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

+ W.P.(C)No.10498/2015 and CM No.44852/2016

% ***Reserved on : 30th November, 2017***
Date of decision : 5th January, 2018

KUSH KALRA ..... Petitioner
Through: Dr. Charu Wali Khanna and Mr. Dharmendra Singh Pal, Advs.

Mr. Gautam Narayan, *Amicus Curiae*

versus

UNION OF INDIA & ANR. ..... Respondents
Through: Mr. Amit Mahajan, CGSC for R-1/UOI with Ms. Sanya Panjwani and Mr. Kunal Dutt, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

GITA MITTAL, ACTING CHIEF JUSTICE

"The subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other."

John Stuart Mill

1. This writ petition, instituted in public interest by the petitioner, complains of institutional discrimination by the respondents against women and prays for issuance of a writ in the nature of a *mandamus* to place female gainfully employed candidates at par with similarly placed male candidates and allowing their recruitment into the Indian Territorial Army. The writ petitioner contends that as per the advertisement put out by the respondents, there is no scope for women to join the Territorial Army as an officer, even if they are gainfully employed and within the age group of 18-42 years, while this is the eligibility condition enabling similarly placed men to join. The challenge, therefore, is premised primarily on the ground that this discrimination, based on gender, is violative of the fundamental rights guaranteed to all women under Articles 14, 15 and 16 of the Constitution of India and also impinges on their basic human rights.

2. In order to appreciate the impact of this discrimination, it is essential to understand the history of the Territorial Army, its role and structure as well as its current strength.

Historical background

3. The origin of the Territorial Army (*'TA' hereafter*) can be traced back to the year 1857,when it was formed and consisted of volunteers only comprising of Europeans & Anglo-Indians. On 1st October, 1920, the Indian Territorial Force Bill was passed by the British and at that time it was organized into two wings, namely,

'the Auxiliary Force' for Europeans and Anglo-Indians and *'the Indian Territorial Force'* for Indian volunteers. After independence, the Territorial Army Act, 1948 came to be enacted and the TA was formally inaugurated on 9th October, 1949 by the Governor General of India Shri C. Rajagopalachari.

Role and structure of the Territorial Army

4. So far as its role is concerned, the TA is part of the regular Indian army. Its present declared role is to relieve the regular army from static duties and assist the civil administration in dealing with natural calamities and maintenance of essential services in situations when life of communities is affected or the security of the country is threatened as well as to provide units for the regular army as and when required.

5. The respondents have also placed on record a Brochure which was issued inviting applications to the TA which informs that the TA is active in numerous fields.

6. Information regarding the structure of the TA is disclosed on its website i.e. *http://territorialarmy.in/*. It is disclosed that as on date, the TA has a strength of approximately 40,000 persons comprising of Departmental TA units such as units in the Railways; the Indian Oil Corporation; the Oil & Natural Gas Corporation; Telecommunications and the General Hospital. It also has Non-Departmental TA units of Infantry Bn (TA) and

Ecological Bn (TA) affiliated to various infantry regiments of the Indian Army.

7. The Brochure placed on record additionally informs that the TA consists of engineer units for line of control fencing. Raising of four composite Ecological Task Force Battalions (*National Mission for Clean Ganga*) is also under consideration.

Who is eligible to apply

8. Inasmuch as the substantial challenge in this case is with regard to the prohibition of women candidates from joining the TA imposed by way of the advertisements being issued inviting application for joining, it becomes necessary to examine the prescriptions made by the respondents with regard to the eligibility based on gender and as prescribed by law.

9. Interestingly, the Brochure/handout furnished to the petitioner by the respondents, referred to above, contains no such prohibition either by gender or by unit. This handout gives information on "*How to Join Territorial Army*" as an officer. In the description of the process, it is stated that *"gainfully employed civilians*", who fulfilled the prescribed criteria being graduates between 18 to 42 years, can apply in response to advertisements published in leading national newspapers and the Employment News in May-June for civil candidates and December – January for ex officers each year.

10. The cause of action for filing the writ petition is premised on a notice inviting the applications by way of the public advertisement, which is placed as *Annexure-P1* to the writ petition. By way of this notice, the respondents invited applications captioned to "*Join Territorial Army As An Officer*".

11. We extract the relevant portion this notice inviting applications hereafter :

*"**JOIN TERRITORIAL ARMY***

AS AN OFFICER

*Applications are invited from **gainfully employed young men** for an opportunity of donning the uniform and serving the nation as Territorial Army Officers, based on the concept of enabling **motivated young men** to serve in a military environment without having to sacrifice their primary professions. **You can serve the nation in two capacities – as a civilian and as a soldier**. No other option allows you such an expanse of experiences.*

PART TIME COMMITMENT – FULL TIME HONOUR : ADVENTURE AWAITS YOU!

ELIGIBILITY CONDITIONS
• ***Only male citizens of India*** *and Ex-service officers who are medically fit.*
• ***Age*** *– 18 to 42 years as on **30 Jun 2015.***
• ***Qualification*** *– Graduate from any recognized university.*
• ***Employment*** *– Gainfully Employed in Central/State Govt/Semi Govt/Pvt Sector/Self Employed.*
• *xxx xxx xxx*
• *Date of written Exam : **02 Aug 2015***
xxx xxx xxx"

As per this advertisement, there was thus an unequivocal and clear prohibition to women from applying for joining the TA.

12. An identical advertisement came to be issued by the respondents prescribing the last date of the application as 20th of June 2016 and notifying the date of the written examination as 13th July, 2016. We have been informed by Ms. Charu Wali Khanna, ld. counsel for the petitioner that during the pendency of the writ petition itself, the respondents have issued identical advertisements repeatedly and completed several rounds of recruitment to the TA.

