

ORISSA HIGH COURT: CUTTACK

W.P(C) NO. 14945 OF 2015

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

Kshirabadi Bala Behera

.....

Petitioner

-Versus-

Orissa Administrative
Tribunal represented
through its Registrar,
Cuttack & Ors.

.....

Opp. Parties

For Petitioner : M/s. B. Moharana,
D. Chhotray, B. Mohanty
and S. Mohanty, Advocates

For Opp. Parties : Mr. S. Jena, Standing
Counsel, S&ME Deptt.

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI

AND

THE HONOURABLE MR. JUSTICE G. SATAPATHY

DECIDED ON : 24.08.2022

DR. B.R. SARANGI, J. The petitioner, who is the daughter of the deceased employee, has filed this writ petition seeking to quash the order dated 06.05.2014 passed in O.A. No.1063 (C) of 2015, by which the Odisha Administrative Tribunal, Cuttack Bench, Cuttack has

disposed of the said O.A. with a direction that one of the members of the deceased family having the eligibility criteria, excepting the petitioner, who is a married daughter of the deceased employee, shall file an application in prescribed form for appointment under the Orissa Civil Service (Rehabilitation Assistance) Rules (in short OCS (R & A) Rules), before the District Education Officer, Balasore, as per letter dated 17.11.2014, and the District Education Officer in turn will take steps for extending the benefit of appointment under the said Rules, and further to quash the order dated 29.06.2015 under Annexure-15 passed in M.P. No.637(C) of 2015, by which the Tribunal has rejected the application for modification observing that no wrong has been committed on the face of the order dated 06.05.2015 directing that one of the members of the deceased family, other than the petitioner, may apply for appointment under Rehabilitation Assistance Scheme. The petitioner has also prayed to issue direction to the opposite parties to appoint the petitioner in a suitable post under OCS (R & A) Rules, by striking down the

word “unmarried” contained in Rule-2(b)(iii) of the OCS (R & A) Rules, 1990 and Rule-2 (1)(d)(iii) of the OCS (R & A) Rules, 2020, being ultra vires to the Constitution of India and violative of Articles-14, 15 and 16 of the Constitution of India.

2. The factual matrix of the case, in brief, is that the petitioner’s father, who was working as Headmaster in Nilasundar Zew High School, Sundarpur, Kupari, died on 12.12.2010 in harness putting the family in distress condition. The petitioner, who is the daughter of the deceased employee, applied for compassionate appointment under the Orissa Civil Service (Rehabilitation Assistance) Amendment Rules, 2008 (“Rules, 2008” for short) through the Headmaster of the School, who, on 08.12.2011, forwarded the application of the petitioner to the Inspector of Schools, Balasore Circle, Balasore. On 16.12.2012, opposite party no.5- District Education Officer, Balasore, who is the appointing authority, forwarded the said application along with documents to the Collector, Balasore for issuance of distress certificate for consideration of the

petitioner's appointment under the Rehabilitation Assistance Scheme.

2.1 The Deputy Collector, Balasore, on 19.05.2012, directed opposite party no.6-Tahasildar, Khaira to enquire and submit a detailed report regarding the distress condition of the deceased family and furnish a certificate at an early date to the effect that "the information stated in the application has been enquired into and found correct". When no step was taken by the Tahasildar, the Deputy Collector, Balasore again issued reminder on 08.08.2012 specifically requesting to furnish the report within a week positively for perusal of the Collector, Balasore, for issuance of distress certificate in favour of the deceased family. As no enquiry report was submitted, the Deputy Collector, Balasore, again on 25.10.2012 issued another letter to the Tahasildar, Balasore, requesting to transmit/furnish the report immediately in order to issue distress certificate.

2.2 On 29.11.2012, the Tahasildar submitted enquiry report to the Deputy Collector (Est.), Balasore stating that the family members of the deceased employee were living in distress condition, but there was no mention about the marital status of the petitioner. Therefore, the Additional District Magistrate, Balasore, on 18.12.2012, directed the Tahasildar, Khaira, to submit the marital status of the petitioner with the signature of the Tahasildar by 25.12.2012 for perusal of the Collector, Balasore and consideration for issuance of distress certificate in favour of the deceased family. Despite specific direction, the Tahasildar, Khaira, did not take any step nor furnished report, for which the Deputy Collector, Balasore, again on 27.02.2013, requested the Tahasildar, Khaira to furnish the report within a week positively in order to issue distress certificate in favour of the deceased family.

