Chief Justice's Court **AFR**

Case :- WRIT - C No. - 60881 of 2015

Petitioner :- Smt. Vimla Srivastava
Respondent :- State Of U.P. And Another
Counsel for Petitioner :- Santosh Kumar Srivastava,Nitin Kumar Rai,Pavan Kumar Singh
Counsel for Respondent :- C.S.C.

WITH

Case :- WRIT - C No. - 14853 of 2015

Petitioner :- Smt. Deepti
Respondent :- State Of U.P. And 2 Ors.
Counsel for Petitioner :- B. Narayan Singh
Counsel for Respondent :- C.S.C.

WITH

Case :- WRIT - C No. - 20204 of 2015

Petitioner :- Smt. Priyanka Srivastava
Respondent :- State Of U.P. & Another
Counsel for Petitioner :- Jeevan Jee Srivastava
Counsel for Respondent :- C.S.C.

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Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Yashwant Varma,J.

(Per: Dr D Y Chandrachud, CJ)

The Uttar Pradesh Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974[1] have been framed under the proviso to Article 309 of the Constitution and regulate the grant

1 Dying-in-Harness Rules

of compassionate appointment to the members of the family of a government servant who dies in harness. The Rules define the expression “family” to include, among others, “unmarried daughters and unmarried adopted daughters”. The Rules also bring sons and adopted sons within the ambit of a family. The eligibility of a son or adopted son is not conditioned by marital status. The challenge in these proceedings is to the stipulation that only an unmarried daughter falls within the definition of the expression “family”. As a consequence of the condition, a married daughter ceases to fall within the family of a deceased government servant for the purpose of seeking compassionate appointment.

Rule 2 (c) of the Dying-in-Harness Rules defines the expression “family” in the following terms:

> “2(c) “*family*” shall include the following relations of the deceased Government servant:
>
> (i) Wife or husband;
>
> (ii) Sons/adopted sons;
>
> (iii) Unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;
>
> (iv) Unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent Court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

In exploring the nature of the constitutional challenge which has been addressed in these proceedings, it would at the outset be necessary to dwell briefly on the nature and purpose of compassionate appointment. The object and purpose of compassionate appointment is to provide ameliorative relief to the family of a government servant who has died in harness. Compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment under Article 16 of the Constitution. Equality of opportunity postulates a level playing field where all eligible persons are entitled to compete in an effort to secure public employment. The basis of the exception that is carved out by the Dying-in-Harness Rules is that the death of a wage earner while in the service of the State imposes severe financial hardship on the family faced with an untimely death. Compassionate appointment is intended to provide

immediate financial support to such a family by stipulating that upon the death of its wage earner while in harness as a government servant, another member of the family would be granted appointment. Compassionate appointment is not a reservation of a post in public employment but is in the nature of an enabling provision under which a member of the family of a deceased government servant who has died while in harness can seek appointment based on financial dependency and need.

Rule 5 of the Dying-in-Harness Rules provides that such an appointment is contemplated to be given to a member of the family of a deceased government servant who has died in harness where the spouse of the government servant is not already employed with the Central or the State Governments or a Corporation owned by them. Moreover, a member of the family who is not already employed with the Central or State Governments or their Corporations can be given suitable employment in government service in relaxation of the normal recruitment rules. Such an appointment can be granted if the person (i) fulfills the educational qualifications prescribed for the post; (ii) is otherwise qualified for government service; and (iii) makes an application for employment within five years from the date of the death of the government servant. The rationale for imposing the requirement of the application being made within five years is that the nexus between the grant of employment and the need of the

family is preserved. That is because after a lapse of time the sense of need or dependency may cease to exist both financially and otherwise. However, Rule 5 enables the time limit to be dispensed with or relaxed for the purpose of dealing with a case in a just and equitable manner where undue hardship is shown. Where compassionate appointment is provided under Rule 5, there is an obligation under the rule for the person appointed to maintain the other members of the family of the deceased government servant who were dependent on him/her immediately before the death occurred and who are unable to maintain themselves. When the person appointed neglects or refuses to maintain a person whom he or she is liable to maintain, the services are liable to be terminated under the Conduct, Discipline and Appeal Rules.

