
(1983) 03 KL CK 0026

In the High Court Of Kerala

Case No : W.A. No. 682 of 1982 and O.P. No. 8915 of 1982-S

A.N. Rajamma

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 29-03-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 15(1), 19, 226, 39A
Kerala Last Grade Service Rules — Rule 1, 5, 8

Citation : (1983) 03 KL CK 0026

Hon'ble Judges : P. Subramonian Poti, Acting C.J.; K.S. Paripoornan, J

Bench : Division Bench

Advocate : S. Vijayan Nair, for the Appellant; T.P. Kelu Nambiar, for the Respondent

Final Decision : Allowed

Judgement

Subramonian Poti, A.C.J.

1. The attitude of courts in the United States of America in dealing with the plea of discrimination against women, in the early cases, is often referred to as romantic paternalism. The social thinking and the approach to the question of the role women had to play in society was, even in that country, tradition bound for more than a century after equal rights of woman had been recognised as an inviolable civil right. The marked change in the attitude of courts on the question of gender based discrimination is a post 1970 phenomena in that country. The protectionist policy has now given way to the realization that woman is in every respect entitled to claim equal rights with man. Bradwell v. State of Illinois (1873) 16 Wall 131 to Frontiero v. Richardson (1973) 411 U.S. 677 is a hundred years of interesting case history. Much more tradition bound, as we are in this country, we may perhaps take some time to get out of the hangover of our past to realise that under the Indian Constitution woman has equal rights with man and that needs to be secured, if necessary, by affirmative action.

2. We have two petitioners before us in two cases. Both are women. They found

themselves in an annoying situation when, responding to invitation to apply for appointment as Last Grade Servants in the Civil Service of the Kerala State, they found [that they had been selected and given high ranks but were told later that they are not being appointed apparently for the reason they are women. They have approached the Court to vindicate themselves.

3. Since the questions arising for decision in the Writ Appeal and the Original Petition are more or less the same we thought it fit to hear the Original Petition along with the Writ Appeal and we are disposing of these by a common judgment. The judgment of the learned Single Judge challenged in the Writ Appeal is one dismissing the Original Petition in limine by a short order which reads:

The Petitioner missed the bus when the list expired on 7th October 1982. No grounds for interference. The Original Petition is dismissed in limine.

Evidently what the learned Single Judge meant appears to be that the validity of the list of Last Grade Servants published by the Public Service Commission was only for a period of 2 years and though the petitioner's name was in the rank list and the petitioner, on the basis of her rank, anticipated appointment and further she was disappointed when she was not advised, the Original Petition having come up for admission only after 7th October 1982 by which time the period of the currency of the list had expired no interference was called for. The Petitioner seems to have waited for advice and only when she found that despite her high rank she was not being advised she came to Court. There is no case that the petition was belated. If, as a matter of fact, she was to be advised and she was not, the mere fact that the period of the list had expired just before she came to Court should not operate to disentitle her to claim relief from this Court. The question would be whether the petitioner's right was infringed by the failure to advise her for appointment. That is the question which arises for decision and therefore we admitted the appeal and ordered notice to the respondents. During the pendency of the Writ Appeal one of us, the Acting Chief Justice, received a petition from one similarly placed as the Appellant in the Writ Appeal and in view of the facts stated therein we thought we should take notice of it. We treated it as an Original Petition, and issued notice to the State of Kerala and the Kerala Public Service Commission. Counter-affidavits have been filed therein by the State as well as the Public Service Commission. There also the question raised is whether the " Petitioner who was selected for appointment as a Last Grade Servant was denied advice for good and sufficient reason. Though the petitioners in both the cases have obtained fairly high ranks in the rank list published by the Public Service Commission they have not been advised for appointment on the ground that they do not know cycling and therefore cannot be appointed as peons in the Last Grade Service. Whether this attitude will militate against the right to equality and the right to be treated fairly is the question that we are called upon to decide in both these cases. We will now state the facts of the two cases. First we will state the facts in O.P. No. 8402 of 1982 from which W.A. No.

682 of 1982 has been filed.

4. The Petitioner therein is a widow with two dependant children one of them being a mentally handicapped child, According to her, driven by dire necessity, she had no option but to seek an employment as a Last Grade Servent in the Kerala Government Service.

5. On 31st December 1979 a gazette notification was published by the Public Service Commission calling for applications for the post of Last Grade Servants. The qualifications prescribed where that the candidate should be litarate in Malayalam and should not have completed 35 years of age. At the relevent time the ability to ride a bicycle had been prescribed as an essential qualification for appointment to the post of peons and chowkidars. The Petitioner did not evidently satisfy that qualification. All the same she was qualified for appointment in other categories of the Last Grade Service for which cycling was not essential. In fact it will be useful here to refer to the relevant rules relating to cycling as a qualification prescribed for appointment to some categories among Last Grade Servants.

6. Special Rules for the Kerala Last Grade Service were prescribed on 8th March 1966. Rule 1 mentioned the categories of posts in the Last Grade Service. Note (2) to Rule 8 mentioned that for appointment to the post of Peons by direct recruitment ability to ride a bicycle will be a desirable qualification. Thus among the various categories of posts of Last Grade Service only for appointment to the post of Peons ability to ride a bicycle was considered as a qualification and that was not essential but only desirable. These rules were amended by G.O. (P) 475/78/GAD, dated 17th October 1978, Rule 1 was substantially amended by including more categories of posts therein. Note (2) of Rule 8 was also amended by prescribing ability to ride bicycle for two of the posts, namely, Peons and Chowkidars. The note so amended read:

2. For appointment to the posts of peons by direct recruitment ability to ride a bicycle will be an essential qualification.

This Note was subsequently substituted by G.O. (P) No. 90/81/GAD, dated 19th March 1981 and as substituted the note read:

(2) For appointment by direct recruitment to the posts of Chowkidars and Messengers in the Administrative Secretariat and for appointment by direct recruitment of males, to the posts of Peons, ability to ride a bicycle shall be an essential qualification.