2.3 Opposite party no.5-District Education Officer, Balasore, on 25.03.2013, submitted a report to the Collector, Balasore regarding marital status of the petitioner as 'unmarried' along with the affidavit sworn

to by the petitioner. On 10.04.2013, the Deputy Collector, Balasore, again requested the Tahasildar, Khaira, to furnish the report within a week positively in order to issue distress certificate in favour of the deceased family for the purpose of compassionate appointment under Rehabilitation Assistance Scheme. Though several requests were made by the Collector, Additional District Magistrate and Deputy Collector, Balasore, but the same were not adhered to by the Tahasildar, Khaira, with an ulterior motive to deprive the petitioner of getting compassionate appointment. As no report was furnished by the Tahasildar, Khaira, the Deputy Collector, Balasore, again on 05.11.2013 and 19.03.2014, requested to furnish the report within a week.

2.4 The Revenue Inspector submitted a detailed report to the Tahasildar, Khaira, on 06.05.2013, as per his direction, holding that the petitioner's family are in distress condition and the marital status of the petitioner as 'unmarried', which was endorsed by the Tahasildar, Khaira, but the same was never submitted

to the Collector, Balasore, for issuance of the distress certificate. Ultimately, on 13.08.2014, the Tahasildar, Khaira, submitted the report in the prescribed proforma stating that the petitioner has married. On the basis of the said report, the Deputy Collector, Balasore, vide letter dated 17.11.2014, communicated to opposite party no.5-District Education Officer, Balasore, that the Collector, Balasore did not consider the application of the petitioner for appointment under Rehabilitation Assistance Scheme as per Rules, 2008, as she has got "married". In the said letter, it was also stated that the Collector, Balasore, has been pleased to give an opportunity to the deceased family for choosing another applicant from among the other legal heirs of the deceased for consideration of compassionate appointment.

2.5 Aggrieved by the said order/letter dated 17.11.2014 issued by the Collector, Balasore, the petitioner approached the State Administrative Tribunal by filing O.A. No.1063 of 2015, but the Tribunal, without appreciating the case of the petitioner in its

proper perspective, vide order dated 06.05.2015, directed that the legal heir of the deceased, except petitioner, has to file an application under the Rehabilitation Assistance Scheme, which will be forwarded to the Government under Rule-16(2) of the OCS (RA) Rules for consideration. Thereafter, the petitioner filed M.P. No. 637(C) of 2015, for clarification/modification of the said order, which was rejected vide order dated 29.06.2015. Hence, this writ petition.

3. Mr. B. Moharana, learned counsel appearing for the petitioner vehemently contended that the Tribunal has failed to appreciate the fact that Rules, 2008, being benevolent, had been formulated with an object to tide over the sudden crisis and relieve the family of the deceased from financial destitution and get over the emergency. It is contended that by the time the petitioner submitted her application, she was 'unmarried' and because of inaction of Tahasildar, Khaira in furnishing the enquiry report, there was delay of four years. During such period, if the petitioner gets

married suddenly, she cannot be denied the appointment under the Rules, 2008. It is further contended that in spite of several correspondences made by the Deputy Collector, Addl. District Magistrate and Collector, Balasore, the Tahasildar, who was in the helm of affairs of giving the information, sat over the matter, for the reason best known to him, and for his laches in due discharge of duties assigned under the law, the petitioner is deprived of getting compassionate appointment. As a consequence thereof, the purpose of the aforesaid Rule is being frustrated.

3.1 It is also contended that the petitioner is highly educated, having M.Sc. in Biotechnology with B.Ed. and Diploma in P.G.D.C.A. and her case should have been considered as per Rule-16 of the OCS (Rehabilitation Assistance) Rules, as due to laches on the part of the appropriate authority, the petitioner has been deprived of getting compassionate appointment. It is also contended that after the death of her father on 12.12.2010, immediately the petitioner, being the 'unmarried' daughter, submitted her application within

the time specified under the Rules for compassionate appointment, which was routed through the Headmaster of the School, who forwarded the application on 08.12.2011 to the District Education Officer, Balasore. She got married in April, 2014, but she was maintaining the family staying at her in-laws house and looking after her mother and her brother. Therefore, denial of the benefit admissible to the petitioner for compassionate appointment cannot be sustained in the eye of law.

