Before Harinder Singh Sidhu, J.

NEETU BALA—*Petitioner*

versus

UNION OF INDIA AND OTHERS—*Respondents.*

CWP No.6414 of 2014

February 01, 2016

Constitution of India, 1950 — Arts. 14, 16 and 226 — Army Medical Corps — Short Service Commission — Seven months pregnancy — DGAFMS letter clearly lays down that all female candidates would be screened for pregnancy and detection of the same would render a candidate unfit for commissioning—Action of the respondents in denying appointment to the petitioner merely on account of her pregnancy is arbitrary and illegal — It is violative of Articles 14 and 16 of the Constitution — That pregnancy would render a candidate unfit for commissioning is also illegal and unconstitutional and is so declared. Forcing a choice between bearing a child and employment—interferes both with reproductive rights and right to employment — such action can have no place in modern India.

Held that, Constitutional Provisions and the Supreme Court:

The Constitution of India accords socio-economic and political justice, equality of status and of opportunity assuring the dignity of individual. Article 14 guarantees equality by providing 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'. Article 15(1) abolishes discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(2) requires that there shall be no disability, liability or restriction on grounds of sex and ensures equality of status. Article 15(3) enables the State to make special provisions for women and children. Article 16(1) accords equality of opportunity in public service for appointment or employment to an office or post under the State and ordains that 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. There is thus a specific prohibition against gender discrimination in matters relating to public employment.

(Para 11)

Further held that, it is in the light of these Constitutional provisions that the validity of the impugned action has to be judged.

(Para 12)

Further held that, at the outset, it would be helpful to refer to two important decisions of the Hon'ble Supreme Court on the issue of gender discrimination in the context of marriage and pregnancy.

(Para 13)

Further held that, India is a signatory to various international covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10.12.1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. There have followed a series of conventions, which reflect the broad international consensus on important issues of global concern.

(Para 26)

Further held that, of the International Conventions, two which are very relevant for the present issue are “Convention on the Elimination of all Forms of Discrimination against Women” (CEDAW) and “ILO: Maternity Protection Convention 2000”.

(Para 27)

Further held that, Convention on the Elimination of all Forms of Discrimination against Women (CEDAW):

The United Nations adopted this Convention on 18.12.1979. India ratified it on 19.6.1993 and acceded to it on 8.8.1993 with reservation on Articles 5(e), 16(1), 16 (2) and 29 of CEDAW.

(Para 28)

Further held that, the preamble of CEDAW reiterates that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of women is a handicap. Establishment of a new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc.

(Para 29)

Further held that, Article 1 defines discrimination against women to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

(Para 30)

Further held that, Article 2(b) enjoins the State/parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women". To take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause C enjoins to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins State/parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.

(Para 31)

Further held that, Article 11 of this Convention which requires States/parties to take all appropriate measures to eliminate discrimination against women in the field of employment is of particular relevance.

(Para 32)

Further held that, ILO: Maternity Protection Convention 2000: As noted in the preamble to this convention, it takes into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society and seeks to further promote equality of all women in the workforce and the health and safety of the mother and child.

(Para 34)

Further held that, this Convention has entered into force on 7 February, 2002. Thirty countries have ratified it, though India is not amongst them.

(Para 35)

Further held that, Article 8 of this Convention is concerned with 'Employment Protection and Non Discrimination'. It makes it unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave on that account except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. Article 9 requires members to take measures to ensure that pregnancy does not constitute a source of discrimination in employment.

(Para 36)

Further held that, Conclusion:

Based on the aforesaid discussion, there can be no conclusion other than to hold that the action of the respondents in denying appointment to the petitioner merely on account of her pregnancy is arbitrary and illegal. It is violative of Articles 14 and 16 of the Constitution. It is against the express provisions of the International Conventions referred to above. It is against the weight of the judicial precedents from major jurisdictions across the globe interpreting laws prohibiting gender discrimination. Most of all by forcing a choice between bearing a child and employment, it interferes both, with her reproductive rights and her right to employment. Such an action can have no place in modern India.

(Para 64)

Further held that, Page 5 of the Appendix to DGAFMS/DG 3A letter No. 9450/USG Abd/DGAFMS/DG 3A dated 22.10.2009 to the extent it lays down that pregnancy would render a candidate UNFIT for commissioning is also illegal and unconstitutional and is so declared.

(Para 65)

Navdeep Singh, Advocate
for the petitioner.

Saurabh Goel, Advocate
for Union of India.

HARINDER SINGH SIDHU, J.

(1) This petition has been filed praying for directions to quash

the letter dated 20.02.2014 (Annexure P-4) whereby the petitioner has been intimated that she is unfit to join service.She has prayed for directions that she be permitted to join service based on the appointment letter issued to her.

(2) Advertisement (Annexure P-1) was issued inviting applications for grant of Short Service Commission in the Army Medical Corps. There were 200 vacancies. The applicants could be either male or female. They were required to have passed the final year M.B.B.S. Examination in the first or second attempt and must not have attained the age of 45 years on 31.12.2013. The tenure for the fresh candidates was five years extendable by another nine years in two spells first one of five years and the second one of four years, subject to eligibility. There was no condition that the candidate had to be unmarried. The petitioner who was MBBS, MD applied in response to the advertisement. She was called for the interview on 10.06.2013 and was intimated that she had been selected for grant of Short Service Commission (hereinafter referred to as `SSC') in therank of Captain. Though, initially, declared unfit in the medical examination on 11.06.2014, she was declared medically fit by the Appeal Medical Board on 16.07.2013. She was issued appointment letter dated 16.01.2014 (Annexure P-2) whereby she was asked to report on 10.02.2014 to the Commandant of Military Hospital, Pathankot for commencement of employment. In the appointment letter it was stated that she had been found fit by the Medical Board. But she would be required to undergo medical inspection on reporting to the unit to simply confirm that there has been no deterioration in the health status.

