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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 17.01.2018**

\+ LPA 640/2017

MADHU & ANR. ..... Appellants
Through: Ms. Siza Nair Pal, Advocate with Appellant No.2 in person.

Versus

NORTHERN RAILWAY & ORS. ..... Respondents
Through: Mr. Jagjit Singh with Mr. Preet Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S.RAVINDRA BHAT, J.

1. The appellants challenge an order by the Single Judge dismissing their writ petition. They sought directions to include their names in the medical card and privilege passes of Om Prakash Gorawara (hereafter, "Gorawara") and to issue them separate cards. The appellants were Gorawara"s wife and daughter; neither are employed, and the first appellant, wife (hereafter "Madhu") is suffering from various chronic ailments. The present proceedings were preceded by a series of litigation between the appellants and second respondent. One of these resulted in applications of maintenance under Section 125 of the Code of Criminal Procedure, 1973. The other cases include proceedings alleging commission of offences under Sections 498A and 406 of the Indian

Penal Code, 1860 (IPC). At the end of these litigations, the second respondent started paying maintenance to the appellants.

2. Gorawar is a former employee of Indian Railways, the third respondent. The Indian Railways Medical Manual and the Railway Servant Pass Rules allows for the issue of a REHLS card and establishes the "wife" and "unmarried daughter" as "family" for the purposes of extending medical card and privilege pass facilities to them. The families of current and former railway servants and officers are thus entitled to avail of medical services from railway hospitals so long as they are carrying the REHLS card. Before 2010 the appellants were listed as family/dependents on the medical card of the second respondent. In 2010 the appellants applied for and were denied separate medical cards by the first respondent, Northern Railways (referred to hereafter by name).

   Before his retirement in 2012, Gorawara removed the appellants‟ names from his medical card, disentitling them to free medical services that are otherwise available to the dependents of railway employees.

3. A writ petition, W.P.(C)No.6535/ 2015, against the decision of Northern Railways taken in 2010 to deny the Appellants the medical card was filed before this court. The court directed the General Manager, Northern Railways to decide the matter expeditiously. On 23.11.2015 the General Manager, Northern Railways issued the speaking order denying the appellants the medical cards and privilege passes, and consequently the use of the free medical facilities. It is against this order of Northern Railways that a writ petition was filed before this court, resulting in the impugned judgment. The Learned Single Judge, rejected the appellants‟ writ petition, holding that the issue involved a personal dispute and in the

absence of nomination of the appellants as family members, by Gorwara, they could not claim the medical and pass benefits.

4. The Appellants argue that Gorwara had initially declared them as eligible to secure medical facilities from the railways and nominated them as such, but subsequently removed their names. This was done by allegedly applying for a duplicate medical card and omitting the appellants‟ name in the „dependants‟ column of the new medical card. The appellants urge that there is no separation of marital ties between Gorwara and his wife, and thus he cannot disown the Appellants. The Appellants bring to the Court‟s notice that the Appellants have filed a Criminal Revision Petition to enhance the amount of maintenance. Considering these facts the Appellants contend that the speaking order of 23.11.2015 is arbitrary, discriminatory, and hence unconstitutional.

5. The Appellants also allege a violation of Section 602(2) of the Indian Railway Establishment Code Volume, which states, "*Medical attendance and treatment facilities shall be available, free of charge, to all „Railway employees" and their „family members and dependent relatives, irrespective of whether they are in Group A, Group B, Group C, Group D, whether they are permanent or temporary, in accordance with the detailed rules as given in Section „C" of this Chapter.*" Thus, the Appellants claim that they are entitled to free medical services as the „family‟ of Respondent No.2, a retired railway employee.

6. The Appellants also rely upon the Railway Board Letter No.2004/H/28/1 RELHS/Card (dated 22.03.2005) wherein provisions were made for eligible family members to procure a RELHS card. The letter notes, "*For Long Term Duration: the original medical card may be deposited with*

the issuing authority who may issue split medical card to the beneficiaries as requested by them". Thus, the Appellants contend that it is within Northern Railway‟s power to issue to the Appellants a separate medical card. It is submitted that the understanding of the Single Judge, in the impugned order that the dispute related to personal issues, is incorrect; it is rather the Railway authorities‟ omission in ignoring material circumstances and denying them what legitimately ought to be given to them.

7. It is argued besides, that the first appellants‟ age and medical ailments render her vulnerable because in the absence of any medical card, health and medical facilities would become so expensive as to become inaccessible. Counsel submitted that the official respondents‟ inability to consider these - as well as the fact that over two decades the appellants are recipients of the medical benefits and railway passes provided by the Railways rules and orders and further ignoring that the behaviour of Gorwara has resulted in direction of competent courts to pay them maintenance, renders the refusal to give them (the appellants) such benefits arbitrary; it also violates their right to life under Article 21 of the Constitution. It is underlined that the status of the appellants as wife and daughter of Gorwara could not have been ignored by the official respondents; therefore, the latter‟s order was made without application of mind.

