
(1976) 02 DEL CK 0001

In the Delhi High Court

Case No : Civil writ Petition No. 779 of 1972

Walter Alfred Baid

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-02-1976

Acts Referred:

Citation : AIR 1976 Delhi 302

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Advocate : B.N. Kirpal and Jagdeep Kishore, for the Appellant; Y.K. Sabharwal, for the Respondent

Judgement

1. Whether the provisions in the recruitment rules for the post of senior nursing tutor in the School of Nursing, Irwin Hospital, New Delhi, which make the post a female preserve, are constitutionally valid or not is the only question that this petition under Article 226 raises.

2. The petitioner, a qualified "A" grade male nurse was appointed as "sister tutor" in the School of Nursing, Irwin Hospital New Delhi and was confirmed in the post against a permanent vacancy with effect from July 23, 1953, (Annexure "A"). At that time, the petitioner was the only sister tutor in the School of Nursing and was, Therefore, discharging administrative responsibilities in addition to the duties of a tutor. According to the petitioner, the responsibility and duties of a sister tutor are detailed in Annexure "B" to the petition. Annexure "B" purports to set out the responsibility and duties of "the senior nursing tutor". According to Annexure "B" the senior nursing tutor or if there is only one nursing tutor, the nursing tutor, is responsible not only for teaching but has administrative duties as well. The duties include "periodical visits to student rooms to make sure that they practice personal hygiene." It is admitted that in course of time more sister tutors were appointed in the School of Nursing and that the petitioner has been the senior-most sister tutor. It is further admitted that in course of time the capacity of the School expanded to an extent that it

became necessary to appoint a senior tutor in a higher grade. The post of "the senior tutor" was accordingly sanctioned by the Delhi Administration in the scale of Rs. 350-575 plus the usual allowances. The sanction is contained in Annexure "D" to the petition. According to the petitioner, respondent No. 4, who was junior to the petitioner as sister tutor, was appointed to the newly created post superseding the petitioner. The said respondent No. 4 was eventually appointed Inspector in the School of Nursing and the petitioner was directed to take over from the said respondent as senior tutor with effect from November 15, 1971, vide Annexure "G" to the petition. According to Annexure "G", the petitioner who was described as "the seniormost tutor" was asked to "carry on the work of the Senior Tutor until further orders". Pursuant to this order, the petitioner worked as senior tutor for about two years. The petitioner's plea for being considered for promotion to the post of senior tutor was, however, turned down on the ground that in terms of the recruitment rules for the aforesaid post male sister tutors were ineligible for the post. According to the Recruitment Rules for the post of Senior Tutor (Annexure "H"), the post is designated as "Senior Tutor (female)". It is a selection post and according to the entry in columns 12 and 13 of the Rules, the post has to be filled in "by promotion failing which by direct recruitment" and the eligible category is "Sister Tutor (female)". The petitioner challenges this ineligibility of male candidates as being unconstitutional on the ground that being based on sex alone, it militates against the constitutional prohibition contained in Article 16(2) of the Constitution of India.

3. Shri B. N. Kirpal, learned counsel for the petitioner, contends that the provisions in the Rules with regard to eligibility for promotion to the post of senior tutor is ultra virus Article 16(2) of the Constitution of India inasmuch as the ineligibility of male candidates is based on consideration of sex alone and, Therefore, militates against the guarantee of absolute equality between the two sexes in the matter of employment as incorporated in Article 16(2) of the Constitution of India.

4. Shri Y. K. Sabharwal, who appears for the Administration, does not dispute any of the facts and concedes that the petitioner was not considered for promotion to the post of senior tutor because under the Rules, male sister tutors were ineligible for the post. He, however, claimed that the provision regarding ineligibility is valid. He contends that the School of Nursing is a predominantly female institution and having regard to the duties of a senior tutor, a female sister tutor would be more suitable for the post of a senior tutor and that the rule regarding eligibility is not based on sex alone but on the suitability of a female candidate and the corresponding unsuitability of a male candidate for the post and, Therefore, on considerations other than sex as well. He further contends that, in any event, the eligibility rule constitutes an instance of permissible classification based on an intelligent differentia having a clear nexus with the object sought to be achieved by the Rules.

