
(2001) 08 BOM CK 0078

In the Bombay High Court

Case No : Writ Petition No's. 1429 of 1991, 1689, 1698 and 1705 of 1992, 804 of 1997, 708 and 1538 of 1998, 2419 of 2000 and 1163 of 2001

Yeshaswinee Merchant and Others

APPELLANT

Vs

Air India Ltd. and Others

RESPONDENT

Date of Decision : 23-08-2001

Acts Referred:

Air Corporations Act, 1953 — Section 34
Constitution of India, 1950 — Article 14, 16
Equal Remuneration Act, 1976 — Section 5

Citation : (2002) 3 MhLj 701 : (2002) 1 MhLj 701

Hon'ble Judges : S.J. Vazifdar, J;A.P. Shah, J

Bench : Division Bench

Advocate : C.U. Singh and Geetanjali Prabhu, instructed by Sanjay Udeshi and Co., Anand Grover and F. Moosa, instructed by Halwasia and Co., Harish Jagtiyani, Mohan Bir Singh and V.M. Singh, instructed by Hitesh Dabhi, J.P. Cama and K.P. Anilkumar, for the Appellant; S.B. Jaisinghani, A.S.G. and H.V. Mehta, instructed by H.D. Rathod, For Union of India, E.P. Bharucha K. Bharucha, S.K. Talsania, K.A. Setalwad and Zuben S. Behramkamdin, instructed by Mulla and Mulla CBC, K.B. Swamy and Jyoti Saigal, instructed by Bhasin and Co., A.J. Rana and Girish Kulkarni, instructed by M.V. Kini and Co., for the Respondent

Judgement

This Judgment has been overruled by : Air India Cabin Crew Association Vs. Yeshawinee Merchant and Others, AIR 2004 SC 187 : (2003) 5 JT 413 : (2003) 3 LLJ 1 : (2003) 5 SCALE 208 : (2003) 6 SCC 277 : (2003) SCC(L&S) 840 : (2003) 1 SCR 455 Supp : (2003) 2 UJ 1358

A.P. Shah, J.—Whether the air hostesses working in Air India have a right to perform flying duties after attaining the age of 50 years is the principal question that falls for consideration in these writ petitions under Article 226 of the Constitution of India.

2. Air India has about 1000 air hostesses. The cabin crew of Air India comprises of females and males. Air India had initially fixed the retirement age of air

hostesses at 30 years with power to the General Manager to extend the retirement age upto 35 years, upon the air hostesses being found medically fit. In 1980-1981 the age of retirement of air hostesses was increased to 35 years and their services could be extended for one year at a time at the sole discretion of the Managing Director until they attained the age of 45 years. In contrast the male cabin crew known as assistant flight pursers, flight pursers and in-flight supervisors, were retained in service and continued on flight duties until the age of 58 years. In view of the decision of the Supreme Court in the case of AIR India Vs. Nergesh Meerza and Others, the age of retirement of the air hostesses stood increased to 45 years subject to their being medically fit. Sometime in the year 1989, pursuant to the report made by the Petitions Committee of the Parliament, the Union of India issued two separate directives both dated 16th October, 1989 directing Air India and Indian Airlines that like male cabin crew, Air hostesses should be allowed to serve till the age of 58 years subject to medical examination once a year after the age of 35 years. This directive was implemented by the Indian Airlines. Air India, however, on the basis of a letter of the 3rd respondent i.e. Joint Secretary Ministry of Civil Aviation and Tourism dated 29th December, 1989 issued the circular dated 23rd March, 1990 to the effect that though the age of retirement of the air hostesses would stand increased to 58 years, they would be grounded upon attaining the age of 45 years and would not be entitled to perform flying duties. The said letter dated 29th December, 1989, the circular dated 23rd March, 1990 and further circulars dated 2nd November, 1990 and 5th May, 1991 and the Office Order dated 12th January, 1993 are challenged by the Air hostesses on the ground that the same are ex-fade, mala fide, arbitrary, unreasonable and violative of their fundamental rights guaranteed under Articles 14, 16, and 21 of the Constitution.

3. During the course of the arguments, Mr. Bharucha, the learned counsel appearing for Air India made a statement before us that Air India does not want to make any discrimination between the air hostesses and male cabin crew and further made a categorical statement that Air India would be willing to assign flying duties to the air hostesses upto the age of retirement i.e. 58 years subject to certain measures which we will discuss at the appropriate stage. Suffice it to say that Air India wants to introduce interchangeability of job functions on board the air craft and flexibility of working positions at the discretion of the management. The learned Additional Solicitor General appearing on behalf of the Union of India endorsed the solution. The reasonable and responsible approach adopted by the Union of India and Air India has resulted in a fair and proper resolution of the disputes between the petitioners on the one hand and Air India/ Union of India on the other. Understandably their only reservation was that Air India should not suffer monetarily or otherwise by introduction of parity in the age of retirement of male and female cabin crew. Mr. Harish Jagtiyani, Mr. Anand Grover, Mr. C. U. Singh and Mr. Mohan Bir Singh, the learned Counsel appearing on behalf of the petitioners in various writ petitions also agreed to the aforesaid suggestion made by Air India and endorsed by the Union of India. It may be

