

(1952) 06 CAL CK 0002
In the Calcutta High Court
Case No : A.F.O.O. No. 131 of 1952

Sm. Anjali Roy

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 05-06-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 14, Order 41 Rule 14(3)
Constitution of India, 1950 — Article 15, 15(1), 15(3), 15(4), 226

Citation : AIR 1952 Cal 825 : 56 CWN 801

Hon'ble Judges : Chakravartti, Acting C.J.; Sen, J

Bench : Division Bench

Advocate : Asoke Chandra Sen and Arun Kumar Dutta, for the Appellant;
Hemendra Kumar Das and Smriti Kumar Roy Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Chakravartti, Ag. C.J.

1. The appellant, who is a girl-student, applied to the Hooghly Mohsin College for admission in the 3rd Year class with Honours in Economics and her application being finally refused, she moved this Court for the issue of certain writs in order to the enforcement of what she claimed to be her fundamental right of being considered for admission to the College. Her case is that the refusal of her application was based solely on the ground of her sex and thus a contravention of Article 15(1) of the Constitution and that it was also mala fide. The way in which she has been dealt with by the Education Department is that while being refused admission to the Mohsin College, she, like other eligible girl-students, has been offered facilities for attending the Honours classes in that institution, provided she got herself admitted in (the "Women's College which was recently established in the locality and which, at present, gives instruction only in the Pass courses. Bose, J., who heard the appellant's application, held that the allegation of mala fides had not been proved; and as regards the alleged violation of Article 15(1), he held that the alternative arrangements made at

Hooghly for the collegiate education of women students constituted a special provision for the benefit of women within the meaning of Article 15(1) and since such provision made substantially equal, though not wholly identical, facilities available to women students, Article 15(1) had not been violated. The learned Judge however, had occasion to make some adverse comments on the conduct of the then. Principal of the College.

2. The facts are fairly clear and so far as they are disputed in the affidavits, the truth appears from the documentary annexures, except with regard to one matter to which I shall refer later. It appears that the appellant passed her Intermediate Examination from the Mohsin College, being placed in the second division and on the 9-7-1951, she applied for admission to the Third Year class of the College with Honours in Economics. On 10th July she was told by the then Principal, one Shri Sudhir Kumar Ghosh, that by reason of an order of the Director of Public Instruction, no girl student who had passed in the second division could be admitted to the College as an Honours student and that she should seek admission in the local Women's College. In her application to this Court the appellant states that the Principal told her that no girl student who had passed in the second division could be admitted to the Mohsin College at all, but what the Principal in fact told her appears sufficiently from the letter which her father addressed to the Director of Public Instruction on 19th July. However, upto 18th July at various interviews with her father and herself which took place on 12th, 13th, 17th and the 18th, the Principal continued to give an alleged order of the Director as the reason for refusing admission to the appellant. In the meantime, the appellant made enquiries at the Women's College and obtained a certificate from the Principal of that institution that it had no affiliation in any Honours subject, but the Principal of the Mohsin College still declined to admit her on the ground of the bar imposed by the Director. The ex-Principal who has sworn a long and rambling affidavit has not ventured to deny the specific allegation that he turned away the appellant on the ground that an order of the Director barred the admission of women students who had passed in the second division.

On 19th July, the father of the appellant, Shri Surendra Nath Roy, made a written representation to the Director of Public Instruction in which he stated that an order passed by him, barring the admission of women students-who had passed in the second division-was being set up against his daughter. On that very day, the Director of Public Instruction wrote to the Principal to remind him of the actual terms of the order, which was contained in Memo. No. 1175 P, dated 9th of May and to point out to him that the only restriction regarding the admission of women students to the Mohsin College was that their admission should be limited to courses in which the Women's College was not yet affiliated, viz., Honours Courses and Science subjects, and that since the appellant was seeking admission to the Honours course in Economics, there was no bar against admitting her, if she was found otherwise suitable. Thereafter, on 21st July the appellant's father again interviewed the Principal and the common case of the

parties is that though the Principal admitted having received the Director's letter, he said that he would have to consult the Divisional Commissioner before passing orders for the admission of the appellant. The Principal adds in his affidavit that he reminded the appellant's father of the necessity of producing the marks-sheet of his daughter which had not yet been produced and that he told him further that it might be necessary to discuss the matter with the Divisional Commissioner, since the Commissioner was the President of the Governing Bodies of both the Mohsin College and the Women's College. The appellant's father denies altogether the allegation that the marks-sheet was ever asked for from him, either during the interview on 21st July or at any other time.

