Delhi High Court
Captain (Mrs.) Krishna vs Uoi & Ors. on 8 October, 2010
Author: Gita Mittal

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*       IN THE HIGH COURT OF DELHI AT NEW DELHI

                                        Reserved on : 14th July, 2010
                                Date of decision: 8th October, 2010

+                               W.P.(C) No.166/2010

        CAPTAIN (MRS.) KRISHNA                .....  Petitioner
                        Through, Mr. S.K. Kakkar, Adv. & Mr. K.S.
                        Pathania, Adv.

                      versus

        UNION OF INDIA & ORS.                .....  Respondents
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Through Mr. Jatan Singh, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL HON'BLE MR. JUSTICE J.R. MIDHA

1. Whether reporters of local papers may be allowed to YES see the Judgment?

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES GITA MITTAL, J

1. This petition manifests the conflict which may arise between matrimonial bliss and the call of duty in the armed forces because of the requirement of a serving personnel having to serve at locations far removed from her/his matrimonial home or the restrictions on movement even though there may be no separation by location. It draws attention to the urgent necessity of balancing personal and professional lives of the defence personnel and raises issues of the nature of the right to marriage and infringement of the petitioner's right to life under Article 21 and violation of Article 14 of the Constitution of India by the respondents by the manner of rejection of her application for resignation from service.

2. Captain Mrs. Krishna, the petitioner herein, took admission in the B.Sc. (Nursing) course at the Armed Forces Medical College, Pune, in 1997 which she successfully completed in June, 2001. The petitioner got her permanent commission in the Indian Army on 7th June, 2001 in the Military Nursing Service ('MNS' hereafter). By dint of her service, she was subsequently promoted to the rank of Captain as Nursing Officer in the service. It is on record that from the 7 th of June, 2001 to the 10th of September, 2001, the petitioner was posted at the CH (SC), Pune; and thereafter from the 14th of September, 2001 to the 9th of June, 2005 was posted at CH (NC) C/O 56 APO. From 10th June, 2005 till the passing of the impugned order, the petitioner remained posted at the

Military Hospital, Roorkee, Uttranchal as Nursing Officer.

3. On the 10th of December, 2004, the petitioner is stated to have married one Shri Rajeev Vishwakarma in accordance with Hindu customs and traditions. From this wedlock, on the 23rd of September, 2005, the parties were blessed with a daughter who is presently aged about five years.

4. So far as the matrimonial home of the petitioner is concerned, her husband is stated to be employed with the Bharat Heavy Electrical Limited (BHEL) located at Ranipur, Haridwar. After marriage, for sometime the petitioner stayed with her husband at BHEL, Ranipur, Haridwar. However, on account of the distance between her place of residence and posting as well as service requirements, the petitioner has not been able to spend much time in the matrimonial home. The petitioner submits that after the birth of their daughter, her husband asked her to stay permanently with him along with their daughter and called upon her to resign from service. He expressed objection to the separation necessitated by her job requirements. The pressures of the service thus resulted in stress and strain on the petitioner's matrimonial life.

5. In view of the ensuing turmoil and expressing inability to tolerate the same any further, on the 5th of September, 2008, the petitioner's husband filed a petition seeking dissolution of their marriage by decree of divorce under Section 13(1)(i)(a) of the Hindu Marriage Act, 1955. This petition is premised, inter alia, on the ground that it was agreed by the parties before marriage that after its solemnization, the petitioner shall resign from service. The petitioner's husband has made a grievance that she is not performing her matrimonial duties; is not residing permanently with him and is not resigning from her job. He has also complained in his petition that thereby he has been deprived of wedded bliss and that not only he has to cook his own food and cope with a separation from his wife but is compelled to endure a separation also from his daughter.

6. The petitioner's husband contends that service compulsions have necessitated the separation of the petitioner from her husband and induced dejection and loneliness in him and he is desperate to end this kind of an arrangement. In this background, the petitioner is faced with the twin alternatives of either resigning from service or dissolving her marriage from her husband by a decree of divorce.

7. On account of this predicament coupled with the extreme emotional strife in her life, the petitioner submits that she is unable to concentrate on her duties and to give her best in service. Physically and mentally strained, the petitioner submits that the continuous stress and tension have also resulted in the deterioration of her health and as a result, she is now suffering from thalasemia minor.

The writ petitioner has stated that she does not want divorce under any circumstance and wants an opportunity to end the acrimony and discord in her matrimonial life. In this background, she sought time from her husband to process her resignation.

8. The petitioner states that, in view of all these facts, she had no option but to make an application on 8th November, 2008 to the Commandant, MH Roorkee seeking permission to apply for

resignation from commission on the above grounds. Our attention has been drawn to the recommendations on this application by the Principal Matron dated 10th November, 2008; the Registrar of the hospital dated 10th November, 2008 as well as the recommendations of the Commandant of the Military Hospital, Roorkee.

9. After obtaining such permission to resign, the petitioner submitted an application for resignation in the form prescribed in the annexure-1 to appendix `A' of the Army Headquarters letter no.B/70030/DGMS-4A dated 31st December, 1999, which was registered as no.11048/Retire/Nur(o)/2008 dated 16th December, 2008 and also referred to as letter no.340023/M-F 25 dated 5th January, 2009. The petitioner furnished the requisite information, enclosing therewith a copy of the divorce petition, her medical records as well as all requisite undertakings including the undertaking that she had not attended any course involving an obligatory period of service during the last five years. The petitioner also submitted the certificate with the application in terms of appendix `B' to the Army Headquarter letter dated 31st December, 1999 to the effect that she had not been allotted a PPO number by the CDA (P) and had not drawn any amount on account of pensionary awards including pension and an undertaking to pay amounts, if any, due to the Government before she was relieved of her duties.

10. As the petitioner did not hear anything on the fate of her resignation letter despite the passage of eight months, she addressed a letter dated 18th August, 2009 to the Commandant of the Military Hospital, Roorkee to know about the status of her resignation citing the problems stated in her request on account of which she would not be able to join her duties again. She requested the commandant to send a reminder to the authorities concerned with regard to her resignation.

11. In the meantime, a communication dated 17th August, 2009 was issued by the Integrated Headquarters of the MOD (Army), Adjutant General's Branch of the Director General of Medical Services (Army), New Delhi addressed to the Headquarters of the Central Command (Med), informing that the petitioner's request for resignation was rejected on the following grounds:-

> ".....the nursing officer had sought resignation on the ground of marital disharmony leading to filing of divorce petition by her spouse. From the perusal of the contents of the petition, it is revealed that reasons for filing of court case is not merely the service of the nursing officer but also the ill treatment to her-in-laws by the nursing officer. In the petition her spouse has also alleged that the nursing officer is least interested in staying with him. Therefore, even her resignation from service will not resolve their marital disharmony. Hence her request for resignation from service has not been acceded to."

12. The petitioner was informed of the rejection of this request under cover of a letter dated 31st August, 2009 issued by Shri A.S. Rathor, Colonel Sr. Registrar & OC TPS for Commandant and was called upon to join her unit. It was also informed that sixty days furlough leave had been sanctioned to her w.e.f. 8th September, 2009 and that an order dated 17th August, 2009 posting her to 7 AFH had been received. This movement was required to be implemented by 19th October, 2009.

13. Aggrieved by the rejection of her request for resignation from service as well as by order of her posting, the petitioner has filed the present writ petition seeking quashing of the order dated 17th August, 2009 with a direction to the respondents to accept her application for resignation and to discharge her from military service. Petitioner's contentions

14. In support of her writ petition, the petitioner has placed reliance on the instructions issued for applying for premature retirement/resignation from commission for Nursing Officers as are provided in appendix `A' to the Army Headquarters letter No.B- 70030/DGMS-4A dated 31st December, 1999. It is contended that these army instructions govern processing and consideration of applications seeking to resign from service of members of the Military Nursing Service. The petitioner contends that having regard to the stated reasons, the respondents had no discretion at all thereunder so far as consideration of her application was concerned and were bound to have granted the same. The primary submission is that the rejection is arbitrary, is based on irrelevant considerations and fails to consider the relevant material. The challenge to her posting is premised on the illegality attributed to this rejection.

