

Case relating to Reservation:

Parties : G. Vijayaraghavan Versus The State of Tamil Nadu, rep. by its Secretary, Personnel and Administrative Reforms Department & Another

Court : High Court of Judicature at Madras

Case No : W.P.No.18399 of 2008

Judges: THE HONOURABLE CHIEF JUSTICE MR. H.L. GOKHALE & THE HONOURABLE MR. JUSTICE D. MURUGESAN

Appearing Advocates : For the Petitioner: N. Subramaniyan, Advocate. For the Respondents: R1, P.S. Raman, Addl. Advocate General assisted by D. Sreenivasan, R2, Niraimathi, Advocates.

Date of Judgment : 23-07-2009

Head Note :-

Constitution of India - Article 14, 15, 16, 226 – Service - Tamil Nadu State and Subordinate Services Rules - Rule 21 - Whether the reservation of 30% of posts provided for the women under the Tamil Nadu State and Subordinate Services Rules is a constitutionally valid reservation - The provision for reservation contained in Rule 21 of the Tamil Nadu State and Subordinate Services Rules is very much in consonance with Article 15(3), and it cannot be said to be in any way violative of Article 16(2) of the Constitution of India - The relevant Rule viz., Rule 21 of the Tamil Nadu State and Subordinate Services Rules is fully constitutional. The petition is, therefore, dismissed.

Para 18 to 20

Cases Referred:

1. Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217
2. Government of A.P. Vs. P.B. Vijayakumar, (1995) 4 SCC 520
3. Union of India Vs. K.P. Prabhakaran, (1997) 11 SCC 638
4. Vijaya Lakshmi Vs. Punjab University (2003) 8 SCC 440
5. Ewanlangki-E-Rymbai Vs. Jaintia Hills District Council (2006)4 SCC 748
6. Ashoka Kumar Thakur Vs. Union of India 2008 (6) SCC 1

Comparative Citations:

2009 (4) LW 140, 2009 (6) MLJ 393

Judgment :-

(Prayer: Petition filed under Article 226 of the Constitution of India for the issuance of a writ of declaration declaring Rule 21 of General Rules, Part-II of Tamil Nadu State and Subordinate Service Rules and the notification issued pursuant to the aforesaid rule by Tamil Nadu Public Service Commission on 01.08.2007 in the Tamil Daily 'Thina Thanthi' for the selection of candidates for Group - I services under the State of Tamil Nadu in so far as providing for 30% reservation for women as illegal, unconstitutional and void and consequently direct the respondents to select the candidates by direct recruitment for public services under the State without reserving any vacancy for women and pass such further or other orders.)

H.L. Gokhale, J.

This writ petition raises the question as to whether the reservation of 30% of posts provided for the women under the Tamil Nadu State and Subordinate Services Rules is a constitutionally valid reservation.

2. The facts leading to this writ petition are as follows:

The petitioner has the degree in Law and he desired to enter the government service as a Group - I officer in the State of Tamil Nadu. At the time of filing the writ petition in April 2008 he was 32 years of age. He claims to belong to a community, which has been classified amongst the Most Backward Communities. On first August, 2007 Advertisement No.120 was published by the 2nd respondent - Tamil Nadu Public Service Commission in Tamil News Paper 'Dina Thanthi' for various posts. The notification provided 30% reservation for women for various posts by laying down 30% reservation horizontally amongst all the communities. The petitioner wrote the preliminary examination and secured 213 marks. As far as the main examination is concerned the cut off marks were published on the website of the 2nd respondent for various categories and for the Most Backward Communities the cut off marks for men were fixed as 196.5 and for women 180. The petitioner, therefore, submits that women with lesser marks can get selected thereby denying the posts for male candidates with higher marks. In paragraph - 3 of his supporting affidavit he states that reservation for the women candidates denies the fundamental right of the male candidates to be considered for the vacancies reserved for women. He contends that this reservation of 30% vacancies for women as per Rule 21 of the Tamil Nadu State and Subordinate Service Rules is illegal and unconstitutional as Article 16(2) of the Constitution of India prohibits discrimination exclusively based on sex. He, therefore, submits that the reservation in favour of women in public employment is in violation of Article 16(2) of the Constitution of India. He seeks a declaration that Rule 21 of the Tamil Nadu State and Subordinate Service Rules, and the notification published by the second respondent on 1st August, 2007, insofar as it provides 30% reservation for women is illegal, unconstitutional and void. He also seeks a direction to the 2nd respondent to select the candidates by direct recruitment for public service without reserving any vacancy.

