



HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Writ Petition No. 13808/2009

1. Smt Tara Agrawat W/o Shri Subhash Chandra Vaishnava, aged about 44 years, resident of Near Maharshi Dadhich School, Krishnapuri, Madanganj, Kishangarh, Ajmer.

2. Smt. Manju Bala Choudhary W/o Shri Phool Singh Choudhary, aged about 46 years, resident of infrount of Edgaha, Manjla Road, Shivaji Nagar, Madanganj, Kishangarh, Ajmer.

3. Smt. Manju Jain w/o Shri Makal Kumar Gangwal, aged about 45 years, resident of Jain Colony, Madanganj, Kishangarh, Ajmer.

4. Smt. Madhu Vyas W/o Shri Satish Sharma, aged about 35 years, resident of Plot No.36, Radheyshwar Colony, City, Road, Madanganj, Kishangarh, Ajmer.

5. Smt. Anita Devi W/o Shri Dharmendra Kumar, aged about 40 years, resident of D-38 Agrasen Nagar, Ajmer Road, Madanganj, Kishangarh, Ajmer.

-----Petitioners

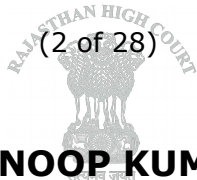
Versus

1. The State of Rajasthan through Secretary Education (Primary), Secretariat, Jaipur.
2. The District Education Officer (Secondary First), Ajmer Mandal, Ajmer.
3. The Deputy Director (Secondary Education) Ajmer.
4. The Director, Education (Primary) Bikaner.

-----Respondents

For Petitioner(s) : Mr. H.R. Kumawat

For Respondent(s) : Ms. Namita Parihar-Dy.G.C.



JUSTICE ANOOP KUMAR DHAND

Judgment

09/09/2024

Reportable

For convenience of exposition, this judgment is divided in the following parts:-

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Background:

1. Throughout history, women have played a vital role in nation-building, yet they have often faced barriers to equal participation in socio-economic activities. Gender bias has impacted many aspects of their lives. To address this, the Constitution of India takes significant steps to ensure gender justice as a fundamental principle. The Preamble promises justice—social, economic, and political—along with equality of status and opportunity, and fraternity that upholds individual dignity. It explicitly recognizes women as a distinct group and prohibits all forms of discrimination against them, paving the way for equal opportunities in education, employment, and advancement.



2. Article 14 under Constitution of India, guarantees the Right to Equality for Women, while Article 15(1) specifically prohibits discrimination based on sex. Furthermore, Article 15(3) allows for positive and affirmative action to benefit women. Article 16 ensures equal opportunities in public employment and forbids discrimination on grounds including sex. Our obligation to reject practices that undermine women's dignity is elevated to a fundamental duty under Article 51-A. The Directive Principles of State Policy, found in Part IV of the Constitution of India, direct the state to protect women human rights, including equal pay for equal work, health rights, and maternity benefits. The 73rd and 74th Constitutional Amendments Act, enacted in the year 1993, marked a significant advancement in women participation in governance by providing for 33% reservation for women at various levels.

3. The 20th century has seen a global rise in women empowerment movements. The Universal Declaration of Human Rights, established in 1948, reaffirms the belief in the fundamental rights and equal dignity of all individuals, emphasizing freedom without any form of discrimination, including based on sex.

4. In response to these principles, the legislature has enacted numerous laws aimed at achieving gender equality, fulfilling both international obligations and constitutional mandates. A comprehensive reading of Articles 14, 15, 16,



and 21 of the Constitution of India clearly indicates that no laws may be created or enforced that discriminate against women.

Factual Matrix of the case:

5. The instant case is a glaring example of gross discrimination between male and female teachers. The male teachers appointed on the post of Teacher Grade III upto the year 1998 were kept in the seniority list for promotion to the post of Teacher Gr.II for the vacancy in the year 2008-09 and 2009-10, while the female teachers appointed only upto the year 1986, were kept in the seniority list for promotion on the same post of Teacher Gr. II against the vacancy for the year 2009-2010 on the ground that the number of girls schools in comparison to the boys schools are less.

6. Feeling aggrieved and dissatisfied by the above action of the State-respondents, all the petitioners have knocked the doors of this Court by way of filing this petition with the following prayer:-

“That the respondents be directed to include the name of petitioners in the list of eligible candidates for promotion on the post of Senior Teacher Grade II for year 2008-09 and 2009-10 equally as per list prepared by them for male teachers.

