

(1992) 11 MAD CK 0061

In the Madras High Court

Case No : Writ Petition No's. 14006, 14701, 17530 and 17531 of 1991, 1530, 2835, 2836, 6674, 6675 and 7638 of 1992

J.R. Clement Regis, General Secretary, Tamil Nadu
Unemployed Secondary Grade Teachers Association, Regn.
No. 5/91, Melagaran, Nellai Kattabomman Dist. and three
others

APPELLANT

Vs

State of Tamil Nadu and others

RESPONDENT

Date of Decision : 06-11-1992

Acts Referred:

Constitution of India, 1950 — Article 10(1)(c), 14, 15(1), 15(3), 16

Citation : (1992) 11 MAD CK 0061

Hon'ble Judges : Somasundaram, J

Bench : Single Bench

Advocate : P.H. Pandian, Mr. C. Selvaraju, Mr. K. Govindarajan, Mr. V. Ramajagadeesan, Mr. S. Krishnaswamy and Mr. M. Agni, for the Appellant; P. Shanmugham, Additional Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Somasundaram, J.—As the constitutional validity of either G.O.Ms. No. 788 Education (C2) Department dated 31.7.1991 or the consequential order in R.Dis. No. I20004/C.23/91 dated 31.8.1991 is challenged in all these Writ Petitions, they are disposed of by this common order. Government of Tamil Nadu, the first respondent in all these writ petitions, by G.O.Ms. No. 250 Education dated 28.2.1989 took a policy decision to appoint only women teachers for handling classes in the 1st Standard and issued directions to that effect to the Director of School Education and the Director of Elementary Education. Again by the orders issued in G.O.Ms. No. 667 Education dated 17.5.1990, the Government of Tamil Nadu issued directions to the Director of School Education and the Director of Elementary Education to the effect that only women teachers should handle classes in Standards 1 to 3. Thereafter, the Government of Tamil Nadu issued G.O.Ms. No. 788 Education (C2) dated 31.7.1991 (hereinafter called the G.O.).

The said G.O. states that the Government have taken a decision to appoint only women teachers for handling classes in 4, & 5 Standards in primary/middle schools in the State in all future vacancies from the academic year 1991-92. By the said G.O., the Government of Tamil Nadu directed the Director of School Education and the Director of Elementary Education to issue suitable instructions to all the schools under the control of the said Directors to appoint only women teachers in 4th and 5th standards in all future vacancies from the academic year 1991-92. The Government further instructed the Director of School Education and the Director of Elementary Education to redeploy to the possible extent to see that Standards 1 to 5 are handled by women teachers. As already stated, the G.O.Ms. No. 788 dated 31.7.1991 or the Consecutive R.Dis. No. I26004/C23/91 dated 31.8.1991 issued by the Director of School Education is challenged in all these writ petitions.

2. In this batch of Writ petitions, principal arguments were advanced by Mr. P.H. Pandian, learned counsel for the petitioner in W.P. No. 14006/91. Therefore, the case of the petitioner in W.P. 14006/91 may now be briefly noted. The case of the petitioner in W.P. No. 14006/91 as disclosed in the affidavit filed in support of the said writ petition is as follows: The petitioner is the General Secretary of the Tamil Nadu Unemployed Secondary Grade Teachers' Association. The Secondary Grade trained teachers whether men or women can handle classes in 1 to 8 standards, in the primary/middle schools. However, in most of the schools established and maintained by minorities and in the Government schools classes in Standards 6 to 8 are generally handled by the B.Ed., teachers, denying the vacancies in the mid due schools to the secondary Grade Teachers. Similarly, in other middle schools in which girls alone are taught, the vacancies for Secondary Grade Teachers are generally filled up only by women teachers. Out of a total 5,624 middle schools in the State of Tamil Nadu nearly 2/3 of the Secondary Grade Teachers' vacancies are either filled up by B.Ed, teachers or women Secondary Grade Teachers, only about 1/3 of the Secondary Grade Teachers' vacancies in the middle schools in the State of Tamil Nadu are available to men possessing Secondary Grade Teachers Certificate. There are about 29,970 primary schools in the State and the possibility of men Secondary Grade Teachers securing appointment to such vacancies are only in the primary schools and not in the middle schools. There are at present about 20,000 men unemployed Secondary Grade Teachers. For the purpose of admission to Government Training Institutions, seats are reserved for men and women equally viz., 50% each. In the absence of similar reservation for appointment also, men are put under a great disadvantage by totally shutting them out of primary schools and leaving only the posts available in middle schools. The vacancies in the middle schools will be hardly sufficient for redeployment in the middle schools of men Secondary Grade Teachers disturbed from the primary schools in which they are presently working. The orders issued by the Govt., in the G.O. coupled with the earlier orders issued in G.O.Ms. No. 250 Education dated 28.2.1989 and G.O.Ms. No. 667 Education-dated 17.5.1990 totally shut out en from employment as