3. The writ petition has been opposed by the respondents at the admission stage itself by arguments across the Bar.

4. To understand the submissions of the petitioner we may first refer to the relevant advertisement, which is Advertisement No.120 calling for the applications for direct recruitment to the various posts in Group - I services, such as Deputy Collector, Deputy Superintendent of Police, etc. The notification was issued on the 1st August, 2007. The last date for receipt of applications was 31st August, 2007, and the date of preliminary examination was 18th December, 2007. In Clause - 4 of the notification the distribution of vacancies has been given, wherein it is stated that the vacancies will be filled in according to Rule of Reservation for appointments. In that clause the vacancies for General Category, Backward Class, Most Backward Class, Scheduled Caste and Scheduled Tribe are separately categorized and in each particular category reservation has been provided for women. This reservation is justified on the basis of Rule 21 of the Tamil Nadu State and Subordinate Services Rules.

5. Rule 21 is divided into sub Clauses (a), (b), (c) and (d). We are concerned with Clause (b). Clauses (a) and (b), which are relevant for our consideration, are therefore quoted herein below, and they read as follows:

“(a). Women alone shall be appointed to post in any institution or establishment specially provided for them.

Provided that men may be appointed, if suitable and qualified women are not available for such appointment.

(b) A minimum of 30 per cent of all vacancies which are to be filled through direct recruitment shall be set apart for women candidates irrespective of the fact whether the rule of reservation of appointments applies to the posts or not. In respect of the posts to which the rule of reservation of appointments applies, 30 per cent of vacancies shall be set apart from women candidates following the existing reservation for Scheduled

Castes and Scheduled Tribes, Backward Classes and General Turn. Women candidates shall also be entitled to compete for the remaining 70 per cent of vacancies along with male candidates."

6. Learned counsel for the petitioner submits that Article 16 of the Constitution provides for equal opportunity in matters of public employment. He, particularly, relied upon Article 16(2) which lays down that "no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State". Relying upon Article 16(2) of the Constitution he submits that the relevant rule viz., Rule 21 of the said Rules, discriminates on the ground of sex against men and denies the equality of opportunity in the matter of public employment. He further submits that under Article 13(2) of the Constitution the State is prohibited from making any law which takes away or abridges the rights conferred by Part III of the Constitution on fundamental rights, and any law made in contravention of this Clause shall to the extent of the contravention be void. It is further submitted that the relevant Rule viz., Rule 21 cannot be defended on the basis of Article 15(3), which provides for special provision for women and children. He submits that the two Articles viz., 15(3) and 16(2) are to be harmoniously read. Reliance is placed on the principle of constitutional interpretation that while interpreting the provisions of the Constitution effect has to be given to all the provisions of the Constitution, and for that purpose, reference is made to paragraph 126 of the recent judgment of the Supreme Court reported in 2008 (6) SCC 1 (Ashoka Kumar Thakur Vs. Union of India).

7. As against this submission of the petitioner's counsel, learned counsel for the respondents pointed out that there is no conflict between Article 15(3) and 16(2) of the Constitution. Article 14 of the Constitution lays down that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Thereafter, Article 15(1) lays down prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. This very Article provides in sub-Article (3) that State can make special provisions for women and children, and also for socially and educationally backward classes of citizens and for Scheduled Castes and Scheduled

Tribes and such provision shall not be hit by any other provision in Article 15. The provision in Article 16 for the equality of opportunity in the matter of public employment is only one facet of right to equality. The right conferred under Article 15 is wider and cannot be reduced in any manner by Article 16.