That the respondents be further directed to appoint to petitioners on the post of senior teacher grade-II as per their qualification and seniority with all consequentially benefits.



Any other suitable direction, which the Hon'ble Court deems fit and proper in the circumstances of the case mentioned herein above may be passed in favour of the humble petitioner.

That cost of this writ petition may also be granted to the petitioners".

7. By way of filing of this writ petition, the petitioner is seeking direction against the respondents to include the name of the petitioners in the list of eligible candidates for promotion to the post of Senior Teacher Grade-II against the vacancy for the year 2008-2009 and 2009-2010 and consider their case for promotion as per their qualification and seniority with all consequential benefits.

Submissions by counsel for the parties:

8. Counsel for the petitioner submits that while preparing the seniority list for promotion from the post of Teacher Grade-III to Teacher Grade- II against the vacancies for the year 2008-09 and 2009-10, the respondents have taken into consideration the male candidates appointed upto the year 1998 while they have considered the female candidates who were appointed only upto the year 1986, which is 12 years behind the one fixed for male candidates in preparation of seniority list for Teacher Gr. II for the year 2008-09 and 2009-10. Counsel submits that by doing such exercise, the respondents have caused discrimination amongst the candidates. Counsel submits that both female and male teachers are equal in the eye of law and they are not to be discriminated only on the basis of their gender. Such actions of the respondents is



arbitrary and violative of Article 14, 15(1) and 16 of the Constitution of India. Counsel submits that under these circumstances, appropriate direction be issued to the respondents to consider the case of the petitioners for promotion against the vacancies for the year 2008-09 and 2009-10.

9. Per contra, counsel for the respondents opposed the arguments raised by counsel for the petitioners and submitted that the male teachers and female teachers are two separate categories and thus, two separate seniority lists were prepared. Counsel submits that the number of boys school is more than the number of girls school, hence there is a difference in the seniority list prepared of male teachers and female teachers and the respondents have not caused any illegality, which may warrants any interference of this Court.

Analysis:

10. Heard and considered the submissions made at Bar and perused the material available on record.

11. Perusal of the record indicates that the petitioners, who are female teachers, were appointed on the post of Teacher Grade-III in different areas in the boys and girls schools, along with the other male teachers. The record further indicates that when the respondents prepared a seniority lists of Teacher Grade -II against the vacancies for the year 2008-09 and 2009-10, they prepared two different seniority lists, one for the male teachers and another for the female teachers. While preparing the



aforesaid lists, they retained the male teachers who were appointed upto the year 1998 whereas, only those female teachers have been retained who were appointed till the year 1986, which is 12 years behind the one fixed for male candidates. By doing such exercise, the respondents have not only caused gender discrimination between the female and male teachers but have also violated the Right of Equality of the female teachers, like the petitioners, for their consideration to the promotional post. Hence, the respondents have violated their fundamental rights contained under Article 14, 15(1), 16 and 21 of the Constitution of India. Such act on the part of the respondents is quite arbitrary, unjustified and is liable to be deprecated.

12. In India, discrimination on the basis of sex has always been considered as infringement of the fundamental rights, as provided under Part III of the Constitution of India. Article 14 of the Constitution addresses equality between the persons, Article 15(1) forbids the state from discriminating against anyone based on their sex among other things, and also prohibits classification amongst citizens on the basis of sex for any purpose and Article 16(1) and (2) deals with the equal opportunity in matters of public employment. These prohibitions are unqualified and absolute.

Judgments referred:-

13. One of the first landmark judgments of the Supreme Court with regard to discrimination against women



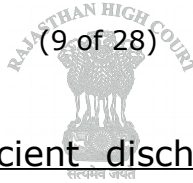


in promotions, came in 1979 in the case of **C.B Muthamma v. Union of India**, reported in **(1979) 4 SCC 260**. This case revolved around gender discrimination within the Indian Foreign Service, wherein CB Muthamma, the first woman to be appointed as an Indian Foreign Service officer, had alleged discriminatory practices prevalent in the service, because of which she was denied the benefit of promotion to Grade I of Indian Foreign Services. Before the Supreme Court, she had contended that the provisions of the Indian Foreign Service (Conduct and Discipline) Rules, 1961, violated her constitutional rights under Articles 14 and 16 as the rules, as they stood at that time, restricted women officers from serving in certain foreign posts and imposed conditions on their eligibility. It also disentitled them to promotion if they were to get married. The Court acknowledged the blatant gender-based discrimination and held that the rules were indeed violative of the constitutional principles of equality. It emphasized that the Constitution guarantees equal opportunities to both men and women in matters of public employment, and that gender cannot be a valid criterion for differential treatment.