13. Appalled by this prohibition, the petitioner addressed a letter dated 8th August, 2015 to the Additional Directorate General of TA pointing out the illegality in the ouster of women from joining the TA as an officer, requesting an examination of the matter and a change in the policy which discriminated against women and to recruit women also along with the men in TA.

14. The response dated 8th September, 2015 of the respondents was emphatic, notifying the petitioner as follows :

> "*2. ...*"*as per para 6 of Appendix I of Territorial Army Act 1948 (Revised Edition 1976),* ***woman are not eligible for Territorial Army so far***."
>
> *(Emphasis by us)*

15. So far as para 6 of Appendix I is concerned, the petitioner has placed the same before us. Appendix I is actually the Territorial Army Act, 1948 and reference to para 6 is in fact to Section 6 of the statute which reads as follows :

"***6. Person eligible for enrolment*** *–* ***Any person*** *who is a citizen of India may offer himself for enrolment in the Territorial Army, and may,* ***if he satisfies the prescribed conditions****, be enrolled for such period and subject to such conditions as may be prescribed.*"

(Emphasis by us)

16. The petitioner appears to have also addressed a query dated 29th April, 2016 under the Right to Information Act, 2005 to the respondents. In response to the petitioner's query seeking eligibility criteria for TA for female candidates, the following information had been furnished by the CPIO, Indian Army :

"xxx	*xxx*	*xxx*
(h)	*Kindly provide the eligibility criteria for Territorial Army for female candidate.*	***Female candidates are entitled*** *for* ***enrolment/commissioning only in departmental TA units.*** *The* ***criteria*** *is as under :-* *(i) Age – 18 – 42 years.* *(ii) Medical Category – SHAPE-I* *(iii) Education Qualification –* *(aa) Officers – Graduation* *(ab) PBOR* *Matriculation with 45% marks.* *(iv) The candidate should also possess requisite technical qualification and should be recommended by the parent department.*
xxx	*xxx*	*xxx"*

(Emphasis by us)

Thus, as per this response, the prohibition to appointment of women to the TA is only with regard to infantry (non-departmental TA) units.

17. The respondents have also provided for grant of honorary commissions to industrialists, politicians and eminent personalities, as mentioned by the petitioner. This admission is contained in the counter affidavit. The respondents have stated that these honorary commissions are provided under the provisions of Para 31 of the *Regulations for the Indian Territorial Army* which states that "*High Government officials, officers of the Army, Air Force and Navy and private gentlemen of good social position may be granted honorary commissions in the Territorial Army upto the rank of 'brigadier' by the Central Government*". It is further stated that "*the purpose of granting honorary rank to an individual, is to recognize his service of high order to the Union of India*".

Thus grant of honorary commissions under para 31 of the *Regulations for the Indian Territorial Army* was also restricted to "*gentlemen*".

18. The respondents have placed before us a Corrigendum dated 22nd April, 2013 to the Territorial Army Regulation, 1948 (revised edition 1976) to para 31 by way of SRO 22 which shows that the restriction of grant of honorary commission to "*gentlemen of good social position*" was amended to read as "*persons (which term shall include both men and women) of good social position*". This amendment clearly shows that a conscious decision was taken by

the Indian Territorial Army Directorate to amend the policy to enable both men and women occupying high social position to be granted honorary commissions.

19. In the counter affidavit filed on record, an effort has been made to explain the prohibition contained in the aforenoticed advertisement (Annexure P1). In para 3 of the preliminary submissions, the respondents have stated that "*women can join and serve in Territorial Army in its Railway Engineer Regiments which is in consonance with existing policies of Govt. of India*".

20. This assertion is sought to be supported by the communication dated 2nd July, 1997 addressed by the Ministry of Defence, Government of India to the Chief of the Army Staff on the subject of induction of women into Railway Engineers Regiment (TA). This communication clearly notifies the Chief of Army Staff regarding the sanction accorded by the President of India for *"Commissioning/enrolling women into Railway Engineer Regiment (TA) amongst the women employees of the Department of Railways who volunteer to serve in the Departmental Units of the Territorial Army and are within the age group of 18 years to 42 years"*.

21. So far as the postings of such women is concerned, we extract hereunder para 3 of this communication dated 9th of July 1997 which reads as follows :

> "3. *The **women** so commissioned/enrolled **will only be appointed to work in posts tenable by the TA Component of the Departmental Territorial Army unit and will be granted rank/appointment** in accordance with the rules governing the grant of such rank/appointment to personnel enrolled in the Territorial Army.*"
>
> *(Emphasis supplied)*

22. So far as the explanation for the prohibition contained in the impugned Advertisement is concerned, the respondents have sought to explain the same in para 3 of the counter affidavit stating that the extracted prohibition "*was published for grant of commission in infantry units of ITA*". It is further stated in the counter affidavit that "*as on date commissioning in fighting arms in Indian Army, which comprises of Regular Army, Army reserves and Territorial Army, is restricted only to male citizens of India, and hence, the word '**male candidates**' was specified in the advertisement.*" It has further been stated in para 4 of the counter affidavit that "*women in ITA are not only granted commission as an officer in Railway Engineer Regiment as Engineer Officers, AMC officers, but are also permitted to seek enrolment as Other Ranks which, on date, is not allowed even in Regular Army/Indian Air Force/Indian Navy.*"

23. In the preliminary submissions made in the counter affidavit, the respondents have denied the petitioner's contention, that there was no scope for women to join the TA, as being factually incorrect.

24. So far as the entitlement for women to join the TA is concerned, it is stated that the respondents have however, restricted the eligibility of women to get commissioned in the Indian Territorial Army only into its Railway Engineer Regiments, as AMC officers and enrollment in other ranks which, according to them in consonance with the "*existing policies of the Government of India*". It is therefore, the clear stand of the government in the counter affidavit that women are not recruited into certain areas of the TA.

