

(1995) 07 DEL CK 0025
In the Delhi High Court
Case No : C.W. No. 2708 of 1990

Smt. Balwinder Kaur

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 20-07-1995

Acts Referred:

Citation : (1996) 1 LLJ 1012

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Judgement

Usha Mehra, J.—The petitioner, Smt. Balwinder Kaur was commissioned in the Military Nursing Services (in short MNS) as Lieutenant on 1st June 1988. She was on probation for a period of two years. During this probation period she got married to one Capt. Y. K. Joseph on 31st December, 1988. Her services were terminated on the "marriage ground" vide order dated 23rd October, 1989. It is against this termination that the present writ petition was filed challenging the impugned order, inter alia, being discriminatory on account of sex prejudice.

2. The respondent in its counter affidavit did not deny the factum of termination of the services of the petitioner on "marriage ground". Respondent however, took the plea that since the petitioner got married within two years of her commissioning in the MNS the same was in violation of Clause "A" of Criteria dated 6th March 1987. The said circular lays down the criteria according to which an Officer who marries during probation period will not be granted retention. The petitioner was well aware of this circular dated 6th March 1987 whereby the criteria was laid down. She however, in violation of the same got married during the period of probation. Hence, her services were terminated. There is no question of any violation of any fundamental right of the petitioner.

3. I have heard Mr. R. K. Singh for the petitioner and Mr. E. X. Joseph, Senior Advocate for the respondent. Mr. Joseph fairly conceded that so far as the blanket ban on marriage of women in MNS was concerned that stood withdrawn by the respondent. The ban on marriage of women officers had to be withdrawn

because of the pronouncements of various High Court as well as of the Apex Court against such ban. He however tried to draw distinction between those cases of total ban on marriage and the resent case where marriage is banned only during probation period. Explaining the observations of the Supreme Court in the case of Miss C.B. Muthamma, I.F.S. Vs. Union of India (UOI) and Others, as well as in case of Bombay Labour Union Representing The Workmen of International Franchises Pvt. Ltd. Vs. International Franchises Pvt. Ltd., . Mr. Joseph contended that in both the above quoted cases the Apex Court wash concerned with a blanket ban being imposed by the employer on the marriage of a woman employee. It was in those circumstances the Court opined that that was no good and convincing reason why such a rule should continue. Such a rule has no justification and Therefore ordered to be abrogated. Supreme Court also ruled that sex discrimination in service rule would be unconstitutional unless justified by the peculiarities and nature of the employment. The rules making marriage of a woman employee and her domestic involvement a ground for disentitlement held was unconstitutional. But according to the respondent the petitioner being a probationer could not have got married. Because during the probationary period a married woman tends to take maternity leave and thus the period of probation get reduced considerably. The respondent would not have the opportunity to judge her performance properly because of reduced probationary period. It was in this background the circular dated 6th March 1987 was issued laying down the criteria for grant of retention/further retention in service after marriage of women officers.

4. The history of the MNS will show that from the time of its inception marriage was not allowed due to the alleged handicap it places on a married woman. The prevalent concept and apprehension of the respondent was that if a woman gets married she would become entitled to maternity leave, furlough leave and extra ordinary leave thereby she would neglect the work. Therefore, they were not permitted to get married if they were to remain in service. Because of this ban on marriage, some of the MNS nurses challenged their termination on ground of marriage. The Kerala High Court while setting aside the termination on the ground of marriage observed in the case of Lt. (MNS) M. M. Sujaya, INHS v. Director General of Military Nursing Service & Ors. O.P. No. 7292/88-R as under :-

Article 15 of the Constitution of India prohibits discrimination on the ground of sex. Article 16(1) declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16(2) states that no citizen shall on the ground of sex, be ineligible for or discriminated against, in respect of any employment or office under the State. It was further observed that the order releasing the petitioner from service on the ground of marriage is highly discriminatory and hence hit by the prohibition contained in Article 14, 15 and 16. If the family and domestic commitments of a woman member of the MNS is likely to be in conflict with the efficient discharge of duties a similar situation may well arise in the case of a male or female doctor serving in the nursing homes. Nonetheless married male

doctors, female doctors and male nurses in the "Armed Forces Hospitals" are allowed to continue in military service until they reach the age of "superannuation." Hence it was observed that the members of MNS were discriminated against in the matter of employment under the State.

5. The observation of the Kerala High Court, to my mind, squarely apply to the facts of this case also. The contention of Mr. Joseph that petitioner being a probationer could not get married or her case is distinguishable has no force. The Supreme Court in almost similar circumstances set aside the order of the respondent in the case of Lieutenant (Mrs.) Indira Kumari Kartiayani v. The Maha Nideshak, Raksha Mantralaya, Shashtra Sena Chikitsa Seva SLP No. 7428/89 Civil Appeal No. 5025/90 decided on 30th October, 1990. Supreme Court was dealing with a Nursing Officer in the MNS. She got married and on account of her marriage her service and discontinued. She challenged the discontinuation of her service. While setting aside that order of discontinuation of service, the Supreme Court held that marriage itself is no ground to discontinue her from service. Her continuation in service depends on her performance. It was observed that :-

"It is not disputed that, but for the marriage, the appellants" performance would have been of sufficiently good average to be retained in service and to be considered for promotion to the next higher post not the basis of her seniority ... her service had to be discontinued because of the marriage coupled with the fact that she had not obtained high efficiency performance rate during the three years preceding the marriage. The Additional Solicitor General appearing for the respondent submitted that with a view to guaranteeing the efficiency of the MNS that it was decided that after marriage a person could remain in service only if she justified her continuance by showing extra efficiency in the year preceding marriage. What was ordinarily good enough for continuing in service was not good enough once a person was married. She could remain in service, notwithstanding the general rule of termination on marriage, by showing extra ability in the past to assure the authorities of the ability to perform well in the future despite marriage.

