

(2010) 06 SHI CK 0127
In the High Court Of Himachal Pradesh
Case No : CWP (T) No. 5696 of 2008

Asha Devi and Another

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 15-06-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16
Foreign Service (Conduct and Discipline) Rules, 1961 — Rule 18, 18(4), 8(2)
Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 — Section 9

Citation : (2010) 06 SHI CK 0127

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Material facts necessary for adjudication of this petition are that the Petitioner No. 1 was appointed as Steno-Typist in the Respondent-department on 23rd August, 1995. Petitioner's father (Petitioner No. 2) was working at that time as Superintendent Grade-II in Himachal Pradesh Secretariat, Shimla. He was allotted Set No. 5-6, Block No. 30, U.S. Club, Shimla a Type-I accommodation. Petitioner No. 2 submitted a representation on 4th July, 1997 stating therein that his daughter, working as Steno-Typist in Directorate of Town and Country Planning Department, Himachal Pradesh was sharing the accommodation with him and the same be allotted to her after his retirement. He made another representation on 2nd August, 1997. Petitioner No. 2 was informed by the Deputy Secretary (GAD) on 3rd October, 1997 that he should apply on the prescribed proforma to the Estate Officer after his retirement for allotment of the said accommodation in the name of his daughter. Petitioner No. 1 also submitted representation in the month of February, 1998 seeking allotment of the accommodation in question in her favour on retirement of her father. Respondent No. 3 informed the Petitioner No. 1 on 6th April, 1998 that she should apply for allotment of accommodation in her favour on prescribed

proforma under Rule-8(2) of the Himachal Pradesh House Allotment Rules, 1994 (hereinafter referred to as "the Rules" for brevity sake). Petitioner No. 2 retired as Superintendent Grade-II in the month of February, 1998. Petitioner No. 1 applied for allotment of accommodation in question on prescribed proforma. Petitioner No. 2 made a representation seeking extension to retain the accommodation in question upto December, 1998. He was permitted to retain the said accommodation upto 31.10.1998 on double the normal rent vide letter dated 27.7.1998. Petitioner No. 2 was served with notice dated 9.11.1998 calling upon him to show cause why order of eviction should not be passed against him. He submitted reply to the show cause notice on 4.12.1998. Petitioner No. 2 was called upon vide order dated 28.12.1998 by the Collector, Director of Estate to vacate the premises in question within 30 days of the order.

2. The case of the Petitioners, in a nutshell, is that once the Petitioner No. 1 had submitted application for out of turn allotment under Rule 8(2) of the Himachal Pradesh Allotment of Govt. Residences (General Pool) Rules, 1994 (hereinafter referred to as the "allotment Rules" for brevity sake), the order dated 28.12.1998 in nullity. Their further case is that since Rule-8(2) of the allotment rules restricts the out of turn allotment only in the event of death or retirement of Government service to wife/ husband or son or unmarried daughter alone, the same is violative of Articles 14, 15 and 16 of the Constitution of India. The case of the Respondents precisely is that the Petitioners should have challenged the order dated 28.12.1998 by way of appeal u/s 9 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (hereinafter referred to as "the Act"). It is further averred by the State in reply that "married daughter" constitutes a separate family and in these circumstances, she cannot be considered for out of turn allotment after the retirement of her father.

3. Mr. Dilip Sharma, learned Counsel for the Petitioners has vehemently argued that word "unmarried" preceding the word "daughter" in Rule 8(2) of the allotment Rules is liable to be struck down being violative of Articles of 14, 15 and 16 of the Constitution of India. He further contended that the issuance of order dated 28.12.1998 was unwarranted without considering the case of the Petitioner No. 1 for allotment after the retirement of her father, i.e. Petitioner No. 2. Mr. R.P. Singh, learned Assistant Advocate General has vehemently argued that the "married daughter" is not entitled to out of turn Government accommodation since after the marriage she constitutes a separate family.

4. I have heard the learned Counsel for the parties and gone through the record carefully.

5. It will be pertinent at this stage to reproduce Rule 8 of the Allotment Rules, which reads thus:

8. Adhoc allotment on out of turn basis:Notwithstanding the provisions of rule-7, adhoc allotment on out of turn basis may be made by the House Allotment Committee to an Officer/Official on the following grounds:

(1) On the following type of illness:

(i) Physically handicapped Government employees in the following cases:

(a) The Blind i.e. those who suffer from either of following conditions:

(i) Total absence of sight.

(ii) Visual Acuity not exceeding 6/60 or 20/200 (Snell) in the better eye with correcting lenses.

(iii) Impression of the field of the vision subtending an angle of 20 degree or worse.

(b) The Deaf-Those in whom the sense of hearing non functional for ordinary purposes of life. They do not hear, understand sounds at all even with amplified speech. The cases include in that category will be those having hearing loss more than 90 decibels in the better ear (profound impairment) or total loss of hearing in both ears.

