
(2008) 08 MAD CK 0091

In the Madras High Court

Case No : Writ Petition No. 28813 of 2007 and M.P. No. 1 of 2007

G. Parimelazhagan

APPELLANT

Vs

State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 11-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(1), 15(3), 15(4)
Penal Code, 1860 (IPC) — Section 497

Citation : AIR 2009 Mad 54

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : R. Suresh Kumar, for the Appellant; G. Sankaran, Spl. G.P. (Edn.), for the Respondent

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—This writ petition has been preferred by a male Staff Nurse of Government Medical College Hospital, Kilpauk, Chennai praying for a writ of declaration to declare Clause 4(vii) of the prospectus issued by the second respondent for the degree of Bachelor of Science in Nursing for the academic year 2007-2008 as illegal and ultra vires of Articles 14 and 15 of the Constitution of India and inconsistent with the provisions of the Indian Nursing Council Act, 1947.

2. The factual matrix necessary for the disposal of the writ petition are as under:

(a) The petitioner is a male nurse qualified with Diploma in General Nursing and Psychiatry and is working as a staff nurse in Government Medical College Hospital, Kilpauk, Chennai, since 2005. He is qualified for admission to degree course of Bachelor of Science in Nursing offered as per the prospectus issued for the year 2007-2008 by the second respondent. However he is aggrieved by the rule of reservation in favour of women at 90% and the limited seats earmarked for male nurses.

(b) It was the contention of the petitioner in the writ petition that up to the year 2003-2004 selection was made on the basis of merit and seniority alone. Similarly for appointment to the service of State Government, initially a ratio was fixed between male and female and in the year 2001, the State Government as per G.O.Ms. No. 251 dated 18-9-2001 abolished the ratio and thereafter appointments were made strictly as per seniority from the waiting list maintained by the concerned employment exchange and no discrimination was made between male and female nurses.

(c) It was the further case of the petitioner that the impugned clause No. 4(vii) is a clear case of discrimination and the State Government is not having any such power to make reservation in favour of women and as such the same is violative of Articles 14 and 15 of the Constitution of India. It was further indicated that as per the age limit fixed in the prospectus a candidate should not have completed 40 years but however the maximum number of seats are only 30 for each academic year for the post of Bachelor of Science in Nursing and as such women candidates gets unfair advantage over male candidates and the said ratio, having no reasonable nexus is discriminatory and as such the petitioner has sought for declaring the same as ultra vires and unconstitutional.

3. In the counter affidavit filed by the second respondent it was indicated that as per the policy decision of the Government of Tamil Nadu for selection to Diploma course in Nursing as well as for B.Sc. Nursing course, Government have prescribed the ratio of 1:9 between men and women. It was further stated that services of male nurses are utilised in the Government Hospitals mainly in Orthopaedics wards, Psychiatry wards and Medico Legal Cases and except for those hard nature of cases, the women nurses are made use of in all the hospitals throughout the world. It was also the contention of the second respondent that majority of nursing works are rendered in the Hospitals by women nurses alone. For paediatric nursing and for nursing of Obstetrics and Gynaecology, female nurses are always preferred and this group form a considerable portion of the population. Similarly, services of female nurses are preferred for adolescent patients of both sexes and about 90% of patients are served by female nurses and their services are used in the wards of the hospitals such as casualty, labour, medical, surgical besides in operation theatres and post operative wards, blood bank and paediatric wards, neuro cardiology wards, surgery wards, etc., and the male nurses are utilised only in few departments. Moreover about 90% of the candidates who apply for Diploma course in Nursing as well as B.Sc. Nursing are female candidates and the Government took all these factors into consideration for making reservation for women at 90% and the remaining seats were earmarked for men. In short, the second respondent relied on the policy decision taken by the Government of Tamil Nadu as the basis for reservation and accordingly prayed for dismissal of the writ petition.