8. The primary contention of the Northern Railways is that the facilities of the Medical Card and Privilege Passes are for the use of the railway officers/servants, and have been extended to the family of the railway officer/servant *only on their declaration*. Northern Railways argues that

there is no provision in the existing policy that allows for separate medical cards and passes to be provided to the mother and daughter, as these documents cannot be individually requested. Thus, absent a declaration by Gorwara, no medical card can be issued to the Appellants.

9. The contesting private respondent, Gorwara alleges that he is living separately from the Appellants and has no semblance of a family life with them. It is also alleged that the duplicate medical card was issued because the original medical card was lost by him. Gorwara claims that he has completely disowned the Appellants and does not wish for them to secure the free medical services based on his medical card.

Analysis and Reasoning:

10. Before analyzing the rival submissions of the parties, it is necessary to extract the relevant provisions of the Railway servants‟ manual. It reads as follows:

> *"**603. Section 'C -Scope of medical attendance and treatment***
>
> ***Sub-section I: General***
>
> ***Medical attendance and treatment**. - The Railway employees, their family members and dependent relatives are entitled free of charge medical attendance and treatment;*
>
> *Family includes:-*
>
> *i. spouse of a railway servant whether earning or not;*
> *ii. son or sons who have not attained the age of 21 years and are wholly dependent on the railway servant;*
> *iii. son or sons of the age of 21 and above who are;*
> *a. bonafide students of any recognized educational Institution;*
> *b. engaged in any research work and do not get any scholarship/stipend;*

c. working as an articled clerk under the Chartered Accountant;
d. invalid, on appropriate certificate from Railway Doctor;
iv. unmarried daughters of any age whether earning or not:
v. widowed daughters provided they are dependent on the railway servant;
vi. legally divorced daughter who is dependent on the railway servant;"

11. The speaking order, issued pursuant to the order of this court, in the previous writ proceeding, brought by the appellants, reads as follows:

> *"A personal hearing was given by me to Ms Madhu and Shri O P Gorawara on 30.10.2015. I have gone through the facts of the case as well as personally heard the grievance of both the affected parties.*
>
> *The Indian Railways Medical Manual Vol-I (third edition 2000) for the reason of RELHS and the Railway Servant Pass Rules establish the 'wife' and the 'unmarried daughter' as 'Family' for the purpose of extending the medical and pass facilities to them, irrespective of their earning status/ age. However, these facilities are primarily provided to the Railway servant/ officer and by virtue of his being employed under the Ministry of Railways. These facilities have further been extended to the family of the Railway servant on his declaration only. There is no provision in the existing frame of policy for providing separate medical card or pass facility to the mother and daughter since the benefit is extended to 'family' of Railway servant/ retired servant and cannot be given individually as requested. Hence this request of the petitioner/ applicant cannot be acceded to."*

12. A plain and textual reading of the provision (Para 603, quoted previously) clearly shows that spouses and unmarried daughters, dependent upon the income of the spouse/father, fall in the category of "family". The reasoning adopted by the Northern Railways, on the other hand, in this case, is simple - that a declaration is necessary by the railway officer/servant, and it is *based on this declaration* that the

dependents of the railway officer/servant will be given the benefit of free medical servants. The Northern Railways‟ understanding, in the opinion of this court, is utterly flawed. The provision which *entitles* the railway servant and his dependents, i.e. family members, clearly says *"Railway employees, their family members and dependent relatives are entitled free of charge medical attendance and treatment".* The corollary is that those answering the description of "family members", like the railway servants, enjoy the benefits she or he is assured. The *declaration* to be given, in the opinion of the court, by the railway servant, is a mere intimation, and thus *facilitative or procedural.* No one can argue - and mercifully the Railways is not arguing- that the status of the family members *depends on the declaration.* To accept that submission would be startling, because it would empower a spouse or father, upon caprice, with the blink of an eyelid, without any rhyme or reason, to decide to deprive what his family members would otherwise be entitled to. By way of illustration, if a dependent, unmarried daughter suffering from a chronic ailment such as tuberculosis or acute diabetes, for some reason has a difference of opinion with her father, or a young college going dependent son similarly has differences with his father, but needs urgent surgery and in both cases, are estranged from their father, the father in either case (if he is capricious) can cut off medical aid. Plainly, the interpretation given by the railways, empowering the railway servant to ignore existing status of his family members through unilateral exclusionary declaration, is untenable.