The Court observed:

“5. Discrimination against women, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by the Government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service are likely to come in





the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, runs in the same prejudicial strain:

“(1)-(3) * * *

(4) No married woman shall be entitled as of right to be appointed to the service.”

6. At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacled the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thralldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable.

7. We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern. This creed of our Constitution has at last told on our governmental mentation, perhaps partly pressured by the pendency of this very writ





petition. In the counter-affidavit, it is stated that Rule 18(4) (referred to earlier) has been deleted on November 12, 1973. And, likewise, the Central Government's affidavit avers that Rule 8(2) is on its way to oblivion since its deletion is being gazetted. Better late than never. At any rate, we are relieved of the need to scrutinise or strike down these rules.

8. The petitioner has, after the institution of this proceeding, been promoted. Is it a case of post hoc ergo propter hoc? Where justice has been done, further probe is otiose. The Central Government states that although the petitioner was not found meritorious enough for promotion some months ago, she has been found to be good now has been upgraded and appointed as Ambassador of India to the Hague, for what it is worth. Her surviving grievance is only one. During the interval of some months between her first evaluation and the second, some officers junior to her have gone above her. In the rat race of Indian official life, seniority appears to be acquiring a religious reverence. Since the career ahead of the petitioner may well be affected by the factum of prior birth into Grade I of the Service, her grievance turning on seniority cannot be brushed aside. Her case, with particular focus on seniority, deserves review vis-a-vis those junior to her who have been promoted in the interval of some months. The sense of injustice rankles and should be obliterated so that every servant in strategic position gives of his or her best to the country. We have had the advantage of the presence of the learned Solicitor General, appearing for the Union of India. With characteristic fairness he has persuaded his client to agree to what we regard as a just gesture viz. that the respondent — Union of India — will shortly review the seniority of the petitioner, her merit having been discovered and her seniority in Grade II being recognised. We direct accordingly.

9. Subject to what we have said above, we do not think it necessary to examine the





averments of mala fides made in the petition. What we do wish to impress upon the Government is the need to overhaul all Service Rules to remove the stain of sex discrimination, without waiting for ad hoc inspiration from writ petitions or gender charity.

10. We dismiss the petition but not the problem."

(emphasis supplied)

14. In the case of **Anuj Garg & Ors v. Hotel Association of India & Ors**, reported in **(2008) 3 SCC 1**, the Supreme Court struck down a law that barred women's employment in premises where liquor was consumed. Such an indirectly discriminatory law was held to be inflicted by "incurable fixations of stereotype morality and conceptions of sexual role". The Supreme Court held that legislations impinging on individual autonomy should be subject to deeper judicial scrutiny, to ensure that no law, in its ultimate effect, perpetuates the oppression of women. It went on to observe that "personal autonomy is inherent in the grounds mentioned in Article 15" and is a "fundamental tenet which cannot be compromised", requiring a "heightened level of scrutiny" in cases of a measure infringing on autonomy. The Court noted:

"26. When a discrimination is sought to be made on the purported ground of classification, such classification must be founded on a rational criteria. The criteria which in absence of any constitutional provision and, it will bear repetition to state, having regard to the societal conditions as they prevailed in early 20th century, may not





be a rational criteria in the 21st century. In the early 20th century, the hospitality sector was not open to women in general. In the last 60 years, women in India have gained entry in all spheres of public life. They have also been representing people at grassroot democracy. They are now employed as drivers of heavy transport vehicles, conductors of service carriages, pilots, et. al. Women can be seen to be occupying Class IV posts to the post of a Chief Executive Officer of a multinational company. They are now widely accepted both in police as also army services.

...

Stereotype roles and right to options

41. Professor Williams in The Equality Crisis : Some Reflections on Culture, Courts and Feminism published in 7 Women's Rts. L. Rep., 175 (1982) notes issues arising where biological distinction between sexes is assessed in the backdrop of cultural norms and stereotypes. She characterises them as "hard cases". In hard cases, the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.