4. Learned Counsel for the petitioner contended that the Indian Nursing Council Act is operating in the field and when there is a Central Legislation operating in

the field and as no reservation was permitted in the said Legislation with respect to a particular sex, it is not possible for the State Government to come up with such a reservation and as such the same is clearly discriminatory and beyond the power of the State Government. Learned Counsel also submitted that even for medical courses like Gynaecology, male students are now taking admission and as such it cannot be said that women alone are competent to undertake nursing to the exclusion of male nurses. According to the learned Counsel discrimination on the basis of sex is clearly prohibited and as such the impugned provision is discriminatory as well as ultra vires and the same is liable to be quashed.

5. The only point for consideration in the present writ petition is as to whether the reservation granted in favour of women nurses at 90% of the total seats is discriminatory as it discriminates between male and female on the basis of sex?

6. Nursing is said to be a cumulative process of recognising, identifying and understanding the health requirements and meeting such health needs of the members of the Society. This process also involves adequate care, nourishment as well as cleanliness both in respect of patients and as well as their surroundings. Women dominates in this field and takes care of patients as an affectionate sister as well as a caring mother. History of Indian Nursing was closely associated with nursing movement launched by the great lady Florence Nightingale popularly known as "Lady with a Lamp". Florence Nightingale took up the issue of sanitation in India in the year 1865 on account of the initiation taken by the Sanitary Commission of Bengal and for the first time nurses were appointed in India in the year 1914 and the said appointment was made in the Queen Alexandra Military Nursing Services founded by none other than Florence Nightingale and it was later came to be known as Indian Military Nursing Service. Literature on the subject of nursing also shows that it was only the Florence Nightingale system of training of nurses which was introduced in India. In fact training of nurses in the erstwhile Government of Madras was stated to have been commenced way back in the year 1871. In the course of time laws were enacted for proper implementation of Nursing Education and accordingly the Indian Nursing Council Act and State Nursing Council Act came into force. When we consider the history of this profession, it can be said without any doubt that mainly women occupied this field and as such the present reservation of 10% for men has in fact been carved out from the 100% reservation given to women candidates earlier, though not by way of any particular Government Order.

7. The very concept of nursing implies the service of women nurses. In fact originally the entire seats for Diploma as well as degree in Nursing were filled up by women students. The present reservation in favour of women cannot be said to be something new and it is in the other way round. Out of the total seats, 10% seats are now reserved in favour of men and the other 90% is sought to be filled up from women candidates. This practice is not something peculiar to Tamil Nadu alone and in other States also the same practice is being followed. In fact for admission to nursing courses in Dr. R.M.L. Hospital and Safdarjung Hospital

run by the Government of India, the entire seats are reserved for unmarried female candidates and the same is the case with some of the other States also. Therefore it cannot be said that only in Tamil Nadu such a reservation is made in favour of women candidates. The Government on the basis of the materials took a policy decision to reserve 90% seats to women and such decision cannot be held to be invalid on the basis of discrimination on the basis of sex.

8. In *AIR India Vs. Nergesh Meerza and Others*, , the Apex Court considered the issue in respect of discrimination on the ground of sex and it was held that there is no prohibition for such a discrimination under Articles 15(1) and 16(2) of the Constitution of India and observed thus:

68. Even otherwise, what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. On this point, the matter is no longer *res integra* but is covered by several authorities of this Court. In *Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoj Laljee*, sex was held to be a permissible classification. While dealing with this aspect of the matter this Court observed thus:

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 of the Indian Penal Code.

69. The same view was taken by this Court in a later decision in *Miss C.B. Muthamma v. Union of India* AIR 1979 SC 1868 where Krishna Iyer, J. speaking for the Court made the following observations : SCC p. 262, Para 7:

We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the Rule of equality must govern.