mentioned that as a matter of fact one of the prayers made by the air hostesses is for a direction to Air India to effect complete parity and merger between the air hostesses and male members of the cabin crew and remove all vestiges of discrimination between the male and female members of the cabin-crew. In these circumstances, it would have been sufficient for us to merely record the compromise arrived at between the petitioners, Air India and the Union of India. However, Mr. J.P. Cama, learned Senior Counsel appearing on behalf of the All India Cabin Crew Association (AICCA) while agreeing to the retirement age of air hostesses being brought on par with that of the male cabin crew, opposed the introduction of interchangeability of duties between the two. Air India gave extremely cogent and valid reasons for insisting on interchangeability of duties between the male and female cabin crew. Mr. Cama attempted to demonstrate that the males and females of his Association would suffer, if interchangeability was introduced. "With the assistance and co-operation of Air India and the Union of India, we ensured that the members of the AICCA would not suffer monetarily or otherwise in a settlement. Ultimately when each of the difficulties faced by Mr. Cama were resolved the real reason for his opposition emerged. Presently, irrespective of seniority, only a male member of the cabin crew is entitled to be a flight supervisor. With interchangeability junior male cabin crew members may have to work under a senior female flight supervisor. This he said was unacceptable to the male members of the AICCA. This really was the real reason why Mr. Cama opposed the compromise. Having regard to the understanding reached between the petitioners and Air India and Union of India, it would not really have been necessary for us to give reason for our order. The order could have been simply confined to the recording of agreement between the parties. However, in view of the opposition by the Interveners we propose to give brief reasons for our order allowing the petitioner's prayer for permitting air hostesses to fly upto the age of 58 years subject to measures suggested by Air India.

4. The air hostesses and the management of Air India are locked in combat for more than three decades mainly on the issue of age of retirement. Air India and Indian Airlines were formed under the Air Corporations Act, 1953. Air India fixed the age of retirement of air hostesses at 30 years vide regulation No. 46(c) of the Air India Employees Service Regulations. Regulation 47 empowered the General Manager to extend the retirement age upto 35 years upon air hostesses being found medically fit. On 10th March 1979 regulations 46 and 47 were amended. The amended regulation 46 reads thus :--

"46. Retiring Age. -- Subject to the provisions of sub-regulation (ii) hereof, an employee shall retire from the service of the Corporation upon attaining the age of 58 years, except in the following cases when he/she shall retire earlier.

24.....

25. An Air Hostess, upon attaining the age of 35 years, or on marriage, if it takes place within four years of service, or on first pregnancy, whichever occurs earlier."

Under regulation 47 services of air hostesses could be extended for one year at a time at the sole discretion of the Managing Director, until they attained the age of 45 years.

5. In 1980 one Nergish Meerza together with some fellow air hostesses, filed writ petition No. 1186 of 1980 in this Court wherein they challenged the retirement age and other conditions of service applicable to the air hostesses, primarily on the ground that the same were discriminatory and violative of Articles 14, 15 and 16 of the Constitution. The said writ petition was transferred to the Supreme Court and heard together with several writ petitions filed by the air hostesses employed in Indian Airlines. The Supreme Court in the case of Nergish Meerza rejected the plea of discrimination vis a vis the male cabin crew. However, this was not on the footing that the jobs performed by the two were substantially different but the decision was primarily based on the difference in service conditions, promotional avenues, retiral benefits and so on. It would be clear from the decision that the Court rejected the argument of Air India that the job functions performed by the assistant flight pursers and air hostesses are entirely different. To quote the words of the Court. "We are, however, not impressed with this argument because a perusal of the job functions which have been detailed in the affidavit, clearly shows that the functions of the two, though obviously different, overlap on some points but the difference, if any, is one of degree rather than of kind. Moreover, being members of the crew in the same flight, the two separate classes have to work as a team, helping and assisting each other particularly in case of emergency". Having said so the Court went on reproducing the award of Justice Maheshchandra observing thus :--

"This aspect of the matter was highlighted by the Mahesh Award which observed thus :--

The Management claims that there cannot be and should not be any inflexibility or rigidity regarding the functions and duties of the different categories of cabin crew and the Management should have full authority and discretion as regards the interchangeability of job allocations and functions and duties of the different categories of cabin crew and for effecting from time to time such interchanges of job allocations and of functions and duties as it might think fit.

There is not the slightest doubt that the cabin crew have to work as a team as pointed out by Shri S.S. Hemmadi (AMW. 5) Although there are different duties fixed for different categories it is necessary for each category to give help and do the work of other categories for the smooth flight.

We entirely agree with the observations made in the Mahesh Award and therefore do not attach much importance to this circumstance relied upon by the Corporation. "

6. It is pertinent to note that in the said case the Supreme Court has clearly held that as the two Airlines i.e. Air India and Indian Airlines were established as a single entity and formed one organisation with two units they had to be equated

for the purposes of service conditions. The following observations of the Supreme Court in that regard are relevant:

"It is manifest therefore from a perusal of the various provisions of the 1953 Act that A I and IAC, were established as a single entity which was divided into two units in view of the nature of the duties that each Corporation had to perform. We have mentioned this fact particularly because one of the contentions of Mr. Nariman, counsel for AI, was that AI itself was a separate and distinct entity and could not be equated with IAC. The provisions of the Act completely nullify this argument and clearly show that the two Corporations formed one single unit to be controlled by the Central Government under the 1953 Act. It may be that the two Corporations may have different functions to perform AI operating international flights and the other (IAC) operating domestic flights within the country. This fact alone, however, would not make the two Corporations absolutely separate entities."

