
(1991) 12 MAD CK 0069

In the Madras High Court

Case No : Writ Petition No's. 8741-43 of 1984

Mohini Philip

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 12-12-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (1993) 2 LLJ 182 : (1993) 2 LLJ 129 : (1993) 1 LW 251

Hon'ble Judges : D.J. Jagannadha Raju, J

Bench : Single Bench

Advocate : Habibulah Badsha, for the Appellant; Javid Khan, for the Respondent

Judgement

1. The above three writ petitions have been filed by one and the same petitioner and having regard to the nature of the issues involved and the submissions made by the learned counsel appearing on either side, they are dealt with together in this order.

2. The petitioner in the above writ petitions was working as a Nursing Officer in military service as on January 30, 1984, when by the impugned proceedings, she was ordered to be released and relieved from service. The petitioner, in the common affidavit filed in support of the above writ petitions, states that she was appointed in the military nursing service on November 10, 1969, that after completion of the probation period her services were regularised, that she got married on January 31, 1982 and that as per the rules she was asked to apply for retention in service. The petitioner also admits, having applied for retention in service, that she was granted extension by virtue of the letter dated May 12, 1982 for a further period of two years which was said to have expired on January 30, 1984 and that on January 30, 1984, the petitioner came to be relieved from service on grounds of marriage. The petitioner also states that her request for extension of retention in service for a further period of two years was turned down and she was not allowed to continue in service.

3. The petitioner further states that the terms and conditions of service for the grant of regular Commissions in the Military Nursing Service were governed by A.I. 274/50 (amended subsequently as A.I. 61/77) issued under the provisions of the Army Act, that under Clause 3 of the terms and conditions, the candidate should submit the application to the Director General, Armed Forces Medical Services, Ministry of Defence, Government of India, New Delhi, in the prescribed form along with the Medical Certificate, that the nursing officer so appointed would be probation for a period of two years from the date of appointment to regular Military Nursing Services, that thereafter, the services will be confirmed, that clause 12 (amended subsequently as Clause 11) of the Army Instructions provided that the appointment, inter alia could be terminated on getting married and that a Circular was issued by the Head Quarters Southern Command, Pune, on April 20, 1977 bearing No. 080403/R/M. 4 under which the nursing officers of the Military Nursing Service (Regular) who were desirous of continuing in service after marriage will have to submit applications in the prescribed form through proper channels, that the superior reporting officers will have to endorse their recommendations on the applications regarding the suitability or otherwise of the applicant for such retention in service and forward the same to the Headquarters and such of the married officers who intended to continue in service after the expiry of initial permission should also apply for further extension of retention in service in the prescribed form. The said application was required to be submitted three months in advance of the expiry of the initial permission for retention in service, and that the retention in service of the married nursing officers would be for a period of two years at a time.

4. The petitioner contends in the affidavit that the Army Instructions in clause 12(b) (amended subsequently as clause 11(b)) of A.I. 61/77 and the Circular dated April 20, 1977 are violative of the fundamental rights secured under Articles 14 and 16 of the Constitution of India, that there is no intelligible differentia in the classification between men and women, that the petitioner had been discriminated against on the ground that she was a woman, when there cannot be differentiation in the matters of service between men and women, that there is neither rationale between the said classification nor any nexus to the purpose sought to be achieved, that as far as the Nursing Staff are concerned, the duties and responsibilities performed by the men and women or by married women and unmarried women are one and the same and, therefore the classification treating married woman as a separate class from that of an unmarried woman is not based on any intelligible differentia sought to be achieved viz., the excellence in the Nursing Service. The Circular dated April 20, 1977 is not containing any reasons for such discrimination particularly when the Constitution does not allow, according to the petitioner, any discrimination on the ground of sex. The petitioner also contends in the affidavit that she has not been given any reason why her services could not be extended for another period and there has been not only total non-application of mind in the rejection of the petitioner's claim but the same constitutes violation of the principles of natural

