in the case of Meenakshi (Supra)"

23. The issue is answered accordingly."

A Division bench of the Himachal High Court in the case of **Mamata Devi vs State of HP : 2020 SCC OnLine HP 2125 : 2021 Lab IC 1,** has directed the State to give compassionate employment to the petitioner who was the married daughter if she otherwise fulfilled the eligibility criteria, holding as follows **:**

*"… **22.** Moreover, in the instant case there is no male member in the family, since the father of the petitioner, who died in harness,*

left behind his widow and two daughters only, the petitioner, being the elder daughter. The aim and object of the policy for compassionate appointment is to provide financial assistance to the family of the deceased employee. In the absence of any male child in the family, the State cannot shut its eyes and act arbitrarily towards the family, which may also be facing financial constraints after the death of their sole bread earner.

23. *As held above, the object of compassionate appointment is not only social welfare, but also to support the family of the deceased government servant, so, the State, being a welfare State, should extend its hands to lift a family from penury and not to turn its back to married daughters, rather pushing them to penury. In case the State deprives compassionate appointment to a married daughter, who, after the death of the deceased employee, has to look after surviving family members, only for the reason that she is married, then the whole object of the policy is vitiated.*

24. *After incisive deliberations, it emerges that core purpose of compassionate appointment is to save a family from financial vacuum, created after the death of deceased employee. This financial vacuum could be filled up by providing compassionate appointment to the petitioner, who is to look after the survivors of her deceased father and she cannot be deprived compassionate appointment merely on the ground that she is a married daughter, more particularly when there is no male child in the family and the petitioner is having 'No Objection Certificates' from her mother and younger sister, the only members in the family.*

25. *In the instant case, in case the petitioner is not given compassionate appointment, who has to take care of her widowed mother and sister, if she is otherwise eligible and she fulfils the*

apt criteria, the whole family will be pushed to impoverishment, vitiating the real aim of the compassionate employment policy…."

In a recent decision, the Madhya Pradesh High Court in the case of **State of M.P vs Jyoti Sharma**: **2021 SCC online M.P.**, has found fault with the provision making a married daughter eligible for compassionate appointment only when she is an only child. Referring to the CEDAW and the observations of the Hon'ble Supreme Court in the case of **Babita Puniya** (supra), it has held as follows:

"…By introducing Clause 2.4, the Government partially recognised the right of consideration of married daughter but such consideration was confined to such daughters who have no brothers. Clause 2.2, as noticed, gives option to the living spouse of deceased government servant to nominate son or unmarried daughter. There is no condition imposed while considering a son relating to marital status. Adjective/condition of "unmarried" is affixed for the daughter. This condition is without there being any justification and; therefore, arbitrary and discriminatory in nature."…..

…."In view of catena of judgments referred hereinabove, it can be safely concluded that Clause 2.2 to the extent it deprives married woman from right of consideration for compassionate appointment violates equality clause and cannot be countenanced. By introducing Clause 2.4, the Government partially recognised the right of consideration of married daughter but such consideration was confined to such daughters who have no brothers. Clause 2.2, as noticed, gives option to the living spouse of deceased government servant to nominate son or unmarried daughter. There is no condition imposed while considering a son

relating to marital status. Adjective/condition of "unmarried" is affixed for the daughter. This condition is without there being any justification and; therefore, arbitrary and discriminatory in nature."…..

The Madhya Pradesh High Court in the case of Bhawna Chourasia vs. State of M.P reported in 2019 (2) MPLJ 707 has held as follows :

"… 15. This is a matter of common knowledge that in present days there are sizable number of families having single child. In many families, there are no male child. The daughter takes care of parents even after her marriage. The parents rely on their daughters heavily. Cases are not unknown where sons have failed to discharge their obligation of taking care of parents and it is taken care of and obligation is sincerely discharged by married daughters. Thus, it will be travesty of justice if married daughters are deprived from right of consideration for compassionate appointment."