(3) The petitioner reported for duty on 10.02.2014. After her medical inspection, certificate (Annexure P-3) was issued that she was medically fit and is free from contagious disease. However a remark was entered that she was seven months pregnant but with no complications. It was conveyed to her that there are no clear instructions or guidelines or rules as to whether pregnancy can be construed as deterioration of health. Accordingly, the petitioner was asked to wait pending a clarification on this issue from the Headquarters. Finally, vide letter dated 20.02.2014 (Annexure P-4) the petitioner was intimated that as per the competent authority, she was unfit to join service. She made a request to keep a vacancy for her so that she could join after delivering the child but received noresponse.

(4) Aggrieved, the petitioner has filed the present writ

petition.

(5) In the written statement filed on behalf of the respondents, it has been stated that as per the letter dated 16.01.2014, when the petitioner reported to 167 MH Pathankot on 10.02.2014, she was subjected to medical inspection and being seven months pregnant was found to be unfit. Further an OP Immediate Signal dated 11.02.2014 was sent to Office of DGAFMS stating that the petitioner was not found to be in SHAPE-I and was a case of Ante Natal Gare (AN G) seven months and advise was sought. The issue was deliberated on the file and since the petitioner was not in a fit condition to be granted SSC and there being no provision for extension of dateof joining, the Office of DGAFMS clarified that the petitionercould not be granted SSC Commission. The same was communicated to the petitioner vide letter dated 20.02.2014.

(6) It is further stated that the terms and conditions of service of officers granted SSC in the Army Medical Corps is governed by Army Instructions 75/78 (as amended). Para 3(d) thereof lays down that the applicant must be in medical categorySHAPE-I for being eligible for grant of Commission. Further DGAFMS/DG-3A letter No. 9450/USG Abd/DGAFMS/DG-3A dated 22.10.2009 lays down the standards for assessment of candidates for commissioning. Page 5 of the Appendix to this letter clearly lays down that all female candidates would be screened for pregnancy and detection of the same would render a candidate UNFIT for commissioning.

(7) It is further stated that the newly commissioned Medical Officers are first directed to report to a Military Hospital where they are expected to learn about the functioning of Armed Forces Medical Services. Within a few months thereafter, subject to availability of training facility at Officers Training College, AMC Centre & College, Lucknow the newly commissioned officers are detailed to undergo 02 months oftraining called as Medical Officers Basic Course (MOBC). This course includes Military training which involves strenuous physical exercise along with weapon training as well and the basic qualification requirement (OR) for the course is medical category SHAPE-1. The officers on successful completion of the course are posted to units deployed in Field/Counter Insurgency Areas wherein they are expected to provide medical cover to the troops in close combat support. The petitioner being sevenmonths pregnant was in no position to undertake the training activities or service in field/CI Ops area expected out of a newly commissioned Medical Officer.

(8) It is stated that even in case of serving lady officers the guidelines for disposal of pregnant lady officers as laid down at para 62 of AO 09/2011/DGMS (Annexure R-3) clearly delineates that pregnant lady officers should be placed in Medical Category P-2 if asymptomatic and P-3, if symptomatic immediately on the diagnosis of pregnancy. It further stipulates that the lady officers should be advised to begin their maternity leave by the end of the second trimester (six months of pregnancy) or beginning of the third trimester. The petitioner who was admittedly in the beginning of the third trimester of pregnancy was in no position to render services as expected of a newly commissioned officer and was ineligible for grant ofcommission as such.

(9) Justifying the denial of her request to keep a post vacant for her so as to enable her to join after delivering thechild, it is stated that as per para 5 of the offer of appointment no request of change of service, place of posting or extension of date of joining could be accepted. The vacancy which remains unsubscribed due to any reason is passed on the candidate next in the merit list prepared at the time of interview.

(10) In the aforesaid facts, the question that arises is whether the denial of appointment to the petitioner holding her to be `unfit' solely on account of pregnancy is legal and justified? Consequently, is Page 5 of the Appendix to DGAFMS/DG-3A letter No. 9450/USG Abd/DGAFMS/DG-3A dated 22.10.2009 to the extent it lays down that detection of pregnancy would render a candidate UNFIT for commissioning legal and Constitutional?

Constitutional Provisions and the Supreme Court :

(11) The Constitution of India accords socio-economic and political justice, equality of status and of opportunity assuring the dignity of individual. Article 14 guarantees equality by providing 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'. Article 15(1) abolishes discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(2) requires that there shall be no disability, liability or restriction on grounds of sex and ensures equality of status. Article 15(3) enables the State to make special provisions for women and children. Article 16(1) accords equality of opportunity in public service for appointment or employment to an office or post under the State and ordains that 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. There is thus a specific prohibition against gender discrimination in matters relating to public employment.

(12) It is in the light of these Constitutional provisions that the validity of the impugned action has to be judged.

(13) At the outset, it would be helpful to refer to two important decisions of the Hon'ble Supreme Court on the issue of gender discrimination in the context of marriage and pregnancy.