3. On 23rd July, the appellant herself saw the Principal and on that day she was told that the admission of women students was being held in suspense for the time being under a direction from the District Magistrate and that she should come on 26th July when final orders would be passed. The Principal explains in his affidavit that he had received a confidential letter from the District Magistrate by which he had been requested to postpone the admission of women students, pending the Government's decision on the question of admission of women students to the College which was expected in a day or two.

4. On 26th July the Principal caused a list of nine women students who had passed the Intermediate Arts Examination in the second division to be hung up on the Notice-Board, with a note that they would be admitted to the College, provided they had obtained 50% of the marks in the subject in which they proposed to take Honours. The list included the name of the appellant. She admits that four of the students whose names appeared in the list got themselves admitted on that very day, but as for herself, while she states that she had obtained more than 50% of the marks in Civics and was thus eligible for admission to the Honours Course in Economics, she does not explain why she also could not get herself admitted on that day. In fact, in her application she does not state that she even went to the College on the 26th, although on her own showing, she had been directed to do so.

5. It was on the 29th July that the appellant went to the College and tendered the admission fee to the receiving clerk which was accepted, but before the clerk could grant her a receipt, he was called away by the Principal and on her return, he told the appellant that she could not be admitted and refunded to her the money she had paid. The appellant then saw the Principal himself who also said that it was not possible to admit her. The Principal explains in his affidavit that as the Government decision referred to in the confidential letter of the District Magistrate was not forthcoming, he considered it impossible to wait further and caused a list of women candidates for admission to be published on the 26th July according to the existing instructions, but thereafter, he received a communication from the Director of Public Instruction by which he was definitely asked not to admit any more women students, but only to allow, for the time being, such women students as were eligible for reading Honours to attend

classes in the College, pending the final decision of the Government and the University who were jointly considering whether students of the women's College could be allowed to read for Honours in the Mohsin College. When this communication was received is not stated, but apparently it was received on or before the 29th July. On the 30th July, the appellant's father personally saw the Director of Public Instruction who also told him that pending his final decision, his daughter would be allowed to attend both Pass and Honours classes at the Mohsin College and that such attendance would in any event be counted towards her percentage. The appellant began to attend classes accordingly.

6. On the 17th August, the Director of Public Instruction addressed a letter to the Principal which was received by him on the 18th and by it he instructed the Principal to admit women students in the Honours classes. The letter has not been produced, but according to the appellant herself, it contained instructions for the admission of the "remaining eligible candidates of the Principal's list published on 26-7-51." As regards why this letter was issued, it appears from the appellant's application that the 14th of August had been fixed, by the University as the last date for normal admissions and the 31st of August as the date upto which students might be admitted after the 14th on payment of a late fee. The Principal explains in his affidavit that the Directorate was under the impression that the last date for admission was the 20th and as they found that the intended adjustments between the Women's College and the Mohsin College as regards women students, reading for Honours, could not be made before that date, they issued instructions for the admission of women Honours students in the Mohsin College itself.

7. The appellant next saw the Principal on the 18th August and, according to her, offered to get herself admitted on payment of the late fee, but was dissuaded by the Principal from doing so, as he said he would be writing to the University for remission of the late fee and asked her to come on the 22nd. On the next day, the appellant's father saw the Principal and he also was told that fees could not be accepted before the 22nd which date had been fixed for the purpose. The Principal states in his affidavit that after receipt of the Director's letter of the 17th, he consulted his staff and fixed the 22nd as the most convenient date, as his office was otherwise busy and as he had come to know in the meantime that the last date for admission, had been extended upto the 31st.