3.2 It is also contended that Rule-2(b) of OCS (R.A.) Rules, 1990 defines 'family members' and under clause-(iii) of Rule-2(b) thereof it is prescribed that only 'unmarried' daughter is eligible to get compassionate appointment, which creates discrimination between the 'unmarried' and 'married' daughter. Therefore, the incorporation of word 'unmarried' to the Rules should be declared as ultra vires to the Constitution of India. Even Rule-16(1) authorizes the appropriate authority to relax the Rules, but such relaxation has never been utilized for the object sought to be achieved in terms of the

Rules. Therefore, it is contended that the word 'unmarried' contained in Rule-2(b)(iii) of OCS (RA) Rules, 1990 be declared as ultra vires to the Constitution, being violative of Articles-14, 15 and 16 of the Constitution of India, by which the 'married' daughter has been deprived of getting the benefit of compassionate appointment because of marital status. It is further contended that in view of Article-15 of the Constitution, which prohibits discrimination on the basis of religion, race, caste and gender, Rule-2(b)(iii) of OCS (RA) Rules, 1990 suffers from vice of discrimination, which cannot be sustained in the eye of law. Therefore, it is contended that the word 'unmarried' should be struck down.

3.3 It is further contended that even now the OCS (RA) Rules, 1990 has been replaced by OCS (RA) Rules, 2020, Rule-2(1)(d)(iii) whereof also prescribes similar clause extending the benefit to the 'unmarried' daughter excluding the 'married' daughter, which is in gross violation of Articles 14 and 15 of the Constitution of India. Therefore, the use of word 'unmarried' in Rule-

2(1)(d)(iii) of the Rules, 2020 should be declared as ultra vires to the Constitution.

3.4 In support of his contentions, learned counsel appearing for the petitioner has placed reliance in ***Bhuvaneshwari V. Puranik vs. State of Karnataka***, 2021 (2) KarLJ 126 : 2021(1) AKR 444; ***Smt. Sarojni Bhoi v. State of Chhattisgarh*** (W.P.(S) No.296 of 2014 disposed of on 30.11.2015); ***C.N. Apporva Shree v. State of Karnataka*** (W.P. No.5409 of 2021 (S-KSAT), disposed of on 22.03.2021 by the High Court of Karnataka) against which order, the State of Karnataka preferred SLP No.20166 of 2021, which was dismissed by the apex Court vide order dated 17.12.2021.

4. Mr. S. Jena, learned Standing Counsel appearing for the School and Mass Education Department emphatically contended that since the OCS (RA) Rules have been framed in exercise of power conferred under Article 309 of the Constitution of India, it has got statutory force. As such, when the Rules do not prescribe to extend the benefit to the 'married'

daughter, meaning thereby only an ‘unmarried’ daughter is eligible to get the benefit, in that case when the application of the petitioner was taken into consideration for compassionate appointment, she had got married. Accordingly, she is not entitled to get such benefit. Therefore, he contended that the writ petition has to be dismissed in limine.

In support of his contentions, he has relied upon **Secretary, Ministry of Defence v. Babita Puniya**, (2020) 7 SCC 469; **Manjul Srivastava v. State of U.P.**, 2005(1) Kar1.J 51 (Writ-A No.10928 of 2020, disposed of on 15.12.2020); **Udham Singh Nagar District Cooperative Bank Ltd. V. Anjula Singh** (Special Appeal No.187 of 2017 disposed of on 25.03.2019 by the High Court of Uttarakhand); **Meenakshi Dubey v. M.P. Poorva Kshetra Vidyut Vitran Co. Ltd.** (W.A. No.756 of 2019, disposed of on 02.03.2020 by the High Court of Madhya Pradesh, Principal Seat at Jabalpur) and **Rita Giri v. The Jharkhand Urja Vikash Nigam Limited through its Chief Managing Director, Ranchi** [W.P.(S) No.1800 of

2018, disposed of on 08.08.2022 by the High Court of Jharkhand at Ranchi].

5. This Court heard Mr. B. Moharana, learned counsel appearing for the petitioner and Mr. S. Jena, learned Standing Counsel for School and Mass Education Department through hybrid mode. Pleadings have been exchanged between the parties, with the consent of learned counsel for the parties the matter is being disposed of finally at the stage of admission.

6. In exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor of Orissa in order to regulate recruitment to the State Civil Services and posts, as a measure of rehabilitation assistance, was pleased to make the Rules called “the Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 (for short “Rules, 1990”), which had been published in the official gazette on 24.09.1990.