justice. Consequently, the petitioner has filed (a) W.P. No. 8741 of 1984 for a writ of certiorarified mandamus to call for the records and quash the proceedings in Order bearing No. 14610/DG/MNS, dated January 30, 1984 and consequently restore the petitioner to service with all backwages and attendant benefits; (b) W.P. No. 8742 of 1984 for a writ of declaration, declaring the Circular No. 080403/R/M.4 dated April 20, 1977 as ultra vires and invalid; (c) W.P. No. 8743 of 1984 for a writ of declaration, declaring clause 11(b) of Army Instructions 61/77 as ultra vires and unconstitutional. It may be pointed out at this stage that though W.P. No. 8743 of 1984 was filed initially to declare unconstitutional clause 12(b) of Army Instructions 274/50, the prayer has been amended by orders of this Court dated February 22, 1991 in W.M.P. No. 3661 of 1991.

5. The respondents have filed a counter affidavit disputing and denying the various claims made by the petitioner in the affidavit. It is contended therein that it is one of the terms and conditions governing the officers of Military Nursing Service holding permanent commission, that their appointment is liable to be terminated on getting married, that, however, in view of the large scale wastage of officers of Military Nursing Service on marriage ground, the Director General, Armed Forces Medical Service has been authorised by the Government of India to exercise his discretion whether they may be permitted to remain in service even after marriage for a period of 2 years at a time, that the cases of married officers as are retained after marriage are also reviewed by the Director General periodically after every two years and that further extensions for subsequent terms are granted only to those officers whose performance for the preceding period was found satisfactory. This procedure, it is claimed, was designed in order to keep the functional efficiency of the military nursing service in particular and Army Medical Services in general par excellence to meet the medical requirements of operationally committed armed forces. In such circumstances, it is claimed that the competent authority duly considered the claims of the petitioner and found her unsuitable for further retention in the light of the recommendations by the lower formations in the chain of reporting on the application of the petitioner for such retention as well as her past record of performance as reflected in her annual confidential reports and relieved her from service by the impugned proceedings dated January 30, 1984. It is also stated that on representations by the petitioner, the case was put up to the concerned Minister of State of Defence who was said to have accorded ex post facto approval to the decision for the release of the petitioner from service. The respondents further contend that as per Army Instruction 274/50 which subsequently stood superseded by Army instruction 61/77 an Officer of the Military Nursing Service was given an option to express willingness or unwillingness to continue in service after marriage for an initial period of two years and for further retention at the end of each of such 2 years period and that the Director General, Armed Forces Medical Service, is the final authority to decide on merit whether an officer should be granted extension of service or not and that his decision is to be final.

6. The case of the petitioner was said to have been considered and granted initial extension upto January 30, 1984, that her case was reviewed for further extension by the Director General, Armed Forces Medical Services and she was not found suitable for further retention in view of the fact that her services were found to be far from satisfactory in the light of the recommendations of the Officers in the chain of reporting. It is also contended that though the petitioner was obliged to submit her application for further extension at least three months before the expiry of the initial permission, the petitioner submitted her application only on December 3, 1983 which was said to have been received at the Army Headquarters on January 16, 1984 when her initial extension itself was about to expire on January 30, 1984 and in spite of this the case of the petitioner was said to have been considered on merits without any prejudice or bias. It is also contended that the provision in the Army Instructions providing for termination of the services of the Military Nursing Officers on getting married was legally in order and does not suffer from any infirmity, that all the pleas of alleged violation of Articles 14 and 16 of the Constitution of India are misconceived and legally not tenable, that in Military Nursing Service, only women officers are appointed and no male members are enrolled, that the nursing profession is an all-women affair and, therefore, the plea of discrimination vis-a-vis man has no basis. It is also stated that even though the duties and responsibilities of married women and unmarried woman in this profession are the same and the commitment of married nursing officers on the domestic front are greater than those of unmarried women and the operational requirements of the services demanded that in order to upkeep the highest standard of service in the medical field of Armed Force and the functional efficiency of the army, a balance requires to be struck between the strength of married and unmarried officers of Military Nursing Service and it is only on account of the same that married officers whose performance deteriorates are not retained in service. It is also stated in the counter affidavit that nursing officers are required to serve all over India including field and operational areas and non-family stations and it has been experienced that performance of married officers of Military Nursing Service generally declines after marriage and despite this, due to shortage in the Military Nursing Service, married nursing officers were constrained to be retained when their performance was just above average, and that it is only for such purposes, their cases are reviewed every two years and a decision taken regarding their further retention. The respondents also contend that selfless service of single-minded devotion required for nursing service suffers a handicap on account of marriage and connected domestic commitments and it is only on that account, the provision for review regarding continuity, on satisfactory performance of married officers has been devised. Difficulties encountered in accommodating requests from such married nursing officers at stations of their choice to live with their family is also urged and it is further stated that cases of termination on the basis of unsatisfactory performance are far and few between and such a decision is taken in the rarest of the rare cases where total indifference to the profession is reported and that

