

(2000) 03 CAL CK 0041
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 791 (W) of 1998

Sukanta Mukherjee

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-03-2000

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 14(4), 15(1), 15(3)

Citation : (2000) 3 CALLT 147 : (2000) 1 ILR (Cal) 313

Hon'ble Judges : Mahemmad Habeeb Shams Ansari, J

Bench : Single Bench

Advocate : Mr. B.K. Bose, Mr. D.K. Samanta and Ms. Mala Dutta, Mr. S. Pal, Mr. Pranab Chattopadhyay and Mr. A. Gupta, for the Appellant; Mr. H.K. Lahiri, Mr. S. Mukherjee, for the Respondent

Judgement

M.H.S. Ansari, J.—By an order dated 10.2.98 of His Lordship the Chief Justice, the matter has been assigned to this Court.

2. The petitioner in the instant writ application has questioned the advertisement dated 19.12.97 published by the respondent Indian Oil Corporation (for short IOC) for grant of dealership of retail outlet at Bidhannagar. The said retail outlet was reserved for woman. The petitioner seeks a declaration that the Impugned reservation in terms of the said advertisement is in violation of Article 14, 15(1) and 21 of the Constitution of India and also direction is sought for restraining the respondents from giving effect to the impugned reservation in terms of the said advertisement.

3. The grievance of the petitioner is that in view of the said reservation, he is not entitled to make an application for grant of dealership in response to the said advertisement though he is otherwise qualified for making such application.

4. When the writ application was moved, S.K. Sen, J., passed an ad-interim order dated 27.1.98 to the effect that the concerned respondent will be at liberty to proceed with the applications that may be received pursuant to the

advertisement issued but no decision for appointment will be taken for a period of two weeks from that date. Subsequently, the interim order was extended by an order dated 6.2.98 and thereafter, by a further order dated 12.2.98 1 extended the said interim order until further orders on the petition.

5. IOC filed an application for vacating the Interim order. The petitioner also filed affidavit-in-reply thereto.

6. One Anjali Ghosh made an application for impleading as party respondent to the above writ application and she also filed another application for vacating the Interim order granted by this Court. The said application has been founded on the ground that she was one of the applicants and had been selected as the dealer of the outlet in question. By an order dated 20.1.2000, the impleading application was allowed.

7. The writ application was with the consent of the parties taken up for hearing. The applications filed for vacating the interim order were treated as the affidavits-in-opposition.

8. IOC in their application for vacating the Interim order which as noticed supra, is treated as affidavit-in-opposition to the writ application, have stated that the reservation for woman in the Impugned advertisement is in pursuance of the policy guidelines for the selection of dealers and distributors issued by the Government of India, Ministry of Petroleum and Natural Gas dated 1st April, 1997. It is disputed that the aforesaid reservation made in pursuance of the said policy of the Ministry is violative of any of the provisions of Constitution. It has been contended that IOC were well within their right in terms of Clause 2 and 2.1 of the policy guidelines for selection of dealers and distributors laid down by the Government of India, Ministry of Petroleum and Natural Gas to reserve the said outlet for woman.

9. Mr. B.K. Bose, learned counsel for the petitioner contended that the IOC is a State within the meaning of Article 12 of the Constitution of India and in the matter of granting licences or awarding dealership, its action has to be fair, reasonable and in conformity with the provisions of the Constitution. The Impugned reservation is violative of Article 14 in that it denies equal opportunity to all citizens. The reservation for woman is one based on sex and, therefore, violative of Article 15(1). Article 16 of the Constitution which enjoins that the State shall not discriminate against any citizen on the ground of religion, race, caste, sex, place of birth or any of them. It was contended that the said reservation is also violative of Article 16(1) which guarantees equality of opportunity for all citizens in matters relating to or appointment and Article 16(2) which enjoins that no citizen shall on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for, or discriminated against. In respect of any employment or appointment of any office under the State. It was further submitted that the Impugned reservation is also of violative of Article 21 of the Constitution in that it tends to deprive the

petitioner of decent livelihood by making him Ineligible for the aforesaid dealership.

10. Mr. Pranab Chatlopadhyay, learned advocate on behalf of the IOC submitted that the IOC being a State within the meaning of Article 12 of the Constitution in Part-111 is bound by the policy guidelines Issued by the Ministry of Petroleum which prescribed the guidelines for selection of dealers and distributors. The reservation has been made in pursuance of that policy. It was the submission of Mr. Chattopadhyay that special provision has been made in favour of woman under Article 15(3) and the policy of the Ministry pursuant to which the impugned reservation has been made is saved thereby. It was further submitted by Mr. Chattopadhyay that making special provisions for woman is an Integral part of Article 15(3) and that power conferred under Article 15(3) is not whittled down in any manner by Article 16. The only requirement is that such reservation must be within reasonable limits. It was the submission of Mr. Chattopadhyay that Article 15(3) is akin to the special provisions contemplated under Article 15(4) and the same reasoning which has been applied by the Courts with respect to the reservation made under Article 15(4) would apply to Article 15(3) as well which is worded similarly.

