Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Special Appeal No. 187 of 2017

Udham Singh Nagar District Cooperative Bank Ltd. & another

……Appellants

Versus

Anjula Singh and Others …….Respondents

With

Special Appeal No. 290 of 2017

State of Uttarakhand & another ……. Appellants

Versus

Anjula Singh & others …….Respondents

With

Special Appeal No. 723 of 2017

State of Uttarakhand & others ……. Appellants

Versus

Smt. Santoshi Kimothi …….Respondent

With

Special Appeal No. 741 of 2017

State of Uttarakhand & others ……. Appellants

Versus

Kaushalya Devi …….Respondent

With

Special Appeal No. 887 of 2017

State of Uttarakhand & others ……. Appellants

Versus

Smt. Rajni Kukreti …….Respondent

Mr. S.N. Babulkar, Advocate General assisted by Mr. Paresh Tripathi, Chief Standing Counsel for the State/appellants.

Mr. Pankaj Miglani, Mr. Vinodanand Barthwal and Mr. S.C. Bhatt, Advocates for the respondents/writ petitioners.

Judgment Reserved: 18.02.2019

Judgment Delivered: 25.03.2019

1. Writ Petition (S/B) No.391 of 2013 dated 26.03.2014
2. Special Appeal No.475 of 2017 dated 11.10.2018
3. Special Appeal No.176 of 2016 dated 26.09.2018
4. Writ Petition (C) No.60881 of 2015 dated 04.12.2015
5. (2008) 15 SCC 560
6. (2013) 11 SCC 178
7. (2007) 2 SCC 481
8. AIR 2012 SC 2294
9. (2012) 9 SCC 545
10. (1996) 5 SCC 308
11. (1989) 4 SCC 468
12. (1995) 6 SCC 476
13. (1996) 5 SCC 308

14. AIR 1991 SC 469
15. (2008) 8 SCC 475
16. (2010) 11 SCC 661
17. 2018 (1) SCT 297
18. (2014) 8 SCC 1
19. (2012) 6 SCC 1
20. (1980) 3 SCC 625
21. AIR 2015 SC 839
22. (2012) 5 SCC 1
23. AIR 1977 SC 2279
24. (1996) 5 SCC 125
25. 1992 (3) KarLJ 570
26. 2016 (1) ALJ 678
27. (1979) 4 SCC 260
28. Dias Jurisprudence, 5th Edition, Page 147
29. (2014) 11 SCC 26
30. (2003) 6 SCC 1
31. (2003) 6 SCC 611
32. 2015 Writ LR 864
33. (2014) 8 MLJ 268
34. (2013) IV LLJ 116 (Madras)
35. (1975) 2 SCC 386
36. (1987) 2 SCC 278
37. (1983) 4 SCC 645
38. (1987)1 SCC 395
39. (1737) WiLles 46
40. AIR 2005 SC 986
41. AIR 1974 SC 1924
42. Francis Bennion Interpretation of Statutes, 4th Edition, Page 771
43. (1996) 2 SCC 380
44. (1985) 1 SCC 641
45. (2007) 13 SCC 673
46. (2017) 7 SCC 59
47. (1992) 2 SCC 643
48. AIR 1951 SC 318
49. AIR 1951 SC 41
50. (1981)1 SCC 246
51. (1974) 1 SCC 19
52. Constitutional Law by Prof. Willis, 1st Edition, Page 578
53. AIR 1969 SC 349
54. (2017) 9 SCC 1
55. (1979) 1 SCC 380
56. (1976) 2 SCC 310
57. (1981) 4 SCC 675
58. (1997) 6 SCC 241
59. 2014 (9) ADJ 331
60. (2014) 5 SCC 438
61. 2005 (1) KarLJ 51
62. 2014 (5) MhLJ 543
63. 2004 WritLR 20
64. 2017 (124) ALR 435
65. MANU/CG/0273/2015

66. 2015 (3) RLW 2327 (Rajasthan)
67. (2004) 11 SCC 625
68. AIR 1990 SC 1747
69. AIR 1966 SC 1678
70. (1988) 2 SCC 602
71. 1996 (4) SCT 282 (Delhi)
72. (2003) 5 SCC 134
73. (2005) 10 SCC 437
74. (1986) 4 SCC 746
75. AIR 1992 SC 76
76. (2001) 4 SCC 139
77. (2001) 3 SCC 735
78. 1991 Supp. (1) SCC 600
79. (2008) 13 SCC 30
80. (1996) 2 SCC 498
81. (1999) 9 SCC 700
82. (1999) 4 SCC 458
83. (1993) 1 SCC 78
84. AIR 2003 SC 3268
85. (2004) 6 SCC 531
86. (1976) 4 SCC 601
87. (2010) 4 SCC 728
88. (1971) 3 SCC 550
89. (1899) A.C. 99
90. (2005) 2 SCC 515
91. (2017) 65 APSTJ 35
92. AIR 1960 SC 610

Coram: Hon'ble Ramesh Ranganathan, C.J.
Hon'ble Lok Pal Singh, J.
Hon'ble R.C. Khulbe, J.

Ramesh Ranganathan, C.J.

Order of Reference

A Division Bench of this Court, by its order in Special Appeal No. 187 of 2017 dated 05.02.2018, has referred the following questions to be answered by a Full Bench of this Court:

(i) Whether any of the members, referred to in the definition of a "family" in Rule 2(c) of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (for short "the 1974 Rules") and in the note below Regulation 104 of the U.P. Co-operative Committee Employees Service Regulations, 1975 (for short "the 1975 Regulations") would be entitled for compassionate appointment even if they were not dependent on the Government servant at the time of his death?

(ii) Whether non-inclusion of a "married daughter" in the definition of "family", under Rule 2(c) of the 1974 Rules, and in the note below Regulation 104 of the 1975 Regulations, is discriminatory, and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India?

2. The aforesaid questions were referred to the Full Bench in view of the conflicting judgments, of two Division Benches of this Court, in **Namrata Sharma**[1] (judgment in Writ Petition (S/B) No. 391 of 2013 dated 26.03.2014), and **Smt. Seeta Dhyani**[2] (judgment in Special Appeal No. 475 of 2017 dated 11.10.2018).

3. While the Division Bench, in **Namrata Sharma**[1], held that compassionate appointments were saved only on the basis of compassion to be shown to the deceased government employee, who died in harness leaving the family in utter penury; and a married daughter was no oasis for such a family, as she had to think of her own family comprising of her husband, children, etc, the Division Bench in **Smt. Seeta Dhyani**[2], following the earlier order of a Division Bench of this Court in **Smt. Aruna**[3] (judgment in Special Appeal No. 176 of 2016 dated 26.09.2018) and the judgment of the Division Bench of the Allahabad High Court in **Smt. Vimla Srivastava**[4] (order in Writ Petition (C) No. 60881 of 2015, dated 4th December, 2015), held that, since a Division Bench of the Allahabad High Court had taken the view that exclusion of a "married daughter", from the definition of a "family", in Rule 2(c) of the 1974 Rules, was illegal and unconstitutional, and the earlier Division Bench of this Court had followed the judgment of the Allahabad High Court, there was no reason to take a different view.

