Before Hon'ble R. P. Sethi, ACJ, G. S. Singhvi, N. K. Sodhi,

K. S. Kumaran & T. H. B. Chalapathi, JJ.

DR. M. C. SHARMA,—*Petitioner.*

versus

THE PANJAB UNIVERSITY & OTHERS,—*Respondents.*

C.W.P. No. 11694 of 1994

19th January, 1995

Constitution of India, 1950—Arts. 14, 15 (3), 16 & 323-A—Panjab University Calendar, 1990—Volume III, Chapter VII (ii)—Regulation 5—Constitutional validity of Regulation 5—Regulation 5 providing that Principal of a women's college shall be a lady—Exclusion of male for appointment to the post of Principal, held per majority, regulation is ultra vires *Article 16—Discrimination on the ground of sex alone in favour of women is violative of Article 14.*

Constitution of India, 1950—Art. 226—Administrative Tribunals Act, 1985—S. 28—Maintainability of writ petition—High Court has jurisdiction to adjudicate on the constitutional validity of Regulation 5 (per majority)—Tribunal to decide case on merits after declaration by the High Court on the validity of Regulation 5—Mere declaration without relief can be granted by the High Court in an appropriate case.

Held, that the relief claimed by the petitioner for quashing Rule 5 of Chapter VI(2) of the Panjab University Calendar, Volume III cannot be granted by the Central Administrative Tribunal in a petition filed before it where the Panjab University is not made a party as admittedly is not within the jurisdiction of the Tribunal. It is true that the Tribunal in fiction is substitute for the High Court and other Courts in service matters having jurisdiction to decide both the questions of fact and law including the question as to validity of Rules but it does not mean that the Tribunal had the jurisdiction to determine the constitutionality of a Rule framed by an authority which is not subject to its jurisdiction. It is also well settled that the Tribunal is bound by the decree passed by the Civil Court of competent jurisdiction and the law declared by the Supreme Court and the High Courts. In this context, the arguments have been addressed with a prayer to only declare the offending Rule as *ultra vires* and leaving the rest of the claim regarding service matters of the petitioner to be decided and adjudicated by the Tribunal. The High Court alone, therefore, have the jurisdiction to test the legality and constitutionality of a provision enacted and incorporated by the authority, like the respondent-university which is admittedly

under the jurisdiction of the Court. The applicability of Article 226, in relation to the University of Punjab, cannot be brought within the ambit or control of the Central Administrative Tribunal. This objection of the respondents, therefore, being without any basis is not acceptable (per majority).

(Paras 11 & 13)

Further held, that the principles underlying the grant of specific relief to be granted by declaratory decrees and injunctions can be said to be applicable in the cases for the grant of relief of writs under Article 226 of the Constitution of India with certain limitations and conditions as spelt out under the constitution and circumscribed by legal pronouncements (per majority).

(Para 17)

Further held, that upon consideration of various aspects of the matter, it can be said that the Courts would normally not grant or issue mere declaratory writs unless the person aggrieved has asked for the consequential reliefs available to him. This rule, however, cannot be held to be absolute and is subject to exceptions that where despite declaration in terms of Article 226, the petitioner is not entitled to the further consequential relief on account of some legal bar of circumstances beyond his control and in that event he cannot be non-suited or deprived of the relief as prayed for by him in terms of Article 226 of the Constitution of India. In exceptional cases, the High Court may be justified to grant the relief merely in a declaratory form after being satisfied that the person approaching the Court was prevented from praying for any other consequential relief on account of the legal impediment or bar of jurisdiction created by some statute (Per majority).

(Para 18)

Further held, that the petitioners cannot be made shuttle cock between the High Court and the Tribunal and ultimately deprived of their right to claim the appropriate relief under the cloak of technicalities as have been projected before us. Under the peculiar circumstances of the case, the writ petition cannot be dismissed despite the fact that the petitioners have only asked for a declaration regarding the constitutionality and vires of the offending Rule 5 which is impugned in this writ petition.

(Para 19)

Further held, that the State has the power to make a provision for workmen and children under Article 15(3) of the Constitution which is to be read as a proviso to Article 15(1) of the Constitution. Discrimination on the grounds of sex is permissible if it is found that the women were not equal with the men and are lagging behind the men in the field where the reservation is sought to be made. For the purpose of providing avenues in the matters of appointment in service such a discrimination cannot be held to be

between two equals but is a discrimination between unequals which is not hit even by Articles 14 & 15(1) of the Constitution. What is prohibited under the Constitution is that discrimination cannot be made among equals and that equals are required to be treated equally. The special provision contemplated by Article 15(2) is aimed to protect the interests of women and children which according to the framers of the Constitution were required to be protective. However as and when any reservation is made in favour of a woman the same is to be tested on the ground of reasonableness. Such reasonableness, once determined by the executive, cannot be substituted by the Court. The State is, however, required to *prima facie* justify the grounds for making reservation and the extent to which such reservation is sought to be made. Reservations under Article 15(3) is the basis which is related to biological grounds of sex.

(Para 33)

Further held, that the reservation made in favour of the women,—*vide* the Rule impugned cannot be justified only on the ground of sex (Per majority, G. S. Singhvi & T. H. B. Chalapathi, JJ. contra).

(Para 42)

Further held, that the offending provision in so far as it provides that Principal of a Women College shall be a lady is *ultra vires* of the provisions of the Constitution as guaranteed by Articles 14, 15 and 16. The respondents have not been in a position to justify the discrimination made in favour of a woman on the ground of sex alone.