There was an explanatory Note to the rule and that read:

According to the existing provisions in the Special Rules for the Kerala Last Grade Service, ability to ride a bicycle is an essential qualification for appointment, to the post of Peon by direct recruitment Government have since decided to exempt women candidates from this essential qualification for being appointed as Peon. This notification is intended to achieve the above object.

7. Thus while from 8th March 1966 up to 17th October 1978 cycling was not a qualification prescribed for the various categories of posts in the Last Grade Service except that of Peons and even in the case of Peons it was only a desirable qualification from 17th October 1978 up to 19th March 1981 this was considered as an essential qualification for Peons and Chowkidars appointed by direct recruitment. From 19th March 1981 only in the case of males appointed by direct recruitment to the post of Peons this was considered as essential qualification.

8. The petitioners in both the cases are females. They had applied for appointment to the Last Grade Service pursuant to a notification in December, 1979 at which time for the posts of Peons and Chowkidars cycling was an essential qualification. Long before the list expired this stood amended by reason of which amendment the petitioners could be appointed irrespective of the cycling qualification. It may be remembered that the recruitment was common to all categories in the Last Grade Service and admittedly advice could be made to all the categories other than Peon and Chowkidar even without cycling qualification.

9. The Petitioner in O.P. 8402 Smt. Rajamma was invited for the interview though in her application it was specifically indicated that she did not know cycling. She was interviewed along with many others. She told the members of the interview board that she did not know cycling. A selection list was drawn up on 7th October 1980 in which nevertheless the petitioner's name was included. She got a fairly high rank, namely 18. Against her name in the list it was written "non-cyclist" perhaps indicating that the candidate was eligible for appointment only in a vacancy which did not call for ability to ride a bicycle. According to her when more than 150 persons were seen advised from that list but she was not advised, she approached the office of the District Officer of the Public Service Commission at Kottayam and every time she approached the office she was told that her name would be advised for appointment as soon as a non-cyclist post became available. Even assuming that the insistence on cycling qualification was proper the Petitioner could have been advised to the posts to which cycling was not a prescribed qualification, but she was not so advised. By 19th March 1981 all post became non-cyclist posts as far as women candidates were concerned. Then, at any rate her name should have been advised in the vacancies that arose thereafter. There were many advised between 19th March 1981 and 7th October 1982 much lower in rank than the petitioner. Even then the Petitioner was not advised and therefore she had to move this Court to secure her right for appointment based on her rank.

10. In the petition sent by the Petitioner in O.P. No. 8915 of 1982 Smt. Kanthimathi Amma, a candidate who has passed S.S.L.G., she claims that she had been ranked 86 after interview by the Public Service Commission and nevertheless she has not been appointed though many persons much lower in rank than she had been appointed. She had also indicated that she did not know

cycling. She particularly points out that it cannot be that she was not advised because she was not a member of a backward class, for, other Nair candidates the Petitioner belongs to the Nair community--have been advised from the rank list though their ranks were much lower. She applied to the Public Service Commission seeking clarification as to why she was not advised for appointment and there was no response. When she contacted the Ernakulam District Office of the Public Service Commission she is said to have been told that women are not being advised as Last Grade Servants and that advice of women from the list was being made only if request is made from any office that women were to be advised. She indicates that it is unlikely that any officer would make a request that women candidates should be advised for his office as his motive may be suspect.

11. According to the Petitioner in O.P. No. 8915 of 1982 if no women was proposed to be appointed though ranked in the rank list the Public Service Commission could have declined to act upon the application. It was not necessary to call her for interview. Even if the Public Service Commission did not notice that the applicant was a woman at least when she appeared for the interview it would have been known that she was a woman. At least then the Commission could have avoided including her in the rank list. According to her having interviewed her and ranked her in the list, to tell her that merely for the reason that she is a woman she would not get appointment would be absolutely discriminatory and unfair. She would say that she has been crucified for the reason that she belongs to the female sex. It is further pointed by her that while women are allowed to function as Postmen, Police Inspectors, Customs Collectors and District Collectors, it is rather harsh that in the Last Grade Service appointment of women could be found to be improper.

12. The Petitioner in O.P. No. 8915 of 1982 sent her petition to the court before the expiry of the list seeking that, before the list so expires action may be taken on her application. By a subsequent statement dated 6th December 1982 she brought some further facts to the notice of the Court. It is pointed out by her that in similar instances when one Beevi approached this Court complaining that she had not been advised by the Public Service Commission because she did not know cycling, an assurance was given to the High Court by the Advocate General that she would be given employment and she was taken into the office of the Advocate General. Certain further facts brought to the notice of the Court by her call for mention here. The gazette in which the ranked list is published is seen to be that of 16th November 1982. It is strange that the rank list should be published in a gazette after the closing of two years of the list. In that list it is seen that one Balakrishna Marar, who has been appointed as Last Grade Servant, is only of rank No. 231 and he is also a person who is shown as a non-cyclist. As against his name in the list published in the gazette two asterisk marks are shown and the footnote shows that two asterisk marks indicate "no cycling". If so the Petitioner who is a female and whose rank number is 86 is denied a job while a male belonging to her community who does not know cycling and whose

rank is 231 is advised and that is said to be proof positive of the discrimination practised as a policy.

13. The long and short of it is that for one reason or other no female candidate has been advised to the Last Grade Service. It is mentioned in the counter-affidavit of the Kerala Public Service Commission that out of the rank list 260 candidates have been advised for appointment to the Last Grade Service. The rank of the Petitioner in O.P. No. 8402 of 1982 is 18 while the rank of the Petitioner in O.P. No. (sic) of 1982 is 86. Of course appointments were made subject to communal rotation. But it is not because of that that the petitioners have not been advised, for, persons of their community much lower in rank have been advised only because they are males. It is mentioned with reference to the Kerala Government Gazette, dated 16th November 1982 wherein a list of those who had been selected showing details as to community and cycling qualification was published, that out of the 260 candidates advised not a single woman candidate has been advised for appointment to the Last Grade Service. Though it is only the post of Peons and Chowkidars that require cycling and therefore it is only for those posts that women candidates were not to be advised for want of cycling qualification, as a matter of fact for other posts also they were not advised for another reason, namely that those posts were those for which only male candidates can be appointed. In other words by the method now adopted women are entirely excluded from appointment to the Last Grade Service. That is the practical effect and that explains why despite the advice of 260 candidates none advised happens to be a woman.