15. The petitioner has contended that her request for voluntary resignation falls under clause 4(b)(v)(aa) of the said instructions. It has been urged that the petitioner has been compelled to put in her request for voluntary resignation on the ground of extreme marital discord which she is facing due to her employment. The petitioner makes a grievance that the order violates her right to life, privacy and dignity guaranteed under Article 21 of the Constitution of India.

16. The petitioner has explained that on account of the exigency of service, she is unable to continuously cohabit with her husband. Her inability to fulfil her marital obligations is putting extreme pressure on her marriage so much so that her husband has filed a petition for divorce. In support of the prayer made in the writ petition, learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court in (1990) 4 SCC 27 J.K. Cotton Spinning and Weaving Mills Company Ltd. Vs. State of UP & Ors. and the pronouncements of this court reported at 1996 (1) SLR 505 : 1995 (59) DLT 573 Major Rahul Shukla Vs. Union of India & Ors.; 2007 INDLAW DEL 176 Captain Preeti Giri Vs. Union of India & Ors.; 2000 (54) DRJ 188 Major S.K. Jain Vs. Union of India.

17. The submission is that the respondents were bound by the afore-noticed instructions and could not have rejected the application on any ground other than those stipulated thereunder.

18. It is further contended that in the judicial pronouncements afore- noticed, the courts have held that the respondents were entitled to keep in view service exigencies and inability to make immediate alternative arrangements in consideration. However, even in such eventuality, the respondents had no jurisdiction to reject an application seeking to resign from service, but, had to keep the decision thereon it in abeyance till such time alternative arrangements are made. In this background, the petitioner has assailed the order dated 17th August, 2009 contending that the order is arbitrary, irrational and contrary to the binding instructions and guidelines read with the applicable law and is therefore also violative of Article 14 of the Constitution of India. The petitioner contends that unlike a prayer for voluntary retirement which is fettered by several riders and

discretion lies with the competent authority to accept or reject the same but a request for resignation has to be treated on a differential footing as the discretionary power vested in the authorities for a decision on an application for resignation is limited and circumscribed.

It has also been urged that the petitioner is not bound by any bond or undertaking which would compel her to continue in service. Respondent's submissions

19. The writ petition is vehemently opposed by Mr. Jatan Singh, learned Standing Counsel for the respondents who contends that the petitioner has no absolute right to acceptance of her prayer for resignation or premature release from the Army. It is urged that such request is required to be considered by the Government and discretion in this regard lies with the respondents in terms of Section 11 of the Military Nursing Service Ordinance 1943 (`MNS Ordinance' hereafter) which stands elaborated by para 105(f) of the Defence Service Regulations (Vol.1) 1987.

20. It has further been contended that though the policy letter states that marital disharmony shall be considered as one of the grounds for sympathetic consideration of the request for release from service so far as the petitioner was concerned, the competent authority rejected her application for the reason that the basic ground for marital disharmony is not the separation of the petitioner and her husband but their mal-adjustment in personal relations. In this regard, the respondents have extensively quoted from the divorce petition in the counter affidavit and in the oral submissions and contended that the application of the petitioner was rightly rejected since it was devoid of any merit.

21. We may note that as per the respondents, only such applications for resignation are accepted on marital grounds where the respondents feel that the acceptance of the request will provide relief to the Nursing Officer and that she will thereafter live with her husband to lead a happy married life.

Applicable rules

22. Before considering the contentions of the parties on the merits, we may consider the applicable rules and instructions governing the subject. The respondents have drawn our attention to the contents of the Defence Service Regulations Vol. 1, 1987. In this behalf, reliance has been placed on para 102 and 104(d) which may be usefully extracted and read as follows:-

> "102. Refusal of Employment- An officer is not at liberty to decline any employment in the Army for which he may be selected, nor can he throw himself out of employment by resignation of his appointment.
>
> xxx xxx xxx
>
> 104. Retirement and Resignation -
>
> xxx xxx xxx
>
> (d) An officer will not be relieved of his duties until receipt of intimation that his application to retire or resign has been accepted. An officer whose application to

retire or resign has been accepted may apply to the Central Government for his application to be cancelled. In the case of officers who have once proceeded on leave pending retirement, permission to withdraw such applications will only be granted in exceptional circumstances. The decision of the Central Government on all applications to retire will be final."

The respondents have placed reliance on para 105(a) and

(f) of the above regulations which reads as follows :-

"105. Application for Resignation-(a) Application of officers of the Army resign their commission of to retire from the service will be forwarded through the prescribed channels to Army Hq. The applicant need not give a prospective date from which it is desired that the retirement/resignation should take effect as it may not be administratively convenient for the competent authority to take a decision by a desired date. However, if an applicant desires to retire from a specified date for any valid reasons, such as commutation of pension or higher rate of pension, he may indicate a prospective date in his application and submit his application not less than 4 months before that date. In the case of retirement with requisite qualifying service for pension, the applicant will also state where he wishes to draw his pension.

xxx xxx xxx

(f) The applications for premature

retirement/resignation will be examined by Army HQ and submitted for consideration and approval of the COAS who may reject an application which is not based on adequate and justifiable reasons at his level without reference to the Government or recommend for acceptance by the Central Government. In case, the officer feels aggrieved by the decision of the COAS, he can, if he so chooses, file a statutory complaint addressed to the Central Government under the provisions of section 27 of the Army Act. The decision of the Central Government on application to retire premature/resign will be final."

23. The petitioner has placed reliance on the Instructions which have been issued as Appendix `A' to the Army Headquarters letter bearing no.B/70030/DGMS/-4A dated 31st December, 1999 on the subject of "Premature Retirement/Resignation from Service : Officers of MNS". The relevant extracts of these instructions necessary for the present adjudication are set out hereafter:-

"Introduction A nursing officer who desires to retire prematurely or resign her commission before she becomes due for retirement on account of superannuation may apply for premature retirement/resignation as per the instructions contained in this letter.

xxx xxx xxx

Criteria for Acceptance

4. The grounds for premature

retirement/resignation will be considered on individual merits subject to service requirements.

For acceptance of an application the guidelines/criteria laid down by the Min. of Def which are enclosed as Appx `A' will be the guiding factors. However, the following guidelines in order of preference would be followed for recommending applications for PR/resignation.

xxx xxx xxx

(b) Extreme Compassionate Grounds : The request on extreme compassionate grounds will be considered after the facts represented by the nursing officers are verified to the extent possible. The following compassionate grounds will be given preference for acceptance of request for premature retirement/resignation:-

xxx xxx xxx

(v) Marital disharmony

(aa) Where there is a threat of divorce corroborated by a certificate from Registrar of the court but not from his/her counsel regarding filing of a case in the court for divorce with a copy of court documents.

(ab) Spouse settled abroad and unwilling to return to the country - a certificate duly attested by a First Class Magistrate to be produced by the applicant.

xxx xxx xxx

Essential Conditions

5. Conditional requests for premature

retirement/resignation which are coupled with postings, reconsideration of punishment, expunction of adverse remarks in annual confidential reports etc. will not be entertained. The aggrieved nursing officer may be advised to take up such issues separately and submit applications for premature retirement/resignation only when they have finally decided to leave service unconditionally, applications from the nursing officers for premature retirement/resignation whose statutory/non-statutory complaints are pending will be considered only after decision on the complaint is communicated and the officer decides to leave the service unconditionally. However, the concerned nursing officer, if she so desires, may withdraw her complaint under intimation to all concerned before submitting her application for premature retirement/resignation.

> 6. Applications from the nursing officers who are involved in any disciplinary case or enquiry, judicial or quasi judicial proceedings, will not be forwarded to this HQ until the case against them is finalized. In case the nursing officer gets involved in any such cases after forwarding her application the matter will be immediately reported to this HQ and AC/DV-2 at the earliest. In this connection attention is also invited to paras 6-8 (a & c) of AG's Branch letter No.B/39010/AG/PS-4C dated 11 Aug 95."

Discussion

24. It is noteworthy that the instructions dated 31st December, 1999 have been specifically issued for the Military Nursing Service and are the only guidance on the subject. The respondents have also not disputed the validity and the bindingness of these instructions on the subject. We thus find that the manner in which a request for voluntary resignation from service by an officer of the Military Nursing Service is to be made, processed, as well as the considerations which would guide the decision making on such a request are stipulated in the afore extracted instructions which have been annexed as appendix `A' to the Army Headquarters letter dated 31st December, 1999. No other rule, regulation or instruction on the subject has been pointed out.