(Para 45)

Held that, the rule has been challenged on the ground that it seeks to make discrimination in favour of women only on the ground of sex. In this context, it is significant to note that the petitioners have not challenged the Government's action to establish colleges exclusively for women. Any such challenge would have ordinarily been rejected because it is primarily within the domain of the Government to determine what types of educational institutions it should establish. *Ex facie* the object of establishing exclusively women's colleges is to encourage female students to go for higher education. In our social structure women has been recognised as a weaker and handicapped section of the society for many centuries. In order to create an atmosphere in which the female students can aspire for higher learning and thereby make their contribution to the development of the nation, the Government has not only established colleges exclusively for women but even exclusive Universities have been established in the country. This has led to a large influx in the colleges of female students having rural background. Those who could hardly imagine of going for higher learning are now able to join colleges exculsively meant for women.

If no exception can be taken to the establishment of the exclusively women colleges and Universities, there is little merit in the challenge to the rule by which the headship of such colleges is sought to be earmarked to for women. A Principal of Women's College is expected to keep a close co-ordination between the teachers and staff on the one hand and the teachers and students on the other hand. The Principal is also required to take special care for the welfare of the female students and involve them in activities, apart from education, which would help them in development of their personality in all dimensions. This can be possible only if the Principal keeps personal touch with the students. As compared to a male Principal, a female Principal is better suited for this job. The powers and functions of the Principal enumerated in Chapter 19 of the Punjab University Calendar, Volume III are merely illustrative and not exhaustive. Apart from undertaking administrative decisions, a Principal is supposed to work as a catalyst for overall development of the institution and create and atmosphere where female students can help in achieving the objective of bringing female segment of the society in the main national stream. Thus, the primary object of the impugned rule is to provide for smooth and efficient functioning of Women's Colleges. The sex of the person to be appointed as Principal happened to be one of the factors. Such a provision would fall within the ambit of Article 15(3) and would not offend Article 16(2) of the Constitution of India. In my opinion, the law laid down by the Full Bench in *'Shamsher Singh Hukam Singh* v. *The Punjab State and others,* AIR 1970 P&H 372 and the observations made by the Division Bench in *Mrs. Raghubans Saudagar Singh* v. *The State of Punjab and others,* 1971 (1) S.L.R. 688, represent the correct proposition of law. Thus, in my opinion, the impugned rule does not offend the equality clauses enshrined in Articles 14, 15 and 16 of the Constitution of India and the writ petitions are liable to be dismissed (T.H.B. Chalapathi, J. agreeing).

(Paras 63, 64 & 65)

Held that, it will be rather anomalous if the contention of the petitions was to be accepted. This Court would first entertain a petition and give a declaration that the Regulation is *ultra vires* but find itself helpless in giving any relief to the petitioners because of the bar of Section 28 they being employees of a Union Territory and thereafter they will have to go to the Tribunal for getting the necessary relief. In my opinion, the law could not have envisaged such a situation where the petitioners would be driven to file two petitions in different forums to get the necessary relief. If they straight away file a petition before the Tribunal and successfully challengs the vires of the Regulation, they would get the necessary relief from the Tribunal. I, therefore, accept the first preliminary objection and hold that the present petitions are not maintainable. The petitions are consequently returned to the

petitioners to be presented before the Central Administrative Tribunal set up for the purpose (per minority).

(Para 68)

Further held, that I agree with my learned Brothers that this Court in the exercise of its jurisdiction under Article 226 of the Constitution does not normally grant or issue more declaratory writs unless the person aggrieved has asked for and can be granted the consequential relief as well but in the facts and circumstances of a given case, the High Courts may mould the relief and grant the same by way of a mere declaration. However, in the present case. have already held that the writ petitions are not maintainable and therefore, the question of granting any relief by way of declaration to the petitioners does not arise.

(Para 69)

Further held, that I have carefully gone through the judgments of my Brother judges and with all respect to the views expressed by them, I agree with Sethi, J. that the impugned Regulation is *ultra vires* and unconstitutional. There is no retionable behind this Regulation which should deprive a senior most member of the teaching staff in a women's college from being appointed as Principal in the same college solely on the ground that he happens to be a male member, no matter that he may be otherwise suitable and eligible. There is a common seniority list of the teaching staff and a male member of the staff can be the Head of a Department in a women's college but not its Principal. This to my mind is very anomalous. Considerations for not appointing a male as a hostel warden or the doctor incharge in a women's college are, however, different. I need not dilate any further and for the detailed reasons recorded by Sethi, J. it must be held that the impugned Regulation is unconstitutional.

(Para 72)

Held, that the provisions of Article 15(3) which are intended to act as a shield to safeguard the interests of women should not be used as a sword to cut the heads of males. Because in a given case, such a provision can be used to deprive a male of his legitimate right of getting promotion and appointed as Principal with ulterior motives, by creating vacancy in the 'Ladies College' whenever his turn comes. While there can be no objection for the reservation of certain numbers of posts of Principal to women, there should be compelling reasons to reserve the post of Principal in a ladies college to a woman only. Unless and otherwise there are convicing and compelling reasons, the reservation as is sought to be made cannot be upheld merely on the basis that Article 15(3) of the Constitution enables the State to make special provisions with regard to women. In these present days women compete with the men on all spheres of life, and they have come to occupy top posts in the Executive, Legislature and the Judiciary. They have even taken their due place not only in the police but also in the defence forces. Gone

are the days when women were confined to the kitchen or found themselves in totally helpless situations. They have come to occupy key positions meant for shaping the destiny of nations. Therefore, I am even emboldened to say that this special provision reservation as is souht to be made by the Punjab University in the shape of Rule 5 is only an anachronism.