8. The next and the last event which happened was that the appellant; accompanied by her father, went to the College on the 22nd August but was told by the Vice-Principal that the Director of Public Instruction had stopped further admission of women students by a telegram. The Principal states in his affidavit that this step was taken by the Director, because the Government had in the meantime finally decided to afford facilities to students of the Women's College to read for their Honours in the Mohsin College.

9. In her application to this Court the petitioner stated that the Women's College was a much inferior institution, both in respect of the standard of teaching and in

respect of its equipments and that by its refusal to admit her to the Mohsin College, the State had discriminated against her on the ground of her sex and denied to her her fundamental right to equal opportunity. She also alleged that the refusal was arbitrary and mala fide and on the allegations of fact I have already set out, she asked for a writ of prohibition against the State of West Bengal, the Director of Public Instruction and the Principal of the Mohsin College, prohibiting them from giving effect to the order of the Director of Public Instruction, communicated to the Principal by telegram on 21-8-1951 and a writ of mandamus directing the Principal, Hooghly Mohsin College, to consider and deal with her application for admission according to law. I have already stated the findings of the trial Judge on which the application has been dismissed.

10. Before dealing with the appeal on the merits, I find it necessary to refer to a matter of procedure. Of the three Opposite Parties to the application, only the State of West Bengal entered appearance before the learned trial Judge. The omission of the other two parties to appear before the trial Judge enabled the appellant to make an application under O. 41, R. 14 (3), Civil P. C, and to pray that service of notice of the appeal on them might be dispensed with and it appears that by an order, dated 24-4-1952, the Registrar granted the prayer. As a result, no notice of the appeal has been served on either the Director of Public Instruction or the Principal of the Mohsin College and if we were to issue a writ on them, we would be issuing directory and prohibitory Orders on persons who had not even been notified of the proceeding before us. It is true that O. 41, R. 14 (3) empowers the Court to dispense with the service of notice of the appeal on respondents who had not appeared in the Court below, but the power is only discretionary and I am clearly of opinion that when the relief asked for is personal order on such respondents, directing them to do or forbear from doing a certain thing, the power ought never to be exercised, nor should its exercise be asked for. Even when the power has been exercised, it is at least a question whether, although the constitution of the appeal may not have become defective, writs can be issued on parties not served with notice of the appeal. In the present case; further complication arises from, the fact that the person who dealt with the application of the appellant as the Principal of the Myosin College, has since ceased to hold that office. In view, however, of the conclusion which I have arrived at on the merits, it is unnecessary for me to consider in the present case what the effect is when in an appeal arising out of an application for a writ which has been dismissed, service of notice on certain of the respondents against whom also a writ is asked for, has been dispensed with on the prayer of the appellant or when the person who did the official act complained of has ceased to hold the office and has been succeeded by another incumbent.

11. Another matter to which I find myself compelled to refer is the slipshod manner in which the case for the appellant appears to have been conducted in the Court below. A great deal turns on the orders passed or letters written by and on behalf of the Government from time to time and yet the appellant took no steps towards calling for or compelling their production. In the application a

prayer was made for a direction on the Opposite Parties to produce some of them and the learned Judge gave leave to press for their production at the time of hearing. Nothing, however, appears to have been done. Even the telegram of the 21st August to which the prayer for a writ of prohibition relates is not before the Court and the appellant is asking this Court, as she asked the trial Judge, to prohibit the respondents by a writ from giving effect to an order which neither Court has ever seen.