even with reference to relaxed standards of efficiency, the expected requirement could not be made by the concerned officer. The classification between married and unmarried officers is said to be not unreasonable but based on intelligible differentia and is also said to have nexus to the object of excellence in the nursing service sought to be achieved. The needs and operational requirements of armed forces, it is claimed, have to be given primary importance in assessing the reasonableness of the classification.

7. Regarding the plea of absence of reasons, it is claimed that there is no statutory requirement obliging the giving of reasons and that as stated already, it was only after consideration of the claim in the light of the recommendations of the authorities below that a decision has been taken in the interests of the efficiency of the service and that no interference is called for in these proceedings.

8. Mr. Habibullah Badsha, learned Senior Counsel appearing for the petitioner, urged the following two contentions.

1) The impugned proceedings in all the three writ petitions are violative of Articles 14 and 16 of the Constitutions of India, inasmuch as the sex or marriage of a woman cannot be a disqualifying factor for continuing in service and a provision which provides for termination of services on the ground of a woman nursing officer getting married is arbitrary, unreasonable and unconstitutional.

2) That the impugned order does not give detailed reasons and that the only reason given being marriage for the termination of the services of the petitioner, no further reasons can be substituted or supplemented on the basis of alleged unsuitability and fall in the standards of efficiency.

9. The learned senior counsel for the petitioner mainly relied upon two decisions of the Supreme Court, one of a learned single Judge of this Court and another of the Kerala High Court. In AIR India Vs. Nergesh Meerza and Others, , the apex Court had an occasion to consider the question of constitutional validity of the regulations which provided for the retirement of an Air Hostess if she marries within four years of joining service and retirement on first pregnancy. Though the Court held that the provision to terminate the services if an Air Hostess became pregnant was not only manifestly unreasonable and arbitrary but contains the quantity of unfairness and exhibits named despotism which is violative of Article 14 of the Constitution of India, it was also held that the Court was unable to find any unreasonableness or arbitrariness in the provisions which necessitate that the Air Hostess should not marry within four years of the service failing which their services will be terminated. In C. M. Muthamma v. Union of India AIR 1979 SC. 1868, the apex court held that the provisions in the service rules requiring a female employee to obtain the permission of the Government in writing before her marriage is solemnised and denying right to be appointed on ground that a candidate is a married woman are discriminatory against woman and that if a married man has a right, a married woman, other things being equal, stands on

no worse footing. The very decision also clarifies the position that it was not meant 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 sensitiveness of sex or the peculiarities of social sectors or the handicaps of either sex may compel selectivity. It has been also made clear that save where the differentiation is demonstrable the rule of equality must govern. In the decision in *Sivanarul Vs. State of Tamil Nadu and Vijaya Ananda, S. Mohan, J.* as the learned Judge then was, held that an order of termination of the services of a lady teacher serving in a private school recognised and aided by the Government based on a clause in the contract of service, on the ground that she got married was not only obnoxious, but also opposed to public policy and, therefore, bad. The decision in *Sujaya v. Director General* 1991 II KLT 58 of a learned single Judge of the Kerala High Court related to the very service now under consideration before me. It was held in that case that the order of release "on marriage grounds" was violative of Articles 14, 15 and 16 of the Constitution of India.

