CASE NO.:
Appeal (civil) 4570 of 2002
Appeal (civil) 4581 of 2002
Appeal (civil) 4584-92 of 2002
Appeal (civil) 4571-78 of 2002
Appeal (civil) 4579-80 of 2002
Appeal (civil) 4582-83 of 2002

PETITIONER:
Air India Cabin Crew Association
Air India Officers Association & Anrs.
Air India Ltd.
Union of India
Kanwarjeet Singh & Ors.
Rani Anthony & Ors

RESPONDENT:
Vs.
Yeshawinee Merchant & Ors
Air India Ltd. & Ors.
Air India Hostesses Asson. & Ors
Air India Hostesses Assn. & Ors
Air India Hostess Assn.& Ors.
Air India Hostess Assn. & Anrs.

DATE OF JUDGMENT: 11/07/2003

BENCH:
Doraiswamy Raju & D.M. Dharmadhikari

JUDGMENT:

J U D G M E N T

Dharmadhikari J.

This batch of appeals has been filed against the Division Bench judgment of the Bombay High Court dated 20-23.8.2002.

In a batch of petitions filed by respondents Air India Air hostesses Association and its members (shortly referred hereinafter as the respondent Association), the High Court of Bombay has held that the age of retirement from flying duties of Air hostesses at the age of 50 years with option to them to accept post for ground duties after 50 and up to the age of 58 years is discrimination against them based on sex which is violative of Articles 14,15 & 16 of the Constitution of India as also Section 5 of the Equal Remuneration Act, 1976 (for short the ER Act) and contrary to the mandatory directions issued by the Central Government under Section 34 of the Air Corporations Act, 1953(for short Act of 1953).

On such declaration of retirement age of air hostesses from flying duties as discriminating compared to their male counterparts working with them on board of Air craft, the High Court went further in passing an alleged consensual order based on proposals in writing given by the employer Air India which was alleged to have been accepted by other parties before the High Court. The operative part of the impugned judgment of Bombay High Court by which several reliefs were granted to the respondent association, needs reproduction:-

(i) "The impugned letter of the 3rd respondent dated 24th December 1989 and circulars issued by Air India dated 23rd March 1990, 2nd March 1990 and 5th August 1991 as well as

office order dated 12th January 1993 are hereby quashed and set aside ;

(i) Air India is directed to implement the directive dated 16th October, 1989 issued by the Union of India by permitting the petitioners to perform flying duties until they attain the retirement age of 58 years subject to medical fitness and weight check and further subject to the measures suggested by Air India and reproduced earlier in this Order;

(ii) Air India is directed to pay to the pettioners the differential amount of salary from the date of grounding till the date of resumption of flight duties and 50% of the compensatory allowances as per column 9 of the proposal marked 'x' to the air hostesses who were grounded prior to 31st December 1997 and 30% of the allowances for the air hostesses who were grounded on or after Ist January 1997;

(iii) Air India is directed to comply with the above directions within a period of 12 weeks.

(iv) Air India is directed to take steps to refix seniority of the cabin crew in accordance with this order and complete the work of refixation of seniority within 24 weeks;

(v) Air India is directed to take steps to amend clause 30(1)(c) of the Certified standing orders in the light of the directions given by this Court;

(vi) all Awards and settlements entered into between the management of Air India and the unions of cabin crew to stand modified to the extent they conflict with this order;

(vii) Air hostesses will be entitled to the benefit under section 192 (2A) read with section 89 of the Income Tax Act with regard to the amounts paid in arrears".

The consensual order recorded by the High Court in its judgment on the conditional proposals made by the employer Air India and alleged to have been accepted by some of the employees and their Associations which were parties before the High Court also needs reproduction:-

"As indicated by us at the outset that Air India has agreed to increase the flying age of air hostesses to 58 years subject to certain measures propsed by Air India, the proposal to that effect in writing was put on record by the learned counsel for Air India. The same was discussed during the course of arguments and finally a consensus has been reached on the following:-

(i) Order of this Court be confined only to such members of the cabin crew of both sexes recruited prior to october 1997;

(ii) There shall be total interchangeability of job functions on board the air craft and flexibility of working positions shall be at the discretion of the management.

(iii) There shall be total parity between the two cadres of air hostesses and flight pursers and all vestiges of distinctions be brought to an end;

(iv) The inter-se seniority between the two cadres shall be worked out as follows:-

a) The seniority of male and female cabin crew will be in accordance with their date of joining;

b) If in the same grade the female cabin crew is senior to a male cabin crew even though her date of entry into Air India is later than that of the male cabin crew, the grade and basic salary of the female cabin crew will be frozen till such time as the male counter part catches up with her

and is placed senior to her as per his date of joining;
c) If a male cabin crew is in a lower grade than a female cabin crew despite the male cabin crew having joined Air India at an earlier date, the grade and basic salary of the female cabin crew will be frozen till such time as the male cabin crew is promoted and becomes senior to the female cabin crew as per his date of joining;
d) In cases covered by clause (b) and (c) above, the basic salary and grade of the female cabin crew shall remain frozen till such time as the male cabin crew becomes senior to the female cabin crew or for a period of two years whichever is less;
e) In situations where the female cabin crew is senior to the male cabin crew, where the date of joining is the same, the existing relative seniority will remain undisturbed;
f) Male/Female cabin crew who have been down graded due to disciplinary action, will continue with the handicap;
g) Male/Female cabin crew who have been refused promotions will also continue with the handicap, and
h) Male/Female cabin crew who are on leave without pay, the number of days will be deducted whilst fixing their seniority.

(v) The hierarchy on board the air craft will be based on seniority irrespective of sex;

(vi) Special benefits which are being given to air hostesses at present, like early retirement and all benefits arising out of early retirement, shall no longer be continued;

(vii) The bar loss compensation will be paid to only such cabin crew (both workmen and executive) as are at present in receipt of the same and to no other cabin crew;

(viii) All cabin crew (both workmen and executive) shall have to undergo annual medical examination after the age of 35 years and shall also be subject to weight checks at all times irrespective of sex. Provided further that in the case of air hostesses who have been grounded need not have to undergo medical tests, weight checks, safety and refresher training;

(ix) All air hostesses shall have to exercise a one time irrevocable option with one month from the date of the receipt of intimation given in that behalf by Air India to decide whether they wish to retire at the age of 50 years or to continue to work in Air India and fly as air hostesses till the retirement age of 58 years. To achieve parity, a similar option will also be offered to the male cabin crew as a one time exercise. No cabin crew as one time exercise. No cabin crew will be eligible for ground jobs except where the cabin crew is grounded by the management due to lack of medical fitness.

(x) No member of the cabin crew, male or female joined after October 1997 will be allowed to claim bar loss compensation.

The impugned judgment of the Bombay High Court has been assailed by the Air India Officers Association who has sought leave to appeal against the judgments being adversely affected in their seniority and promotional prospects by the passing of alleged consensual order recorded in the impugned judgments. Majority of air hostesses of the workmen category, whose terms and conditions of service including age of retirement is governed by agreements and settlements entered into between them with the employer under the Industrial Law, are also aggrieved by the judgment. They are

appellants before us through Air India Cabin Crew Association [for short 'AICCA'] which has membership both of male and female employees working as cabin crew. Appeals have also been preferred separately by Employer Air India, Union of India and some of the air hostesses individually. Learned Senior Counsel appearing for the appellants addressed separate arguments and highlighted the patent illegalities on merits and procedure committed by the High Court.

Before dealing with the several contentions advanced on behalf of the appellants before us, it would be necessary to give the factual and legal background in which the present dispute by the air hostesses represented by respondent association on the question of retirement from flying duties has been raised.

