

(1953) 05 MAD CK 0004

In the Madras High Court

Case No : Letters Patent Appeal No. 4 of 1952

The University of Madras

APPELLANT

Vs

Shantha Bai and Another

RESPONDENT

Date of Decision : 01-05-1953

Acts Referred:

Constitution of India, 1950 — Article 12, 15(1), 15(3), 29, 29(2)

Citation : AIR 1954 Mad 67 : (1954) ILR (Mad) 426 : (1953) 66 LW 665 : (1953) 2 MLJ 287

Hon'ble Judges : Rajamannar, C.J;Venkatarama Ayyar, J

Bench : Division Bench

Advocate : K.V. Venkatasubramania Aiyar and T.P. Gopalakrishna, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

1. This is an appeal by the University of Madras against the judgment of Subba Rao J. in W.P. No. 341 of 1951 and the point for determination is

whether the directions issued by the appellant to the affiliated colleges not to admit girl students without obtaining the permission of the Syndicate

are valid. For a correct appreciation of the true scope and significance of those directions, it is necessary to state the conditions under which they

came to be given. Until recently, the number of girl students who sought higher education in the colleges was inconsiderable and the women's

colleges that were in existence were quite ample to provide for their needs. Latterly there has been a large increase in their number and as the

existing women-colleges were not sufficient to accommodate them, colleges which were admitting only boys also began to admit girls. Co-

education became so general that by 1943 the Syndicate considered it desirable

to frame certain rules for regulating the admission of women students in such mixed colleges. Women could be admitted only with the prior sanction of the Syndicate and the maximum number that could be admitted was fixed by the Syndicate on the basis of the amenities and facilities such as separate hostel, playgrounds and the like provided by the college. In 1945 a Commission was appointed in accordance with Section 16 (12) of the Madras University Act to report on the state of higher education and its progress in the State of Madras. The Commission went into the question of women's education and set out its views in Chapter VIII of the report. It noted with gratification that the education of women had advanced rapidly in recent years" and observed that notwithstanding the increase in the number of women's colleges ""they have been unable to accommodate the rapidly increasing number of applicants seeking collegiate education in every branch."" Next, after referring to the Rules prescribed by the Syndicate in 1943, the report went on to state that most colleges have not attempted anything more than a nominal compliance with the conditions imposed by the University with regard to common rooms, recreational facilities etc. On the whole, the life of women students in these colleges is handicapped, the atmosphere of freedom necessary for their natural development is lacking as the bulk of the students and almost the whole of the staff are men. In addition to this it becomes necessary to impose many restraints for the sake of discipline. It is the unanimous opinion of the Commission that men's colleges should be precluded from admitting women to the Intermediate classes. The difficulties, of women students at this stage are such greater because of their age and the time required to get accustomed to the change from school to colleges conditions of life and instruction. To achieve this very desirable object, it is necessary that more women's colleges with the necessary hostel accommodation should be established.

Pursuant to the policy enunciated in the report the Syndicate was granting permission for co-education only when they were satisfied that the college had complied with the requisite conditions. It will thus be seen that the restrictions imposed on the admission of girl students in the colleges are not the outcome of any policy of discrimination against them as in the familiar cases of exclusion of the Coloured Races in America. The report

of the commission shows that the object of the University is to encourage higher studies among women and that the regulations are intended to

ensure a proper and healthy education in conditions of co-education. The grounds for differential treatment of boys and girls are not political, but

social. It is as well to bear this aspect of the matter in mind in considering whether the directions given by the University are discriminatory.