(c) The orthopaedically handicapped, that is, those who as a result of their orthopedic deformity find it very difficult to move freely; or

(ii) Heart ailment for self only (heart ailments having symptoms of Grade-III and IV which includes serious disabilities like Angina Grade III and IV or congested cardiac failure Grade-III and IV or Malignant Hypertension with symptoms of Grade-III and IV); or

(iii) Tuberculosis is (Pulmonary tuberculosis in active phase with risk to other) and Cancer, of self, spouse and dependent children.

(2) In the event of death or retirement of a Government servant, to the wife/husband or son or unmarried daughter, provided that the retired or the deceased Government servant was in occupation of Government accommodation at the time of retirement or death. Such allotment shall not be made in a category higher than a category to which the ward of the deceased or retired Government servant is entitled.

(3) In the event of transfer, deputation on Foreign Service sponsored by the Government and study leave of more than one year of an allottee, to the spouse of such employee according to his/her entitlement in case the spouse is in Government service and posted at the same station.

(4) In the event of officer occupying an earmarked house and is transferred to another post at the same station or to another station.

(5) An officer/official who after completing of their full tenure in the Districts of Lahaul and Spiti, Kinnaur and Pangi Tehsil of Chamba District are transferred.

(6) Personal staff i.e. one out of the Personal Assistants/Private Secretaries etc. of the Ministers.

(7) Where exigencies of services so warrant.

(8) Notwithstanding anything contained in Sub-rules (1 to (7)), an officer/official who owns a house either in his own name or in the name of any member of his family at or near the station of his/her posting, shall not be eligible for adhoc allotment on out of turn basis.

7. A bare perusal of Sub-rule (2) of Rule 8 of the Rules reveals that in the event of death or retirement of the Government servant, the accommodation can be allotted to the wife/husband or son or unmarried daughter provided that the retired or deceased Government servant was in occupation of Government accommodation at the time of his retirement or death. In other words the married daughter has been left out from the purview of the applicability of this rule.

8. In the present case, Petitioner No. 1's father has retired on 28th February, 1998. Petitioner No. 1 was advised by Respondent No. 3 that she should apply for allotment of accommodation under Rule 8(2) of the H.P. House Allotment Rules, 1994. She applied as advised. However, no decision was taken by the Respondents and in the meantime order dated 28.12.1998 was passed. The Respondents ought to have taken some decision once the application has been preferred by Petitioner No. 1 in the prescribed proforma.

9. Now the Court will advert to whether Rule 8(2) discriminates against the married daughter or not? The existing Sub-rule (2) has confined the allotment on out of turn basis to the wife/husband or son or unmarried daughter. The justification given by the Respondent-State in the reply to the exclusion of married daughter from Sub-rule (2) is that she constitutes a separate family. The Court is of the considered view that there is no rationale and reasonableness for making discrimination between the son, unmarried and married daughter. This classification is violative of Articles 14 and 15 of the Constitution of India. The classification made by the Respondent-State has no nexus with the object sought to be achieved. Married daughter can also take care of her aged parents and they can stay with her. The time has come to change the societal attitude. The classification made by the State between the son, married and unmarried daughter suffers from gender discrimination. A son as per the existing Rules whether married or unmarried has been held entitled to out of turn Government accommodation and married daughter has been left. A son has been held entitled to allotment of accommodation whether he is married or not, whereas, in the case of women, the allotment has been restricted only to the unmarried daughter. Such action is discriminatory on the ground of sex as envisaged under Article 15 of the Constitution of India. In a similar situation, their Lordships of Hon"ble Supreme Court in *Savita Samvedi (Ms) and Another Vs. Union of India (UOI) and Others*, have held as under (paras 5 to 10):

As is obvious from the plain reading of the Circular, the married daughter of a retiring official is eligible to obtain regularisation if her retiring father has no son.

She thus has a foothold, not to be dubbed as an outcaste outright. In case he has a son, she shall not be in a position to do so, unless he is unable to maintain the parents e.g. like a minor son, but then she should be the only person who is prepared to maintain her parents. It is thus plain that a married daughter is not altogether debarred from obtaining regularisation of a railway quarter, but her right is dependent on contingencies. The authorities concerned as also the central Administrative tribunal seemed to have overlooked the important and predominant factor that a married daughter would be entitled to regularisation only if she is a railway employee as otherwise, she by mere relationship with the retiring official, is not entitled to regularisation. Logically it would lead to the conclusion that the presence of a son or sons, able or unable to maintain the parents, would again have to be railway employees before they can oust the claim of the married daughter. We are not for the moment holding that they would be capable of doing so just because of being males in gender. Only on literal interpretation of the Circular, does such a result follow, undesirable though.

A common saying is worth pressing into service to blunt somewhat the Circular. It is

A son is a son until he gets a wife. A daughter is a daughter throughout her life.

The retiring official's expectations in old age for care and attention and its measure from one of his children cannot be faulted, or his hopes dampened, by limiting his choice. That would be unfair and unreasonable. 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 regularisation 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.