14. Before we refer to the counter-affidavit it would be interesting to notice how and on what apparent justification despite applications being called for from candidates irrespective of sex and the candidates being interviewed for the purpose of appointment and ranked in the rank list, female candidates were denied advice even to posts other than Peons and Chowkidars though there is no requirement of cycling qualification for those posts.

15. The Special Rules for the Kerala Last Grade Service enumerates several categories of posts in that service. Rule 5 of the Special Rules deals with appointment to the various categories. There is a Note to this rule which Note is of considerable importance. It is relevant to notice that the Note did not originally find a place in these rules which came into force in 1966. It was inserted by a notification, dated 15th May 1972. This Note read thus:

Vote.--In view of the arduous and special nature of the duties and responsibilities attached to the posts specified in the Table below, only male candidates shall be eligible appointment under this rule to the said posts:

Peon Watchman Duffadar Cleaner-cum-conductor Gate Keeper Court Keeper Process Server Messenger Villageman Chainman Maistry Plumber.

Evidently this Note underwent amendments by addition of categories from time to time so as to exclude women candidates from more and more categories. Ext.

R-1 (b) filed by the State along with its counter-affidavit show that by the time of that letter, dated 16th April 1982, in place of the 12 original categories 25-categories were included as categories inaccessible for women and 4 more were proposed to be included. The apparent reason indicated in the Note for this taboo is that these posts envisage arduous duties, or duties of a special nature. This Court had occasion to look into this rule and comment on the undesirability of keeping the rule as such. Despite the attention of the Government being so drawn to this by the Judgment in O.P. No. 5080 of 1976 as early as in March, 1979 the ban has not been lifted. Of course there is a platitude in the counter-affidavit filed by the State (we call it a platitude because the way the matter has been taken up leisurely would necessarily reflect on the want of seriousness and concern in the approach) that the matter is receiving attention. According to the Government on the basis of the observations in the judgment of this Court the matter was being looked into and all Heads of Departments were addressed to identify the posts from which females were to be kept out. One must remember that the delay in such identification would jeopardise the rights of many women who would be barred by overage from being appointed, as the petitioners in these two cases. Remembering that equality of sexes is raised to the level of constitutional guarantee and Government of its own should have taken steps to promote such equality rather than negative it, at least when the court alerted the Government to the need for a fresh look the matter should have been considered with a sense of urgency which by its very nature is deserved. The sequel to the delay is that the attitude of the Government, despite the judgment of this Court, is of no consequence to the petitioners herein. The Petitioner in O.P. No. 8915 of 1982 has averred that this is her last chance for appointment as she would be overaged if she is not selected from this list.

16. Now we will refer to the counter-affidavit of the State Government in O.P. No. 8915 of 1982. It is mentioned that though cycling was only a desirable qualification prior to 17th October 1978 for the appointment to the posts of Peons it became a necessary qualification for a short period between 17th October 1978 to 19th March 1981, not only for post of Peons but also for the post of Chowkidars. It ceased to be a qualification on 19th March 1981. The counter-affidavit of the Public Service Commission shows that the turn of the Petitioner in O.P. No. 8915 of 1982 for advice came up after 19th March 1981 at which time the requirement of cycling had been dropped. But nevertheless the Petitioner was not advised to the post of Peon and Chowkidar which did not require cycling qualification because of the letter of the Government, Ext. R-1 (a) which referred to such a situation and directed that in the event of any change in the qualifications that will be applicable only to subsequent selections and will not operate to disturb the existing list. It is said that this rule applied so as to deny appointment to the petitioners in both the cases even after 19th March 1981.

17. In order to pinpoint the attention of the State to the proper answers to be given in the case we had, in our order, dated 6th December 1982 indicated what

the counter-affidavit of the State Government and the Public Service Commission must highlight. We wanted them to advert to the following three matters:

1. Whether the Petitioner should not have been advised for appointment after 19th March 1981 (the date when the cycling qualification was dropped) from the current list prepared for the post of last grade servants?

2. Whether persons junior to the Petitioner in rank without cycling qualification have been advised in preference to the Petitioner merely for the reason that they are males?

3. Whether it is discriminatory to exclude women from the purview of appointment to posts in the last grade service on the plea that women are unsuitable for appointment for such posts? Even assuming that this could be done, whether posts shown in the note to Rule 5(b) of the Kerala Last Grade Service Rules are those from which women are to be excluded? If the answer is yes, what is the basis of such classification?

18. In regard to the third question, namely discrimination against women Government relies on the Note to Rule 5 reserving many of the categories only to male candidates in view of the arduous or special nature of duties. Reference is then made to the judgment of this Court in O.P. No. 5080 of 1976 and it is said that the Government proposes:

to examine further with special reference to the exact nature of the duties of each post and of its arduous nature, if any to identify the posts which the female members are in full incapable of performing, so that those posts alone so identified may be specified as the posts to which women are ineligible for appointment in the Last Grade Service.

Reference is made to the communication Ext. R-1 (b), dated 16th April 1982 sent to all Heads of Departments. There is no answer to the plea of discrimination. No attempt is made to justify the classification. No facts which would indicate that duties attached to excluded posts are onerous or arduous have been marshalled. There is only a statement that the matter is being examined. Nevertheless the rule as it stands has been implemented totally denying appointment to women candidates to any of the 260 posts to which advice has been made.