Two Corporations in the name of Air India (engaged in international flights) and Indian Air lines (engaged in domestic flights)were established under the Air Corporations Act 1953. Section 45(2)(b) enables the Corporation established under the Act to frame regulations laying down terms and conditions of service of its officers and employees. After the Corporation was formed, Air India by regulation 46(1) fixed the retirement age of Air hostesses as 30 years. By regulation 47, General Manager was empowered to extend the retirement age to 35 years for the Air hostesses who are found to be medically fit. This retirement age was fixed by the two National Industrial Tribunals which were set up to determine conditions of service of employees of the two Corporations. Those tribunals were presided over by Mr. Justice Khosla and Mr. Justice Mahesh Chandra.

In the year 1972 the Air Corporation Employees Union raised the dispute of retirement age of air hostesses in Indian Air lines. A settlement was reached between employer and employees under which General Manager's power to extend the retirement age of unmarried and medically fit air hostesses was increased from 35 to 40. In 1972 Justice Mahesh Chandra Award was given on the basis of dispute referred by the Central Government concerning the service conditions of workmen of Indian Airlines. The employees' Union of Air India were permitted to be impleaded as a party. The employer Air India made a demand before the tribunal of interchangeability of job functions between male and female members of the crew so as to allow them to operate the aircraft with only 14 crewmembers. Justice Mahesh Chandra tribunal gave its award on 25.2.1972 in which Air India's claim for interchangeability of the job functions of male and female members of the crew was rejected on the ground that the Air India Manual has laid down separate and distinct job functions of male and female cabin crew. According to the employer Air India the Mahesh Chandra Award is binding as a Contract reached between the employer and employees in the course of industrial adjudication.

For airhostesses in the Indian Air lines, Government of India Notification dated 12.4.1980 fixed minimum retirement age as 35 years. It was provided that air hostesses will retire on attaining the age of 35 years or on marriage if it takes place within four years of joining service or on first pregnancy whichever occurs earlier. In line with Indian Air lines, Air India also carried out similar amendments in their regulations. The male cabin crew members, known as Assistant Flight Pursers, Flight Pursers and Flight Supervisors were to continue on flight duties until the age of 58 years. Ms. Nergeshh Meerza together with her fellow Air hostesses filed a Writ Petition in the Bombay High Court challenging the retirement and other conditions of service applicable to Air hostesses on the ground that they were discriminatory under Articles 14,15 & 16 of the Constitution. The petition was transferred to the Supreme Court and by its decision in the case of Air India vs. Nergeshh Meerza [1981 (4) SCC 335] the provision of retirement of Air hostesses on first pregnancy was struck down as arbitrary and violative of Article 14 of the Constitution.

The regulation, which provided for extension of service of the air hostesses beyond 35 years and up to the age of 45 years at the sole discretion of Managing Director, was also found to be arbitrary being without any guidelines. This Court in Nergesh Meerza's case, therefore, came to the conclusion that the service regulations in so far as they provided for termination of service on first pregnancy and extension of service beyond 35 years only at the discretion of Managing Director, were arbitrary hence unconstitutional under Article 14 of the Constitution.

It would be necessary to take note of the decision of Nergeshh Meerza's decision (supra) rendered by three Judges' Bench of this Court as according to the appellants some of the legal premises are already covered and certain legal questions are already settled by the aforesaid judgment, which are binding on the High Court and also on this Bench of two Judges. In the case of Nergesh Meerza (supra) attempt was made to persuade the Court to hold that the air hostesses (females) and flight pursers (males) being members of a team on board air craft should be treated as one single cadre of employees allowing no discrimination in their service conditions. After taking note of different modes of the recruitment, promotional avenues, salaries, allowances of the two cadres, in the case of Nergesh Meerza (supra), this Court recorded the following conclusion in paragraph 57 of its judgement:

"Thus , from the comparison of the mode of recruitment the qualification, the promotional avenues and other matters which we have discussed above we are satisfied that the Air hostesses form an absolutely separate category from that of the Flight pursers in many respects having their different grades, different promotional avenues and different service conditions."

The conclusion is reiterated in paragraph 60 of the judgment in the following words:-

"Having regard, therefore, to the various circumstances, incidents, service conditions, promotional avenues etc. of the Flight pursers and Air hostesses, the inference is irresistible that Air hostesses though members of the cabin crew are entirely separate class governed by different set of rules and regulations and conditions of service."

It is after recording the above conclusion that the Court then went on to consider the argument advanced on behalf of Air India by their Senior Counsel Mr. Nariman that most of the job functions performed by flight pursers and air hostesses are entirely different. This argument of the counsel made on behalf of the employer was negatived and the relevant part of the observations in the judgment have to be understood in the context in which they are made. They cannot be read out of context by the High Court to nullify the conclusion of this Court reproduced above in which it is very clearly stated that the male and female members of the crew on board are two different classes of employees governed by different sets of service conditions. On the alleged difference in job functions the Supreme Court observed as under:-

"We are, however, not impressed with this argument because on perusal of job functions which have been detailed in affidavit clearly shows that the functions of the two, though obviously different overlap on some points but the difference, if any, is one of degree rather than of kind. Moreover, being members of the crew in the same flight, two separate classes have to work as a team helping and assisting each other particularly in case of emergency."

Having thus rejected the contention advanced on behalf of

employers on the alleged difference of job functions, the Court in para 62 further reiterated its conclusion thus :-

"Once we have held that Air hostesses form separate category with different and separate incidents, the circumstances pointed out by the appellant cannot amount to discrimination as to violate Article 14 of the Constitution on this ground."

The Supreme Court thus negatived the grievance that service conditions providing lower age of retirement to air hostesses is unfavourable compared to flight pursers, who are male members of the crew on board and are allowed the age of retirement of 55 or 58 years. The argument claiming parity on retirement age by females with male members of the crew was negatived. It was held that there is no discrimination against air hostesses based only on sex. It further held that the service condition is neither unconstitutional under Articles 15 & 16 of the Constituion nor violative of Section 4 of the ER Act. The Court quoted notification issued by the Central Government under Section 16 of the ER Act. It upheld the stand of the employer that the different ages of retirement and salary structure for male and female employees in Air India are based on their different conditions of service and not on sex alone.

Section 4 of the E.R. Act prohibits the employer from paying unequal remuneration to male and female workers for 'same work or work of a similar nature.' Section 5 of the said Act prohibits discrimination by the employer while recruiting men and women workers for 'same work or work of similar nature.' By Amendment introduced to Section 5 by the Amendment Act No.49 of 1987, employer has been prohibited from discriminating men and women after their recruitment in the matter of their conditions of service for the 'same work and work of similar nature.' Section 5 after its amendment by Act No.49 of 1987 reads as under:-

"5. No discrimination to be made while recruiting men and women workers. - On and from the commencement of this Act, no employer shall, while making recruitment for the same work of a similar nature, [or in any condition of service subsequent to recruitment such as promotions, training or transfer] make any discrimination against women except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force.

Provided that the provisions of this section shall not affect any priority or reservation for scheduled castes or scheduled tribes, ex-servicemen, retrenched employees or any other class or category of persons in the matter of recruitment to the posts in an establishment or employment."

The expression - 'same work or work of a similar nature' has been defined in Section 2(h) of E.R. Act as under:
"2(h) - same work or work of a similar nature" means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment.

Section 16 empowers the appropriate government to make a declaration by notification that in respect of particular employment difference in regard to remuneration of men and women workers under an employer is found to be based on 'a factor other than sex' and there is no contravention of the provisions of the Act by the employer. Section 16 reads as under:-

"16. power to make declaration - Where the appropriate Government is, on a consideration of all the circumstances of the case, satisfied that the differences in regard to the remuneration or a particular species of remuneration, of men and women workers in any establishment, or employment is based on a factor other than sex, it may, by notification, make a declaration to that effect, and any act of the employer attributable to such a difference shall not be deemed to be a contravention of any provision of this Act."