Secondary Grade Teachers in the entire State of Tamil Nadu and affect their fundamental right guaranteed under Art.19(1)(g) of the Constitution of India, viz., to practice any profession or to carry on any occupation, trade or business. Further, the G.O. is also challenged on the ground that it offends Articles 14, 15(1), 16 and 21 of the Constitution.

3. The respondents filed a common counter affidavit contending as follows: The Government has taken a policy decision to give more opportunities to the women candidates who are qualified for the Secondary Grade Teacher post and directed by G.O.Ms. No. 250, G.O.Ms. No. 667 and in the impugned G.O., to appoint only women teachers to handle classes in 1 to 5 Standards in recognized elementary/middle schools in the Government of Tamil Nadu. The said decision has been taken by the Government with a view to promote the welfare of women in the society. The impugned G.O. will not affect the employment opportunities of men candidates who are qualified for the Secondary Grade Teachers Post. The existing men teachers will be redeployed to the middle schools so as to enable them to handle 6 to 8 Standards. When women Secondary Grade trained teachers are given employment in the primary schools to teach standards 1 to 5, men teachers will also be given equal opportunity by absorbing them in the posts to be created in the middle schools in future. The men candidates will continue to get their share in the matter of employment as secondary Grade Teachers, which they have been getting in the past years. The employment opportunities of men teachers will not be affected as there are 5000 High Schools and Higher Secondary Schools and 5636 middle schools in the State of Tamil Nadu where men teachers can be appointed. The men teachers can be appointed in the middle schools to handle Standards 6 to 8. The impugned G.O. is passed on rational public policy in order to help children and women.

4. Mr. P.H. Pandian, the learned counsel for the petitioner in W.P. 14006/91, Mr. C. Selvaraju, the learned counsel for the petitioners in W.P. Nos. 14701/91, 6674 and 6675 of 1992, Mr. V. Ramaigadeesan, the learned counsel for the petitioners in W.P. 17530 and 17531 of 1991 of 1520/92, Mr. S. Krishnaswamy learned counsel for the petitioners in W.P. 2835 and 2836/92 and Mr. M. Agni, learned counsel for the petitioner in W.P. 7638/92, submitted in the first place that the impugned G.O. provides for total reservation of all the posts of Secondary Grade Teachers in Standards 1 to 5 in the primary schools to women teachers, such a total reservation of all the posts of secondary Grade Teachers in the primary schools for women offends Art. 15(1) of the Constitution. The learned counsel for the petitioners further contended that such a total reservation of all the posts of Secondary Grade Teachers for women, deprives the right of men of men Secondary grade Teachers to be considered for appointment as Secondary Grade Teachers in Standards 1 to 5 in the primary/middle schools and therefore, the impugned G.O. attends Art. 16 of the Constitution. The learned counsel for the petitioners again contended that that there cannot be any reservation exceeding 50% of the total number of posts in favor of women and therefore, the impugned G.O. which provides for a total reservation of all the posts of Secondary Grade

Teachers in the primary/middle schools in favor of women are illegal and liable to be struck down. In support of his contention, Mr. P.H. Pandian learned counsel for the petitioner in W.P.14006/91 relied upon the decisions in :

1. M.R. Balaji and Others Vs. State of Mysore,
2. State of Uttar Pradesh and Others Vs. Pradip Tandon and Others,
3. The State of Andhra Pradesh and Others Vs. U.S.V. Balram, etc.,
4. Minor A. Peeriakaruppan and Sobha Joseph Vs. State of Tamil Nadu and Others,
5. R. Chitrlekha and Another Vs. State of Mysore and Others,