11. Mr. Chattopadhyay has placed before this Court the manual for selection of dealers and distributors effective from 1.4.1997. Therein, it has been stated that after nationalisation of OH Companies, common guidelines applicable to Public Sector Oil Companies were enunciated for the first time by the Government of India vide their letter No. P-27015/166/74-IOC (Volume II) dated 23.9.1977. The guidelines inter alia, provide for reservation to persons belonging to Scheduled Castes/Scheduled Tribes candidates, preference with regard to certain genuine and efficient Consumer Cooperative Societies and Agro Industries Corporation, reservation for Defence Personnel, disabled in war, physically handicapped persons. Appointments are to be made after giving advertisement in the Newspapers. A Selection Committee to be constituted for the purpose and the persons to comprise the same. Constitution of Oil Selection Board and the composition of the Board.

12. In paragraph "2", the percentages of reservation for various categories are specified which reads as under;

"2.1 Scheduled Castes/ Scheduled Tribes (SC/ST) 25%

2.2 Physically Handicapped Persons (PH) 5%

2.3 Paramilitary/ Police/ Govt. Personnel (PMP) 8%

2.4 Defence Personnel (DC) 8%

2.5 Freedom Fighters (FF) 2%

2.6 Outstanding Sports persons (OSP) 2%

2.7 Open (OP) 50%"

13. As regards for reservation of woman, it is laid down therein as under;

"Reservation for Women.

33% of the delershlps/distributorships in all the categories mentioned above will be reserved for Women belonging to that category. Other things belong equal Unmarried women above 40 years of age without earning parents and Widows will be given priority over others in all women categories."

14. In the Impugned advertisement for appointment of dealer for the retail outlet at Bidhannagar, District-Darjeeling, the reservation for women has been stated as under in Clause 4.

"4, Other things being equal. Unmarried Women above 40 years of age without earning parents and widows will be given priority over other."

15. Mr. P.K. Bose, learned counsel for the petitioner relied upon a Judgment of a learned single Judge of this Court in Naba Kumar Roy v. Union of India & Ors.. reported in 1979(2) CLJ 258 in support of his contentions that a direction of filling up posts of Clerk by women only had been held to be violatlve of Articles 14, 15 and 16 of the Constitution. It is true, in that case that the Railway Board's letter dated 30.6.78, office circular dated 21.6.1978, employment notice No. 1/78 and Railway Board's Circular dated 5.8.1976 all concerning the filling up of posts of Enquiry-cum-Reservation Clerks by women were challenged on the ground that such steps to recruit only women candidates was in violation of Articles 14, 15 and 16 of the Constitution. The learned single Judge up-holding the said challenge directed withdrawal of Impugned circulars on the ground that they were discriminatory and such discrimination on the basis of attributes of sex was clearly forbidden by Article 16(1) and (2) of the Constitution.

16. Mr. Chaltopadhyay submitted that the aforesaid judgment must be deemed to have been over-ruled by the Judgment of the Supreme Court in Reservation of a woman in the post of Enquiry-cum-Reservation Clerks in Railways , (1997) 11 SCC 638 . The same circular relating to appointment on the post of Enqulry-cum-Reservation Clerks in the four metropolitan cities viz., Madras Calcutta, Bombay and Delhi was considered by the Madras High Court and it was held that the Railway administrative decisions were vloatlve of Articles 14, 16(1) and (2) and were not protected by Article 15(3) of the Constitution. The Madras High Court had held that Article 15(3) cannot be read as a proviso and/or exception qualifying or restricting the guarantee under Article 16(1) and (2) of the Constitution. The Supreme Court relying upon its judgment in Government of Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another, held as under;

".....In view of the above Inferred judgment of this Court in Government of A.P. v. P.B. Vijayakumar, the Impugned judgment of the High Court holding that Article 15(3) has no application in matters relating to employment under the State falling under Articles 16(1) and (2) cannot be upheld and has to be set aside."

17. In the light of the said Judgment of the Supreme Court in Prabhakaran's case, cited supra, it must be observed that the judgment of the learned single Judge in Naba Kumar Roy's case is jmpledly over-ruled.

18. In Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another, , the Rule 22A introduced in the A.P. State and subordinate service rules which reads as under, was the subject matter of challenge.

"22-A. Notwithstanding anything contained in these Rules or Special or ad hoc Rules-

(1) in the matter of direct recruitment to posts for which women are better suited than men, preference shall be given to women; (GGMs No. 472, GA dated 11.10.1985) : Provided that such absolute preference to women shall not result in total exclusion of men in any category of posts.

