

(2014) 01 MP CK 0015
In the Madhya Pradesh High Court
Case No : W.P. No. 209 of 2013

Himadri Raje and Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 27-01-2014

Acts Referred:

Constitution of India, 1950 — Article 13(2), 14, 15(3), 16, 16(3)
Penal Code, 1860 (IPC) — Section 497

Citation : (2014) 1 JLJ 370 : (2014) 2 MPHT 50 : (2014) 2 MPLJ 106

Hon'ble Judges : S.K. Gangele, J;G.D. Saxena, J

Bench : Division Bench

Advocate : Anil Mishra and Navnidhi Parharya, Advocate for the Appellant;
M.P.S. Raghuvanshi, Additional Advocate General for Respondent Nos. 1, 2 and 4/
State, Advocate for the Respondent

Judgement

S.K. Gangele, J.—In this petition, the petitioners have challenged vires of Schedule III of Rule 8 of the recruitment rules named as Madhya Pradesh Transport Department Subordinate (Class - III Executive) Service Recruitment Rules, 2011 (hereinafter referred as "Rules of 2011"), which prescribes minimum physical qualification for female Transport Constable. The main contention of the petitioners is that prescribing similar minimum physical qualification for male and female Transport Constables is violative to Articles 14, 16 and Article 15(3) of the Constitution and it negates reservation, which has been provided in the recruitment rules upto 30% for female candidates.

2. The petitioners pleaded that they were qualified otherwise to appear in the selection for appointment to the post of Transport Constable initiated by the VYAPAM in accordance with notification (Annexure P/3), however, they could not apply to the post because they did not fulfil the physical qualification of height 1.68 Meter and the particular requirement of chest unexpanded 81.00 cm. and expanded 86.00 cm. as prescribed in the advertisement in accordance with Schedule III of Rule 8 of Rules of 2011.

3. In exercise of powers conferred by the proviso of Article 309 of the Constitution of India, the State of Madhya Pradesh made Rules of 2011. Rule 8 of the aforesaid Rules prescribes conditions of eligibility for direct recruitment. Rule 8(2) of the Rules of 2011 mentions that the candidate must have possessed the educational qualifications and physical efficiency prescribed for the respective posts as shown in Schedule III. Schedule III prescribes following physical qualification to the post of Transport Constable, which is as under:--

(i) Higher Secondary School Certificate Examination of equivalent 10+2 Examination passed from a recognized Board.

(ii) Driving license to drive motor cycle/motor car/heavy goods vehicle/heavy passenger vehicle is essential.

(iii) He must possess a good Physical and mental fitness he should possess 1.60 Meter Height and 81.00 cm. chest (unexpanded) and 86.00 cm. (expanded) for SC/ST candidate 1.60 Height and 76.00 cm. (unexpanded) and 81.00 cm. (expanded) chest. Candidate should possess normal vision 6/9 in both the eyes and 6/12 in one eye. He should be able to recognize different colors.

There is no differentiation of physical qualification for male and female Transport Constable.

4. In accordance with the aforesaid schedule, a transport constable, may be male or female, must possess height of 1.68 Meter and chest 81.00 cm. (unexpanded) and 86.00 cm. (expanded). Some relaxation has been given to SC, ST candidates male and female both.

5. Earlier recruitment rules named as Madhya Pradesh Transport Department Subordinate (Class-III Executive) Service Recruitment Rules, 2001 (hereinafter referred to "Rules of 2001") were in force. Rule 8 of the aforesaid rules prescribed condition of eligibility for candidates of direct recruitment and there was different physical qualification for male and female candidates of transport constable, however, the aforesaid rule was repealed by the Rules of 2011. Relevant Rule 8 of Rules of 2001 is as under:

(b) Transport Constable:--

(i) Should not be less than 165 cm. in height except Gurkhas, Garhwalis and Marathas, whose height should not be less than 162.50 cm., ladies should not be less than 152 cm. in height.