5. Articles 14, 15 and 16 deal with the various facets of the right to equality.

Article 14 provides for equality before the law and prohibits the State from denying to any person equality before the law or the equal protection of the laws. Article 15 provides for prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth or any of them but permits special provision being made for women and children or for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Article 16 guarantees equality of opportunity in matters of public employment to the citizens of India. These three Articles form part of the same constitutional code of guarantees and, in that sense, supplement each other. Article 14 on the one hand and Articles 15 and 16 on the other, have frequently been described as being the genus and the species respectively.

6. Article 14, which is presently in a state of suspension on account of the declaration of emergency, contains a general prohibition against denial to "any person" equality before the law or the equal protection of the laws, and has, with respect, been appropriately described as combining within it "the English doctrine of the rule of law with the equal protection clause of the 14th Amendment to (the U. S.) Constitution. Per Das, C. J., in *Bheshwar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, ." It is of very wide amplitude because it incorporates a very wide concept of equality before the law and the equal protection of the laws and enshrines and guarantees this equality to any person irrespective of whether he is a citizen of India or an alien. It, however, does not incorporate any concept of "absolute equality", because of the principle that the equality is a charter for the equals and not for the unequals. It has, Therefore, been judicially recognised both in the United States with reference to the equal protection clause of the U. S. Constitution as well as in India that while this guarantee prohibits hostile discrimination between persons who are similarly situated, it permits reasonable classification provided such classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and the differentia has a rational relation to the object sought to be achieved by the statute or executive action in question, as the case may be.

7. The right to equality and the prohibition against discrimination provided for under Articles 15 and 16 of the Constitution of India are in a sense narrower than the guarantee of equality before law incorporated in Article 14. Both Articles 15 and 16 confine the guarantee, as well as the corresponding prohibition, in relation to citizens alone and have, Therefore, no application to aliens. The operation of these two Articles is, Therefore, narrower in that sense than the terms of Article 14. In a sense the guarantee provided in these two Articles is more unqualified than the terms in which Article 14 guarantees the right. While Article 14 permits reasonable classification provided such classification is permissible on an application of the principle referred to above, the scope of such classification under Articles 15 and 16 is restricted by the terms of these two Articles because any classification based solely on the grounds set out in these

Articles, which would be permissible under Article 14 would, nevertheless be outside these Articles. For example, if a person is discriminated against solely on ground of religion, race, caste, or sex or place of birth or any of them, the discrimination would not be struck down under Article 14 if such classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others who are outside the group and such differentia has a rational relation to the object sought to be achieved. Such a classification, however, would nevertheless militate against Article 15 and in case of any matter of public employment, Article 16 as well, unless, in the case of Article 15, such a classification could be justified with reference to clause (3) of Article 15 which provides that "nothing in this article shall prevent the State from making any special provision for women and children", and, in the case of Article 16, relating to matters of public employment, such a classification or discrimination is saved by clauses (3), (4) and (5) of that Article. Article 16 operates in a still narrower field because it is not only confined to the citizens but also to matters "relating to employment or appointment to any office under the State". It follows, Therefore, that while discrimination on the basis of sex, as in the present case, may be justified under Article 14 of the Constitution of India, if sex, on the facts and circumstances of this case, could be said to be an intelligible differentia which distinguishes male and female members of the staff of the Nursing School and this differentia has a rational relation to the object that was sought to be achieved by the Rules for the recruitment containing the condition of eligibility, such a classification would not be permissible either under Article 15 of the Constitution of India, unless it was saved by clause (3) of that Article, or under Article 16 of the Constitution of India unless it was saved by clauses (3), (4) and (5) of that Article.

8. It was not seriously disputed on behalf of the respondents that a discrimination based on sex alone in the matter of employment or appointment to any office under the State, even though justified under Article 14 of the Constitution of India, would not be able to stand the test of Article 16(2) of the Constitution of India unless it was saved by sub-clauses (3), (4) and (5) of Article 16. These clauses save provisions under any law laying down the requirement as to residence in a particular State or a Union Territory as a qualifying condition for employment, or reservation for such appointment in favor of any backward class of citizens or that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body of such institution shall be a person professing a particular religion or belonging to particular denomination. It was not disputed that a discrimination based on sex alone in the matter of public employment could not be saved by any of these three sub clauses.