13. This court is of the opinion that the structure of Para 603 is such that the status of spouse, is recognized as long as the relationship of matrimony

subsists. In the case of an unmarried and dependent daughter, there is no question of changing the status; by its very nature it is unalterable. Thus, the mere circumstance that one or the other party to a matrimonial bond, is disgruntled or involved in litigation against the other, would not alter the *factum* of relationship, which is *per se* a matter of status.

14. Madhu is suffering from various chronic ailments that have rendered her unemployable. Her daughter has chosen not to secure employment in order to care for her ailing mother. The Constitution of India establishes a welfare state whose duties include the providing of medical care for its citizens. This right is firmly protected within the right to live with dignity under Article 21. Additionally, as an employer, the government must ensure (as Section 603 of the Railway Servants Manual clearly notes) the health of its employees. This reasoning has been laid down by the Supreme Court in *State of Punjab v Ram Lubhaya Bagga* (1998) 4 SCC 117, where the Court stated,

> "*Right of one person correlates to a duty upon another, individual, employer, Government or authority. The right of one is an obligation of another. Hence the right of a citizen to live under Article 21 casts an obligation on the State. This obligation is further reinforced under Article 47, it is for the State to secure health to its citizens as its primary duty. No doubt Government is rendering this obligation by opening Government hospitals and centres, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks at another hospital.*
>
> […] *The State can neither urge nor say it has no obligation to provide medical facility. If that were so, it would be ex facie violative of Article 21.*"

15. Thus, by denying the medical facilities to Madhu, Northern Railways is in effect, violating the mandate enshrined in Article 21 of the Constitution.

16. This Court must also keep in mind that the Appellants, under the Constitution, fall within a particular group, i.e. that of "women". The Constitution in Articles 15 and 16 recognises the principle that certain groups have been historically disadvantaged and that post the enactment of the Constitution, actions of the State that discriminate against women (not falling within the exceptions of Article 15(4) and Article 16(4) are constitutionally untenable. Thus, while affirmative action to secure the interests of women is allowed, the Constitution, irreproachably, does not permit discrimination against women. This understanding has been articulated by the Supreme Court in *Jeeja Ghosh v Union of India* (2016) 7 SCC 761 where the court stated,

> "*The principle of non-discrimination seeks to ensure that all persons can equally enjoy and exercise all their rights and freedoms. Discrimination occurs due to arbitrary denial of opportunities for equal participation. For example, when public facilities and services are set on standards out of the reach of persons with disabilities, it leads to exclusion and denial of rights. Equality not only implies preventing discrimination (example, the protection of individuals against unfavourable treatment by introducing anti-discrimination laws), but goes beyond in remedying discrimination against groups suffering systematic discrimination in society.*"

17. Since the actions of Northern Railways result in denial of benefits and rights to this special class, it must be closely examined to see if the actions, or their effect, are discriminatory. The Northern Railways contends that the Appellants are not denied the medical card *because*

they are women, but rather because their husband and father had not made the requisite declaration. However, this explanation is not enough. It is not sufficient to say that the reasoning of Northern Railways did not *intentionally discriminate* against the Appellants *because they were women*. Law does not operate in a vacuum and the reasoning and consequent decision of Northern Railways must be examined in the social context that it operates and the *effects* that it creates in the real world. Even a facially neutral decision can have disproportionate impact on a constitutionally protected class. This has been recognised by the Supreme Court in *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1 where the Court stated,

> "*Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects* […] *51. No law in its ultimate effect should end up perpetuating the oppression of women.*"

18. Similar observations were made by the Supreme Court in the landmark case of *R.C. Cooper v Union of India* 1970 SCR (3) 530. The Court stated,

> "[…] *To hold that the extent of, and the circumstances in which, the guarantee of protection is available depends upon the object of the State action, is to seriously erode its effectiveness. Examining the problem not merely in semantics but in the broader and more appropriate context of the constitutional scheme which aims at affording the Individual the fullest protection of his basic rights and on that foundation to erect a structure of a truly democratic polity, the conclusion, in our judgment, is inevitable that the validity of the State action must be adjudged in the light of its operation upon the rights of*

> *the individual and groups of individuals in all their dimensions.*
>
> […] *it is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim: it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.*"

19. Thus, the touchstone of validity for State action is not the intention behind the action, but rather the actual impact and effect on a citizen"s life. This is clearly seen by the observations by the Supreme Court in *Maneka Gandhi v Union of India* 1978 SCR (2) 621 where the Court noted,

> "[…] *In testing the validity of the state action with reference to fundamental rights, what the Courts must consider is the direct and inevitable consequence of the State action.*"