Judicial recognition of the greater role of women in all spheres of life

25. The prohibition to the recruitment of women in the present case is not the first instance of such a prohibition. Mr. Gautam Narayan, ld. *amicus curiae* has undertaken a careful analysis of prohibitions contained in the rules and policies of several statutory and non-statutory authorities and placed an outcome of the challenges to such discriminatory practices. We propose to briefly consider the same hereafter before we undertake an examination of the fact situation in the present case.

26. In the oft-cited judgment reported at ***(1979) 4 SCC 260, C.B. Muthamma, I.F.S. v. Union of India & Ors.,*** a challenge was laid by a senior member of the Indian Foreign Services complaining of hostile discrimination against women in the service. Rule 8 of the *Indian Foreign Service (Conduct and Discipline) Rules, 1961* which required a woman member of the service to mandatorily

obtain permission of the government, in writing, before her marriage was solemnized was assailed by the petitioner. This rule also prescribed that any time after the marriage, "***a woman member of the service may be required to resign from service***", if the government was satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service. On the petitioner's challenge to this rule as being violative of Articles 14 and 16 of the Constitution of India, the Supreme Court, in the judgment penned by *Krishna Iyer, J.* for the Bench, observed as follows :

> ***"6.*** *At the first blush this* ***rule is in defiance of Article 16****. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This* ***misogynous posture*** *is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom.* ***Freedom is indivisible, so is Justice****. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable."*
>
> ***7.*** *We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise* ***where the requirements of particular employment, the***

sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But <u>save where the differentiation is demonstrable, the rule of equality must govern</u>. …"

(Emphasis by us)

27. In the pronouncement reported at ***(2008) 3 SCC 1, Anuj Garg & Ors. v. Hotel Association of India & Ors.,*** the Supreme Court was concerned with a challenge to the Constitutional validity of Section 30 of the Punjab Excise Act, 1914 which prohibited employment of "*any man under the age of 25 years*" or "*any woman*" in any part of such premises in which liquor or intoxicating drugs were consumed by the public. The challenge had commenced by way of a writ petition, filed under Article 226 of the Constitution of India before a Division Bench of this court, in which the court had declared the statutory provision as *ultra vires* Articles 19(1)(g), 14 and 15 of the Constitution of India to the extent that it prohibited employment of any woman in any part of such premises, in which liquor or intoxicating drugs were consumed by the public. The decision was challenged before the Supreme Court, which, while repelling the challenge, upheld the judgment holding that prohibition from employment avenues in bars etc. was oppressive and violated the rights of the women. Some observations of the court which may have a bearing on the consideration in the present case deserve to be extracted *in extenso* and read thus :

"26.** When a **discrimination is sought to be made on the purported ground of classification, such classification

*must be **founded on a rational criteria**. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a multinational company. They are now widely accepted both in police as also army services.*

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Right to employment vis-à-vis security : competing values

***33.** The instant matter involves a **fundamental tension between right to employment and security**.*

***34.** The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. **Right to self-determination is an important offshoot of gender justice discourse**. At the same time, security and protection to carry out such choice or option specifically, and state of violence-free being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix.*

35. Privacy rights prescribe autonomy to choose profession** whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that the measures to safeguard such a guarantee of autonomy should not be so strong that the essence of the guarantee is lost. **State protection must not translate into censorship.

> ***36.*** *At the same time we do not intend to further the rhetoric of empty rights. Women would be as vulnerable without State protection as by the loss of freedom because of the impugned Act.* ***The present law ends up victimising its subject in the name of protection***. ***In that regard the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging*** *the* ***proportionality should be a standard capable of being called reasonable*** *in a modern democratic society.*
>
> ***37.*** *Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf.*
>
> ***38.*** *Also with the advent of modern State, new models of security must be developed. There can be a setting where the cost of security in the establishment can be distributed between the State and the employer.*
>
> *(Emphasis by us)*

28. Interestingly, the court also considered the stereotypes and cultural norms and the requirement of deeper judicial scrutiny in paras 41 and 42 in following terms :

> ***"<u>Stereotype roles and right to options</u>***
>
> ***41.*** *Professor Williams in The Equality Crisis: Some Reflections on Culture, Courts and Feminism published in 7 WOMEN'SRTS. L. REP., 175 (1982) notes issues arising where* ***biological distinction between sexes is assessed in the backdrop of cultural norms and stereotypes****. She characterises them as "hard cases". In hard cases, the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the*

oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. ***It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over****.*

42. *Therefore, one* ***issue of immediate relevance*** *in such cases is the* ***effect of the traditional cultural norms*** *as also the* ***state of general ambience in the society*** *which* ***women have to face while opting for an employment*** *which is otherwise completely innocuous for the male counterpart. In such circumstances the question revolves around the approach of the State."*

(Emphasis by us)

29. So far as the standard of judicial scrutiny is concerned, the Supreme Court observed as follows :

"<u>The standard of judicial scrutiny</u>

46. *It is to be borne in mind that* ***legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. 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. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.*

47. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be

compromised in the name of expediency until and unless there is a compelling State purpose. *Heightened level of scrutiny is the normative threshold for judicial review in such cases.*

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50. *The* ***test to review*** *such a protective discrimination statute would entail a* ***two-pronged scrutiny****:*

(a) the legislative interference (induced by sex discriminatory legalisation in the instant case) should be justified in principle,

(b) the same should be proportionate in measure.

51. *The court's task is to* ***determine whether the measures furthered by the State in the form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy, equality of opportunity, right to privacy, et al****. The bottom line in this behalf would be a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis. In fine, there should be a reasonable relationship of proportionality between the means used and the aim pursued."*

(Emphasis by us)

In conclusion, the Supreme Court held that the impact of the impugned Section 30 resulted in an invidious discrimination perpetrating sexual differences and upheld the judgment of this court.