9. In *Toguru Sudhakar Reddy and another Vs. The Govt. of Andhra Pradesh and others*, , the issue was with regard to the Constitutional validity of Andhra Pradesh Cooperative Societies Act, 1964 as amended in the year 1991, by which a proviso was added to Section 31(1)(a) of the said Act, whereunder the Registrar was given power to nominate two women members to the Committee of such class of societies and in such manner as may be prescribed from among women members of the general body of such societies and such nominated women members shall, notwithstanding anything contained in the Andhra Pradesh Co-operative Societies Act have the right to vote and otherwise to take part in the proceedings of the meetings of the Committee. The said provision was

challenged as violative of Article 14 of the Constitution of India and also on the ground that total reservation would go beyond 50% which is not permitted in view of the law laid down by the Apex Court in *M.R. Balaji and Others Vs. State of Mysore*, and the Apex Court rejected the said contention and upheld the decision of the Andhra Pradesh High Court that reservation of more than 50% was permissible and that the ratio in *Balaji's* case was only confined to the reservations under Articles 15(4) and 16(4) of the Constitution of India.

10. The Apex Court in *Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another*, considered the scope and ambit of Articles 14, 15 and 16 of the Constitution of India in the light of the contentions raised in the said case with regard to discrimination on the ground of sex in public employment under the State and held thus:

6. This argument ignores Article 15(3). The interrelation between Articles 14, 15 and 16 has been considered in a number of cases by this Court. Article 15 deals with every kind of State action in relation to the citizens of this country. Every sphere of activity of the State is controlled by Article 15(1). There is, therefore, no reason to exclude from the ambit of Article 15(1) employment under the State. At the same time Article 15(3) permits special provisions for women. Both Articles 15(1) and 15(3) go together. In addition to Article 15(1), Article 16(1), however, places certain additional prohibitions in respect of a specific area of State activity viz. employment under the State. These are in addition to the grounds of prohibition enumerated under Article 15(1) which are also included under Article 16(2). There are, however, certain specific provisions in connection with employment under the State under Article 16. Article 16(3) permits the State to prescribe a requirement of residence within the State or Union Territory by parliamentary legislation; while Article 16(4) permits reservation of posts in favour of backward classes. Article 16(5) permits a law which may require a person to profess a particular religion or may require him to belong to a particular religious denomination, if he is the incumbent of an office in connection with the affairs of the religious or denominational institution. Therefore, the prohibition against discrimination on the grounds set out in Article 16(2) in respect of any employment or office under the State is qualified by Clauses (3), (4) and (5) of Article 16. Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16--the former being a more general provision and the latter, a more specific provision. Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State.

7. 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 socio-economic 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. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16.

11. In *Reservation of a woman in the post of Enquiry-cum-Reservation Clerks in Railways*, (1997) 11 SCC 638, the issue before the Apex Court was in relation to the decision taken by the Railway Administration to the effect that both upper and lower class reservation counters in the Reservation Offices in the metropolitan cities of Madras, Bombay, Calcutta and Delhi would have to be manned only by women. As per the circular dated 30-6-1978, it was decided that the Reservation Offices in the said metropolitan cities should constitute a seniority unit separate from the rest of the Enquiry and Reservation cadre in the Railways. The said decision was challenged before this Court and the same was quashed on the ground that it was violative of the provisions of Articles 14 and 16(1) and (2) of the Constitution of India and the Court reject the contention of the Railways that it was protected by Article 15(3) of the Constitution. The High Court also observed that Article 15(3) of the Constitution cannot be read as a proviso or an exception qualifying or restricting the guarantee under Articles 16(1) and (2) of the Constitution. While setting aside the judgment of this Court in the said case, the Apex Court observed that since Articles 15(1) and 15(3) go together the protection of Article 15(3) would be applicable to employment under the State falling under Articles 16(1) and 16(2) of the Constitution.

12. In *Vijay Lakshmi Vs. Punjab University and Others*, , the issue before the Apex Court was in respect of reservation in favour of women for being appointed as Principal of Government College for Women and after considering the policy decision of reservation for females and right to equality, the Apex Court held that sex is a sound basis for classification and Article 15(3) categorically empowers the State to make special provision for Women and Children and held thus:

5. In the light of the aforesaid principles, on the concept of equality enshrined in the Constitution, it can be stated that there could be classification between male and female for certain posts. Such classification cannot be said to be arbitrary or unjustified. If separate colleges or schools for girls are justifiable, rules providing appointment of a lady Principal or teacher would also be justified. The object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught. One may believe in absolute freedom, one may not

believe in such freedom but in such case when a policy decision is taken by the State and the rules are framed accordingly, it cannot be termed to be arbitrary or unjustified. Hence, it would be difficult to hold that the rules empowering the authority to appoint only a lady Principal or a lady teacher or a lady doctor or a woman Superintendent are violative of Article 14 or 16 of the Constitution.