4. In order to answer the questions referred to hereinabove, it is necessary to take note of the relevant provisions of the 1974 Rules and the 1975 Regulations. The 1974 Rules were made in the exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. Rule 2 (a) thereof defines a "**Government servant**" to mean a Government servant employed in connection with the affairs of the State of Uttarakhand who (i) was permanent in such employment; or (ii) though temporary, had been

regularly appointed in such employment; or (iii) though not regularly appointed, had put in three years' continuous service in a regular vacancy in such employment. The explanation thereto defines "**Regularly appointed**" to mean appointed in accordance with the procedure laid down for recruitment to the post or service, as the case may be. Rule 2 (b) defines "**deceased Government servant**" to mean a Government servant who dies while in service. Rule 2 (c) is an inclusive definition, and defines a "**family**" to include the following relations of the deceased Government servant (i) wife or husband; (ii) sons; (iii) unmarried and widowed daughters; (iv) if the deceased was an unmarried Government servant, the brother, unmarried sister and widowed mother dependant on the deceased Government servant.

5. Rule 3 makes the 1974 Rules applicable to recruitment of dependants, of deceased Government servants, to public services and posts in connection with the affairs of the State of Uttarakhand, except services and posts which are within the purview of the Uttarakhand Public Service Commission. Rule 4 gives the 1974 Rules, and any orders issued thereunder, overriding effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force at the commencement of the 1974 Rules. Rule 5 relates to recruitment of a member of the family of the deceased and thereunder, in case a Government servant dies in harness after the commencement of these Rules, and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family, who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, shall, on making an application for the purposes, be given suitable employment in Government service in a post, except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules, if such person (i) fulfils the educational qualifications prescribed for the post; (ii) is otherwise qualified for Government service, and (iii) makes an application for employment within five years from the date of the death of the Government servant. Under the proviso thereto,

where the State Government is satisfied that the time limit fixed, for making the application for employment, causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

6. Rule 5(3) of the 1974 Rules stipulates that each appointment, under sub-rule (1), should be under the condition that the person, appointed under sub-rule(1), shall upkeep those other family members of the deceased Government Servant who are incapable of their own maintenance, and were dependent on the above said deceased Government servant immediately before his death. Rule 6 relates to the contents of the application for employment. Rule 7, which prescribed the procedure when more than one member of the family seeks employment, stipulates that, if more than one member of the family of the deceased Government servant seek employment under the 1974 Rules, the Head of the Office shall decide about the suitability of the person for giving employment. The decision would be taken keeping in view also the overall interest and the welfare of the entire family, particularly the widow and the minor members thereof. Rule 8 relates to relaxation from age and other requirements, and Rule 9 relates to the satisfaction of the appointing authority, as regards general qualifications. Rule 10 relates to the power to remove difficulties.

7. The 1975 Regulations were made in the exercise of the power conferred under Section 122 of the Uttar Pradesh Co-operative Societies Act, 1965 (hereinafter referred to as the "1965 Act") and were published in the U.P. Gazette on 06.01.1976. Regulation 2(iii) thereof defines "**appointing authority**" to mean the "**Committee of Management**" or any other authority which is empowered, under these Regulations or the by-laws of the society concerned, to make appointment. Regulation 2(xi) defines an "**employee**" to mean a person in the whole-time service of a co-operative society, but not to include a casual worker employed on daily wages or a person in part-time service of a society. Regulation 104 relates to recruitment of dependents of employees dying in harness. Sub-regulation (i) thereof stipulates that in case an employee of a Co-operative Society, who was either permanent or temporary, who has been recruited in accordance

with the provisions of the Uttar Pradesh Co-operative Societies Employees' Service Regulations, 1975, and has been holding his post for a minimum continuous period of three years, dies in harness, after the commencement of these Regulations, one member of his family, who is not already employed under the Central Government or a State Government or a Corporation or an undertaking owned or controlled by the Central Government or a State Government, shall, on making an application for the purpose, be given a suitable employment under the society concerned provided such member possesses the minimum educational qualifications prescribed for the post, and is otherwise fit for appointment thereto. Such employment is required to be given to the said member without delay and, as far as possible, under the same society in which the deceased servant was employed at the time of his death. Sub-regulation (ii) thereof requires an application for appointment to be addressed to the appointing authority, and to contain details of the surviving members of the family of the deceased employee; details about the financial position of the said members; and educational and other qualifications of the applicant. Sub-regulation (v) thereof stipulates that, when more than one member of the family of the deceased employee seek employment under this Regulation, the Board shall decide, keeping in view the overall interest of the family of the deceased employee particularly the widow and the minor members thereof, which of the members should be given employment under the provisions of this Regulation, and the decision of the Board in the matter shall be final. The note thereunder stipulates that "**family**", for the purposes of Regulation 104, shall include the wife/husband, sons and unmarried or widowed daughters of the deceased employee.

I. <u>Question No. 1:</u>

8. It is evident, from the 1974 Rules and the 1975 Regulations detailed hereinabove, that mere death of an employee in harness does not entitle his family to such a source of livelihood (i.e. appointment on compassionate grounds). As a rule, appointments in public services should be made strictly on the basis of open invitation of applications, and on merit. Appointment, on compassionate grounds, offered to a dependant of a deceased employee is

an exception. It is a concession, not a right. (**Madhusudan Das**[5]**; Pankaj Kumar Vishnoi**[6]). No appointment, on compassionate grounds, can be granted to a person other than those for whose benefit the exception has been carved out. (**Neeraj Kumar Singh**[7]).

9. The object of compassionate employment is to enable the family, of the deceased Government servant who died in harness, to overcome the sudden financial crisis it finds itself in, and not to confer any status upon it. (**Shashank Goswami**[8]**; Arvind Kumar Tiwari**[9]**).** Compassionate appointment, extended to a dependent of the deceased employee, is an exception to the right granted to the citizen under Articles 14 and 16 of the Constitution. (**Rani Devi**[10]; **Smt. Sushma Gosain**[11]**).**

10. Rules are made so as to provide immediate financial assistance to the family, when there is no other earning member (**Bhagwan Singh**[12]), and the family is left without any means of livelihood. As the object is to enable the family to tide over a sudden crisis, appointment on compassionate grounds is made taking into consideration the financial condition of the family of the deceased (**Umesh Kumar Nagpal**[13]**; Rani Devi**[10]**)**, with a view to redeem the family in distress (**Bhagwan Singh**[12]; **Sushma Gosain**[11]**; Phoolwati** [14]**)**, so that the members of family of the deceased may not starve. (**Pankaj Kumar Vishnoi**[6]**; Anju Jain**[15]. The penurious condition of the deceased's family is the justification for compassionate employment. (**Umesh Kumar Nagpal**[13]).