(ii) Chest measurement should not be less than:

81.cm. (unexpanded)

86.50 cm. (expanded)

(iii) Must have good binocular vision and should be free from disease of eyelids and eye balls.

(iv) The acuteness of his vision should not be less than 6/9 with one eye and 6/12 with other eye. He must be able to distinguish the principal colours.

6. In accordance with the Rules of 2011, M.P. Professional Examination Board issued an advertisement for appointment to the post of Constable in Transport Department. The persons were directed to submit on-line form having physical qualification as mentioned above in the order. Total 332 posts were advertised. 100 posts were reserved for female candidates, out of which 50 posts were for general candidates, 15 for SC candidates, 20 for ST candidates and 15 for OBC candidates as mentioned in letter dt. 2-6-2012 (Annexure R/2) written by the Transport Commissioner, Gwalior, filed along with the additional return.

7. As per the return filed by the respondents, only 8 female constables were selected and male candidates have been appointed against the posts reserved for female candidates.

8. The respondents in their reply pleaded that the Rules of 2001 stand repealed by Rules of 2011 and in accordance with Schedule III of Rule 8(2) of Rules of 2011, there is no separate provision in regard to physical standard for male and female constable. The petitioners did not submit any objection at the time of inviting applications. The selection process including the written examination was completed and results were declared on 1-9-2012. The selected candidates joined on their respective posts and they had also given training.

9. The respondents further pleaded that earlier a writ petition was filed before this Court, which was registered as W.P. No. 8735/2012 and disposed of vide order dt. 5-12-2012 with directions to consider the representations of the petitioners. Thereafter, the representations were dismissed vide order dt. 10-12-2012. Other persons Meenakshi Kumari Chaudhari and others filed another petition, which was registered as W.P. No. 9172/2012, that was dismissed as withdrawn. It is further pleaded that the selected candidates have not been made as party, hence, the present petition is not maintainable.

10. Learned counsel appearing for the petitioners has contended that in other departments including Armed Forces, separate physical standard has been provided for male and female candidates, however, in the Rules of 2011, same physical criteria has been provided for male and female candidates, which has been inserted to defeat the purpose of reservation provided to the female candidates. Due to the criteria, majority of female candidates have been debarred from participating in the selection process, hence, their right to get employment has been infringed. The criteria is violative of Articles 14 and 16(3) of the Constitution. In support of his contention, learned counsel relied on the following judgments:--

(i) A.P. Dairy Development Corporation Federation Vs. B. Narasimha Reddy and Others, , (ii) Vijay Lakshmi Vs. Punjab University and Others, .

11. Learned Additional Advocate General appearing for the respondents/State

has contended that the physical criteria prescribed in the recruitment rules is in accordance with law. It has been provided looking to the nature of the work. He has further contended that the selection process is over and the candidates have also been appointed. The selected candidates have not been made party in the petition, hence, this petition is not maintainable. In support of his contention, learned counsel relied on the following judgments:--

(i) Jitendra Kumar Singh and Another Vs. State of U.P. and Others, , (ii) Public Service Commission, Uttaranchal Vs. Mamta Bisht and Others, , (iii) Arun Tewari and Others Vs. Zila Mansavi Shikshak Sangh and Others, .

12. We have quoted the provisions in regard to essential qualification prescribed for the Transport Constable in Schedule III of Rule 8 of Rules of 2011. As per the Schedule, the male and female candidates must have height of 1.6 mtr. and chest of 81.00 cm. (unexpanded) and 86.00 cm. (expanded). In the return, the respondent-State has not mentioned any reason that why same physical qualification has been prescribed for male and female constable. Earlier the criteria was different. Even though the qualification having chest (unexpanded and expanded) is the same. However, as per the physical anatomy of male and female, there cannot be a particular measurement of breast of female. Earlier the qualification of height for male candidate was not less than 165 cm. and for female candidate it was 152 cm. There is sexual dimorphism between male and female in regard to height and body shape. The petitioners have filed some report from Wikipedia encyclopaedia in this regard. It is mentioned in it that on average, men are taller than woman, by about 15 cm. (6 inches). The average height of American male is 176.8 cm. and female is 162 cm.