(Para 73)

Held, that there is no dispute that the Central Administrative Tribunal constituted under the Administrative Tribunal Act, 1985, has no jurisdiction over the Punjab University and it cannot declare the Regulation of the University as not binding on the U.T. Administration on the ground of its invalidity nor can it strike down the regulation as unconstitutional. The Punjab University cannot be made a party before the Central Administrative Tribunal. The Tribunal cannot give any relief to the petitioners without putting the U.T. Administration into jeopardy of incurring the unpleasant situation of having its college de-recognised or its affiliation withdrawn. If the affiliation is withdrawn the College has to be closed and it is not at all in the interest of the petitioners or the U.T. Administration and the student community at large. There can not be any dispute that the Punjab University is within the jurisdiction of this Court and any rule or regulation of the Punjab University can be struck down by this Court and the decision of this Court is binding on all the parties in these writ petitions including the Punjab University.

(Para 85)

Further held, that I am of the opinion that it is the High Court and the High Court alone has the power to decide the constitutionality of Regulation V, Chapter VII (ii) of the Punjab University Calendar Vol. III.

(Para 95)

Further held, that reserving the post of Principal in Women's college is in fact laudable and commendable. Apart from the powers and functions of the Principal of an affiliated college as enumerated in Chapter XIX of Punjab University Calendar Vol. III, 1985 the Principal of a College whether affiliated or not is expected to function as the executive head of the College and exercise general control over its working, ensure whole some teacher-student relations, promote the welfare of the students and healthy interest among the students. In a women's college, these functions can effectively be performed if there is a lady Principal heading the institution. The girl students feel homely and friendly atmosphere if their Principal also belongs to their sex and they can freely ventilate their grievances and the problems faced by them because of their gender. Thus, the classification is reasonable and satisfy the criteria enunciated by Justice Jeevan Reddy in P. B. Vijaya Kumar's case for sustaining the classification under Article 16(1) of

the Constitution of India. I, am, therefore, of the view that Regulation V Chapter VII(ii) which provides for appointment of lady Principal is valid, Constitutional and does not violate the Articles 14, 15 & 16 of the Constitution of India.

(Paras 138 & 139)

Held, that under the peculiar circumstances of the case, the writ petitions are held maintainable (N. K. Sodhi, J. contra).

Regulation 5 Chapter VII(ii) of the Punjab University Calendar Volume III is struck down being unconstitutional and *ultra vires* not any manner affecting the service rights of the petitioners who are entitled to be considered for promotion alongwith others if otherwise eligible for promotion as such (G. S. Singhvi & T. H. B. Chalapathi, JJ. contra).

(Paras 142 & 143)

Mansur Ali, Advocate, S. D. Sharma with Surinder Sharma and Prem Kumar, Advocates, *for the Petitioner.*

Ashok Aggarwal, Senior Advocate with J. S. Sighu and Rajinder Goad Advocates, *for the Respondents.*

JUDGMENT

R. P. Sethi, ACJ.

(1) "All men are created equal" declared Abraham Lincon in his Gettysburg Address. These words were repeated by Thomas Jefferson in Declaration of Independence and since 1776 this statement has been echoed by generations in United States. The Liberty and Equality were the watch words of the French Revolution and the foundations upon which the great Magna Carta of England stood. Article 7 of the Universal Declaration of Human Rights States declared. All are equal before law and are entitled without any discrimination to equal protection of law." Jennings's in his Law of the Constitution (5th Edition page 50) stated, "Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike." Dicey's Law of the Constitution, (10th Edition page 202) asserted equality before the law as a corollary from his famous doctrine of Rule of Law. The idea of equality is the heart and soul of the Indian Constitutional system. The preamble of our Constitution promises equality which is explained and detailed in Articles 14 to 16 as enshrined in Part III of the Constitution. Equality as contemplated under our constitutional system is among equals and similarly situated. Equality in general cannot be universally

applied and is subject to conditions and restrictions as spelt out in the Constitution itself.

(2) Article 16 of the Constitution guarantees equality of Opportunity for all citizens in the matter relating to employment or admission to any Office under the State with the guarantee that no citizen shall be discriminated only on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them. in respect of such employment. This guarantee is an extension of specific application of the general principles of Equality contained in Article 14. It has been held by the Apex Court that Articles 14, 15 and 16 forming part of the same constitutional goal of guarantees are supplement to each other. Article 15 of the Constitution prohibits discrimination on the basis of sex alone and does not forbid from making discrimination on the ground of sex coupled with other considerations.

(3) In the light of the Constitutional Guarantees of Equality in the matter of employment under the State, we are called upon to test the Constitutional validity of Regulation 5 of the Panjab University Calendar contained in Chapter VII (ii). The matter has been referred to this Bench,—*vide* order of the Division Bench, dated 19th January, 1995, which reads as under :—

> "The constitutional validity of Regulation 5 Chapter-VII(ii) of the Panjab University Calendar Volume III has been challenged on the ground of discrimination and thus, being violative of the provisions of Article 16 of the Constitution of India. Learned counsel for the petitioner has relied upon a judgment of Delhi High Court in Walter Alferd Baid, Sister Tutor (Nursing) Irwin Hospital, New *Delhi* v. *Union of India and others*, 1977 S.L.J. 55. Learned counsel appearing for the respondents has, however, drawn our attention to a judgment of the Gujarat High Court reported as 1988 Labour and Industrial Cases 1465 as 1988 Labour and Industrial Cases 1465 and a Full Bench decision of this Court reported as AIR 1970 Punjab and Haryana 373.