(14) In ***C.B. Muthamma*** versus ***Union of India***[1] Rule 8 (2) of Indian Foreign Service (Conduct and Discipline) Rules, 1961, was challenged by Miss Muthamma, a member of the Indian Foreign Service. As per this Rule, a woman member of the service was required to obtain the permission of the Government in writing before her marriage was solemnized. Further, as per this Rule, at any time after the marriage, a woman member of the Service could be required to resign from service, if the Government was satisfied that her family and domestic commitments were likely to come in the way of the due and efficient discharge of her duties.

(15) Though, the Court was saved of the necessity to strike down the Rule, as it was stated that the Rule had been deleted, but it made very pertinent observations regarding the invalidity thereof. The Court observed that gender discrimination was patent in the Rule, that sex prejudice against Indian Womanhood was writ large in the Rule and that it was in violation of Article 16 of the Constitution.

> "This writ petition by Miss Muthamma, a senior member of the Indian Foreign Service, bespeaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality. The credibility of constitutional mandates shall not be shaken by governmental action or inaction but it is the effectof the grievances of Miss Muthamma that sex prejudice against Indian womanhood pervades the service rules even a third of a century after Freedom. There is some basis for the charge of bias in the rules and this makes the ominous indifference of the executive to bring about the banishment of discrimination in the heritage of service rules. If high officials lose hopes of equal justice under the

[1] (1979) 4 SCC 260

rules, the legal lot of the little Indian, already priced out of the expensive judicial market, is best left to guess. This disturbing thought induces us to make a few observations about the two impugned rules which appear prima facie, discriminatory against the female of the species in public service and have surprisingly survived so long, presumably, because servants of government are afraid to challenge unconstitutional rule making by the Administration......

3. If a fragment of these assertions were true, unconstitutionality is writ large in the administrative psycheand masculine hubris which is the anathema for Part III haunts the echelons in the concerned Ministry. If there be such gender injustice in action, it deserves scrupulous attention from the summit so as to obliterate such tendency......

5. Discrimination against women, in traumatic transparency, isfound in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by the Government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service are likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to .understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, runs in the same prejudicial strain:

"(1)-(3) (4) No married woman shall be entitled as of right to beappointed to the service."

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 postureis a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. 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 especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable."

(16) The next case is ***Air India*** versus ***Nergesh Meerza***[2] which is a locus classic us on the issue.

(17) In this case, challenge was to the Constitutional validity of Regulation 46(1) (c) of the Air India Employees Se**rvice Regulations, as per** which, as against the normal age of retirement of the employees of the Air India Corporation of 58 years, an Air Hostess was to be retired upon attaining the age of 35 years or on marriage if it took place within four years of service or on first pregnancy, whichever occurs earlier. This Regulation was challenged on the ground of being arbitrary and unreasonable and violative of Article 14 of the Constitution.

(18) The bar of pregnancy and marriage was sought to be justified by the Air India Corporation as being a reasonable restriction in public interest. It was argued that if the bar of marriage and pregnancy was removed, it would lead to a number of practical difficulties and cause considerable expense to the Corporation as it would have to make arrangements for substitutes for the period of pregnancy and after.

(19) The Court held that as marriage after four years was not prohibited, there was no reason as to why pregnancy should stand in the way of the Air Hostesses continuing in service. It negated the argument that from the very beginning of pregnancy women may be prone to sickness during long flights. It was observed that, in any case, the difficulty in discharge of duties by pregnant Air Hostesses could be mitigated by granting themmaternity leave even up to periods of 14 to 16 months and making alternative arrangements on temporary or ad hoc basis. Termination of service in such circumstances was held to be callous and cruel. It was termed as an insult to Indian Womanhood and violative of Article 14 of the Constitution.

(20) It was emphatically held that pregnancy is not a disability but one of the natural consequences of marriage. Any distinction made

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[2] (1981) 4 SCC 335

on the ground of pregnancy was held to be arbitrary. The Hon'ble Court observed as under:

> **"82.** Coming now to the second limb of the provisions according to which the services of AHs would stand terminated on first pregnancy, we find ourselves in complete agreement with the argument of Mr Setalvad that this is a most unreasonable and arbitrary provision which shocks the conscience of the Court. The Regulation does not prohibit marriage after four years and if an AH after having fulfilled the first condition becomes pregnant, there is no reason why pregnancy should stand in the way of her continuing in service. The Corporations represented to us that pregnancy leads to a number of complications and to medical disabilities which may stand in the efficient discharge of the duties by the AHs. It was said that even in the early stage of pregnancy some ladies are prone to get sick due to air pressure, nausea in long flights and such other technical factors. This, however, appears to be purely an artificial argument because once a married woman is allowed to continue in service then under the provisions of the Maternity Benefit Act, 1961 and the Maharashtra Maternity Rules, 1965 (these apply to both the Corporations as their Head Offices are at Bombay), she is entitled to certain benefits including maternity leave. In case, however, the Corporations feel that pregnancy from the very beginning may come in the way of the discharge of the duties by some of the AHs, they could be given maternity leave for a period of 14 to 16 months and in the meanwhile there could be no difficulty in the Management making arrangements on a temporary or ad hoc basis by employing additional AHs**.** We are also unable to understand the argument of the Corporation that a woman after bearing children becomes weak in physique or in her constitution. There is neither any legal nor medical authority for this bald proposition. Having taken the AH in service and after having utilised her services for four years, to terminate her service by the Management if she becomes pregnant amounts to compelling the poor AH not to have any children and thus interfere with and divert the ordinary course of human nature. It seems to us that the termination of the services of an AH under such circumstances is not

only a callous and cruel act but an open insult to Indian womanhood — the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution ”