12. Turning now to the merits, no argument was addressed to us on the allegation of mala fides, though the conduct of the Principal was commented on. The learned Judge has characterised that conduct as dilatory, but in my opinion, it deserves stronger condemnation. I agree with the trial Judge that; there are no materials for holding that the Principal was actuated by bad faith, but it is impossible to acquit him of inefficiency or want of a sense of responsibility. It is not easy to understand how a person of the education of a Principal of a First Grade College could have misread the Director's order of the 9th of May and found in it an absolute prohibition against the admission of women students who had passed in the second division. Nor is it easy to understand why, even after the Director had informed him that there was no bar against admitting the appellant, if she was otherwise suitable, the Principal should have gone on putting her off on the plea of having to consult the Divisional Commissioner or because of a confidential letter received from the District Magistrate. The former, at least, was the President of the Governing Body of the College, but what concern the District Magistrate had with the matter, has not been explained. Again, even after the final order of the Director, dated the 17th August, had been received, the Principal caused further delay by putting off the date of admission till the 22nd with the unfortunate consequence that, during the interval, the Government changed their mind and stopped farther admission of women students. In my opinion, Bose J. is entirely right in holding that the Principal is to a large extent responsible for the appellant losing her opportunity to be admitted to the Mohsin College.

13. On the other hand, in spite of the conduct of the Principal and the successive changes of mind on the part of the Government, the appellant could have got herself admitted if she herself . had not been guilty of lack of diligence. She got at least two openings, one on the 26th July and another, although this is slightly doubtful, on the 18th August. On the former date, other girl students included in the principal's list succeeded in getting themselves admitted and if she had presented herself on that date and produced her marks-sheet and tendered the admission fee, she would have secured her admission Her father has denied that the marks-sheet was ever mentioned or asked for and this is the one disputed matter about which there is no documentary evidence. But I am unable to accept the denial of the appellant's father as true, because the appellant herself states in her application that the notice of the 26th July distinctly stated that the candidates would have to show that they had obtained 50 per cent of the marks in the subject in which they proposed to take Honours and that even the

Director's letter of the 17th August permitted the admission of only "eligible women candidates of the Principal's list." In those circumstances, it is not believable that the marks-sheet would not be asked for.

As regards the 18th August, the appellant herself states in her application that she came away because the Principal told her that he would be writing to the University for a remission of the late fee. It is not credible that the Principal should have spoken of trying to have the late fee remitted, unless the appellant herself made a request or suggestion that he should do so and the circumstances lead me to think that the appellant did not insist on her admission on that day, because she herself wanted to see if she could be admitted without paying the late fee. It is true that according to the Principal, he fixed the 22nd August as the date for admission, but it does not appear when he did so and the appellant does not state in her application that on the 18th August she was refused admission on the ground that the date fixed was the 22nd.

14. I must now turn to the main question in the appeal although, in my view, it has already been answered by the facts I have recited. In my opinion, the facts do not establish that any discrimination has been made against the appellant only on the ground of her sex and that however great may have been the harassment to which she was subjected and however unacceptable to her the position to which she has been consigned, her case under Article 15(1) of the Constitution must fail.

15. Article 15(1) is in the following terms:

"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

The clause must be read with clause (a) which is in the nature of a proviso and reads as follows:

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

16. Of paramount importance in clause (1) are the words "discrimination" and "only". What the Article forbids is discrimination and discrimination based solely on all or any of the grounds mentioned in the Article. All "differentiation is not discrimination, but only such differentiation as is invidious and as is made, not because any real difference in the conditions or natural difference between the persons dealt with which makes different treatment necessary, but because of the presence of some characteristic or affiliation which is either disliked or not regarded with equal favour but which has no rational connection with the differentiation made as a justifying reason. Next, the discrimination which is forbidden is only such discrimination as is based solely on the ground that a person belongs to a particular race or caste or professes a particular religion or was born at a particular place or is of a particular sex and on no other ground. A discrimination based on one or more of these grounds and also on other grounds

is not hit by the Article.

17. Taking clause (1) by itself, it can by no means be said on the facts of the present case that any discrimination was made against the appellant only on the ground that she was a woman. According to her own application, "8 women candidates, both of First and Second Divisions, had been admitted in the B. A. (Honours) Class" of the Mohsin College and there are "a lot of women students in other classes." It is thus clear that the doors of the Mohsin College have not been closed against women students in general and if the appellant was refused admission, it was not solely on the ground that she was a woman and as such could have no place in the Mohsin College, but on the ground that she complied with the preliminary requirements and presented herself for admission at a stage when because of certain departmental arrangements that had in the meantime been made in respect of the Mohsin College and the Women's College, further admission of women students in the former college had been stopped.