In exercise of powers under Section 16 of the Act a Notification was issued on 15th June 1979 and published in Gazette of India dated 17th June, 1979 which reads as under:

"New Delhi, the June 15, 1979. S.O. 2258 - in exercise of the powers conferred by Section 16 of the Equal Remuneration Act, 1976 (25 of 1976) the Central Government having considered all the circumstances relating to, and terms and conditions of employment of Air Hostesses and Flight Stewards, are satisfied that the difference in regard to pay, etc. of these categories of employees are based on different conditions of service and not on the difference of sex. The Central Government, therefore, declares that any act of the employer attributable to such differences shall not be declared to be in contravention of any of the provisions of the Act."

It is to be noted that the aforesaid notification was issued in the year 1979 much before the amendment brought in 1987 to Section 5 of the ER Act. The notification under Section 16 quoted above is relevant for a different purpose. In Nargesh Meerza's case (supra) - the Court recorded following conclusion in paragraph 67:-
"Thus, declaration is presumptive proof of the fact that in the matter of allowances, conditions of service and other types of remuneration, no discrimination has been made on the ground of sex only. The declaration by the Central Government, therefore, completely concludes the matter."

The Supreme Court on considering the challenge to the lower retirement age of female members of the crew on board on the basis of gender discrimination prohibited by Articles 15(1) and 16(2) of the Constitution, observed thus:-

"The Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations."

In Para 70, the conclusion recorded is thus:-

"For these reasons, therefore, the arguments of Mr. Setalwad that the conditions of service with regard to retirement etc., amount to discrimination on the ground of sex only is overruled and it is held that conditions of service indicated above are not violative of Article 16 on this ground."

Having thus rejected the challenge to the lower retirement age for female members of crew as the discrimination based only on sex, Supreme Court struck down two service conditions which provided for termination of services of Air hostesses on first pregnancy and extension of service beyond 35 up to 45 only at the sweet will and discretion of the Managing Director. The aforementioned two service conditions were held to be unreasonable and arbitrary hence violative of the Constitution. In Nergesh Meerza's case (supra) the different retirement ages of male and female members on board was upheld after examining the stand and justification shown by the employer. The discussion and the conclusion reached for upholding different ages of retirement of male and female employees

on the Aircraft are contained in paragraphs 105 to 113 of the judgment. The Court made a survey of retirement ages of male and female members of the crew on board in different air lines all over the world and on consideration of the stand of the employer with regard to the fitness and efficiency of the members of crew of both sexes observed thus :- 'there cannot be any cut and dry formula for fixing the age of retirement which 'would always depend on a proper assessment of the relevant factors and may conceivably vary from case to case.'

The Court then relied on the award of Justice Mahesh Chandra Tribunal and held that before the Tribunal the Air hostesses never demanded that their age of retirement should be at par with the male employees at the age of 58 years. The Award of the Tribunal was held to be binding on the air hostesses. See the following observations in paragraph 114:-

"We might further mention that even before the Mahesh Tribunal, the stand taken by the Air hostesses was merely that their age of retirement should be extended to 45 years and they never put forward or suggested any claim to increase the retirement age to 58 which clearly shows that their present claim is not merely belated but an afterthought particularly because the Mahesh Tribunal was dealing with this particular grievance and if the Air hostesses were really serious in getting their retirement age equated with that of the Flight pursers, i.e. 58, they would not have failed to put forward this specific claim before the Tribunal. This is yet another ground on which the claim of the Air hostesses to be retired at the age of 58 cannot be entertained because as we have already shown the Award binds the parties even though its period may have expired."

On 17.11.1993 Air India as the the employer and the members of the AICCA representing both its male and female employees entered into an agreement where under the category of Deputy Chief Air hostess was reintroduced having its promotional avenues from within the female cadre. The record note of the proceedings mentions that existing avenues of promotion of the male cabin crew would remain unaffected, the separate hierarchy among the various categories would remain as at present and there would be no change in the job functions of any category of cabin crew as a result of the agreement.

It may also be mentioned that the Cabin Crew Manual which provided for separate and distinct job functions and promotional avenues to male and female cabin crew was challenged by one of the Air hostesses, namely, Ms. A. Mulgaonkar in Writ Petition No. 490/84 in the High Court of Bombay. That petition was dismissed on 22.3.1984. Nargesh Meerza and four other Air hostesses challenged the agreement containing the record note dated 17.11.1983 in the High Court of Bombay in Writ Petition 116/84. The Court speaking through the learned Sujata Manohar J.(as she then was) upheld the legal validity of the agreement by its judgment dated 25.7.1984. The Division Bench on 31.10.1985 also dismissed Appeal No.1068/84 preferred by the individual Air hostesses.

In the year 1987, Ms. Aquilia Mohan in WP 3091/86 again challenged the lower retirement age of Air hostesses fixed under the agreement. The Court held that the issue was barred by principle of 'constructive res judicata' in view of Nergesh Meerza's case (supra). Appeal preferred was also dismissed.

In 1987 itself identical issues of the lower age of Air hostesses was brought to this Court for reconsideration by Ms. Lena Khan in Writ Petition No. 231/87. By judgment in Ms. Lena khan vs. Union of India [1987 (2) SCC 402], a two Judges' Bench of this Court

dismissed the petition on the ground that the three Judges' Bench decision in Nergesh Meerza's case (supra) is binding on the parties. In fact, in the case of Lena Khan, the principle grievance was that Indian air hostesses are made to retire comparatively at younger age than air hostesses on other international flights and Air lines of other countries.

In the year 1988, fresh agreement was entered into between employer Air India and AICCA where-under Air hostesses were to be subjected to medical examination for assessing their fitness between the age of 37 and 45 years. The bar on marriage was brought down from four to three years. The number of posts of Senior Airhostesses and Deputy Chief Airhostesses was increased.

In the year 1989 Air hostesses of India Air lines and Air India filed a petition before the Petition Commiittee of the Lok Sabha complaining discrimination in the retirement age and other service conditions. The Petition Committee recommended that the different retirement ages for male and female cabin crew members be abolished and ban on marriage of Air hostesses should be completely revoked. On 16.10.1989, the Central Government in exercise of powers under Section 34 of the Air Corporations Act issued a direction to the Air India that the male and female cabin crew members be allowed to serve till the age of 58 years. Rival contentions have been addressed on the import and effect of the Directives of the Central Government and the efficacy of the subsequent clarification issued to the same by letter dated 16.10.1989. The relevant parts of the letters are, therefore, reproduced hereunder with some portions underlined for the purpose of emphasis:

'To

The Managing Director, Air India,
Air India Bldg., Bombay

The managing Director, Indian Air lines,
Air lines House, New Delhi.

Subject: Discrimination against Air hostesses in Air India and Indian Air lines - Decisions regarding

Sir,

I am directed to say that the question of removing discrimination service conditions against Air hostesses in Air India and Indian Air lines has been engaging the attention of the Government for quite some time, after careful consideration, it has been decided as under:

i) That like the male Cabin crew, Air hostesses in Air hostesses in Air India and Indian Air lines should also be allowed to serve till the age of 58 uears.
ii) That the air hostesses should be subject to medical examination once a year after the age of 35 years, but such medical examination shall not be called superannuation medical examination. In addition, Air hostesses. Shall be subject to weight restriction regime which shall be very strictly observed and for which suitable executive instructions and guidelines may be drawn.
iii) That no marriage by the Air hostesses within the years of joining service shall be removed.

2. You are requested to implement the above decisions of the Government with immediate effect under intimation to this Ministry.

