

(2009) 07 MP CK 0037
In the Madhya Pradesh High Court

Dr. Satish Menon

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 03-07-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 19, 226
Penal Code, 1860 (IPC) — Section 497

Citation : AIR 2009 MP 185 : (2009) ILR (MP) 2583 : (2009) 4 MPHT 10 :
(2009) 3 MPLJ 323 : (2009) 3 MPLJ 322

Hon'ble Judges : A.K. Patnaik, C.J.;Ajit Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.K. Patnaik, C.J.

In this writ petition under Article 226 of the Constitution, we are called upon to decide the constitutional validity of the Madhya Pradesh Medical and Dental Post Graduate Course Entrance Examination Rules, 2(K)9 (for short "the Rules, 2009") which provide that the one seat of Orthodontics in Post Graduate Dental Course allocated to the unreserved category will be filled up by female candidate in the year 2009.

The petitioner after completing his Bachelor of Dental Surgery (BDS) Course and internship, appeared in the Post Graduate Entrance Test on 12-4-2009 conducted by the Madhya Pradesh Professional Examination Board and secured 162 marks out of 200 marks; and was placed in the merit list as number one. He was called for counselling and scrutiny of documents on 28-4-2009 and he expected that he will be allotted the seat of Orthodontics of MDS Course but was informed that the seat of Orthodontics of MDS Course had been allotted to Dr. Sapna Jain (respondent No. 3) who stood 4th in the merit list of unreserved category candidates because under the Rules, 2009, this single seat of Orthodontics in the Government Dental Colleges in the Government of Madhya Pradesh had been reserved for a woman in the year 2009. Aggrieved, the petitioner has filed this

writ petition praying for declaring the Rules, 2009 as ultra vires Articles 14 and 19(1)(g) of the Constitution.

On 6-5-2009, the Court after hearing the learned Counsel for the petitioner, issued notices to the State of Madhya Pradesh and Director of Medical Education (respondent Nos., 1- and 2) and also to the respondent No. 3. In response to the notice, no return has been filed on behalf of the respondent Nos. 1 and 2 stating inter alia that Rule 8(1) of the Rules, 2009, provides for reservation for woman candidates to the extent of 30% according to merit-cum-option and such reservation for women to the extent of 30% is not vertical reservation but to be applied horizontal compartment-wise for the purpose of maintaining 50% ceiling of reservation for SC/ST/OBC categories and for the remaining 50% seats meant for unreserved candidates, reservation has been provided for female candidates as a special provision under Article 15(3) of the Constitution. The return of respondent Nos. 1 and 2 further states that the single seat of Orthodontics has been allotted to the unreserved category and 30% reservation in this seat in favour of the female candidates has been worked out by equitable distribution of the seat under Rule 17(6) of the Rules, 2009 by providing that the seat will be filled up for two years by open candidates and for one year by a female candidate and accordingly in the years 2007 and 2008, the seat had been allotted to open candidates and in the year 2009 the seat has been allotted to a female candidate and this was done in accordance with the constitutional obligation of the State under Article 15(3) of the Constitution.

At the hearing, Mr. Aditya Sanghi, learned Counsel for the petitioner vehemently submitted that the Supreme Court has held in *M.R. Balaji v. State of Mysore* AIR 1963 649 that reservation of 68% of seats for admission in a technical institution in favour of the backward classes of SC/ST is not permissible under Article 15(4) of the Constitution. He submitted that following the aforesaid law laid down in *M.R. Balaji v. State of Mysore* (supra), the Supreme Court again reiterated in *Deepak Sibal Vs. Punjab University and Another*, that the provision in Article 15(4) does not contemplate reservation of all the seats or the majority of the seats in an educational institution at the cost of the rest of the society and this principle will also apply with equal force in the case of cent per cent reservation of seats in educational institutions for a certain class of persons to the exclusion of meritorious candidates. He submitted that the Rules, 2(K)9 in reserving the only seat of Orthodontics in MDS Course in favour of a female candidate in the year 2009 in fact provides for 100% reservation in favour of female candidates and this is not permissible as per the law laid down in *M.R. Balaji v. State of Mysore* (supra) and *Deepak Sibal v. Punjab University* (supra). He also cited the decision of the Supreme Court in *Dr. Chakradhar Paswan v. State of Bihar* 1988 MPLJ 411 and in *Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association and Others*, , for the proposition that there cannot be any reservation in a single post cadre under Article 16(4) and 16(4-A) of the Constitution.

