AIR INDIA V. NARGESH MEERZA

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"Case Name – Air India v. Nargesh Meerza

Citation – AIR 1981 SC 1829

Quorum – Justice Fazalali and Justice Syed Murtaza, Justice Varadarajan A. and Justice Sen

Petitioner – Air India

Respondent – Nargesh Meerza"

INTRODUCTION

A basic question that we need to ask ourselves, before starting the case analysis, is 'What is Gender Discrimination?'. Gender discrimination is nothing but a type of discrimination where individuals are judged and discriminated against on the basis of their gender rather than their merits and talents. In a society like India, there has always been gender discrimination in one form or the other. Women, in India, have always been considered secondary humans or inferior beings that are in need of constant guidance and protection. Following such a mindset, the society formed and established roles for both genders. Both men and women were allocated separate roles as society deemed them fit enough to perform. In short, men were considered strong and able enough to go and fight wars and do the earning whereas a woman was considered the family caretaker.

The case below too, reflects the mindset of the society. Patriarchy and its subsequent practices have gotten so ingrained that we, as a society, have forgotten to see all as humans and to determine their roles on the basis of their individual skills or capabilities. Hence, it is high time that we understand that though not everyone is equal, everyone is unique. In about thirty years after the enactment of the constitution, with the exception of the Yusuf Abdul Aziz v. State of Bombay[1] where the issue of adultery was discussed at length, the Supreme Court did not have the ability to deal sufficiently with cases relating to discrimination under Article 15(1). However, all of this changed in 1981, when a division bench decided Air India v Nargesh

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[1] 1954 AIR 321

Meerza[2], which is still considered one of the Supreme Court's fundamental decisions on the matter of discrimination on the basis of gender. It's also an intellectually unsatisfying opinion, as it ignores the nuanced and thoughtful sex discrimination jurisprudence that, as we have seen, is being formed across the country by the judgements of various High Courts.[3]

FACTS OF THE CASE

"The facts of the case are highly complex and exhaustive. The case involved two companies (Air India and Indian Airlines Corporation), numerous legal rounds before tribunals and before courts, and then the final decision before Supreme Court. Regulations 46 and 47 of the Air India Employees Service Regulations were the basic legal points being challenged here. The Air Hostesses under Air India were retired from service in the following contingencies":

(a) On attaining the age of 35 years;

(b) On marriage if it took place within four years of the service; and

(c) On first pregnancy.

"The age of retirement of an Air Hostess could be extended up to ten years by granting yearly extensions at the option of the Managing Director. If the Managing Director chose to exercise his discretion under Regulation 47 an Air Hostess could retire at the age of 45 years. Air Hostesses under Indian Airlines Corporation was governed by similar service conditions except that the age of retirement of permanent Air Hostesses could be extended up to 40 years".

"The Rules were affirmed by two Tribunals in the first round of hearings, with judgments such as the requirement to deal with temperamental customers by hiring "young and attractive" air hostesses. The lawsuit eventually reached the Supreme Court, which sustained the restrictions in part, changed them in part, and struck them down in part."

Looking at the bare provisions of the regulations;

"***Regulation 46** Air India Employees Service Regulations"

Retiring Age:

[2] AIR 1981 SC 1829
[3] Chandra, S., Sen, J., & John, M. (2013). Administrative Law-Fall 2014.

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

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

"***Regulation 47** – Of Air India Employees Service Regulations"

Extension of Service.

"Notwithstanding anything contained in Regulation 46, the services of any employee, may, at the option of the Managing Director but on the employee being found medically fit, be extended by one year at a time beyond the age of retirement for an aggregate period not exceeding two years, except in the case of Air Hostesses and Receptionists where the period will be ten years and five years respectively."

The arbitrariness becomes very clear after reading these bare provisions carefully.

ISSUES PRESENTED BEFORE THE COURT

(I) Whether Regulation 46 & 47 violative of Articles 14, 15, and 16 of the Constitution of India and thus ultra vires in whole or part?

(II) Whether discretionary powers as enumerated under Regulation 47 can be deemed as being excessive delegation or arbitrary?