11. The dependants of such employees do not have any special claim or right to such employment, except as a concession extended by the employer under the 1974 Rules, and the 1975 Regulations (**Pankaj Kumar Vishnoi**[6]). The post is offered only to see that the family overcomes the economic crisis it finds itself in. (**Umesh Kumar Nagpal**[13]. The Government or the public authority should examine the financial condition of the family of the deceased, and it is only if it is satisfied that, but for the provision of employment, the family of the deceased will not be able to meet the crisis, that a job is to be offered to the eligible member of the family. [**Umesh Kumar Nagpal**[13]**; Bhagwan Singh**[12]**; Pankaj Kumar Vishnoi**[6]**]**. Posts in

Class-III and IV are the lowest posts, in the non-manual and manual categories, and hence they alone can be offered on compassionate grounds. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. The exception to the rule, made in favour of the family of the deceased employee, is in consideration of the services rendered by him, and the legitimate expectation, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned. (**Umesh Kumar Nagpal**[13]).

12. As the 1974 Rules and the 1975 Regulations are more or less identical, it would be unwise to burden this judgment with a repetition of the 1975 Regulations wherever a reference is made to the 1974 Rules. Suffice it therefore to observe that, wherever the relevant Rule is referred to in this judgment, it shall be understood as a reference to the corresponding Regulation also. The 1974 Rules apply to the recruitment of dependents of Government Servants who have died in harness (Rule 3). The conditions to be fulfilled before appointment can be made on compassionate grounds are: (1) the Government Servant should have died in harness; (2) his/her spouse should not be already employed under: (a) the Central Government or (b) the State Government or (c) a Corporation owned and controlled by the Central Government or the State Government; (3) the member of the deceased government servant's family (i.e. the person seeking compassionate appointment) should not be employed under: (i) the Central Government, or (ii) the State Government or (iii) a Corporation owned or controlled by the Central Government or the State Government; (4) an application should be made to be given suitable employment in a post in Government service; (5) such posts should be those not falling within the purview of the Uttarakhand Public Service Commission; and (6) the person seeking such appointment should (i) fulfil the educational qualifications prescribed for the post, (ii) be otherwise qualified for Government service, and, (iii) make an application for employment within five years from the date of the death of the Government servant [Rule 5(1)]. The five year time limit, for making an application, may be dispensed with or relaxed by the State Government, if it

is satisfied that the time limit has caused undue hardship in a particular case. [Proviso to Rule 5(1)].

13. The application seeking compassionate appointment should contain, among others, (i) the names, age and other details pertaining to all the members of the family of the deceased Government servant, particularly about their marriage, employment and income; (ii) details of the financial condition of the family; and (iii) the educational and other qualifications of the applicant. Where more than one members of the family, of the deceased Government servant, seek employment, it is for the Head of the Department to decide the suitability of the person to be given employment. The decision, in this regard, is to be taken keeping in view the overall interest of the welfare of the entire family, including the widow and minor members thereof. (Rule 7).

14. It is only one of the members of the family, of the deceased Government servant, who can seek appointment on compassionate grounds provided both the spouse of the deceased Government servant, and the applicant member of the family, are not employed in the institutions/establishments referred to in Rule 5. Since the Rules apply only to the recruitment of dependents of Government servants (Rule 3), the member of the family of the deceased Government servant, seeking appointment on compassionate grounds, must be a dependent of the deceased Government servant. It is because appointment on compassionate ground is provided to a member of the family of the deceased Government servant, in order to provide succor to the family in distress, are details of the financial condition of the family required to be furnished by the applicant.

15. As is evident from Rule 5, it is only if the family of the deceased Government servant is: (i) in financial distress; (ii) his/her spouse is not employed in the prescribed institutions/establishments; (iii) the person seeking appointment on compassionate ground is not already employed in the prescribed institutions/ establishments, and is dependent on the deceased Government servant, would he/she then be entitled to seek appointment on compassionate grounds. Where more than one member of the family seeks

appointment on compassionate grounds, it is for the Head of the Department to decide which one, of the members of the family seeking appointment on compassionate grounds, is the most suitable. The suitability of the person is to be decided not only with respect to his/her educational and other qualifications, but also in the overall interests of the welfare of the entire family of the deceased Government servant, particularly the widow and the minor members.

16. The primary tests to be satisfied, for appointment on compassionate appointment, are whether the deceased's family is in financial distress, whether the applicant is dependent on the deceased Government servant, and whether providing him employment would be in the overall interest of the family of the deceased. The conditions to be fulfilled are three fold: (i) the immediate need for an appointment; (ii) identification as dependent and satisfaction in relation to dependency; and (iii) possessing the required qualifications. It is the need for immediate relief, to mitigate the hardship arising out of the sudden death of the bread-winner, that every policy for compassionate appointment seeks to address. It is axiomatic that, although the financial distress of the family may be pronounced, compassionate appointment cannot be offered to anyone in the family, other than one who was dependent on the earnings of the deceased employee. A person dependent would be one who, for his survival, was entirely dependent on the earnings of the Government employee, and should he/she be appointed, is likely to take care of the other family members by his/her earnings. Passing of the 'dependency' test is, therefore, essential. [**Purnima Das**[17]**].**

17. The test to be applied is, therefore, whether the member of the deceased Government servant's family, seeking appointment on compassionate grounds, was dependent on him/her prior to his/her demise. It matters little therefore, whether the applicant is the wife/husband of the deceased, his/her son/sons or the unmarried or widowed daughter, for it is only if they fulfill the test of being dependent on the deceased Government servant, would they then be entitled to seek appointment on compassionate grounds. A married/ unmarried son or an unmarried/ widowed daughter,

who are not dependent on the deceased Government servant, are not entitled to seek appointment on compassionate grounds. The question, whether the applicant was dependent on the deceased Government servant, would invariable depend upon the facts and circumstances of each case, and no test of universal application can be prescribed.