25. The petitioner has urged that having regard to the admittedly binding instructions and the guidelines provided therein, it was not open to the respondents to reject the petitioner's request for resignation from service on a ground other than one which is stipulated thereunder.

26. There can be no dispute also to the applicability of the Defence Service Regulations relied upon by the respondents. However, it needs no elaboration that a decision rejecting an application to be relieved from service which impacts fundamental rights of a party and is assailed on grounds of arbitrariness and irrationality, would be subject to judicial review in appropriate proceedings despite the statement that finality is attached to it in para 104(d) of the said Regulation as extracted above.

Nature of right involved

27. The first issue which bears consideration as to what is the nature of the right of the petitioner which is involved. The petitioner submits that by resigning her commission, she is making an endeavour to preserve her family by dispelling the acrimony and discord in her matrimonial life.

28. It is important to note that the expression "family" as a social unit is not specifically statutorily defined in any legislation in India. International perspectives and impact on the right involved in the present case

29. The right to family life has, however, been placed at the highest pedestal and has attained comprehensive recognition and protection in international law. It is noteworthy that several international conventions are centered around the family as a unit and list such right as a fundamental and basic human right. Foremost amongst these is the Universal Declaration of Human Rights, 1948. Articles 12, 16 and 25 of this declaration unequivocally state that family is a

natural and fundamental group unit of society which is entitled to protection by society and the state, and stipulate as follows:-

> "Article 12 No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference.
>
> Article 16
>
> 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> 2. Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
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> xxx xxx
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> Article 25
>
> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services..
>
> 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." India voted in favour of this declaration and has also adopted it."
>
> (emphasis supplied)

30. The International Covenant on Economic, Social, Cultural Rights, 1966 also underlines the importance of the family. In Article 10(1), 17 & 23, it states as follows:-

> "Article 10 The State Parties to the present Covenant recognize that:
>
> (1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
>
> xxx xxx xxx

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

xxx xxx xxx

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

(Underlining by us) This covenant came into force on 3rd January, 1976 while India ratified it on the 10th of April, 1979. It also recognises that the widest possible protection and assistance should be accorded by the state parties to the family which is the natural and fundamental group unit of society.

31. The International Covenant on Civil and Political Rights is a multilateral treaty adopted by the United Nations General Assembly on 16th of December, 1966 and entered into force on 23rd March, 1976 which restates the above principles. Article 23 thereof is relevant for the present consideration and states as follows :-

"Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

> 3. No marriage shall be entered into without the free and full consent of the intending spouses.
>
> 4. States Parties to the present covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."
>
> (Underlining supplied) It is pertinent to note that India is a state party to the treaty.

The 'State parties' have an obligation to respect the human rights mentioned in this treaty.

32. Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 is another provision which grants comprehensive protection to women in the context of family life. The relevant extract thereof reads as follows :- "Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

xxx xxx xxx"

33. Certain regional covenants and instruments also recognise the right to marriage including the European Convention on Human Rights which states as follows :-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority ex- cept such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."

34. Article 9 of the Charter of Fundamental Rights of the European Union which was declared at Nice in December 2000 provides that 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'

35. These international and regional conventions emphasise the centrality and the social importance of the family and are a clear expression of the recognition of the right to family as well as the protection of the family unit, as a basic human right.

36. The effect of these international norms and covenants on recognition, exposition, expansion and interpretation of basic human rights and expansion of fundamental rights guaranteed under the Constitution of India is well settled. Reference to celebrated and binding judicial precedents on this aspect can be usefully adverted to. On the issue of absence of domestic legislation on the subject of sexual harrasment at work place and the jurisdiction of the courts to rely upon international norms, in para 7 & 14 of the pronouncement reported at AIR 1997 SC 3011 Vishakha & Ors. vs. State of Rajasthan & Ors. the Supreme Court had stated as follows :-

> "7. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Article 51(c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Article 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil.
>
> 14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in Minister for Immigration and Ethnic Affairs v. Tech 128 ALR 353, has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia."
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> (emphasis by us)

37. In (1999) 1 SCC 759 Apparel Export Promotion Council vs. A.K.

Chopra, also the Supreme Court was dealing with the case of sexual harassment at the place of work which vitiated the working environment and observed that the international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. The Supreme Court again emphasised that the courts must never forget the core principles embodied in International Conventions and Instruments and reiterated the above principles.

38. In the case of (2003) 6 SCC 1 Kapila Hingorani Vs. State of Bihar, the Apex court while placing reliance on a previous pronouncement stressed on the importance of reading International Treaties and Conventions into the interpretation of Constitutional provisions and domestic laws. Placing reliance on earlier judgments, the court observed as follows:

> "47. It is also well-settled that a statute should be interpreted in the light of the International Treaties and Conventions. In Chairman, Railway Board and Ors. v. Mrs. Chandrima Das and Ors. MANU/SC/0046/2000 : 2000CriLJ1473 this Court stated the law thus:-
>
> "24. The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence." "
>
> (underlining supplied)
>
> 39. The principles which would govern the extent and manner and applicability of International Conventions and treaties have been succinctly laid down in a pronouncement of the Supreme Court reported at JT 2008(7)SC11, 2008(9)SCALE69 Entertainment Network (India) Ltd. Vs. Super Cassette Industries Ltd. This case was concerned with an issue involving interpretation of Section 31 of the Copyright Act, 1957. The court traced the evolution of the jurisprudence on the issue under consideration in paras 48 to 54 which are important and read as follows:-
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> "48. Beginning from the decision of this Court in Kesavananda Bharati v. State of Kerala MANU/SC/0445/1973 : AIR 1973 SC 1461, there is indeed no dearth of case laws where this Court has applied the norms of international laws and in particular the international covenants to interpret domestic legislation. In all these cases, this Court has categorically held that there would be no inconsistency in the use of international norms to the domestic legislation, if by reason thereof the tenor of domestic law is not breached and in case of any such inconsistency, the domestic legislation should prevail.

In Jagdish Saran and Ors. v. Union of India MANU/SC/0067/1980 : (1980) 2 SCR 831, it was observed:

"It is also well-settled that interpretation of the Constitution of India or statutes would change from time to time. Being a living organ, it is ongoing and with the passage of time, law must change. New rights may have to be found out within the constitutional scheme. Horizons of constitutional law are expanding."

49. In the aforementioned judgment, this Court referred to a large number of decisions for the purpose of treaties and conventions. Yet again in Indian Handicrafts Emporium and Ors. v. Union of India MANU/SC/0640/2003 : AIR 2003 SC 3240, this Court considered the Convention on International Trade in Endangered Species (CITIES) and applied the principles of purposive constructions as also not only the Directive Principles as contained in Part IV of the Constitution but also Fundamental Duties as contained in Part IVA thereof. Referring to Motor General Traders and Anr. v. State of Andhra Pradesh and Ors. MANU/SC/0293/1983 : (1986) 1 SCR 594, Rattan Arya and Ors. v. State of Tamil Nadu and Anr. MANU/SC/0550/1986 : (1986) 2 SCR 596 and Synthetics and Chemicals Ltd. and Ors. v. State of U.P. And Ors. MANU/SC/0595/1989 : AIR 1990 SC 1927, this Court held:

"There cannot be any doubt whatsoever that a law which was at one point of time was constitutional may be rendered unconstitutional because of passage of time. We may note that apart from the decisions cited by Mr. Sanghi, recently a similar view has been taken in Kapila Hingorani v. State of Bihar (supra) and John Vallamattom and Anr. v. Union of India (supra)."

50. These judgments were referred to in the decision of Liverpool and London S.P. and I Asson.

Ltd. v. M.V. Sea Success I and Anr.

MANU/SC/0951/2003 : (2004) 9 SCC 512, wherein this Court observed that as no statutory law in India operated in the field, interpretative changes, if any, must, thus be made having regard to the ever changing global scenario. Liverpool also referred for the proposition that the changing global scenario should be kept in mind having regard to the fact that there does not exist any primary act touching the subject and in absence of any domestic legislation to the contrary. Concurring with the said decisions, it was however opined that the same could not mean that it restricted the jurisdiction of the Indian High Courts to interpret the domestic legislation strictly according to the judge made law.