After noting that the air hostesses in Indian Airlines are entitled to continue in service upto the age of 45 years the Supreme Court has held that the Air hostesses in Air India and Indian Airlines would be entitled to continue in service and retire at the age of 45 years subject to their being medically fit. Medical fitness was to be determined annually on the basis of an examination conducted by the Corporation. The discretion of the Managing Director to deny continuation to an air hostess after she turned 35 was struck down as being arbitrary and unguided.

7. Though the air hostesses seem to have lost the battle at that stage, the war continued. In 1988, the air hostesses of both the Airlines filed a joint petition before the Petitions Committee of the Lok Sabha on the issue of discrimination in retirement age and other service conditions. The Petitions Committee after hearing Air India, Indian Airlines, male cabin crew and air hostesses, recommended that all discrimination between the male and female cabin crew be put to an end. The Petitions Committee observed that a stage has now come for a fresh look at the service regulations to remedy the in built bias against female employees and take necessary corrective measures with full confidence in the capabilities of women folk. It was noted by the Committee, and in our view rightly, that although the Supreme Court has held that fixation of different age of retirement for different categories of employees was perfectly constitutional, it has not said that the age of retirement of air hostesses cannot be more than 35 years or 45 years as provided in the relevant service regulations and that as a matter of fact the Court has in its judgment observed that the question of fixation of retirement age of an air hostess has to be decided by the authorities concerned after taking into consideration various factors such as the nature of work and the prevailing conditions, the practice prevalent in other establishments and the like. The Petitions Committee went on to recommend as under :--

"Considering the general improvement in life expectancy as well as the position obtaining in several international airlines, the Committee are of the view that the

retirement age of the air hostesses may be raised to 55 years. This can be subject to the condition that after completing 50 years of service, the air hostesses may be required to undergo a medical fitness test annually. The Committee are also of the view that the restriction of four years' service before an air hostess would get married is not warranted and should be done away with. The only reasonable restriction which the Committee feel could be imposed in keeping with the small family form, is that the services of an air hostess may be terminated in case of third pregnancy after two living children.

The Committee are further of the view that just as the senior most cabin crew members of board on Indian Airlines Flight is allowed to supervise the functions of all other cabin crew, whether male or female, the Air Hostesses working in Air India should also be permitted to function as supervisors on board. The Cabin crew manual of Air India which provides that only flight purser could be incharge of each zone on flight may be amended so as to provide that a Deputy Chief Air Hostess could be entrusted with supervisory functions on board."

8. It would be of some interest to note that a couple of days prior to the date of submission of the report by the Petitions Committee to Parliament, the then Prime Minister Mr. Rajiv Gandhi in his letter dated 2-5-1989 to the Minister of State for Civil Aviation and Tourism expressed his views as under :--

"It is extremely important that we remove all traces of gender based discrimination in all public sector undertakings. On the face of it the worst discrimination is in Air India and Indian Airlines. There is discrimination in regard to the age of retirement for male and female cabin crew. There is discrimination between male and female employees in regard to such personal matters as marriage. There appears to be discrimination in regard to promotions. And there are differential rules in regard to medical examinations before superannuation regulation are relaxed.

As a Government, we are committed to equal and fair treatment for women. I would request you to please review all rules and regulations in regard to women employees of Air India and Indian Airlines with a view to removing all discrimination and unequal treatment."

9. In the above background, by the two separate directives both dated 16th October, 1989, the Union of India in exercise of powers u/s 34 of the Air Corporations Act, 1953 directed both the Airlines to abolish discrimination between male cabin crew and air hostesses and submit a compliance report of the action within a week. The directive dated 16-10-1989 addressed to Air India reads as follows :--

"Most immediate

No. A 18022/23/88-ACIA Government of India, Ministry of Civil Aviation and Tourism, New Delhi dated 16th October 1989

To The Managing Director, Air India, Air India Bldg., Bombay.

The Managing Director, Indian Airlines, Airlines House, New Delhi.

Sub : Discrimination against Air Hostesses in Air India and Indian Airlines -- decisions regarding. --

Sir,

I am directed to say that the question of removing discrimination service conditions against air hostesses in Air India and Indian Airlines has been engaging the attention of the Government for quite some time, after careful consideration, it has been decided as under :--

(i) that like the male cabin crew, air hostesses in Air India and Indian Airlines should also be allowed to serve till the age of 58 years,

(ii) that the air hostesses should be subject to medical examination once a year after the age of 35 years, but such medical examination shall not be called superannuation medical examination. In addition, air hostesses shall be subject to weight restriction regime which shall be very strictly observed and for which suitable executive instructions and guidelines may be drawn,

(iii) that ban on marriage of by air hostesses within the years of joining service shall be removed.

2. You are requested to implement the above decisions of the Government with immediate effect under intimation to this Ministry.

3. A compliance report of the action taken may please be submitted to this Ministry within a week.

4. Please acknowledge receipt of this letter. Yours faithfully.

Sd/- J.R. Nagpal. Under Secretary to the Government of India."