3. A compliance report of the action taken may please be submitted to this Ministry within a week.

4. Please acknowledge receipt of this letter.

Yours faithfully
Sd/- JR Nagpal
Under Secretary to the Govt. of India

[Underlining by Court]

On receipt of the above letter the employer Air India wrote a detailed letter making a mention of various agreements and settlements reached between the employer and employees with regard to the age of retirement and conditions of service of Air hostesses and FPs. It made a request for reconsideration of the Directive which might be understood to allow flying duties to Air hostesses at par with males' up to the age of 58 years. The relevant part of the letter of Air India addressed to the Joint Secretary of Government of India dated 15.12.1989, in response to the Directives issued in the letter dated 16.12.1989, also needs reproduction for proper understanding of the Directives of the Central Government and the subsequent clarification issued by the Central Government.

"HQ/65-6/6719 15.12.1989

The Joint Secretary to the Govt. of India
Ministry of Civil Aviation & Tourism
New Delhi.

Kind attn: Shri Ravindra Gupta

Discrimination against Air hostesses in Air India and Indian Air lines - Decision Regarding

Please refer to the Ministry's letter No.AV.18022/23/88-ACCIA dated October 16, 1989:-

.....
.....
.....

It may be pointed out that, as indicated above, all these issues relating to service conditions of hostesses are subject matters of settlement, understanding award and as such the question of implementing the government decision on the retirement age of hostesses cannot and should not be considered in isolation. The matter requires to be examined in all its aspects, particularly repercussions it may give rise to and also to be discussed with the union for arriving at a mutual settlement.

In view of the position explained above, the matter requires a further thorough review by the government. For the reasons stated, we are also proposing to begin a dialogue with the AICCA with a view to coming to an understanding with them on the various issues detailed above. This will also be on the clear understanding that the government decision relates to increase in age of retirement to 58 years and not on flying duties after the age of 35 years, and the deployment of the hostesses after 35 years in alternate jobs would be left to the discretion of the management. As regards the hostesses who are desirous of availing of the option available to them under the existing provisions viz., retirement any time between the age of 35 and 45 years, they may be allowed the option for which a cut off date would be fixed.

We shall be grateful for immediate confirmation of the position state above.

Yours faithfully,
AIR INDIA
SD/-

[J.R. Jagtap]
Secretary & Dy. Director - Admin.

In reply to the above letter of the employer Air India, the Joint Secretary of Ministry of Civil Aviation and Tourism, Department of Civil Aviation, Government of India wrote on 29.12.1989 and informed that the subject was reviewed and it is clarified that the age of retirement of Air hostesses would be 58 years but at the age of 35 the Air hostesses may be given suitable alternate jobs on ground till they attain the age of 58 years. The relevant part of the clarificatory letter dated 29.12.1989 also deserves full reproduction as the learned counsel for the respondent Association has seriously questioned the legal effect of the same.

Joint Secretary
Ministry of Civil Aviation & Tourism
Department of Civil Aviation,
Government of India,
New Delhi.

Ravindra Gupta
Phone : 352300

December 29, 1989.

My dear Rajan,

Please refer to letter No. HC/65/6/6719 dated 15th December, 1989 from Secretary & Dy. Director, Admn., (Shri J.H. Jagtap) regarding discrimination against airhostesses in Air India and Indian Airlines.

2. The matter has been reviewed and it is clarified that the increase in age of retirement to 58 years does not specify the job functions after the age of 35. Airhostesses may be given suitable alternate jobs till they attain 58 years of age. Further, on being given alternate jobs there is no question of annual medical check up. The government feels that the male cabin crew as well as airhostesses should turn out attractively and the management may explore the possibility of prescribing suitable medical examination and weight regime for both types of cabin crew.

3. As regards problems of salary grades, job functions, promotion, etc., the management must sort them out and negotiate suitable agreements with the concerned Unions.

With best wishes,
Yours sincerely,

Sd/-
Ravindra Gupta

Shri Rajan jetley
Managing Director
Air India,
Air India Building,
Bombay 400 021.
[Underlining by Court]

After receipt of the above clarificatory letter on 2.11.1990 Air India issued a circular that Senior Air hostesses who have attained the age of 45 years would be offered suitable positions on ground. A further circular was issued by Air India on 5.11.1991 for modifying a certain portion of the earlier circular dated 2.11.1990 which provided for assignment of duties on ground to the Air hostesses at the lowest level.

On 19.10.1992 Writ Petition filed by the respondent Air India Air hostesses' Association in the Bombay High Court was admitted by the Division Bench. On 12.1.1993 Air India issued an office order extending the age of Air hostesses for flying duties up to 50 years to meet the requirement of the employer and subject to their medical fitness for flying duties. Air Corporations Act 1953 was repealed by Air Corporation transfer of (Undertaking and Repeal) 1984. By the New Act, Air India and Indian Air lines became two separate and distinct Companies under the Companies Act 1956. After the Corporation became the Company a fresh agreement was entered into between the Air India Company and the appellant AiCCA on 17.3.1995 where under interchangeability of job functions of male and female members of the crew was agreed only for new entrants without in any way affecting the service conditions and promotional chances of the existing members of the cabin crew. It is to be noted that the agreement of 17.3.1985 makes it clear that pre 1997 recruits would continue to be governed by their existing service conditions, which did not provide for interchangeability of job functions.

A formal memorandum of settlement was reached between the appellant AICCA and Air India on 5.6.1997 where under all earlier settlements, awards, record notes and understandings reached when the employer was a Corporation were agreed to be continued as applicable. A revised promotion policy for cabin crew was brought into effect from 7.6.1997. It is at this stage that a small number of about 53 air hostesses, who were near about the age of 50, which included those promoted to executive cadres for ground duties or who were at the verge of retirement from flying duties, formed an Association in the name of Air India Air hostesses Association (main contesting respondent in these appeals). They filed Writ Petition 932/97 in the Bombay High Court seeking a declaration that the settlement dated 5.6.1997 entered into between Air India as a newly incorporated - Company and appellant Association of which majority of Air hostesses of workmen category numbering about 684 are members, is not binding on the respondent Air hostess working in the executive cadre who fall outside the definition of 'workmen' under the Industrial Disputes Act. In order to assert and protect their distinct interest as Air hostesses in executive cadre they also got themselves impleaded as a party in a pending reference before the National Industrial Tribunal and submitted their claims on the question of laying down revised terms and conditions of the employees of Indian Airlines and Air India.

In the pending dispute before the National Industrial tribunal the respondent Association had raised the issues of merger and interchangeability of job functions between male and female cabin crewmembers. The majority of the Air hostesses who were still on flight duties made a joint representation on 20.6.1988 to the Air India stating that they are unwilling to give up their benefits granted to them under settlements and agreements or awards treating them in separate and distinct cadre. They also protested against loss of seniority to flight pursers. They insisted on their right of early retirement with option to serve on ground till the age of superannuation at par with males. They opposed merger of two cadres of air hostesses and flight pursers. The Writ Petition No. 932/77 filed by the respondent/association seeking declaration that the settlement dated 5.6.1997 entered into with the appellant is not

binding on them was dismissed by the Division Bench of Bombay on 08.7.1997. Second Writ Petition No. 1473/99 was also decided on 14.9.99 against the respondent/association holding that the two companies i.e. Indian Air lines and Air India are separate entitles after the Air Corporation Act, 1953 was repealed and substituted by Repealing Act of 1994. It was held that the members of the crew of two companies cannot be treated as one class.