The Chhatisgarh High Court in the case of **Sarojini Bhoi vs. State of Chattisgarh and others: WP(S) No.296 of 2014 decided on 30.11.2015** has held that the impugned policy of Government prohibiting consideration of married daughter from compassionate appointment to be violative of Article 14 of the Constitution the criteria to grant compassionate appointment should be dependency rather than marriage. A daughter even after marriage remains daughter of her father and she could not be treated as not belonging to her father's family. Institution of marriage was basic civil right of man and woman and marriage by itself was not a disqualification. Paragraphs 16, 28 and 29 of the judgment are extracted below :

"…16. Thus, marriage is an institution/sacred union not only legally permissible but also basic civil right of the man and woman and one of

the most important inevitable consequences of marriage is the reciprocal support and the marriage is an institution has great legal significance and right to marry is necessary concomitant of right to life guaranteed under Article 21 of the Constitution of India as right to life includes right to lead a healthy life.

.....

28. Thus, from the aforesaid analysis, it emanates that institution of marriage is an important and basic civil right of man and woman and marriage by itself is not a disqualification and impugned policy of the State Government barring and prohibiting the consideration of the married daughter from seeking compassionate appointment merely on the ground of marriage is plainly arbitrary and violative of constitutional guarantee envisaged in Article 14, 15 and 16(2) of the Constitution of India being unconstitutional.

29. As a fallout and consequence of aforesaid discussion, writ petition is allowed and consequently Clause 3(1)(c) of policy relating to compassionate appointment dated 10/06/2003 and Clause 5(c) of policy dated 14/06/2013 being violative and discriminatory to the extent of excluding married daughter for consideration from compassionate appointment are hereby declared void and inoperative and consequently the impugned order (Annexure-P/3) rejecting the petitioner's case for compassionate appointment is quashed. The respondents/State is directed to reconsider the claim of petitioner for being appointed on compassionate ground afresh in accordance with law keeping in view that her father died on 06/01/2011 and her application was rejected on 28/09/2011, preferably within a period

of forty five days from the receipt of certified copy of order. No order as to cost(s).”

A Division Bench of the Chattisgarh High Court in the case of **Bailadila Berozgar Sangh vs. National Mineral Corporation Ltd**. has held as follows :

"*....It is not disputed that the Corporation is an instrumentality of the State and comes within the definition of the State under Article 12 of the Constitution and that the equality provisions in Articles 14 and 16 of the Constitution apply to employment under the Corporation. Therefore, a woman citizen cannot be made ineligible for any employment under the Corporation on the ground of sex only but could be excluded from a particular employment under the Corporation if there are other compelling grounds for doing so."*

A larger Bench of the Calcutta High Court in the case of **State of W.B. and others vs. Purnima Das and others (2018 Lab IC 1522)** had been called upon to decide the question:

"*Whether the policy decision of the State Government to exclude from the zone of compassionate appointment a daughter of an employee, dying- in-harness or suffering permanent incapacitation, who is married on the date of death/permanent incapacitation of the employee although she is solely dependent on the earnings of such employee, is constitutionally valid* ?"

Clause 2 (2) provided “*For the purpose of appointment on compassionate ground a dependent of a government employee shall mean wife/husband/son/unmarried daughter of the employee who is/was solely dependent on the government employee”*

It interalia held that –

".....We are inclined to hold that for the purpose of a scheme for compassionate appointment every such member of the family of the Government employee who is dependent on the earnings of such employee for his/her survival must be considered to belong to 'a class'. Exclusion of any member of a family on the ground that he/she is not so dependent would be justified, but certainly not on the grounds of gender or marital status. If so permitted, a married daughter would stand deprived of the benefit that a married son would be entitled under the scheme. A married son and a married daughter may appear to constitute different classes but when a claim for compassionate appointment is involved, they have to be treated equally and at par if it is demonstrated that both depended on the earnings of their deceased father/mother (Government employee) for their survival. It is, therefore, difficult for us to sustain the classification as reasonable."

It answered the reference in the following words:

"*111. Our answer to the question formulated in paragraph 6 supra is that complete exclusion of married daughters like Purnima, Arpita and Kakali from the purview of compassionate appointment, meaning thereby that they are not covered by the definition of 'dependent' and ineligible to even apply, is not constitutionally valid.*

112. Consequently, the offending provision in the notification dated April 2, 2008 (governing the cases of Arpita and Kakali) and February 3, 2009 (governing the case of Purnima) i.e. the adjective 'unmarried' before 'daughter', is struck down as violative of the Constitution. It, however, goes without saying that after the need for compassionate appointment is established in

accordance with the laid down formula (which in itself is quite stringent), a daughter who is married on the date of death of the concerned Government employee while in service must succeed in her claim of being entirely dependent on the earnings of her father/mother (Government employee) on the date of his/her death and agree to look after the other family members of the deceased, if the claim is to be considered further."