10. An identical directive was issued to the Indian Airlines Corporation. In compliance thereof Indian Airlines immediately issued a circular dated 19th October, 1989 whereby the retirement age of air hostesses was increased to 58 years and air hostesses were permitted to continue with flying duty upto the age of retirement. However, Air India instead of properly complying with the directive of the Union of India by its letter dated 15th December, 1989 addressed to the Ministry of Civil Aviation and Tourism, pleaded that the condition of service applicable to the air hostesses are distinct from those of male cabin crew such as salary grades, job functions, hierarchy on board, avenues of promotions, and medical examination and on that basis sought confirmation of its stand that the Government decision relates to increase in age of retirement to 58 years without specifying the job functions after the age of 35 years. In other words the stand taken by Air India was that the air hostesses can be continued in employment till the age of 58 years but not on flying duties after the age of 35 years and the deployment of air hostesses after the age of 35 years in alternate job is left to the discretion of the management. In reply to the said letter the 3rd respondent

vide his letter dated 29th December, 1989 wrote to the Chairman of Air India, Mr. Rajan Jetley as follows :--

"My Dear Rajan,

The matter has been reviewed and it is clarified that the increase in age of retirement to 58 years does not specify the job functions after the age of 35. Air hostesses may be given suitable alternate jobs till they attain 58 years of age. Further, on being given alternate jobs there is no question of annual medical check up. The Government feels that the male cabin crew as well as Air hostesses should turn out attractively and the management may explore the possibility of prescribing suitable medical examination and weight regime for both types of cabin crew.

With best wishes.

Yours sincerely,

Sd/- (Ravindra Gupta)"

Suffice it to mention at this stage that the learned Additional Solicitor General conceded that this letter was a "clarification" in respect of the directive dated 16-12-1989. He very fairly, and in our view, rightly, did not agree that this letter was also a directive u/s 34 of the Air Corporations Act, 1953. The question that falls for our consideration therefore, is, whether the letter of 29-12-1989 correctly clarifies the directive dated 16-10-1989. We shall shortly demonstrate why it does not.

11. Armed with the aforesaid letter Air India issued the impugned circular dated 29th March, 1990 directing that the air hostesses would retire at the age of 58 years but they shall be entitled to flying duties only upto the age of 35 years which may be extended upto 45 years. By a further circular dated 2nd November, 1990 issued by Air India it was directed that the air hostesses would be given employment in the level equivalent to that of the juniormost level of officers and would be required to perform such duties as may be assigned by the management. On such appointment they were ranked as the juniormost in the relevant clerical or officers category/grade to which they were assigned. Thereafter a circular dated 5th August, 1991 was issued by Air India in partial modification of the circular dated 2nd November, 1990 providing that on such appointment, after the age of 45, the air hostesses will belong to a separate cadre and the inter-se seniority of air hostesses and other allied categories of female cabin crew in the respective cadre will be protected. By an Office Order dated 12th January 1993 Air India directed that flight duties may be assigned to those air hostesses who have crossed the age of 45 years, till they attain the age of 50 years, keeping in mind the requirement of the Corporation.

12. It is the contention of the petitioners that the directive dated 16th October, 1989 clearly allowed the air hostesses to fly till the age of 58 years and there was no occasion to seek any clarification of the said directive dated 16th October,

1989. We find merit in this contention of the petitioners. It is obvious from the opening para of the directive..." like the male cabin crew, air hostesses in Air India and Indian Airlines should also be allowed to serve till the age of 58 years....." that the air hostesses are allowed to serve as air hostesses including flying duties till the age of 58 years. Indeed the directive was issued to remove discrimination in all those aspects against the air hostesses in Air India and Indian Airlines and if there be any ambiguity the same is removed by Clause (ii) of the said directive which provides for subjecting the air hostesses to medical examination after the age of 35 years and weight restrictions which are applicable only to flight crew and are directly related to flight duties. In other words the members of the cabin crew whether male or female are brought on par subject to the above restrictions. Otherwise it would mean setting at naught the report of the Petitions Committee of Parliament which was accepted by the Union of India with clear objective of removal of discrimination against the air hostesses. The Petitions" Committee"s report which is quoted by us extensively clearly indicates that the age of retirement was raised upto 58 years to allow the air hostesses to continue to serve as air hostesses i.e. to serve as air hostesses with flying duties. In our opinion the so called clarificatory letter by the 3rd respondent is per se discriminatory and has the effect of nullifying the directive dated 16th October, 1989.

13. It was submitted on behalf of the respondents that this letter dated 28th December 1989 itself amounts to a fresh directive by the Union of India u/s 34. We are unable to accept this submission for the simple reason that the so called directive/letter leaves the matter to the discretion of the Air India Management by using the word may thereby indicating that that it was not intended to be a directive u/s 34. Secondly there is absolutely no material to show that Union of India intended to continue the discrimination against the air hostesses by denying them flying duties after the age of 45 years. In this connection it would be worthwhile to refer to the noting made by Mrs. Jayanti Natrajan, the then Minister for Civil Aviation dated 11th December 1998. After recording that the circular dated 16th October, 1989 was fully complied with by the Indian Airlines, the Minister observed "In my view this is a clear case of arbitrary, reactionary and wholly unjustified discrimination against air hostesses in Air India. The case made out by the air hostesses is genuine and deserves immediate redressal. This gender discrimination is totally violative of all rules of natural justice, and also the Constitution of India. Such a state of affairs cannot be allowed to continue. Hence, a directive may be issued to Air India advising them to remove discrimination in service conditions of air hostesses and allow them to continue in full service till the official age of retirement subject to all other service conditions. Action taken may be reported within 10 days. This order should be implemented forthwith." We have been informed that no further action was taken on the said noting of the Minister in view of the pendency of present writ petitions.