7. For just and proper adjudication of this case, Rule-2(b)(iii) & Rule-16 of the Rules, 1990 are extracted below:-

“2. In these rules, unless the context otherwise requires-

Xxx

xxx

xxx

(b) ‘Family Members’ shall mean and include the following members in order of preference;

xxx

xxx

xxx

(iii) Unmarried daughters and unmarried step daughter;”

xxx

xxx

xxx

“16. (1) The State Government where satisfied that the operation of all or any provisions of these rules causes undue hardship in any particular case, it may dispense with or relax the provisions to such extent as it may consider necessary for dealing with the case in a just and equitable manner.

(2) Such cases shall be examined in General Administration Department and orders of Chief Minister shall be obtained.”

8. In exercise of powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of the Odisha Civil Service (Rehabilitation Assistance) Rules, 1990, the Governor of Odisha, to regulate recruitment to the Group-D Posts as a measure of rehabilitation assistance, was pleased to make the Rules called “the Odisha Civil Services (Rehabilitation Assistance) Rules, 2020” (for short “the Rules, 2020”).

9. For just and proper adjudication of this case, Rule-2(d)(3) & Rule-10 of the Rules, 2020 are extracted below:-

“2. Definitions:- (1) In these rules, unless the context otherwise requires-

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xxx

xxx

(d) ‘family members’ means and include the following members,-

xxx

xxx

xxx

(iii) Unmarried daughters and unmarried step daughters.

xxx

xxx

xxx

10. Interpretation:- If any question arises relating to the interpretation of any provision of these rules, it shall be referred to the Government in the General Administration and Public Grievance Department for decision.”

10. In view of the provision contained in the Rules, referred to above, the ‘unmarried’ daughters and ‘unmarried’ step daughters coming within the meaning of family members are eligible to be considered for compassionate appointment, whereas ‘married’ daughters are excluded from such consideration, though married sons are eligible to get such benefit. Thereby, this creates gender discrimination between the ‘son’ and ‘daughter’ having ‘married’ and ‘unmarried’.

11. In **Umesh Kumar Nagpal v. State of Haryana**, (1994) 4 SCC 138, the apex Court held that the object of compassionate appointment is to help the family tied over the crisis that befalls them on the circumstance, so that the family will not be put to jeopardy by being driven to impecuniosities and condemned by penury. It is for this reason the emphasis on appointment on compassionate grounds is immediacy of appointment. This principle has been laid down in various judgments of the apex Court and, as such, the compassionate appointment is by now too well settled that it is not a matter of right and not an alternate source of recruitment.

12. Like the provisions mentioned in Rules, 1990 and Rules, 2020, as mentioned above, similar provision has also been provided in the Karnataka Civil Services (Appointment on Compassionate Grounds) Rules, 1996, Rule-2(1)((b) thereof defines 'Family' in relation to a deceased Government servant means his or her spouse and their son (unmarried daughter and widowed

daughter), (unmarried brother, unmarried or widowed sister) who were living with him.

Taking into such meaning attached to 'Family' and referring to the ratio decided in **C.B. Muthamma v. Union of India**, (1979) 4 SCC 260, the apex Court in the context of Indian Foreign Service (Conduct and Discipline), Rules, 1961, which prohibits appointment of married woman to such service, held in paragraphs-6 and 7 as follows:

"6. At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacled the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thralldom. Freedom is indivisible, so is justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-à-vis. half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable.

7. We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps

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

Similar view has also been taken by the Bombay High Court in ***Ranjana Murlidhar Anerao v. State of Maharashtra***, (2014) 5 Mah LJ 543.

13. In ***Madhu Kishwar v. State of Bihar***, (1996) 5 SCC 125, the apex Court while taking note of discrimination being suffered in silence by Indian women observed in paragraph-28 to the following effect:

"28.....Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination."

14. Similarly, in ***Voluntary Health Assn. of Punjab v. Union of India***, (2013) 4 SCC 1, the apex Court in paragraph-20 observed as follows:

"20. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilised. In the first

part of the last century Swami Vivekanand had said:

'Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind'."