It is at the above stage, that Writ Petition No. 1163 of 2000, which has given rise to this appeal, came to be filed in the High Court of Bombay by the respondent/association with membership of minority of air hostesses working in executive cadre. The appellant/AICCA filed a Caveat for being made a party but the High Court only allowed intervention to them. Both the employer Air India and the appellant/AICCA as intervenor before the Bombay High Court took a stand in their affidavits that interchangeability between male and female members of the crew has been agreed only for post 1997 recruits and not for pre-1997 recruits. In the long course of hearing before the Bombay High Court, it appears that Air India as employer was encouraged to make proposals for removing alleged discrimination in conditions of service between males and females members of the cabin crew. Two sets of proposals were submitted by Air India. It was proposed that if all pre-1997 recruits also claim similar conditions of service and same retirement age of 58 years at par with males from flying duties, the two cadres of air hostesses and flight pursers should be merged and their service conditions be suitably readjusted to bring them at par for future prospects. The seniority inter se between them was proposed to be re-fixed by nullifying the effect of accelerated promotion already earned by air hostesses with the higher allowances given to them. It is on these proposals that the High Court in the impugned judgment has put its signature and seal of approval giving a go bye even to certain conditions subject to which only the proposal was made. Recording of such consensual order was stiffly opposed by the appellant/AICCI which claims to be the only recognised employees union having the largest number of air hostesses as its members. We are told that there are in all about 1138 air hostesses in Air India of which 684 are members of the appellant/AICCA being in the workmen category. Only a small number of remaining 53 air hostesses, who are in the age group of near about 50 and working in executive posts and since falling outside the definition of 'workmen' have formed a separate association in the name of Air India Air hostesses Association [respondent herein]. They are ventilating their grievances and agitating for rights of parity in the conditions of service and age of retirement on flying duties with males. It is submitted by AICCA that these air hostesses are unmindful of the interest of the larger number of air hostesses who are of workmen category and have agreed for an early retirement age from flying duties under various agreements, settlements and awards of which mention has already been made above.

The High Court of Bombay passed the impugned judgment dated 20/23.8.2001 whereby it accepted the conditional proposal of merger of cadres of male and female members of cabin crew and held that air hostesses are also entitled to retirement age of 58 years on flying duties at par with flight pursers and other members of the cabin crew. The operative part of the judgment of the Bombay High Court and the contents of the proposals of the Air India, as have been accepted by the High Court under its seal and signature and recorded in its judgment, have already been reproduced above.

After hearing the arguments advanced by the learned senior counsel for appellants at length and after giving due consideration to the submissions made by the learned senior counsel appearing for the respondent/association of air hostesses, we deal with the rival

contentions of the contesting parties under distinct Heads.

Constitutional Provisions.

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 State from discriminating any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 16 which contains fundamental right of equality of opportunity in matters of public employment, by sub-clause (2) thereof guarantees that "No citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State".

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'. Article 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.

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 criteria which would favour the opposite sex and women will not be deliberately selected for less favourable treatment because of their sex. It is on this 'but for sex' test, it appears in Nergeshh Meerza's case (supra) the three Judges' Bench of this Court did not find the lower retirement age from flying duties of air hostesses as discrimination only based on sex. It found that the male and females members of crew are distinct cadres with different conditions of service. The service regulation based on the agreements and settlement fixing lower retirement age of air hostesses was not struck down.

The constitutional prohibition to the State not to discriminate citizens only on sex, however, does not prohibit a special treatment to the women in employment on their own demand. The terms and conditions of their service have been fixed through negotiations and resultant agreements, settlement and awards made from time to time in the course of industrial adjudication. Where terms and conditions are fixed through collective bargaining as a comprehensive package deal in the course of industrial adjudication and terms of service and retirement age are fixed under agreements, settlements or awards, the same cannot be termed as unfavourable treatment meted out to the women workers only on basis of their sex and one or the other alone tinkered so as to retain the beneficial terms dehors other offered as part of a package deal. The twin Articles 15 and 16 prohibit a discriminatory treatment but not preferential or special treatment of women, which is a positive measure in their favour. The Constitution does not prohibit the employer to consider sex in making the employment decisions where this is done pursuant to a properly or legally chartered affirmative action plan. We have taken a resume of several agreements, settlements and awards made after negotiations from time to time and periodically, between Air India and the AICCA being the recognised association with majority of male and female cabin crew members. In all the demands, it insisted on maintaining two separate cadres for pre-1997 recruits and agreed for early retirement age to air hostesses compared to males from flying duties with option to go for ground duty between 50 to 58 years of age. In

the course of industrial adjudication through conciliation and negotiation the employer could legitimately acknowledge women's perspective, their life experience and view point. After giving consideration to the same, the employer could agree for terms and conditions which suited the air hostesses.

The condition of service agreed by majority of air hostesses is that they would prefer to retire from flight duties on international flights at the age of 50 years or opt for ground duties after 50 years of age up to the age of 58 years at par with males so that at least in some period of their service they may not remain away for long periods from their homes and families and would be able to discharge their marital obligations. This term and condition of service fixing age of retirement from flying duties with option to go for ground duties cannot be said to be a discriminatory treatment given by employer to the air hostesses only on the basis of their sex. Such terms and conditions are fixed after negotiating with them and on that basis an agreement and settlement have been reached between them which are now part of statutory regulation under Air Corporation Act of 1953 and standing orders certified under Industrial Employment Standard Standing Order Act.

In employment requiring duties on Air craft, gender-neutral provisions of service may not be found necessarily to be beneficial for women. The nature of duties and functions on board of an Air craft do deserve some kind of a different and preferential treatment of women compared to men. The early retirement age from flying duties at the age of 50 year with option to go for ground duties has been found to be an agreeable and favourable condition by majority of air hostesses. On that basis, written settlements and record notes were entered into and signed by employer and AICCA representing the majority of male and female members of cabin crew.

A small number of air hostesses nearing the age of 50 years and who are now in executive cadre cannot wriggle out of the binding agreements and settlements to which they were parties through the association. Only because they have now earned promotions and are working in executive posts, which fall outside the definition of 'workmen' under Industrial Disputes Act, they cannot be permitted to question the agreements, settlements and awards which continue to bind them on the age and condition of retirement and allowed to seek for unilateral alteration of the same to the detriment of the majority of the members and against their wishes and interest.

It is surprising that the High Court in the impugned judgment completely side-stepped the legal issues firmly settled in the decision of three Judges' Bench of this Court in Nergesh Meerza's case (supra) which were binding on it. By impugned judgment, the High Court has indirectly nullified the effect of this Court's decision in case of Nergesh Meerza (Supra) and in doing so relied on subsequent event. The subsequent event is that for fresh recruits after 1997 in the services of Air India, which is now a company formed under the Air Corporation Act of 1994, the male and female cabin crew members have been merged into a common cadre with uniform service conditions. Recourse to this subsequent event could not be made to water down the binding effect of judgment of this Court in Nergesh Meerza's case (supra). The subsequent event would not have changed the pre-1997 condition of service of male and female members of the cabin crew. How could the High Court in its judgment observe that 'the differences in qualification, pay, promotional avenues and other conditions of service between male and female cadres of the crew have been obliterated' only because for fresh recruits the cadres have been merged after 05.6.1997. We totally disapprove the reasoning and conclusions of the High Court in the impugned judgment that differential treatment which was justified

earlier when Nergesh Meerza's case (supra) was decided, 'has become arbitrary and unreasonable because of the passage of time and merger of cadres' after 1997. How could the High Court lose sight of the fact that apart from the binding decision of this Court in Nergesh Meerza's case (supra), air hostesses of executive cadre, who were all pre-1997 recruits, were bound, with majority of air hostesses of workmen category, by the agreements and settlements as also awards reached between them and the employer/Air India.

The High Court, we must say, acted against judicial discipline in taking a view in favour of respondent/association on an erroneous basis that with the passage of time differences in service conditions between male and female cadres have been obliterated and the decision of the Nergesh Meerza's case (supra) does not bind the High Court from making a declaration that lower retirement of air hostesses from flying duties is a discrimination based only on sex which is violative of Articles 15 and 16 of the Constitution.