14. In our opinion the decision to ground the air hostesses working in Air India

after attaining the age of 58 years clearly amounts to violation of Articles 14 and 16 of the Constitution. It is a settled position of law that Articles 14 and 16 forbid class legislation but only permits reasonable classification. The classification must satisfy the twin tests viz. that it must be founded on intelligible differentia and that the differentia must have a rational nexus to the object sought to be achieved. By increasing the age of retirement to 58 years but not allowing the air hostesses to carry on flight duties after the age of 50 years air hostesses are arbitrarily divided into two classes, one below the age of 50 years and the other above the age of 50 years. There is no legitimate objective that is sought to be served which has a rational nexus to the division of the air hostesses into two classes in this fashion. It is settled legal position that the burden to sustain discrimination is entirely on the State seeking to justify the same (See D.S. Nakara and Others Vs. Union of India (UOI),). The learned counsel for Air India was unable to show any valid basis for this classification. It is seen from the affidavit in reply filed on behalf of Air India that the sole basis for making this classification was the possibility of objections being raised either by the male or the female members of the cabin crew to the increased flying age. It is not the case of Air India that after the age of 50 years any particular inherent requirement of the flying job cannot be satisfied by the air hostesses or that after they complete age of 50 years they do not comply with any bona-fide occupational qualification or requirement. There is also no rational reason why the age of 50 years is taken as the cut off point for grounding the air hostesses and for that matter, 51 or 55 years is not taken as the cut of point.

15. In Nergish Meerza's case it has held by the Supreme Court that the case of Air hostesses in Air India and Indian Airlines is identical i.e. they are one class for the purpose of retirement. In Indian Airlines age of retirement of air hostesses was 40 years and that of Air India air hostesses was 45 years. The Supreme Court brought this on par as the air hostesses were held to belong to one class. Therefore the difference in the age of retirement between the two would obviously result in discrimination forbidden by Articles 14 and 16. As seen above after the directive of 16th October, 1989 was issued by the Union of India the Indian Airlines increased the age of retirement of the air hostesses upto 58 years and they are allowed to fly upto that age. Therefore the air hostesses in Air India will also be entitled to continue flying duty upto 58 years. It is, however, sought to be contended that the job of the air hostesses in Air India is more arduous than the air hostesses in Indian Airlines. We find absolutely no foundation for this contention. It has been rightly pointed out by the petitioners that Indian Airlines also operates on international routes. The air hostesses in Indian Airlines operate 100 hours a month, whereas in Air India, air hostesses are assigned 55 hours flying duties extendable upto 80 hours a month. Therefore, the argument based on the allegedly strenuous nature of work on international airlines, does not stand to scrutiny.

16. In Nergish Meerza's case the Supreme Court considered that the male and female cabin crew of Air India form two separate classes. The said decision is

based on the following differences noticed by the Supreme Court in the said judgment (see paras 41 to 49):

- (i) difference in qualifications at the time of recruitment;
- (ii) difference in basic pay at the time of entry;
- (iii) difference in promotional avenues;
- (iv) difference in time kept between promotions at different levels and (v) difference in number of posts of the two categories.

Over the years all the aforesaid differences have been obliterated by subsequent events. In fact on 5th June, 1997 Air India entered into an agreement with the AICCA whereby the cabin crew (both Air hostesses and flight pursers) recruited after 5-6-1997 have integrated job functions that is they are required to perform the functions of both air hostesses and flight pursers depending upon the allocation of flight duties.

17. At present the hierarchy of two cadres is as follows :--

Male Cabin Crew Female Cabin Crew Manager Manager (After 22 years cumulative or 4 years in the previous grade) Sr. Check Cabin Crew Sr. Check Cabin Crew (After 18 years cumulative or 4 years in the previous grade) Addl. Sr. Chk. Cabin Crew Addl. Sr. Chk. Cabin Crew (After 14 years cumulative or 4 years in the previous grade) Check Cabin Crew Check Cabin Crew (After 10 years cumulative or 5 years in the previous grade) Cabin Crew II Cabin Crew II (5 years after joining) Cabin Crew I Cabin Crew I

The pay scales as well as grades in both the categories have now become almost identical, the only difference being that the male cabin crew is entitled to a "bar loss" compensation whereas the air hostesses are not. The promotion upto the level of manager for both the male cabin crew and female cabin crew are time bound promotions on the basis of completion of certain number of years of service. Even beyond managerial level, promotions are on the basis of their rendering particular years of service. However, we have been informed that this time bound promotion beyond managerial level is kept in abeyance for the time being. But this makes no difference as far as the question of discrimination is concerned. We find that there is no basis whatsoever for giving differential treatment to the air hostesses as regards performing of flying duties beyond the age of 50 years. Even though differential treatment was justified earlier when Nargish Meerza's case was decided due to difference in two cadres, we find that with the passage of time and changed circumstances, classification which was justified at that time has now become arbitrary and unreasonable. There is ample judicial authority in support of the proposition that legislation which was justified when enacted with the passage of time, may become arbitrary and unreasonable with the change in circumstances. There is a catena of decisions on this proposition right from State of Madhya Pradesh Vs. Bhopal Sugar Industries Ltd., and the recent judgment in the case of Malpe Vishwanath Acharya and

Others Vs. State of Maharashtra and Another, .