13. We would like to consider the requirement of height for male and female constable and employees in other departments in order to find out that whether prescribing same height for male and female candidate is arbitrary or not.

(i) In the Police Department of State of M.P., in accordance with provisions of Police Executive (Non-Gaz.) Service Recruitment Rules, 1996, minimum height for male Sub Inspector is prescribed as 167.5 cms. or more and for women 152.4 cms. or more.

(ii) In accordance with UPSC standard the minimum acceptable height for male candidate is 157.5 cms. (157 for Navy and 162.5 cm. for Air Force) and for female candidates, the minimum acceptable height prescribed is 152 cms.

(iii) In Central Industrial Security Force, different minimum height has been prescribed for male and female candidates, which is as under:--

(iv) Army also prescribes relaxation in physical standard in regard to height for female candidate, which is 2 cm. as mentioned in eligibility criteria for recruitment of JCO and other ranks, which is as under:--

SOS, SOEX, SOWW and Widow of Ex-Servicemen Adopted Son/Son-in-law of a War Widow, if she has no son and including a legally adopted son of serving Sol/

Ex- Servicemen.

(v) In Border Security Force, the minimum height for male constable is 170 cms. and for female candidate it is 157 cms.

(vi) In Rajasthan Police, for the purpose of recruitment to the post of Constable, the minimum height for male is 160 cm. and for female 145 cm.

(vii) In Central Reserve Police Force, in accordance with the provisions of Central Reserve Police Force Act, 1949, the minimum height for male constable is prescribed as 5'7" and for female candidate it is prescribed as 5'-2.3/4" (157 cm.).

14. From the facts quoted above, it is clear that requirement of minimum height for male and female candidate is different, it is less for female. No reason has been assigned that why the criteria of minimum height is same for male and female constable in the transport department. As per the biological structure of male and female, there is difference of height between male and female and in later it is less. Earlier in the Rules of 2009, the criteria of minimum height was different for male and female. Subsequently, it has been changed. We have asked the question from the learned Additional Advocate General that why the same criteria has been adopted for male and female constables in regard to height, learned Additional Advocate General does not answer and does not elaborate the reason that what were the reasons for prescribing the same criteria.

15. Article 15(3) of the Constitution prescribes that the State can make special provisions for women and children. The aforesaid Article reads as under:--

(3) Nothing in this Article shall prevent the State from making any special provision for women and children.

16. In order to give proper representation to women in service, reservation has been prescribed in the recruitment rules. In the Rules of 2011, it is up to 30%. By prescribing stringent physical condition, the special provision has been negatived by the State. It is clear from the facts that only five female candidates could have been appointed against the total 100 posts reserved for women candidates. Number of female candidates who could have been appointed against the posts reserved for female could not participate in the selection process due to minimum criteria of height and against the posts reserved for female candidates, male candidates have been appointed. It shows that by indirect method the reservation, which has been provided to female candidate, has been taken away by the State. It is well settled principle of law that an act which cannot be done directly, cannot be permitted to be done indirectly in accordance with law. The object of providing reservation to woman is a precautionary, preventive and protective measure based on public moral and particularly to save women from exploitation and give them proper opportunity of participation in public life. This is an important goal, which has been prescribed in the Constitution. The nation cannot progress and prosper if there is

un-equality between man and woman in the society. This is an important and pious dictum of the Constitution, which has to be achieved in accordance with the provisions of Constitution. We have to interpret the provisions keeping in mind the aforesaid object.

17. Hon''ble Supreme Court in *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, has held as under in regard to right to equality:--

But the concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Equality is for equals. That is to say that those who are similarly circumstanced are entitled to an equal treatment.

Since the constitutional code of equality and equal opportunity is a charter for equals, equality of opportunity in matters of promotion means an equal promotional opportunity for persons who fall, substantially, within the same class.