51. Liverpool and London S.P. and I Asson. Ltd. (supra) has been followed by the Supreme Court in a plethora of cases inter alia The State of West Bengal v. Kesoram Industries Ltd. & Ors.

MANU/SC/0038/2004 : (2004) 2 66 ITR 721(SC). In Pratap Singh v. State of Jharkhand and Anr. MANU/SC/0075/2005 : 2005 CriLJ 3091 wherein this Court directed to interpret the Juvenile Justice Act in light of the Constitutional as well as International Law operating in the field. (See also Centrotrade Minerals and Metal Inc. v. Hindustan Copper Limited MANU/SC/8146/2006 : (2006) 11 SCC 245 : State of Punjab; State of Punjab and Anr. v. Devans Modern Brewaries Ltd. and Anr. MANU/SC/0961/2003 : (2004) 11 SCC 26 and Anuj Garg and Ors. v. Hotel Association of India and Ors. MANU/SC/8173/2007 : AIR 2008 SC 663.

52. However, applicability of the International Conventions and Covenants, as also the resolutions, etc. for the purpose of interpreting domestic statute will depend upon the acceptability of the Conventions in question. If the country is a signatory thereto subject of course to the provisions of the domestic law, the International Covenants can be utilized. Where International Conventions are framed upon undertaking a great deal of exercise upon giving an opportunity of hearing to both the parties and filtered at several levels as also upon taking into consideration the different societal conditions in different countries by laying down the minimum norm, as for example, the ILO Conventions, the court would freely avail the benefits thereof. Those Conventions to which India may not be a signatory but have been followed by way of enactment of new Parliamentary statute or amendment to the existing enactment, recourse to International Convention is permissible.

53. This kind of stance is reflected from the decisions in PUCL v. Union of India MANU/SC/0274/1997 : AIR 1997 SC 1203, John Vallamattom v. Union of India MANU/SC/0480/2003 : AIR 2003 SC 2902, Madhu Kishwar v. State of Bihar MANU/SC/0468/1996 : AIR 1996 SC 1864, Kubic Darusz v. Union of India MANU/SC/0426/1990 : 1990 CriLJ 796, Chameli Singh v. State of Swaminathaswami Thirukoil MANU/SC/0441/1996 : (1996) 1 SCR 1068, Apparel Export Promotion Council V. A.K. Chopra MANU/SC/0014/1999 : (1999) 1 LLJ 962 SC, Kapila Hingorani v. State of Bihar MANU/SC/0403/2003 : (2003) III LLJ 31 SC, State of Punjab and Anr. v. Devans Modern Breweries and Anr. MANU/SC/0961/2003 : (2004) 11 SCC 26 and Liberpool & London S.P. & I Asson. Ltd. v. M.V. Sea Success I MANU/SC/0951/2003 : (2004) 9 SCC 512."

40. With regard to the application of International conventions and treaties in India, in para 47 it was pointed out that International Law had been utilised for several purposes including the following :-

"In interpreting the domestic/municipal laws, this court has extensively made use of International law inter alia for the following purposes :

(i) As a means of interpretation;
(ii) Justification or fortification of a stance taken;

(iii) To fulfill spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law;

(iv) To reflect international changes and reflect the wider civilization;

(v) To provide a relief contained in a covenant, but not in a national law;

(vi) To fill gaps in law."

41. So far as the present case is concerned there is no legislation on the question which arises. The right recognised by and the rules laid down in the aforenoticed international conventions, would guide the consideration of the petitioner's right in the light of the following principle laid down in Entertainment Network (India) Ltd. v. Super Cassette Industries (supra) :-

"54 Furthermore, as regards the question where the protection of human rights, environment, ecology and other second generation or third-

generation rights is involved, the courts should not be loathe to refer to the International Conventions."

42. The jurisdiction of the high courts to source and base interpretation and rights in international conventions stands recognised and reiterated by the Supreme Court in the above referred precedents. (Ref :- Liverpool and London S.P. and I Asson. Ltd. v.

M.V. Sea Success I and Anr. (supra); Vishakha & Ors. vs. State of Rajasthan & Ors.; Apparel Export Promotion Council vs. A.K. Chopra; Jagdish Saran and Ors. v. Union of India (Supra)).

43. Marriage involves fundamental decisions about creation of a relationship which stands recognised as a basic human right in the several international and regional conventions and treaties set out above. The same is also an essential part of the national constitutions and legislations in several countries including the Constitutions of the Kingdom of Belgium, Hellenic Republic, Kingdom of Spain, Ireland, Italian Republic, Republic of Cyprus, Republic of Latvia, Republic of Lithuania, Republic of Hungary, Republic of Poland, Portuguese Republic and the Republic of Slovenia and others. Marriage and family are under the special protection of the state under the basic law of the Federal Republic of Germany.

44. The international instruments recognise and reiterate that the family is a natural and fundamental group unit of society; provide that it is the right of men and women of marriageable age to marry and found a family, and clearly state that such right is entitled to protection by society and the state.

45. The international instruments further clearly state that parties are all under obligation to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage and that

the states are also under an obligation to recognise and accord the widest possible protection and assistance to the family as a natural and fundamental group unit of society.

46. It would, therefore, be the responsibility of the respondents and the duty of the court to construe the right claimed in the context of these norms, and ensure its protection.

Marriage as part of right to life under Article 21 and protection accorded to a person's privacy and dignity

47. Even though marriage as a right has not received statutory recognition in any legislation in India, judicial pronouncement has, however, held that the individual's privacy of marriage and dignity are essential concomitants of the right to life and liberty guaranteed under Article 21 of the Constitution of India which are to be afforded protection.

48. In (1994) 6 SCC 632 R. Rajagopal vs. State of Tamilnadu , the Supreme Court held that "the right to privacy was implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 and that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".

49. The Supreme Court has declared that though our Constitution did not refer the right to privacy expressly, still it can be traced from the right to life in Article 21. In (1964) 1 SCR 332 Kharak Singh vs. State of U.P., it has been held that 'right to privacy' was part of right to life in Article 21.

50. On the issue as to what would constitute privacy, light is thrown in the judgment of the Supreme Court in Gobind vs. State of M.P. (1975) 2 SCC 148. Placing reliance on the pronouncements of the US Supreme Court reported at 381 (1965) US 479 Griswold vs. Connecticut and 410 (1973) US 113 Jane Roe vs. Henry Wade, it was held as follows :-

> "20. There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realised as Brandeis, J. said in his dissent in Olmstead v. United States 277 US 438, 471 the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the Government a sphere where he should be let alone.
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> xxx xxx xxx
>
> 22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior, or where a compelling state interest was shown. If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether the state interest is of such paramount importance as would justify an infringement

of the right."

In para 28, it was held that the right to privacy will have to go through a process of case-by-case development and that the right is not absolute.

51. In 381 (1965) US 479 entitled Griswold v. State of Connecticut, the Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of marital cohabitation.

52. In 410 (1973) US 113 entitled Jane Roe v. Wade, the US Supreme Court had observed that though the Constitution of the USA does not explicitly mention any right of privacy, the United States Supreme Court recognised that a right of personal privacy or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights in the Ninth Amendment and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

53. Constitutional protection to personal decisions relating to marriage, family relationships, procreation, contraception, child rearing and education was reiterated in the judgment reported in 505 (1992) US 833 entitled Planned Parenthood of Southeastern Pa v. Casey. The Court explained the respect that the constitution demands for the autonomy of the person in these matters which involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State".

54. It is considered the normal aspiration of every human being to fulfil his personal being and the desire to belong to a family unit of which he considers himself to be a part. It brings about the most intimate, socially and legally accepted relationship. The right to family life is recognised as an important right of every individual. This is the aspiration which the petitioner is seeking to be recognised, respected and protected.

55. Human dignity is also considered an essential concomitant of the right to life under Article 21 of the Constitution of India.

56. The expression `dignity of the individual' finds specific mention in the preamble to the Constitution of India. In AIR 1980 SC 1535 : 1980 SCR (3) 855 Prem Shankar Shukla vs. Delhi Administration at page 529, V.R. Krishna Iyer, J had observed that the guarantee of human dignity forms part of our human culture.

