
(1977) 07 KL CK 0009
In the High Court Of Kerala

Vijayamma

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 20-07-1977

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 19, 29
Government of India Act, 1935 — Section 298

Citation : (1977) 2 ILR (Ker) 521 : (1978) 2 LLJ 323

Hon'ble Judges : George Vadakkal, J

Bench : Single Bench

Judgement

George Vadakkal, J.—According to the petitioner, but for Ext. P4 Government order dated 1-1-1974 she was entitled to be promoted in the Police Department in she was working as upper division typist till she was relieved from there pursuant to Ext. P6 order dated 1-11-1974 as stenographer Grade II. This submission on her behalf by her learned Counsel is sought to be substantiated by referring roe to Ext. P5 seniority list of typist in the Police Department who were qualified and willing for appointment as stenographers, a list dated 30-10-1973. It is pointed out by the learned Counsel for the petitioner that number 1 mentioned therein is the petitioner. Therefore, the petitioner impugns Ext. P4 aforementioned as also Ext. P7 order dated 20-11-1974 whereby respondents 4 onwards along with one Sri Jacob (he is admittedly senior to the petitioner in the cadre of U.D. typists) were promoted as stenographers Grade II in the Police Department. The contention is that Ext. P4 Government order and the promotions given to respondents 4 onwards on the basis of Ext. P4 Government order are violative of Articles 14, 15 and 16(1) and (2) of the Constitution of India.

2. It is not disputed before me on behalf of the respondents that but for Ext. P4 Government order the petitioner was entitled to be promoted as submitted on her behalf and would have been promoted so. The submission on behalf of the respondents is that as stated in Ext. P4 order the vacancies in the Police Department in the cadre of stenographers could not be filled up by promoting

women typists " on public grounds". This basis of classification has been elaborated in paragraph 10 of the counter-affidavit filed on behalf of the first respondent as follows :

...Moreover due to the peculiar nature of the work of the stenographers of the department (touring along with the officers and working at odd hours) it decided not to appoint ladies as stenographers in the Police Department....

This is the only ground, according to the respondents, for the classification. The question to be considered is whether the classification as aforesaid for the purpose of promotion of U.D. typists to the cadre of stenographers can be sustained. Article 15(1) of the Constitution directs that " the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." Clauses (1) and (2) of Article 16 reads as follows :

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) 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 office under the State.

The question, therefore, that arises for consideration is whether Ext. P4 Government order is bad for the reason that there is discrimination against women only on the ground of sex so far as their being employed by promotion as stenographers.

3. In Radha Charan Patnaik Vs. State of Orissa and Another, the question arose as regards as provision to the effect that " no married woman shall be entitled as of right to be appointed to the service and where a woman appointed to the service subsequently marries, the State Government may, if the maintenance of the efficiency of the service so requires, call upon her to resign" and the Court examined the argument to the effect that the classification is not solely on the basis of sex but on the basis of sex coupled with the factum of marriage. Considering the contention as aforesaid that Court said :

The above reasoning, however, overlooks the aspect that in substance the disqualification of married women from being eligible for appointment amounts, in substance, to a disqualification on the ground of sex only and as such is violative of Article 14 of the Constitution. Marriage does not operate as a disqualification for appointment as a District Judge in the case of men, whereas in the case of married women, by Rule 6(2) they are being excluded from appointment. Such a disqualification being thus based on sex is unconstitutional...

4. In O. p. Nos. 410 and 416 of 1975 disposed of by a common judgment by my learned brother T. Chandrasekhara Menon, J., somewhat similar question as in this case arose with respect to the matter of appointment of Circle Inspectors of Excise which, as per the rules obtained, was barred to women. Though my learned brother did not decide that question as such, he made the following

observations :

...It is rather difficult to understand why in the matter of appointment of Circle Inspector of Excise a lady cannot be appointed. The reason given is that the work is of arduous nature. Can that be a reason in view of the fact that even in police service ladies are appointed to the cadres which were previously taboo to the ladies...?

As stated earlier the question of discrimination was not decided though it appears to me that the observations lent support to the argument advanced on behalf of the petitioners in these cases. Even arduousness of a work may not have a relation to the classification of citizens on the basis of sex for the purpose of appointment.

5. It is necessary to point out that it is the case of the petitioner as averred in Ground B of the petition that there are 17 lady stenographers in the Police Department. The answer to the aforesaid averment as is seen from paragraph 11 of the counter-affidavit filed on behalf of the first respondent is that there are only 10 lady stenographers as such and that they were appointed in the Police Department prior to 1-9-1971. That is the date of Ext. P1 Government order by which the Government said that " vacancies of stenographers in the Secretariat should be filled up by direct recruitment and by promotion of qualified typists in the ratio of 1 : 1 " ; the above benefit has been extended to typists of all the departments including the Police Department. Exhibit. P4 order on the face of it mentions only " public grounds " as the basis of classification. No doubt it is also stated therein that " the nature of the work in the Police Department is such that lady stenographers would not be suitable." As mentioned earlier the nature of work to which Ext. P4 order refers to, appears to be that the stenographers of that department will have to tour along with the officers and that they would have to work at odd hours. If 17 lady stenographers as contended for on behalf of the petitioner and if 10 lady stenographers as stated in the counter-affidavit, though appointed previously, could take up that work, it is difficult to understand how further promotions can be denied to typists on the basis that they being women are unsuitable for the department taking into account the nature of the work of the department.