18. Hon''ble Supreme Court further in *AIR India Vs. Nergesh Meerza and Others*, has held as under in regard to Article 14:--

(2) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases Article 14 will be completely out of the way.

(3) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(4) Where equals and unequals are treated differently, Article 14 would have no application.

19. Hon''ble Supreme Court in *Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoj Laljee*, has held as under:--

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 of the Indian Penal Code.

20. Hon''ble Supreme Court in *Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another*, has held as under in regard to providing equal job opportunities for 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 post 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.

21. Hon"ble Supreme Court in State of Orissa and Another Vs. Mamata Mohanty, has held as under in regard to principle of rule of law and Article 14 after considering the earlier judgments in Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, , Dr Rash Lal Yadav Vs. State of Bihar and Others, and Tata Cellular Vs. Union of India, :--

59. The rule of law inhibits arbitrary action and also makes it liable to be invalidated. Every action of the State or its instrumentalities should not only be fair, legitimate and above board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even give an impression of bias, favouritism and nepotism. Procedural fairness is an implied mandatory requirement to protect against arbitrary action where statute confers wide power coupled with wide discretion of an authority. If the procedure adopted by an authority offends the fundamental fairness or established ethos or shocks the conscience, the order stands vitiated. The decision-making process remains bad.

22. Hon"ble Supreme Court further in Society for Un-aided Private Schools of Rajasthan Vs. Union of India (UOI) and Another, has held as under:--

Fundamental rights have two aspects - they act as fetters on plenary legislative powers and, secondly, they provide conditions for fuller development of our people including their individual dignity.

23. Hon"ble Supreme Court in Dr. Subramanian Swamy Vs. Dr. Manmohan Singh and Another, has held as under:--

Article 14 of the Constitution must be construed as a guarantee against uncanalised and arbitrary power.

24. Hon"ble Supreme Court further in Siddhu Matriculation Hr. Secondary School Vs. K. Shyam Sunder and Others, has held as under in regard to consideration by the Court in the matter of considering the validity of a statute after considering various judgments on the point:--

40. In Behram Khurshid Pesikaka vs. State of Bombay and Mahendra Lal Jaini vs. State of U.P., this Court held that in case a statute violates any of the fundamental rights enshrined in Part III of the Constitution of India, such statute remains still born, void, ineffectual and nugatory, without having legal force and effect in view of the provisions of Article 13(2) of the Constitution. The effect of the declaration of a statute as unconstitutional amounts to as if it has never been in existence. Rights cannot be built up under it; contracts which depend upon it for their consideration are void. The unconstitutional act is not the law. It confers no right and imposes no duties. More so, it does not uphold any protection nor create any office. In legal contemplation it remains not operative as it has never been passed. In case the statute had been declared unconstitutional, the effect

being just to ignore or disregard.

IV. Doctrine of lifting the veil

41. However, in order to test the constitutional validity of the Act, where it is alleged that the statute violates the fundamental rights, it is necessary to ascertain its true nature and character and the impact of the Act. Thus, Courts may examine with some strictness the substance of the legislation and for that purpose, the Court has to look behind the form and appearance thereof to discover the true character and nature of the legislation. Its purport and intent have to be determined.

8. ... In order to do so it is [permissible in law] to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy.

(Vide *Dwarkadas Shrinivas vs. Sholapur Spg. and Wvg. Co. Ltd.*, *Mahant Moti Das vs. S.P. Sahi* and *Hamdard Dawakhana vs. Union of India*, AIR p. 559, para. 8.).

25. As per the law laid down by the Hon"ble Supreme Court quoted above, there cannot be discrimination between same class of persons. It means that it is not permissible to create class within class, however, a reasonable classification is permissible. In the present case, the male and female candidates have been treated similarly in regard to prescribing minimum physical qualification of height. It is contrary to physical structure of male and female. It means that by providing such stringent condition of height to the female candidates, number of female candidates have been ousted from competition. It has taken away their right of reservation prescribed in the recruitment rules itself. In other departments and services, the criteria of height is different for male and female candidates. No reasons have been assigned in prescribing the criteria, hence, it is arbitrary, illegal, violative of Article 14 and against the mandate of Article 15(3) of the Constitution, hence, it is liable to be quashed.