2. Now, turning to the facts of this case, in 1949 a new college called the Mahatma Gandhi Memorial College was founded in the town of Udipi

and affiliated to the University of Madras. While granting affiliation, the Syndicate gave permission for the admission of only 10 girl students in the

Junior Intermediate class as a temporary measure for that year and directed that in future no women students should be admitted without the

special sanction of the syndicate. On 24-7-1951, the petitioner Shantha Bai applied for admission to the Intermediate course in this college, but her

application was refused by the Principal on the ground that girl students would not be admitted, Thereupon, she filed the petition out of which the

present appeal arises for the issue of a writ of mandamus against the Principal of the College to admit her to the Intermediate course. The first

respondent to this application was the University of Madras and the second, the Principal of the college. The affidavit in support of the petition

stated that the second respondent had refused to admit the petitioner as a result of the directions given by the first respondent not to admit women

into the college; that those directions were opposed to Section 5(1) of the Madras University Act, 7 of 1923 and that they were also repugnant to

Article 15(1) of the Constitution, in that they discriminated against the applicant on the ground of sex and therefore void. On these allegations it

was prayed that a writ of mandamus be issued directing the second respondent to admit the petitioner in the college. No relief was claimed against

the University of Madras, but its Joinder as the first respondent was obviously with a view to obtain a Judicial determination in its presence that the

directions issued by it are not valid. The second respondent appeared by counsel, but did not contest the application. The University of Madras

filed a counter-affidavit stating that the directions given by it were based on considerations of practical convenience and were neither discriminatory

nor unjust, that they were not opposed either to Section 15(1) of the Madras University Act or Article 15(1) of the Constitution and that the matter

was governed by Art 29 of the Constitution and not by Article 15(1) that no right of the petitioner had been invaded and that the application was liable to be dismissed.

3. The petition was heard by Subba Rao J. He overruled the contention that the directions given by the University were in contravention of Section

5(1) of the Madras University Act 7 of 1923 which so far as it is material is as follows:

No person shall be excluded from admission to any degree or course of study on the sole ground of sex, race (creed, class, or political views.)

He held that "'admission to any degree or course of study'" in Section 5(1) referred to admission to particular courses of studies such as Law,

Medicine, Engineering and the like and not to admission to colleges. He also held following the decision in -- "King v. Benchers of Lincoln's Inn",

(1825) 107 E. R. 1277 (A), that no writ of mandamus could be granted to compel the Principal to admit the petitioner Into the college. He was of

the opinion that Article 29 did not exclude the application of Article 15(1); that the directions given by the University were opposed to that Article

as discriminatory against the petitioner on the ground of sex and that they were accordingly void. In this view and in view of the fact that the

Principal did not oppose the application, Subba Rao J. directed the issue of a mandamus to the second respondent to consider the application of

the petitioner without making any discrimination on the ground of sex. The University of Madras prefers this appeal against this decision.

4. Three contentions have been urged on behalf of the appellant: (1) Article 15(1) prohibits discrimination only by the State; the University of

Madras is not a State and its directions are therefore unaffected by the operation of Article 15(1), (2) The right of a citizen to get admission into an

educational institution is governed not by Article 15(1), but by Article 29 and that Article does not prohibit any restriction based on the ground of

sex. (3) The directions given by the University do not deny the right of women to be admitted into colleges, but only regulates the exercise of that

right and that having regard to the nature of the right, the restrictions are reasonable and not discriminatory.

5. (1) On the first question. Article 15(1) enacts "'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex,

place of birth or any of them." This provision is directed only against the State. The State is defined in Article 12 as including "The Government and

Parliament of India and the Government and the Legislature of each of the state and all local or other authorities within the territory of India or

under the control of ,the Government of India." The question is whether the University can be held to be "local or other authority" as defined in

Article 12. These words must be construed "ejusdem generis" with Government or Legislature and so construed can only mean authorities

exercising governmental functions. They would not Include persons natural or Juristic who cannot be regarded as Instrumentalities of the

Government. The University of Madras is a body corporate created by Madras Act VII of 1923. It is not charged with the execution of any

Governmental functions; Its purpose is purely to promote education. Though Section 44 of the Act provides for financial contribution by the local

Government, the University is authorised to raise its own funds of income from fees, endowments and the like. It is a State-aided institution, but it is

not maintained by the State.

6. What is action by the State authority as distinguished from Individual action has, in America, come up for consideration frequently in connection

with the Fourteenth Amendment which prohibits States from enacting certain classes of legislation. In the Civil Rights Cases, -- (1883) 27 Law Ed.