The basic rationale and the foundation for granting compassionate appointment is thus the financial need of the family of a deceased government servant who has died in harness and it is with a view to alleviate financial distress that compassionate appointment is granted.

The submission which has been urged on behalf of the petitioners in challenging Rule 2 (c) (iii), insofar as it confines the zone of eligibility only to unmarried daughters, is two fold. Firstly, it has been submitted that in matters of public employment, marital status cannot disqualify an applicant and any discrimination on the

ground of marital status would be violative of Articles 14 and 15 of the Constitution. Secondly, it has been urged that there can be no discrimination between a son and a daughter in the grant of compassionate appointment and any discrimination on the ground of gender violates Article 15 of the Constitution.

A counter affidavit has been filed on behalf of the State in these proceedings in which, it has been asserted that:

> "After marriage, the daughter becomes the family member of her husband and the responsibility of her maintenance solely lies upon her husband, therefore, in such circumstance there is no justification of giving employment to the married daughter of the deceased employee as the dependent of deceased employee.
>
> That, it is also relevant to mention here that the employment as a dependent of deceased is a compassionate appointment which is not a matter of right. It is further submitted that the married daughter is not covered by definition of "family", therefore, she cannot be considered eligible for giving the compassionate appointment. It is further submitted that under the Hindu Law, a married daughter cannot be considered as dependent of her father or dependent of joint Hindu family. After the marriage, her husband is not only her guardian but he is under legal obligation to maintain her. Under the Hindu Law, after the marriage, the daughter even does not remain member of the family of her father and she becomes member of her in laws family."

Moreover, it has been submitted that a married daughter is not

considered as a dependent of her deceased father and is not legally entitled to get compassionate appointment.

In support of the submissions which have been urged in the counter affidavit, learned Standing Counsel submits that Rule 2 (c) has made no discrimination on grounds of gender. The submission is that the purpose of Rule 2 (c) is to enable the State to grant compassionate appointment to a member of the family who was dependent on the deceased government servant. When a daughter is married, it is asserted, the element of dependency on the deceased government servant ceases to exist and the reason for the exclusion is not gender but the absence of dependency.

While assessing the rival submissions, it must be noted at the outset that the definition of the expression “family” in Rule 2 (c) incorporates the categories of heirs of a deceased government servant. Among them are the wife or husband, sons and adopted sons, unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law. Clause (ii) of Rule 2 (c) brings a son as well as an adopted son within the purview of the expression “family” irrespective of marital status. A son who is married continues to be within the ambit of the expression “family” for the purpose of Rule 2 (c). But by the stroke of a legislative definition, 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. The invidious discrimination that is inherent in Rule 2 (c) lies in the fact that a daughter by reason of her marriage is excluded from the ambit of the expression “family”. 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 invidious. 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. A divorced daughter would similarly 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”. 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”.

The issue before the Court is whether marriage is a social circumstance which is relevant in defining the ambit of the expression “family” and whether the fact that a daughter is married can constitutionally be a permissible ground to deny her the benefit of compassionate appointment. The matter can be looked at from a variety of perspectives. Implicit in the definition which has been adopted by the state in Rule 2 (c) is an assumption that while a son

continues to be a member of the family and that upon marriage, he does not cease to be a part of the family of his father, 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 daughter when equivalent benefits are granted to a son in terms of compassionate appointment. Marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, 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 effaced either in fact or in law upon marriage. Marriage does not bring about a severance of the relationship between a father and mother and their son or between parents and their daughter. These relationships are not governed or defined by marital status. The State has based its defence in its reply and the foundation of the exclusion on a paternalistic notion of the role and status of a woman. These patriarchal notions must answer the test of the guarantee of equality under Article 14 and must be held answerable to the recognition of gender identity under Article 15.