19. Now we will consider three questions that, according to us, arise for determination in these cases. These are : (1) Is the exclusion of the petitioners from the scope of advice to the post of Peons justified on the ground that they do not know cycling? (2) Assuming that this is justified is the non-advice after 19th March 1981 when the rule dropped the requirement of cycling qualification justified? and (3) Whether it is not discriminatory to totally exclude women from appointment to the posts of Last Grade Servents as done in this case where out of the 260 posts advised for Last Grade Service not one is a women? Consequently is not the relevant rule unconstitutional?

20. There is much to be said in favour of the contention of the petitioners that

the prescription of cycling qualification in the case of women for appointment to the posts of Peons is not justified. Evidently the post of peon covers a large area of the posts in the Last Grade Service. Exclusion of women from the post of Peon would operate as a substantial exclusion of women from, the posts in the Last Grade Service particularly when males who are also so excluded for want of cycling qualification nevertheless get appointment to the Last Grade Service in the other categories to which women are considered unsuitable for appointment "on account of arduous duties" of such posts. This seems to be highly unfair. It is not that every post of Peons requires cycling. There may be posts where cycling could be dispensed with. There is no positive averment in this case that duties of the Peons are such that for all the posts of Peons, without cycling, it will be impossible to conceive of a person holding the post effectively. In fact there cannot be such a case, for, ever since 1966 when the special rules came into force till 1978 cycling was only a "desirable qualification" which meant that males and females could be appointed as Peons even if they did not know cycling. After 19th March 1981 the position is the same. In fact it is better, since, cycling qualification was not necessary at all in regard to Peons in the case of females. There is no case that the job description of Peons changed by, 19th March 1981. Peons continued to do the same work as before. Even without envisaging any change in nature of their duties the Government found it proper to prescribe that no cycling qualification was necessary in the case of women candidates for being appointed as Peons. That means that they could be appointed in posts in the category of Peons which did not necessitate knowledge of cycling. The position would have been the same earlier and therefore the insistence upon cycling qualification which had the effect of excluding female candidates from the post of Peons during the period from 17th October 1978 to 19th March 1981 is not supportable either on logic or on reason and such an approach was not required by any exigency of situation judged in the light of the subsequent amendment which came into force on 19th March 1981. We therefore find that denial, effectively, of any appointment to females which was the practical result of the operation of the amended rules which came into force on 17th October 1978 was irrational, unjust and unfair and militated against the guarantee of equality. Hence we answer the first question in favour of the petitioners in these cases.

21. Even assuming that insistence on cycling qualification up to 19th March 1981 was valid when once it was found that for female candidates this was no longer necessary after the amendment of 19th March 1981 advice of female candidates thereafter should have been governed by that criterion. In answer it is said that Ext. R-1 (a), a Government Order, dated 12th August 1971 was passed as an order laying down the rule that any change made in the qualification, age, method of appointment etc. prescribed for a post after the issue of the notification will be given effect to in future selections only. Therefore it is said that the Public Service Commission could not give effect to the amendment in regard to a list already published for advice for appointments subsequent to 19th

March 1981. We must notice here that strictly speaking it was not as an amendment it was brought into force from 19th March 1981 with regard to different qualifications for selection to a post. It was only because the petitioners were qualified for the post for which applications were invited that their applications were entertained and they were interviewed. They found their names in the rank list. They were eligible to be appointed to the Last Grade Service, but as and when they were to be advised the post to which they were to be advised was to be such that cycling qualification was not required. They would be passed over in regard to such posts to be considered again when other posts for which cycling qualification was not necessary had to be filled up. Therefore it is not as if a fresh selection had to be made upsetting the selection already made. The petitioners were already in the select list and only the advice depended on the circumstance relevant to the time the vacancy arose. It cannot therefore be said that Ext. R-1 (a) would apply to their case and consequently even though vacancies arose in the post of Peons after 19th March 1981 they could not be appointed thereafter. The turn of the petitioners at any rate that of the Petitioner in O.P. No. 8915 of 1982, arose only after 19th March 1981 at which time there was no bar in making advice to the post of Peon. For this reason too we find that the petitioners could have been advised as Peons to the posts in the Last Grade Service that fell vacant after 19th March 1981.

22. Now we have a larger question which calls for consideration at our hands. Stated as in the counter the stand taken by the Government and the Public Service Commission appears to be innocuous, at any rate not sufficiently damaging as to deny all rights of appointment to female candidates to the posts in the Last Grade Service. But what is the practical effect of the stand? It is well known that for the posts in the Last Grade Service the Public Service Commission holds selections only once in a while and those selected and included in the list wait for the expiry of the period of two years for advice from that list. After the period expires a fresh list is prepared. By that time those who do not have the good fortune to be advised from the current list and who become overaged are out of the field of choice for ever. Therefore to be advised from the current list is a very material right. We are told that despite the advice of 260 persons from the list in which the petitioners figure and despite the Petitioner in O.P. No. 8402/82 getting the 18th rank and the Petitioner in O.P. No. 8915/82 getting 86th rank they have not been appointed, and more than that in the 260 posts no woman has been appointed. Naturally that means that males who hold much lower ranks than the females have been advised and the females have been left out. Why? It would appear that they are excluded only from some posts which require the qualification of cycling. Really that is not the case. In respect of other posts or most of the other posts they are excluded for the reason that the posts involve "duties of a special or arduous nature". As we have indicated earlier, neither in the counter affidavit of the State nor in the counter affidavit, of the Public Service Commission is there any answer to the propriety of such exclusion despite the fact that Respondents were specifically called upon to answer a plea

of discrimination. Naturally the Public Service Commission cannot be expected to justify the stand taken by the Government and it was therefore the counter of the State that must have asserted one way or the other as to whether the stand was sustainable. It is initially for the petitioners to make out a case that the result of operation of the Note to Rule 5 is such as could be said to be discriminatory, but when once that is indicated by the circumstances of the case it is for the State to justify its stand as to what is the compelling reason for such treatment under the rule. Advertence has already been made to the decision of this Court in O.P. No. 5080/76. It is interesting to notice that though the decision has been rendered as early as on 22nd March 1979 the Government is said to have taken action in accordance with the judgment by addressing a letter Ext. R-1 (b) to all the Heads of Departments to ascertain their view only on 16th April 1982, more than three years after the judgment of this Court. This speaks volumes about the sincerity or concern. We make no further comment on it, but suffice to say that the stand taken here that the Government have addressed a letter to the Heads of Departments will not be an answer to the charge of discriminatory attitude in the matter of employment of women.