30. Interestingly, before us the respondents have not even espoused the oft-used excuse of "*protection*" for the prohibition for recruitment of women to the TA.

31. Certain practices in the Air Force and Army were the subject of contests before this court, which were dealt by way of a judgment dated 12th March, 2010 rendered in W.P.(C)No.1597/2003 ***Babita Puniya v. The Secretary & Anr.*** and connected writ petitions which came to be reported at ***(2010) 168 DLT 115 (DB)***. In this judgment, this court had ruled on a challenge to the denial of permanent commission only to women officers, who were commissioned into the Air Force and the Army in the Short Service Commission. The court had, *inter alia*, observed that the women officials had undertaken the same training of one year as the male permanent commissioned officers whereas 10 batches of male short commissioned officers who had undergone training of much lesser period, of only three months, in the Air Force Administrative College were considered and granted permanent commission in the same period, when women short service commissioned officers continued to work in that capacity. So far as the areas of operation of Air Force where women should be employed was concerned, the court observed that it being a policy decision, this was an issue which was not for the court to decide. Furthermore, it was observed that the policy decision not to offer permanent commission to Short Service Commissioned officers across the board for men and women being on parity and

as part of manpower management exercises, was a policy decision which was not required to be interfered with. The court however, observed that the questions of suitability or requirement were not in doubt and that the advertisement issued by the respondents held out a promise to women Air Force officers for grant of permanent commission depending on two factors which were vacancy, position and suitability of the officer. The officers had thus joined the Air Force on the promise of these terms of recruitment apart from other conditions of service and the respondents could not introduce an alien element other than these two elements. It therefore, ruled that the Short Service Commissioned officers of the Air Force who had opted for permanent commission and were not granted permanent commission but granted extension of Short Service Commissions, as well as those of the Army, were entitled to permanent commission at par with male Short Service Commissioned officers with all consequential benefits.

32. In the judgment reported at ***(2015) 1 SCC 192, Charu Khurana & Ors. v. Union of India & Ors.,*** the Supreme Court was concerned with gender discrimination in the film industry. The Cine Costume Make-Up Artists and Hair Dressers Association in Maharashtra had made bye-laws prohibiting women to work as make-up artists and only permitting them to work as hair dressers. The petitioner, who was a trained make-up artist and hair stylist, was rejected a membership card as a make-up artist resulting in the challenge. In this seminal decision of the Supreme Court, it was

held that prohibiting women from working as make-up artists offended Articles 14, 15, 19(1)(g) and 21 of the Constitution of India. The court held as follows :

> ***"52.*** *Thus, the aforesaid decision in Vishaka case [**Vishaka v. State of Rajasthan**, (1997) 6 SCC 241 : 1997 SCC (Cri) 932] unequivocally recognises **gender equality as a fundamental right.** The **discrimination** done by the Association, a trade union registered under the Act, whose rules have been accepted, cannot take the route of the discrimination **solely on the basis of sex.** It really plays foul of the statutory provisions. It is **absolutely violative of constitutional values and norms.** If a female artist does not get an opportunity to enter into the arena of being a member of the Association, she cannot work as a female artist. It is inconceivable. The likes of the petitioners are given membership as hair dressers, but not as make-up artist. There is no fathomable reason for the same. It is gender bias writ large. It is totally impermissible and wholly unacceptable."*

33. The court finally concluded as follows :

> ***"57.*** *It is really shocking that Respondent 5 has maintained such an adamantine attitude. In ordinary circumstances, the Registrar would have been directed to cancel the registration but we do not intend to do so. As the clauses relating to the membership and the domicile, namely, Clauses 4 and 6, are violative of the statutory provisions and the constitutional mandate and taking further note of the fact that the Registrar would have been, in normal circumstances, directed by us requiring the trade union to delete the clauses, we **quash the said clauses and further direct that the petitioners shall be registered as members of the fifth respondent** within four weeks. It will be the obligation of the Registrar of Trade Unions to see that they are registered as make-up artists. If the Association would create any hurdle, it will be*

obligatory on the part of the police administration to see that the female make-up artists are not harassed in any manner whatsoever, for harassment of a woman is absolutely unconscionable, unacceptable and intolerable. Our directions close the matter as far as the State of Maharashtra is concerned."

(Emphasis by us)

34. Lastly, our attention is drawn to the pronouncement dated 4th September, 2015 in *W.P.(C)No.7336/2010,* ***Annie Nagaraja & Ors. v. Union of India & Ors.*** and connected writ petitions, reported at ***2015 SCC OnLine Del 11804***, whereby this court decided six writ petitions filed by 70 women officers who had joined Indian Navy as Short Service Commissioned officers in different branches which includes Education, Logistics and ATC seeking entitlement to permanent commission. In para 32 of the judgment, the court noted that the petitioners along with male officers had undertaken the same kind of training but nevertheless were denied permanent commission although the men were granted the permanent commission with no special merit except for the fact that they were males. It was held that this tantamounted to gender discrimination. The court held that the 2008 policy of the respondents which took no care to offer permanent commission to the women officers in the branches where these officers had worked as Short Service Commissioned officers for 14 years, was irrational and a clear case of discrimination and granted relief to the petitioners.