42. Therefore, one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart. In such circumstances the question revolves around the approach of the State.



43. Instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other policy inference (such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the privacy rights.

44. The description of the notion of "romantic paternalism" by the US Supreme Court in Sharron A. Frontiero v. Elliot L. Richardson [411 US 677 : 36 L Ed 2d 583 : 93 S Ct 1764 (1973)] makes for an interesting reading. It is not to say that Indian society is similarly situated and suffers from the same degree of troublesome legislative past but nevertheless the tenor and context are not to be missed. The Court noted in this case of military service : (US pp. 684-85)

"There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. ...

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes...."

The Court also maintained the strict scrutiny standard for review and repelled the administrative convenience argument in the following terms : (Frontiero case [411 US 677 : 36 L Ed 2d 583 : 93 S Ct 1764 (1973)] , US pp. 690-91)

"In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some





importance, 'the Constitution recognizes higher values than speed and efficiency'. ... And when we enter the realm of 'strict judicial scrutiny', there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality. ... On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are ... similarly situated', and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] ...'. We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment...."

45. In another similar case wherein there was an effective bar on females for the position of guards or correctional counselors in the Alabama State penitentiary system. The prison facility housed sexual offenders and the majority opinion on this basis inter alia upheld the bar. Marshall, J.'s dissent captures the ranges of issues within a progressive paradigm. Dissent in Dothard v. Rawlinson [433 US 321 : 53 L Ed 2d 786 : 97 S Ct 2720 (1977)] serves as useful advice in the following terms:

"It appears that the real disqualifying factor in the Court's view is 'the employee's very womanhood'. The Court refers to the large number of sex offenders in Alabama prisons, and to 'the likelihood that inmates would assault a woman because she was a woman'. In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women





that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, 'the pedestal upon which women have been placed has upon closer inspection, been revealed as a cage'. It is particularly ironic that the cage is erected here in response to feared misbehavior by imprisoned criminals."

He also notes the nature of protective discrimination (as garb) in the following terms:

"The Court points to no evidence in the record to support the asserted 'likelihood that inmates would assault a woman because she was a woman'. Perhaps the Court relies upon common sense, or 'innate recognition'. But the danger in this emotionally laden context is that common sense will be used to mask the 'romantic paternalism' and persisting discriminatory attitudes that the Court properly eschews. To me, the only matter of innate recognition is that the incidence of sexually motivated attacks on guards will be minute compared to the 'likelihood that inmates will assault' a guard because he or she is a guard. The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law-abiding women who wish to contribute to their community, but to take swift and sure punitive action against the inmate offenders. Presumably, one of the goals of the Alabama prison system is the eradication of inmates' antisocial behavior patterns so that prisoners will be able to live one day in free society. Sex offenders can begin this process by learning to relate to women guards in a socially acceptable manner. To deprive





women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down."

46. It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.

47. No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases."

(emphasis supplied)

Ratio Decidendi:

15. It is in this legal background that the present petition has to be adjudicated by this Court. The Petitioners herein, who are female working on the post of Teacher Grade III, are aggrieved by the apparent discrimination done by the respondents in not considering their promotion to the post of Teacher Grade II, merely because they were appointed post the year 1986, whereas the male Teachers Grade III who are appointed on the same posts in the years 1986 upto 1998 were also considered for promotion to the aforementioned post. The Respondents have justified this





exclusion based on the assertion that there are greater number of boys schools than girls schools and thus, the requirement for male teachers is more than the female ones.

16. Though on the face of it the rule makes a classification based on the demand of teachers belonging to a particular gender, the impact of that classification falls on female teachers, and thus, in effect, the rule entrenches social hierarchy by reaffirming existing inequalities between men and women. The above classification unjustly implies that only male teachers are competent enough to teach in boys' school, thus treating female teachers as a sub-standard class in comparison to their counterpart.