23. The case in O.P. No. 5080/76 was one where a post of Sweeper-cum-Watchman was denied to a woman despite the fact that she was duly selected and had the necessary rank. The post of Sweeper-cum-Watchman was not one of the posts included in the Note to Rule 5(b) already adverted to, but even so it was taken that Watchman being a post in the excluded category Sweeper-cum-Watchman should also be excluded. This Court was not prepared to accept this exclusion in that case and directed the Government to appoint the person selected. In the course of the judgment which was by one of us, the Acting Chief Justice, the court said:

7. We in this country carry with us, to a considerable extent, our conventional thinking and attitude to social life despite modern trends in the approach to individual freedom and right to equality. Our people, and particularly the Hindus and the Muslims who constitute a large proportion of the population have been conditioned over a long period of time to view woman as subordinate to the authority of her man, as one not equal to man in physical prowess and capacity for physical endurance. The Constitution of our nation reflects civilized thinking and assures women their rightful place as citizens of this country. But despite such solemn guarantee there are many areas where she has yet to gain equality with the male. Despite resolutions at International Conferences highlighting the need for a fairer treatment to the fair sex there are areas where law has not still stepped in to remove the disabilities of women and the anomalies in the social set up. We have recently observed the International Year of the Women but its impact, in terms of positive gains is yet to be assessed.

What is important to notice is that in paragraph 5 of that judgment this Court noticed that there was no attack to the validity of the rule excluding women from certain categories of posts and therefore this Court said:

and therefore whatever might be the prima facie impression one may have on the fairness of such rule that may not call for adjudication in this case.

While therefore this Court did not strike down the rule in that case because there was no attack to the validity of the rule the court alerted the Government to the need of a fresh look into the matter, but despite the seriousness of the question and the very material consequences upon nearly one-half of the population of this country the Government seems to have done nothing more than address a letter to all Heads of Departments three years after the judgment of this court. The Government is said to be awaiting the response to that letter so that in due time it may take a decision. That is certainly not an answer to the case of the petitioners in these cases when the petitioners seek an adjudication on the validity of the rule, challenging the rule on the ground of discrimination. They seek nothing more or nothing less than appointments for themselves. That they feel have been denied to them while more fortunate males with lesser ranks in the select list have enjoyed the benefit of appointment.

24. We regret to say that the absence of even an attempt to justify the Government's approach makes it more difficult for the court to adjudicate on the plea of discrimination. We would have expected the State Government to answer not merely by stating that they have sent out--a circular a matter which is of no consequence to the petitioners here--and are awaiting the response, but to explain their attitude to this question. When this Court called their attention to the situation the Government should have made use of that occasion to look into the matter at least with a view to tentatively determine the attitude which they have to take in the matter. Reference to the letter of 16th April 1982 will not meet the needs of the case. No better stand was taken at the hearing so much so that on the question of discrimination we have to proceed as if the plea is not attempted to be met at all.

25. In the opening paragraph of this judgment we referred to the case of *Bradwell v. Illinois* (1873) 16 Wall. 131. A Chicago woman appealed to the United States Supreme Court, contending the State's refusal to license her to practise law at the Bar. This was solely on the ground that she was a woman. It is interesting to notice that the plea that women were unfit by nature to hold certain occupations such as that of being a member of the bar did receive the acceptance of the court at that time. Justice Joseph Bradley of the United States Supreme Court gave expression to the view that:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex: evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in divine ordinance, as well as in the nature of things indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

We find something in common in this with what Manu said centuries earlier

26. Consistent with the view expressed on the right of women to enter the bar the United States Supreme Court took the view in *Minor v. Happersett* (1875) 21 Wall 163 that though women had citizenship rights they need not necessarily be allowed to vote since voting is not a privilege or immunity. In 1880 the Supreme Court ruled that women could be excluded from jury duty, a view which was affirmed as recently as in 1961. But that was overruled in 1975 in *Taylor v. Louisiana* (1975) 419 U.S. 522 . The marked departure from its earlier traditional view by the Supreme Courts perhaps because of the agitation for establishment of civil rights in the 1950s is visible in the case in *Frontiero v. Richardson* (1975) 411 U.S. 677 where a female Air Force Officer sought increased benefits for her husband as dependant. If the officer had been a male the wife would be the dependant and the officer would be eligible to additional benefits. But the law did not make admissible such a claim in the case of husband since law did not conceive the husband as a dependant of the wife. This was struck down by the Supreme Court and in his opinion Justice William, J. Brennan Jr. observed thus:

...gender-based classifications, like distinctions based on race and alienage, were inherently suspect.

He further said thus:

As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

27. We find mention of a case in the publication of the United States Equal Employment Opportunity Commission titled "Affirmative Action and Equal Employment" Volume I at page 8 which may be of relevance here. One Anaconda Aluminium Company was ordered to pay 1,90,000 dollars in back wages and court costs to 276 women who alleged that the company maintained sex-segregated job classifications. Job formerly classified "female" and "male" had been reclassified as "light" and "heavy", but women still were prevented from transferring to "heavy" jobs, and after layoffs, the company hired new male employees into "heavy jobs" rather than recalling females with seniority in light jobs. The company was ordered to assure opportunity for all jobs to anyone who could qualify. (1971).