57. The concept of right to dignity has been explained in para 8 of (1981) 1 SCC 608 Francis Coralie Mullin vs. Administrator, Union Territory of Delhi & Ors., in the following terms:-

> "... We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. ..... Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

58. A Division Bench of this court in the pronouncement reported at 160 (2009) DLT 277 Naz Foundation vs. Government of NCT of Delhi & Ors., in para 26 has observed that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society. It recognises a person as a free being who develops his or her body and mind as he or she sees fit. The court held that at the root of the dignity is the autonomy of the private will and a person's freedom of choice and of action. Human dignity rests on recognition of the physical and spiritual integrity of the human being, his or her humanity, and his value as a person, irrespective of the utility he can provide to others.

59. In this regard, the court had placed reliance on the observations of L'Heureux-Dube, J in Egan vs. Canada (1995) 29 CRR 2nd 79, 106 to the effect that dignity is a difficult step to capture in precise terms. The court had also relied on expansion of this concept in the pronouncement of the Canadian Supreme Court in the judgment reported as The Canadian Supreme Court in Law vs. Canada (Ministry of Employment and Immigration, 1999 (1) SCR 497 wherein it was held as follows :-

> "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognise the full place of all individuals and groups within Canadian society."[at para 53]"

60. It needs no elaboration that the right to life under Article 21 encompasses protection of a person's dignity, autonomy and privacy. Section 2(i)(d) of the Protection of Human Rights Act, 1943 defines `human rights' as the 'rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by the courts in India. The rights to life, liberty and dignity thus stand statutorily recognised as well in the above legislation as entitled to protection and enforceable by judicial process.

61. The right to marriage encapsulates the right to privacy, dignity, liberty and self-fulfilment of the aspirations of individuals, which stand recognised as essential concomitants of the right to life under

Article 21 of the Constitution of India. It is also the object, spirit and intendment of the several laws relating to marriage. The social importance of the family unit as a social institution between persons of opposite sexes also stands emphasised in several judgments. Personal liberty under Article 21 would take into its ambit the right to marry, cohabit and socialise with spouse and other members of family. Without such right and opportunity the `family' as a unit would be meaningless and marriage would be an empty shell. Thus the claimed right of the petitioner to marriage and cohabitation with her family, which is involved in the instant case, is an essential part of her fundamental right to life guaranteed under Article 21 of the Constitution. The challenge by the petitioner has to be examined in the context of the complained violation of this basic right. Denial of the application for resignation - Whether violates the petitioner's privacy & dignity and tantamounts to infringement of any right of the petitioner.

62. There is another aspect to the right to life which would be involved in the instant case. The expression 'personal liberty' in Article 21 has been held by the Supreme Court to be covering a variety of rights which go into constitution of the personal liberty of man which have been raised to the status of fundamental rights and also lend additional support and protection to the right guaranteed under Article 19 of Chapter III of the Constitution. In (1978) 1 SCC 248 Maneka Gandhi vs. Union of India, it was held that any law interfering with the personal liberty of persons must satisfy the triple test of (i) it must prescribe a procedure; (ii) the procedure must withstand a test of one or more of the fundamental rights conferred under Article 19 applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. It is well settled that the tests propounded by Article 14 pervade Article 21 as well and any law and procedure authorising interference with the personal liberty must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy such requirement of Article 14, it would fail to be a procedure within the meaning of Article 21.

63. Restrictions on the private intimacy which a marriage entails is a breach of the individual's privacy and dignity and hence would be an infraction of the fundamental rights conferred under Article 21 of the Constitution of India. The same can only be by a law and procedure which satisfies the established tests. Such procedure and its working cannot be arbitrary, illogical or irrational.

64. The exercise of the right to marry obviously gives rise to personal, social as well as legal consequences. It would be subject to the constitutional provisions and the prevailing laws. So far as the defence services are concerned, there would be several limitations prescripted by the legislations, rules and regulations governing the armed forces. However, the limitations thereby must not restrict or reduce right to such an extent or in such a way that the very existence of the right is irreparably damaged or permanently impaired. The dissolution of marriage by decree of divorce obviously results in demolition of the very edifice on which a marital relationship rests. It is, therefore, to be seen as to whether the order passed by the respondents is substantially and procedurally reasonable.

65. The Supreme Court has explained the difference between voluntary retirement and resignation in a judgment reported at (1990) 4 SCC 27 J.K. Cotton Spinning & Weaving Mills Company Ltd. Vs. State of UP & Ors. In para 7 of the pronouncement, so far as resignation is concerned, the court had

observed as follows:-

> "7. From the aforesaid dictionary meanings becomes clear that when an employee resigns his office, he formally relinquishes or withdraws from his office. It implies that he has taken a mental decision to sever his, relationship with his employer and thereby put an end to the contract of, service, As pointed out earlier just as an employer can terminate the services of his employee under the contract, so also an employee can inform his employer that he does not desire to serve him any more. Albeit, the employee would have to give notice of his intention to snap the existing relationship to enable the employer to make alternative arrangements so that his work does not suffer. The period of notice will depend on the period prescribed by the terms of employment and if no such period is prescribed, a reasonable time must be given before the relationship is determined. If an employee is not permitted by the terms of his contract to determine the relationship of master and servant, such an employment may be branded as bonded labour, That is why in Central Inland Water Transport Corporation v. Brojonath Ganguly this Court observed as under : (SSCC p.228, para 111) "By entering upon a contract of employment a person does not sign a bond of slavery and a permanent employee cannot be deprived of his right to resign. A resignation by an employee would, however, normally require to be accepted by the employer in order to be effective."

66. These observations are made in the context of civil employment. Undoubtedly, the considerations which govern severance of the employment in the defence services are different. The observations, however, do shed valuable light on the question raised before us and would certainly guide adjudication in the instant case.

67. It needs no elaboration that there are restrictions on the working of the rights of persons in service with the defence services. Article 33 of the Constitution permits such restrictions as are reasonable.

68. So far as fundamental rights of serving officers of the army are concerned, reference can usefully be made to the pronouncement of the Supreme Court reported in JT 2000 (5) SC 135 Union of India Vs. Charanjit S. Gill & Ors. wherein the court had held that the fundamental rights of serving officers of the army have to be protected to the extent permissible under law by not forgetting the paramount need of maintaining the discipline in the armed forces of the country.

69. At this stage, we may usefully refer to the judicial pronouncement reported at 1995 (59) DLT 573 : 1996 (1) SLR 505 Major Rahul Shukla Vs. Union of India & Ors. wherein this court had occasion to consider a request for resignation by the petitioner who was a doctor with the Indian Army. The observations of this court on the nature of and limitations on the right of an army personnel to resign from the commission as well as the manner in which such an application is required to be processed shed valuable light on the issue in hand and deserve to be considered in extenso. The same read as follows:-

"9. There may be substance in the submission of learned counsel for the respondent that the service jurisprudence applicable to the civil services cannot be ipso facto extended and applied to defence services which are a class by themselves and therein considerations of secrecy, and of safety, security and sovereignty of the country have vital role to play enabling personal interest to be sacrificed for or giving way to the larger interests of the nation. Yet it cannot be forgotten that the persons serving the army are citizens of the country and the authorities in the army are subject to the Constitution.

10. Assuming that the right of an army personnel to resign from his commission in army may not be so wide and absolute as it may be in civil services, yet the authorities in the army are bound to follow the regulations of the army and they have to play within the four corners laid down thereby subject to provision of law. A reading of the several provisions of that Section of the Army Manual which deals with the removal resignation and retirement of army personnel, specially the provisions which we have quoted hereinabove, in our opinion, leads to a few inferences. The applications for voluntary retirement or resignation though dealt with on similar footing do not in fact deserve so. While an application seeking voluntary retirement is fettered by several riders and discretion lies with Competent Authority to accept or not to accept the prayer; a prayer for resignation has to be dealt with on different footing as the discretionary power vested in the authorities taking decision on application for resignation is limited and circumscribed.

11. An application for resignation may be rejected if it is not based on adequate and justifiable reasons. The over-riding consideration is whether the officer's continuance in service for a specific period is necessary to meet exigencies in a service and alternative arrangements cannot be made. Even in such a case the application for resignation cannot be rejected. It can only be held in abeyance. In the case at hand it is not the case of the respondent that the facts stated by the petitioner in his application for resignation were false or were not adequate or not justifiable. That finding could not have been arrived at in as much as the Colonel Commanding Officer having personally reviewed the application, was satisfied of the validity thereof. Any higher authority to form an opinion different from the one expressed by the Colonel Commanding Officer must have been possessed of material concrete enough to form a different opinion which it is not so.