The High Court then proceeded to adopt a strange procedure unknown to law by eliciting from employer - Air India concrete proposals for bringing about parity in retirement age and other conditions of service of male and female members of the cabin crew. To make it worse the plea to implead the majority recognised union was not only denied but were merely made to intervene and the High Court seem to have relegated deliberations relating to the proposals to be submitted to the responsibility of the management, unmindful of the serious and adverse impact which the ultimately altered conditions of service inevitably are bound to have on the majority who are not made parties to the proceedings. The High Court was aware that there were agreements, settlements and awards laying down different terms and conditions of female and male cadre. It was also aware of the decision of this Court in Nergesh Meerza's case (supra) wherein it was held that air hostesses and flight pursers constitute two different cadres justifying fixation of different service conditions and ages of retirement from flying duties. The High Court could not have, therefore, adopted a wholly impermissible course of accepting and putting its seal and signature on the conditional proposal of the employer dehors even the conditions stipulated for the offer that the air hostesses can be granted same retirement age of 58 years from flying duties at par with flight pursers provided they agree for merger of two cadres and withdrawal of all earlier benefits available to them such as accelerated promotions, higher seniority, higher allowances and better pensionary benefits. How could the High Court forget that at the instance of a very small number of air hostesses in executive cadre, it was accepting conditional proposal of employer and thus, prejudicially affecting majority of air hostesses of workmen category who were bound and satisfied with the agreements, settlements as also awards made between their association and the employer from time to time.

The High Court also gave no importance to the fact that the industrial dispute on refixation of terms and conditions of the employees of Indian Airlines as the newly formed company was pending adjudication before the National Industrial Tribunal in which notices have been issued to Air India and its employees and their associations. It is not disputed that employees of Air India through different associations including the appellants and the respondent/association have submitted their claims before the Tribunal. In such a situation the High Court ought to have rescued itself from undertaking a parallel exercise of fixing terms and conditions of male and female employees of Air India. On basis of self serving proposals made by the employer and despite strong protest raised against it by the appellant/AICCA, which represents the majority members of the males and females cabin crew of Air India, the High Court could not have accepted the proposals of the employer

and varied the terms and conditions of pre-1997 recruits of Air India by directing merger of male and female cadres. The High Court thus has nullified the binding agreements, settlements and awards and frustrated the adjudication of disputes pending before the National Industrial Tribunal to which Indian Air lines and its employees are parties and Air India and its employees through their association have been summoned to participate.

On behalf of the respondent/association reference has been made to Article 51-A(e) of the Constitution. It is submitted that air hostesses are selected for their youth and looks hence, retired earlier than males which is a practice derogatory to women. It runs contrary to the fundamental duties of a citizen laid down in Article 51-A(e) of the Constitution.

We have already found above that early retirement age fixed for women for flying duties with option to them to go after 50 years of age to ground duties is a condition of service fixed after negotiations and settlements with association of air hostesses represented by AICCA with appropriately matching numerous advantages and betterment to match them . We have also found that early retirement age for women from flying duties has been found favourable by majority of air hostesses represented through the appellant/AICCA before us who support the age of retirement and option for ground duties given to them. Air India is a travel industry. Pleasing appearance, manners and physical fitness are required for members of the crew of both sexes. The air hostesses have agreed to the early retirement age, as they need an option to go for ground duties after the age of 50 years. The arguments advanced on behalf of respondent/association, therefore, cannot be accepted that the air hostesses are made to retire at an age earlier than males because of their failing physical appearance and it is a practice derogatory to the dignity of women. For services on board of an Air craft both male and female members of the crew are expected to be smart, alert and agile.

The early retirement age of 50 years from flying duties for female members of the crew with an option to them to accept ground duties beyond 50 years up to the age of 58 years being a service condition agreed to and incorporated in a binding agreement or settlement and award reached with the employer, the same cannot be held to be either arbitrary or discriminatory under Articles 15 and 16 of the Constitution. It is not a discrimination against females only on ground of sex. As a result of the impugned judgment of the High Court, there would be merger of two cadres of air hostesses and flight pursers and the air hostesses would have to compulsorily continue on flying duties up to the age of 58 years even though for health and family reasons they are unable to fly after the age of 50 years. On the order of the High Court and after the merger of cadres of male and female employees, the females have to resign from their jobs if they do not want to fly up to the age of 58 years. The order of the High Court requires the air hostesses to give up their more advantageous conditions of service for which they had held negotiations with the employer and obtained binding settlements and awards in the course of industrial adjudication.

The decision in Nergesh Meerza’s case (supra) was binding on the High Court. The High Court was clearly wrong in holding that it had become inapplicable by passage of time. It is not open to a High Court to indirectly overrule a judgment of this Court or try to sidetrack it on the basis of subsequent events which were not relevant for pre-1997 recruits. The separation of male and female cadres with differences in their conditions of service, seniority, emoluments and allowances remained unchanged for pre-1997 recruits and the merger has taken place only for male and female new recruits after 1997.

For the aforesaid reasons, we do not find that the conditions of services applicable to the air hostesses both presently working in air or on ground are discriminatory under Articles 14, 15 and 16 of the Constitution.

Equal Remuneration Act, 1976.

In the impugned judgment, the High Court has also held that the term of service fixed by Air India to retire air hostesses at the age of 50 years or grounding them on alternative jobs is also discriminatory treatment to them on sex which violates section 5 of the Equal Remuneration Act, 1976 [for short, 'the E.R. Act of 1976']. The High Court also took note of the fact that there existed a declaration under section 16 of the E.R. Act of 1976 that differences with regard to remuneration of air hostesses compared to flight pursers is 'on factors other than sex'. Yet in the opinion of the High Court such a declaration was made before amendment introduced to the provisions of section 5 of the E.R. Act of 1976 and would not save the terms and conditions of retirement of air hostesses fixed at lower age compared to males from the vice of section 5 of the E.R. Act of 1976.

We have already extracted above the amended section 5 of the E.R. Act of 1976. Section 5 as amended not only prohibits employer from making discrimination based on sex in the matter of recruitment for 'same work or work for a similar nature' but even discrimination on that 'basis in conditions of service subsequent to the recruitment'.

The challenge to the fixation of lower retirement age of air hostesses compared to the flight pursers was also a ground of challenge in the case of Nergesh Meeza (supra) and this Court came to the conclusion that terms and conditions of service of flight pursers and air hostesses are not 'same or of similar nature' as they constitute two different cadres with different methods of recruitment, salary structure, promotion avenues and terminal benefits. This Court also took into consideration the declaration made under section 16 of the E.R. Act of 1976 and held that such a statutory declaration reinforces the conclusions that nature of work of air hostesses and flight pursers is not same or of similar nature as they constitute two different cadres with different conditions of service. The declaration made under section 16 was made much before amendment of section 5 of the E.R. Act of 1976. It, however, clearly mentions that "the differences in regard to pay etc., of these categories of employees are based on different conditions of service and not on the ground of sex."

We have already made a reference to the various agreements, settlements and awards entered into between employer and employees. For a long period, after Air India Corporation became a company under the Air Corporation Act of 1994 [for short 'the Act of 1994], the different terms and conditions of service of air hostesses and male members of the crew continued till the year 1997 when the two cadres were merged for fresh recruitment. In such a situation even though declaration under section 16 was made and notified on 15.6.1979 i.e. before amendment introduced to Section 5 of the E.R. Act of 1976 by Amendment Act of 49 of 1987, the said declaration which is taken note of and relied in the decision in Nergesh Meeza's case of this Court clearly indicates that the Central Government did record its satisfaction that the differences in remuneration and conditions of service of male and female members of the crew were not based only on the ground of sex. We have noticed above that differences in conditions of service of the two cadres remained unchanged till the year 1997. The factual foundation of the declaration under section 16 of the E.R. Act of 1976, therefore, remains unshaken and the declaration has not lost its efficacy on amendment introduced to section 5 in the year 1997. There has been

no change in the service conditions of pre-1997 recruited air hostesses, after their recruitment. Section 5 of the Act of 1976 can only be invoked against discriminatory treatment to women compared to men where between them the 'nature of work is same or of a similar nature' and after recruitment there has been a change in conditions of service of women only on the ground of sex.