(21) The Hon'ble Court approved the dissenting opinion of three Judges of the U.S. Supreme Court in ***General Electric Company*** versus ***Martha V. Gilbert***[3] holding that the pregnancy disability exclusion amounted to downgrading women’s role in labour force. It was observed:

“84......The counsel for the Corporation relied on the majority judgments of Rehnquist, Burger, Stewart, White and Powell, JJ. while the petitioners relied strongly on the dissenting opinion. We are inclined to accept the dissenting opinion which seems to take a more reasonable and rational view. Brennan, J. with whom Marshall, J. agreed, observed as follows:

“(1) the record as to the history of the employer’s practices showed that the pregnancy disability exclusion stemmed from a policy that purposefully downgraded women’s role in the labour force, rather than from gender-neutral risk assignment considerations.”

85. Stevens, J. while endorsing the view of Brennan, J. observed thus:

“The case presented only a question of statutory construction, and the employer’s rule placed the risk of absence caused by pregnancy in a class by itself, thus violating the statute as discriminating on the basis of sex, since it was the capacity to become pregnant which primarily differentiated the female from the male.”

86. In the instant case, if the Corporation has permitted the

[3] 429 US 125 (1976)

AHs to marry after the expiry of four years then the decision to terminate the services on first pregnancy seems to be wholly inconsistent and incongruous with the concession given to the AHs by allowing them to marry. Moreover, the provision itselfis so outrageous that it makes a mockery of doing justice to the AHs on the imaginative plea that pregnancy will result in a number of complications which can easily be avoided as pointed out by us earlier ”

(22) Some other decisions of the U.S. Supreme Court were referred to, which dealt with pregnancy disability as being per se discriminatory. As these cases illustrate different situations where such a discriminatory treatment prevails and the Court's response thereto, a reference to them is instructive:

> “88. .... In Cleveland Board of Education v. Jo Carol La Fleur the U.S. Supreme Court made the following observations:
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> “As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the board’s objectives just as well, while imposing a far lesser burden on the women’s exercise of constitutionally protected freedom.
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> While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals....
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> While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, theycannot pass muster under the due process clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.”
>
> 89. The observations made by the U.S. Supreme Court regarding the teachers fully apply to the case of the pregnant AHs. In Sharron A. Frontiero v. Elliot L. Richardson the following observations were made:

"Moreover, since sex, like race and national origin, isan immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility."

90. What is said about the fair sex by the Judges fully applies to a pregnant woman because pregnancy also is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Any distinction, therefore, made on the ground of pregnancy cannot but be held to be extremely arbitrary.

91. In Mary Ann Turner v. Department of Employment Security the U.S. Supreme Court severely criticised the maternity leave rules which required a teacher to quit her job several months before the expected child. In this connection the Court observed as follows:

"The Court held that a school board's mandatory maternity leave rule which required a teacher to quit her job several months before the expected birth of her child and prohibited her return to work until three months after childbirth violated the Fourteenth Amendment... the Constitution required a more individualised approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since 'the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancyis very much an individual matter,

It cannot be doubted that a substantial numberof women are fully capable of working well into theirlast trimester of pregnancy and resuming employment shortly after childbirth....

We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the La Fleur case."

92. We fully endorse the observations made by the U.S.

Supreme Court which, in our opinion, aptly apply to the facts of the present case. By making pregnancy a bar to continuance in service of an AH the Corporation seems to have made an individualised approach to a woman's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach.

93. Similarly, very pregnant observations were made by the U.S. Supreme Court in City of Los Angeles, Department of Water & Power v. Marie Manhart thus:

"It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less... The question, therefore, is whether the existence or non- existence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of the statute command.

Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."

94. These observations also apply to the bar contained in the impugned regulation against continuance of service after pregnancy. In Bombay Labour Union v. International Franchises Pvt. Ltd. this Court while dealing with a rule barring married women from working in a particular concern expressed views almost similar to the views taken by the U.S. Supreme Court in the decisions referred to above. In thatcase a particular rule required that unmarried women were to give up service on marriage — a rule which existed in the Regulations of the Corporation also but appears to have been deleted now. In criticising the validity of this rule this Court observed as follows:

> "We are not impressed by these reasons for retaining a rule of this kind. Nor do we think that because the work has to be done as a team it cannot be done by married women. We also feel that there is nothing to show that married women would necessarily be more likely to be absent than unmarried women or widows. If it is the presence of children which may be said to account for greater absenteeism among married women, that would be so more or less in the case of widows with children also. The fact that the work has got to be done as a team and presence of all those workmen is necessary, is in our opinion no disqualification so far as married women are concerned. It cannot be disputed that even unmarried women or widows are entitled to such leave as the respondents rules provide and they would be availing themselves of these leave facilities."
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> 95. These observations apply with equal force to the bar of pregnancy contained in the impugned Regulation.
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> 96. It was suggested by one of the Corporations that after a woman becomes pregnant and bears children there may be lot of difficulties in her resuming service, the reason being that her husband may not permit her to work as an AH. These reasons, however, do not appeal to us because such circumstances can also exist even without pregnancy in the case of a married woman and if a married woman leaves the job, the Corporation will have to make arrangements for a substitute. Moreover, whether the woman after bearing children would continue in service or would find it difficult to look after the children is her personal matter and a problem which affects the AH concerned and the Corporation has nothing to do with the same. These are circumstances which happen in the normal course of business and cannot be helped. Suppose an AH dies or becomes incapacitated, it is manifest that the Corporation will have to make alternative arrangements for her substitute. In these circumstances, therefore, we are satisfied that the reasons given for imposing the bar are neither logical nor convincing."