9. What is, however, contended is that clause (2) of Article 16 forbids any provision for ineligibility for or discrimination in respect of any employment or office under the State if such ineligibility or discrimination is based "on grounds only", inter alia, of sex. It is contended that the School of Nursing is a

predominantly female institution and that having regard to this as well as the nature of the duties of the senior tutor, it would be eminently proper that such a post was "manned" by a member of the female sex and the male members of the staff are made ineligible for it for administrative reasons and claims of propriety presumably because the induction of a female as a senior tutor in a predominantly female institution would eliminate or at least reduce chances of undue advantage of the female and ensure smoother and better administration of the institution. It is. Therefore, contended that the ineligibility is not because the male members of the staff belong to that sex but because of the implications of their belonging to that sex. It is, Therefore, contended that the ineligibility and discrimination in the present case is permissible because it is not on ground of sex alone but on other considerations.

10. A similar argument prevailed with a Division Bench of the Punjab and Haryana High Court in the case of *Raghubans Saudagar Singh Vs. The State of Punjab and Others*, and there are observations of Chagla, C. J., as he then was, in the case of *Dattatraya Motiram More Vs. State of Bombay*, which lend considerable support to the contention. In the case of *Mrs. Raghubans Saudagar Singh (supra)*, the question before Grover, J., as he then was, was if the order of the Governor of the then East Punjab made in exercise of power conferred by Section 275(b) of the Government of India Act, 1935 by which women were ineligible to all posts in men's jails except to the post of clerks etc. and the consequent disqualification and ineligibility of the petitioner in that case for the post of Superintendent of Jails, was unconstitutional being hit by Article 16(2) of the Constitution of India on the ground that the ineligibility and disqualification was based on ground of sex alone. Relying on an earlier decision of the Division Bench of the Punjab High Court in the case of *Mrs. H. M. Dhillon*, 1966 Cur Lj 678 a decision to which Grover, J., was a party, the learned Judge "tentatively formed" an opinion that the order of the Governor became void and illegal on the enforcement of the Constitution in the year 1950 by virtue of the provisions of Article 16(2) of the Constitution of India. Having regard, however, to the fact that the questions raised were not free from difficulty the learned Judge referred the matter to a larger Bench.

The Division Bench held that, having regard to the duties of the Superintendent of Jails, which, inter alia, "involved a direct and continuous contact" with the inmates of a jail who have "a large majority of hardened and ribald criminals guilty of heinous crimes of violence and sex", and obliged the Superintendent "to personally ensure and maintain discipline over habitual male criminals", a woman performing these duties in men's jail "would be even in a more hazardous predicament" than male warders and other jail officials. In an attempt to test the proposition in reverse, the Division Bench expressed the view that it was possible "to visualise that in an exclusively woman's jail, the State may for identical considerations consider it desirable to exclude men from the post of Warder and other jails officials who may have to come in direct and close contact with the women inmates". In this context the instance of exclusively women's educational

institutions was also mentioned and it was pointed out that in such case also, "the State may well consider to employ women teachers and employees only to the exclusion of men as in fact has been alone in many institutions". It was then pointed out that "such reasonable classification (where sex enters as one of the many grounds taken into consideration) having a clear nexus to the object to be achieved" would be constitutional. The requirement that the State must select and appoint only such persons who , are suitable for a particular post was also pressed into service. It was pointed out that "where disparities of either sex, patently add to or detract from, the capacity and suitability to hold a particular post or posts, then the State would be entitled to take this factor into considerations in conjunction with others". Support for the conclusion was sought from the decision of the Bombay High Court in the case of Dattatraya (supra) and certain other decisions. Certain American decisions were relied upon in support of the conclusion that sex was "a sound classification" and it was pointed out that "legislation which along with other factors takes the same into consideration, would be immune from constitutional challenge". It was noticed that Article 16(2) used the expression "only" indicating that what was forbidden was discrimination on the ground of sex alone and it was pointed out that "when the peculiarities of sex added to a variety of other factors and considerations form a reasonable nexus for the object of classification, then the bar of Articles 15 and 16(2) cannot possibly be attracted". In the context of the facts of the petitioner's case, it was pointed out that the petitioner had been tried earlier as a Deputy Superintendent of a men's jail and was found wanting in and it followed from that that "the unsuitability of the petitioner to -perform the functions of Deputy Superintendent or Superintendent of Men's Jail was patent". The, earlier judgment of the Division Bench of the Court from which support was sought by the learned referring Judge, was apparently not cited before the Division Bench and it is probably for that reason that that judgment has not been noticed.