ANALYSIS AND REVIEWING OF CONSTITUTIONAL PROVISIONS

1. Article 14 (Classification test)

The court in the first instance stated that;

"*Art. 14 bans hostile discrimination, but the classification is not fair. Thus, if persons belonging to a given class are handled differently in the public interest to advance and improve*

participants belonging to backward classes in spite of their unique attributes, qualities, style of recruiting, and the like, such a designation does not amount to discrimination."[4]

The regulation created a significant degree of incongruity between the male workers (referred to as Air flight Pursers) and female workers (referred to as Air hostesses). The Supreme Court basically interpreted both male and female workers as separate classes of workers. It also stated that "*Unavoidable inference that follows is that there are two distinct and distinct groups with distinct service requirements and distinct incidents, [and] the issue of discrimination does not occur.*"[5]

First off, we need to understand this classification of workers into categories. This is done in numerous industries where different types of workers exist. It is done to streamline the classification for the purposes of salary distribution, work distribution, privileges, etc. So yes, classification of workers into categories exist but is done on the basis of their work and not on the basis of their religion, gender, caste, etc. The two cadres here, true, had different their own separate procurement laws, promotional avenues, and terms of service. This in itself, does not pose any concern with Article 14. This is because the work performed here is the same. Instead of understanding that there has been a violation of Article 14, the Supreme Court went on to try and classify males and females into two different categories.

The classification or categorization in the present case was based on gender. The Supreme Court was on the wrong lines here when it interpreted males and females performing the same work into two different categories of workers. Likewise, thinking on the same lines, every industry can divide workers on the basis of religion, gender, caste, etc, assign them different names, treat them unequally, use this as a way to circumvent fundamental rights, and then justify it by using the very distinctness of treatment to argue that the two constitute separate cadres[6].

In short, the Supreme Court justified the unjust treatment of women over men by concluding that since both genders constituted separate groups the treatment was fair. However, two wrongs don't make a right. The logic of this judgment given by the Supreme Court stemmed from the fact that the Court found that one of the criteria for AHs to be hired was that they had

[4] Air India Etc Etc vs Nergesh Meerza & Ors Etc Etc AIR 1981 SC 1829 4 (2)
[5] Air India Etc Etc vs Nergesh Meerza & Ors Etc Etc AIR 1981 SC 1829 [18]
[6] Kannabiran, K. (2009). Judicial meanderings in Patriarchal thickets: Litigating sex discrimination in India. Economic and Political Weekly, 88-98.

to be unmarried, while the AFPs did not have such a requirement. Just on the basis of such different criteria for hiring does not make them separate cadres.

2. Article 14 test of arbitrariness

After using up two rounds of ammo in its arsenal, the challengers now had just one round left. This round is that of the test of arbitrariness. These regulations had to now be challenged for the reason that they were arbitrary. Now to gain a slight background, Article 14 has two tests attached to it. One is a classification test where it is necessary to prove that an intelligible differential existed between the groups created through classification and that a rational nexus existed behind the decision of the government. Two is the arbitrary test. Here, a particular law will fail if it is "manifestly unreasonable" "absolutely unreasonable" or "absolutely arbitrary".

The arbitrary test has been formed through precedents and has never been clearly defined. In this case, when the question of four years marriage clause came up the court said;

"*We do not think that the laws suffer from any constitutional infirmity as far as the issue of marriage within four years is concerned. An AH continues her career between the age of 19 and 26 years, according to the legislation. Most AHs are not just SSC, which is the basic requirement, but they have much higher credentials, and very few plan to marry after joining the service immediately. Accordingly, the Law requires an AH to marry at the age of 23 if it has entered the service at the age of 19, which is a very sound and salutary provision by all means.*

In addition to enhancing the employee's health, it aims to support and improve our family planning programme. Second, if a woman marries near the age of 20 to 23 years, she becomes fully mature and there is every likelihood that such a marriage will prove fruitful, all things being equal. Thirdly, the Corporation has rightly pointed out to us that if the marriage bar is abolished within four years of operation, then the Corporation would have to incur considerable expense either on a temporary or ad hoc basis in hiring additional AHs to replace the working AHs if they conceive and any period short of four years will be too little time for the Corporation to phase out."[7]