The stand which has been taken by the state in the counter affidavit proceeds on a paternalistic notion of the position of a woman in our society and particularly of the position of a daughter

after marriage. The affidavit postulates that after marriage, a daughter becomes a member of the family of her husband and the responsibility for her maintenance solely lies upon her husband. The second basis which has been indicated in the affidavit is that in Hindu Law, a married daughter cannot be considered as dependent of her father or a dependent of a joint Hindu family. The assumption that after marriage, a daughter cannot be said to be a member of the family of her father or that she ceases to be dependent on her father irrespective of social circumstances cannot be countenanced. Our society is governed by constitutional principles. Marriage cannot be regarded as a justifiable ground to define and exclude from who constitutes a member of the family when the state has adopted a social welfare policy which is grounded on dependency. The test in matters of compassionate appointment is a test of dependency within defined relationships. There are situations where a son of the deceased government servant may not be in need of compassionate appointment because the economic and financial position of the family of the deceased are not such as to require the grant of compassionate appointment on a preferential basis. But the dependency or a lack of dependency is a matter which is not determined a priori on the basis of whether or not the son is married. Similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to

whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant. Excluding daughters purely on the ground of marriage would constitute an impermissible discrimination and be violative of Articles 14 and 15 of the Constitution.

A variety of situations can be envisaged where the application of the rule would be invidious and discriminatory. The deceased government servant may have only surviving married daughters to look after the widowed parent – father or mother. The daughters may be the only persons to look after a family in distress after the death of the bread earner. Yet, under the rule, no daughter can seek compassionate appointment only because she is married. The family of the deceased employee will not be able to tide over the financial crisis from the untimely death of its wage earner who has died in harness. The purpose and spirit underlying the grant of compassionate appointment stands defeated. In a given situation, even though the deceased government employee leaves behind a surviving son, he may not in fact be looking after the welfare of the surviving parents. Only a daughter may be the source of solace – emotional and financial, in certain cases. These are not isolated situations but social realities in India. A surviving son may have left the village, town or state in search of employment in a metropolitan city. The daughter may be the one to care for a surviving parent. Yet

the rule deprives the daughter of compassionate appointment only because she is married. Our law must evolve in a robust manner to accommodate social contexts. The grant of compassionate appointment is not just a social welfare benefit which is allowed to the person who is granted employment. The purpose of the benefit is to enable the family of a deceased government servant, who dies in harness, to be supported by the grant of compassionate appointment to a member of the family. Excluding a married daughter from the ambit of the family may well defeat the object of the social welfare benefit.

The living tree – the Constitution – on which the law derives legitimacy is a liberal instrument for realising fundamental human freedoms. The law and the Constitution must account for multiple identities. Individuals – men and women – have multiple identities : as a worker in the work place; as a child, parent and spouse; identities based on preferences and orientation; those based on language, religion and culture. But from a constitutional perspective, they are protected and subsumed in the overarching privileges of citizenship and in the guarantee of individual freedoms.

In the judgment of this Court in **Isha Tyagi vs. State of U.P.**[2]**,** a Division Bench considered the legality of a condition which was imposed by the State Government while providing horizontal

2 Writ – C No. 41279 of 2014

reservation to descendants of freedom fighters. The condition which was imposed by the State excluded the children of the daughter of a freedom fighter from seeking admission to medical colleges in the State under an affirmative action programme. Holding this to be unconstitutional, the Division Bench held as follows:

> "It would be anachronistic to discriminate against married daughters by confining the benefit of the horizontal reservation in this case only to sons (and their sons) and to unmarried daughters. If the marital status of a son does not make any difference in law to his entitlement or to his eligibility as a descendant, equally in our view, the marital status of a daughter should in terms of constitutional values make no difference. The notion that a married daughter ceases to be a part of the family of her parents upon her marriage must undergo a rethink in contemporary times. The law cannot make an assumption that married sons alone continue to be members of the family of their parents, and that a married daughter ceases to be a member of the family of her parents. Such an assumption is constitutionally impermissible because it is an invidious basis to discriminate against married daughters and their children. A benefit which this social welfare measure grants to a son of a freedom fighter, irrespective of marital status, cannot be denied to a married daughter of a freedom fighter."