835 (B)", the question arose whether bye-laws and rules framed by Railway companies and by proprietors of public restaurants and hotels

excluding the coloured races or limiting their rights to get accommodation were within the prohibition enacted in the Fourteenth Amendment. In

holding that they were outside the purview of the Amendment, Bradley J. observed:

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.

It may be possible to hold different opinions as to whether in a particular case the Act complained against is that of the State or of its

instrumentalities or not as to which see -- "United States of America v. Classic", (1941) 85 Law Ed. 1368 CO; the comment thereon of a learned

writer M. Pekelis in "Law and Social Action" at pages 106 and 107 & the later decision of the Supreme Court in --"Screws v. United States",

(1945) 89 Law Ed. 1495(D). But the principle that the Fourteenth Amendment prohibits only State action is itself not open to argument. That is

State action as distinguished from individual action was thus stated by Strong J. in "Ex parte", Commonwealth of Virginia" (1880) 25 Law Ed. 676

(E):

We have said the prohibitions of the 14th Amendment are addressed to the StatesThey have reference to actions of the political body

denominated a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its

judicial authorities. It can act in no other way. The constitutional provision therefore must mean that no agency of the State, or of the officers or

agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of

public position under a State Government, deprives another of property, life or liberty without due process of law, or denies or takes away the

equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's

power his act is that of the State.

The question has also been considered in America with special reference to Universities. Where the University is maintained by the State any

regulation or law made by the University which is repugnant to the 14th Amendment has been held to be unconstitutional and appropriate writs

have been issued. Such for example are the decisions in -- "Missouri Ex rel Gaines v. Canada", (1939) 83 Law Ed. 208 (F), -- "Sipuel v.

University of Oklahoma", (1948) 92 Law Ed. 247 (G), -- "Sweatt v. Painter", (1950) 94 Law Ed. 1114 (H), -- Mclaurin v. Oklanoma S.

Regents", (1950) 94 Law Ed. 1149 (D. But where the University is not one maintained by the State, their regulations are not open to attack under

the 14th Amendment because such a University cannot be considered to be a State. A case of this kind arose in -- "People Ex Rel Tinkoff v.

North Western University", (1948) 93 Law Ed. 383 (J). The North Western University was incorporated by an Act of the Legislature of the State

of Illinois in January 1851. It was not maintained by the State, though it received aid from the State. Vide the decision in -- "North Western

University v. People", (1879) 25 Law Ed. 387 (K), where the constitution of the

University is set out. The University reserved the right to reject any application for admission to it for any reason which it considered adequate. An applicant who had been denied admission to the college filed a suit against the University to compel it to admit him. In dismissing this action Judge Kiley observed:

Under its Charter the University had the power to adopt whatever rules it deemed necessary to the proper attainment of the University purpose.

An application to the Supreme Court for the issue of a writ of certiorari against this decision was dismissed. Vide-- "(1948) 93 Law Ed. 383 (J)".

Commenting on this decision a learned American writer Mr. Chambers, observes:

The outcome, no doubt, will be regarded as a strengthening of the ramparts defending the right of a privately controlled educational institution to

select its own students, free from State compulsion. The way is open for the State to provide facilities for higher education for all qualified

applicants at its own State universities and colleges.

The distinction between State-maintained universities and State-aided universities has also been adopted in several decisions pronounced by the

State Courts in America. Thus in -- "Norris v. Mayor & City Council of Baltimore", 78 F. Supp. 451 (L), a rule prohibiting admission of Negroes

in a private school which received aid from the State, but was not maintained by it, was held not to violate the 14th Amendment; whereas a similar

provision in -- "Kerr v. Enoch Pratt Free Library", 149 F. 2 d. 212 (M), was held to be void as the school was maintained by the Local

authorities (vide 62 Marward's Law Review, pp. 126 to 128).