With respect, I am unable to subscribe either to the conclusion arrived at by the High Court or the reasons on which they are based. In the first instance, unlike Article 14, Article 16(2) does not permit any classification which is solely based on any of the differentia such as religion, race, caste, sex etc., which are specifically mentioned in clause (2) except in so far as it may be saved by clauses (3), (4) and (5) of that Article and there is, Therefore, no question of any ineligibility or discrimination on those grounds alone being saved by the existence of any nexus between such differentia and the objects sought to be achieved. In that sense Article 16(2) incorporates a concept of equality which is more unqualified in terms than that in Article 14. The only classification which is permissible under clause (2) of Article 16 is a classification based on differentia other than those which are specifically excluded either in conjunction with those excluded or otherwise. Article 16(2) incorporates a concept of absolute equality between the sexes in the matter of employment which is underscored by the absence of any saving in the other clauses of the Article in relation to sex. In the

second place, it is difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex "alone" because it is based on "other considerations" even though these other considerations have their genesis in the sex itself. It virtually amounts to saying that woman was being discriminated against by the impugned provision in the case before the High Court not because she belonged to a particular sex but because of what the sex implied. It is difficult to understand the logic that where women are considered ineligible for appointment to a post because it is an area where even a daring man dare not tread and women on that account, would be preeminently unsuitable to hold such a post, it is nevertheless not a discrimination grounded on sex alone. If a person is considered ineligible for a post, whether a male or a female because such a person is too cowardly or too much of a weakling, whether of body or mind, or is of such a frail constitution that there is something in his or her background which makes him or her eminently unsuitable for a particular type of work, it would be within the area of permissible discrimination but where it is stated that, having regard to the physical disparity between the two sexes or the inherent characteristics or susceptibilities of one or the other of the sexes, all members of that or the other sex are ineligible for a particular position, on what else is such discrimination or disability based, if not sex alone ? While it is true that there are patent physical disparities between the two sexes, yet it is not possible to justify a conclusion by any process of reasoning, without impinging on the guarantee against discrimination on the ground of sex, that all women or all men, as the case may be, would be unfit or, to put it differently, no man or woman, as the case may be, would be suitable for a particular class of work. It is often said that a man can do better what a woman can do except perhaps a function that has been exclusively assigned by nature to a woman. It is, however, equally true that a woman can do all that a man can, again subject to the well known exceptions, if not better than man. It is too late, Therefore, for any one to suggest that there is any area of human activity for which women as a class are ineligible or any work for which all women are unfit. An aggressive protagonist of women's lib may perhaps describe such findings by a Court as a virtual judicial slander and legitimately point to the achievements of at least three women Prime Ministers, including the Prime Minister of the largest democracy in the world, which are still fresh in public mind as a complete answer to such a conclusion. It has been recognised that a woman Prime Minister has done in this country during the stormiest decade in its history what few men in that position would perhaps have dared to attempt. It is undoubted that the courage, determination and grit shown by her against rather heavy odds and in the midst of deep crisis would have earned laurels even for the toughest, of men. It is, however, sufficient for my purpose to say that in spite of all that may be said of the physical disparities between the sexes, it is neither possible for one to say nor to be able to justify in law that there is any post for which all women are unfit or ineligible.

American decisions which have been relied upon do not provide a parallel. The

equal protection clause of the United States Constitution permits reasonable classification subject to the conditions as to its basis and the nexus between the basis and the object and would, Therefore, be comparable to Article 14 of the Constitution of India. These cases, however do not provide a parallel to a situation arising under Article 16(2) of the Constitution of India which does not permit any classification on grounds solely, inter alia, of sex. In any event, the American decisions were based on a manifest judicial anxiety to protect the female sex rather than to enlarge the area of its disability or discrimination. In all these cases, what was being judicially defended was the special provision for their welfare and special protection because of their susceptibility to evil influences. None of these decisions were concerned with a case where the woman was being discriminated against. The argument that the rule was not bad because in the case of the petitioner she had been found to be wanting in a somewhat similar post on an earlier occasion, does not appear to be tenable because if there is anything in the previous record of the petitioner which may justify the conclusion that she would not be suitable for a particular post of that type, it would still not be able to save a rule which incorporates a wholesale condemnation of the members of a sex in relation to a particular post and renders them ineligible on ground of sex alone.