Dealing with the aspect of marriage, the Division Bench held as follows:

> "Marriage does not have and should not have a proximate

> nexus with identity. The identity of a woman as a woman continues to subsist even after and notwithstanding her marital relationship. The time has, therefore, come for the Court to affirmatively emphasise that it is not open to the State, if it has to act in conformity with the fundamental principle of equality which is embodied in Articles 14 and 15 of the Constitution, to discriminate against married daughters by depriving them of the benefit of a horizontal reservation, which is made available to a son irrespective of his marital status."

The principles underlying Articles 14 and 15 of the Constitution have an important bearing on gender identity. In **C.B. Muthamma vs. Union of India**[3]**,** the Supreme Court considered the legality of a rule in the Indian Foreign Service (Conduct and Discipline) Rules under which a woman member of the service was required to obtain the permission of the Government before her marriage was solemnized and could be required to resign from service after her marriage, if the Government was satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. The Supreme Court held that "If a married man has a right, a married woman, other things being equal, stands on no worse footing". In the meantime the Central Government had indicated that the rule was being reconsidered and its deletion was being gazetted.

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3 AIR 1979 SC 1868

In **Vijaya Manohar Arbat vs. Kashirao Rajaram Sawai[4],** the Supreme Court held in the context of the provisions of Section 125 of the Code of Criminal Procedure 1973 that “a daughter after her marriage does not cease to be a daughter of the father or mother”.

The same principle was applied in **Githa Hariharan vs. Reserve Bank of India[5]** while defining the ambit of the expression “the father, and after him, the mother” in Section 6(a) of the Hindu Succession Act, 1956. The Supreme Court observed that if the word 'after' was read to mean that a mother would be disqualified from acting as a guardian of a minor during the lifetime of the father, this would run counter to the constitutional mandate of gender equality and will lead to an impermissible differentiation between males and females. Interpreting the word 'after', the Supreme Court held that it does not necessarily mean after the death of the father but would mean in the absence of, whether temporary or otherwise or in a situation of the apathy of the father or his inability to maintain the child.

In **Savita Samvedi vs. Union of India[6]**, the Supreme Court considered the validity of a circular of the Railway Board by which a railway servant who is an allottee of service accommodation was entitled to nominate, while retiring from service, a son or unmarried daughter among other persons for allotment of the accommodation

4 AIR 1987 SC 1100
5 (1999) 2 SCC 228
6 1996 2 SCC 380

on out-of-turn basis. Holding that the circular (insofar as it precluded the nomination of a married daughter for allotment of accommodation) violated Article 14, the Supreme Court observed as follows:

> "... If he has only one married daughter, who is a railway employee, and none of his other children are, then his choice is and has to be limited to that railway employee married daughter. He should be in an unfettered position to nominate that daughter for regularization of railway accommodation. It is only in the case of more than one children in Railway service that he may have to exercise a choice and we see no reason why the choice be not left with the retiring official's judgment on the point and be not respected by the railway authorities irrespective of the gender of the child. There is no occasion for the railways to be regulating or bludgeoning the choice in favour of the son when existing and able to maintain his parents. The Railway Ministry's Circular in that regard appears thus to us to be wholly unfair, gender biased and unreasonable, liable to be struck down under Article 14 of the Constitution. The eligibility of a married daughter must be placed on a par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit of the earlier part of the Circular, referred to in its first paragraph, above-quoted."