28. Reference may also be made to another case mentioned in the same volume, a case which arose in 1972, *U.S. v. Household Finance Corporation* 4 E.P.D. para 7680 N.D. 111 1972. The white collar female employees charged that they were denied promotion because of sex. Under the terms of consent decree the Corporation had to pay more than 1,25,000 dollars to such employees and the company also agreed to hire 20 per cent females for branch representatives openings. These are some cases in the affirmative action area.

29. It may be remembered here that Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 extended equal employment opportunity in the United States to:

- (1) All private employers of 15 or more persons
- (2) All educational institutions, public and private
- (3) State and local Governments
- (4) Public and private employment agencies
- (5) Labour unions with 15 or more members
- (6) Joint labour-management committees for apprenticeship and training.

30. An interesting case where a plea of discrimination succeeded was in *Ida Philips v. Martin Marietta Corporation* 400 U.S. 542. The petitioner, a woman with pre-school age children sought employment with a corporation. She was informed that applications from women with pre-school age children were not being accepted. The Corporation did employ men with pre-school age children. The Petitioner thereafter commenced an action in the United States District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964 alleging that she had been denied employment because of her sex. The District Court granted a judgment in favour of the employer finding that since 70 to 75 per cent of the applicants for the position sought by the Petitioner were women and 75 to 80 per cent of those hired for the position were women, no question of bias against women as such was presented. This was affirmed by the Court of Appeals. On certiorari United States Supreme Court vacated the judgment and remanded the matter. It was found by the Supreme Court that the provision in the Civil Rights Act of 1964 which required that persons of similar qualification were to be given employment opportunities without discriminating on the ground of their sex did not permit one hiring policy for women and another for men, where each had pre-school age children though "conflicting family obligations, if demonstrably more relevant to job performance for woman than for men, could arguably be a basis for distinction". The records in that case were inadequate for resolution of such issue and therefore the judgment was set aside.

31. An interesting recent case that arose in America in 1977 may deserve appropriate mention here. In *Dothard v. Rawlinson* (1977) 433 U.S. 321 the court had to consider whether it had to strike down a state law that set minimum height and weight requirements for certain jobs, in that case that of a prison guard. The complaint in that case was by a woman who was rejected for a job of prison guard because she did not have the required measurement of 5' 2" height and 120 pounds of weight. According to her if the law were to apply it would disqualify more than 40 per cent of the women in the country but only one per cent of the men and therefore it was discriminatory. The court held that the case was one of sex discrimination particularly when the State had failed to show that the height and weight requirement had a "manifest relationship" to the job in question.

32. Though there was no constitutional guarantee in England to women of equality with men, women's rights have been regulated from time to time by

appropriate enactments. Sex Disqualification (Removal) Act, 1919 Equal Pay Act, 1970. Health and Safety at Work Act, 1974 and Sex Discrimination Act, 1975 are the relevant statutes. A case which may have relevance on the point before us arose before the Court of Appeal in *Nagle v. Feilden and Ors.* 1966 (1) A.E.R. 689. The Jockey Club and the Stewards of Jockey Club were exercising power to grant licences to officials, trainers and Jockeys in Great Britain. In accordance with the unwritten practice of refusing licence to women the Jockey Club declined to issue trainer's licence to Mrs. Nagle though they did grant such licence to her "head lad" who was simply her servant. Mrs. Nagle sued the stewards for a declaration that this act was against public policy and also sought for an injunction. Her claim was struck down as showing no cause of action and that was confirmed in appeal. Mrs. Nagle took the matter to the court of appeal seeking and obtaining leave. Lord Denning MR. noticed, in considering the role of the Jockey Club that the club was exercising a virtual monopoly and by refusing or withdrawing the licence the stewards will be able to put a man out of his profession. In that background the question was whether the court could give any redress. The right to work at one's trade or profession was just as important to any person as or perhaps more important than this rights of property and Lord Denning expressed the view that just as the court would protect the right to property the court would also intervene to protect the right to work. In the case before the court of Appeal it was found that the stewards of the Jockey club had made a practice of refusing license to any women trainer and such refusal was merely for the reason that the applicant was a woman and for no other reason. Lord Denning said thus:

The practice is so uniform that it amounts to an unwritten rule. The only way she can get round it is to get her head lad to apply. The licence is granted to him, not to her. It seems to me that this unwritten rule may well be said to be arbitrary and capricious. It is not as if the training of horses could be regarded as an unsuitable occupation for a woman, like that of a jockey or speedway-rider. It is an occupation in which women can and do engage most successfully. It may not be a "vocation" within the Sex Disqualification (Removal) Act, 1919, but still it is an occupation which women can do as well as men, and there would seem to be no reason why they should be excluded from it. If this practices--this written rule--is invalid as being contrary to public policy there is ground for thinking that the court has jurisdiction to say so. It can make a declaration of right whenever the interest of the plaintiffs is sufficient to justify it (see *Boulting v. Association of Cinematograph Television and Allied Technicians*).

Danckwerts, L.J. expressed the view thus:

It may have appeared a natural attitude in Victorian times or earlier, but in present day conditions it seems to me to be restrictive and nonsensical.

The learned Judge also observed that "the application was not considered simply because she is a woman. That is arbitrary and entirely out of touch with the present state of society in Great Britain.

Salmon, L.J. in the same case referred to the fact that the licence was refused solely on the ground that Mrs. Nagle was a woman and observed thus:

It would be as capricious to do so as to refuse a man licence solely because of the colour of his hair. No doubt there are occupations such as boxing which may reasonably be regarded as inherently unsuitable for women; but evidently training racehorses is not one of them.

The court was agreed that the statement of claim by Mrs. Nagle was not to be struck down and the appeal, was to be allowed.

33. There is not much of case law in the Indian Courts on the question of discrimination against women not because there is no discrimination but perhaps because women are reluctant to come up to the courts to vindicate their rights. The petitioners before us and particularly the Petitioner in O.P. No. 8915 of 1982 seem to have taken up the matter Ho this Court in a crusading spirit.