7. It will be abundantly clear from the provisions enacted in part 3. that the Indian Constitution has also recognised the distinction between State-

maintained institutions and State-aided institutions. Thus, while Article 28(1) enacts that no religious instruction shall be provided in any educational

institution wholly maintained out of State funds, Article 28(3) provides that religious instruction might be given in educational institutions recognised

by the State or receiving aid out of State funds, but that no person should be compelled to take part in such instructions. Article 29(2) also

recognises that educational institutions might be either state-maintained or State-aided. Adopting therefore the principles laid down in the American

authorities, it must be held that educational institutions will be within the

purview of Article 15(1), only if they are State-maintained and not otherwise; and that the regulations of the University of Madras, which is state-aided & not State-maintained are not within the prohibition enacted in Article 15(1).

8. (2) It is also urged on behalf of the appellant that the matter is governed not by Article 15(1), but by Article 29(2) which runs as follows:

No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

This Article does not prohibit refusal of admission to educational institutions on the ground of sex and if that is the governing provision, then

educational authorities are within their rights in declining to admit the petitioner. The argument which found favour with Subba Rao J. was that

Article 29(2) did not expressly authorise any discrimination on the ground of sex, that it was only by implication that an inference could be made

that there could be an exclusion on the ground of sex, that no such implication should be made as that would run counter to the clear language of

Article 15(1) and that the omission to specify sex as a ground of refusal in Article 29(2) might be explained on the ground that its inclusion would

conflict with Article 15(3) which saves special provisions made by the State for women and children. Now, it will be seen that while Article 15(1)

enacts a general principle. Article 29(2) deals with a particular topic, viz., admission to educational institutions. If the principle *generalia specialibus*

non derogant is to apply, the controlling provision would be Article 29(2) and not 15(1) (15(1)?) It should also be noted that the language of

Article 29(2) is significantly different from that of Article 15(1). Thus as pointed out by the learned Advocate General while Article 15(1) prohibits

discrimination on the ground "inter alia" of "place of birth" these words are omitted in Article 29(2). The omission is clearly deliberate and there is a

purpose behind it. A State might be minded to open an institution for the advancement of knowledge in a particular region which might be

backward and for carrying out this object it might restrict admission into the institution to persons of the locality. If persons from other and more

advanced regions are to insist on being admitted and the restriction in favour of persons who belong to the locality is to be rejected as inconsistent

with Article 15(1), the result would be that persons in the locality might be prevented for all times from improving their lot. It is to avoid such

consequence that "place of birth" which is included in Article 15(1) would appear to have been omitted in Article 29(2). In the same manner the

omission of "sex" in Article 29(2) would appear to be a deliberate departure from the language of Article 15(1) and its object must have been to

leave it to the educational authorities to make their own rules suited to the conditions and not to force on them an obligation to admit women.

9. Some argument was addressed before us on the exact significance of Article 15(1) which enacts that "Nothing in this Article shall prevent the

State from making any special provision for women and children". The true scope of Article 15(3) is that notwithstanding Article 15(1), it will be

lawful for the State to establish educational institutions solely for women and that the exclusion of men students from such institutions would not

contravene Article 15(1). That is not inconsistent with the authorities of educational institutions not falling within Article 15(3) from being clothed

with power to admit or exclude women students from those institutions. The combined effect of both Articles 15(3) and 29(3) is that while men

students have no right of admission to women's colleges, the right of women to admission in other colleges is a matter within the regulation of the

authorities of these colleges. In -- Anjali Roy Vs. State of West Bengal and Others, . Bose J. was of the view that Article 29(2) would be

controlled by Article 15(1). But on appeal, the learned Judges left the point open. We are of opinion that Article 29(2) is a special Article and is

the controlling provision when the question" relates to the admission to colleges.

10. (3) The third contention urged in support of the appeal was that the directions given by the appellant prescribing the conditions under which

admission of women to colleges would be permitted could not be said to be discriminatory against them on the ground of sex and that the

American decisions which decide that exclusion of Negroes from educational institutions is opposed to the 14th Amendment do not bear on the

point. In America the restrictions placed on the rights of Negroes to receive education in State Universities had a political origin dating back to the

times when slavery had not been abolished. The 14th Amendment was intended to confer on Negroes the same status and privileges as were

enjoyed by other citizens. But, notwithstanding this enactment, the Negroes continued to suffer under social inequalities. The Southern States in

particular enacted Laws segregating the Negroes in railways and restaurants and excluding them from educational institutions intended for the