(2) in the matter of direct recruitment to posts for which women and men are equally suited, other things betng equal, preference shall be given to women and they shall be selected to an extent of at least 30% of the posts in each category of CC, BC. SC and ST Quota.

(3) in the matter of direct recruitment to posts which are reserved exclusively for being filed by women they shall be filled by women only."

19. A single Judge of the A.P. Court upheld the validity of Rule 22-A. In appeal, however, a Division Bench struck down a portion of Rule 22-A(2) as unconstitutional while upholding sub-rules (1) and (3) of Rule 22-A..In appeal against the said judgment, the question before the Supreme Court was whether the sub-rule (2) of Rule 22-A is vlovative of Article 14 or Article 16(4) of the Constitution.

20. The submission before the Supreme Court was that if Article 16(2) is read with Article 16(4), it would be clear that reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately reprsented in the services under the State is expressly permitted. But there is no such express provision in relation to reservation of appointments or posts in favour of women under Article 16. It was, therefore, contended that State cannot make any reservation in favour of women in relation to appointments or posts under the State as that would amount to discrimination on the ground of sex in public employment to posts under the State and would be violative of Article 16(2). The said contention was rejected in the following terms;

"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 king of State action in relation to the citizens of this country. Every sphere of acUvly 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(3) and 15(3) go together. In addition to Article 15(1), Article 16(1),

however, placed 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 preservation of posts in favour of backward classes. Article 16(5) permits a law which 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 provisions. 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 of 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 15."

21. The Supreme Court also observed that Article 15(3) contains special provisions for women akin to Article 15(4) which provides for reserving seats for scheduled caste, scheduled tribes and backward classes in educational institutions. Article 15(3) it was held would also Include the power to make reservations for women. A relevant passage from the said Judgment dealing with this aspect of the matter needs to be noticed and for that purpose is extracted hereunder;

"..... The object of the First Amendment was to bring Articles 15 and 29 in line with Article 16(4). After the introduction of Article 15(4), reservation of seats

in educational Institutions has been upheld in the case of M.R. Balaji and Others Vs. State of Mysore, and a number of other cases which need not be referred to here. Under Article 15(4) orders reserving seats for Scheduled Castes, Scheduled Tribes and Backward Classes in Engineering, Medical and other Technical Colleges, have been upheld. Under Article 15(4), therefore, reservations are permissible for the advancement of any backward class of citizens or of Scheduled Castes or Scheduled Tribes, since Article 15(3) contains an identical special provision for women. Article 15(3) would also include the power to make reservations for women. In fact, in the case of Indra Sawhney v. Union of India 1992 Supp (3) SCC 217 this Court (in para 846) rejected the contention that Article 15(4) which deals with a special provision, envisages programmes of positive discrimination. This Court observed : (SCC pp. 755-56)."

"We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservations in educational institutions and other walks of life can be provided under Article 15(4) Just as reservations can be provided in services under Article 16(4) if so, it would not be correct to confine Article 15(4) to programmes of positive action alone. Article 15(4) is wider than Article 16(4) Inasmuch as several kinds of positive action programmes can also be evolved and Implemented thereunder (in addition to reservations) to improve the conditions of SEBCs, Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts."

"This Court has, therefore, clearly considered the scope of Article 15(4) as wider than Article 16(4) covering within it several kinds of positive action programmes in addition to reservations. It has, however, added a word of caution by reiterating M.R. Balaji to the effect that a special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. These limits of reservation have been broadly fixed at 50% at the maximum. The same reasoning would apply to Article 15(3) which is worded similarly."

22. In conclusion, it was held by the Supreme Court that the Impugned Rule 22-A(2) is within the ambit of Article 15(3) and is not violative of Article 16(2) or 16(4) which have to be read harmoniously with Articles 15(1) and 15(3). It was further held that both reservations and affirmative action are permissible under Article 15(3) in connection with employment or posts under the State and that Article 15(3) is to be read harmoniously with Article 16 to achieve the purpose for which these articles have been framed.

23. In the light of the above authoritative pronouncement of the Apex Court, the contention of the learned counsel for the petitioner have to be rejected. The Impugned reservation for women is protected by Article 15(3). Article 15(3) authorises the making of special provision for women. Such reservation as in the instant case, it must be held, is permissible under Article 15(3) and is not

violative of Articles 14, 16 and 21 of the Constitution. A feeble attempt was made by contending that the sole dealership cannot be reserved for women as that would amount to cent percent reservation. The aforesaid contention is without any foundation and does not, therefore, merit consideration. The reservation and percentages have been prescribed. It is within those percentages that the provision for women has been made. In the Instant case, we are dealing with the open category for which 50% of the dealerships are available. It is within this open category that one outlet in the instant case has been advertised as reserved for women.