34. Remembering what the practical?consequence of the attitude of the Government has been, namely that for one reason or other not a single woman has been advised to any one of the 260 posts we find that this is a clear case of discrimination, a discrimination which falls not within Article 14 of the Constitution only, but also within the specific prohibition in Article 15(1) of the Constitution. The mandate to the State that it shall not discriminate against any citizen on grounds only of sex is one of the most important fundamental rules that calls for strict observance. In the framing of any statute or law or the making of subordinate legislation by a delegated legislative authority this is a fundamental rule which, under no circumstances, would bear violation. Unlike the freedoms in Article 19 of the Constitution there is no Scope for restricting the absolute scope of the rights under Article 15(1) of the Constitution. There would be no scope whatever to justify differentiating between the male and female sexes in the matter of appointment. The right of women should not be denied on fanciful assumptions of what work the woman could do and could not do. Whether the work is of an arduous nature and therefore unsuitable for women must be decided from the point of view of how women feel about it and how they would assess it. If the work of say, a Duffadar, a Cleaner-cum-Conductor, Court Keeper, Chairman, Housekeeper or a Field Worker does not suit a woman or she would feel humiliated by such work it is for her to decide whether she should apply for the concerned job and not for the male dominated legislature or the male dominated bureaucratic machinery which may be functioning as a delegated legislative body to decide whether women should be permitted to do such work or not. Incidentally in the 29 categories of excluded posts mentioned in Ext. R-1 (i) letter of Government we find some such as that of House keeper which, we would have thought, is traditionally the preserve of women, but from these few posts too women seem to have been excluded. It is regrettable that decisions of material consequence said to be in the so called interests of women purporting to protect the position of women are generally taken not after any consultation with representative bodies of women, but unilaterally by the

administrators, most of whom carry with them the hang over of the past, the past of male domination in our social set up.

35. Judged in the background of our traditional attitudes and conventional sentiments it may perhaps appear that women, whose role has all along been understood to be domestic dominance cannot expose and adjust herself to some of the occupations which have been the sole preserve of men hitherto and that might perhaps explain the inaccessibility of several posts to women envisaged in the impugned Note to the rule. Just as the Civil Rights Movement of the 1950s and 1960s in the United States aroused a new national sensibility to sex discrimination, situations may arise in this country too compelling women to seek enforcement of what is due to them. Woman is no longer content merely to sit at home expecting the man to earn the bread for the family. Both are quite often equal partners in sharing the financial burden of running the home. This social change must necessarily have its impact upon traditional perspectives concerning women's role and that must call for change in our laws, particularly so in the light of the constitutional mandate of equality. Rules should not operate as a deterrent, to such change, but promote it. A time must necessarily come when all posts excepting those which due to physical reasons a woman cannot take up must be available to them. The attempt should not be to perpetuate discrimination but to obliterate it. We are sorry to see that the list of excluded categories started with a small number, namely 12 but is growing rapidly in size as newer and newer categories of posts are added to the excluded categories in the Last Grade Service.

36. In these circumstances we have no hesitation to hold that the denial of appointment to women to posts in the Last Grade Service on the sole ground that they are women is opposed to Articles 14 and 15(1) of the Constitution of India and consequently Note to Rule 5(b) of the Special Rules for the Kerala Last Grade Service as it stands has to be struck down as unconstitutional. This does not preclude new but rational approach being made to the whole question by the Government.

37. We have now to deal with two minor arguments that were addressed to us at the Bar. The Respondents contended that the list published by the Kerala Public Service Commission would have validity only for two years and the period having expired by now there can be no advice from the list. It is said that therefore the Petitions have become infructuous. It must be remembered that even the rank list was published only in the gazette dated 16th November 1982 which is after the expiry of the two years' period. It was information as to the persons who are seen to have been advised from that list that gave material to the Petitioner in O.P. No. 8915/82 to illustrate her case of discrimination. Perhaps had not the circumstances been brought forcibly to our notice we might not have interfered in this case at all. The petitioners waited for advice in the hope that at least after 19th March 1981 they would be advised, but that was not to be and when they found that the list was about to expire they rushed to court. If the expiry of the

list would be an effective answer to the petitioners it will appear that this Court is impotent. If petitioners are entitled to appointment on the basis of their selection and ranking in the list, if there be no laches on their part and at no time they have given up the idea of seeking appointment pursuant to the rank list, when once their stand is vindicated it is the duty of the court to grant them appropriate relief. This Court has necessarily to mould the relief to suit the situation in any given case. There may be many like the petitioners who may not have thought of coming to this Court at all. It can be said in their case that they have forfeited their right to seek appointment by reason of their laches. Article 226 could not be invoked to benefit such persons. It may be that a few unfortunate petitioners who had come to this Court and litigated on the same question had lost perhaps because they were not able to place all the facts as the petitioners here have. That again would not be a ground to deny the petitioners here appropriate relief. Once we find that the petitioners ought to have been advised for appointment and the failure by the Public Service Commission to advise them was unjustified and unconstitutional the natural sequel should be to direct the Kerala Public Service Commission to advise these persons for the next two vacancies in the Last Grade Service that may arise in the State. Those who have already been appointed need not be disturbed. There may be no practical difficulty in finding out two places for the two petitioners so as to advise them to those places.