(4) After hearing the learned counsel for the parties and perusing the record, we are of the opinion that the point raised by the petitioner requires an authorotative pronouncement by a larger Bench. Despite the fact that the above said decision of Full Bench

of this Court could be held to be distinguishable we have come to the conclusion that for an authoritative pronouncement on the point, the plea raised by the petitioner regarding constitutional validity of Regulation 5 requires determination by a Larger Bench. *Prima facie* we are of the opinion that the aforesaid regulation is discriminatory being violative of the provisions of Article 16 of the Constitution of India.

Admitted. To be heard by a Bench consisting of more than three Judges."

(5) In order to appreciate the rival contentions of the learned counsel appearing for the parties, it would be profitable to refer to some of the facts as alleged by the petitioner in C.W.P. No. 11694 of 1994.

The petitioner in that case claims to have joined as Lecturer in Sanskrit on 15th January, 1968 in Government College for Boys, Sector 11, Chandigarh. He was subsequently selected by the U.G.C. to conduct the Post Doctoral in Masters leading to the Ph.D. degree in July, 1968 and was assigned teaching job besides the research project in the Department of Sanskrit for two years. After completion of the period of scholarship, the petitioner joined on regular basis as Lecturer in Government College for Boys, Sector 11, Chandigarh on 13th July, 1970. He has claimed to have approved as Lecturer by the Punjab University to teach the Graduates and Honours Classes. The petitioner further claims to have to his credit not only the Ph.D. degree but also numerous Research Papers acknowledged at the National and Inter-national level, Research Organisations. Numerous publications of Research work in national and inter-national journal in Sanskrit Oriental Literature and claimed to be to his credit. He was transferred and appointed as Head of the Department in Sanskrit in the Government College of Girls. Sector 42, Chandigarh on 17th August, 1987 where he continued as Head of the Department. He claims to be the senior-most Lecturer and the top meritorious candidate in Chandigarh. A post of Principal in Sector 42 College to which the petitioner was transferred fell vacant on 31st October, 1991. The petitioner was held not entitled to be appointed to the aforesaid post on the basis of the impunged Rule of the Punjab University Calendar, admittedly applicable in the Colleges run by the Chandigarh Administration, the decision of which was conveyed to him.—*vide* Annexure P/1. Annexure P/1 and the Rule is alleged to be discriminatory and violative of the constitutoinal guarantees as enshrined in Part III of

the Constitution. It is contended that when a post of Principal in Boys' College, Sector 11, Chandigarh fell vacant, Ms. S. Kalkear, a Music Teacher, was appointed as Principal who was not even M.A. in the subject of Music. The petitioner approached the Central Administrative Tribunal, Chandigarh in O.A. No. 1110/CH/89 which was decided on 12th November, 1991 issuing a direction that in both the Colleges regular appointment of Principal be made within two months from the date of the receipt of the order. Instead of filling up the posts. The respondent No. 3 filed S.L.R. No. 612-613 of 1990 before the Hon'ble Supreme Court against the order of the Tribunal and,—*vide* its orders dated 31st January, 1992, the Apex Court directed that the case of the applicant-petitioner be considered for being appointed as Principal of the Government Colleges at Chandigarh,—*vide* Annexure P/2. In his earlier petition, being C.W.P. No. 17410 of 1990, the petitioner filed C.M. No. 1983 of 1992. Both the main writ petition and the Civil Misc. application were disposed of on 5th March, 1992 observing :—

> "In view of the direction of the Supreme Court contained in Annexure P/2 whereby the Supreme Court has directed the U.T. Administration to consider the cases of eligible persons including the petitioner for appointment as Principal, no order in this writ petition in necessary at this stage. If after consideration of the matter the order passed is adverse to the petitioner, he shall be at liberty to agitate the claim in the manner advised. This writ petition is disposed of accordingly."

(6) In their reply, respondent Nos. 1 and 2 have submitted that the petitioner being a U.T. Government employee could be transferred by the Union Territory Administration to any of its affiliated Colleges falling under its jurisdiction. It is contended that a male teacher cannot be appointed as a Principal in a Women College as per rules framed by the respondents. It is contended that the Rules framed by the Syndicate for appointment of teachers in Women Colleges are legal, valid and constitutional. A provision has been made for appointment of Women Teachers as Principal Hostel Superintendent and Medical Officer so that the girl students can have a frank communication with them while discharging their duties on the administrative and excutive side. The petitioner can be considered for appointment as Principal only in Government College meant for Boys.

(7) In their reply, respondent No. 3 have submitted that the petitioner had no right to file the present petition as he is junior and is shown at serial No. 23 in the seniority list of the Lecturers, circulated by the respondent-administration. It is submitted that the name of the petitioner was considered and he was accordingly informed,—*vide* Annexure P/2. He was intimated that his grading being low in the merit prepared by the D.P.C., he could not be appointed Principal, Government Colleges, Union Territory, Chandigarh. The other averments regarding his service career have appropriately been replied. No justification has been tendered regarding the vires of the impugned Rule of the Punjab University.

(8) In his replication, the petitioner has submitted that he is not at serial No. 23 in the seniority list but is at serial No. 1. Respondent No. 3 is alleged to have not counted the service ot fhe petitioner from 15th July, 1968 to 13th July, 1970. He claims to have been given two increments for this period as is alleged to have been admitted by the respondents in Annexure R/2.

(9) The petitioner Satya Narain Singla in C.W.P. No. 17185 of 1994 has made similar prayer for striking down the impugned Rule. He claims to be the seniormost Lecturer available for promotion to the post of Principal. Reliance has been placed on the final seniority list of Group 'A' and Group 'B' College Cadre Principal and Lecturers in which he is shown at serial No. 3. Persons shown at serial Nos. 1 and 2 are stated to have already been promoted as Principals.