35. Article 14 of the Constitution of India provides that the State shall not deny to any person equality before the law or equal protection of laws within the territory of India. The State is precluded from discriminating against any citizens on grounds only of religion, caste, sex, place or any of them under Article 15(1). Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

36. We may usefully refer to, what, *Lord Denning*, in his book "*Due Process of Law*", has observed about women in the following words:

> *"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom – to develop her personality to the full as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals."*

37. The aforenoticed judicial pronouncements effectuate these values and rights.

38. In this regard, useful reference may also be made to the pronouncement of the Supreme Court reported at ***(2003) 6 SCC 277 Air India Cabin Crew Assn. v. Yeshaswinee Merchant & Ors*** in the following terms:

> ***"39.*** *Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Clauses (1) and (2) of Article 15 prohibit the State from discriminating any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 which contains the fundamental right of equality of opportunity in matters of public employment, by sub-clause (2) thereof guarantees that:*
>
> > *"16. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."*
>
> ***40.*** *Article 16(2) prohibits discrimination only on sex but clause (3) of Article 15 enables the State to make "any special provision for women and children".* ***Articles 15 and 16 read together prohibit direct discrimination between members of different sexes if they would have received the same treatment as comparable to members of the opposite gender****. The two Articles do not prohibit special treatment of women.* ***The constitutional mandate is infringed only where the females would have received same treatment with males but for their sex.***
>
> ***41. In English law "but-for-sex" test has been developed to mean that no less favourable treatment is to be given to women on gender-based criterion which would favour the opposite sex and women will not be deliberately selected for less favourable treatment because of their sex…****"*
>
> *(Emphasis supplied)*

39. The established principles governing Articles 14, 15 and 16 came be to succinctly summarized by the Supreme Court in the

pronouncement reported at ***(2003) 8 SCC 440 Vijay Lakshmi v. Punjab University*** as follows:

> *"**4.** ...we would refer to established propositions of law interpreting Articles 14 to 16, which are:*
>
> *• **Article 14 does not bar rational classification.***
>
> *• **Reasonable discrimination between female and male for an object sought to be achieved is permissible**.*
>
> *• **Question of unequal treatment does not arise if there are different sets of circumstances**.*
>
> *• Equality of opportunity for unequals can only mean aggravation of inequality.*
>
> *• **Equality of opportunity admits discrimination with reasons and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus with constitutionally permissible objects.** It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. Equality means the relative equality, namely, the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required (Re St. Stephen's College v. University of Delhi[(1992) 1 SCC 558] .)*
>
> *• **Sex is a sound basis for classification.***
>
> *• Article 15(3) categorically empowers the State to make special provision for women and children.*
>
> *• Articles 14, 15 and 16 are to be read conjointly."*

40. Therefore it emerges that the state may be empowered to discriminate reasonably, provided such discrimination is for an object which is sought to be achieved.

41. The writ petitioner relies also on Article 39(a) in Part IV of the Constitution of India dealing with the Directive Principles of State Policy which provides that the State shall direct its policies towards securing the citizens, men and women equally, for their rights to adequate means of livelihood.

42. We may notice the landmark pronouncement reported at ***AIR 1974 SC 555, E.P. Royappa v. State of Tamil Nadu & Anr.*** wherein it was held by *Bhagwati, J.,* in his separate but concurring view, thus :

> ***"85.*** *... **Article 16** embodies the fundamental guarantee that there shall be **equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State**. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The **basic principle** which, therefore, **informs both Articles 14 and 16 is equality and inhibition against discrimination**. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot*

countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. ..."

(Emphasis by us)

43. The writ petitioner, has also contended that the discrimination being complained of also borders on human rights violation. In this respect, we may refer to the pronouncement of the Supreme Court reported at ***(1996) 3 SCC 545, Valsamma Paul (Mrs) v. Cochin University*** where it was remarked that *"...All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights..."*

44. The challenge before us has to be examined in the light of these well settled principles.

<u>The respondent's stand that the prohibition was as per the extant policy which was as per the Territorial Army Act, 1948</u>

45. As noted above, in the response dated 8th of September 2015 to the petition, the respondents had informed the petitioner that the present policy was as per para 6 (i.e. Section 6 of the Territorial Army Act, 1948). This position stands reiterated in the counter affidavit. The respondents have further stated that amendment in this policy would require an amendment in the Act itself. It therefore, becomes necessary to examine the statutory position as to whether there is actually any statutory bar to the recruitment of women in the Territorial Army.

46. Mr. Gautam Narayan, Advocate, who appears as *amicus curiae*, has painstakingly taken us through the statutory scheme. It has been emphasized that the statutory interpretation must be in consonance with today's day and age given the fact that a period of more than almost 70 years have lapsed since the 1948 when the enactment was brought into force.

47. We have, with the assistance of Mr. Gautam Narayan, ld. *amicus curiae,* examined the statutory scheme. Section 6 of the said statute extracted above sets out the contentions for eligibility for enrollment. Section 6 clearly makes eligible any "*person*" who is a citizen of India. The respondents appear to be relying on the statutory reference to "*he*" in the later portion to the effect that "*if he satisfies the prescribed conditions*".

48. So far as interpretation of the expression "*he*" is concerned, reference has to be made to the provisions of Section 13 of the General Clauses Act, 1897 which readss thus :

> *"**13 Gender and number**. —In **all Central Acts and Regulations**, unless there is anything repugnant in the subject or context,—*
>
> *(1) **words importing the masculine gender shall be taken to include females; and***
>
> *(2) words in the singular shall include the plural, and vice versa."*
>
> *(Emphasis by us)*

49. Clearly the use of expression "*he*" in the later part of Section 6 of the Territorial Army Act, 1948 has to be reasonably interpreted to include females. In the opening words, Section 6 uses the compendious expression "*any person*". It is important to note that the respondents do not suggest that there is anything repugnant to the context if such an interpretation is to be adopted.

50. The view we are taking is also supported by the unequivocal declaration made in the handout and brochure prepared and circulated by the respondents which includes any civilian can seek recruitment in the Indian Territorial Army.