15. In **Indra Sarma v. V.K.V. Sarma**, (2013) 15

SCC 755, the apex Court held that marriage is one of the basic civil rights of man/women and observed in paragraphs-24 & 25 as follows:

"24. Marriage is often described as one of the basic civil rights of man/women, which is voluntarily undertaken by the parties in public in a formal way, and once concluded, recognizes the parties as husband and wife. Three elements of common law marriage are (1) agreement to be married (2) living together as husband and wife, (3) holding out to the public that they are married. Sharing a common household and duty to live together form part of the Consortium Omnis Vitae which obliges spouses to live together, afford each other reasonable marital privileges and rights and be honest and faithful to each other. One of the most important invariable consequences of marriage is the reciprocal support and the responsibility of maintenance of the common household, jointly and severally. Marriage is an institution has great legal significance and various obligations and duties flow out of marital relationship, as per law, in the matter of inheritance of property, successionship, etc. Marriage, therefore, involves legal requirements of formality, publicity, exclusivity and all the legal consequences flow out of that relationship.

25. Marriages in India take place either following the personal Law of the Religion to which a party is belonged or following the provisions of the Special Marriage Act. Marriage, as per the Common Law, constitutes

a contract between a man and a women, in which the parties undertake to live together and support each other. Marriage, as a concept, is also nationally and internationally recognized. O'Regan, J., in **Dawood v. Minister of Home Affairs** (2000) 3 SA 936 (CC) noted as follows:

"Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well. The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function. This importance is symbolically acknowledged in part by the fact that marriage is celebrated generally in a public ceremony, often before family and close friends...."

16. In view of propositions of law, as laid down by the apex Court, it is made clear that 'marriage' is an institution/sacred union not only legally permissible but also basic civil right of the man and woman and one of the most important inevitable consequences of marriage is the reciprocal support and the marriage is an institution has great legal significance and right to marry is necessary concomitant of right to life guaranteed under Article 21 of the Constitution of India as right to life includes right to lead a healthy life.

17. It is very often said that 'married' daughter has no obligation to maintain her parents even if they are unable to maintain themselves. In **Dr. (Mrs.) Vijaya Manohar Arbat v. Kashi Rao Rajaram Sawai**, (1987) 2 SCC 278, the apex Court held that a daughter after her marriage does not cease to be a daughter of her father or mother, and observed in paragraphs 12 and 13 as follows:

"12. We are unable to accept the contention of the appellant that a married daughter has no obligation to maintain her parents even if they are unable to maintain themselves. It

has been rightly pointed out by the High Court that a daughter after her marriage does not cease to be a daughter of the father or mother. It has been earlier noticed that it is the moral obligation of the children to maintain their parents. In case the contention of the appellant that the daughter has no liability whatsoever to maintain her parents is accepted, in that case, parents having no son but only daughters and unable to maintain themselves, would go destitute, if the daughters even though they have sufficient means refuse to maintain their parents.

13. After giving our best consideration to the question, we are of the view that Section 125(1)(d) has imposed a liability on both the son and the daughter to maintain their father or mother who is unable to maintain himself or herself. Section 488 of the old Criminal Procedure Code did not contain a provision like clause (d) Section 125(1). The legislature in enacting Criminal Procedure Code, 1973 thought it wise to provide for the maintenance of the parents of a person when such parents are unable to maintain themselves. The purpose of such enactment is to enforce social obligation and we do not think why the daughter should be excluded from such obligation to maintain their (sic her) parents."

18. The apex Court in number of cases repeatedly emphasized the need of compassionate appointment to the dependent of the deceased Government servant without any loss of time. The whole object of granting compassionate appointment to enable the dependent(s) of deceased's family to earn bread and butter for the family and to come out from financial

crisis, who suffers on account of unexpected and untimely death of deceased/Government servant therefore, the criteria to grant compassionate appointment should be 'dependency' rather than 'marriage'. In a given case, a 'married' daughter might be deserted wife, might have been abandoned wife, fully dependent upon her father, she might have been married to an indigent husband so that both the married daughter and son-in-law could have been dependent of the bread winner whose death left them to extreme financial hardship. There might be many other probability in which married daughter might be fully dependent upon the income of her father so that the death of the father to leave her and rest of the family members in extreme financial hardship, therefore, the yardstick for extending the benefit of compassionate appointment should be dependency of the dependents on the deceased Government Servant and their marital status of dependent should not be impediment for his/her consideration on compassionate ground to wipe-

out leaves from the eyes of the suffering family on account of loss of earning member in the family.