It is certainly true that the manner in which the Government arrived at their final decision was wavering and to a certain extent clumsy which caused the appellant some hardship, but her exclusion from the Mohsin College was not due to the fact that her sex was taboo far less due to that fact alone, but it was due to the introduction of a comprehensive scheme for the provision of educational facilities to both male and female students at Hooghly. The Mohsin College is primarily a Men's College, while the Women's College has recently been established as a college exclusively for women, but it has not yet obtained affiliation in Honours courses. In those circumstances, the Government obviously thought it right in the interest of both the colleges and of both male and female education not to crowd the Mohsin College with women students but to keep them in the college meant exclusively for them — at the same time to allow women students reading for Honours to attend Honours classes at the Mohsin College. It is that scheme which has been applied to the case of the appellant, but even so, she has not been altogether excluded from the Mohsin College on the ground of her sex, because she has been allowed to attend Honours classes there. In my opinion, it is unarguable that the appellant has been discriminated against only on the ground of her sex.

Incidentally, I may point, out that she has not alleged that after she had been refused admission any male students have been admitted to the Honours Class in Economics at the Mohsin College, but I do not attach much importance to that circumstance. The cardinal fact is that she was not refused admission merely because she was a woman, but because under a scheme of better organisation of both male and female education at Hooghly which covered development of the Women's College as a step towards the advancement of female education, and also relieving the pressure on the Mohsin College which was a mixed college, it was considered reasonable to restrict further admission of women students to the Mohsin College and at the same time to safeguard the interests of women students reading for Honours by permitting them to attend Honours Classes at

the Mohsin College. This appears sufficiently from the facts disclosed by the affidavits.

18. Turning now to el. (3) of the Article, a question arises as to what the words "special provision for women" mean. Bose J. was inclined to think that they meant provision "in the case of or "concerning" women and would thus cover both provisions in favour of women and provisions against them. For the purposes of the present-case, however, the learned Judge accepted the construction put upon the words by P. B. Mukherji J, in the case of Sri Mahadeb Jiew and Another Vs. Dr. B.B. Sen, and proceeded on the basis that they meant provision in favour of women. On the facts he held that what had been done was that a special provision for the benefit of women students had been made in the shape of establishing a special college for them and it was in furtherance of the scheme of developing that college into a well-established and self-sufficient organisation that the order which had affected the appellant, had been made. The learned Judge held further that the Women's College provided reasonably sufficient facilities to its students and as it was thus a suitable substitute for the Mohsin-College, a good special provision within the meaning of Article 15(3) had been made and therefore the operation of Article 15(1) was "ousted".

19. I must confess that this part of the learn-ed Judge's judgment does not appear very convincing to me. If the establishment of the Women's. College as a separate college for women had to be justified, the reasoning of the learned Judge would have been very relevant and material, but what is to be justified here is the exclusion of the-appellant from the Mohsin College. The only way in which Article 15(3) can perhaps be laid under contribution is by regarding the establishment of the Women's College, taken along with the provision for attending Honours Classes at the Mohsin College, as a special provision for women students reading for Honours, but whether even such a provision can be regarded as a special provision "in favour of the women students, as contrasted with a provision for their being admitted as regular students of the Moshin College, admits, of doubt.