Mr. Samdarshi Tiwari, the learned Government Advocate appearing for the respondent Nos. 1 and 2 and Mr. Ashok Jain, learned Counsel appearing for the respondent No. 3, on the other hand, submitted that the aforesaid decisions of the Supreme Court cited by Mr. Sanghi on Articles 15(4) and 16(4) of the Constitution are not applicable to special provisions in favour of the women made under Article 15(3) of the Constitution. In support of this contention, they relied on *Toguru Sudhakar Reddy and another Vs. The Govt. of Andhra Pradesh and others*, . Mr. Jain also cited the decision in *Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another*, , in which the Supreme Court has observed that the insertion of Clause (3) of Article 15 of the Constitution in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped and they are unable to participate in the socio-economic activities of the nation on equal footing with men and with a view to eliminate the backwardness of women and to empower them in a manner that would bring about effective equality between men and women Article 15(3) was placed in Article 15 of the Constitution. They pointed out that in the aforesaid decision, the Supreme Court has further observed that the category for whose benefit a reservation is provided is not required to compete in open category as the very purpose of reservation is to protect the weak category against competition from the open category candidates. They submitted that the contention of Mr. Sanghi that the petitioner was placed in the merit list in number one amongst the unreserved category candidates whereas the respondent No. 3 was placed in 4th position in the merit list of unreserved candidates is thus of no relevance in deciding on the validity of a special provision for women under Article 15(3) of the Constitution.

We would like to first deal with the provisions of Articles 14 and 15(3) of the Constitution on which the petitioner and respondents rely for their respective cases. Article 14 provides 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. Article 15(1) states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and Article 15(3) provides that nothing in this article shall prevent the State from making any special provision for women and children. These provisions of Articles 14 and 15 of the Constitution have been interpreted by Courts while dealing with challenges to special provisions for women made by the State and it has been held that special provisions made by the State under Article 15(3) of the Constitution are saved both from Articles 14 and 15 of the Constitution.

In *Dattatraya Motiram More Vs. State of Bombay*, , the provision made in Section 10(1)(c) of the Bombay Municipal Boroughs Act for reservation of seats for women and the rules made by Government with regard to the reservation of seats for their election to the Jalgaon Municipality were challenged before the Bombay High Court as ultra vires Articles 14, 15 and 16 of the Constitution and Chagla C.J., who wrote the judgment of the Division Bench of the Bombay High Court while repelling the challenge and dismissing the writ petition, held:

In our opinion, if that was the object of enacting Article 15(3), then Article 15(3) need not have been enacted at all, because if the special provisions for women contemplated by Article 15(3) were only those provisions which did not discriminate against men, then no proviso to Article 15(1) was necessary. Article 15(3) is obviously a proviso to Article 15(1) and proper effect must be given to the proviso. It is true that in construing a proviso one must not nullify the section itself. A proviso merely carves out something from the section itself, but it does not and cannot destroy the whole section. The proper way to construe Article 15(3), in our opinion, is that whereas under Article 15(1) discrimination in favour of men, only on the ground of sex is not permissible, by reason of Article 15(3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1). Therefore, as a result of the joint operation of Article 15(1) and Article 15(3) the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women.

In *Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoj Laljee*, , Section 497 of the Indian Penal Code which provides that the offence of adultery committed by a woman would be punishable only as an abettor, was challenged as discriminatory and violative of Articles 14 and 15 of the Constitution, but the Supreme Court held that Articles 14 and 15 of the Constitution read together validate the impugned provision in Section 497, Penal Code. Paragraphs (4) and (6) of the aforesaid judgment which are relevant for this case, are quoted herein below:

(4) The portion of Article 15 on which the appellant relies is this:

The State shall not discriminate against any citizen on grounds only of...sex.

But what he overlooks is that this subject to Clause (3) which runs:

Nothing in this article shall prevent the State from making any special provision for women....

The provision complained of is a special provision and it is made for women, therefore it is saved by Clause (3).

(6) Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of women and children. The two Articles read together validate the impugned clause in Section 497. Penal Code.

It is, thus, clear from the aforesaid two judgments *Dattalruya Moirram v. State of Bombay* and *Yusuf Abdul Aziz v. State of Bombay* (supra), quoted above, that Article 14 of the Constitution is a general provision providing that equality to all persons will not be denied by the State but this Article has to be read with Article 15(3) of the Constitution which provides that the State can make a special provision for women and where such a special provision in favour of women is

made, it cannot be held to be violative Article 14 of the Constitution. History reveals that in our country, women were not treated with equality with men and hence insertion of Clause 3 in Article 15 of the Constitution was thought necessary. As explained by the Supreme Court in *Government of A.P. v. P.B. Vijaykumar and Anr.* (supra):

The insertion of Clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socioeconomic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women.