(23) Thus, as per this decision, in cases where a married woman is not disqualified for appointment, the fact that she is pregnant,

cannot be a disqualification for continuing with appointment. Nor can pregnancy, in such circumstances, be treated as a bar to be appointed. Any inability to discharge duties during the months, before and after child birth, can be taken care of by granting maternity leave for the period required.

(24) Apart from Articles 14 and 16 which were the basis of the Supreme Court decisions, discriminatory treatment of pregnant women would also fall foul of Article 42 of the Constitution which requires the State to make provision for securing just and humane conditions of work and for maternity relief. In ***Municipal Corpn. of Delhi*** versus ***Female Workers (Muster Roll)***[4] it has been held that the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

International Conventions.

(25) While in the earlier decisions reliance was only on the provisions of the Constitution, an additional dimension to Constitutional adjudication, of gender discrimination/ gender justice issues has emerged in view of the increasing reference by the Hon'ble Supreme Court to International Conventions. It has declared that International Conventions would be enforceable when they elucidate and effectuate the fundamental rights and that the Courts are obliged to apply them when there is no inconsistency with the domestic law.

(26) India is a signatory to various international covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10-12-1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. There have followed a series of conventions, which reflect the broad international consensus on important issues of global concern.

(27) Of the International Conventions, two which are very relevant for the present issue are "*Convention on the Elimination of all Forms of Discrimination against Women*" (CEDAW) and "*ILO :Maternity Protection Convention 2000*".

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[4] (2000) 3 SCC 224

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) :

(28) The United Nations adopted this Convention on 18- 12-1979. India ratified it on 19-6-1993 and acceded to it on 8-8-1993 with reservation on Articles 5(*e*), 16(1), 16(2) and 29 ofCEDAW.

(29) The preamble of CEDAW reiterates that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth ofthe personality from society and family and makes more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of women is a handicap. Establishment of a new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc.

(30) Article 1 defines discrimination against women to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

(31) Article 2(*b*) enjoins the State/parties while condemning discrimination against women in all its forms, topursue, by appropriate means, without delay, elimination of discrimination against women by adopting *"appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women"*. To take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause C enjoins to ensure legal protection of the rights of women on equal basiswith men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins State/parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.

(32) Article 11 of this Convention which requires States/parties to take all appropriate measures to eliminate discrimination against women in the field of employment is of particular relevance. It is reproduced below:

> "Article 11:
>
> 1. States/parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
>
> (a) the right to work as an inalienable right of all human beings;
>
> (b) the right to the same employment opportunities, including the application of the same criteria forselection in matters of employment;
>
> (c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
>
> (d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
>
> (e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
>
> (f) the right to protection of health and to safety inworking conditions, including the safeguarding of the function of reproduction.
>
> 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States/parties shall take appropriate measures:
>
> (a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave

and discrimination in dismissals on the basis of marital status;

(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealedor extended as necessary."

(33) By its provisions CEDAW attempts to ensure substantive equality as against merely formal equality. Towards this end, it requires the State/ parties to take all appropriate measures to eliminate discrimination against women in the field of employment and provide the same employment opportunities, including the application of the same criteria for selection in matters of employment. To prevent discrimination against women on the grounds of marriage or maternity, it requires States/parties to take appropriate measures to prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status. It also requires the introduction of maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowance.

ILO :Maternity Protection Convention 2000 :

(34) As noted in the preamble to this convention, it takes into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society and seeks to further promote equality of all women in the workforce and the health and safety of the mother and child.

(35) This Convention has entered into force on 7th February,

2002. Thirty countries have ratified it, though India is not amongst them.

(36) Article 8 of this Convention is concerned with `Employment Protection and Non Discrimination'. It makes it unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave on that account except on grounds unrelated to the pregnancy or birth ofthe child and its consequences or nursing. Article 9 requires members to take measures to ensure that pregnancy does not constitute a source of discrimination in employment. Articles 8 and 9 are reproduced below:

> **"Article 8** :
>
> 1. It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.
>
> 2. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.
>
> **Article 9** :
>
> 1. Each Member shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including — notwithstanding Article 2, paragraph1 - access to employment.
>
> 2. Measures referred to in the preceding paragraph shall include a prohibition from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment, except where required by national laws or regulations in respect of work that is:
>
> (a) prohibited or restricted for pregnant or nursing women under national laws or regulations; or
>
> (b) where there is a recognized or significant risk to the health of the woman and child."

(37) CEDAW, in particular, has been invoked by the Hon'ble Supreme Court in numerous cases while deciding different issues of gender discrimination.

(38) ***In Githa Hariharan*** versus ***Reserve Bank of India***[5] the Hon'ble Supreme Court was dealing with a challenge to the constitutionality of section 6 (a) of the Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardians and Wards Act, 1890, as per which, the father is treated as natural guardian of a Hindu minor and only after him, is the mother so treated. The provision was challenged as being violative of provisions of Article 14 and 15 of the Constitution. The Court relied on CEDAW and interpreted the provisions in a manner to save the provision from unconstitutionality and read the word `after' to mean `in the absence of', thereby, referring to the father's absence from the care of the minor's property in question for any reason whatsoever. The relevant passage is as under:

> "14. The message of international instruments — the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("CEDAW") and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June 1993. The interpretation that we have placed on Section 6(a) (supra) gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them. (See with advantage Apparel Export Promotion Council v. A.K. Chopra.)"