20. As to the true meaning of Article 15(3), I am inclined to think that it really contemplates provision in favour of women, although grammatically and etymologically, "for" may mean "concerning" and although, theoretically, it is possible to think of reasonable discrimination against women and children such as that they shall not be admitted to certain sections of a public museum or an art gallery where exhibits of a certain kind are to be seen. But the ordinary meaning of "provision for" is certainly "provision in favour of. Besides, the command in Article 15(1), to quote only the material portion, is that the State shall not discriminate against any citizen on the ground only of sex. That means that no discrimination shall be made against any citizen solely on the ground that such citizen is a man or a woman. Then comes clause (3) which provides that nothing in the Article shall prevent the State from making any special provision for women and children. That clause is obviously an exception to clauses (1) and

(2) and since its effect is to authorise what the Article otherwise forbids, its meaning seems to me to be that notwithstanding that clauses (1) and (2) forbid discrimination against any citizen on the grounds of sex, the State may discriminate against males by making a special provision in favour of females. It is true that since clauses (1) and (2) use the general term "sex", clause (3) may logically also mean that the State may discriminate against women, but the language used being "provision for", such an intention of the clause appears to be excluded, further support to that conclusion is lent by clause (4), the other exception clause newly added, which speaks of any special provision " for the advancement of any socially and educationally backward classes of citizens" or "for the Scheduled Castes and Scheduled Tribes. " There can be no doubt that the word " for " in the last part of clause (4) means " in favour of and it is reasonable to presume that the same word, used elsewhere in the same Article, bears the same meaning. Another instance where " provision for " clearly means " provision in favour of " is to be found in Article 16(4).

21. Incidentally, it is not easy to understand why the reference to children has been included in Article 15(3). There is nothing in the rest of the article which affects children as such, because age is not one of the forbidden grounds of discrimination specified in clauses (1) and (3). The authorisation of special provisions for children, notwithstanding anything contained in the Article, appears to be pointless.

22. Some argument appears to have been addressed to Bose J. on Article 29(2) and the learned Judge has held that the Article should be read as controlled by Article 15(1) which is of a general character and cover all matters. Before assenting to that provision, I should require to consider the matter further when a proper occasion arises. Article 29(2) deals specifically with denial of admission into educational institutions maintained by the State and it may not be without significance that it does not mention sex as one of the grounds on which such admission may not be denied. The framers of the constitution may have thought that because of the physical and mental differences between men and women and considerations incidental thereto, exclusion of men from certain institutions serving women only and vice versa would not be hostile or unreasonable discrimination. It is true while formerly Article 29(2) was, in form at least, an independent provision concerned with the particular subject of admission into educational institutions, it has now been linked up, to a certain extent, with Article 15, since clause (4), added to the last Article, authorises special provision for the advancement of educationally backward classes. Such provision may obviously be a provision, reserving certain educational institutions for the backward classes or reserving a certain number of seats for them, with the consequence of denying admission to other classes and, therefore, the clause suggests that the subject of admission to educational institutions is not outside the ambit of Article 15. It may, however, be said that Article 15(4) has been, added as an exception to that part of Article 15(1) which forbids discrimination on the ground of race or caste and as an amendment of that part of Article 29(2)

which forbids denial of admission into educational institutions on the same grounds; but since no such provision regarding educational institutions has been made in Article 15 in the case of the ground of sex, Article 29(2), in so far as it does not mention sex as a forbidden ground of discrimination in regard to admission into educational institutions, remains unaffected. The matter is not free from difficulty but I would prefer not to express any final opinion on it, since, even on the view that Article 29(2) is controlled by Article 15(1), the appellant has no case-.

23. In my opinion, it is sufficient in this case to hold that the refusal to admit the appellant to the Mohsin College was not mala fide and was not a refusal solely on the ground that she was a woman. It does not even appear that she has suffered any prejudice, because as everyone knows, for a honours student, instruction in the pass course subjects is a matter of very minor importance and it was only those subjects that she would be required to read in the Women's College while, for the honours subject, she would get the benefit of the Mohsin College as much as a regular student. Further, in her application, she does not allege that it is inconvenient to her to attend two Colleges. Nor is it immaterial to notice that actually she got herself admitted to another College in Calcutta and although she was finally refused "admission to the Mohsin College on 22-8-1951, the present application was not made till 13-3-1952.

24. For the reasons given above, this appeal must, in my opinion, fail and is dismissed. There will be no order for costs.

Sen, J.

25. I agree.