(10) Before dealing with the main controversy debated in the case, we are required to dispose of the two pronged attack in the form of preliminary objections regarding the maintainability of the writ petition. It is contended ;—

(i) firstly, that in view of the provision of the Central Administrative Tribunal Act, the present writ petition was not maintainable as the employees of the respondent-Union Territory Administration, as the petitioners, are subject to the jurisdiction of the Central Administrative Tribunal; and

(ii) Secondly, that as the petitioners have asked for a mere declaration no relief can be granted to them under the provisions of Article 226 of the Constitution of India.

(11) The Central Administrative Tribunal Act, 1985 (for short the 'Act') was enacted for adjudication and trial of disputes and

complaints with respect to the recruitment and conditions of service of persons appointed to public service and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or under the control of the Government or to any Corporation owned or controlled by the Government to which the Act is specifically made applicable. Section 1 of the Act extends the Act in so far as it relates to the Central Administrative Tribunal to the whole of the India and in so far as it relates to Administrative Tribunals for States, to the whole of India, except the State of Jammu and Kashmir. The Central Administrative Tribunal is established under Section 4 of the Act and has to exercies the jurisdiction, powers and authority conferred on the Tribunal by or under the Act. The Central Administrative Tribunal can exercise all the jurisdiction, powers and authroity exercisable by all the Courts excepting the Supreme Court of India in relation to :—

"(a) recruitment, and matters concerning recruitment, to any All India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian ;

(b) all service matter concerning—

(i) a member of any All India Service ; or

(ii) a person (not being a member of an All India Service) or a person referred to in clause (c) appointed to any civil service of the Union or any civil post under the Union ; or

(iii) a civilian (not being a member of an All India Service or a person referred to in clause (c) appointed to any defence service or a post connected with the defence, and pertaining to the service of such member person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation (or society) owned or controlled by the Government.

(c) All service matters pertaining to service in connection with the affairs of the Union concerning a person appointed

to any service or post referred to in sub-clause (ii) or sub clause (iii) of clause (b), being a person whose services have been placed by the State Government or any local or other authority or any corporation (or society) or other body, at the disposal of the Central Government for such appointment.

(*Explanation.*—For the removal of doubts, it is hereby declared that references to 'Union' in this sub-section shall be construed as including references also to a Union Territory."

The Central Government has further power to apply the provision of the Act to a local or other authority within the territory of India, from such date as may be specified in the notification issued in that behalf. Save as otherwise expressly provided, the Central Administrative Tribunal is also authorised to exercise on and from the date with effect from which the provision of the Act applies to any local or other authority or the Corporation or Society, all the jurisdiction, powers and authority exercisable immediately before that date by all the Courts excepting the Supreme Court in relation to matters specified under sub-section 3 of the Act. It has been conceded before us that the Act is admittedly applicable so far as the respondent-Union Territory Administration is concerned but is not made applicable so far as the Punjab University, respondent No. 1, is concerned. In view of this, the relief claimed by the petitioner for quashing Rule 5 of Chapter VI(2) of the Punjab University Calender, Volume III cannot be granted by the Central Administrative Tribunal in a petition filed before it where the Punjab University is not made a party as admittedly is not within the jurisdiction of the Tribunal. It is true that the Tribunal in fiction is substitute for the High Court and other Courts in service matters having jurisdiction to decide both the questions of fact and law including the question as to validity of Rules but it does not mean that the Tribunal had the jurisdiction to determine the constitutionality of a Rule framed by an authority which is not subject to its jurisdiction. It is also well settled that the Tribunal is bound by the decree passed by the Civil Court of competent jurisdiction and the law declared by the Supreme Court and the High Courts. In this context, the arguments have been addressed with a prayer to only declare the offending Rule as *ultra vires* and leaving the rest of the claim regarding service matters of the petitioner to be decided and adjudicated by the Tribunal.

(12) In *'Om Prakash Puri* v. *University Grants Commission* (1), the Central Administrative Tribunal itself held that, "the Central Administrative Tribunal constituted under the Administrative Tribunals Act cannot, therefore, entertain the grievance of the employees of the University Grants Commission. The University Grants Commission is a body which may be termed as an instrumentality of the State or the Body under the control of the Central Government. Still it is not a department of the Government and its employees are not employees of the Central Government or employees holding a post under the Union."

(13) It is true that the petitioners before us are not the employees of the University but it is equally true that consequence of the declaration of the constitutionality of the offending Rule would effect the University and its employees. The High Court alone therefore, have the jurisdiction to test the legality and constitutionality of a provision enacted and incorporated by the authority, like the respondent university which is admittedly under the jurisdiction of the Court. The applicability of Article 226, in relation to the University of Punjab, cannot be brought within the ambit or control of the Central Administrative Tribunal. This objection of the respondents, therefore, being without any basis is not acceptable.

(14) The argument regarding the maintainability of the writ petition so far as it seeks only a declaration regarding the constitutionality of the offending Rule is concerned, it is to be taken note of the fact that the petitioners who are otherwise subject to the jurisdiction of the Tribunal in relation to their service matters even if pray for any other relief cannot be granted the same by this Court in view of the bar of jurisdiction incorporated under Section 28 of the Act. Article 226 of the Constitution of India confers power upon the High Court to issue to any person or authority including in appropriate cases any Government. orders or writs including the writs in the nature of Habeaus Corpus. *mandamus*, Prohibition, *quo-warranto* and certiorari or any one of them for the enforcement of any of the rights conferred by Part III or for any other purpose. This Article is admittedly widely worded and does not place any

(1) 1987 (3) S.L.R. 841.

restraint or restriction on the High Court in the exercise of its Jurisdiction. The High Court can, therefore, issue directions or orders or writs other than prerogative writs as understood and prevalent in England. The High Court has the power to mould the relief to meet the peculiar and complicated requirements according to the facts and circumstances of each case.