(39) In ***Apparel Export Promotion Council*** versus ***A.K. Chopra***[6], the Hon'ble Supreme Court was concerned with the question as to whether the action of a superior against a female employee which is against moral sanctions and does not withstand the test of decency and modesty would amount to sexual harassment and whether physical contact with an female employee is an essential ingredient of such a charge. The Court referred to CEDAW and the Beijing Declaration

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[5] (1999) 2 SCC 228

[6] (1999) 1 SCC 759

which directed all State/ Parties to take appropriate measures to prevent discrimination of all forms against women, besides taking steps to protect the honour and dignity of women and held that the message of these instruments is loud and clear. It was held that these instruments cast an obligation on Indian State to gender sensitize its laws and the Courts are under an obligation to see that the messageof international instruments is not lost. It was held that in cases of violation of human rights the Courts should always remainalive to international conventions and apply the same when there is no inconsistency between the international norms and the domestic laws occupying the field.

(40) In ***Municipal Corpn. of Delhi*** versus ***Female Workers (Muster Roll)***[7] while dealing with the question whether female workers (muster roll) engaged by the Municipal Corporation of Delhi were entitled to maternity benefit, the Hon'ble Supreme Court held that the principles which are contained in Article 11, of CEDAW have to be read into the contract of service between the Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. It was directed that the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages.

(41) It was observed that to become a mother is the most natural phenomenon in the life of a woman. An employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing her duties at the workplace while carrying a baby in the womb or while rearing up the child after birth. It was observed:

> "33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segmentof our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work, they must be provided all the facilities to which theyare entitled. To become a mother is the most natural phenomenon in the life of a woman. Whatever is needed to facilitate the birth of child to a

[7] (2000) 3 SCC 224

woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the workplace while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre-or post-natal period.

38. These principles which are contained in Article 11, reproduced above, have to be read into the contract of servicebetween the Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary notification under the proviso to sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, if it has not already been issued."

English Courts and the European Court of Justice

(42) Certain decisions of English Courts and theEuropean Court of Justice wherein gender equality has been recognized as a key principle of the Convention rights and a goalto be achieved by member States of the Council of Europe are also relevant.

(43) In ***Brown Appellant And Stockton-On-Tees Borough Council Respondent***[8] a decision of the House of Lords, the appellant, Mrs. Brown, commenced employment with the respondent local authority, as a care supervisor in a youth Training scheme. The Manpower Services Commission, who were funding the scheme, decided to withdraw their financial support. They were however prepared to finance a revised scheme employing fewer staff. Accordingly, the local authority decided to terminate the existing staff and invited them to apply for an appointment under the new revised

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[8] (1988)2 WLR 935

scheme.

(44) Mrs. Brown was one of four staff who applied for three posts in the new revised scheme. Of the other three applicants, one had started work with the local authority after Mrs. Brown, the other two had been employed before her. As there was nothing adverse against her earlier conduct on the principle of *last in first out* Mrs. Brown legitimately expected to have been successful. She was, however, pregnant at the timeof her interview. The new revised scheme which was to commence on 1st April, 1985 and was to be of 12 months' duration and Mrs. Brown would have required maternity leave for about six to eight weeks out of the twelve month contract. She was not offered the post solely on account of her pregnancy as in the event of her being appointed, the local authority would either have had to employ a temporary replacement or managewith lesser employees.

(45) Mrs. Brown complained relying on Section 60 of the Employment Protection (Consolidation) Act 1978 as per which subject to certain exceptions, an employee shall be treated as unfairly dismissed if the reason or principal reason for her dismissal is that she is pregnant or is any other reason connected with her pregnancy.

(46) Holding her dismissal to have been unfair and inviolation of Section 60 it was observed as under:

> "Section 34 (now section 60) must be seen as a part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, but this is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the work place. If an employer dismisses a woman because she is pregnant and he is not prepared to make the arrangements to cover her temporary absence from work he is deemed to have dismissed her unfairly. I can see no reason why the same principle should not apply if in a redundancy situation an employer selects the pregnant woman as the victim of redundancy in order to avoid the inconvenience of covering her absence from work in the new employment he is able to offer others who are threatened with redundancy. It surely cannot have been intended that an employer should be

> entitled to take advantage of a redundancy situation to weed out his pregnant employees.
>
> xx xx xx
>
> The practical effect of sections 57 and 60 is that an employer faced with deciding which of several employees to make redundant must disregard the inconvenience that inevitably will result from the fact that one of them is pregnant and will require maternity leave. If the employer does not do so and makes that absence the factor that determines the pregnant woman's dismissal then the dismissal is to be deemed unfair. On the facts of the present case it is clear that Mrs. Brown's requirement of maternity leave was the reason that determined her selection for dismissal on grounds of redundancy. That was a reason connected with her pregnancy within the meaning of section 60 and is therefore deemed to be an unfair dismissal. I would therefore allow this appeal, restore the finding of unfair dismissal made by the industrial tribunal and remit the case to the industrial tribunal for consideration of the question of compensation."