18. It is unnecessary for us to dwell on this aspect any further as it is submitted by Mr. Pankaj Miglani and Mr. Vinodanand Barthwal, learned counsel, appearing on behalf of the respondents-writ petitioners, that it is evident from the Rules/Regulations that the intention is to provide immediate help to the family of a Government Employee who died in harness; and if a family member is not financially dependent upon the deceased bread earner, he / she will not have any right to be considered under the Rules/Regulations. Likewise, both the learned Advocate General and the learned Chief Standing Counsel, appearing on behalf of the State Government, would submit that a member of a family, unless dependant on the deceased, would not be entitled for compassionate appointment under the Rules/Regulations. We agree.

II. <u>Question No. II:-</u>

19. The second question referred to the Full Bench is far more contentious. As elaborate submissions, both oral and written, have been made on this question by the learned Advocate General and the learned Chief Standing Counsel, appearing for the State, and Mr. Pankaj Migalani and Mr. Vinodanand Barthwal appearing on behalf of the writ petitioners, it is convenient to examine the rival contentions under different heads.

(i) Is exclusion of "Married daughters", from the definition of "family", on the ground that those of them, who are dependent on their parents, are an exception, justified in the situation prevailing in the present times?

20. It is submitted, on behalf of the State Government, that the impugned Rules/Regulations were made in the exercise of the socialistic obligation of the State, as contemplated under Article 39 (a) read with Article 41 of the Constitution of India; implementation of directive principles of state policy cannot be blocked on the ground of violation of fundamental rights; application of the law should not ignore prevailing social and economic

conditions of the people, as laws are made for their welfare; rights conferred on women, under the Hindu Succession Act, are by virtue of their birth in the family; such rights have no application to the 1974 Rules, as a "Married Daughter" cannot be said to be dependent on her parents after her marriage; cases where, even after marriage, a married daughter may not be maintained by her husband, are an exception to the Rule; it can be safely presumed that, generally, a married daughter would be maintained by her husband; the 1974 Rules/1975 Regulations are an exception, to the general procedure of appointment, whereby dependents of the family are exempt from the rigour of Articles 14 & 16 of the Constitution of India; it is more an exception where a married daughter is not maintained by her husband, and is dependent on her father/mother; situations where the husband of the married daughter of the deceased is not settled, or is a lunatic or an alcoholic, are more in the nature of exceptions; there cannot be an exception to an exception; laws are always made to provide for generalities, and not for exceptions; judging a law on the basis of exceptions would result in every law being open to challenge by those who fall under the exceptions; and if, in some cases, the said classification produces some unequality, that cannot be a ground to declare the 1974 Rules/1975 Regulations violative of Part III of the Constitution of India.

21. On the other hand, learned counsel for the respondents-writ petitioners, would submit that a daughter is made to suffer from gender discrimination ever since her birth; the 1974 Rules, as applicable in the State of Uttarakhand vide Government Notification dated 08.10.2004, is a 44 years old archaic rule which categorizes "married women" as other`s property (PARAYA DHAN); while orthodox views have hampered her growth, the status of a woman (both married and unmarried) has changed with the passage of time; she is now considered equal to the male members of the family; and, merely on the basis of her marriage, she cannot be separated from her parent's family.

22. It is true that the Court is required to interpret fundamental rights in the light of directive principles [**Paramati Educational and Cultural Trust (Registered)**[18]**; Society for Unaided Private Schools of Rajasthan**[19]**;**

Minerva Milts Ltd.[20]**; Charu Khurana**[21]**]** and, with the development of the law, certain matters, covered under Part IV relating to directive principles, have been uplifted to the status of fundamental rights. [**Ramlila Maidan Incident, In Re**[22]]; **Charu**[21]**].** While the 1974 Rules and the 1975 Regulations, providing for compassionate appointment, may have been made as part of the socialistic obligations of the State, can exclusion of a married daughter, from the applicability of such a scheme, be justified on this score?

23. It is also true that a law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs. **(R.S. Joshi**[23]). The fact, however, remains that, in the absence of any material being placed on record to show that married daughters, who are dependent on their husbands/in-laws family, is the norm, and married daughters dependent on their parents is an exception, such an assumption cannot be readily accepted. If the criteria, for providing compassionate appointment, is dependence on the deceased Government servant, it is difficult to accept the submission that "dependent married sons" are the norm and "dependent married daughters" are an exception. On the contrary married sons, not dependent on their parents, may be the norm, and married sons, dependent on their parents, the exception.

24. Every scheme introduced for the benefit of the weaker/deprived sections, such as the scheme of compassionate appointment, must be implemented in its proper spirit for achieving the noble object for which such law or scheme is brought into existence.**[Purnima Das**[17]**]**. When the necessity to frame a scheme arises as a social welfare measure, it ought to be the duty of the framers to take into consideration all conceivable situations, that such a scheme should cover, to satisfy its avowed object. **[Purnima Das**[17]**]**. A law should, ordinarily, cover all possible contingencies, and not exclude those, who are also eligible, from within its ambit.

25. Indian women have suffered, and are suffering, discrimination in silence. They have been subjected to inequities, indignities, inequality and discrimination. **[Madhu Kishwar**[24]**]**. Though women have equal rights in

law, tradition and social customs have hindered Indian women enjoying equal rights with men. With a change in the family structure, life styles and social norms, nothing is so detrimental to society as a blind adherence to outworn forms and obsolete social customs which largely survive because of inertia. **[R. Jayamma[25]].** Excluding a married daughter from the ambit of the family may well defeat the object of a social welfare subordinate legislation. **[Vimla Srivastava[26]].**

26. 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 manacling the weaker sex. That our founding faith, enshrined in Articles 14 and 16, should have been tragically ignored vis-a-vis half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in Action. And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part III, the inference of die-hard allergy to gender parity is inevitable. **[C.B. Muthamma[27]; R. Jayamma[25]].**

27. It is a truism that the legislature, and the Rule making authority, should change laws/rules to keep the law abreast of change. (**Dias Jurisprudence[28]**; **Devans Modern Breweries Ltd.[29]).** A law which was, at one point of time, constitutional, may be rendered unconstitutional because of passage of time. **(Kapila Hingorani[30]).** Unlike the Rule/Regulation making authority which has, by framing the 1974 Rules and the 1975 Regulations, placed complete faith in the archaic concept of a paternalistic society where hindu women were considered “property” to be transferred, on her marriage, from the father to the husband, and thereafter to remain the property of the husband and his family, plenary legislation has, comparatively, kept abreast with the changing times, it has not only recognized the progress made by women both in the social and educational fronts, but has also made efforts (albeit slowly) to treat men and women equally both in matters of rights to which they are entitled to, and the obligations which they must discharge.