20. This Court itself has recognised that actions taken on a seemingly innocent ground can in fact have discriminatory effects due to the structural inequalities that exist between classes. When the CRPF denied promotion to an officer on the ground that she did not take the requisite course to secure promotion, because she was pregnant, the Delhi High Court struck down the action as discriminatory. Such actions would inherently affect women more than men. The Court in *Inspector (Mahila) Ravina v Union of India* W.P.(C) 4525/2014 stated,

> "*A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here: though CRPF asserts that seniority benefit at par with the petitioner"s colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy.*"

21. The principle that a facially neutral action by the State may disproportionally affect a particular class is accepted across jurisdictions in the world. In Europe for instance, the principle has received statutory recognition. *Council Directive 76/207* (9 February, 1976) states,

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

22. *Council Directive 2000/78/EC* (27 February, 2000) defines the concept of „indirect discrimination" as,

> "*indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*"

23. It is also worth paying attention to the case of *Bilka-Kaufhaus GmbH v Webber von Hartz* (1986) ECR 1607. Bilka was a supermarket that paid all employees who had worked full-time for more than 15 years a pension. Mrs. Webber worked part-time at Bilka for over 15 years, but was denied the pension because she was only a part-time employee. Mrs.

Webber alleged that the requirement to be a full-time employee before securing the pension was discriminatory against women, since women were far more likely than men to take up part-time work, so as to take care of family and children. The Court noted,

> "*Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.*"

24. The Canadian Supreme Court has also espoused an understanding of "disparate impact", where the touchstone to examine the validity of an allegedly discriminatory action is whether or not *the effect of the action* has a disproportionate impact on a class of citizens. The Court in *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143 noted,

> "*Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.*
>
> […] *The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. These words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage. The effect of the impugned*

> *distinction or classification on the complainant must be considered.*
>
> […] *I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.*"

25. The Canadian Supreme Court had similar observations in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 where the court noted that discrimination arises when:

> "*It arises where an employer* […] *adopts a rule or standard* […] *which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.*"

26. Thus, the Court concluded there was no requirement to show that the employer had the *intention* to discriminate against the complainants because of a constitutional prohibited ground, merely that the effect on the constitutionally protected class of people was adverse. The Court also stated,

> "*The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or*

restrictive conditions not imposed on other members of the community, it is discriminatory

[…] *On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited grounds on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.*

[…] *An employment rule honestly made for sound economic or business reasons, equally applicable to all whom it is intended to apply may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply*."

27. The Supreme Court of South Africa made analogous observations regarding discrimination. In *The City Council of Pretoria v Walker Case CCT 8/97* the Court noted,

"*The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.*

In many cases, particularly those in which indirect discrimination is alleged, the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair discrimination was intentional. This problem would be particularly acute in cases of indirect discrimination where there is almost always some purpose other than a

> *discriminatory purpose involved in the conduct or action to which objection is taken.*"

28. The origin of the idea of "disparate impact" originated in the landmark case of *Griggs v Duke Power Co.* 401 U.S. 424. The Court was faced with the case of an employer who required employees to pass an aptitude test as a condition of employment. The work in question was manual work. Although the same test was applied to all candidates, the Court noted that African-American applicants had long received sub-standard education due to segregated schools. Thus, the employer‟s requirement disproportionately affects African-America candidates. The Court held in the context of the Civil Rights Act,

> "*The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.*"

29. The reason that the drafters of the Constitution included Article 15 and 16 was because women (*inter alia*) have been subjected to historic discrimination that makes a classification which disproportionately affects them as a class constitutionally untenable. The Northern Railways‟ decision to not grant the Appellants medical cards clearly has such a disproportionate effect. By leaving an essential benefit such as medical services subject to a declaration by the railway officer/servant, the dependents are subject to the whims and fancies of such employee. The large majority of dependents are likely to be women and children, and by insisting that the railway officer/servant makes a declaration, the Railway authorities place these women and children at risk of being denied medical services.

30. It is irrelevant that the Railways did not deny them the medical card *because the Appellants were women*, or that it is potentially possible that a male dependent may also be denied benefits under decision made by the Railways. The *ultimate effect* of its decision has a disparate impact on women by perpetuating the historic denial of agency that women have faced in India, and deny them benefits as dependents.

31. In light of these facts and the observations made above, we are of the conclusion that the speaking order passed by the Northern Railways on 23.11.2015 is arbitrary, discriminatory and made without application of mind. This court hereby quashes the order dated 23.11.2015 and directs the Northern Railways to include both the appellants‟ names on the medical card of the second respondent and issue a separate medical card and privilege pass to the Appellants. These directions shall be complied with, within four weeks. The appeal, and consequently, the writ petition is allowed in the above terms; there shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

JANUARY 17, 2018