In **Air India Cabin Crew Assn. vs. Yeshaswinee Merchant**[7]**,** the Supreme Court dealt with the prohibition under Article 15(2) on discrimination on the ground only of sex. Interpreting the provisions

7 (2003) 6 SCC 277

of Articles 15 and 16, the Supreme Court held that the constitutional mandate would be infringed where a woman would have received the same treatment as a man but for her sex.

In **National Legal Services Authority vs. Union of India**[8]**,** the Supreme Court recognized that gender identity, is an integral part of sex within the meaning of Articles 15 and 16 and no citizen can be discriminated on the ground of gender. The Supreme Court observed as follows:

> "We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community."

Specifically in the context of compassionate appointments various High Courts have taken the view that a woman who is married cannot be denied entry into service on compassionate appointment merely on the ground of marriage. This view was taken by a learned Single Judge of the Karnataka High Court in **Manjula vs. State of Karnataka**[9]**.** The same view has been adopted by a Division Bench of the Bombay High Court in **Smt. Ranjana**

8 (2014) 5 SCC 438
9 2005 (104) FLR 271

Murlidhar Anerao vs. The State of Maharashtra[10] where it was held that the exclusion of a married daughter for the grant of a retail kerosene license on the death of the license holder was not justifiable. The Division Bench of the Bombay High Court held as follows:

> "This exclusion of a married daughter does not appear to be based on any logic or other justifiable criteria. Marriage of a daughter who is otherwise a legal representative of a license holder cannot be held to her disadvantage in the matter of seeking transfer of license in her name on the death of the license holder. Under Article 19(1)(g) of the Constitution of India the right of a citizen to carry on any trade or business is preserved. Under Article 19(6) reasonable restrictions with regard to professional or technical qualifications necessary for carrying on any trade or business could be imposed. Similarly, gender discrimination is prohibited by Article 15 of the Constitution. The exclusion of a married daughter from the purview of expression "family" in the Licensing Order of 1979 is not only violative of Article 15 but the same also infringes the right guaranteed by Article 19(1)(g)
>
> of the Constitution."

The same view has been adopted by a learned Single Judge of the Madras High Court in **S Kavitha vs. The District Collector**[11]**.** A learned Single Judge of the Kolkata High Court in **Purnima Das vs. The State of West Bengal**[12] has held that while appointment on

10 Writ Petition No. 5592 of 2009, decided on 13 August 2014
11 Writ Petition No. 16153 of 2015, decided on 9 June 2015
12 Writ Petition No. 33967 (W) of 2013, decided on 19 March 2014

compassionate ground cannot be claimed as a matter of right, at the same time, it was not open to the State to adopt a discriminatory policy by excluding a married daughter from the ambit of compassionate appointment.

We are in respectful agreement with the view which has been expressed on the subject by diverse judgments of the High Courts to which we have made reference above.

During the course of submissions, our attention was also drawn to the judgment rendered by a learned Single Judge of this Court in **Mudita vs. State of U.P.**[13]**.** The learned Single Judge while proceeding to deal with an identical issue of the right of a married daughter to be considered under the Dying-in-Harness Rules observed that a married daughter is a part of the family of her husband and could not therefore be expected to continue to provide for the family of the deceased government servant. The judgment proceeds on the premise that marriage severs all relationships that the daughter may have had with her parents. In any case it shuts out the consideration of the claim of the married daughter without any enquiry on the issue of dependency. In the view that we have taken we are unable to accept or affirm the reasoning of the learned Single Judge and are constrained to hold that **Mudita** does not lay down the correct position of the law.

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13 Writ Petition No. 49766 of 2015, decided on 10 September 2015

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.

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.

The writ petitions shall, accordingly, stand allowed. There shall be no order as to costs.

Order Date :- 4.12.2015
RK

(Yashwant Varma, J) (Dr D Y Chandrachud, CJ)