17. A traditional and formalistic interpretation of Article 14, as seen from catena of judgments indicates that to be a reasonable classification under Article 14 of the Constitution, two criteria must be met: (i) the classification must be founded on an intelligible differentia; and (ii) the differentia must have a rational nexus to the objective sought to be achieved by the legislation. **[State of W.B. v. Anwar Ali Sarkar, (1952) 1 SCC 1]** There must, in other words, be a causal connection between the basis of classification and the object of the statute. If the object of the classification is illogical, unfair and unjust, the classification will be unreasonable. **[Deepak Sibal v. Punjab University, (1989) 2 SCC 145].**



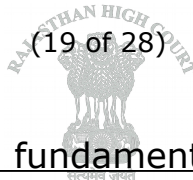
18. However, the Supreme Court went one step ahead in **Navtej Singh Johar v. Union of India**, reported in **(2018) 10 SCC 1**, to recognize the evolving nature of liberty and substantive equality and the limitation that the formalistic interpretation of Article 14 poses. It noted:

“409. Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula : the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere mantra. What it ignores is that Article 14 contains a powerful statement of values—of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in State action. As our constitutional jurisprudence has evolved towards recognising the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence.

...

428. When the constitutionality of a law is challenged on the ground that it violates the guarantees in Part III of the Constitution, what is determinative is its effect on the

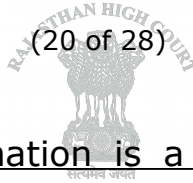




infringement of fundamental rights. [Kerala Education Bill, 1957, In re, AIR 1958 SC 956 at para 26; Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305 at para 42; Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248 at paras 43, 49; Bennett Coleman and Co. v. Union of India, (1972) 2 SCC 788 at para 39; Maneka Gandhi v. Union of India, (1978) 1 SCC 248 at para 19.] This affords the guaranteed freedoms their true potential against a claim by the State that the infringement of the right was not the object of the provision. It is not the object of the law which impairs the rights of the citizens. Nor is the form of the action taken determinative of the protection that can be claimed. It is the effect of the law upon the fundamental right which calls the courts to step in and remedy the violation. The individual is aggrieved because the law hurts. The hurt to the individual is measured by the violation of a protected right. Hence, while assessing whether a law infringes a fundamental right, it is not the intention of the lawmaker that is determinative, but whether the effect or operation of the law infringes fundamental rights.

...
438. A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That





such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.

440. A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the State in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex."

(emphasis supplied)

19. Thus, from the aforementioned judgments it is clear that a discrimination will not survive constitutional scrutiny when it is grounded in, and perpetuates, stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect, is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the State in



enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights.

20. Drawing upon the standards laid down in the above judgments in the present case, the impact of the rule on an already disadvantaged or vulnerable class (here, women) is irrelevant to the traditional formulation of the classification test, which only requires an intelligible differentia (here, between male teachers appointed till 1998 and female teachers appointed only till 1986) having a rational nexus to the objective of the classification (here, greater demand of male teachers as a result of more number of boys school). Thus, the traditional classification test fails to recognise that the rule, though facially neutral and innocuous and not based on sex, is in effect entrenching differences between men and women by granting a greater proportion of promotions of male teachers, on the basis of archaic gender stereotype rather than any evidence of better educational outcomes. What matters is the effect of law on the exercise of fundamental rights, which calls the courts to step in and remedy the violation.

21. In the present case, we find that this is a clear case of discrimination, a discrimination which falls not within Article 14 of the Constitution but also within the specific prohibition in Article 15(1) and Article 16(2) of the Constitution. The mandate to the State, that it shall not discriminate against any citizen on grounds of sex and

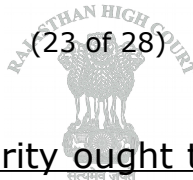




would ensure equality of opportunity in matters of public employment, is one of the most important fundamental rule that calls for strict observance. Unlike the freedoms in Article 19 of the Constitution there is no scope for restricting the absolute scope of the rights under Article 15(1) and 16(2) of the Constitution. There would be no scope whatever to justify differentiating between the male and female sexes in the matter of appointment and promotion. The right of women should not be denied on fanciful assumptions of what work the woman could do and could not do.