10. There could be no controversy over the fact that the Army Act, the rules and regulations and Army Instructions issued thereunder govern the service conditions of the commissioned officers including those on emergency commission and that the Army Instructions have statutory status (Vide : *Capt. Rachpal Singh Vs. Union of India (UOI)*, . Army Instructions Nos. 61/77 governed the terms and conditions of military nursing service. Clause 10 of the terms and conditions of service found in the Annexure to the said Instructions stipulated the age of compulsory retirement for various ranks of officers and in respect of Lt. Colonel and below, the age of superannuation was fixed as 55 years with no specific tenure of service. Clause 11 provided as follows :-

"11. Termination of appointment : Appointment in the MNS will be terminated under the following conditions :

(a) On being pronounced by a medical board to be unfit for further service in the Armed Forces;

(b) On getting married;

(c) For misconduct, breach of contract or if services are found unsatisfactory."

On behalf of the respondents, my attention was also invited to the terms of the agreement of service entered into by the petitioner with the President of India, and particularly clauses

(d) and (e) which are as hereunder and which provide for the right of the Government to terminate the services of the incumbent at any time without previous notice, if

(d) I am guilty of insubordination, misconduct or any breach or non-observance of the agreement or if my services are found to be unsatisfactory.

(e) I get married.

Special emphasis was laid by the learned counsel for the respondent at the time of hearing on the words "if my services are found to be unsatisfactory" to contend that the case on hand is one such termination on account of the services of the petitioner being found to be also unsatisfactory.

11. The respondents have also stated that measures have been initiated in January 1968, as a matter of policy, to retain the officers of MNS (regular) even after marriage for two years at a time and that the same has been subsequently reviewed and criteria for retention/further retention in service after marriage have been laid down on the basis of the Army Headquarters Communication dated March 6, 1987. There is also no controversy over the fact that after marriage the petitioner was once ordered retention for two years ending with January 30, 1984 and that the further extension came to be refused resulting in her release/termination with effect from January 30, 1984. It is contended for the respondents that the question of recommendation for retention depended upon the concerned individual's performance and so far as the petitioner was concerned, she was not recommended since she was found to be indifferent and chronically ill with repeated attacks of asthma. The relevant annual confidential reports relating to the petitioner were made available before me for the years 1970 onwards and particular reference was invited to the reports relating to the years 1978-1979-80 and onwards. The petitioner was said to be suffering with attacks of Asthma on and off and during the year 1983, she was on various categories of leave for 150 days and was sick in quarters and hospitalised for 56 days thus virtually absent from duty for a period of 206 days. In the light of such plea raised on behalf of the respondent, it was contended on behalf of the petitioner that the termination in question was said to be on account of marriage in the impugned order, it is not open to the respondents to come up with or supplement the order with further or new reasons like unsatisfactory performance etc. Reliance was also placed for the petitioner upon a decision of the Supreme Court in *Mohinder Singh Gill v. Chief Election Commissioner* 1978(I) SSC 405 wherein the apex court held that when a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in shape of affidavit of otherwise.

12. The submissions of the learned counsel appearing on either side have been carefully considered in the light of the above referred decisions and the records. It is too late in the day to contend that the contracting of marriage by a woman per se disqualifies her for any job or for the very job, as in this case that the woman only was considered to be best suited and appointed and that any provision in that regard would not only be shocking to good conscience but opposed to reason, logic and ordinary course of human nature and extremely detestable and abhorrent to the notions of civilised society apart from being an open and cruel insult to Indian womanhood which has been always considered to

be the most sacrosanct and cherished institution and held ever in high esteem. There can be no rhyme or reason for the assumption that a woman after bearing children becomes weak in her physique or constitution or that women alone become less devoted in their duties or obligations of the job or develop any disinterestedness in the tasks expected of them in the jobs unlike men. But, at the same time the rights of an employer, to prescribe reasonable restrictions in this regard cannot be completely ruled out or totally denied. Action proposed within permissible limits of law and conforming to reason and judicial conscience, can in any individual case or category of cases be always considered and allowed to exist.