51. At this stage, we may usefully also advert to following certain provisions of Section 6A of the Territorial Army Act, 1948 which imposes liability upon certain persons to render compulsory service into the TA :

*"**6A. Liability of certain persons for compulsory service in the Territorial Army.—(**1) Without prejudice to the provision contained in section 6, **every person employed under the Government or in a public utility service** who has attained the age of twenty years but has not completed the age of forty years **shall**, subject to the other provisions contained in this section and subject to such rules as may be made in this behalf, **be liable, when so required to do, to perform service in the Territorial Army**.*

xxx xxx xxx

(4) Every person liable to perform service under sub-section (1) shall, if so required by the prescribed authority, be bound to fill up such norms as may be prescribed and sign and lodge them with the prescribed authority within such time as may be specified in the requisition.

(5) The prescribed authority may require any person incharge of the management of a public utility service to furnish within such time as may be specified in the requisition such particulars as may be prescribed with respect to persons employed under him, who may be liable to perform service under sub-section (1)

xxx xxx xxx

*Explanation.—For the purposes of this section, the **expression "person employed under the Government** or in a public utility service" **shall not include**—*

*(a) **a woman**;*

xxx xxx xxx"

(Emphasis by us)

A plain reading of the above statutory provision manifests that the Legislature has consciously and expressly excluded women

from inclusion within the ambit of the expression "*person*" by way of a specific explanation to the statutory provision.

52. The stand of the respondents that the policy of exclusion of women from seeking recruitment in all branches in the TA, is based on or informed by the provisions of Territorial Army Act, 1948, is therefore, clearly belied upon the complete reading of the statutory scheme, more specifically of Section 6, which contains no such exclusion. Unlike the specific exclusion of women from the application of Section 6A, there is clearly no prohibition at all under Section 6 of the statute which provides the eligibility of enrolment.

53. The above position is also manifested from the schemes of other legislations relating to the armed forces. Mr. Gautam Narayan, ld. *amicus curiae* has carefully drawn our attention to the statutory provisions governing the Indian Army, Air Force and Navy. We find that Section 12 of the Army Act, 1950; Section 12 of the Air Force Act, 1950 as well as Section 9 of the Indian Navy Act, 1957 contain specific and express provisions excluding women from eligibility for enrolment. In this regard, it may be useful to advert to these provisions of the statute which read thus :

> ***The Army Act, 1950***
>
> *"**12. Ineligibility of females for enrolment or employment**. - No female shall be eligible for enrolment or employment in the regular Army, except in such corps, department, branch or other body forming part of, or attached to any portion of, the regular Army as the Central*

Government may, by notification in the Official Gazette, specify in this behalf:

Provided that nothing contained in this section shall affect the provisions of any law for the time being in force providing for the raising and maintenance of any service auxiliary to the regular Army, or any branch thereof in which females are eligible for enrolment or employment."

The Air Force Act, 1950

*"**12. Ineligibility of females for enrolment or employment**.—No female shall be eligible for enrolment or employment in the Air Force, except in such corps, department, branch or other body forming part of, or attached to any portion of, the Air Force as the Central Government may, by notification, specify in this behalf:*

Provided that nothing contained in this section shall affect the provisions of any law for the time being in force providing for the raising and maintenance of any service auxiliary to the Air Force or any branch thereof in which females are eligible for enrolment or employment"

The Navy Act, 1957

***"9. Eligibility for appointment or enrolment**.—(1) No person who is not a citizen of India shall be eligible for appointment or enrolment in the Indian Navy or the Indian Naval Reserve Forces except with the consent of the Central Government.*

Provided that nothing in this section shall render a person ineligible for appointment or enrolment in the Indian Navy or the Indian Naval Reserve Forces on the ground that he is a subject of Nepal.

(2) No woman shall be eligible for appointment or enrolment in the Indian Navy or the Indian Naval Reserve

Forces except in such department, branch or other body forming part thereof or attached thereto and subject to such conditions as the Central Government may, by notification in the Official Gazette, specify in this behalf."

54. Clearly, the stand of the respondents, reading an implied bar into the statute justifying an extant policy of exclusion, is premised on misreading of Section 6 of the Territorial Army Act and has to be rejected.

Whether the advertisement invites applications only to infantry units of the TA?

55. The respondents have pressed the stand in the counter affidavit and before us that the impugned advertisement is confined to recruitment to infantry units of the TA. As discussed above, a bare reading of the Act suggests that there is no bar to recruitment of women in departmental units.

56. We have extracted the relevant provisions of the advertisement above. It nowhere states that the applications are invited for recruitment only to infantry units of the TA. There is no clarification at all in the advertisement that women may seek recruitment to departmental units of the TA. Therefore, the stand taken in the counter affidavit and in the oral submissions by Mr. Amit Mahajan, Central Government Standing Counsel for the Union of India - respondent no.1, that the advertisement relates only to infantry units of the TA is contrary to the document. The advertisement invites applications to all battalions of the Territorial

Army and imposes an absolute prohibition to the commissioning and recruitment of women into it.

Whether there is any rationale or basis to justify the prohibition for recruitment/enrolment/commissioning of women?

57. The issue of the prohibition for commissioning of women into the non-departmental units can be examined through yet another pertinent aspect, which has been also placed before us. As noted above, no differentiation or basis for justifying the prohibition has been placed before us.

58. So far as the differentiation in the job requirements of the departmental battalions and non-departmental battalions are concerned, even the job profile of the battalions has not been placed before us. However, we have before us the prescription of the training, which a candidate has to undergo upon enrolment.