I am unable to accept the above contention of the learned counsel for the petitioners. The contention of the learned counsel for the petitioners proceeds on the basis that there is a total reservation of all the posts of Secondary Grade Teachers for women and that men are deprived of the right to be considered for appointment as Secondary Grade Teachers. Admittedly Secondary Grade trained teachers can handle classes in Standards 1 to 8. By the impugned G.O, the Government has taken a decision to appoint only women teachers for handling classes in Standards 4 & 5. By virtue of the impugned G.O coupled with the earlier G.Os. viz., G.O. 260 Education dated 28.2.89 and G.O.Ms. No. 667 Education dated 17.5.1990, men Secondary Grade Teachers cannot handle Standards 1 to 5. However, the men Secondary Grade Teachers can handle Standards 6 to 8. Further, it is stated in the counter affidavits, that the existing men Secondary Grade Teachers will be reemployed to the middle schools to enable them to handle standard 6 to 8. Further, it is stated in the counter affidavit that there are 5000 High Schools and Higher Secondary Schools and 5,624 Middle Schools and that the men Secondary Grade Teachers will be appointed in the middle Schools, High Schools and Higher Secondary Schools to handle 6 to 8 standards. It is relevant to refer to para-10 of the counter affidavit which reads thus:

It is submitted that the men candidates are given opportunity as given in past years and there is no reduction in their share of getting employment. Non-teachers employment opportunity will not be affected as there are 5,000 High and Higher Secondary Schools and 5,624 Middle Schools where men teachers can be appointed. The men teachers will be appointed in Middle Schools so as to enable them to handle VI to VIII Standards. The G.O. is based on rational public policy in order to help children and women. There is no discrimination.

In view of the above factual position as disclosed in the counter affidavit, it cannot be contended that the impugned G.O. provides for total reservation of all the Secondary Grade Teachers posts for women and that men are deprived of their right to be considered for appointment as Secondary Grade Teachers and on that ground the impugned G.O. is invalid.

5. The principles laid down in the decisions referred to above and relied upon by the learned counsel for the petitioners will not apply to the facts of the present case as there is no material available in the present case on the basis of which one can come to the conclusion that there is either total reservation or reservation exceeding 50% of the post of the Secondary Grade Teachers for women as contended by the counsel for the petitioners. The principles laid down by the Supreme Court also will not apply to the facts of the present case, because the specific stand taken by the respondents in their counter affidavit is that men can be appointed as Secondary Grade Teachers to handle Standards 6 to 8 in the 5000 High Schools and higher Secondary Schools and 5,624 Middle Schools in the state and that the opportunities of men for employment as Secondary Teachers will not be effected by the impugned G.O. Again the decisions referred to above do not deal with the scope of Articles 15(1) and 15(3) of the Constitution. It is significant to note that by the earlier Gas. viz., G.O.Ms. No. 259 dated 28.2.90 and G.O.Ms. No. 667 dated 17.5.90. the Government have ordered that only women teachers be appointed for handling standards 1 to 7 YD in the primary/middle schools. In these writ petitions, the said G.O.s.250 dt. 28.2.1989 and G.O.Ms. No. 667 dated 17.5.90 are not challenged and only G.O.Ms. No. 788 is challenged. In the absence of factual materials to substantiate the case of the petitioners that there is either total reservation or reservation exceeding 50% of the total posts of Secondary Grade Teachers for women, I have no hesitation in rejecting the first contention of the learned counsel for the petitioners.

6. The second contention of the learned counsel for the petitioners is that the impugned G.O.Ms. No. 788 dated 31.7.1991 offend Art .15(I) of the Constitution because it makes a discrimination on the ground of sex alone and therefore, it is liable to be quashed. The learned counsel for the petitioners further contended that by the impugned G.O. the Government of Tamil Nadu, the 1st respondent in these writ petitions have directed the respondents 2 and 3 in W.P.14006/91 to issue suitable instructions to all the schools under their control to appoint only women teachers in standards 4 & 5 in all future vacancies from the academic year 1991-1992; therefore the impugned G.O. has resulted in discrimination on the ground of sex alone and there by offends Article 15(1) of the Constitution. The learned counsel for the petitioners also contended that the reservation made by the impugned G.O. in favor of women cannot be considered as special reservation for women as contemplated under Art.15(3) of the Constitution. The further submission of the learned counsel for the petitioners is that the impugned G.O. is bad because it offends Art.14 of the Constitution also.

7. On the other hand, Mr. P. Shanmugham, the learned Additional Government Pleader contended that Art. 15(3) empowers the State to make a special provision for women and children and by the impugned G.O., the State has made a special provision for women and children and therefore, the impugned G.O. is saved by Art.15(3) of the Constitution, even if it results in discrimination in favor of women against men in the matter of employment as secondary Grade Teacher.

