

A C. B. MUTHAMMA

v.

UNION OF INDIA & ORS.

September 17, 1979

B [V. R. KRISHNA IYER AND P. N. SHINGHAL, JJ.]

*Constitution of India—Articles 14 & 16—Scope of.*

C The petitioner is a senior member of the Indian Foreign Service and complains that she had been denied promotion to Grade I of the Indian Foreign Service on the grounds that (i) there is a long standing practice of hostile discrimination against women (ii) had to give an undertaking at the time of joining the foreign service that if she were to get married, she would resign from the service (iii) had to face the consequences of being a woman and thus suffered discrimination and (iv) the members of the appointment committee of the Union cabinet and respondent No. 2 are basically prejudiced against women as a group. The petitioner has further challenged two rules namely rule 8(2) of Indian Foreign Service (Conduct and Discipline) Rules 1961 and Rule 18(4) of the Indian Foreign Service (Recruitment, Cadre Seniority and Promotion) Rules 1961, which in short states that a woman member of the service shall obtain permission in writing of the Government before marriage and the woman member may be required to resign any time after marriage if the Government is satisfied that her family and domestic commitments will hamper her duties as a member of the service and under the second rule no married woman shall be entitled as of right to be appointed to the service. The petitioner's remaining grievance is that during the interval of some months between her first evaluation and the second, some officers junior to her, have gone above her and her career would be affected.

E Dismissing the petition,

F HELD : That sex prejudice against the Indian womanhood pervades the service rules even a third of a century after Freedom. There is some basis for the charge of bias in the rules and this makes the ominous indifference of the executive to bring about the banishment of discrimination in the heritage of service rules. If high officials lose hopes of equal justice under the rules, the legal lot of the little Indian, already priced out of the expensive judicial market, is best left to guess. This disturbing thought induces the making of a few observations about the two impugned rules which appear *prima facie*, discriminatory against the female of the species in public service and have surprisingly survived so long, presumably, because servants of Government are afraid to challenge unconstitutional rule making by the Administration. [669 E-H]

G Discrimination against women, is found in Rule 8(2). If a woman member shall obtain the permission of Government before the marriage, the same risk is run by Government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the service is 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, intercontinental marriages and unconventional behaviour, one fails to under-

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stand, the naked bias against the gentler of the species. Rule 18(4) is in defiance of Art. 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. Freedom is indivisible, so is justice. That our founding faith enshrined in Art. 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 die-hard allergy to gender parity is inevitable. As Rule 18(4) has been deleted in November, 1973, and rule 8(2) is on its way to oblivion as its deletion is being gazetted, there is no need to scrutinise or strike down these rules. The petitioner has, after the institution of this proceeding, been promoted and where justice has been done, further probe is *otiose*. [671 B-D, E-G, 672 C]

The Court directed the respondent to review the petitioner's case with particular focus on seniority *vis-a-vis* those junior to her who have been promoted in the interval of some months. It was further impressed upon the respondent the need to overhaul all service rules to remove the stains of sex discrimination, without waiting for *ad-hoc* inspiration from Writ Petitions or gender charity. [672 G-H]

ORIGINAL JURISDICTION : Writ Petition No. 743 of 1979.

(Under Article 32 of the Constitution.)

*D. P. Singh, L. R. Singh and S. Sahu* for the Petitioner.

*Soli J. Sorabjee, Solicitor General and Miss A. Subhashini* for the Respondent.

The Judgment of the Court was delivered by

KRISHNA IYER, J. This writ petition by Miss Muthamma, a senior member of the Indian Foreign Service, bespeaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality. The credibility of constitutional mandates shall not be shaken by governmental action or inaction but it is the effect of the grievance of Miss Muthamma that sex prejudice against Indian womanhood pervades the service rules even a third of a century after Freedom. There is some basis for the charge of bias in the rules and this makes the ominous indifference of the executive to bring about the banishment of discrimination in the heritage of service rules. If high officials lose hopes of equal justice under the rules, the legal lot of the little Indian, already priced out of the expensive judicial market, is best left to guess. This disturbing thought induces us to make a few observations about the two impugned rules which appear *prima facie*, discriminatory against the female of the species in public service and have surprisingly survived so long, presumably, because servants of governments are afraid to challenge unconstitutional rule making by the Administration.

**A** Miss Muthamma, the petitioner complains that she had been denied promotion to Grade I of the Indian Foreign Service illegally and unconstitutionally. She bewailed that, to quote her own words;

“...one of the reasons for the petitioner’s supersession is the long standing practice of hostile discrimination against women. Even at the very threshold when the petitioner qualified for the Union Public Services at the time of her interview, the Chairman of the U.P.S.C. tried to persuade (dissuade) the petitioner from joining the Foreign Service. On subsequent occasion he personally informed the Petitioner that he had used his influence as Chairman to give minimum marks in the viva. As the time of entry into the Foreign Service, the petitioner had also to give an undertaking that if she were to get married she would resign from the service.

**D** That on numerous occasions the petitioner had to face the consequences of being a woman and thus suffered discrimination though the Constitution specifically under Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth and Article 14 of the Constitution provides the principles of equality before law.....

**E** That members of the Appointments Committee of the Union Cabinet and the respondent No. 2 are basically prejudiced against women as a group. The Prime Minister of India has been reported in the Press as having stated—it will not be irrelevant here to mention that most of the women who are in the service at senior levels are being very systematically selected for posts which have traditionally been assigned a very low priority by the Ministry.”

**G** If a fragment of these assertions were true, unconstitutionality is writ large in the administrative psyche and masculine hubris which is the anathema for part III haunts the echelons in the concerned Ministry. If there be such gender injustice in action, it deserves scrupulous attention from the summit so as to obliterate such tendency.

**H** What is more manifest as misogynist in the Foreign Service is the persistence of two rules which have been extracted in the petition. Rule 8(2) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961, unblushingly reads :

“Rule 8(2) : In cases where sub-rule (1) does not apply, a woman member of the service shall obtain the per-

mission of the Government in writing before her marriage is solemnised. At any time after the marriage, a woman member of the Service may be required to resign from service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service."

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 government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service is 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, run in the same prejudicial strain :

"(1) .....

(2) .....

(3) .....

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

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 manacling 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 die-hard allergy to gender parity is inevitable.

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

**A** 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, **B** 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.

**C** 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. **D** 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, **E** 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-**F** 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 to Grade II being recognised. We direct accordingly.

**G** 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 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.

**H** We dismiss the petition but not the problem.