The court out rightly stereotyped gender roles when it decided that the marriage clause was not supposed to be the same for both men and women. The reasoning it relied upon as it was

[7] Air India Etc Etc vs Nergesh Meerza & Ors Etc Etc AIR 1981 SC 1829 32-33

necessary for 'health and family planning purposes'. Nevertheless, the court held the requirement of termination of first pregnancy clause to be unconstitutional and stated; "*It seems to us that under certain conditions, the termination of the services of an AH is not only a callous and cruel act but an open insult to the most sacrosanct and revered institution of Indian womanhood.*"[8]

Now, the court described all of these changes as fair. However, curiously, the court accepted the dissenting decision in the American judgment in the case General Electric Company vs. Martha Gilbert[9]. Here the ruling said that any categorization based on pregnancy would amount to gender discrimination and the termination of third pregnancy was also upheld. Here, these two points, however contrary, are very difficult to reconcile and this decision of the court probably showcases the intellectual meltdown of the doctrine of arbitrariness. The court went on to quote;

"*In the first case, the amendment to avoid the third pregnancy of two existing children will be of greater importance to the welfare of the AH involved as well as to the well-being of the children concerned. Secondly, as mentioned above, the same factors will extend to a third pregnancy bar when two children are already there when coping with the law on the prohibition of marriage within four years since as the entire world faces the issue of population growth, it would not only be beneficial but completely necessary for any nation to see that the family planning policy is not only whipped up but maintained at sufficient levels*"[10]

Finally, the court decided to strike down the absolute authority bestowed upon the director to terminate the work of an Air Hostess who exceeded the age of 35. The reasoning given by the court was that such discretionary power of termination amounted to the undue delegation of power.

[8] Air India Etc Etc vs Nergesh Meerza & Ors Etc Etc AIR 1981 SC 1829 6(11)
[9] 429 U. S. 125 (1976)
[10] Air India Etc Etc vs Nergesh Meerza & Ors Etc Etc AIR 1981 SC 1829 6(13)

SUMMARY OF THE JUDGMENT

So far, we have understood that the judgment for the case of Air India v. Nargesh Meerza is slightly frustrating. However, to get a better and concise view of this judgment it is important to summarize it[11].

- "In holding that AFPs and AHs constituted distinct classes and, accordingly, that different terms of service were valid, the Court disregarded the fact that they themselves constituted classes along the lines of sex. In fact, the Court used the fact that the requirements of service for women were inferior to those for men to hold that the two represented distinct cadres in the field of service law and that the disparity in terms of service was thus justified. This contention is cruelly contradictory.
- In holding that the notification made by the Government pursuant to Section 16 of the Equal Remuneration Act gave rise to the issue of whether the Legislation discriminated on the grounds of sex, the Court made three errors: first the expansion of the scope of Section 16 to the Constitution; second, the statement made by the Government on the question of constitutional rights was regarded as conclusive; and, third, indifference.
- The Court made no effort to prove that Articles 15(1) and 16(2) were not relevant to the circumstances at hand, irrespective of the Government's notification under Section 16 of the ERA.
- The arbitrary investigation by the Court ended up perpetuating and supporting the precise prejudices that the statute of discrimination is meant to obliterate. These included the role of women as caregivers and family planning vessels".

CONCLUSION

Nagesh Meerza is a very disappointing ruling and will go down as one of the worst in the archives of Indian sex discrimination law. Going through subsequent writings, we will understand that it was injured not just by the logic it deployed, but also by its status as a precedent. The sexist and irrational nature of the judgment is bought to the forefront on multiple occasions. One such instance is where the court rejects the one-child foundation for air hostess retirement and instead advocates for an amendment that would allow air hostesses to retire after the birth of their third child. What sense does that make now? While the court

[11] Saikia, R. (2013). A Few Aspects of Gender Justice and Social Jurisprudence in India: A Critique. Binay Barman, 211.

gave this rationale a unifying tint by citing a public health basis, I believe it just serves to reaffirm a stereotyped concept about fixed gender roles.