In support of his contention the learned Additional Government Pleader relied upon the following decisions:

1. Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoy Laljee,
2. M Ahmed Jalaludin v. The State of Tamil Nadu 1986 Writ.L.R. (Supplement) 1
3. The State Vs. Kapurchand Adebhan Oswal and Others,
4. Ramchandra Mahton and Another Vs. State of Bihar and Others,
8. Let me first examine the position of law, with regard to the scope of Articles 15(1) and 15(3) of the Constitution for the purpose of deciding the validity of the impugned G.O. In Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoy Laljee, the Supreme court held that, S. 497 I.P.C. making, on a charge of adultery the male offender liable, but also providing that in such a case, the wife shall not be punishable as an abettor is not ultra vires. The Supreme Court in that case while rejecting the plea of discrimination in favor of women an holding that the impugned clause of S. 497 IPC is saved by Art. 15(3) of the Constitution observed thus:

Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is 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 and impugned clause in S. 497 of the Indian Penal Code.

9. In The State Vs. Kapurchand Adebhan Oswal and Others, one of the questions which arose for consideration was whether the reservation of seats for women under S. 10(1)(c) of the Bombay Municipal Boroughs Act (Act 18 of 1925) offends Art. 15(1) of the Constitution. A Division Bench of the Bombay High Court speaking through M.C. Chagla, Chief Justice, while holding that the said legislation does not offend Art. 15(1) held as follows:

Reliance is then placed on Art. 15 (1). That article is intended to prevent the State from discriminating against any citizens on grounds only of religion, race, caste, sex, place of birth or any of them, and the contention put forward is that in reserving seats for women the State has discriminated in favor of women on the ground of sex. It must always be borne in mind that the discrimination which is not permissible under Art. 15 (1) is a discrimination which is only on one of the grounds mentioned in Art. 15 (1). If there is discrimination in favor 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, and there is force in the Advocate-General argument that if Government have discriminated in favor of women in reserving seats for them, it is not only on the ground that they are women, but there are various other considerations which have come into play. It is said that even today women are more backward than

men. It is the duty of the State to raise the position of women to that of men. It is rightly urged that it would be very difficult for women to be elected if there was no reservation in their favor, and Government may well take the view that women are very necessary in local authorities because the point of view of women must be placed before the councilors before they decide any question affecting the municipality. But the clear answer to Art. 15 (1) is Art. 15(3) and that provides that nothing in this Article shall prevent the State from making any special provision for women and children. Mr. Kotwal says that Art. 15(3) must not be read as a proviso to Art. 15(1) because if it is read as a proviso then it would completely nullify one of the important ingredients of Art. 15(1). It is said that discrimination on the ground of sex is not permissible under Art. 15(1) and the object of enacting Art. 15(3) could not possibly be to make that discrimination possible by permitting special provision for women. It is therefore argued that Art. 15(3) must be read to mean that only those special provisions for women are permissible which do not result in discrimination, against men. It is said that there can be certain facilities which can be given to women without those facilities resulting in discrimination against men. It is said that there are certain facilities which only women can enjoy, and to the extent that those facilities can only be enjoyed by women provision can be made for those facilities, and with regard to this provision it could not possibly be said that this provision discriminate against men. An illustration is given with regard to maternity homes. It is said that this is a facility given to women, special provision can be made for that right or privilege and it could never be urged that if the State did so the State was discriminating against men. In our opinion, if that was the object of enacting Art. 15(3) then Art. 15(3) need not have been enacted at all because if the special provision for women contemplated by Art. 15(3) were only those provisions which did not discriminate against men, then no proviso to Art. 15(1) was necessary. Article 15(3) is obviously a proviso to Art.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 Art. 15(3) in our opinion is that whereas under Art. 15(1) discrimination in favor of men only on the ground of sex is not permissible, by reason of Art. 15(3) discrimination in favor of women is permissible and when the State does discriminate in favor of women it does not offend against Art. 15(1). Therefore as a result of the joint operation of Art. 15(1) and Art. 15(3) the State may discriminate in favor of women against men, but it may not discriminate in favor of men against women. In this particular case, even if in making special provision for women by giving them reserved seats the State has discriminated against men, by reason of Art. 15(3) the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex. Therefore, in our opinion the legislation we are considering does not offend against Art. 15(1) by reason of Art. 15(3).