Neither in the decision in the case of Nergesh Meeza (supra) nor by us, it has been found that a lower retirement age for air hostesses has been fixed on the ground only of their sex. We have already held, while discussing the constitutional validity of fixation of lower age of retirement of air hostesses with option to them to accept ground duties after that age, that this condition of service was agreed after negotiations in the course of industrial adjudication by the air hostesses through their association. Such terms and conditions willingly agreed to by them are binding on them and cannot be questioned on the basis of provisions of section 5 of the E.R. Act of 1976. They cannot be described as discriminatory conditions of service on the basis of sex alone. In this respect, it is relevant to notice the provisions of section 15 and particularly clause a) and sub-clause (ii) of clause b) of section 15 of the E.R. Act of 1976 which are also introduced by Amendment No. 49 of 1987. Section 15 of the E.R. Act of 1976 reads thus :-

"15. Act not to apply in certain special cases.- Nothing in this Act shall apply -

a) to cases affecting the terms and conditions of a woman's employment in complying with the requirements of any law giving special treatment to women, or
b) to any special treatment accorded to women in connection with -

i) the birth or expected birth of a child, or
ii) the terms and conditions relating to retirement, marriage or death or to any provision made in connection with the retirement, marriage or death.
[Underlining by us]

The term and condition of age of retirement settled in course of industrial adjudication by air hostesses through their associations is a term and condition of their employment fixed in accordance with the adjudicatory machinery provided in Industrial Law. It gives them a special treatment as found by them to be favourable to them. We have already noticed that there is nothing objectionable for the air hostesses to agree for a lower retirement age from flight duties with option for grounds duties after the age of 50 years up to the age of 58 years. Duties on flight demand of air hostesses physical fitness, agility and alertness. Duties in air are full of tension and sometimes hazardous. They have, therefore, agreed for comparatively early age of retirement with option to accept duties on the ground. There is nothing objectionable for air hostesses to wish for a peaceful and tension-free life at home with their families in the middle age and avoid remaining away for long durations on international flights. This view point has been projected before us on their behalf by learned counsel appearing for AICCA and other appellants.

A service condition giving a special treatment to women is saved by clause a) of Section 15 of the E.R. Act of 1976. It is also saved by sub-clause (ii) of clause b) of the said section which allows special treatment to women in terms and conditions of service relating to retirement. We, therefore, hold that the early age retirement policy of airhostesses in Air India does not contravene Section 5 of the E.R. Act of 1976 and otherwise, it is saved by section 15 (a) and 15 (b) (ii) of the E.R. Act of 1976. The challenge, therefore, to the terms and conditions of early retirement of air

hostesses and option to them to go for ground duties up to the age of 58 years, fails. These terms and conditions are now part of Statutory Regulations w.e.f. 30.3.2000, framed under Air Corporation Act and Standing Order framed under Industrial Employment (Standing Order) Act, 1946 w.e.f. 21.10.2000.

The Air Corporations Act, 1953.

The High Court in the impugned judgment has also set aside the conditions of service providing lower age of retirement for air hostesses as compared to flight pursers on the ground that such terms and conditions of service are in clear contravention of the mandatory direction issued by the Central Government on 16.10.1989 in exercise of powers under section 34 of the Air Corporations Act, 1953 [for short 'the Act of 1953].

On this aspect, the High Court held that the subsequent clarificatory letter of Joint Secretary of Central Government dated 29.12.1989, cannot be read as virtually nullifying the effect of the direction dated 16.10.1989. The clarificatory letter is held to be per se discriminatory.

We have already reproduced above fully the contents of the directions dated 16.10.1989 and relevant part of the letter dated 15.12.1989 of Air India addressed to the Ministry of Civil Aviation seeking clarification on the direction dated 16.10.1989. The full contents of the alleged clarificatory letter dated 29.12.1989 addressed by Shri Ravindra Gupta, Joint Secretary, Ministry of Civil Aviation to shri Rajan Jaitly, Managing Director, Air India Limited have also been reproduced above.

Section 34 of the Act of 1953 enables the Central Government to give directions to the Corporation on "the exercise and performance by the Corporation of itss functions. The Corporation is bound to give effect to such directions". In the case of Air India vs. B.R. Age [1995 (6) SCC 359], this Court has held that the power to issue directions regarding "exercise and performance by the Corporation of its functions" includes power to make directions for regulating terms and conditions of services of officers and servants of the Corporation. The valid exercise o power under Section 34(1) of the Act of 1953 and its mandatory effect on Air India, therefore, cannot be questioned.

On behalf of the respondents/associations, in these appeals, it is contended that the said letter dated 29.12.1989 is a personal letter from Joint Secretary, Ministry of Civil Aviation to Managing Director, Air India Limited and cannot be treated as a directive under Section 34 of the Act of 1953. It is also argued that the said clarificatory letter cannot be treated as a letter of the Central Government clarifying or modifying its original directions dated 16.10.1989 in which there are clear instructions to Air India and Indian Airlines that the air hostesses should be allowed to serve with male members of cabin crew up to the age of 58 years. The High Court held that these directions have to be construed as meaning that flight duties be allowed to air hostesses at par with male members of the crew up to the age of 58 years.

By its letter dated 15.12.1989, Air India brought to the notice of the Central Government the separate terms and conditions of service of two distinct cadres of flight pursers and air hostesses which were fixed under various agreements, settlements and awards. It then requested Central Government to review its directions in the light of the settlements, understandings and awards entered by the employer with the air hostesses. A clarification was sought by Air India stating that even if the retirement age of both male and female members of the cabin crew are brought at par to be 58 years

whether it would be necessary to give the air hostesses flight duties up to the age of 58 years or under the then existing conditions agreed to by air hostesses, they can be grounded for alternate job at the age of 35 years. It was informed that the air hostesses may be given suitable alternate job till they attain the age of 58 years.

On behalf of the respondent/association, learned senior counsel contended that the clarificatory letter addressed by Joint Secretary, Ministry of Civil Aviation in his personal capacity to Managing Director, Air India Limited is ineffectual in either modifying or clarifying the main direction of the Central Government issued on 16.10.1989 and which in very categorical terms directs superannuation age of air hostesses to be 58 years which means flying duties to air hostesses has to be allowed till 58 years of age at par with males.

Separate appeals against the impugned judgment of the High Court [CA Nos. 4584-4592 of 2002] have been preferred by the employer/Air India Limited and by Union of India [CA Nos. 4571-4578 of 2002] questioning the correctness of the view taken by the Bombay High Court in its judgment on the meaning and effect of directions issued under Section 34 of the Act of 1953. Both the learned senior counsel appearing for the Air India and Union of India have taken a consistent stand that the letter of clarification dated 29.12.1989 issued by the Joint Secretary was a decision of the Central Government taken in accordance with rules of business with due approval of Minister-in-charge of the Civil Aviation Ministry. The High Court took a view that letter dated 29.12.1989 is not in itself a direction under section 34 of the Act of 1953 merely on the format of the same though there is no particular prescribed format for issuing such direction. It clarifies the meaning and effect of the original letter issued by the Central Government on 16.10.1989. In this Court, the stand taken by Union of India is that the letter of clarification dated 29.12.1989 is also a direction under section 34 as was the original directive issued on 16.10.1989. Since the directive issued under Section 34 of the Act of 1953, is of the Central Government, it is the Central Government which can affirmatively and with certainty say whether the letter dated 29.12.1989 be read as a separate directive or a clarification. There is affidavit of Union of India filed before the High Court in which it is specifically asserted that alleged clarificatory letter dated 29.12.1989 emanated from the Central Government and was not a personal letter of the Joint Secretary. The records produced by Union of India before the High Court as well as in this court amply demonstrate that both direction dated 16.10.1989 and letter dated 29.12.1989 were issued for the Central Government with the specific approval of the then Minister of Civil Aviation. The relevant contents of the affidavit filed before the High Court on behalf of the Central Government reads thus :-

"For the sake of abundant caution, I reiterate that the first directive dated 16.10.1989 was issued under section 34 of the Air Corporations Act, 1953, and that the second directive dated 29.12.1989 was issued under the provisions of the said section 34 of the said Act in clarification of the earlier first directive, and in the premises the second directive had to be mandatorily implemented by Air India Corporation as it was then known.