After setting out the eligibility conditions, the impugned advertisement itself contains the details of the training which a candidate has to undergo and prescribes as follows :

"xxx xxx xxx
• ***EMBODIMENT FOR TRAINING***
• ***One month basic training*** *in the* ***first year*** *of commission.*
• ***Two months annual training camp every year*** *including the first year.*
• ***Three months Post Commissioning training within first two years*** *at IMA Dehradun.*
• *Date of written Exam* : ***02 Aug 2015***
xxx xxx xxx"

(Emphasis by us)

Therefore, not only does the advertisement not draw any distinction between applications for departmental and non-departmental battalions but it also does not prescribes different eligibility conditions nor any differentiation even in the training which is imparted to all candidates, male or female. The discrimination against entry of women into the Territorial Army is also not supported by the training regime.

Submission that exclusion of women from roles in the Territorial Army is irrational

59. The respondents have placed no material at all to support the prohibition for not appointing women in the non-departmental battalions. There is not an iota of empirical or statistical data or any scientific study or analysis produced by the respondents to justify such policy prohibiting partial recruitment of women as per the counter affidavit, or, the total prohibition as manifested by the impugned advertisement.

60. An extensive research appears to have been undertaken by Mr. Gautam Narayan, ld. *amicus curiae* which deserves to be noticed. The ld. *amicus curiae* has placed before us a study undertaken by the Canadian Armed Forces being the "*SWINTER Trials"* (an acronym for *"Service Women In Non Traditional Environment and Roles"*) for a five year period between 1980-84 with the object of collecting verifiable and quantifiable data to ascertain problems (physical, psychological and social) that might arise if all military operations were open to women without any

restrictions. The study also attempted to ascertain as to whether the operational effectiveness of the armed forces would be affected, if women were to be recruited. After a detailed analysis and assessment, eventually in the year 1989, Canada allowed women to be recruited in combat roles.

61. In support of the submission that the recruitment of women in combat roles does not actually impact operational effectiveness of the armed forces, Mr. Gautam Narayan, ld. *amicus curiae* has placed the following tabulation of countries which allow women to serve even in combat roles in its defence forces, along with the year from which they were so allowed :

"Sr.No.	***Countries***	***Year from which women were allowed in combat roles***
(i)	*North Korea*	*1950*
(ii)	*Netherlands*	*1979*
(iii)	*Sweden*	*1989*
(iv)	*Canada*	*1989*
(v)	*Denmark*	*1988*
(vi)	*Norway*	*1985*
(vii)	*Spain*	*1999*
(viii)	*Eritrea*	*1998*
(ix)	*France*	*1998*
(x)	*Israel*	*1995*
(xi)	*Finland*	*1994*
(xii)	*Lithuania*	*2000*
(xiii)	*Germany*	*2000*
(xiv)	*New Zealand*	*2001*
(xv)	*Romania*	*2002*
(xvi)	*Poland*	*2004*
(xvii)	*Australia*	*2011*

(xviii)	*Belgium*	*2010*
(xix)	*Estonia*	*2013*
(xx)	*United States*	*2015*
(xxi)	*United Kingdom*	*2016*
(xxii)	*Brazil*	*2016"*

62. So far as the armed forces in India are concerned, our attention is drawn to a news report dated 21st November, 2017 titled "*SALUTE TO THE INDIAN SOLDIER*" which refers to three women becoming fighter pilots in the Indian Air Force.

63. Given our finding that the stand in the counter affidavit and action of the respondents in imposing the prohibition against entry of women into the Territorial Army by way of the impugned advertisements have no statutory support, has no factual basis at all and is irrational, it is not necessary for us to deal with the issue as to whether prohibition of engagement in the combat roles would be justified or not.

Development of the law in other jurisdictions

64. A careful evaluation of the military service of women in other jurisdictions has been placed by Mr. Gautam Narayan, *amicus curiae* before us which manifests that more and more countries have moved away from positions of total prohibition/exclusion of women to permitting recruitment of women even in combat roles in the Armed Forces. The tabulation extracted above would show that approximately 22 countries permit recruitment of women even in combat roles.

65. In the pronouncement by the Supreme Court of the United States reported at ***453 US 57 (1981), Rostker v. Goldberg***, the court was considering the challenge to the Military Selective Service Act which required registration for possible military service of males but not females, the purpose of the registration being to facilitate any eventual conscription under the Act. In 1980, the President of the United States of America had recommended that the Congress amend the Act to permit the registration and conscription of women as well as men. The Parliament declined to amend the Act to permit registration of women. A lawsuit was brought by several men challenging the Act's constitutionality. The three-judge District Court ultimately held that the Act's gender based discrimination violated the "*Due Process Clause*" of the Fifth Amendment and enjoined registration under the Act. The opinion of the court was delivered by *Rehnquist, J.*, in which *Burger, C.J.*, and *Stewart, Blackmun, Powell and Stevens, JJ.* joined. *White, J.* and *Marshall, J.*, filed dissenting opinions, in which, *Brennan, J.*, joined. It was held by the majority that the Congress had acted well within its Constitutional authority when it authorized the registration of men and not women under the Military Selective Service Act and that non-registration of women for possible military service under the enactment was not violative of the Fifth Amendment.

66. In yet another determinative decision reported at ***518 US 515 (1996) : 1996 SCC OnLine US SC 74, United States v. Virginia et***

al., the United States Supreme Court was considering the decision rendered by the Court of Appeals for the Fourth Circuit laying down that the exclusion of women from the educational opportunities by the Virginia Military Institute (VMI) was violative of the equal protection to women. In 1990, prompted by a complaint filed with the Attorney General by a female high school student seeking admission to the Virginia Military Institute (VMI), the United States sued the Commonwealth of Virginia and VMI, alleging that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment. The VMI was the sole single sex school amongst Virginia's public institutions of higher learning with the mission of producing "*Citizen-Soldiers*", men prepared for leadership in civilian life and in military service. The District Court had ruled in VMI's favour. The Fourth Circuit reversed and ordered Virginia to remedy the Constitutional violation. In response, Virginia proposed a parallel program for women. The District Court found that Virginia's proposal satisfied the Constitution's equal protection requirement, and the Fourth Circuit affirmed. The appeals court deferentially reviewed Virginia's plan and determined that provision of single-gender educational options was a legitimate objective.