6. Secondly, such reservation by the State is permissible in exercise of powers conferred under Article 15(3), which provides thus:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.--(3) Nothing in this article shall prevent the State from making any special provision for women and children.

Policy decision of reservation for females and right to equality;

....

9. (b) In *Dattatraya Motiram More Vs. State of Bombay*, provisions of the Bombay Municipal Boroughs Act, 1925 which reserved seats for women in the election were challenged on the ground that they offended Articles 14, 15 and 16 of the Constitution. That contention was negated by the Court and explaining the scope of Article 15, the Court (Chagla, C.J.) observed that it must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is only on one of the grounds mentioned in Article 15(1). If there is a discrimination in favour of a particular sex, that discrimination would be permissible provided it is not only on the ground of sex, or, in other words, the classification on the ground of sex is permissible provided that classification is the result of other considerations besides the fact that the persons belonging to that class are of a particular sex. The Court further held thus:

....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....

13. The learned Counsel for the petitioner contended that the impugned reservation is per se violative of the provisions of Indian Nursing Council Act, 1947. According to the counsel the State Government is not empowered to make regulations or policy decision to reserve seats on the basis of sex when there is no power conferred under the Nursing Council Act. The Nursing Council Act, 1947 has been enacted for the purpose of constitution of Indian Nursing Council in

order to establish uniform standard of training for nurses, midwives and health visitors. The Act provides for constitution and composition of Council, recognition of qualifications and procedure regarding recognition and maintenance of Indian Nursing Register. The said Act also provides for a State Council to regulate the registration of nurses, midwives or health visitors in the concerned States and the degree or diploma conferred by various universities are recognised as qualification for registration as a nurse. The said Act has nothing to do with the allocation of seats or reservation of seats in nursing institutions in a particular State and in the matter of admission to the Nursing Schools, the authority to fix the quota is only the State Government, as there is no contra-indication in the Indian Nursing Council Act and as such the contention of the learned Counsel for the petitioner that the impugned reservation is in conflict with the provisions of Indian Nursing Council Act, 1947 is devoid of merits.

14. The impugned provision was made in the prospectus on the basis of the Government policy taken on consideration of relevant materials and taking into consideration the necessity for effective nursing. The fact that females alone were seeking admission for nursing course and thus it was a female dominated field was also taken into consideration by the Government while formulating such policy. The counter-affidavit filed by the second respondent clearly shows that for Paediatric nursing, nursing for Obstetrics and Gynaecology, casualty, labour wards, medical wards, surgical wards, operation theatres, post operative wards, blood bank, etc., services of female nurses are absolutely necessary and the male nurses are utilised only in few departments. The services of male nurses are confined to Orthopaedic wards, psychiatry wards and medico legal cases and in all other branches services of female nurses are utilised. It was also indicated that 90% of the candidates, who apply for diploma in Nursing as well as the course in B.Sc. Nursing are all female candidates and these relevant materials were taken into consideration by the Government for the purpose of reservation of seats in favour of the female students. These details furnished in the counter-affidavit cannot be said to be incorrect. Moreover, as indicated earlier, in respect of admission to nursing institutions run by the Government of India, entire seats are reserved for unmarried female candidates.

15. In view of the reasons aforesaid, I do not find any merit in the contention of the petitioner and I hold that Sl. No. 4(vii) of the prospectus is intra vires and is not discriminatory and is also not violative of any of the provisions of the Constitution of India and as such the same is valid and enforceable.

In the result, the writ petition is dismissed. Consequently, the connected MP is also dismissed. No costs.