18. The report of the Petitions Committee, the letter of the late Prime Minister Mr. Rajiv Gandhi and the noting made by the former Civil Aviation Minister Ms. Jayanthi Natarajan which have been already referred all show that the Central Government has since over a decade strongly felt that the discriminatory treatment given to the air hostesses in the matter of age of retirement was totally unwarranted. Our attention is also drawn to the statement made by the then Minister of Power Mr. R. Kumaramangalam who in his speech in Parliament while replying on the issue of discrimination against women especially against air hostesses stated :

"I would like to assure the Hon. Members who spoke on the issue of discrimination against women especially against Air hostesses that I will definitely bring it to the notice of the Minister of Civil Aviation. We do understand their problems. As you are aware, even the former Minister for Civil Aviation Shrimati Jayanthi Natarajan passed orders which got implemented only with regard to the Indian Airlines. I will definitely bring it to the notice of the Hon. Minister of Civil Aviation. Constitutionality it needs to be rectified. We will take steps",

19. At this stage we may refer to the provisions of Equal Remuneration Act, 1976 (for short ERA) which is enacted to prohibit discrimination in conditions of service that makes any discrimination between men and women for the same or similar work. Section 5 of the ERA reads as under :--

"5. No discrimination to be made while recruiting men and women workers. -- On and from the commencement of this Act no employer shall while making recruitment for the same work or work of a similar nature (or in any condition of service subsequent to recruitment such as promotions, training or transfer), make any discrimination against women except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force :

Provided that the provisions of this section shall not affect any priority or reservation for Scheduled Castes or Scheduled Tribes, ex-servicemen, retrenched employees or any other class or category of persons in the matter of recruitment to the posts in an establishment or employment".

The bracketed portion was inserted by the Equal Remuneration (Amendment) Act (49 of 1987) with effect from 16-12-1987 i.e. after the decision in Nergish Meerza's case.

20. It would be clear that in view of the above provision Air India would be prohibited from having any condition of service subsequent to the recruitment of the employee that makes any discrimination between men and women for the same or similar work. The provisions of the ERA by virtue of the non obstante clause occurring in Section 3 thereof override any provisions of law or terms of

any award, agreement or contract of service, whether made before or after the commencement of the ERA or in any instrument having effect under any law for the time being in force. Section 5 as amended is clear in this regard. Any doubt in the contrary is set at rest by a reference to Clause 2 of the S.O. Rs. of the Amending Act 49 of 1987 which reads as under :--

"2. The Act, while requiring equal payment to be made to men and women doing the same or similar work and stipulating that no discrimination should be made between men and women in recruitment does not specifically state that discrimination should not be made between men and women while in employment. This is a lacuna which can enable an employer to discriminate against women in matters like promotions, training, transfers, etc. It is, therefore, proposed to modify Section 5 of the Act to prohibit discrimination against women not only in recruitment but also in relation to conditions of service subsequent to employment such as promotions, training, transfers, etc."

21. In Nergish Meerza's case the Supreme Court referred to the declaration issued by the Union of India dated 15th June, 1979 u/s 16 of the ERA to sustain the discrimination between the air hostesses and flight pursers relating to the age of retirement. It is pertinent to note that at the time when the said declaration was issued by the Union of India, Section 5 prohibited discrimination in the matter of recruitment only and not in the matter of service conditions subsequent to the recruitment. Thus the 15-6-1979 notification being prior to the amendment to Section 5 of the ERA does not apply to the conditions of service of the petitioners. Moreover Section 16 provides for a deeming provision but that provision obviously applies to differential treatment in the matter of recruitment only. It needs also to be noted that whereas Section 5 was amended incorporating service conditions after the recruitment as well, no such amendment is made to Section 16 empowering the Union of India to make a declaration in the matter of service conditions after the recruitment. It is doubtful whether for the purpose of service conditions subsequent to the recruitment the Union of India can resort to Section 16. It is, however, not necessary for us to decide this issue as in fact the Union of India has not issued any such declaration under the said section. Taking into consideration the above aspects the impugned circular issued by Air India directing the grounding of air hostesses at the age of 50 year's would per se contravene Section 5 and could not be saved by reference to the aforesaid declaration issued in 1979.

22. Now as regards Clause 30(i)(c) of the Certified Standing Orders dated 3rd January 1998, on which reliance was placed by Air India, the same cannot stand in view of the provisions contained in Section 5 of the ERA prohibiting the discrimination in service conditions solely on the ground of sex. Moreover, the Certified Standing Orders disclose complete non application of mind, inasmuch as the Standing Orders prescribe the age of air hostesses for flying duties between 35 and 45 years whereas Air India itself has permitted air hostesses to fly upto the age of 50 years. It is also liable to be struck down on the ground that no

hearing was given to the affected air hostesses before framing the Standing Orders. Taking any view of the matter, therefore, the Standing Orders prescribing the age of flying duties of the air hostesses are totally unjust and unfair and cannot be given effect to in view of the express provisions of Section 5 of the ERA.