In our opinion, the above affidavit should be held to be decisive with regard to the effect and efficacy of the clarificatory letter dated 29.12.1989. The direction of the Central Government under Section 34 of the Act of 1953 have to be understood on the basis of both the communications dated 16.10.1989 and 29.12.1989. Reading them together the directive can only be construed to mean that the air hostesses have to be continued in service up to the age of 58 years and as per the terms and settlements reached between the parties

they can be assigned ground duties at their option after retirement from flight duties at the age of 45 years which is now raised to 50 years.

In the course of argument, learned senior counsel appearing for the appellants/associations also made a reference to Article 77 of the Constitution of India which requires every executive action of the government to be expressed to have been taken in the name of President.

In our opinion, reference to Article 77 is wholly inappropriate. The exercise of statutory power under section 34 by the Central Government, even though not expressed to have been taken in the name of President, does not render it invalid. Clause 2 of Article 77 insulates an executive action of the government formally taken in the name of President from challenge on the ground that it is not an order or instrument made or executed by the President. Even if an executive action of the Central Government is not formally expressed to have been taken in the name of President, Article 77 does not provide that it would, therefore, be rendered void or invalid. We need not, therefore, deal with the argument advanced on the basis of Article 77 of the Constitution because the respondent/association itself is relying on the directive dated 16.10.1989 of the Central Government which is not formally expressed in the name of President in terms of Article 77 of the Constitution.

We have already dealt with the challenge made to the retirement of the air hostesses from flight duties at the age of 50 years and grounding them thereafter up to the age of 58 years. We have held that the conditions of retirement are not a discrimination based only on sex. The directives issued by the Central Government, therefore, also cannot be held to be in any manner in violation of Articles 14, 15 and 16 of the Constitution or the provisions of Equal Remuneration Act, 1976.

Effect of pending reference no. 1 of 1990 before the National Industrial Tribunal.

We have already held above that the High Court committed a serious error of procedure and law in entertaining proposals from the employer - the Air India Limited and accepting them as consented by all parties, to make it as a part of its judgment. We have already held that Nergesh Meerza's case (supra) was binding on the High Court and could not have been sidetracked by observing that by passage of time the cadres of flight pursers and air hostesses have virtually been merged and the distinction between them has been obliterated. We have also held that such conclusion on the part of the High Court is not borne out from the facts on record. The two cadres of males and females on cabin came to be merged only after the year 1997 for fresh recruits and the conditions of service and distinction between two cadres continued with regard to the existing cabin staff up to the year 1997. The impugned order of the High Court is self-contradictory. It holds that with passage of time the distinction between two cadres and their conditions of service have been obliterated and at the same time, it allows the employer/Air India to make proposals for merger of cadres and interchangeability on all allied matters. Before the High Court, there was neither any pleadings nor materials placed by any of the parties to undertake the exercise of merging of two cadres.

It is true that the pending dispute before the National Industrial Tribunal is between employees of Indian Airlines and its employer but there is ample material on record to show that Air India and its important employees' associations have been noticed to participate in the pending dispute before the National Industrial Tribunal. It is also on record that statements of claims have been

submitted by appellants/All India Cabin Crew Association as also by the respondent/association. The respondent/association, only after it succeeded in the petition before the High Court and could get a favourable judgment, which is subject matter of these appeals before us, withdrew their claims from the National Industrial Tribunal. When the matter of fixing the terms and conditions of employees of Indian Airlines, in which Air India and its employees had also been noticed, was pending before the National Industrial Tribunal, it was wholly uncalled for the High Court to have allowed the employer to come forward with proposals for creating parity in age of superannuation between air hostesses and flight pursers only on the condition of merging of the two cadres with withdrawal of all earlier benefits conferred on air hostesses like accelerated promotions, higher salaries, higher allowances and pension packages. Proceedings under Article 226 of the Constitution, are neither appropriate nor a substitute of industrial adjudication in the industrial courts and tribunals constituted in industrial law. In our opinion, the High Court was clearly in error in exceeding its jurisdiction by trenching upon an industrial field and adjudicating disputes inter se employer and employees and employees. Before the High Court not all the parties likely to be affected were the parties to the writ petitions. The appellant/All India Cabin Crew Association was only allowed intervention and it could not have foreseen that conditions of service of both male and female members working in cabin would be adversely affected by High Court by recording a so called consensual order directing merger of cadres. The consensual order seriously prejudices the air hostesses of the workman category represented by appellant/AICCA. The order freezes their salaries and allowances for two years, forces them to opt within a month as to whether they would fly after 50 year of age or not, makes their duties interchangeable and forces them to continue with the arduous jobs with males on board with flight duties up to the age of 58 years.

It is also to be noted that Air India Officers Association as one of the appellants on leave before us was not even a party before the High Court. The impugned judgment rendered in favour of the respondent/association comprising air hostesses of executive category has also adversely affected the service conditions of its male and female members of officers category. The High Court, therefore, adopted a hazardous course of fixing the terms and conditions of employees of Air India of various categories of males and females which was an exercise to be undertaken in pending industrial dispute before the National Industrial Tribunal.

A request was made in the course of hearing on behalf of the some of the parties that this Court should direct the National Industrial Tribunal to decide the disputes inter se Air India and its employees - 'males and females'.

On behalf of the All India Cabin Crew Association, an alternative submission has been made that the ideal situation for them would be that the air hostesses are allowed more than one option. They may be allowed to retire from flight duties at the age of 50 years, to opt for ground duties after the age of 50 years up to 58 years of age or to opt flight duties throughout up to the age of 58 years. Whether such several options can be given and would be condusive to an efficient and sound management of the business of the employer is a matter better left for adjudication to a legally chosen industrial forum by the parties.

We do not consider it proper or necessary for us to make any direction in the pending reference to the National Industrial Tribunal as in doing so, we would be committing a similar mistake as was done by the High Court.

It is open to the Central Government to enlarge the terms of the reference under section 10 of Industrial Disputes Act to specifically include for adjudication the dispute of Air India and its employees and/or the employees inter se. It would also be open to the air hostesses represented by appellant/AICCA and the respondent/AHSA to make their demands in the pending reference before the Tribunal by seeking a fresh reference from the Central Government. It would be then open to the National Industrial Tribunal to take a fair and just decision in accordance with law after examining all aspects of the matter, on hearing the employer and considering its business and administrative exigencies.

Lastly in desperate attempt, to support a part of the judgment of the High Court which declares denial of flight duties to the air hostesses up to the age of 58 years at par with males as invalid, on behalf of the respondents/associations, an alternative submission is advanced that the other part of the impugned judgment whereby conditional proposal of Air India of merger of the two cadres [males and females] was accepted, may alone be quashed and the remaining part be left undisturbed and intact as valid.

In view of the detailed discussion of the various grounds urged before us, we have held that both impugned parts of the judgment of the High Court are unsustainable. It is, therefore, not possible for us to accept the alternative submission made on behalf of the respondents/associations that since two parts of the impugned judgment are severeble, one of the parts fixing age of retirement for air hostesses on flight duties up to the age of 58 years be upheld.

In the result, these appeals are allowed and the impugned judgment of the Bombay High Court dated 20/23.8.2001 is hereby set aside. The Writ Petition of respondent/association is dismissed. All interim orders including dated 14.12.2001 shall stand vacated. Looking to the nature of the controversy involved, we leave the parties to bear their own costs in this Court.