The tribunal took the view that when the Circular dated 11-8-1992 had itself not specifically been impugned before it and ex facie the conditions contained in the said Circular had not been satisfied in the present case, no relief need be given to the Appellants. The tribunal viewed that when there were two major sons of the second Appellant, gainfully employed, the fact that they were not railway employees, not residing in Delhi, did not alter the situation that the terms of the Circular dated 11-8-1992 had not been satisfied, under which alone

regularisation was permissible. As brought about before, the tribunal overlooked this aspect that the Circular was meant only to enlist the eligibles, who could claim regularisation, but the important condition of one being a railway employee had to be satisfied before claim could be laid. In the instant case, the first Appellant, on that basis, alone was eligible (subject to gender disqualification going). So the second Appellant could exercise his choice/option in her favour to retain the accommodation, obligating the Railway authorities to regularise the quarter in her favour, subject of course to the fulfilment of other conditions prescribed. The error being manifest is hereby corrected, holding the first Appellant in the facts and circumstances to be the sole eligible for regularisation of the quarter.

It was also pointed out before us that the central Administrative tribunal, Bombay bench in one of its decisions in OA No. 314 of 1990 decided on 12-2-1992 (Annexure P-8) relying upon its own decision in *Ambika R. Nair v. Union of India* in which the earlier Circular of the Railway Board dated 27/12/1982 had been questioned, held the same to be unconstitutional per se as it suffered from the twin vices of gender discrimination inter se among women on account of marriage. We have also come to the same view that the instant case is of gender discrimination and therefore should be and is hereby brought in accord with Article 14 of the Constitution. The Circular shall be taken to have been read down and deemed to have been read in this manner from its initiation in favour of the married daughter as one of the eligibles, subject, amongst others, to the twin conditions that she is (i) a railway employee; and (ii) the retiring official has exercised the choice in her favour for regularisation. It is so ordered.

For the reasons stated above, this appeal is allowed and direction is issued to the Respondents to grant regularization of the quarter in favour of the first Appellant with effect from the date of retirement of the second Appellant and regulate/readjust the charges on account of house rent accordingly. There shall be no order as to costs.

10. Their Lordships of Hon''ble Supreme Court in *Miss C.B. Muthamma, I.F.S. Vs. Union of India (UOI) and Others*, have held that sex-discrimination in service Rules would be unconstitutional unless justified by the peculiarities and nature of the employment. Their Lordships have held as under (paras 4 to 7):

What is more manifest as misogynist in the Foreign Service is the persistence of two rules which have been extracted in the petition. Rule 8(2) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961, unblushingly reads:

Rule 8(2): In cases where Sub-rule (1) does not apply, a woman member of the service shall obtain the per- 671 mission of the Government in writing before her marriage is solemnized. At any time after the marriage, a woman member of the Service may be required to resign from service, if the Government is 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.

Discrimination against women, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service is likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment Cadre, Seniority and Promotion) Rules, 1961, run in the same prejudicial strain:

(1)

(2)

(3)

(4) No married woman shall be entitled as of right to be appointed to the service.

At the first blush this rule is in defiance of Article 16. If 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 manacled the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thralldom. 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.

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 672 handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern. This creed of our Constitution has at last told on our governmental mentation, perhaps partly pressured by the pendency of this very writ petition. In the counter affidavit, it is stated that Rule 18(4) (referred to earlier) has been deleted on November 12, 1973. And, likewise, the Central Government's affidavit avers that Rule 8(2) is on its way to oblivion since its deletion is being gazetted. Better late than never. At any rate, we are relieved of the need to scrutinise or strike down these rules.

11. The classification made by the Respondents between the married and unmarried daughter in view of the observations made hereinabove is ultra vires the Constitution. The explanation/justification given by the Respondent-State

that the married daughter constitutes a separate family cannot be accepted. It is for the father whether he wants to live with married or unmarried daughter after his retirement. His choice cannot be restricted only to sons or unmarried daughters. The Rules made by the State must be humane and based on common sense.

12. The rules are required to be made, understood, interpreted in a humane manner. The purpose of rule making cannot be to give advantage to one group over another without justifiable reasons. The primary objective of Rule 8(2) of the Rules is to provide out of turn allotment of accommodation to mitigate the hardship to be faced by a family in the event of retirement of a Government servant. In this context, one member of the family, i.e. the married daughter cannot be deprived of the right to get Government accommodation after the retirement of her father, more particularly, when the father intends to stay with her. Consequently, in these circumstances, the eviction order dated 28.12.1998 cannot be given effect to, even though the Petitioner No. 2 has not assailed the same by filing an appeal.

13. Accordingly, in view of the observations made hereinabove, the writ petition is allowed. The word "unmarried" preceding the word "daughter" in Rule 8(2) of the Himachal Pradesh Allotment of Govt. Residences (General Pool) Rules, 1994 is struck down being violative of Articles 14 and 15 of the Constitution of India. It is also made clear that henceforth the married daughters shall also be held entitled for out of turn allotment after the retirement/death of a Government employee. The Respondents are directed to regularize the allotment made in favour of Petitioner No. 1 after the superannuation of her father with effect from 31.10.1998. There shall, however, be no order as to costs.