The Karnataka High Court in **(R. Jayamma V.Karnataka Electricity Board reported in ILR 1992 Kar 3416** has held as follows **:** :

"10. *This discrimination, in refusing compassionate appointment on the only ground that the woman is married is violative of Constitutional Guarantees. It is out of keeping with the trend of times when men and women compete on equal terms in all areas. The Electricity Board would do well to revise its guidelines and remove such anachronisms."*

The Madras High Court in **R. Govindammal V. The Principal Secretary, Social Welfare and Nutritious Meal Programme Department & others reported in 2015 (3) LW 756)** :

"14. *Therefore, I am of the view that G.O.Ms. No. 560 dated 3-8-1977 depriving compassionate appointment to married daughters, while married sons are provided compassionate appointment, is unconstitutional. In fact, the State can make law providing certain benefits exclusively for women and children as per Article 15(3) of the Constitution. But the State cannot discriminate women in the matter of compassionate appointment, on the ground of marriage."*

In **Krishnaveni vs. Kadamparai Electricity Generation Block, Coimbator District** reported in **2013 (8) MLJ 684 in R. Govindammal,** the Madras High Court has inter alia observed that if marriage is not a bar in the case of son, the same yardstick shall be applied in the case of a daughter also.

The Bombay High Court in **Sou. Swara Sachin Kulkrni v. Superintending Engineer, Pune Irrigation Project Circle, 2013 SCC OnLine Bom 1549** opined as under:

> "3..... *Both are married. The wife of the deceased and the mother of the daughters has nobody else to look to for support, financially and otherwise in her old age. In such circumstances, the stand of the State that married daughter will not be eligible or cannot be considered for compassionate appointment violates the mandate of Article 14, 15 and 16 of the Constitution of India. No discrimination can be made in public employment on gender basis. If the object sought can be achieved is assisting the family in financial crisis by giving employment to one of the dependents, then, undisputedly in this case the daughter was dependent on the deceased and his income till her marriage.*"
>
> It was further held as under:
>
> "3..... *We do not see any rationale for this classification and discrimination being made in matters of compassionate appointment and particularly when the employment is sought under the State."*

A larger bench of the Tripura High court in the case of **Debashri Chakraborty vs. State of Tripura and others** reported in, **2020 (1) GLT 198,** has taken note of various judgments of the High Courts including the judgment of Allahabad High Court in **Vimla Shrivastava and others vs. State of UP** (supra) and judgment of Karnataka High Court in **Manjula Vs. State of Karnataka, 2005 (104) FLR 271** and answered the question referred to it , as follows;

> "ii. *Question No.2 should also be answered in the affirmative. Non-inclusion of "a married daughter" in the definition of a "family", under Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though she was dependent on the Government servant at the time of his death, is discriminatory and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India.*
>
> *iii. We, however, read down the definition of "family", in Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, to save it from being held unconstitutional. As a result a "married daughter" shall also be held to fall within the inclusive definition of the "family" of the deceased Government servant, for the purpose of being provided compassionate appointment under the 1974 Rules and the 1975 Regulations.*" (Emphasis supplied).

18. In the light of aforesaid decisions , constitutional principles, exclusion of a married daughter from consideration compassionate appointment while at the same time including a married son as one of the dependents

eligible for compassionate appointment, is based solely on gender discrimination and there is no other constitutionally permissible basis . Exclusion of a married daughter is not based on any rationale having reasonable nexus with the object sought to be achieved. Such unreasonable exclusion is therefore violative of Article 14 and 16 of the Constitution of India which prohibits discrimination only on the ground of sex.

19. In the case of **Charadhar Das** (supra), which had been filed by the parents of the deceased Government Servant, this Court had directed the Government to consider the case of their unemployed son in law for compassionate as Rule 16 (1) authorised the appropriate authority to relax the Rules to such extent as it may consider necessary for dealing with a case in a just and equitable manner. But as discussed earlier there is no *pari materia* provision in the 2000 Rules.