19. A daughter after her marriage doesn't cease to be daughter of the father or mother and obliged to maintain their parents and daughter cannot be allowed to escape its responsibility on the ground that she is now married, therefore, such a policy of the State Government disqualifying, a 'married' daughter and excluding her from consideration apart from being arbitrary and discriminating is retrograde step of State Government as welfare State, on which stamp of approval cannot be made by this Court.

20. Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Clauses (1) and (2) of Article 15 of the Constitution prohibit the State from discriminating any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 of the Constitution which contains the fundamental right of equality of

opportunity in matters of public employment, by sub-clauses (1) and (2) thereof guarantees that:

"16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

16. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."

21. Article 16(2) of the Constitution prohibits discrimination only on sex but clause (3) of Article 15 enables the State to make "any special provision for women and children". Articles 15 and 16 of the Constitution read together prohibit direct discrimination between members of different sexes if they would have received the same treatment as comparable to members of the opposite gender. The constitutional mandate is infringed only where the females would have received same treatment with males but for their sex.

22. In ***Shreejith L. v. Director of Education, Kerala***, (2012) 7 SCC 248, the apex Court held that marriage by itself does not disqualify the person concerned from seeking employment.

23. In **Secretary, Ministry of Defence** (supra), the apex Court, while considering gender equality/equality of opportunity in case of claim for Permanent Commissions by women officers engaged in Short Service Commissions officers in Army, held that women officers who are granted Permanent Commission are entitled to all consequential benefits at par with SCC male officers.

24. In **Manjul Srivastava** (supra), learned Single Judge of Allahabad High Court, while considering the claim for compassionate appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, directed the authority to consider the claim of compassionate appointment in accordance with law, which shall mean without reference to her marital status.

25. In **Udham Singh Nagar District Cooperative Bank Ltd** (supra), the Full Bench of Uttarakhand High Court, while considering the definition of “Family” in Rule-2(c) of the Uttar Pradesh

Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 and in the note below Regulation 104 of the U.P. Cooperative Committee Employees Service Regulations, 1975 that any of the members, referred to which includes a 'married' daughter would be entitled to compassionate appointment even if they were not dependant on the Government servant at the time of death and also struck down the non-inclusion of 'married' daughter within the definition of 'family' under Rule-2 (C) of 1975 Rules and in the note of Regulation 104 of 1975 Regulation holding that same is discriminatory and in violation of Articles-14, 15 and 16 and Part-III of the Constitution of India.

26. Reverting back to the case at hand, exclusion of "married daughters" in the Rules, as mentioned above, is based on the premise that, on her marriage, a daughter ceases to depend on her father and is, thereafter, dependent on the her husband and her in-laws. While this premise may, possibly, have been justified in the social environment prevalent half a

century ago, such a premise ignores the realities of present day society where the number of destitute women abandoned by their husbands, or those who are divorced and are not even provided maintenance, are on rise. The policy, based on the marriage of a daughter proving fatal for appointment on compassionate grounds, proceeds in oblivion of husbands harassing and torturing wives in ample measure, and thereby creating a situation for the wives to withdraw from the matrimonial household, and return to her paternal home, usually the first refuge of one in distress. Such situations are not uncommon in Indian conditions. These destitute women invariably come back to their parental home, and are supported by their parents both financially and otherwise. This premise of the State Government, in making the Rule/Regulation, is completely flawed and ignores present day social realities.

27. Considering the question of dependence, it matters little whether or not the son or the daughter is

married for, if a married son dependent on the deceased Government servant is eligible for compassionate appointment, there is no justifiable reason why a married daughter, merely because of her 'marriage', should be held disentitled to be considered for compassionate appointment, even if she fulfills the requirement of being dependent on the deceased Government servant at the time of his demise. Just as a son continues to be the son of the deceased Government servant, both before and after marriage, so does the daughter. The mere fact that she is married does not result in her ceasing to be the daughter of the deceased Government servant. Just as sons (married or unmarried) or daughters (widowed or unmarried) may also have an independent means of livelihood and would therefore not be eligible to be considered for compassionate appointment as they are not dependent on the deceased Government servant, likewise a married daughter, who is not dependent on the deceased, would also be ineligible for being considered for compassionate appointment.

28. No doubt, a daughter acquires a new relationship on marriage; she does not, however, lose the old relationship; qua relationships she is a daughter before, during and after marriage; once married, the dependency factor does not altogether cease; and proceeding on such an assumption would be a misadventure. Therefore, drawing a distinction between “married sons” on the one hand and “married daughters” on the other, should satisfy the requirement of a classification based on an intelligible differentia. It should, in addition, fulfill the other test of having a reasonable relation to the object sought to be achieved thereby.