(47) In ***Webb Appellant And Emo Air Cargo (U.K.) Ltd. Respondents***[9] the House of Lords was grappling with the question whether an employer is guilty of sex discrimination, direct or indirect, when he dismisses a female employee, shortly after engaging her, on learning that she is pregnant and therefore would not be available for work at the time when required.

(48) Though this question was referred to the European Court of Justice and final disposal of the appeal was postponed to await the answer, but the discussion and some observations in this case are very pertinent to the present case.

(49) It was observed that, in general, to dismiss a woman because she is pregnant or refuse to employ a woman because she may become pregnant is unlawful direct discrimination. As capacity for child bearing are characteristic of the female sex, dismissal or refusal to employ based on this characteristic constitutes direct unlawful discrimination. It was observed:

> "..There can be no doubt that in general to dismiss a

[9] (1993) 1 WLR 49

> woman because she is pregnant or to refuse to employ a woman of child-bearing age because she may become pregnant is unlawful direct discrimination. Child-bearing and the capacity for child-bearing are characteristics of the female sex. So to apply these characteristics as the criterion for dismissal or refusal to employ is to apply a gender-based criterion, which the majority of this House in James v. Eastleigh Borough Council [1990] 2 A.C. 751 held to constitute unlawful direct discrimination ”

(50) The House of Lords referred to certain decisions of the ***European Court of Justice of which Dekker*** versus ***Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus (Case 177/88)***[10]. is particularly relevant to the issue in this case as it also deals with refusal to employ because of pregnancy, which was held to be illegal being direct discrimination on grounds of sex.

(51) The decision was concerned with the interpretation of Council Directive (76/207/E.E.C.) of the Council of the European Communities, article 2(1) of which is as follows:

> “For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.”

(52) The facts were that one Mrs. Dekker applied for a job with VJV and informed the selection committee that she was three months pregnant. The committee recommended her to the board of VJV as being the most suitable candidate for the job, but the board decided not to employ her. The reason was that under the applicable law of the Netherlands, VJV would have been required to pay Mrs. Dekker 100 per cent of her salary while she was absent owing to her confinement, but would not have been in a position to recover the amount so paid from its insurers because her pregnancy would be a condition known to the employer before her commencing employment. In that situation VJV would not have been able to afford to pay a replacement for Mrs. Dekker and this might have led to a staff shortage. The Dutch courts held that the domestic equal treatment legislation had been breached, but that VJV had a justifiable ground for the breach. The Supreme Court of the Netherlands, referred a number

[10] (1992) I.C.R. 325

of questions to the European Court of Justice, the first of which was, at p. 327:

> "Is an employer directly or indirectly in breach of the principle of equal treatment laid down in articles 2(1) and 3(1) of the Council Directive of 9 February 1976 (76/207/E.E.C.) on the implementation of the principle of equal treatment for men and women as regards access to employment … if he refuses to enter into a contract of employment with a candidate, found by him to be suitable, because of the adverse consequences for him which are to be anticipated owing to the fact that the candidate was pregnant when she applied for the post …?"

(53) In relation to this question the relevant passages in the judgment of the European court, which were quoted in the report were these :

> "10. Consideration must be given to the question whether a refusal of employment in the circumstances to which the national court has referred may be regarded as direct discrimination on the grounds of sex for the purposes of the Directive. The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex. 11. The reason given by the employer for refusing to appoint Mrs. Dekker is basically that it could not have obtained reimbursement from the Risicofonds of the daily benefits which it would have had to pay her for the duration of her absence due to pregnancy, and yet at the same time it would have been obliged to employ a replacement. That situation arises because, on the one hand, the national scheme in question assimilates pregnancy to sickness and, on the other, the Ziekengeldreglement contains no provision excluding pregnancy from the cases in which the Risicofonds is entitled to refuse reimbursement of the daily benefits.
>
> 12. In that regard it should be observed that only women can be refused employment on the ground of pregnancy and such a refusal therefore constitutes direct discrimination on the ground of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy

must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.

13. In any event, the fact that pregnancy is assimilated to sickness and that the respective provisions of the Ziektewet and the Ziekengeldreglement governing reimbursement of the daily benefits payable in connection with pregnancy are not the same cannot be regarded as evidence of discrimination onthe ground of sex within the meaning of the Directive. Lastly,in so far as as an employer's refusal of employment based on the financial consequences of absence due to pregnancy constitutes direct discrimination, it is not necessary to consider whether national provisions such as those mentioned above exert such pressure on the employer that they prompt him to refuse to appoint a pregnant woman, thereby leading to discrimination within the meaning of the Directive.

14. It follows from the foregoing that the answer to be given to the first question is that an employer is in direct contravention of the principle of equal treatment embodied in articles 2(1) and 3(1) of Council Directive (76/207/E.E.C.) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness."

(54) The effect of this case, was summarized by theHouse of Lords thus:

"....In the Dekker case, the European Court of Justice held that the fundamental reason for the refusal of employment was pregnancy, a reason which did not apply to workers of either sex without distinction but which appliedexclusively

to the female sex, and that this constituted direct discrimination on grounds of sex. That the refusal of employment was not on grounds of pregnancy as such butwas on account of the adverse financial consequences to the employer of absence of the worker due to pregnancy was regarded as not material because, in the court's view, therefusal was essentially based on the fact of pregnancy."