12. The ground on which the application has been turned down is the necessity of the petitioner continuing in service to meet exigencies .thereof. That cannot be a ground for rejection of the application. It may be a ground for keeping the application in abeyance. Unfortunately on two occasions the grounds available-for keeping the application in abeyance was utilised for rejecting the application.

13. The petitioner moved the application for resignation earlier on 22.3.93 and later on 6.6.94. The respondents should have formed an opinion about the period for

which the petitioner's continuance in service was necessary and how much time it would take to make an alternative arrangement. It is difficult to believe the authorities of the respondents could not have succeeded in making alternative arrangements during the period of over two years by this time and if that be so then it is not a happy reflection on them."

(Emphasis by us) This court had allowed the above petition and set aside the impugned order rejecting the petitioner's request for resignation. The respondents were directed to consider the same afresh with sympathy and compassion.

70. We are informed by Shri S.K. Kakkar, learned counsel for the petitioner that the Special Leave Petition assailing the above judgment also stands rejected and it has attained finality. The respondents are therefore bound to consider applications for resignation from commission from the forces in accordance with these principles. Inability to permit immediate resignation even on account of service exigency, therefore can merely result in postponement of the event and not denial of the request.

71. Our attention is also drawn to the judgment of this court in a writ petition filed by a lady officer of the Military Nursing Service reported at 2007 INDLAW DEL 176 Captain Preeti Giri Vs. Union of India & Ors. In this case, the court had occasion to consider the petitioner's request for discharge from Military Nursing Service in terms of the afore-noticed policy on extreme compassionate ground. The petitioner was given liberty to make a fresh application enclosing supporting documents for consideration thereby making out a case of discharge before the respondents.

72. Learned counsel for the petitioner has also placed a pronouncement of this court reported at 2000 INDLAW DEL 747 : 2000 (54) DRJ 188 Major S.K. Jain Vs. Union of India wherein the petitioner, who was a captain in the Army, had submitted an application for premature retirement in view of domestic problems being faced by him. This application had been rejected by the respondents which order was the subject matter of challenge. In this case, the petitioner had placed reliance on policy guidelines dated 20th January, 1979 governing the consideration of an application for premature retirement. The petitioner had also sought to bring his case within the clause of extreme compassionate grounds which were disputed by the respondents. Placing reliance on the earlier pronouncement of the Division Bench in Major Rahul Shukla (supra) it was held that the competent authority had committed an error in treating the specific instructions detailed in the policy as exhaustive rather than illustrative of the instances cited therein.

It is, therefore, open to the respondents to consider applications for resignation on grounds other than those cited in the guidelines and instructions on the subject.

73. It is essential to understand the spirit in which the respondents appear to have carved out the policy with regard to an application seeking resignation from service by personnel who are part of the Military Nursing Service contained in the instructions under consideration. So far as the criterion for acceptance of such a request is concerned, the same is to be found in para 4 of the afore-noticed instructions. `Marital disharmony' is one of the stated reasons and has been put under

the category of `Extreme Compassionate Grounds'. The respondents have specifically indicated in these guidelines that the marital disharmony is required to be manifested by a threat of divorce. Such a threat is required to be corroborated by a certificate from the registrar of the concerned court with regard to filing of a case in the court for divorce with a copy of a court document and nothing more.

74. The respondents have rejected the application of the petitioner referring to the petitioner's conduct as stated in the petition and further that her husband has alleged that the petitioner was least interested in staying with him. The respondents have concluded that the reason for filing the divorce case was not merely the service of the nursing officer and that her resignation from service will not resolve their marital disharmony and therefore rejected her application.

75. We may note that even though there is no specific constitutional or statutory recognition of the right to marriage and family in any legislation in India, however, the importance accorded to preservation and sanctity of the marriage is found in all personal laws and every effort to prevent its breaking up is mandated therein. Such considerations are also statutorily recognized in some of the statutes. The cultural background and sociological evolution would show that marriage as an institution in this country is placed on the highest pedestal. The importance of its preservation does stand recognised in several legislations and by all religions.

76. The Hindu Marriage Act, 1955 which is concerned with marriages between hindus provides for dissolution of marriage by decree of divorce on certain grounds which have been set out in Section 13 of the enactment. However, by virtue of sub-section 2 of Section 23 of the Hindu Marriage Act, 1955, the statute mandates that before proceeding to grant any relief under the enactment, it is the bounden and the mandatory duty of the court, in the first instance in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. This provision applies to a petition where dissolution of marriage by the decree of divorce has been sought even on grounds of cruelty. Such being the statutory spirit, intendment and purpose, it would be the mandatory duty of every court or authority who could effect a reconciliation between warring spouses, to facilitate the same. These matters are required to be considered by courts sensitively with a human angle. The judge is required to actively stimulate a rapprochement process with a constructive, affirmative and productive approach rather than adopting an abstract, theoretical or doctrinaire approach to this important effort.

77. So far as Muslim law is concerned, in the judgment of this court reported at 2008 (103) DRJ 137 Masroor Ahmed vs. State (NCT of Delhi) & Anr., learned brother B.D. Ahmed, J on a detailed examination of the Muslim law held that Islam discourages divorce, yet it is permissible on grounds of pragmatism, at the core of which is the concept of an irretrievably broken marriage. The court reiterated the observations of Baharul Islam, J (then in the Gauhati High Court) in Sri Jiauddin vs. Mrs. Anwara Begum (1981) 1 GLR 358 wherein necessity of reconciliation was recognised. It was held that 'talaq' must be for reasonable cause, only under exceptional cases and was required to be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family, the other from the husband's. If the attempts failed, talaq may be effected. So far as

reconciliation was concerned, in para 33 of the judgment, the court pointed out the following :-

> "The crucial point is that for a pronouncement of talaq to result in the dissolution of the marital tie there must be an attempt at reconciliation. In the case of an irrevocable talaq, it must precede or it may be after the pronouncement but before the end of the iddat period."

78. The Family Court Act, 1984, applicable to all persons irrespective of their religion contains Section 9 which provides that an attempt at reconciliation is again required to be made at the first instance where ever it is possible to do so, consistent with the nature and circumstances of the case.

79. The Special Marriage Act, 1954 also applicable to all, contains similar statutory provisions as well. Under sub section (2) & (3) of Section 34, a duty is cast on the court in the first instance, in every case where it is possible to do so, consistently with the nature and circumstances of the case, to make every endeavour to bring about a conciliation between the parties.

80. A view has been taken by the present respondents on the contents of the divorce petition filed against her by the petitioner's husband. However, the permissibility and propriety of such a view requires to be examined.

81. On the aspect of the considerations which must weigh even with a court seized of divorce proceedings, reference can usefully be made to the following observations of Lord MacDermott in (1951) AC 319 Preston-Jones Vs. Preston-Jones :-

> "the jurisdiction in divorce involves the status of the parties and public interest requires that the marriage bond shall not be set aside lightly without strict enquiry."

82. In its pronouncement reported at AIR 1958 SC 441 Earnest John While v. Kathleen Olive White, the Supreme Court has relied upon the above observations in Preston Jones (supra) emphasising the necessity to inquire into and be satisfied beyond reasonable doubt in matrimonial disputes.

83. On the duty of the judge exercising matrimonial jurisdiction, the court in the judgment reported at (1979) 4 SCC 258 V.K. Gupta Vs. Nirmala Gupta very aptly stated that:-

> "It is fundamental that reconciliation of a ruptured marriage is the first essay of the Judge aided by counsel in this noble adventure. The sanctity of marriage is, in essence, the foundation of civilisation and therefore, court and counsel owe a duty to society to strain to the utmost to repair the snapped relations between the parties. This task becomes more insistent when an innocent offspring of the wedding struggles in between the disputed parents.
>
> At the end of this conciliatory journey, it is possible to reach a happy destination resulting in the restoration of the conflict between the parties, eventual restoration of the conjugal home, on our gentle persuation, they may move to live together, and we

> may be glad that story ends happily we should impress the spouses that an ideal marriage, life is always good and they should not break the tie.. Judicial monitoring is a statutory prophylactic. "
>
> The Court further stated as follows:
>
> "Before proceeding to grant any relief in the matter of matrimonial causes.... it shall be the duty of the court in the first instance in every case where it is possible to do so consistently with the nature and circumstances of the case to make every endeavour to bring about a reconciliation between the parties."