13. The circular orders in 080403/R/M-4 dated April 20, 1977 which govern the case on hand, as one in force at the relevant point of time and the subsequent modified and detailed Circular in 711/R/M-1 dated March 27, 1987 issued on the basis of Army Headquarters Letter No. 30371/DGMS-4 dated March 6, 1987 provides for giving an option to the incumbent to express willingness after marriage whether or not they are willing to be considered for retention in service after such marriage and for review of the case when opted for retention. Retention of such persons getting married even during the period of probation was considered to be not normally permitted. The subsequent circular dated March 27, 1987 even lays down objective norms, guidelines and the criteria in detail which should be taken into account in assessing the claims for further retention after marriage, on a review of prior performance periodically, every two years. The power in clause (11)(b) of A.I. No. 61/77, though expressed in absolute terms leaving the discretion with the competent authority to terminate or order release, the Circular Orders referred to above, particularly the one issued on March 27, 1987 mandate the exercise of power on certain well laid objective criteria of assessment only and not either automatically or at the whim and fancy of any one, be it even the competent authority. If the power under clause 11(b) of the A.I. No. 61/77 is viewed in the light of the guidelines for such exercise of power, it cannot, in my view, be said to suffer from the vice of unconstitutionality of Articles 14, 15 or 16 of the Constitution of India. A conjoint consideration of the matter would disclose that the termination/release is to sought to be effected per se on the ground of marriage but on a pragmatic assessment of the performance of such officer and the fall in standards of such performance after marriage. A review of the standard of performance and a decision on certain objective criteria provides sufficient safeguard and comes to the rescue of the Army Instruction under challenge to pass through, unaffected, the challenge of unconstitutionality. The Circular Orders, in my view, get themselves interwoven with the stipulation in clause 11(b) itself and, therefore, save it from the onslaught of unconstitutionality. The Kerala High Court decision had no occasion to deal with the issue in the perspective in which I had to consider the question. The question of alleged discrimination vis-a-vis men have no basis since it is categorically asserted for the respondents that in Military Nursing Service there are no male nurses at all and the petitioner could not

substantiate any claim to the contra. The circular order dated April 20, 1977 has outlived its purpose by virtue of the more detailed circular dated March 27, 1987 and on this ground also except for the purpose of this case a consideration of its validity as a matter of general principle has since become superfluous. In the light of my conclusion that the provisions of clause 11(b) of Army Instructions No. 61/77 cannot be construed to confer any absolute or arbitrary powers to enable the authorities to automatically terminate/release a member of the Military Nursing Service on account of her marriage alone and that the said power has got to be exercised only on the basis of due and proper review and decision on certain well laid objective criteria contained in the circular orders governing the question of retention/release after marriage, the challenge to the constitutional validity of the Army Instructions and the Circular dated April 20, 1977 fails and shall stand rejected.

14. The question that remains for consideration is regarding the validity of the impugned order under which the petitioner was ordered to be terminated/released from the service. The impugned order does give an impression that the termination was effected only "on marriage grounds". There is no indication in the order of any consideration of the case of the petitioner by the competent authority on the criteria laid down and no other material to substantiate such consideration have been also produced in Court. Instead what was produced was the Annual Confidential reports, as referred to above, and the remarks made regarding the review of performance of the petitioner do not indicate that a fall in her standards of performance was noticed as being attributable on account of and only after her marriage. It is seen that the petitioner got married only on January 31, 1982 and the drawback noticed pertaining to asthma was evidently affecting the petitioner and her capacities even before and not only after the marriage. The reports produced amply establish this aspect. If that be the position that the standard of efficiency noticed to have been suffered during the years after marriage is the one pertaining to an ailment otherwise suffered before and continued to be so even after marriage, the services of the petitioner could be terminated or released relying upon clause II(b) of the Army Instructions, and if at all, it should be only on the ground of the Medical Board condemning her as unfit. So long as this has admittedly not been done in this case, the order dated January 30, 1984 cannot be justified in law. The same, in my view, is not only arbitrary and unreasonable, but suffers from the vice of lack of due and proper application of mind to the real issue and particularly, with reference to the relevant materials and aspects. It is arbitrary also for the reason that irrelevant considerations have been taken into account to order the release on marriage ground only. The impugned order dated January 30, 1984 is therefore quashed. Consequently W.P. Nos. 8742 and 8743 of 1984, shall stand dismissed and W.P. No. 8741 of 1984, shall stand allowed as prayed for. There shall be no order as to costs.