26. The learned Additional Advocate General has contended that the persons who have been selected, have not been joined as party neither some of them have been joined as party by the petitioners in this petition, hence, the writ petition is liable to be dismissed. In support of his contentions, learned Additional Advocate General relied on the judgment of the Hon"ble Supreme Court in *Arun Tewari and Others Vs. Zila Mansavi Shikshak Sangh and Others*, .

27. It is well settled principle of law that some of the selected candidates have to be made party in the petition if the petitioner or petitioners want to set aside the selection, but in the present case, the appointment of candidates, who were appointed against the posts, which were reserved for female candidates, was a conditional appointment. Copy of the order of appointment dt. 13-12-2012 of

one of the candidate has been filed as Annexure R/5. It is mentioned in the order of appointment that the appointment was subject to decision of the judgments in the writ petitions pending before Jabalpur, Gwalior and Indore Benches. It means that if the judgments in the aforesaid writ petitions would be contrary, then the appointment of the candidates was contingent in nature.

28. In view of the aforesaid peculiar facts of the case, in our opinion, the petition could not be dismissed on the grounds that the persons who were selected against the quota fixed for female candidates have not been joined as respondents.

29. Another point raised by the learned Additional Advocate General appearing for the respondents/State that earlier two writ petitions were dismissed, hence, the present petition is not maintainable could also not be accepted. W.P. No. 8735/2012 was disposed of by this Court with the directions to decide the representations of the petitioners, thereafter the representation was rejected. There was no adjudication about the merits of the case. Another writ petition, W.P. No. 9172/2012 was dismissed as withdrawn. In the present petition, the petitioners have challenged the vires of the rule. No writ petition has been dismissed on merits by the Court, in which the vires of the Rules of 2011 was involved. Hence, the argument advanced by the learned Additional Advocate General in this regard liable to be rejected.

30. Now the question for consideration before this Court is that what relief could be granted to the petitioners. The petitioners have challenged vires of the Rules of 2011. We have already held that the rule, which prescribes physical qualification to female constable at par with male constable is ultra vires and the appointment of male constable against the posts which were reserved for female constable was contingent in nature. It was mentioned in the order of appointment that it is subject to the decision of the High Court. When the decision is against, necessary corollary is that the persons who have been occupying the posts, which were reserved for female candidates have to vacate the posts. This is also necessary in order to fulfil the constitutional goal. If the provisions of the Constitution is not complied with in letter and spirit, it would remain in paper. In the present case, the State authorities have acted contrary to the constitutional provisions. They have inserted a condition in the recruitment rules, which is so stringent that most of the female candidates could not participate in the selection process. Their valuable right has been taken away and only five female constables have been recruited against the 100 posts reserved for female candidates. The male candidates could not be permitted to occupy the posts in view of the condition mentioned in the order of appointment and in view of the constitutional goal enshrined in the Constitution. The male candidates, who have been selected against the posts reserved for female candidates, have to vacate their posts. Consequently, the petition is disposed of with the following directions:--

(i) Schedule III of Rule 8 of Rules of 2011, which prescribes minimum physical

qualification of Transport Constable (Female) as 1.68 Meter height is hereby quashed. The minimum qualification of chest would not be applicable to female.

(ii) The State is directed to prescribe proper physical qualifications in regard to height for Transport Constable (Female) in accordance with the observations made by this Court in the order.

(iii) The appointments made by the Transport Department of male candidates against the posts reserved for female candidates are hereby set aside.

(iv) It is directed that the State shall fix the physical qualification of height for the post of Transport Constable (female) in Transport Department and incorporate the same in the Rules of 2011 within a period of four weeks from today and thereafter the State shall conduct a fresh selection of remaining vacancies to the post of Transport Constable (female), which could not be filled up in pursuance to the selection process initiated vide notification (Annexure P/3) issued by the VYAPAM.

No order as to costs.