The Orthodox Rule of not granting the mere relief of declaration as prevalent in England underwent a change in the year 1852 when Chancery Procedure Act was enacted and Section 50 of which provided :—

> "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for civil courts to make binding declarations of right without granting consequential relief."

The law as to declaring the relief has been described in Halsbury's Laws of England as under :—

> "Judgements and orders are usually determinations of rights in the actual circumstances of which the Court has cognizance and give some particular relief capable of being enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may now be given, and the Court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not. There is a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration, and although a claim to consequential relief has not been made, or has been abandoned or refused, but it is essential that some relief should be sought or that a right to some substantive relief should be established."

(15) *In Sheo Singh Roy* v. *Mt. Dakho* (2), the Privy Council held that, "a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court."

(2) I.L.R. 1 A 11 688.

(16) Section 42 of the Specific Relief Act, 1977 effected a change in law as to the circumstances under which a mere declaratory decree could be granted. The Supreme Court in *Ramaraghavareddy* v. *Seshu Reddi* (3), considered the scope of Section 42 of the Specific Relief Act and held :—

> "In our opinion Section 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the Section."

Section 34 of the Specific Relief Act, 1963 replaced Section 42 of the earlier Act and provided :

> "Any person entitled to any legal Character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

(17) The principles underlying the grant of specific relief to be granted by declaratory decrees and injunctions can be said to be applicable in the cases for the grant of relief of writs under Article 226 of the Constitution of India with certain limitations and conditions as spelt out under the constitution and circumscribed by legal pronouncements.

(18) Upon consideration of various aspects of the matter, it can be said that the Courts would normally not grant or issue mere declaratory writs unless the person aggrieved has asked for the consequential reliefs available to him. This rule, however, cannot be held to be absolute and is subject to exceptions that where despite declaration in terms of Article 226, the petitioner is not entitled to the further consequential relief on account of some legal bar or circumstances beyond his control and in that event he canont be non-suited or deprived of the relief as prayed for by him in terms

(3) A.I.R. 1967 S.C. 436.

of Article 226 of the Constitution of India. In exceptional cases, the High may be justified to grant the relief merely in a declaratory form after being satisfied that the person approaching the Court was prevented from praying for any other consequential relief on account of the legal impediment or bar of jurisdiction created by some statute.

(19) The facts of this case are exceptional and peculiar in nature. Unless the impugned Rule 5 is declared unconstitutional, the petitioners are not entitled to the grant of any relief with respect to service matters as projected by them in this writ petition. The consequential relief partaining to the service conditions of the petitioner cannot be granted by this Court in view of the bar of jurisdiction under Section 28 of the Act. The Tribunal which otherwise has the jurisdiction to entertain the claim and grant the relief to the petitioners *vis-a-vis*, the respondent-Union Territory Administration is not in a position, in the instant case, to declare the offending provision as unconstitutional on account of the fact that the author of the offending provision i.e. the Panjab University is not subject to its jurisdiction. The petitioners cannot be made shuttle cock between the High Court and the Tribunal and ultimately deprived of their right to claim the appropriate relief under the cloak of technicalities as have been projected before us. Under the peculiar circumstances of the case, the writ petition cannot be dismissed despite the fact that the petitioners have only asked for a declaration regarding the constitutionality and vires of the offending Rule 5 which is impugned in this writ petition.

(20) In order to appreciate the rival contention of the parties and to determine the constitutionality of the offending rule, it is necessary to have a glimpse of the Rule itself which reads as under :—

> "The Principal of a Women's College shall be a lady who shall possess atleast Master's degree in 1st or 2nd Class or an equivalent degree with experience of a teaching in a College. This rule shall not apply to women's college whose men or women Principals have already been approved. Provided that on their retirement a qualified lady Principal shall be appointed."

The constitutionality of the said Rule, as noted earlier, has been challenged mainly on the ground of discrimination in terms of Article 15 of the Constitution. The mandate of Article 15 is not to make discrimination on the grounds of religion, race, caste, sex,

place or birth or any of them. Article 16 of the Constitution specifically provides that there shall be equality of opportunity to all citizens in the matters relating to employment or appointment to any office under the State and that no citizen shall, on the ground 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 appointment under the State. Sub Article (3) of Article 15 authorises the State to make special provision for women and children. The power to make special provision in favour of women is not whittled down in any manner by Article 16 of the Constitution.

(21) It cannot be denied that there are patent physical disparities between two sexes which were noted by Mr. Justice Brewer speaking for the United States Supreme Court in *Curt Muller* v. *State of Oregon* (4), who observed :

> "The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labour, particularly when done standing, the influence of vigorous health upon the future well being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle or subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her."

(22) To justify the special provision in favour of the women, the Judge had observed :

> "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burden of motherhood are upon her..... Differentiated by these matters from the other sex, she is properly placed in a class by hereself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained."

(4) 208 U.S. 412.

The Supreme Court in *Yusuf Abdul Aziz* v. *State of Bombay* (5), however, held that Article 14 is general and is required to be read with other provisions which set out the ambit of fundamental rights. Sex was held to be sound classification and although there could be discrimination in general on the ground, the Constitution itself provided for special provision in the case of women and children. A combined reading of Articles 15(1) and 16(2) would clearly demonstrate that what is forbidden is discrimination on the ground of sex alone.

(23) This Court in *Raghubans Saudagar Singh* v. *State of Punjab* (6), held, "if the sex added 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 possible be attracted". To arrive at such a conclusion, this Court had relied upon the observations of the Bombay High Court in *'Dattatraya Motiram More* v. *State of Bombay* (7).