28. Section 6 of the Hindu Succession Act, 1956 which relates to devolution of interest in coparcenary property, has, after its substitution, conferred coparcenary rights on the daughter of a coparcener in a joint Hindu family governed by the Mitakshara law i.e. (a) by birth to become a coparcener in her own right in the same manner as the son; (b) to have the same rights in the coparcenary property as she would have had, if she had been a son; and (c) to be subject to the same liabilities, in respect of the said coparcenary property, as that of a son; and any reference to a Hindu Mitakshara coparcener is required to be deemed to include a reference to a daughter of a coparcener.

29. While coparcenary rights have now been conferred on the daughter of a coparcenary akin to that of his son, the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 places an equal duty on both the son and daughter to take care of their parents in their old age. **[B. Saranya**[32]**; P.R. Renuka**[33]**; Jayalakshmi**[34]**].** Section 125 Cr.P.C, whose object is to provide a summary remedy to save dependents from destitution and vagrancy and thus to serve a social purpose, **[Bhagwan Dutt**[35]**]**, makes it a moral obligation both of the son and the daughter to maintain his or her parents. [**Kashirao Rajaram Sawai**[36]**].**

30. Law is a dynamic science, the social utility of which consists in its ability to keep abreast of the emerging trends in social advancement, and its willingness to readjust its postulates in order to accommodate those trends. **(Deena Vs. Union of India**[37]**).** Law has to grow in order to satisfy the needs of a fast changing society. As new situations arise, the law has to evolve in order to meet the challenge of such new situations. Law cannot afford to remain static. **(M.C. Mehta**[38]**).** The judiciary cannot cling to age-old notions of any underlying philosophy behind interpretation. It has to move with the times. When the nature of things change, the rules of law must change too. (**Davies v. Powell**[39]). In **B.P. Achala Anand**[40], the Supreme Court observed: -

> "Unusual fact situation posing issues for resolution is an opportunity for innovation. Law, as administered by Courts, transforms into justice. "The definition of justice mentioned in Justinian's Corpus Juris Civilis (adopted from the Roman jurist Ulpian) states 'Justice is

> constant and perpetual will to render to everyone that to which he is entitled.' Similarly, Cicero described justice as 'the disposition of the human mind to render everyone his due'." **The law does not remain static. It does not operate in a vacuum. As social norms and values change, laws too have to be re-interpreted, and recast. Law is really a dynamic instrument fashioned by society for the purposes of achieving harmonious adjustment, human relations by elimination of social tensions and conflicts.** Lord Denning once said: "Law does not standstill; it moves continuously. Once this is recognized, then the task of a judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time……" (emphasis supplied)

31. Discrimination, in refusing compassionate appointment on the only ground that the woman is married, is not in keeping with the times when men and women compete on equal terms in all areas. **[R. Jayamma[25]].** Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. **(Murlidhar Agarwal[41]).** The 1974 Rules and the 1975 Regulations were made more than three and half decades ago, and must be construed not in terms of the societal norms prevailing when these Rules/Regulations were made, but in the context of the present times. Where relevant social conditions have changed since the date of the enactment, what was then classed as a social mischief may not be so regarded today, and vice-versa. **(Francis Bennion Interpretation of Statutes[42]).** Accepting the archaic paternalistic notions of a "married daughter' ceasing to be a part of her parents family after her marriage, and ignoring her identity as distinct from that of her husband, is not in tune with the current times where women compete, on an equal footing, with men in almost all walks of life. There is no occasion for regulating or bludgeoning the choice in favour of the son when a daughter is existing and is able to maintain her parents. The eligibility of a married daughter must be placed at par with an unmarried daughter so as to claim the benefit **[Savita Samvedi[43]]** of the Rule.

(ii) Does exclusion of a "married daughter", from being extended the benefit of compassionate appointment, amount to protective and non hostile discrimination?

32. It is contended, on behalf of the State Government, that a valid classification need not be mathematically precise, and scientifically perfect;

the presumption is always in favour of the constitutionality of a Rule / Regulation; a law is not open to the charge of denial of equal protection on the ground that it has no application to other persons; financial dependence on the deceased bread-earner is the primary basis for being considered for compassionate appointment, for it is on such a dependent that the entire family of the deceased Government servant would depend for their survival; exclusion of a "married daughter" is, in these circumstances, not a case of hostile or gender discrimination; on the contrary, it is a case of protective discrimination; financial dependence on the deceased is a peculiar difference i.e. the intelligible differentia; the object of the Rules/Regulations is to redeem the family from financial distress; a daughter, who after marriage is called a "Married Daughter", is no more dependent on the family of her parents; her family status changes on her marriage, and she becomes a member of the family of her husband; if she is not financially independent, she would be financially dependent on her husband and her in-laws; the Rule making authority is required to deal with diverse problems, and has the power of making Rules to attain particular objects and, for that purpose, of classifying persons upon which its Rules are to operate; the principle of equality of law only requires that there should be equality of treatment under equal circumstances; the financial position of both i.e. the married son and the married daughter are distinct and different; unlike a married daughter, an unemployed married son is solely dependent on the deceased; equality of opportunity does not mean equality between members of separate independent classes and, consequently, omission/ exclusion of a "Married Daughter", from the definition of a "family", is just and valid.

33. On the other hand, learned counsel for the respondent-writ petitioners would submit that marriage of a daughter does not severe her relationship with her parents; just like married sons, she continues to remain a daughter even after her marriage; there cannot be any distinction or discrimination between "married sons" on the one hand, and "married daughters" on the other, for the purposes of compassionate appointment; and, hence, the words "unmarried" and "widowed", with regard to daughters appearing in the definition of "family", should be struck down as unconstitutional and illegal.

34. If the definition of "family", in the 1974 Rules and the 1975 Regulations, is construed as being confined only to those persons specified therein, and to exclude all others, the question which would then necessitate examination is whether the classification of members of a "family", of the Government servant who died in harness, to include married sons and to exclude married daughters, would satisfy the tests of a valid classification under Articles 14 to 16 of the Constitution of India.

35. The 1974 Rules and the 1975 Regulations are in the nature of subordinate legislation, and do not carry the same degree of immunity which is enjoyed by a Statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does not conform to the Statute under which it is made. It may further be questioned on the ground that it is inconsistent with the provisions of the Act or that it is contrary to some other statute applicable on the same subject matter. It can also be questioned on the ground that it is manifestly arbitrary and unjust. It can also be challenged on the ground that it violates Article 14 of the Constitution, [**Indian Express Newspaper**[44]**; J.K. Industries Limited**[45]**],** or that it does not conform to constitutional requirements or that it offends Part III of the Constitution. [**J.K. Industries Limited**[45]].