8. It would be appropriate to quote Articles 14, 15 and 16 for ready reference. They read as follows:

Right To Equality

"14. Equality before law: - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to"

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in Clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

16. Equality of opportunity in matters of public employment: -

(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.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for

reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person possessing a particular religion or belonging to a particular denomination."

9. As far as this controversy is concerned, it is no longer *res integra*. The Andhra Pradesh State and Subordinate Services Rule 22-(A)(2) contained a provision which is slightly different from the one in our matter. It provided that where women and men are equally suited preference be given to women, other things being same, in selection to the direct recruitment to the extent of at least 30% of the posts for each category of OC, BC, SC and ST quota. That provision was held to be discriminatory by the Andhra Pradesh High Court and it struck down the second part of Rule 22 - (A)(2).

10. Andhra Pradesh government challenged the judgment in the Supreme Court in *Government of A.P. Vs. P.B. Vijayakumar*, reported in (1995) 4 SCC 520 the law in this behalf was explained by *Sujata V. Manohar, J.* The Court in terms held that Article 15(3) carves out a permissible departure from the rigors of Article 15(1). In paragraph - 4 of the judgment the Court noted that the ambit of Article 16(2) is more limited in scope than Article 15(1), because Article 16(2) is confined to employment or office under the State. Article 15(1), on the other hand, covers the entire range of State activities. It was submitted before the Supreme Court that Article 16 included sub Article (4) which provided for reservation in appointments or posts in favour of the backward classes of citizens, if they were not adequately represented in service and that there was no similar express provision in favour of women under Article 16. Therefore, the State could not have made any such reservation in favour of women. The Apex Court answered this argument in paragraphs 6 and 7 of the judgment as follows:

"6. This argument ignores Article 15(3). The interrelation between Articles 14, 15 and 16 has been considered in a number of cases by this Court. Article 15 deals with every kind of State action in relation to the citizens of this country. Every sphere of activity of the State is controlled by Article 15(1). There is, therefore, no reason to exclude from the ambit of Article 15(1) employment under the State. At the same time Article 15(3) permits special provisions for women. Both Articles 15(1) and 15(3) go together. In addition to Article 15(1), Article 16(1), however, places certain additional prohibitions in respect of a specific area of State activity viz. employment under the State. These are in addition to the grounds of prohibition enumerated under Article 15(1) which are also included under Article 16(2). There are, however, certain specific provisions in connection with employment under the State under Article 16. Article 16(3) permits the State to prescribe a requirement of residence within the State or Union Territory by parliamentary legislation; while Article 16(4) permits reservation of posts in favour of backward classes. Article 16(5) permits a law which may require a person to profess a particular religion or may require him to belong to a particular religious denomination, if he is the incumbent of an office in connection with the affairs of the religious or denominational institution. Therefore, the prohibition against discrimination on the grounds set out in Article 16(2) in respect of any employment or office under the State is qualified by clauses (3), (4) and (5) of Article 16. Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16 - the former being a more general provision and the latter, a more specific provision. Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State.

7. The insertion of clause (3) of Article 15 in relation to women is recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16."