6. In this connection it would be advantageous to refer to the decision in *Nagle Feilden and Ors.* [1956] 1 All England Law Reports 689. No doubt that case arose not with reference to the fundamental right of equality of opportunity in matters of public employment as envisaged in Part III of the Constitution but with reference to the common law right of a man to work at his trade or profession without being unjustly excluded from it as also with reference to the Sex Disqualification (Removal) Act, 1919. In that case the question arose as to whether the practice of refusing licence to a woman as a trainer of racehorses was against public policy. Mrs. Nagle sued the stewards of the Jockey Club for a declaration that this practice was against public policy. Striking down the statement of claim, the Master dismissed the action. Appeal from it was also

dismissed. On further appeal the court of appeal allowed the same and said that the case should go to trial. For Denning, M.R., observed as follows:

The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that Rule is bad. It is against public policy. The Courts will not give effect to it.

In this case Mrs. Nagle alleges that the Stewards of the Jockey Club made a practice of refusing any woman trainer who applies for a licence. She is refused because she is a woman and for no other reason. The practice is so uniform that it amounts to an unwritten rule. The only way she can get round it is to get her head lad to apply. The licence is granted to him, not to her. It seems to me that this unwritten rule may well be said to be arbitrary and capricious. It is not as if the training of horses could be regarded as an unsuitable occupation for a woman, like that of a jockey or speedway-rider. It is an occupation in which women can and do engage most successfully. It may not be a "vocation" within the Sex Disqualification (Removal) Act, 1919, but still it is an occupation which women can do as well as men, and there would seem to be no reason why they should be excluded from it. If this practice-this unwritten rule-is invalid as being contrary to public policy, there is ground for thinking that the Court has jurisdiction to say so, It can make a declaration of right whenever the interest of the plaintiffs is sufficient to justify it.

Agreeing with the judgment rendered by Lord Denning, M.R., Danckworts, L.J. said follows ;

Mrs. Nagle has been training racehorses in fact since 1938, but has consistently been refused a trainer's licence by the stewards, and a trainer's licence has been granted by the stewards to her head lad. I am not surprised that she finds this a mortifying situation. She claims that this practice is not a reasonable exercise of the discretion vested in the stewards by capricious and unreasonable. It may have appeared a natural attitude in Victorian times or earlier, but in present day conditions it seems to me to be restrictive and nonsensical....

Her application was not considered simply because she is a woman. That is arbitrary and entirely out of touch with the present state of society in Great Britain....

Salmon, L. J. said on this point as follows:

...It follows that Mrs. Nagle may succeed in this action if she can show that the stewards, whilst recognising her good character and long experience and ability as a trainer, have refused her a licence solely on the ground that she is a woman, it would be as capricious to do so as to refuse a man a licence solely because of the colour of his hair. No doubt there are occupations, such as boxing, which may

reasonably be regarded as inherently unsuitable for women ; but evidently training race - horses is not one of them....

7. The common law right to work at one's trade or profession without being excluded unjustly by those in control of it is enshrined in Article 19(1)(g) of the Constitution which guarantees to every citizen the right to practise any profession and to carry on any occupation, trade or business. The right to choose the work rests with the individual concerned, though as provided in Article 19(6) in the interests of the general public reasonable restrictions on the exercise of this right can, by law, be imposed by the State. Assuming (without deciding) that such restrictions can in certain cases, amount to a total prohibition of the exercise of this right, where restriction or prohibition, as the case may be is founded on a classification based on sex, the same would be, under the Common Law unjust and arbitrary depending upon whether the work which is prohibited or, in relation to which the restriction has been imposed is or is not suitable to women ; under the Indian Constitution such restrictions would be absolutely unreasonable and such prohibition void, for under Article 15(1), the State cannot discriminate against any citizen on grounds only of (amongst other grounds) sex ; and Article 16(2) emphasises this aspect with particular reference to public employment under the State. Though Article 16(1) does not confer on a citizen a right to employment to an office under the State, it does confer on him (or her) a right to an equality of opportunity for being considered for that employment in accordance with rules governing the same. If the effect of the law or an executive order is such, that by its operation he or she is denied this fundamental right only on the basis of his or her sex, the same would be unconstitutional, of course, subject to Article 15(3) which enables the State to discriminate in favour of women and children by making special provisions in that behalf. Article 15(1) prohibits classification of citizen on the basis of sex for any purpose and Article 16(2), in matters relating to public employment, and these prohibitions are unqualified and absolute. The words "on grounds only of" in these clauses of the Constitution appear to have been taken from Section 298(1) of the Government of India Act, 1935, which is as follows :

298(1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade business or profession in British India.