23. In the light of the foregoing discussion, we hold that the impugned letter of the 3rd respondent dated 29-12-1989 purporting to clarify the directive dated 16-10-1989 is illegal and unjustified. The purported clarification is contrary to and in violation of the clear and express language of the directive dated 16-10-1989. The impugned circulars issued by Air India, including the circular dated 2nd November, 1990, are also therefore, illegal. They are also discriminatory and violative of Articles 14 and 16 of the Constitution.

24. As indicated by us at the outset that Air India has agreed to increase the flying age of air hostesses to 58 years subject to certain measures proposed by Air India. The proposal to that effect in writing was put on record by the learned counsel for Air India. The same was discussed during the course of arguments and finally a consensus has been reached on the following :

(i) Order of this Court be confined only to such members of the cabin crew of both sexes recruited prior to October, 1997;

(ii) There shall be total interchangeability of job functions on board the aircraft and flexibility of working positions shall be at the discretion of the management;

(iii) There shall be total parity between the two cadres of air hostesses and flight, pursers and all vestiges of distinctions be brought to an end;

(iv) The inter-se seniority between the two cadres shall be worked out as follows :--

(a) The seniority of male and female cabin crew will be in accordance with their date of joining;

(b) If in the same grade the female cabin crew is senior to a male cabin crew even though her date of entry into Air India is later than that of the male cabin crew, the grade and basic salary of the female cabin crew will be frozen till such time as the male counter part catches up with her and is placed senior to her as per his date of joining;

(c) If a male cabin crew is in a lower grade than a female cabin crew despite the male cabin crew having joined Air India at an earlier date, the grade and basic salary of the female cabin crew will be frozen till such time as the male cabin crew is promoted and becomes senior to the female cabin crew as per his date of joining;

(d) In cases covered by Clause (b) and (c) above, the basic salary and grade of the female cabin crew shall remain frozen till such time as the male cabin crew becomes senior to the female cabin crew or for a period of two years whichever

is less ;

(e) In situations where the female cabin crew is senior to the male cabin crew, where the date of joining is the same, the existing relative seniority will remain undisturbed;

(f) Male/female cabin crew who have been downgraded due to disciplinary action, will continue with the handicap;

(g) Male/female cabin crew who have been refused promotions will also continue with the handicap, and

(h) Male/female cabin crew who are on leave without pay, the number of days will be deducted whilst fixing their seniority.

(v) The hierarchy on board the aircraft will be based on seniority irrespective of sex;

(vi) Special benefits which are being given to air hostesses at present, like early retirement and all benefits arising out of early retirement, shall no longer be continued;

(vii) The bar loss compensation will be paid to only such cabin crew (both workmen and executive) as are at present in receipt of the same and to no other cabin crew;

(viii) All cabin crew (both workmen and executive) shall have to undergo annual medical examination after the age of 35 years and shall also be subject to weight checks at all times irrespective of sex. Provided further that in the case of Air hostesses who have been grounded need not have to undergo medical tests, weight checks, safety and refresher training;

(ix) All air hostesses shall have to exercise a one time irrevocable option within one month from the date of the receipt of intimation given in that behalf by Air India to decide whether they wish to retire at the age of 50 years or to continue to work in Air India and fly as air hostesses till the retirement age of 58 years. To achieve parity, a similar option will also be offered to the male cabin crew as a one time exercise. No cabin crew will be eligible for ground jobs except where the cabin crew is grounded by the management due to lack of medical fitness.

(x) No member of the cabin crew, male or female joined after October, 1997 will be allowed to claim bar loss compensation.

We must clarify that Mr. A.J. Rana and Mr. E.P. Bharucha expressly stated that they consented to the above terms as a whole. In other words Air India was willing to increase the age for assigning air hostesses flying duties only if the other terms set out above were also implemented.

25. The above measures are vehemently opposed by the interveners AICCA. Mr. Cama who represents the AICCA raised before us certain objections to the proposal of introducing interchangeability between the two cadres. The first

objection of Mr. Cama is that due to interchangeability the air hostesses will be required to undertake duties involving strenuous physical work, which so far is performed by the male cadre. He submitted that at present the air hostesses are mainly concerned with cabin service, clearing the same and liquor service, which is comparatively lighter work. Mr. Cama complained that if interchangeability is introduced the air hostesses will be required to do the functions which are more arduous and which are ordinarily performed by the male crew. He has filed a long list of alleged difference in the functions of the two cadres. Secondly, Mr. Cama submitted that from the beginning the male pursers are always regarded as senior in hierarchy on board the aircraft and that only a male cabin crew is allowed to act as in-flight purser or in-flight supervisor as the case may be. Mr. Cama submitted that this right of the male cabin crew has been clearly recognised by the Record Note dated 17th November, 1983, the validity whereof was upheld by the learned single Judge in Writ Petition No. 1166 of 1984 decided on 25-7-1984 and the decision of the learned Single Judge was confirmed by the judgment of the division bench dated 31-10-1985 in Appeal No. 1068 of 1984. Mr. Cama submitted that this right which has been vested in the male cabin crew cannot be taken away by the Court in exercise of writ jurisdiction under Article 226. If at all the management wants interchangeability between the two cadres, it has to resort to appropriate forum under Industrial Disputes Act, 1947. According to Mr. Cama the distinction between the two cadres is based on the award made by Justice Maheshchandra, which award has also been recognised by the Supreme Court in the case of Nergish Meerza. We hasten to add that Mr. Cama conceded before us that there is no post or cadre of flight supervisor or in-flight supervisor and there is no monetary benefit attached to the said post and it is only a matter of status on board the aircraft. However, according to Mr. Cama this recognised status of the male cabin crew on board the aircraft cannot be interfered in the present proceedings under Article 226.