29. If “dependency” is the intelligible differentia, which distinguishes those included in the group from those excluded therefrom, then a classification, which excludes “married daughters dependent on the deceased Government servant” from within its ambit, would not satisfy the test of a valid classification, as it would then not be based on an intelligible differentia. A valid

classification should also have a reasonable nexus with the object sought to be achieved by the Rules/Regulations which, in the present case, is to provide immediate succor, to the deceased Government servant's family in financial distress, by providing appointment on compassionate grounds to a dependent.

30. Violation of gender equality is in violation of the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution. The guarantee under Article 15 of the Constitution encompasses gender discrimination, and any discrimination on grounds of gender fundamentally disregards the right to equality, which the Constitution guarantees. There cannot be any discrimination solely on the ground of gender. The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and, if a woman is debarred at the threshold, it clips her capacity and affects her individual dignity. Gender identity is an integral part of sex and no citizen can be

discriminated on the ground of gender identity. Discrimination, on the basis of gender identity, includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying the equal protection of laws guaranteed under our Constitution.

31. In the context of compassionate appointments, various High Courts in ***Manjul Srivastava; Ranjana Murlidhar Anerao*** (supra); ***State of West Bengal v. Purnima Das***, 2017 SCC Online Cal 13121; ***Anjula Singh*** and ***Smt. Sarojni Bhoi*** (supra) have held that ‘married’ women cannot be denied entry into service by way of compassionate appointment, merely on the ground of marriage.

32. The exclusion of married daughter is based on the assumption that, while a son continues to be a member of the family, and that upon marriage he does not cease to be a part of the family of his father, a daughter upon marriage ceases to be a part of the family of her father; it is discriminatory and constitutionally impermissible for the State to make that assumption,

and to use marriage as a rationale for practicing an act of hostile discrimination by denying benefits to a daughter, when equivalent benefits are granted to a son in terms of compassionate appointment; marriage does not determine the continuance of the relationship of a child, whether a son or a daughter, with the parents; the State has based its defence, and the foundation of the exclusion, on a paternalistic notion of the role and status of a woman; these patriarchal notions must answer the test of the guarantee of equality under Article 14; and it must be held answerable to the recognition of gender identity under Article 15.

33. The inclusion of “married daughter”, in the definition of a “family”, would enable her alone to get the benefit from two families (that of her parents and of her husband) does not merit acceptance. If the test is of dependence, a married daughter who is dependent on her husband and her in-laws would not be entitled to be extended the benefit of compassionate appointment on the death of her parent, since she would then not be

dependent on them. It is exclusion of only those destitute women, who are abandoned/ignored by their husbands, who do not have any other source of livelihood, and have perforce to depend on their parent for their survival, from the ambit of a “family”, which is unreasonable, irrational and arbitrary.

34. A larger Bench of Madhya Pradesh High Court in ***Meenakshi Dubey*** (supra) held that Clause-2.2 of policy of compassionate appointment of the State Government dated 29.09.2014 is violative of Articles 14, 16 and 39(a) of the Constitution of India to the extent it deprives a ‘married’ daughter from consideration for compassionate appointment.

35. Adverting to the prayer made to declare the provision as ultra vires, it means beyond powers, in strict sense. Therefore, the expression is used to mean any act performed in excess of powers of the authority or the person, who performs the act. Prof. Wade, H.W.R.: Administrative Law, observes as follows:

“The ultra vires doctrine is, therefore, not confined to cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. In law the consequences are exactly the same; an improper motive or a false step in procedure makes an administrative act just as illegal as does a flagrant excess of authority. Unless the Courts are able to develop doctrines of this kind, and to apply them energetically, they cannot impose limits on the administrative powers which Parliament confers so freely, often in almost unrestricted language”.

36. The term ‘ultra vires’, therefore, not only means ‘beyond powers’ but also “wholly unauthorized by law” and thus void. Basically, ultra vires character of an act may be two-fold, (i) simple ultra vires, and (ii) procedural ultra vires.

(i) *Simple ultra vires*- An act may be said to acquire the character of simple ultra vires when the person does the act in excess of the power conferred on him.

(ii) *Procedural ultra vires*- Procedural ultra vires may happen when there is a failure to comply with mandatory procedural requirements. All procedural requirements as laid down by statute should be complied with.