38. The other contention which we referred to as a minor contention is urged by the Kerala Public Service Commission. Evidently the Commission is not happy with the way the Petitioner in O.P. No. 8915/82 has approached this court. She has only sent a letter to the court. She has not filed a petition before the registry a petition in the form in which such Petitions have to be framed making the State and the Public Service Commission Respondents in the petition and paying court fee thereon. This Court on a reading of the petition addressed to the Acting Chief Justice chose to take notice of it, acted upon it as an Original Petition and directed issue of notice thereon to the Kerala State and the Kerala State Public Service Commission. The Petitioner pointed out certain further facts with reference to a gazette published on 16th November 1982, that many persons who held much lower rank than the Petitioner but who are males had been appointed. Whatever might be the view on the entertain ability of O.P. No. 8915/82 we had to deal with the question raised therein because we have before us Writ Appeal No. 682/82 against O.P. No. 8402 of 1982 where also this question calls for consideration. That Writ Petition was dismissed at the threshold by the learned Single Judge on the ground that the Petitioner has missed the bus when once the period of the list had expired. Our decision on the main question, namely of discrimination and of the impropriety of not making advice on the ground that the person selected does not know cycling would stand whatever may be our view on entertaining the petitioner's complaint in O. P. No. 8915/82 as a petition under Article 226 of the Constitution.

39. Even so, independent of the ultimate result of the case it is only appropriate that we consider the plea of the Kerala Public Service Commission, that of access

to this Court by a person who does not come by way of a formal petition paying court fee and drafting the petition in the traditional manner. Rules of procedure are not incapable of waiver and must necessarily be waived in appropriate circumstances in the interests of justice by a court sitting under Article 226 of the Constitution of India, for the ultimate object of the exercise of jurisdiction is to mete out justice in matters which fall within its jurisdiction. While a court should be extremely careful not to trespass upon a field which is not its and should take extreme care to confine its operation to matters which are entirely within its competence for decision, once the question falls within its jurisdiction and competence and the matter before it requires and deserves attention by the court the prime emphasis is to be given to the justice of the case. A court should not be rigid or inflexible in its approach to the case and should not throw out a case merely because a person has not come to the court in the manner in which the rules envisage he should come to this court. Otherwise this Court will be inaccessible to a large Section of the people who, by reason of impecuniousness and want of technical know how as how to approach a court, are unable to get the benefit of adjudication by this Court in an issue of importance, in an issue in which, had they been able to approach this Court by engaging a counsel, which they were unable to do, they would have obtained appropriate relief. We must always remember that the directive principles of State policy in our Constitution of equal justice and free legal aid envisaged in Article 39A is not an empty declaration and the State is under an obligation, a constitutional obligation though not enforceable, to make suitable legislation or frame suitable schemes to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. In our State where no such scheme has been framed for enabling access to a citizen so situated economically as not to be able to afford legal aid on his own for resort to this Court strict enforcement of procedural rules in force even prior to the Constitution (Fortysecond Amendment) Act, 1976 by which Amendment Article 39A of the Constitution was incorporated would be destructive of social justice and the procedural rules should be so read down as not to nullify a citizen's rights. In other words until the State discharges its obligation under Article 39A by extending its helping hand by providing legal aid to those who, for economic or for other reasons, deserve its aid the court should not deny justice merely on the ground that a person has not come to this Court in the manner contemplated by the rules, but has chosen to resort to this Court as an uninformed person, uninformed of the procedure of this Court or as a person who cannot afford to engage a lawyer. Whether a given case deserves this special treatment is entirely a matter for the court to decide.

40. The observations of the Supreme Court in People's Union for Democratic Rights and Others Vs. Union of India (UOI) and Others, are apt in this context and we extract the same here:

Where judicial redress is sought of a legal injury or legal wrong suffered by a person or class of persons who by reason of poverty disability or socially or

economically disadvantaged position are unable to approach the court and the court is" moved for this purpose by a member of a public by addressing a letter drawing the attention of the Court to such legal injury or legal wrong, Court would cast aside all technical rules of procedure and entertain the letter as a writ petition on the judicial side and take action upon it. That is what has happened in the, present case.

41. We make it clear that this does not mean that in each and every case of a communication received by this Court or letter received by this Court from an aggrieved party this Court will take notice as a petition under Article 226. That depends on the importance of the question involved, the propriety of resort to this Court rather than other authorities, the possibility of the Petitioner going without any relief if this Court does not take notice of the matter and the circumstances relating to the Petitioner which convinces the court that it will be highly inequitable if the court does not take notice of the petition. Speaking from experience we must state here that one of us, the Acting Chief Justice, receives a number of letters from aggrieved persons by post every day and after screening it is only one among many that is being taken notice of as a petition under Article 226 of the Constitution. This is not a phenomenon unknown. *Gideon v. Wainwright* (1963) 372 U.S. 335 is a famous case decided by the Supreme Court of United States, a case which established the right of an accused to assistance of counsel even in a case where special circumstances are not shown. The interview by the Voice of America with Anthony Lewis, a columnist for the New York Times, a two time winner of the Pulitzer Prize who covered that case shows that Gideon when he was convicted did not go through the regular appeals which are granted to offenders and the convicted under the U.S. Law, but he went directly to the Supreme Court and found redress there. He wrote a letter in pencil from Florida where he was in prison. "There are literally thousands of prisoners" in the United States who write such Petitions to the Supreme Court every year. It is not that every such petition comes to court. There is a preliminary screening. As remarked by Anthony Lewis in his interview which appears at page 213 of the book "The Supreme Court and Human Rights" edited by Burke Marshall:

In Gideon's case, he beat the odds, at that first level. Only one out of 500 or a thousand gets taken and he made it; they agreed to hear his case. At that point the court followed its practice of appointing a lawyer to represent him in their own court, because that is the invariable practice; a poor person always gets a lawyer appointed if he has a case that is going to be heard in the Supreme Court. And they picked a rather high-class lawyer to represent Mr. Gideon, Abe Fortas.

We are only indicating that taking notice of such Petitions is not a new practice even outside India.

42. We therefore direct the Kerala Public Service Commission to advise the petitioners in the two Original Petitions for appointment to the next two vacancies in the Last Grade Service that would arise immediately hereafter.

43. Before we close this judgment we must alert the State and Union Governments to the need for attention to affirmative action in the area of sex discrimination. We learn by experience. The experience of the story of sex and minority discrimination in the United States and the impact of the affirmative action programmes adopted in that country deserve closer study.

The Writ Appeal and the Original Petition are allowed as above. No costs.