In **Smt Ketaki Manjari Sahu vs State of Orissa** reported in **1998 (II) OLR 452**, this Court in similar facts referring to Rule 16 of the 1990 Rules had directed the State Government to consider the case of the married daughter on compassionate ground and without making it a precedent**.**

Unfortunately as has happened in the present case, when it is left to the discretions of the authorities, more often than not, they do not exercise it to do render justice. In spite of the tribunal directing the Government to consider the case of the petitioner as a special case under

Rule – 16 of the 1990 Rules in accordance with the decision in the case of **Chakradhar Das** (supra), till date, the petitioner has not been reinstated.

20. In the present case, the petitioner was the only child of the deceased Government servant and was a minor at the time of his death. She deserved to be considered for appointment under the 1990 Rules after the death of her father not only because she had been dependent on him and also because she was unmarried at the time of making application in the year 1999. In fact, after consideration of her case she had been rightly issued appointment order on 10.04.2008 although after nine years of her application . But merely because she had got married by the time she was appointed and had admitted the same before the authorities, she was discharged from service on 09.12.2009 , after she had undergone training and her services had been regularized. As this was done unilaterally without any notice to her and we have set aside impugned order discharging her from service on the ground of violation of the principles of natural justice. But it is apparent that the petitioner has been discriminated against and this discrimination will continue to be perpetrated against married daughters in matters of compassionate appointment resulting in injustice to married daughters and harassment to a family which has lost its bread winner and thereby defeating the object of the Rules

Implicit in such definition of family, is the baseless assumption that while a son continues to be a member of the family even after marriage , a

daughter upon marriage ceases to be a part of the family of her father . It is discriminatory and constitutionally impermissible for the State to make that assumption and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a married daughter when equivalent benefits are granted to a married son in terms of compassionate appointment. Marriage does not determine the continuance of the relationship of a child with the parents. A son continues to be a son both before and after marriage. A daughter continues to be a daughter. This relationship is not obliterated either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between parents and a son or between parents and their daughter. These relationships are not governed or defined by marital status.

A son who is married continues to be within the ambit of the expression "family" for the purpose of Rule 2 (1) (d) . But , a daughter who is married is excluded from the scope and purview of the family of a deceased government servant unless she falls within the category of a widowed daughter. This discrimination that is inherent in Rule 2(1) (d) based on the presumption that a daughter by reason of her marriage is excluded from the ambit of the expression "family". Her exclusion operates by reason of marriage not whether she was at the time of the death of the deceased government servant dependent on him. Marriage does not exclude a son from the ambit of the expression "family". But marriage excludes a daughter. This is perse discriminatory . A married daughter who has separated after

marriage and may have been dependent on the deceased would as a result of this discrimination stand excluded. Even if she is dependent on her father, she would not be eligible for compassionate appointment only because of the fact that she is not "unmarried". A divorced daughter was similarly excluded. But she has been included in the definition of “family members” in the 2020 Rules The only basis of the exclusion is marriage and but for her marriage, a daughter would not be excluded from the definition of the expression "family".

In the present writ petition , as the exclusion of the definition of “family members” has not been specifically challenged by the petitioner as being discriminatory and unconstitutional , we have refrained from declaring it as striking it down or declaring it as ultra vires , but will not hesitate to do so in an appropriate case . At this juncture it would be appropriate to reiterate the words Justice V.R. Krishna Iyer in the case of **C.B Muthamma** (supra) :

> … “*What we do wish to impress upon Government is the need to overhaul all Service Rules to remove the stain of sex discrimination, without waiting for ad hoc inspiration from writ petitions or gender charity*
>
> *We dismiss the petition but not the problem…..”*

India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to all citizens . The State should therefore frame policies so that men and women have equal

opportunity and women are not discriminated against especially in matter of employment . Thus , we hope and trust that the State Government as a model and ideal employer and in order to implement and safeguard the fundamental rights of equality and the directive state principles , will take a cue from the aforesaid observations and the decisions of the Hon'ble Supreme Court and various other High Courts which have been referred to and take appropriate steps to prevent continued violation of gender equality and the right of equality guaranteed under the Constitution of India , in the matter of compassionate appointment.

(Savitri Ratho)

Judge