26. We are unable to see any force in the submissions of Mr. Cama. The Supreme Court has in clear terms held that the job functions of male and female cabin crew are similar and sometime they are overlapping. We are satisfied that no distinction can be made on the basis of the alleged arduous nature of work nor can we differentiate between the two cadres on that basis. It is pertinent to note that AICCA has itself entered into settlement thereby agreeing to the interchangeability of job functions between the two cadres on board the aircraft in respect of cabin crew recruited after 1997. We find that after the passage of two decades and several intervening circumstances there is absolutely no justification for continuing the so called differentiation between the female and male cabin crew as argued by Mr. Cama. We find that the submission of Mr. Cama is farfetched and as urged by the learned counsel for the petitioners that the bogey of arduous nature of work is raised at the behest of the male cabin crew whose status on board the aircraft is likely to be affected.

27. We are equally unable to uphold the second submission of Mr. Cama that only male cabin crew has a right to act as flight purser or flight supervisor on board

the aircraft. It may be recalled that the Petitions Committee of the Parliament has categorically recommended that the hierarchy in flight should be determined on the basis of inter-se seniority and no preference should be given to male cabin crew as has been done in the past. It seems that prior to 1976 there was a post of Deputy Chief Airhostess which came to be abolished. One of the grievances made by the air hostesses before the Supreme Court in *Nergish Meerza's* case was that due to the abolition of the post of Deputy Chief Air hostess, there had been considerable restriction in the promotional avenues of the air hostesses. The Supreme Court recommended that "Air India should seriously consider desirability of restoring the post of Deputy Chief Air hostess and thereby remove the serious injustice done to the air hostesses in violation of the principles of natural justice." Accordingly on 17th November, 1983 the Record Note was executed between Air India and the AICCA setting out agreement pertaining to the promotional avenues evolved for the category of air hostesses. By the said Record Note it was agreed that a senior category of air hostess would be created in the grade of Rs. 720-1300 and be designated as senior check air hostess. It was also stated that the existing avenues of promotion for assistant flight purser, flight purser and in-flight supervisors will continue unaffected and the hierarchy on board the aircraft for various categories will remain as at present and there will be no change in the job functions of any category of cabin crew as a consequence of this agreement. The fact that the challenge raised to the Record Note on the basis of Article 14 has failed does not mean that status given to male cabin crew on board the aircraft should be perpetually continued and the management has no right to change this position with a view to remove the discrimination against the air hostesses. In fact it was clarified by the division bench that..... "the word "hierarchy" used by Air India is unwarranted and unnatural. Between these two classes there is no chain of command. And neither sits in judgment over the other. Both classes work as a team and complement each other with, should the need arise, mutual requests for assistance, in the interest of a comfortable flight for the passengers for whom both classes are intended to exert themselves". In our opinion the male crew cannot claim any vested right as such for special status on board the aircraft.

28. In the result, in view of the foregoing discussion, we make the Rule absolute in all the writ petitions in terms of the following order :

(i) the impugned letter of the 3rd respondent dated 24th December, 1989 and circulars issued by Air India dated 23rd March, 1990, 2nd March, 1990 and 5th August, 1991 as well as office order dated 12th January, 1993 are hereby quashed and set aside;

(ii) Air India is directed to implement the directive dated 16th October, 1989 issued by the Union of India by permitting the petitioners to perform flying duties until they attain the retirement age of 58 years subject to medical fitness and weight check and further subject to the measures suggested by Air India and reproduced earlier in this order ;

(iii) Air India is directed to pay to the petitioners the differential amount of salary from the date of grounding till the date of resumption of flight duties and 50% of the compensatory allowances as per column 9 of the proposal marked "X", to the air hostesses who were grounded prior to 31st December, 1997 and 30% of the allowances for the air hostesses who were grounded on or after 1st January, 1997;

(iv) Air India is directed to comply with the above directions within a period of 12 weeks.

(v) Air India is directed to take steps to refix seniority of the cabin crew in accordance with this order and complete the work of refixation of seniority within 24 weeks;

(vi) Air India is directed to take steps to amend Clause 30(i)(c) of the Certified Standing Orders in the light of the directions given by this Court;

(vii) all awards and settlements entered into between the management of Air India and the Unions of cabin crew to stand modified to the extent they conflict with this order;

(viii) air hostesses will be entitled to the benefit u/s 192(2A) read with Section 89 of the Income Tax Act with regard to the amounts paid in arrears.

Certified copy expedited.

The parties and the authorities to act on the ordinary copy of this order duly authenticated by the personal secretary of this Court.