22. The Supreme Court, in the case of **Ajay Kumar Shukla v. Arvind Rai & Ors**, reported in **(2022) 12 SCC 579**, has unequivocally, while relying on numerous precedents, held that though right to promotion is not considered to be a fundamental right but consideration for promotion has now been evolved as a fundamental right. It observed:

“40. It is also admitted by the parties that the next promotion of Junior Engineers in the higher grade is to the post of Assistant Engineer. In the cadre of Assistant Engineer, there are no separate streams but only one cadre of Assistant Engineers. It is the seniority list of the cadre of Junior Engineers which would be the feeder cadre for the post of Assistant Engineers. The Junior Engineers of Agricultural stream of the selection of the year 2001, would have direct march over the Junior Engineers selected in the same selection of the Mechanical and Civil streams, even though the overall merit of some or many of Agricultural stream Junior Engineers could be lower than some or many of the Engineers of the Mechanical and Civil streams. The



appointing authority ought to have prepared a combined merit list based upon the performance or the proficiency on the basis of the marks received in the selection test as prepared by the Commission. Otherwise, it would amount to denial of the right of consideration for promotion to a more meritorious candidate as against a candidate having lesser merit. Right to promotion is not considered to be a fundamental right but consideration for promotion has now been evolved as a fundamental right.

41. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in Lift Irrigation Corpn. Ltd. v. Pravat Kiran Mohanty [Lift Irrigation Corpn. Ltd. v. Pravat Kiran Mohanty, (1991) 2 SCC 295 : 1991 SCC (L&S) 472] in para 4 of the report which is reproduced below : (SCC p. 299)

"4. ... There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent-writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent-writ petitioner was unjustly denied of the same is obviously unjustified."

42. A Constitution Bench in Ajit Singh (2) v. State of Punjab [Ajit Singh (2) v. State of Punjab, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239] , laying emphasis on Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. Jagannadha Rao, J. speaking for himself and Anand, C.J., Venkataswami, Pattanaik, Kurdukar, JJ.,





observed the same as follows in paras 22 and 27 : (SCC pp. 227-28)

"Articles 14 and 16(1) : is right to be considered for promotion a fundamental right

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the 'State shall not deny to any person equality before the law or the equal protection of the laws'. Article 16(1) issues a positive command that:

'there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'.

It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

"Promotion" based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)

27. In our opinion, the above view expressed in Ashok Kumar Gupta [Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201 : 1997 SCC (L&S) 1299] and followed in Jagdish





Lal [Jagdish Lal v. State of Haryana, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550] and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta [Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201 : 1997 SCC (L&S) 1299] right from 1950."



43. This Court in H.M. Singh v. Union of India [H.M. Singh v. Union of India, (2014) 3 SCC 670 : (2014) 1 SCC (L&S) 649] , again reiterated the legal position i.e. right to be considered for promotion as a fundamental right enshrined under Article 14 and Article 16 of the Constitution of India. The relevant extract from para 28 is reproduced below : (SCC p. 686)

"28. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition that the respondents were desirous of filling the vacancy of Lieutenant-General, when it became available on 1-1-2007. The factual position depicted in the counter-affidavit reveals that the respondents indeed were desirous of filling up the said vacancy. In the above view of the



matter, if the appellant was the seniormost serving Major-General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29-2-2008, and thereafter, by a further Presidential Order dated 30-5-2008. The above orders clearly depict that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant-General (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet, stands affirmed). The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant-General would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary."





44. If the seniority list is allowed to be sustained then the Engineers who are more meritorious in the Mechanical and Civil streams than the Junior Engineers of the Agricultural stream would be deprived of their right of being considered for promotion and in fact their right would accrue only after all the Junior Engineers of the Agricultural stream selected in the same selection are granted promotion. For these reasons also the seniority list in question must go."

(emphasis supplied)

Conclusion:

23. Hence, non-consideration of the petitioners for promotion to the post of Teachers Grade II is violative of their fundamental rights under Article 14, 15, 16 and 21 of the Constitution. The competent authority and the State have committed a serious error of law in determining the seniority list merely on the basis of the greater number of boys' school. At a time when 'beti padhao, beti bachao' is the goal, such an action of the respondents could neither be supported in law nor on facts.

24. In view of the above, the present writ petition stands allowed. The respondents are directed to consider the case not only of the petitioners but also of all the similarly situated female teachers appointed as Teacher Gr.III upto the year 1998 for their promotion to the post of Senior Teacher Gr. II for the vacancies of the year 2008-09 and 2009-10 and grant them all consequential benefits.

25. All pending application(s), if any, also stands disposed of.





26. It goes without saying that the entire exercise would be completed by the respondents within a period of three months from the date of receipt of the certified copy of this order.

27. No costs.

(ANOOP KUMAR DHAND),J



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