(24) In *'Girdhar Gopal* v. *State'* (8), it was observed that, "if the discrimination is based not merely on the grounds stated in Article 15(1) but also on considerations of properiety, public morals, decency, decorum and rectitude, the legislation containing such discrimination would not be hit by the provisions of Article 15(1). It cannot be denied that an assault or criminal force to a woman with intent to outrage her modesty is made punishable under Section 354, not merely because women are women, but because of the factors enumerated above."

(25) Articles 15 and 16 confine a guarantee of equality in putting a corresponding prohibition whereas Article 14 is general in terms. Articles 15 and 16 are restricted by the terms and conditions incorporated in the aforesaid Article permitting classification under specified circumstances.

(26) A Full Bench of this Court in *'Shamsher Singh* v. *Punjab State'* (9), had held that Articles 14, 15 and 16 are constituents of a single code of constitutional guarantees supplementing each other and if a particular provision fell within the ambit of Article 15(3)

(5) A.I.R. 1954 S.C. 321.
(6) 1971 (1) S.L.R. 688.
(7) A.I.R. 1953 Bombay 341.
(8) A.I.R. 1953 M.B. 147.
(9) A.I.R. 1970 P & H 372.

it could not be struck down merely because it also amounted to discrimination solely on the ground of sex. Only such provisions could be made in favour of women which were reasonable and did not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2) of the Constitution. It was held :—

> "The scheme and the setting of Articles 14, 15 and 16, particularly under a common caption, and their language unmistakably show that they belong to one family. While Article 14 can be called the genus, Articles 15 and 16 are its species. Article 14 is the basic Article which guarantees right to equality before law in a general way. It is of very wide amplitude. It ensures equal treatment to persons in similar circumstances both in the privileges conferred and in liabilities imposed by the law, and thus prevents discrimination between one person and another, if as regards the subject matter of the legislation they are similarly situated. Article 15(1) guarantees the same right of equality by prohibiting discrimination only on the ground of religion, race caste, sex, place of birth or any of them. Whereas Article 14 is applicable to all persons, Article 15(1) reserves that guarantee for citizens only and touches only one aspect of the general guarantees contained in Article 14, by affording protection against discrimination."

It was further held :—

> "If I may say so with respect, the above is a correct statement of the law and on the point. If clauses (1) and (2) of Article 15, as held in Dattatraya's case, AIR 1953 Bom. 311 *ibid*, cover the entire field of State discrimination, including the field of public employment specifically dealt with in Article 16, then it will not be wrong to say that, in a way, it overlaps and supplements what is said in Article 16. It follows as a necessary corollary therefrom 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. Thus construed, clause (3) of Article 15 is 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)."

(27) In *C. B. Muthamma* v. *Union of India* (10), Justice V. R. Krishna Iyer, J. speaking for the Court observed that discrimination against women on the basis of their marriage was 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 thraldom. It was further observed :—

> "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....."

(28) In *Government of Andhra Pradesh* v. *P. B. Vijay Kumar and another* (11), it was argued before the Supreme Court that if Article 16(2) is read with Article 16(4), no reservation was permissible in favour of woman in relation to appointment or post under the State. It was argued that such a provision as made in Rule 22-A of the Andhra Pradesh State and Subordinate Service Rules was violative of the constitutional guarantees and liable to be quashed. The Supreme Court rejected the argument holding :

> "This argument ignores Article 15(3). The interrelation between Artices 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 or women. Both Arts. 15(1) and 15(3) go together. In addition to Art. 15(1). Art. 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

(10) A.I.R. 1979 S.C. 1868.
(11) A.I.R. 1995 S.C. 1648.

specifical 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 of Union Territory by parlimentary 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.

(29) The insertion of clause (3) of Article 15 in relation to women is a 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 can not 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.

(30) What then is meant by "any special provision for women" in Article 15(3) ? This "special provision," which the State may make to improve women and control of the State can be in the form of either affirmative action or reservation. It is interesting to note that the same phraseology finds a place in Article 15(4) which deals

with any special provision for the advancement of any socially or educationally backward class of citizens or Scheduled Castes or Scheduled Tribes. Article 15 as originally enacted did not contain Article 15(4). It was inserted by the Constitution First Amendment Act, 1951 as a result of the decision in the Case of *State of Madras* v. *Champakam Darairajan* (12), setting aside reservation of seats in educational institutions on the basis of caste and community. The Court observed that the Government's order was violative of Article 15 or Article 29(2). It said (at page 228, para 9 of AIR).

(31)"Seeing, however, that clause (4) was inserted in Article 15, the omission of such an express provision from Article 29 cannot but be regarded as significant."

(32) The object of the First Amendment was to bring Articles 15 and 29 in line with Article 16(4). After the introduction of Article 15(4), reservation of seats in educational institutions has been upheld in the case of *M. R. Balaji* v. *State of Mysore,* 1963 Supp. (1) SCR 430 : (AIR 1963 SC 649) and a number of other cases which need not be referred to here. 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 premissible 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* (13), the apex Court (in paragraph 846) (of SCC) : (para 116 of AIR), 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. The apex Court observed :—

> "We are afraid we may not be able to fit these provisions into this kind of compartment-alisation 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 inservices under

(12) 1951 SCR 525 (A.I.R. 1951 S.C. 226).
(13) 1992 Suppl. (3) SCC 217 (1992 A.I.R. S.C.W. 3682).

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."