The decision of the Bombay High Court in the case of Dattatraya (supra) could not have given any support to the conclusion of the Punjab High Court. In that case, a challenge had been thrown to the reservation of a seat for women in the municipal elections on the ground that it offended Article 15(1) of the Constitution of India, Chagla, C. J., an illustrious Judge, who became a legend in his lifetime and was known for his concern for women and children, pointed out, and with great respect rightly, that Art, 15(3) was a complete answer to the challenge because that clause permitted "special provision" for women and that is exactly what had been done. It was observed that "classification on the ground of sex is permissible provided that classification in the result of other consideration besides sex" and "that if Government have discriminated in favor of women in reserving seats for them, it is not only on the ground that they are women but because there are various other considerations which have come into play" such as the plight of women and the need to have their representation in the legislatures. The considerations to which attention was drawn could not be said to be founded on sex alone but were Part of the socio-economic conditions particularly the social and economic disabilities from which women suffered because of the various historical reasons. I am unable to understand, how, and I say so with respect, such a reasoning or logic would be relevant in the consideration of a case of discrimination against women on ground of sex alone in the matter of service under the State. If women are discriminated against in the matter of service under the State because they were not suitable for the post on account of certain physical disabilities from which they suffered as a class, the discrimination is based on sex alone. The discrimination being based on what the sex implied would nevertheless be founded on sex alone. Sex and what it implies

cannot be severed. considerations which have their genesis in sex and arise out of it would not save such a discrimination. What could save such a discrimination is any ground or reason independently of the sex such as socio-economic conditions marital status, and other disqualifying conditions such as age, background, health, academic accomplishments, etc.

The case of Girdhar Gopal, Air 1953 Madh Bha 147 was again a case which was distinguishable. That was also a case under Article 15(1) which had been invoked to challenge the validity of Section 354 of the Indian Penal Code. Here again Article 15(3) was a complete answer to the contention and the reliance by the court "on considerations of propriety, public morals, decency, decorum and rectitude" as justifying the provision with regard to assault or criminal force on a woman with intent to outrage her modesty was fully justified. None of these considerations would be relevant in a case in which the challenge is to the ineligibility rule based on sex alone. The attempt of the High Court to test the proposition "in reverse", with respect cannot succeed. If every man is ineligible for a particular post in an exclusively female jail or educational institution it would be a clear case of discrimination on the ground of sex alone, howsoever justified, socially, administratively or otherwise such a requirement may be. Such a discrimination having its genesis in sex would be hit by Article 16(2) and none of the considerations which have their foundation in sex would be able to save such a discrimination from the challenge of unconstitutionality on the ground of violation of Article 16(2).

11. Clause (2) of Article 16 prohibits discrimination on ground of religion alone; could a bar on any one subscribing to a particular religion from holding an office in the affairs of a religious institution other than that of his own be justified on the ground that such a person being unsuitable for such an office was, not being discriminated against on ground of religion alone? Obviously not, otherwise a special provision in clause (5) of the Article to save such a discrimination would have been unnecessary. The prohibition must Therefore, be held to extend not only to consideration of sex as such but to all considerations which have their genesis in and arise out of sex unless saved by any exception that may be carved out of the prohibition and there is no such exception in the language of the Article.

12. The impugned provision in the Rules in the instant case cannot, Therefore , be justified on the ground of any permissible classification and would be liable to be struck down as being with in the mischief of the provision contained in clause (2) of Article 16 of the Constitution of India unless it could be saved with reference to clause (3) of Article 15 of the Constitution of India, an attempt at which, in a slightly different setting, succeeded in the Punjab and Haryana High Court in the case of Shamsher Singh Hukam Singh Vs. The Punjab State and Others, . In that case, the validity of a special allowance for women in a wing of the educational service was challenged on the ground that their male counterparts were not given the benefit although both performed identical