36. Article 14 of the Constitution gives the right to equal treatment in similar circumstances, both in privileges conferred and in the liabilities imposed. (**Binoy Viswam**[46]**; Sri Srinavasa Theatre**[47]**)**. The principle of equality does not take away, from the State, the power of classifying persons for legitimate purposes. **(F.N. Balsara**[48]**; Chiranjit Lal Chowdhury**[49]**).** The Legislature/Rule making authority has the power of making laws/Rules to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons upon whom its laws are to operate. The principle of equality of law means that alike should not be treated unlike, and unlikes should not be treated alike. (**Binoy Viswam**[46]). The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation

is enacting laws differentiating between different persons or things in different circumstances. (**Akhil Bhartiya Shoshit Karamchari Sangh (Railway)**[50]).

37. The legislature is free to recognise degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest. (**Akhil Bhartiya Shoshit Karamchari Sangh (Railway)**[50]**; Triloki Nath Khosa**[51]). What Article 14 prohibits is class legislation, and not reasonable classification for the purpose of legislation. Article 14 permits a reasonable classification which is founded on an intelligible differentia and accommodates the practical needs of society, and the differentia must have a rational relation to the objects sought to be achieved. A classification violates Article 14 only when there is no reasonable basis. (**Binoy Viswam**[46]). The guarantee of the equal protection of the laws does not prohibit legislation, which is limited in the objects to which it is directed. Mathematical nicety and perfect equality are not required. (**Constitutional Law, by Prof. Willis**[52]; **F.N. Balsara**[48]**)**. There is no denial of equality of opportunity unless the person, who complains of discrimination, is equally situated with the person or persons who are alleged to have been favoured. (**V.P. Narasinga Rao**[53]**; Akhil Bhartiya Shoshit Karamchari Sangh (Railway)**[50]**)**.

38. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and, being contrary to the Rule of law, would violate Article 14. (**Shayara Bano**[54]). Classification means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily. (**In RE the Special Courts Bill, 1978**[55]). A plea of discrimination can only be raised by showing that the impugned law creates two classes without any reasonable basis and treats them differently. (**Binoy Viswam**[46]). While a pragmatic doctrine of classification, of equal treatment to all who fall within each class, should be read into Articles 14 to 16, care must be taken to ensure that the classification is not pushed to such an extreme as to make the fundamental right to equality cave in and

collapse. (**Triloki Nath Khosa**[70]**; Thomas**[56]**; Akhil Bhartiya Shoshit Karamchari Sangh (Railway)**[50]**).**

39. Classification, in order to be constitutional, must rest upon distinctions that are substantial and not merely illusory. (**Akhil Bhartiya Shoshit Karamchari Sangh (Railway)**[50]). Classification cannot be made arbitrarily and without any substantial basis. **(F.N. Balsara**[48]**; Chiranjit Lal Chowdhury**[49]**).** While there is no doubt a presumption in favour of the constitutionality of a statute/rule and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles (**R.K. Garg**[57]), the presumption may be rebutted by showing that, on the face of the statute/rule, there is no classification at all, and there is no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class. **F.N. Balsara**[48]**; Chiranjit Lal Chowdhury**[49]**).** Among the several tests, to decide whether a classification is reasonable or not, is whether it is conducive to the functioning of modern society. (**Binoy Viswam**[46]).

40. The classification of a "family" under the 1974 Rules and the 1975 Regulations, as excluding "married daughters", is based on the premise that, on her marriage, a daughter ceases to depend on her father and is, thereafter, dependent on 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. An analysis of the population of destitutes in India, during the period 1981 to 2001, was made by the Population Research Centre, Dharwad and, in their article "Trends and Patterns of Population, Development and Destitution in India", the Director of the Institute Dr. P.K. Bhargava states that the female destitute population in India in the year 1981 was 299888, in the year 1991 it was 210319, and in the year 2001 it was 305994. The 2011 census, however, shows a manifold increase in the total number of separated and divorced women as 2372754 (separated) and 909573 (divorced) i.e. a total of nearly 3.3 million women as having been rendered destitute. The number of

destitute women, even as per the 2011 census, (i.e. nearly eight years ago), is considerable.

41. 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. **[Purnima Das[17]].** 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.

42. Even if the submission, urged on behalf of the State Government, that the rule making authority has consciously omitted a married daughter from the definition of "family" of the deceased Government servant, since she is dependent on her husband and her in-laws, consequent upon her marriage, is presumed to have some basis, (though it is very difficult to accept such a premise), such a "married daughter" would be disentitled to be considered for compassionate appointment not because she ceases to be the daughter of the deceased Government servant consequent upon her marriage, but only because she is not dependent on him. As the test is of dependence, there is no justification in excluding a "married daughter" from being considered for appointment on compassionate grounds, as a member of the "family" of the deceased Government servant, in cases where she is found, despite her being married, to be dependent on the deceased Government servant.

43. When examined from the point 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.

44. In **Smt. Vimla Srivastava**[4], a Division Bench of the Allahabad High Court held that the test, in matters of compassionate appointment, is of dependency within defined relationships; dependency, or lack of dependency, is a matter which is not determined a priori on the basis of whether or not the son is married; and, similarly, whether or not a daughter of a deceased should be granted compassionate appointment has to be defined with reference to whether, on a consideration of all relevant facts and circumstances, she was dependent on the deceased government servant.

45. In **Purnima Das**[17], a Full Bench of the Kolkata High Court held that, without even a bare assessment of the dependency factor, the application of the married daughter would stand rejected; a daughter undoubtedly 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.

46. The subject classification, 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. The submission, urged on behalf of the State Government, is that the intelligible differentia, in classifying members of the family of the deceased government servant who died in harness, is whether such member of the family was dependent on the government

servant at the time of his death; and the object sought to be achieved, by such a classification, is to provide a source of monetary support to the deceased's family in financial distress, and to enable them to survive and cope with the loss of earnings caused as a result of the demise of the government servant.

47. 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 dependant.

48. If the test is that of dependence on the deceased Government servant, then the impugned Rule/Regulation treating "married sons" and "married daughters" as two distinct classes, and in conferring the benefit of compassionate appointment on the former, and denying it to the latter, cannot be said to be based on an intelligible differentia as both a "married son" and a "married daughter", who were dependent on the government servant who died in harness, would stand on the very same footing. Further such a classification would also have no reasonable nexus with the object sought to be achieved of providing succor to the family of the deceased government servant facing financial distress. The presumption that a dependent married daughter would not take care of the other members of the deceased's family, while a dependent married son would, is but a matter of perception, and is not supported by any reliable and acceptable data. The classification made under the 1974 Rules and the 1975 Regulations, between a "married son" and a "married daughter", would therefore fail the test of a valid classification falling foul of Articles 14 to 16 of the Constitution of India.

(iii) Does exclusion of "married daughter", from the definition of a "family", also result in gender discrimination?