67. The opinion of the United States Supreme Court was delivered by *Ginsburg, J.* in which *Stevens, O'Connor, Kennedy, Souter and Breyer, JJ.* joined. *Rehnquist, C.J.*, filed a concurring opinion while *Scalia, J.,* filed a dissenting opinion. The Supreme

Court considered its current directions for cases of official classification based on gender pointing out that the court must determine : (i) Whether the proffered justification is "*exceedingly persuasive*". The burden of justification is demanding and it rests entirely on the State; (ii) The State must show "*at least that the challenged classification serves 'important governmental objectives and that the discriminatory means employed' are substantially related to the achievement of those objectives*"; (iii) The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation; (iv) It must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

It was held that Virginia has shown no "*exceedingly persuasive justification*" for excluding all women from the "*Citizen-Soldiers*" training afforded by the VMI.

68. In ***442 US 256 (1979) : 1979 SCC OnLine US SC 108 Personnel Administrator of Massachusetts v. B Feeney,*** the United States Supreme Court held as follows:

> ***"22.*** *... **Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.** Caban v. Mohammed, 441 U.S. 380, 398, 99 S.Ct. 1760, 1771, 60 L.Ed.2d 297 (STEWART, J., dissenting). **This Court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives**...**and are in many settings unconstitutional**. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225; Frontiero v.*

Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583; Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514; Craig v. Boren, supra; Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270; Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306; Caban v. Mohammed, supra. ***Although public employment is not a constitutional right,*** *...* ***and the States have wide discretion in framing employee qualifications****, ...****these precedents dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.****"*

(Emphasis by us)

69. In these terms, it is apposite to refer to another decision of the United States Supreme Court reported at ***441 US 380 (1979) : 1979 SCC OnLine US SC 72 Caban v. Mohammed*** where ruling on gender based distinctions it was held thus:

*"****14. Gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause****. Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976). See also Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971)..."*

(Emphasis by us)

70. In a decision of the United States District Court for the District of Columbia reported at ***455 F. Supp. 291 (D.D.C. 1978), Owens v. Brown,*** the court decided that the absolute prohibition that prevents the Secretary from exercising the discretion to assign

female personnel to duty at sea is violation of the Fifth Amendment of the Constitution.

71. Mr. Gautam Narayan, *amicus curiae* has also placed a decision of the Supreme Court of Israel reported at ***HCJ 4541/94, Alice Miller v. Minister of Defence*** which held that the budgetary and planning considerations did not justify a general policy of rejecting all women from being trained as Air Force pilots.

72. In a decision of the Court of Justice of the European Communities in case C-285/98, ***Kreil v. Germany***, it was decided that on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes the application of national provisions such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military music services.

73. Yet another decision of the Court of Justice of European Communities in case C-273/97 reported at ***(1999) ECR I-7403, Angela Sirdar v. Army Board,*** has been placed before us by Mr. Gautam Narayan, *amicus curiae*. In this decision, the court upheld the exclusion of women from the Royal Marines to be justified by reason of the nature of activities in question and the context in which they were carried out.

74. In the decision reported at ***(1989) C.H.R.D. No.3, Gauthier v. Canadian Armed Force,*** the Canadian Human Rights Tribunal held that there is no risk of failure of performance of combat duties by women sufficient to justify a general exclusionary policy in respect of their entry to the Canadian Armed Forces. A policy of this sort cannot constitute a *bonafide* constitutional requirement and is deemed to be discriminatory on the grounds of sex.

75. The above decisions would support the submissions made on behalf of the petitioner by Mr. Gautam Narayan, Advocate, appearing as *amicus curiae* as well as Dr. Charu Wali Khanna, Advocate that the prohibition in the advertisements as well as the claimed policy to deny recruitment to women in non-departmental units of the Territorial Army is based on no rationale and is completely unjustified and arbitrary.

Conclusion

76. Women are eligible for recruitment and appointment to the Territorial Army under Section 6 of the Indian Territorial Army Act, 1948.

77. The respondents have failed to show any decision of policy, let alone binding policy, enabling them to deny opportunity to the women to serve in all units of the TA. No rationale has been offered to justify or sustain the action of the respondents enforcing a bar against recruitment of women through their advertisements.

78. Even as per the Brochure printed and circulated by the respondents, all gainfully employed civilians, irrespective of their gender, who are graduates between 18 to 42 years are eligible for applying for consideration for appointment to the TA.

79. So far as the prohibition notified in the Advertisements with regard to employment of women is concerned, the same is not supported either by statute or by any policy document placed on record.

80. The impugned advertisements imposing a blanket bar on appointment of women to both departmental and non-departmental battalions of the TA without any credible, reasonable or compelling justification for imposing such restrictions. The restriction of enrolment of women contained in the impugned advertisements and the claimed policy is neither reasonable nor rational and has to be quashed.

Result

81. It is declared that '*any* person' mentioned in Section 6 of the Territorial Army Act, 1948 includes both males as well as females.

82. The impugned advertisements to the extent they exclude women from appointment to the Territorial Army and the claimed policy in this regard are *ultra vires* of Articles 14, 15, 16 and 19(1)(g) of the Constitution of India and are hereby quashed.

83. The writ petition is allowed in the above terms.

84. We record our deep appreciation for Mr. Gautam Narayan, *Amicus Curiae* for the valuable assistance rendered to this court.

85. In view of the above, CM No. 44852/2016 does not survive for adjudication and is hereby disposed of.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

JANUARY 05th, 2018/aj