duties, and were part of the same service, The discrimination was sought to be justified on the ground that, even though it was grounded on sex alone, it was saved by clause (3) of Article 15 of the Constitution of India, which provides that "nothing in this Article shall prevent the State from making any special provision for women and children". The question whether the provisions of clause (3) of Article 15 could be invoked for construing and determining the scope of clause (2) of Article 16 of the Constitution, and, if so, to what extent, and in what class of cases, was eventually referred to the Full Bench, The question was answered in the affirmative by Sarkaria, J., as his Lordship then was and who spoke for the majority, with "the proviso that only such special provisions could be made in favor of women which were reasonable and "do not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2)". The affirmative answer to the reference was based on the grounds that Articles 14, 15 and 16 constituted a part of the same constitutional code of guarantees and supplement each other; that Article 14 was the genus and the other Articles were its species; that clauses (1) and (2) of Article 15 cover the "entire field of State discrimination, including the field of public employment specifically dealt with in Article 16" and that, Therefore, "it overlaps and supplements what is said in Article 16" implying that "the scope and the content of the exception in clause (3) will extend to the entire field of State discrimination, including that of public employment". It was, Therefore, held that clause (3) of Article 15 was "to be deemed as a special provision in the nature of a proviso qualifying the general guarantees contained in Articles 14, 15(1), 15(2), 16(1) and 16(2)". Support for this conclusion was sought from a number of decisions of the Supreme Court as well as of the Bombay High Court in the case of Dattatraya (supra). Narula, J., as his Lordship then was, struck a dissenting note, even while expressing an apparent sympathy for that point of view and answered the reference ;n the negative holding that the provision of clause (3) of Article 15 could not be invoked to restrict the scope of the application of clause (2) of Article 16. The majority view was explained as being at least partly due to administrative convenience and the dissenting view was justified as a sequel to the compulsion arising out of a sacred obligation not to allow any of the constitutional guarantees being "belittled or restricted" and affirmed that the constitutional guarantee under Article 16(2) could not be "diluted by reference to a similar other provision in the same chapter which the Constituent Assembly in its wisdom expressly abstained from applying to the right in question", an apparent reference to the provision of reservation in clause (3) of Article 15, which was conspicuously absent in Article 16.

The dissenting opinion appears to me to represent the true legal position and I say so with great respect. Narula, J., has given almost invincible reasoning in differing from the majority view and I am in respectful agreement with it. The scheme of Article 16 incorporates a right to equality and a constitutional prohibition against discrimination in the matter of service under the State which is more unqualified in terms than those incorporated in Article 14. The equality of

opportunity in the matter of employment between the sexes and the corresponding prohibition against discrimination is absolute in nature and no exception has been carved out of it in Article 16 unlike in Article 15. It is not possible to read into Article 16 the exception contained in Article 15(3) and the attempt to transpose clause (3) of Article 15 in Article 16 and to restrict the scope of the prohibition in Article 16(2) with reference to that clause could not possibly be justified on the basis of any aid to interpretation, either internal or external. The function of the Court is to interpret the laws. Courts are concerned with what the law is and not what it should or ought to be, however laudable such a wish otherwise may be. I am not unaware of the long-standing controversy between the strict constructionists and the liberal constructionists, both in the United States and, to an extent, in this country, and of the large body of judge-made laws in certain branches of law, as a result of liberal construction particularly in the realm of beneficial legislation. Constitution, however, is a basic law and it is for the people, who gave to themselves a Constitution, to determine the scope of rights and limits of obligations, particularly in rights and obligations which are of a fundamental nature. It is not the province of any Court to redraw the boundaries of such rights and obligations in the process of discovering these limits. It is true that radical decisions helped in the growth of legislation by pointing out the course that legislation should take. But, to my mind, it is necessary to draw a distinction between ordinary legislation and the fundamental law of the Constitution. Judicial legislation may perhaps be justified to an extent with a view to bring out the real intent of the legislature; judicial constitution making would be fraught with dangers.

13. The legislative and judicial solicitude for the moral, physical and economic well being of women is almost axiomatic and it may, Therefore, perhaps sound incongruous but there appears to me to be no escape from the conclusion that the impugned rule which makes the post of senior nursing tutor a female preserve, is unconstitutional being hit by Article 16 of the Constitution of India inasmuch as it is based on sex alone and cannot be saved either with reference to any permissible classification or by any of the exceptions carved out of the Article.

14. In the result the petition succeeds. The provision in the recruitment rules regarding ineligibility of the male candidates is quashed and I direct that the authorities would consider the candidature of the petitioner for the post of senior tutor on the merits of his suitability for the post in the light of the above conclusions.

15. The petitioner would have his costs. Counsel fee is fixed at Rs. 500/-.

16. Petition allowed.