10. In *M. Ahmed Jalaludin v. State of Tamil Nadu* 1986 Writ.L.R (Supplement), writ petitions were filed before a Division Bench of this Court challenging the validity of the Tamil Nadu Ordinance 13 of 1981, replaced by T.N. Act 8/82 in carrying out certain amendment to the Tamil Nadu Panchayats Act (35 of 1958) providing for reservation of 18% of seats for the Scheduled Castes and Scheduled Tribes and 50% of the seats for women, for the office of the President of Panchayats and the Chairman of the Panchayat Union Councils. The Division Bench of this court while holding that the said reservations are valid observed as follows:

We are in respectful agreement with the learned Chief Justice Chagla that the reservation in the instant case is not based on sex alone but because of the status of the women in this country, who require special legislation and cannot compete with men on an equal footing. Therefore, we are unable to hold that Article 15(1) is in any way violated as far as women are concerned, since the discrimination is not on sex alone, but on various other factors. It is worthwhile to note in this connection that the discrimination is forbidden only on any of the grounds mentioned in Articles 15(1), which certainly is not the case here.

11. The following is the sum and substance of the principles to be gleaned from the pronouncement of the courts referred to above. Art. 15(3) is a proviso to Art. 15(1) of the Constitution and full effect must be given to the proviso. The proper way to construe Art.15(3) is that whereas under Art. 15(1), discrimination in favor of men only on the ground of sex is not permissible, by reason of Art.15(3) discrimination in favor of women, is permissible, and when the State does discriminate in favor of women, it does not offend against Art.15(1) of the Constitution and therefore, as a result of the joint operation of Art. 15(1) and 15(3) the State may discriminate in favor of women against men but it cannot discriminate in favor of men against women, if we apply the above principles to the facts of the present case, there is no difficulty in holding that by the impugned G.O. a special provision is made for women under Art. 15(3) of the Constitution and as a result of the special provision made in favor of the women in the impugned G.O., even if it results in discrimination in favor of women against men in the matter of employment as Secondary Grade Teachers, the impugned G.O. does not offend Art.15(1) as it is saved by Art.15(3) of the Constitution.

12. Further, as pointed out by the Division Bench of the Bombay High Court in *The State Vs. Kapurchand Adebhan Oswal and Others*, the discrimination which is not permissible under Art.15(1) is a discrimination which is only on one of the grounds mentioned in the said Art.15(1). if there is a discrimination in favor of a particular sex, that discrimination would be permissible provided it is not, only on the ground of sex, but it is the result of other considerations. The stand of the respondents in the counter affidavit is that the impugned G.O. was issued with the view to promote the welfare of women in our society. One of the considerations which weighed with the Government to take a policy decision to

give more opportunity to women and to pass the impugned G.O. is stated in Para 7 of the counter affidavit in the following terms:

It is further submitted that in rural areas there is a substantial increase in the number of drop-outs especially the girls. If women teachers are appointed in primary schools it will create a greater confidence in rural areas and will motivate the parents to send girls to the schools

Another factor which weighed with the State to take a decision to appoint only women teachers for handling Standards 4 & 5 as mentioned in Para 6 of the counter affidavit in the following terms;

Naturally women are having the tenderness with the children. The women teachers are exerting their teaching experience with the nature of motherhood to which children are absorbed and this enrich their learning capacity. The women teachers are more kind and affectionate towards children. Teacher absentees is more in men than women. After taking into consideration of the children's psychology and various aspects including the fact that employment opportunity of men candidates should not be disturbed in any way, Government as a policy matter issued such an order.

In these circumstances, it has to be held that even if the impugned G.O. results in discrimination in favor of women against men, such discrimination is made not, only on the ground of sex, but it is the result of the other considerations as seen from the passages of the counter affidavit extracted above. Therefore, such a discrimination arising out of considerations other than sex is permissible as pointed out by the Division Bench of Bombay High Court in *The State Vs. Kapurchand Adebhan Oswal and Others*, Therefore I have no hesitation in rejecting the second contention of the learned counsel for the petitioners that the impugned G.O. offends Art.15(1) of the Constitution because it makes a discrimination on the ground of sex alone and therefore, it is liable to be quashed.

13. The other contention of the learned counsel for the petitioners that the impugned G.O. is bad because it offends Article 14 has no substance, because as pointed out by Supreme Court in *Yusuf Abdul Aziz v. State of Bombay* Art.14 is general and it must be read with the provisions like Art. 15(1) and 15(3). If Art. 14 is so read with Art. 15(1) and 15(3), it cannot be contended that impugned G.O. is bad because it offends Article 14. For all the reasons stated above, it has to be held that the impugned G.O. is legal and does not offend Arts.14, 15(1) and 16 of the Constitution as contended by the learned counsel for the petitioners. Therefore, the petitioners are not entitled to any relief in these Writ Petitions and the Writ Petitions are liable to be dismissed. Accordingly, the Writ petitions are dismissed. No costs.