Whites. These laws came to be upheld on the ground that the equal protection of laws guaranteed by the 14th Amendment was "a pledge of the

protection of equal laws" and that the requirements of the statute were satisfied if provisions substantially equal were made for the accommodation

and education of the Coloured Races. Thus, in -- "Plessy v. Ferguson", (1896) 41 Law Ed. 256 (O), it was held that railway regulations providing

separate accommodation for Coloured Races did not offend the 14th Amendment and that the Negroes would not insist on sitting in the same

carriage with the Whites. In -- "Berea College v. Commonwealth of Kentucky", (1908) 53 Law Ed. 81 (P), it was held that a State regulation

forbidding teaching to both White and Coloured students at the same time and at the same place was valid. In -- "Cong Lum v. Rice", (1921) 72

Law Ed. 172 (Q), it was held that a regulation by which a Chinese girl was to receive education in a school for coloured children in a neighbouring

district, but not in the local school reserved for White students, was valid. From 1938 there came a change in the perspective through which the

question was viewed. The theory that equal protection of laws meant only a pledge of equal laws and not identical laws still stands. But the

interpretation of what is an equal law has been liberalised so as to narrow the distinction between equal laws and identical laws. Thus, in -- "(1939)

83 Law. Ed. 208 (P)" it was held that there was no substantial equality in a Negro student being required to attend college in another district, while

White students were admitted in a local institution. In -- "(1948) 92 Law. Ed. 247 (G)" it was held that the provision of a separate college for

Negro students could not be said to be substantially equal where the college was not in existence and available at the same time as the college for

Whites and that a promise to start a college with equal facilities was not a ground for excluding the applicants from a college which was then in

existence. In -- "(1950) 94 Law. Ed. 1114 (H)" it was further held that there was no substantial equality when the new college had not the same

facilities in the matter of variety of courses, opportunity for specialisation, size of the library, and tradition and prestige as the college to which

admission was denied. In -- "(1950) 94 Law. Ed. 1149 (I)" it was decided that rules requiring Negro students in a college to occupy separate

seats in the class, to sit at designated tables in the Library and at special tables in the cafeteria specified for coloured students were in violation of

the 14th Amendment as denying equal protection. These authorities establish that it is a right of all students to be admitted to educational institutions

without distinction of colour and that it would be a discrimination to provide that they should be accommodated in colleges situated in other places.

11. These decisions clearly have no bearing on the question that arises for determination in these proceedings. As already mentioned, the Madras

University never attempted to exclude women from collegiate courses. The University Commission Report records with satisfaction that education

among women had made rapid strides. The problem it has had to tackle has been how to provide for the ever-increasing demand on their part for

higher education. There are not sufficient number of Women's colleges to accommodate all these who went to receive higher education. Co-

education has become inevitable and unless that is properly controlled. It might result in evil and not good. It is for this reason that the syndicate

requires that colleges which seek permission to admit women students should provide the necessary facilities for them. In fact there is no regulation

refusing admission to women students; those regulations are addressed to the colleges and it is the colleges that are (?) refused permissions to

admit women when they do not provide sufficient facilities. It is difficult to see how these regulations can be regarded as discriminatory against

women. These regulations stand on the same footing as other regulations relating to the affiliation of colleges in particular courses which require that

certain conditions should be satisfied if sanction for opening such courses is to be granted. Thus, an application to open science course might be

refused on the ground that there is no laboratory. This clearly is no discrimination. In the same manner in requiring that colleges should provide

certain facilities for women before they can be admitted, it cannot be said that there is any discrimination on the ground of sex.

12. Our conclusions are that the University of Madras is not a state as defined in Article 12 of the Constitution and that its regulations are not

subject to the prohibition enacted in Article 15(1); that admission to colleges is regulated by Article 29(2) and that the regulations of the University

requiring that colleges should provide certain facilities for women before they could be admitted are not discriminatory on the ground of sex. In the result, this appeal must be allowed and W. P. No. 341 of 1951 dismissed. There will be no order as to costs.