24. Mr. Bose, however, contended that IOC is an "instrumentality" and, therefore, State within the meaning of Article 12 but it has neither legislative nor executive power which has been reserved to the State. Any reservation can only be by a legislative action and in the Instant case, the reservation made is not in pursuance of or under any statute, the same is wholly illegal and without authority of law.

25. Mr. Pranab Chattopadhyay, learned counsel for IOC submitted that giving effect to the mandate of the Constitution by an instrumentality of the State, can never be regarded as without authority of law. The IOC, it was submitted has given effect to the policy decision of the Ministry of Petroleum. In the absence of any challenge to the said policy, the decision of IOC cannot be assailed or questioned. Even, otherwise it was submitted the policy being in accord with the provisions of the Constitution, the same can only be questioned on the ground of its unconstitutionality. The Court in exercise of its power of judicial review can consider the policy decision of the Ministry on the ground of unreasonableness or on any other constitutional or legal infirmity. The policy decision, it was submitted does not suffer from any such vices.

26. It admits of no doubt that IOC has Implemented the policy guidelines issued to it by the Ministry of Petroleum which prescribed the guidelines for selection of dealers and/or distributors. It also admits of no doubt that there is no statute covering the field With regard to selection of dealers/ distributors of retail outlets.

27. When a State action is challenged, the function of the Court is to examine the action in accordance with the law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the Court must strike down the action. While exercising power of judicial review of administrative action, the Court is not an appellate authority. The Court's duty is to see that these authorities do not transgress their constitutional limits or statutory powers.

28. In *M.R. Balaji and Others Vs. State of Mysore*, , while dealing with the reservation under Article 15(4), wherein by an order of Mysore Government dated 13.7.1962, reservation of seats for backward classes in technical Institution in the State was questioned. A contention was urged before Court that even if a special provision can be made by State under Article 15(4), the said

provision must be made not by an executive order but by legislation. The same was repelled in the following terms :

"..... This argument is equally mis-conceived. Under Article 12, the State includes the Government and the Legislature of each of the States, and so. It would be unreasonable to suggest that the State must necessarily mean the Legislature and not the Government. Besides, where the Constitution Intended that a certain action should be taken by legislation and not by executive action it has adopted suitable phraseology in that behalf. Article 16(3) and (5) are Illustrations in point. Both the said sub-clauses of Article 16, in terms, refer to the making of the law by the Parliament in respect of the matters covered by them. Similarly, Articles 341(2) and 342(2) expressly refer to a law being made by Parliament as therein contemplated. Therefore, when Article 15(4) contemplates that the State can make the special provision in question, it is clear that the said provision can be made by an executive order."

29. In *Comptroller and Auditor General of India and others Vs. Mohan Lal Mehrotra and others*, , it has been held that reservations of post for Scheduled castes and Scheduled tribes being enabling provision, they can be made by administrative orders also.

30. On the parity of reasoning as in *Balaji's* and *Mehrotra's* case, cited supra, the special provision for women, in my judgment, can be made by a policy guideline and not necessarily by legislation alone. It is of some significance that in *Prabhakaran's* case, cited supra, which was in respect of posts of Enquiry-cum-Clerks and reserved exclusively for women, the said reservation was made not by any legislative action but by an administrative order. The Railway administration in that case had taken a decision that the reservations counters would have to be manned only by women. The said decision was communicated by Railway's circulars dated 30.6.1978 and that circular letter dated 30.6.1978 was the subject of challenge before the Court.

31. In the Instant case, the policy enunciated by the Ministry of Petroleum has made provision for women for grant of dealership of retail outlet. Unless, it is held that the policy decision is either a capricious, unreasonable and arbitrary or is violative of any constitutional or statutory mandate, Court's interference is not warranted. The policy in the Instant case does not suffer from any such vices. An important limb of gender equality is creating Job opportunities for women. The same as held in *P.B. Vijoy Kumar's* case supra, is an integral part of Article 15(3), Already having held that the same is not violative of the aforesaid provisions of the Constitution, there is no warrant for interfering with the same in the instant case. The policy in the instant case is neither irrational nor arbitrary.

32. While on this aspect of the matter, it would be appropriate to quote a relevant passage from the Judgment of the Supreme Court in *M.P. Oil Extraction and Another Vs. State of M.P. and Others*, wherein the Apex Court sounded a note of caution and prescribed the parameters of the Court when dealing with

the policy decisions of the State. The Supreme Court held as under:

".....Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere (pso dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the uncharted ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of Judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

For the reasons aforesaid, the writ petition must fall and is accordingly dismissed, however, without any order as to costs. Interim order shall stand vacated forthwith. All applications are accordingly disposed of.

Urgent xerox certified copy of the order be supplied to the learned counsel appearing for the parties on priority basis.

33. Petition dismissed