(55) In this case, the European Court of Justice laid down a very significant proposition that as only women can become pregnant and as such only women can be refused employment on the ground of pregnancy, hence a refusal for employment on the ground of pregnancy constitutes direct discrimination on the ground of sex, even though the refusal may be occasioned by adverse financial consequences to the employer for finding a replacement for the duration of the pregnancy.

(56) The question referred in ***Webb Appellant And Emo Air Cargo (U.K.) (supra)*** was answered by the EuropeanCourt of Justice in ***Webb*** versus ***Emo Air Cargo (U.K.) Ltd***.[11]

(57) The European Court answered the question in the context of the facts which disclosed that the contract was for an indefinite period. The relevant Community Directive was Directive (76/207/E.E.C.).

(58) According to Article 1(1), its purpose was to put into effect in the member states the principle of equal treatment for men and women as regards access to employment, including promotion, and vocational training and as regards working conditions.

(59) Article 2(1) of the Directive required that

"the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."

Under article 5(1):

"Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be

[11] (1994) 3 WLR 941

guaranteed the same conditions without discrimination on grounds of sex."

(60) The European Court took note of the relevant judgments and other Directives, which provided the context for the answer as under:

> "19. As the court ruled in paragraph 13 of its judgment in Handels- og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening (Case C-179/88) [1992] I.C.R. 332, 335 and confirmed in paragraph 15 of its judgment in Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. eV (Case C-421/92) [1994] 2 C.M.L.R. 681, 691, the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex.
>
> 20. Furthermore, by reserving to member states the rightto retain or introduce provisions which are intended to protect women in connection with "pregnancy and maternity," article 2(3) of Directive (76/207/E.E.C.) recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth: Habermann-Beltermann , judgment at paragraph 21, and Hofmann v. Barmer Ersatzkasse (Case 184/83) [1984] E.C.R. 3047, 3075, para. 25.
>
> 21. In view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, the Community legislature subsequently provided, pursuant to article 10 of Council Directive (92/85/E.E.C.) of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (Official Journal 1992 No. L. 348, p. 1), for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their

maternity leave.

22. Furthermore, article 10 of Directive (92/85/E.E.C.) provides that there is to be no exception to, or derogation from, the prohibition on the dismissal of pregnant women during that period, save in exceptional cases not connected with their condition."

(61) The answer of the European Court was as under:

"24. First, in response to the House of Lords' inquiry, there can be no question of comparing the situation of a womanwho finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons.

25. As the applicant rightly argues, pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of awoman without discriminating on grounds of sex. Moreover, in Handels- og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening (Case C-179/88) [1992] I.C.R. 332, the court drew a clear distinction between pregnancyand illness, even where the illness is attributable to pregnancybut manifests itself after the maternity leave. As the court pointed out, at paragraph 16, there is no reason to distinguish such an illness from any other illness.

26. Furthermore, contrary to the submission of the United Kingdom, dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for theemployer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render

ineffective the provisions of the Directive.

27. In circumstances such as those of the applicant, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged: see Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. eV (Case C-421/92) [1994] 2 C.M.L.R. 681, 695, para. 25, and paragraphs 10 and 11 of the Advocate General's opinion in this case, ante pp. 962B–963C.

28. The fact that the main proceedings concern a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment cannot affect the answer to be given to the national court.

29. Accordingly, the answer to the question submitted must be that article 2(1) read with article 5(1) of Directive (76/207/E.E.C.) precludes dismissal of an employee who is recruited for an unlimited term with a view, initially, to replacing another employee during the latter's maternity leave and who cannot do so because, shortly after recruitment, she is herself found to be pregnant."

(62) The European Court held that termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged. It negated attempts to draw an analogy between a pregnant woman being unavailable for work on that account with a man who for some illness or other medical reasonwould not be similarly available, by answering that such situations are not comparable. It further held that pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds which may justify dismissal of a woman without discrimination on grounds of sex.

(63) It was held that dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract as the protection afforded by Community law to a woman during

pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. It concluded that any contrary interpretation would render ineffective the provisions of the Directive preventing discrimination.

Conclusion :

(64) Based on the aforesaid discussion, there can be no conclusion other than to hold that the action of the respondents in denying appointment to the petitioner merely on account of her pregnancy is arbitrary and illegal. It is violative of Articles 14 and 16 of the Constitution. It is against the express provisions of the International Conventions referred to above. It is against the weight of the judicial precedents from major jurisdictions across the globe interpreting laws prohibiting gender discrimination. Most of all by forcing a choice between bearinga child and employment, it interferes both, with her reproductive rights and her right to employment. Such an action can have no place in modern India.

(65) Page 5 of the Appendix to DGAFMS/DG-3A letter No.9450/USG Abd/DGAFMS/DG-3A dated 22.10.2009 to the extent it lays down that pregnancy would render a candidate UNFIT for commissioning is also illegal and unconstitutional and is so declared.

(66) However, keeping in view the nature and responsibilities of the job in question, it would be open to the respondents to devise any appropriate procedure to either give appointment on selection and grant maternity leave or keep a vacancy against which the woman candidate who is pregnant was selected, reserved for her to be offered to her after confinement.

(67) But no such consideration to defer joining arises in the present case. Vide order dated April 2, 2014 one post had been directed to be kept vacant for the petitioner. Further it has been informed by the Ld. Counsel for the petitioner that she has given birth to her child on 11.4.2014.

(68) Accordingly, this writ petition is allowed.

(69) The respondents are directed to offer appointment to the petitioner within a period of one month of the receipt ofcertified copy of this order.

Shubreet Kaur