6. In that case the Additional Solicitor General appearing for the respondent relied on the order of the President of India made as early as in 1968, which reads as under :-

"I am directed to state that, in superannuation of the existing orders the President is pleased to decide as follows as in regard to the entry and retiring ages of the MNS (Regular) Officers and their retention in service after marriage :

(i) The upper age limit for entry in Department Commission will be 35 years.

(ii) The age limit for compulsory retirement for MNS (Regular) Officers of the rank of Colonel will be 57 years.

(iii) The MNS (Regular) Officers may be permitted to remain in service even after marriage at the discretion of the DG AFMS for a period of two years at a time.

The case of such married officers as are retained will also be reviewed by the DG AFMS periodically after every two years. The relaxation of the normal rules will be a temporary measure and the position will be reviewed by 1.1.1970.

2. This letter issues with the concurrence of the Ministry of Finance (defense) vide their D.O. No. 289-PA of 1960.

7. Pursuance to the above order issued by the President of India, the Supreme Court served that the respondent employer should have given the appellant a chance to prove her ability in the two years following the marriage. If she succeeded in proving that she was good enough to remain in service, notwithstanding the marriage. She was entitled to be retained in service in terms of the President's order. Since that appellant was not given that opportunity, Therefore, the order passed by the respondent was set aside.

8. In the present case also even though the petitioner was on probation it is not case of the respondent that she was not efficient or she was not fit to be retained in service on account of her lack of ability or unsatisfactory performance. Given opportunity she might have succeeded in providing that she was good enough to remain in service, notwithstanding the marriage if marriage was a handicap. Under the principles of natural justice, she was entitled to an opportunity to prove her ability that she could continue to be efficient despite marriage. She ought to have been provided with such an opportunity to prove that marriage was not a handicap. It was open to the respondent to discontinue her service in the event of her not proving her ability and efficiency during the two years' period of probation. The alleged presumption of the respondent that on account of marriage in each and every case of probation the period would get reduced to 11 months as against 24 months. It is nothing but the fragmentation of the respondent's imagination. Such a presumption can be said to be based on surmises. It is not necessary that every nurse who would get married during the probationary period would get pregnant and take maternity leave. For example, in the two year's probationary period a nurse may get married when hardly four months are left in the completion of probation period. In such a case, would the respondent still terminate her service on the ground of marriage ? In a case like this, there cannot be any resumption that she will ask for maternity leave. Hence the order of the respondent laying down the condition that each and every probationer who will get married her services to be terminated is nothing but a ins on account of sex. It is clearly in violation of Articles 15 and 16 of the Constitution of India. In the absence of there being any rationale justifying such restriction, the impugned order is liable to be set aside. Such an order of criteria discriminates against MNS Nurse on account of her sex and, Therefore cannot stand the test of time and scrutiny of law. The respondent could have terminated the probationary period of the petitioner on the basis of her performance or on the ground that she could not successfully complete the two years period of probation. Her service could not be terminated in the mere ground of marriage. The respondents rule of probation prescribes that after the completion of two

years of probation period, the incumbent will not automatically get confirmed specific order has to be passed retain the employee in service. It has not been the case of the respondent that petitioner's performance was not good or that she had not completed the probation period successfully and, Therefore, terminated her service. Instead the respondent terminated her service because she got married. This is a clear violation of Articles 15 and 16 of the Constitution of India. Since the respondent's rules do not provide automatic confirmation Therefore, if the petitioner had not completed the probation period satisfactorily nothing prevented the respondent to terminate her service on that ground. I find no difference between the total ban on marriage of woman while in service and the present ban on marriage during probation period. Both the bans stand almost on the same bias against a woman nurse on account of sex. The observations of the Supreme Court in Lieutenant (Mrs.) Indira Kumari case (supra) surely apply to the facts of this case. The petitioner's service could only be terminated if it had been the case of the respondent that she did not complete the probation period satisfactorily or that her performance was not good or that she was inefficient. That being not the case of the respondent the order of termination dated 23rd October, 1989 is violative of the petitioner's rights as guaranteed under our Constitution. Hence the impugned order is set aside.

9. It must however be observed that the respondent would not be debarred from discontinuing the service of the petitioner in the event of her being not in a position to prove her ability during the period she will now be placed on probation which period will begin to run from the date fresh orders are passed. If at the end of the probationary period or during that period, the respondent finds that the petitioner qualified for remaining permanently in service, she would then have the benefit of continuity of service for all purposes.