11. In paragraph - 8 the Court further observed as follows:

"..... Under Article 15(4) orders reserving seats for Scheduled Castes, Scheduled Tribes and Backward Classes in Engineering, Medical and other technical colleges, have been upheld. Under Article 15(4), therefore, reservations are permissible for the advancement of any backward class of citizens or of Scheduled Castes or Scheduled Tribes. Since Article 15(3) contains an identical special provision for women, Article 15(3) would also include the power to make reservations for women. In fact, in the case of *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, this Court (in para 846) rejected the contention that Article 15(4) which deals with a special provision, envisages programmes of positive action while Article 16(4) is a provision warranting programmes of positive discrimination. This Court observed: (SCC pp. 755-56)

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

This Court has, therefore, clearly considered the scope of Article 15(4) as wider than

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

12. At the end of paragraph - 9 in *P.B. Vijayakumar's Case (supra)* the Court held that "the reservation, therefore, is one of the constitutionally recognized methods of overcoming backwardness. Such reservation is permissible under Article 15(3)". Although, the Court was concerned in that matter with a kind of affirmative action, in paragraph -11 in terms it held once again that both reservation and affirmative action are permissible under Article 15(3) and both the Articles 15 and 16 are designed for the same purpose for creating an egalitarian society.

13. One of the submissions canvassed on behalf of the petitioner was that the reservation in favour of women was irrational classification, and there was no intelligible differentia to favour such a classification, and it is has no rational nexus with the object of efficient administration. Reliance was also placed on Article 335 of the Constitution in this behalf.

14. Article 335 deals with the claims of Scheduled Castes and Scheduled Tribes to services and posts consistently with the maintenance of efficiency of administration. It has not been pointed out that employment of women would reduce the efficiency of the administration in any way. However, this argument is also answered in paragraph - 9 in P.B. Vijayakumar's judgment (supra) relying upon paragraph 836 of Indira Sawhney judgment (supra) whereupon it was noted that the very idea of reservation implies selection of a less meritorious person. At the same time, this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. What is required is an opportunity to prove the competence of the person concerned. It is precisely a lack of opportunity which has led to the backwardness of some of the communities and also amongst women. Reservation is one of the methods constitutionally recognized to overcome this backwardness. That being the constitutional objective, there is no question of any unjustified discrimination.

15. The judgment in P.B. Vijayakumar's case (supra) has been followed consistently by the Apex Court in different judgments rendered from time to time. Thus, in the year 1997 in Union of India Vs. K.P. Prabhakaran, (1997) 11 SCC 638 the Apex Court upheld the railway administration's decision to reserve all the posts of Enquiry-cum-Reservation Clerks in Reservation Offices in the metropolitan cities of Madras, Bombay, Calcutta and Delhi exclusively for women. It relied upon the earlier judgment in P.B. Vijayakumar's Case (supra) and emphasized the significance of Article 15(3). The court in terms held that since Articles 15(1) and 15(3) go together, the protection of Article 15(3) would be applicable to the employment under the State falling under Articles 16(1) and 16(2) of the Constitution.

16. P.B. Vijayakumar's Case (supra) was again quoted with approval in Vijaya Lakshmi Vs. Punjab University, reported in (2003) 8 SCC 440. In that matter the posts in women's college/hostel were all reserved for women only. The Apex Court held the same to be perfectly permissible.

17. Recently, in Ewanlangki-E-Rymbai Vs. Jaintia Hills District Council, (2006)4 SCC 748 the Supreme Court reiterated that Article 16 is limited in its scope than Article 15, since it is confined to office or employment under the State whereas Article 15 covers the entire range of State activities. This judgment also relied upon the judgment in P.B. Vijayakumar's Case (supra).

18. In view of what is stated above, it is very clear that the provision for reservation contained in Rule 21 of the Tamil Nadu State and Subordinate Services Rules is very much in consonance with Article 15(3), and it cannot be said to be in any way violative of Article 16(2) of the Constitution of India.

19. Mr. P.S. Raman, learned Additional Advocate General drew our attention to the recent trend and effort to provide for reservation to women in legislative bodies also. He referred to the proposed Women (Empowerment for Equal Participation) Bill, 2005 in this behalf.

20. Be that as it may, in view of what is stated above, we do not find any substance in the petition. The relevant Rule viz., Rule 21 of the Tamil Nadu State and Subordinate Services Rules is fully constitutional. The petition is, therefore, dismissed, though without any orders as to costs.