In AIR 1946 66 (Privy Council) Lord Thankerton construed these words as :

Beaumont, J. holds that in applying the terms of Sub-section (1) of Section 298, it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based, Their Lordships are able to accept this as the correct test. In their view, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in Section 298(1), but whether its operation may result in a

prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obviate the prohibition of Sub-section (1).

The Supreme Court adopted this construction in *The State of Bombay Vs. Bombay Education Society and Others*, with reference to Article 29(2) of the Constitution. On behalf of the Court S.R. Das, J., said :

The object or motive attributed by the learned Attorney-General to the impugned order is undoubtedly a laudable one but its validity has to be judged by the method of its operation and its effect on the fundamental right guaranteed by Article 29(2). A similar question of construction arose in the case of AIR 1946 66 (Privy Council) .

Granting that the object of the impugned order before us was what is claimed for it by the learned Attorney-General, the question still remains as to how that object has been sought to be achieved. Obviously that is sought to be done by denying to all pupils, whose mother tongue is not English, admission into any school where the medium of instruction is English. Whatever the object, the immediate ground and direct cause for the denial is that the mother tongue of the pupil is not English. Adapting the language of Lord Thakerton, it may be said that the laudable object of the impugned order does not obviate the prohibition of Article 29(2) because the effect of the order involves an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language.

8. Exhibit P4 denies the petitioner the right conferred on her by Article 16(1). She has not been considered for promotion as stenographer in the Police Department because she is a woman, wherefore, according to the respondents she is unsuitable for that work because of its "peculiar nature", namely, "touring along with officers and working at odd hours". The: real and substantial reason for, and the direct and immediate ground of her ineligibility for promotion is that she is a woman. Whatever be the ultimate reason behind the order, and however "laudable" it may be, that would not remove the prohibition of Article 16(2), for "the effect of the order involves an infringement" of her fundamental right under Article 16(1), " and that effect is brought about by denying" promotion to the petitioner in the Police Department only on the ground of sex.

9. It was contended on behalf of the respondents that pursuant to Ext. P6 order dated 1-11-1974 the petitioner, for the reason that she cannot be promoted as a stenographer in the Police Department, was with the concurrence of the Public Service Commission appointed as stenographer in the Indo-Swiss Project, Mattupatty and that she was relieved from the Police Department so as to enable

her to join in the Indo-Swiss Project aforesaid. It is brought to my notice by the learned Counsel for the petitioner that even before joining in the Indo-Swiss Project pursuant to Ext. P6 order the petitioner approached this Court by filing this original petition dated 28-11-1974 and this Court by order on C.M.P. No. 16257 of 1974 stayed regularisation of promotions under Ext. P7 until further orders. It is further brought to my notice that the interim order passed by this Court as aforesaid still continues and that, therefore, it cannot be said that the petitioner in any manner acquiesced with Ext. P4 or P7 orders. It is further contended that at any rate in so far as the petitioner's case is that she has been discriminated against solely on the basis of sex, and that her right guaranteed by Article 15 of the Constitution has been interfered with, respondents cannot be heard to say that on account of the acquiescence she cannot approach this Court to redress her grievances. The submission is that the fundamental rights cannot be bartered away and in support thereof the learned Counsel for the petitioner referred me to the decisions of the Supreme Court in *Behram Khurshed Pesikaka Vs. The State of Bombay*, (Paragraph 52 thereof), in *In re The Kerala Education Bill 1957* AIR 1958 S.C. 956 at page 981 and in *Bhadeshwar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, (paragraph 14 at page 158 and paragraph 32 at page 163). It appears to me that the submissions as aforesaid are wellfounded. I am also not prepared to accept the contention that the petitioner in any manner acquiesced with Exts. P4 and P7 orders.

10. In view of what is stated above, the petitioner is entitled to succeed. I quash Exts. P4 and P7 orders so far as the petitioner is concerned. It is her case that the first person mentioned in Ext. P 7 order is senior to her and that the second person mentioned therein is junior to her in the cadre of U.D. typists and that, therefore, she is entitled to be promoted as Stenographer Grade II and assigned rank between the aforementioned persons. This is not controverted before me on behalf of the respondents. I, therefore, direct respondents 1 and 2 to appoint the petitioner to the post of Stenographer Grade II with effect from 1-9-1971 as done in the case of the second person mentioned in Ext. P7 list in the Police Department. In view of the relief given as aforesaid alternative relief prayed in relief (c) does not arise for consideration.

11. No other directions are called for in this case. This original petition is allowed to the above extent. There will be no order as to costs.