49. It is contended, on behalf of the State Government, that if a "married woman" is included in the definition of the "family" of her parents, she would be a member of two families i.e. her parents and her in-laws; a "Married Son" always remains a member of his parents family; inclusion of a "Married Daughter", in the definition of "Family", would violate Articles 14, 15 & 16 of the Constitution of India, as a "Married Daughter" would alone be entitled to claim benefit in two families; and exclusion of a married daughter, from the definition of "family", is intra-vires, and there is no gender discrimination. On the other hand it is contended, on behalf of the writ petitioners, that gender identity is an integral part of sex within the meaning of Articles 15 & 16; in both the Rule/Regulation, the eligibility of a son is not conditioned by his marital status, but a married daughter has been excluded on this basis; and this amounts to discrimination on the basis of gender.

50. Violation of gender equality is in violation of the fundamental rights guaranteed under Articles 14, 15 and 21 of the Constitution. [**Vishaka**[58]**; Charu Khurana**[21]**]**. 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. **[Isha Tyagi**[59]**]**. 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. **[Charu Khurana**[21]**].** 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. **[National Legal Services Authority**[60]**;** [**Smt. Vimla Srivastava**[4]**; Isha Tyagi**[59]**].**

51. In the context of compassionate appointments, various High Courts have taken the view that a married woman cannot be denied entry into service, by way of compassionate appointment, merely on the ground of her marriage. **[(Refer: Manjula**[61]; **Smt. Ranjana Murlidhar Anerao**[62]**; S. Kavitha**[63]**; Purnima Das**[17]**; Anjula Singh**[64]**; Sarojni Bhoi**[65]**; Isha Tyagi**[59]**; Namisha**[66]**)].**

52. The very same 1974 Rules were examined by the Division Bench of the Allahabad High Court, in **Smt. Vimla Srivastava**[4]**,** and it was held that the invidious discrimination, that is inherent in Rule 2 (c), lies in the fact that a daughter, by reason of her marriage, is excluded from the ambit of the expression "family", whether or not she was, at the time of the death of the deceased government servant, dependent on him; marriage does not exclude a son from the ambit of the expression "family", but marriage excludes a daughter; this is invidious; a married daughter who has separated after marriage, and may have been dependent on the deceased, would, as a result of this discrimination, stand excluded; a divorced daughter would similarly stand excluded; even if she is dependent on her father, she would not be eligible for compassionate appointment only because of the fact that she is not "unmarried"; Rule 2 (c) 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.

53. The contention, urged on behalf of the State Government, that inclusion of a "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 parents for their survival, from the ambit of a "family", which is unreasonable, irrational and arbitrary.

54. The very assumption of the State Government that a married daughter, would invariably and in all cases, not be dependent on her father, is based on surmises and conjectures not in tune with present day social realities, and is completely flawed. We are satisfied, therefore, that exclusion of a "dependent married daughter", while including a "dependent married son" in the definition of a "family" in the Rules/Regulations relating to compassionate appointment, amounts to gender discrimination, and is in violation of Article 15 of the Constitution of India.

55. The obvious consequence of such a conclusion would have been to strike down the words "widowed and unmarried" in Rule 2(c) of the 1974 Rules, and the note below Regulation 104 of the 1975 Regulations, as violative of Part III of the Constitution of India, and to declare that all sons and daughters (irrespective of their marital status), who were dependent on the government servant at the time of his death, would be eligible to be considered for compassionate appointment provided, of course, they satisfy the other requirements of the Rules/Regulations. However, as the Courts should endeavour to uphold the constitutional validity of the Rule /Regulation, if possible by reading it down, let us now examine whether it is possible to uphold the constitutional validity of Rule 2(c) of the 1974 Rules, and the note below Regulation 104 of the 1975 Regulations, by resorting to the "reading down rule".

(iv) Can Rule 2(c) of the 1974 Rules, and the note below Regulation 104 to the 1975 Regulations, be read down to uphold its constitutional validity?

56. It is submitted, on behalf of the State Government, that the prayer sought for in the Writ Petition is to strike down the words "unmarried and widowed" appearing in Rule 2(c) of the 1974 Rules, and the note below Regulation 104 of the 1975 Regulations; such a relief was not granted by the learned Single Judge, and must be deemed to have been refused; no Special Appeal has been preferred by the respondent-writ petitioner against the order passed by the learned Single Judge; the special appeals have been preferred by the appellants, who were the respondents in the writ petition; the respondent-writ petitioners cannot, therefore, be permitted to contend that the said relief, which was not granted by the learned Single Judge, should be granted by a Larger Bench in an appeal preferred by the appellants (respondents in the writ petition); courts would neither legislate nor would it supply omission in the legislation; the learned Single Judge read the word 'married woman' into the definition of "family", which amounts to judicial legislation; the words, omitted by the Rule making authority, cannot be supplied by the Court; and, while the Court can iron out the creases, it cannot legislate.

57. The constitutional validity of Rule 2(c) of the 1974 Rules, and the note below Regulation 104 of the 1975 Regulations, were subjected to challenge, in the writ petition filed by the respondents-writ petitioners before the learned Single Judge, as violative of Articles 14, 15 and 16 of the Constitution of India. Instead of striking down the offending portion of the said Rule/Regulation, the learned Single Judge has chosen to read it down and, instead, bring "married daughters" within the ambit of the said definition. Since the respondents-writ petitioners were granted relief by the learned Single Judge, and their writ petitions were allowed, the question of their challenging such an order would not arise, as Courts do not decide academic issues. As the constitutional validity of Rule 2(c) of the 1974 Rules, and the note below Regulation 104 of the 1975 Regulations, have

been put in issue in the writ petition, and as the Division Bench has referred this question to a Larger Bench, we may not be justified in refusing to examine whether, on the touchstone of Part III of the Constitution of India, the Rules/Regulations are valid; and, if they are not, to examine whether the Rule / Regulation can be read down to uphold its constitutionality.

58. It is no doubt true that Courts should not, ordinarily, add words to a statute or read words into it which are not there (**Rajiv Anand**[67]), and a construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided. **(Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd.**[68]**, Shyam Kishori Devi**[69]**, A. R. Antulay**[70]**, Hari Prakash**[71]**, J. P. Bansal**[72] **and Govind Singh**[73]**).** There is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. Courts expound the law, they do not legislate. (**Mathai Verghese**[74], **Deoki Nandan Aggarwal**[75]). A Judge is not entitled to add something more than what is there in the Statute by way of a supposed intention of the legislature. (**Elphinstone Spinning and Weaving Co. Ltd**[76]). The legislative casus omissus cannot be supplied by the judicial interpretative process. **[(Maruti Wire Industries Pvt. Ltd.**[77]**]**. While the legislature has the affirmative responsibility, Courts have only the power to destroy, not to reconstruct. (**R.K. Garg**[57]).

