

(1985) 02 BOM CK 0015

In the Bombay High Court

Case No : Special Civil Application No. 1490 of 1977

Vinayak Sudame

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 21-02-1985

Acts Referred:

Constitution of India, 1950 — Article 15(2), 16(2)
Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 — Rule 35, 61(2)
Secondary School Code — Rule 61(2)

Citation : (1986) 2 BomCR 671 : (1985) MhLj 569

Hon'ble Judges : V.A. Mohta, J; S.W. Puranik, J

Bench : Division Bench

Advocate : B.A. Udhoji, for the Appellant; P.N. Chandurkar and G.S. Padhye and V.S. Kanitkar for respondent No. 5 and W.M. Sambre, G.P., for the Respondent

Judgement

V.A. Mohta, J.—On 3rd June, 1977 the State Government passed a resolution by which the old Rule 61 of the Secondary Schools Code, relating to appointment of the head of a school was substituted by a new rule. Previously the merit cum seniority was the principle but by amendment seniority has become a predominant factor-deviation from rule of seniority is possible but only as specified in the rule. In the relevant Rule 61(2)(a) is carved out an exception with which we are concerned in the present matter. It reads :

"In the case of Girls school, that is a school run exclusively for girls, the senior most teacher fulfilling the conditions laid down in Rule 61(1)(a) above and having satisfactory record of service shall be appointed as Head Mistress of that school irrespective of her seniority vis-a-vis the male teachers."

Obliged by this rule the Governing Council of the New High School, Amraoti, a Society duly registered under the Indian Societies Registration Act, 1960, (respondent No. 3), which runs three schools (1) New High School (Main), (2) Nutan Kanya Shala and (3) New High School (Belapura) appointed vide

resolution dated 18th April, 1977, Shrimati Mayabai Ganu (respondent No. 4) the senior most lady teachers in the society as the head of Nutan Kanya Shala-a-school run exclusively for girls. Vinayak Sudame (petitioner) who undoubtedly is senior to respondent No. 4 in the common seniority list has by this petition challenged the legality of the Resolution of the respondent No. 3 as well as the constitutional validity of the relevant provisions quoted above.

2. It is admitted position that but for the rule the petitioner would be entitled to the post and if the rule is valid, the respondent No. 4 is entitled. Thus what really falls for real consideration is validity of the rule. The challenge is founded on the right to Equality guaranteed under the Constitution. The allegation is of invidious discrimination in public employment on the ground of sex against the mandate of Article 16(2). Now, Articles 14 to 16 which are the relevant Articles dealing with the subject are grouped under one head. Article 14 deals with equality before the law generally, Article 15 contains general prohibition against discrimination on grounds only of religion, race, caste, sex or place of birth and Article 16 contains prohibition against discrimination in matters of public employment or to appointment to any office under the State, on the grounds only of religion, race, caste, sex, or place of birth, residence, Article 15(3), permits the State to make any special provision for women and children. No such provision is to be found in Article 16. The first aspect which needs consideration is whether Article 15(3) can be attracted in the matters of public employment which is specially dealt with by Article 16. In our view the answer has to be in the affirmative considering the rule of harmonious construction. These three Articles together constitute a guaranteed right of equality and cannot be read in isolation or in the spirit of one excluding the other. The point appears to be no more *res integra* in view of several decisions of the Supreme Court such as *Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhai Laljee*, *State of Kerala and Another Vs. N.M. Thomas and Others*, *Air India v. Nargesh Meerza and others*, AIR S.C. 1829. Full Bench of the Punjab and Haryana High Court in the case of *Shamsher Singh Hukam Singh Vs. The Punjab State and Others*, has also by majority taken a similar view. Our attention was invited to the *Walter Alfred Baid Vs. Union of India and Others*, in which a view has been taken that provisions of Article 15(3) cannot be invoked for construing and determining the scope of Article 16(2). With respect it seems to us that this decision does not represent the true legal position and ignores the well settled law on the point.

3. Whereas Articles 14, 15(1), 16(1) and 16(2) are couched in a negative language, Articles 15(3), 15(4), 16(4) are couched in a positive language in the sense that they permit discrimination in favour of a class such as women, children and socially and educationally backward. Article 16 except the State to promote with special care the interest of the weaker sections and Article 15(3) enables such activity. These positive and negative aspects together are the right of equality. Unless there is affirmative action in favour of those who are traditionally weak for historical reasons, real equality can never be achieved. Reverse discrimination thus becomes a part of parcel of right of equality. That women and

children as compared to male are weaker sections cannot admit of any serious debates. That is the historical bitter truth. Even most modern countries cannot today claim that real equality between men on one hand and women on the other achieved by them. In India the degree of inequality is more prominent. Women undisputed have always been socially, economically, educationally, backward, though it will be have to be conceded that chasm is narrowing down with passage of time.

4. At this stage the significance of deliberate use of the word "only" in Article 15(2) as well as 16(2) may be examined. If sex and nothing else is the reason for discrimination these Articles may be attracted, but not otherwise. In other words if discrimination can also be justified on ground other than sex, there is no violation. We can do no better than reproduce the following passage in *Miss C.B Muthamma v. Union of India and others*, AIR 1979 S.C. 1868 :

"We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of social sectors of the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable the rule of equality must govern."

In *Air India case* (supra) discrimination in the age retirement for men and women has been upheld on the ground that the differentiation was not on the ground of sex only but was also based on other considerations. This Court in the case of *Dattatraya Motiram More Vs. State of Bombay*, , in the context of creation of separate words for women under the *Bombay Municipal Boroughs Act*, observed :

"It must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is only on one of the grounds mentioned in Article 15(1). If there is a discrimination in favour of particular sex, that discrimination would be permissible provided it is not only on the ground of sex, or in other words the classification on the found of sex is permissible provided that classification is the result of other considerations besides the facts that persons belonging to that class of particular sex and there is force in the *Advocates General's* arguments that if the Government had discriminated in favour of women reserving seats for them, it is not only on the ground that they are women, but there are various other considerations which have come into play."

5. In *Raghubans Saudagar Singh Vs. The State of Punjab and Others*, prohibition against a woman occupying a post of jail warden was upheld. Considering the hazardous nature of the job and in the context was held that the discrimination was not merely on the ground of sex and had direct nexus with the nature of the duties to be performed. In *Charan Singh and others v. Union of India and others*, 1979 Lab.I.C. 633, the policy of reservation in the posts of railway booking clerks

in metropolitan cities in favour of women was upheld on the touch stone of Article 15(3).

6. Bearing in mind these principles and precedents let us examine whether keeping the post of head of an education institution meant exclusively for girls as a woman preserve militates against right of equality. We do not think so. This is a pure policy decision having nexus to the object sought to be achieved viz., benefit to the girls students and lady teachers as well. It does not require great imagination visualize various situation arising in administration in which the girls students can be better at ease with a headmistress. Several awkward situations can be avoided if the head is a lady with whom better and easier report and communication can be established. Considered even from the point of view of special benefits to the lady teachers as a class, the provisions can be sustained as reasonable. Incidentally it may be mentioned that such a provision finds place even in Rule 35 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981.

7. To conclude exception to Rule 61(2)(a) of the Secondary School Code is valid. Rule discharged. No costs.