84. The effort for reconciliation has, therefore, been statutorily institutionalized. Judicial interpretation and pronouncements have mandated that such efforts are to be made even if there is acute estrangement, and that it is the bounden duty of the family court to make an attempt for reconciliation and rapprochement. It has been stipulated that the attempt by the court to effect the resolution must be sincere and every effort made to preserve the matrimonial ties.

85. The spirit, intendment and purpose of these statutory provisions is a recognition of the fact that the jurisdiction in matrimonial matters is not punitive but is remedial, whether it be to effect the dissolution of a marriage or a direction for restitution of conjugal rights.

86. We may note that the guiding principle in such cases is the recognition of the importance of marriage and that the acrimony between spouses manifests erosion of the basic human rights of the persons involved and impacts the community as well as society. For this reason, the legislation and jurisprudence which has evolved, emphasise that the same deserves to be brought to an end. An effort for reconciliation may result in the parties burying their differences and agreeing to live together. Or they may agree to, disagree and part. In either case, stability is brought to lives and the parties know where their relationship stands and litigation ended.

87. What needs to be stressed is that such be the duty of the court, the responsibility on the respondents to act in consonance with these principles is even more onerous.

88. The instructions dated 31st December, 1999 issued by the respondents are in consonance with the spirit of the above international covenants and jurisprudence. They encompass the special needs and strains which a marriage may face on account of the rigors of service with the armed forces.

It is clearly evident that the ground of marital discord recognised in para 4(b)(v)(aa) of the said instructions dated 31st December, 1999 is a reflection on the recognition of the right to marriage and the aforenoticed principles by the respondents and the importance given by the armed forces also to the institution of marriage. This is clearly in consonance with the recognition of such right nationally and internationally. The respondents recognise the importance of bringing marital discord to an end. The instructions also indicate the awareness about the possible need of cohabitation to nurture a marriage. We find that provision of an opportunity to bring about either is clearly postulated therein. For these reasons, the instructions on the subject have provided that

filing of a divorce petition would be considered as an extreme compassionate ground to justify the severance of the ties of employment with the armed forces, so as to further possible preservation or amicable resolution and dissolution of bonds of another kind. The aforenoticed Instructions thus manifest the high degree of protection to the families of the members of the MNS which is accorded by the respondents. The procedure prescribed thereunder has to be effectuated to ensure implementation of this spirit.

We are heartened by the recognition of the above principles and norms as well as positive stand on the issue adopted in this behalf in the Instructions dated 31st December, 1999 governing the Military Nursing Service.

89. The aspiration and desire of the petitioner to make an effort to resolve disputes and cohabit with her husband and daughter as a family by itself deserves to be protected and encouraged. It is a fact that her employment is not only interfering with the same, but has become a root cause of such discord and is exposing the petitioner to a threat of severance of her matrimonial ties on account of dissolution of her marriage by a decree of divorce. This manifests the essential and immediate need of taking such measures which could facilitate rapprochement and restoration of harmony in the petitioner's family life.

90. We find that the valid criterion for the favourable consideration of a request for resignation and the limits within which the respondents would exercise discretion to consider such an application are stipulated under the said instructions. In Major Rahul Shukla Vs. Union of India & Ors. (supra), it has been stated that the contingencies stated in similar instructions are merely illustrative and not exhaustive. It has been held that the same, however, do bind the respondents to consider a request for resignation on the grounds stated in the illustration.

91. The respondents have not rejected the petitioner's application on any consideration relating to non-availability of adequate manpower in the category of officers in which the petitioner is employed. No exigency of service, let alone any extremity is even suggested in the impugned order. The respondents have not disputed the petitioner's statement that she has not given any bond and that she is not shackled by any service liability.

92. On the factual aspect, It is also not disputed that the petitioner has a daughter who was an infant in the year 2005. The respondents also do not dispute that the petitioner's husband has filed a petition seeking divorce. In this background, the petitioner's request for resignation in the admitted facts clearly falls within the criterion laid down in para 4(b)(v)(aa) of `marital disharmony' and appears to be covered within the nature of Extreme Compassionate Grounds mentioned in the instructions.

93. An issue has been raised with regard to the parameters within which the respondents can examine the contents of the divorce petition which is mentioned in the applicable instructions. Even assuming that the respondents could examine the grounds on which the divorce petition has been filed, perusal of the opening paragraph of the divorce petition shows that the petitioner's husband has referred to the pre-nuptial agreement between the parties to the effect that after the marriage,

she would resign from service. A grievance is made by him against the petitioner shifting to the official quarters. This was obviously in order to meet the service requirements, its nature and demands. The petitioner's husband has expressed distress because of his separation from the petitioner and he complains in the petition that he is not only compelled to live far from his wife and daughter, but as a result is having to do his own cooking.

94. The failure to have resigned from service has been perceived by her husband as an extreme ambition on the part of the petitioner and a dream not fulfilled by her marriage. The allegations made in the divorce petition thus may very well be an erroneous construction or misunderstanding on the part of the petitioner's husband. As noticed hereinabove, the petitioner was posted at Roorkee, which may be considered as close to Haridwar. However, the impugned order discloses that the petitioner stands posted out therefrom. It is on record that while posted as Roorkee, the petitioner had to reside in official quarters. It cannot be disputed that continuation in military service warrants separation from her husband.

95. It would also appear that the petitioner's submission with regard to the constraints in leaving her job, has been considered by her spouse as an incident of cruelty to him. Every action of the petitioner is being construed by her husband as an effort to further ambitious desires which perception has resulted in a prayer for dissolution of the marriage by a decree of divorce on the ground of cruelty on the part of the petitioner.

96. This petition seeking dissolution of marriage appears to have been filed by the petitioner's husband on 5th September, 2008. The petitioner's application for permission to apply for resignation was made only on 8th November, 2008 which would be indicative of the fact that the divorce action is not collusive and does not appear to have been created or urged as a shield and device to seek resignation from service. We may note that the petitioner's resignation manifests her desire to make an effort to restore some order to her matrimonial life. It also displays a lack of ambition as against a desire to restore normalcy to her matrimonial life with her husband.

97. The petitioner has urged that her husband has clearly indicated that she must resign from service or divorce him.

98. The respondents in the instant case, do not dispute the existence of marital disharmony in the marriage of the petitioner. On the contrary, the respondents place reliance on the averments in the divorce petition filed by the petitioner's husband. The impugned order reflects that a subjective picking of the allegations against the petitioner by her husband has been effected without taking a comprehensive view in the matter.

99. The impugned order does not manifest any effort by the respondents for reconciliation or resolution of the grievance expressed by the petitioner's husband. It makes no reference at all to the fact that the petitioner's husband refers to his desire for cohabitation with his wife. The order also does not refer to grievance of the petitioner's husband in more than one place with regard to the failure of the petitioner to resign from service and that he is thus compelled to live away from his wife and daughter because of the same. The respondents have erred in failing to consider that the

primary allegations against the petitioner is her husband's contention about her refusal to resign from service and the impact of the consequent separation. The other allegations really arise out of the pressures of the kind of existence which is thereby enforced.

100. From the above, it would appear that the criterion in the instructions dated 31st December, 1999 are also premised on a presumption of inability of a serving personnel to give the essential hundred per cent to the service if he/she is faced with a divorce petition. The prescribed criteria in the binding instructions, clearly accepts that continuation in service may be one of the attributes of or a contributory factor for marital disharmony. A threat of divorce evidenced by the filing of a case for the same has been prescribed as sufficient for a favourable consideration of a request for resignation. The imperative nature of such ground is manifested from the fact that the respondents have placed the same under the category captioned as "Extreme Compassionate Grounds".

101. It is important to note that the criterion laid down under the instructions do not stipulate that continuation in service must be the ground for the marital disharmony or the only ground on which the divorce petition must rest. On the contrary, a threat of divorce is perceived as sufficient reason for favourable consideration of an application for resignation from service. The instructions presume that being relieved from service is an essential step to reduce marital disputes. The instructions do not refer to either the nature of allegations or the result of the divorce action. In this background, it may not be appropriate for the respondents to analyse the grounds on which the petitioner's spouse has sought divorce and premise an order on the same, without anything more.