59. It is also true that, while a judge must not alter the material of which a law or an instrument is woven, he can and should iron out the creases, and make articulate the inarticulate premise but only those which follow the constitutional position. **(Lord Denning in "The Discipline of Law"; Delhi Transport Corporation**[78]). Where the meaning of the Statute is neither clear nor sensible, a purposive construction is warranted and the statute may be read down, and the creases ironed out (**Entertainment Network (India) Ltd.**[79]) to ensure that it does not fall foul of Part III of the Constitution, and, only if it cannot, to then strike down legislation (plenary or subordinate) as ultra-vires Part III of the Constitution of India.

60. Though the submission, urged on behalf of the State Government, that this Court would not be justified in including a "married daughter" within

the definition of "family", since that would amount to judicial legislation, cannot be brushed aside as without merit, it is within the power of the High Court to strike down legislation-plenary or subordinate, if they fall foul of Part-III of the Constitution of India, or to read it down to uphold its constitutionality. Extending the benefit of compassionate appointment to all dependant sons (including those who are married), and in restricting the benefit only to widowed and unmarried daughters (excluding those who are married) falls foul of Articles 14 to 16 of the Constitution of India. If the definition of a family in Rule 2(c), and the note below Regulation 104, is not so read down as to include a "married daughter", the words "unmarried or widowed" in the definition of a "family" in Rule 2(c) of the 1974 Rules, and the note below Regulation 104 of the 1975 Regulations, must be struck down as violative of Articles 14 to 16 of the Constitution of India, and thereby all sons and daughters (irrespective of their marriage) would be eligible to be considered for compassionate appointment provided, of course, they fulfill all the other conditions stipulated in the Rules/Regulations, primarily of being a dependent on the deceased Government servant at the time of his death. It is only by reading it down to include a "married daughter" can the Rule / Regulation be saved from unconstitutionality. The question which necessitates examination is whether, and if so in what manner, should it be read down.

61. A provision of an Act/Rule is read down to sustain its constitutionality [**Pannalal Bansilal Patil**[80]**; D.T.C. Mazdoor Congress**[78]), and by separating and excluding that part of the provision which is invalid, or by interpreting the word in such a fashion as to make it constitutionally valid. [**B.R. Enterprises**[81]**]**. The question of reading down a provision arises if it is found that the provisions are ultra vires as they stand. [**Electronics Corporation of India Ltd.**[82]].In order to save a statute or a part thereof, from being struck down, it can be suitably read down. But such reading down is not permissible where it is negatived by the express language of the statute. [**C.B. Gautam**[83]**]**.

62. As the Court must start with the presumption that the impugned Rule is intra vires, the said Rule should be read down only to save it from being

declared ultra vires, if the Court finds, in a given case, that the presumption stands rebutted. [**J.K. Industries Limited**[45]]. An attempt should be made to make the provision of the Act workable and, if it is possible, to read down the provision. (**Balram Kumar wat**[84]**; ANZ Grindlays Bank Ltd.**[85]). If a provision can be saved by reading it down, it should be done, unless the plain words are so clear as to be in defiance of the Constitution. This interpretation springs out of the concern of Courts to salvage a legislation. Yet, in spite of this, if the impugned legislation cannot be saved the Courts shall not hesitate to strike it down. [**B.R. Enterprises**[81]].

63. Both Rule 2(c) of the 1974 Rules, and the note below Regulation 104 to the 1975 Regulations, are an inclusive definition of "family" and, thereunder, "family" is to include the wife/husband, sons and unmarried or widowed daughters of the deceased Government servant. Unlike the word "means", the word "include" would bring within its ambit other persons or things, not specified in the definition, also. The word "include" is generally used as a word of extension. It is used in interpretation clauses to enlarge the meaning of words or phrases in the statute. In such a case, the words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. **[South Gujarat Roofing Tiles Manufacturers Asso.**[86]**; Oswal Fats & Oils Ltd.**[87]**; M/S Taj Mahal Hotel, Secunderabad**[88]**; Dilworth**[89]**]**. Where the word "includes" has an extending force, it adds to the word or phrase a meaning which does not naturally belong to it. **[South Gujarat Roofing Tiles Manufacturers Asso.**[86]**].**

64. In ordinary parlance it indicates that what follows the word "including" comprises or is contained in or is a part of the whole of the word preceding. [**South Gujarat Roofing Tiles Manufacturers Asso.**[86]**; Godfrey Phillips India Ltd.**[90]**; Godrej Sara Lee Limited**[91]**].** The words, used in an inclusive definition, denote extension and cannot be treated as restricted in any sense. Where we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wider

denotation. [**Hospital Mazdoor Sabha**[92]**; South Gujarat Roofing Tiles Manufacturers Asso.**[86]**]**.

65. Any person, who is a part of the "family" of the deceased Government servant, would also be included within the said definition. Consequently, a "married daughter" would also fall within the definition of a "family" both in Rule 2(c) of the 1974 Rules, and under the note below Regulation 104 of the 1975 Regulations. Needless to state that the members of the "family" of the deceased Government servant in Clauses (i) to (iii) of Rule 2(c) of the 1974 Rules, and the note below Regulation 104 of the 1975 Regulations, which would include a "married daughter", would be entitled to be considered for compassionate appointment only if they were dependent on the Government servant at the time of his death, and satisfy all the other conditions stipulated in the 1974 Rules and the 1975 Regulations.

(v) Conclusion:

66. We answer the reference holding that:-

i. Question No.1 should be answered in the affirmative. It is only a dependent member of the family, of the Government servant who died in harness, who is entitled to be considered for appointment, on compassionate grounds, both under the 1974 Rules and the 1975 Regulations.

ii. Question No.2 should also be answered in the affirmative. Non-inclusion of "a married daughter" in the definition of a "family", under Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, thereby denying her the opportunity of being considered for compassionate appointment, even though she was dependent on the Government servant at the time of his death, is discriminatory and is in violation of Articles 14, 15 and 16 in Part III of the Constitution of India.

iii. We, however, read down the definition of "family", in Rule 2(c) of the 1974 Rules and the note below Regulation 104 of the 1975 Regulations, to save it from being held unconstitutional. As a result a "married daughter" shall also be held to fall within the inclusive

definition of the "family" of the deceased Government servant, for the purpose of being provided compassionate appointment under the 1974 Rules and the 1975 Regulations.

67. Let all these special appeals be listed before the appropriate Division Bench for its disposal in the light of the law declared by us in this judgment.

(R.C. Khulbe, J.) (Lok Pal Singh, J.) (Ramesh Ranganathan, C.J.)

27.03.2019

NISHANT