37. The development of the doctrine of ultra vires now refers to not only the lack of power to do any act but also to any situation like improper or unauthorized

procedure, purpose or violation of the law of natural justice in exercising the power that is lawfully conferred on the authority concerned.

38. In ***Shri Sitaram Sugar Company Ltd. v. Union of India***, (1990) 3 SCC 223, the apex Court observed that “a repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or by acting in bad faith or for an inadmissible purpose or for irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. Act any of the repository of power, whether legislative, administrative or quasi-judicial, is open to challenge if it violates the provisions of the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it”.

39. In ***Express Newspapers (P) Ltd v. Union of India***, AIR 1986 SC 872, the apex Court observed that “the doctrine of ultra vires can cover virtually all situations where statutory power is exercised contrary to

some legal principles. Where a public authority is held to have acted for improper motives or irrelevant considerations, its action is ultra vires and void”.

40. In ***National Institute of Mental Health and Neuro Sciences v Dr. K. Kalyana Raman***, AIR 1992 Supp (2) SCC 481, the apex Court observed that “the procedural fairness is the main requirement in administrative action. The ‘fairness’ or ‘fair procedure’ in the administrative action ought to be observed”.

41. In ***Km. Srilekha Vidyarthi v. State of U.P.***, (1991) SCC 212, the apex Court observed that “arbitrariness and abuse of power is the antithesis of the rule of law and hence every action involving arbitrary decision and abuse of power is ultra vires”.

42. Article 14 of the Constitution guarantees to every person in India equal treatment before law and extends protection of the laws in equal measures to all.

43. In ***D.K. Yadav v. J.M.A. Industries Ltd***, (1993) 3 SCC 259, the apex Court held that Article 14

has a pervasive processual potency and versatile quality, equalitarian in its social and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness.

44. In ***Savitri Cairae v. U.P. Avas Ebam Vikas Parishad***, AIR 2003 SC 2725, the apex Court observed that “equality clause in Article 14 is of wide import and it permits reasoning classification based on intelligible differentia having nexus with the object sought to be achieved. Ordinarily equality clause cannot be invoked in the enforcement of a State legislation vis-à-vis a Parliamentary legislation or the legislation of another State”.

45. In ***Maneka Gandhi v. Union of India***, AIR 1978 SC 597, the apex Court observed that “Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

46. From the factual and legal analysis, as made above, it emanates that institution of marriage is an important and basic civil right of man and woman and marriage by itself is not a disqualification and impugned policy of the State Government barring and prohibiting the consideration of the 'married' daughter from seeking compassionate appointment merely on the ground of marriage is plainly arbitrary and violative of constitutional guarantees, as envisaged in Articles 14, 15, and 16(2) of the Constitution of India. Accordingly, the word 'unmarried', as prescribed in Rules, 1990 and Rules, 2020 is hereby struck down being unconstitutional and ultra vires being violative of Articles 14, 15 and 16 of the Constitution of India.

47. As a fallout and consequence of aforesaid discussions, the orders dated 06.05.2015 and 29.06.2015 passed by the Tribunal in O.A. No.1063 (C) of 2015 and M.P. No.637(C) of 2015 respectively cannot be sustained in the eye of law and accordingly the same are liable to quashed and are hereby quashed. As a

consequence thereof, refusal to grant benefit to the 'married' daughter for consideration of compassionate appointment is hereby declared void and inoperative. Hence, the order impugned passed by the authority in rejecting the petitioner's case for compassionate appointment is hereby quashed. Accordingly, the opposite parties are directed to reconsider the claim of the petitioner for being appointed on compassionate ground afresh in accordance with law keeping in mind the fact that her father was died on 12.12.2010 and her application was rejected on 17.11.2014 after four years.

48. Before parting with the case, this Court strongly condemns the attitude of the Tahasildar, Khairā, who was discharging his duty at the relevant point of time, in not providing the enquiry report to the Collector, Balasore in spite of repeated communications being made through Deputy Collector, Addl. District Magistrate and Collector, Balasore for issuance of distress certificate in favour of the petitioner in time. The Tahasildar concerned shall be communicated with

regard to displeasure of this Court and compliance thereof shall be filed before this Court by the State Government within three months hence.

49. In the result, the writ petition is allowed. However, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

G. SATAPATHY, J. I agree.

(G. SATAPATHY)
JUDGE

*Orissa High Court, Cuttack
The 24th August, 2022, Alok*