102. We may point out that it is also not essential that acceptance of a resignation, as in the case in hand, may necessarily put an end to the parties' matrimonial woes. However, recognition of such an opportunity to resolve the disputes by acceptance of the resignation and provision of an opportunity to do so, is an effort to implement and afford protection to the right to family of every person, the mandate of the provisions of the Constitution, the International Covenants and the spirit of the statutes set out above.

103. There is another aspect to this matter. The possibility of frustration and set back to the afore-noticed statutorily mandated reconciliation process by the court seized of the matrimonial action against the petitioner which could result from the separation between the spouses on account of the posting of the serving spouse, cannot be ignored. In the instant case, the divorce litigation is in the court at Haridwar while the petitioner stands posted out to a distant location.

104. The impugned order completely fails to consider the recommendations on the application of the petitioner's immediate superiors and fails to give any reasons for overruling them.

105. It has been settled by various previous pronouncements that the state or its instrumentalities while implementing their policy and in decisions based thereon cannot be unreasonable or arbitrary and must be guided by reason.

106. In a recent judgment of the Supreme Court reported at MANU/SC/0476/2010 Sindhu Education Society & Anr. Vs. The Chief Secretary, Govt. of NCT of Delhi & Ors., the Supreme Court

observed that framing a policy is a domain of the Government. However, the working of a government policy has essentially to be done within the framework of the Constitution & the laws. The framework of policy should be such as to fit in of the Constitutional scheme of our democracy. It has been held by the court that even when Government changes its policy decision, it is expected to give valid reasons and act in the larger interest of the entire community rather than a section thereof. In para 66 of the judgment, the Supreme Court held:

> "..... It is a settled canon of administrative jurisprudence that state action, must be supported by some valid reasons and should be upon due application of mind. In the affidavits filed on behalf of the state, nothing in this regard could be pointed out and in fact, none was pointed out during the course of arguments. Absence of reasoning and apparent non-application of mind would give colour of arbitrariness to the state action."

107. The reasons in the impugned order are certainly not valid and fail to consider the relevant facts.

108. The impugned order in the instant case raises yet another important aspect on the right to life of the petitioner. Its impact on the dignity and privacy, integral and essential components of the right to life of the petitioner require to be examined.

109. Marriage and issues relating thereto are certainly matters involving the core issues of the privacy and dignity of the individual concerned which are essentials of the fundamental right to life. We find that the impugned order on the other hand has scrutinized the divorce petition and reached a conclusion on the merits of the allegations made therein without even hearing the petitioner's side on the allegations. The observations in the order would only add to the differences between the parties.

110. The afore-noticed instructions contain clear directions. Yet, the respondents have completely misdirected themselves in presuming the correctness of the averments, made in the divorce petition against the petitioner and deduced that her resignation from service would not resolve the marital disharmony in the petitioner's marriage. This is certainly not the spirit, intendment and purport of the guidelines and instructions issued by the respondents. It is important that the authorities must apply the criteria in its true spirit and must not overlook material points while dealing with the applicability of such guidelines. In our view, the respondents have limited jurisdiction to go into the reasons or grounds on which a petition for dissolution of marriage has been filed. The instant case underlines the need of the working of the right to marriage and family life so far as the members of the forces is concerned and the urgency to reflect on the need to reconcile family and working life.

111. The matter of verification of the allegations in matrimonial matters requires sensitive handling. The instructions suggest that the factor which is to be verified, is the existence of marital discord in the life of the personnel concerned which is manifested by the existence of a threat of divorce and nothing more. The impugned order certainly encroaches into matters which are strictly within the confidential space occupied by delicate and sensitive disputes between two spouses and not permitted by the instructions on the subject.

112. These observations are based only on some of the contents of the divorce petition and do not reflect any effort made by the authorities to verify the real facts. The conclusions arrived at by the respondents mock at the most private conduct of the petitioner, relate to issues and allegations of happenings which were within the four walls of her home and make public disclosure of the same in the impugned order. They certainly degrade and devalue the self worth of the petitioner, and hence make an improper intrusion on her privacy and dignity.

113. Merely because the respondents had access to the divorce petition filed by the husband of the petitioner does not permit comment on the correctness or tenability of the averments therein by any person or authority, other than the court before whom it is filed. Even the decision making by the court has to rest on a trial and evidence after sincere reconciliation efforts. The same is subject to defence by the other side.

To say the least, the observations in the impugned order are not only wholly unwarranted but suggest ignorance about human relations and the requirement of matrimonial adjustments to nurture marital ties.

114. It is evident that the petitioner's predicament with regard to the choice between her personal and professional life appears to be that of a person placed between the devil and the deep blue sea. A humanitarian and compassionate view envisaged under the instructions in keeping with the constitutional principles was required to be taken.

Conclusion

115. The impugned order, therefore, certainly tantamounts to a gross violation of the privacy and dignity of the petitioner and hence of her constitutional right to life guaranteed under Article 21 of the Constitution of India. Such order premised on the contents and evaluation of the merits of allegations in the divorce petition is contrary to the spirit, intendment and purpose of the international instruments noticed above, the Constitutional provisions, the marriage laws of the country as well as the specific Army Instructions noted above. The respondents have also failed to abide by the clear directions in Major Rahul Shukla's case (supra).

116. We, therefore, hold that the rejection of the application for resignation by the respondents is not based on relevant material but is premised on extraneous grounds. The impugned order is also contrary to the instructions which govern the subject. The same violates the requirements of Article 14 of the Constitution as well and thereby justifies the interference by this court. The order of posting of the petitioner in the given facts and circumstance was unwarranted and unjust.

Result

117. In view of the above discussion, it is directed as follows:-

(i) The order dated 17th August, 2009 is hereby set aside and quashed and the respondents are directed to consider afresh the application of the petitioner seeking resignation from service in the

light of the above discussion.

(ii) It is further directed that such consideration shall be effected within a period of four weeks and the decision taken communicated to the petitioner forthwith.

(iii) Pending consideration, decision and communication of the order to the petitioner, there shall be a stay of the order of posting bearing no.IHQ letter No.B/70034/P/DGMS-4A dated 17th August, 2009.

(iv) Appropriate orders with regard to the petitioner's service, pending consideration of the application, shall also be passed by the respondents taking a considered and sympathetic view in the matter. Additional Directions

118. Before parting with this case, we may advert to the statutory recognition of yet another dispute redressal mechanism which has found statutory recognition in Section 89 of the Code of Civil Procedure and has been successfully implemented in the courts in Delhi. Inter alia, mediation and conciliation have been provided as an alternate dispute redressal mechanism. This court has pioneered institutionalised mediation mechanisms.

Long separations, as in the case in hand, are essential having regard to the size of the work force and nature of duties in the defence services. Coping with the separation and bringing up children single handedly, while husband and/or wife is on a field posting or away on training and exercises or for any other exigency, is no mean a task. Undoubtedly, the separation involved by the nature of postings and duties in the armed forces must be putting a strain on the most undemanding of spouses of the force personnel.

119. In this background, it may perhaps be appropriate that a mediation and conciliation mechanism is explored and created by the respondents to facilitate resolution of disputes and differences, if any, in the areas of marriage and other related areas. The nature of issues between the parties in the present case clearly suggests that perhaps, if such a facility was available, the petitioner may not have been facing the proceedings which she is now defending.

120. We may notice that several welfare mechanisms are already in place in the defence forces. It is time that the defence forces also explore the institutionalization and putting in place of a formal mediation and conciliation framework, perhaps even within the existing welfare schemes and agencies worked by them, which may facilitate dispute resolution, or in any case provide a forum for ventilating grievances of the parties, before they seek dispute redressal in courts.

121. Of course, lest it be said that this court has encroached on their jurisdiction, we hasten to add the examination of such possibility, and putting it in place, are in the absolute domain of the respondents. But certainly the essentiality, propriety and possibility of such measures deserves to be seriously examined and explored. Not only grievances as the present one but of other kinds including those relating to service issues may perhaps be brought to an end without court intervention being necessary.

We, accordingly issue a direction to the respondents to examine this issue and take a considered view on creating such a facilities, if possible.

The writ petition is accordingly allowed in the above terms.

GITA MITTAL (JUDGE) J.R. MIDHA (JUDGE) October 8, 2010 aa/kr