It is therefore, clear that to enable women of this country, who for centuries were socially and economically handicapped to participate in the socio-economic activities on equal footing with men and to eliminate the backwardness of women, Article 15(3) provides that the State can make special provision for women. Such special provisions for women include reservation of seats in educational institutions or of posts in public employment in favour of women. According to Mr. Sanghi, however, no provision for reservation can be made of a single seat in an educational institution or a single post in public* employment in favour of women as per the law laid down in *M.R. Balaji v. State of Mysore*, *Deepak Sibal v. Punjab University*, *Dr. Chakradhar Paswan v. State of Bihar* and *Post Graduate Institute of Medical Education and Research*}, *Chandigarh v. Faculty Association and Ors.* (supra). But it has been held in *Toguru Sudhakar Reddy v. The Government of Andhra Pradesh* (supra) that the decision of the Supreme Court in *M.R. Balaji v. State of Mysore* (supra), that the total reservation of seats in educational institutions under Article 15(4) should not go beyond 50% was confined only reservation under Article 15(4) of the Constitution. In *Vijay Lakshmi Vs. Punjab University and Others*, , the Supreme Court relying upon *Toguru Sudhakar Reddy v. The Government of Andhra Pradesh* (supra), has observed:

Further, this Court in *Toguru Sudhakar Reddy and another Vs. The Govt. of Andhra Pradesh and others*, , approved the reasoning of the High Court of Andhra Pradesh, wherein it was held that reservation beyond the Constitution and that ratio in *M.R. Halaji Vs. State of Mysore* 1963 Supp. (1) SCR 439, was only confined to the reservation under ArticleS 15(4) and 16(4) of the Constitution of India.

Hence, the decisions of the Supreme Court under Articles 15(4) and 16(4) that reservations in favour of SC, ST and OBC categories cannot exceed 50% or cannot be 100% do not apply to a special provision in favour of women under Article 15(3) of the Constitution.

We may now deal with the impugned provisions of the Rules 2009. Rule 8(1) of the Rules, 2009 provides that reservation for women candidates shall be 30% according to merit-cum-option in each category. Rule 17 (6)(i) provides as follows:

Seats available: At autonomous Dental College for MDS Course, following seats are available as shown below:

(i) Orthodontics-- One Seat Unreserved Category (female): (1) Year 2001 Unreserved & Open (2) Year 2002 Unreserved & Open (3) Year 2003 Unreserved & Female (4) Year 2004 Unreserved & Open (5) Year 2005 Unreserved & Open (6) Year 2006 Unreserved & Female (7) Year 2007 Unreserved & Open (8) Year 2008 Unreserved & Open (9) Year 2009 Unreserved & Female (10) Year 2010 Unreserved & Open

Under the aforesaid provisions, therefore, there is only one seat available in Orthodontics in Autonomous Dental College for MDS course and this seat has been allotted to the Unreserved Category. The reservation of 30% in favour of women in unreserved category as provided in Rule 8(1) is sought to be ensured by providing in Rule 17(6)(i) that this one seat in Orthodontics will be filled up for two consecutive years through open competition on the basis of merit and for the third year by competition among the only female candidates. If such a provision is not made to fill up one available seat of Orthodontics by competition confined to only a female candidate in the third year, the female candidates who are socially and economically handicapped in our country may not be able to compete in the open competition with the male candidates and get an opportunity to study the Post Graduate Course in Orthodontics. As has been held by the Supreme Court in *Government of A.P. v. P.B. Vijay Kumar* (supra)-

The very purpose of reservation is to protect this weak category against competition from the open category candidates in the case of *Indira Sawhney*, while dealing with reservations, this Court has observed (SCC p. 751, Para 836):

It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed.

These remarks are qualified by observing that efficiency, competence and merit are not synonymous and that it is undeniable that nature has endowed merit upon members of other backward classes. What is as much as it has endowed upon classes as much as it has endowed upon members of other classes. What is required is an opportunity to prove it. His precisely a lack of opportunity which has led to social backwardness, not merely amongst what are commonly considered as the backward classes, but also amongst women. Reservation, therefore, is one of the constitutionally recognised methods of overcoming this type of backwardness. Such reservation is permissible under Article 15(3).

We are, thus, of the view that Rule 8(1) and Rule 17(6)(i) of the Rules, 2009 are

saved by Article 15(3) of the Constitution and are not ultra vires Article 14 of the Constitution.

Coming now to the ground taken in the writ petition that the impugned provisions of the Rules, 2009 are ultra vires Article 19(1)(g) of the Constitution, the learned Counsel for the petitioner Mr. Sanghi did not advance any argument that the right of the petitioner under Article 19(1)(g) of the Constitution, has been affected by impugned provision in Rule 8(1) read with Rule 17(6)(i) of the Rules, 2009.

In the result, we do not find any merit in the writ petition and we accordingly dismiss the same.