The apex 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. P. Balaji (AIR 1963 SC 649), (supra) to the effect that a special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4), must be within reasonable limits. These limits of reservation have been broadly fixed at 50 per cent at the maximum. The same reasoning would apply to Article 15(3), which is worded similarly."

It was further held that reservations normally implies a separate quota which is reserved for special category of persons.

(33) On the basis of the various pronouncements made by the Apex Court and the High Courts in the country it can safely be held that the State has the power to make a provision for woman and children under Article 15(3) of the Constitution which is to be read as a proviso to Article 15(1) of the Constitution. Discrimination on the grounds of sex is permissible if it is found that the women were not equal with the men and are lagging behind the men in the field where the reservation is sought to be made. For the purposes of providing avenues in the matters of appointment in service such a discrimination cannot be held to be between two equals but is a discrimination between unequals which is not hit even by Articles 14 and 15(1) of the Constitution. What is prohibited under the constitution is that discrimination cannot be made among equals and that equals are required to be treated equally. The special provision contemplated by Article 15(3) is aimed to protect the interests of women and children which according to the framers of the Constitution were required to be protective. However,

as and when any reservation is made in favour of a woman the same is to be tested on the ground of reasonablness. Such reasonableness, once determined by the executive, cannot be substituted by the Court. The State is, however, required to *prima facie* justify the grounds for making reservation and the extent to which such reservation is sought to be made. Reservations under Article 15(3) is the basis which is related to biological grounds of sex.

(34) In *Walter Alfred Baid, Sister Tutor (Nursing) Irwin Hospital, New Delhi* v. *Union of India and others* (14), the Delhi High Court considered the scope of the recruitment rules for the post of senior Tutor in the School of Nursing, Irwin Hospital, New Delhi and held that the provision in the recruitment rule regarding ineligibility of male candidates for the said post was unconstitutional being violative of Article 16(2) of the Constitution which was not saved by Clause (3) of Article 15. In that case, the petitioner, qualified 'A' grade male nurse, had been appointed as 'sister tutor' in the school of Nursing, Irwin Hospital, New Delhi and was confirmed in the post against a permanent vacancy. The post of Senior Tutor was sanctioned by the Delhi Administration in the higher pay scale and a person junior than the petitioner was appointed to the newly created post by superseding the petitioner. The plea of the petitioner for being considered to the post of Senior Tutor was turned down on the ground that in terms of the recruitment rules for the afroesaid post, the male sister tutors were ineligible for the post, the male sister tutors were ineligible for the post. According to the recruitment rules the post of Senior Tutor had been designated as Senior Tutor (Female). The petitioner challenged the ineligibility of male candidate as being unconstitutional on the ground of sex alone. The Court after considering the rival contention of the parties held :—

> "Articles 14, 15 and 16 deal with the various facts 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, 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

(14) 1977 All India S.L.J. 55.

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 the 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.

(35) 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 by 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." It is of very wide emplitude 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.

(36) 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 then 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 citizen alone and have therefore, no application 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 Article 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 never the less be outside these Articles. For example, if a person is discriminated against solely on ground of religion, raec, 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 neverthe-less militate against Article 15 and in case of any matter of public employment, Article 16 as well unless, in the case Article 15, such a classification could be justified with a 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," any 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 narrowerfield 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 recruiment 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 clause (3) ,(4) and (5) of that Article.

(37) It was not seriously disputed on behalf of the respondents that a discrimination based on sex alone in the matter of the employment or appointment to any office under the State, even through 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-clause (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 favour of any backward class of citizens or

that the incumbent of an office in connection with the affairs of any religious or dominational 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.

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 that such a post was "manned" by a member of the female sex, and the male member of the staff are made ineligible for administrative reasons and claims of propriety presumably because the induction of a female as a senior tutor in a predominently 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 inteligibility 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.

(38) After referring to a Division Bench judgment of this Court in *Mrs. Raghubans Saudagar Singh* v. *State of Punjab* (15), and the observations made by Chagla, C.J., in the case of *Dattatraya Motiran's* case (supra), the Court concluded :

"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 within 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

(15) 1971 (1) S.L.R. 688.

slightly different setting, succeeded in the Punjab and Haryana High Court in the case of Shamsher Singh. 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, what extent, and in what clause 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 favour of women 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 ; the 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 Duttaraya (supra), Narula, J., as his Lordship then was, struck as dissenting note, even while expressing an apparent sympathy for that point of view and answered the reference in 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 an equal to the complusion 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 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 provisions 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 them. 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 the 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, laudabe 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 the 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 redical 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.

(39) The legislative and judicial solicitude for the moral, physical and economic well-being of women is almost a xiomatic and it may, therefore, perhaps sound incongruous but there appears to me to be no scape from the conclusion that the impugned rule which make 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 Articles."

The writ petition was allowed by noting aside the ineligibility clause with a direction to the authorities to consider the candidature of the petitioner for the post of Senior Tutor on his merits and suitability for the post. We agree with the reasoning and the conclusion arrived at by the Division Bench of the Delhi High Court in *Walter Alfred Baid's case* (supra).

(40) In *B. R. Acharya* v. *State of Gujarat* (16), a Single Bench of the Gujarat High Court considered the scope and the provision making only lady officers in common cadre entitled to promotion to higher post of Lady Superintendents of Institutes of destitute women, unmarried mothers etc. and declined to set aside or quash the same on the allegation of discrimination on the ground of sex. Without referring of various judgments of the Apex Court and the High Court, it was held that :—

"The institutions which are headed by Lady Superintendents are exclusively for women, and it is for the Government

(16) 1988 Lab. I.C. 1465.

to decide as a matter of policy whether or not such institutions should be headed by only lady officers. Merely because at some stage there is a common cadre in which the officers of both the sexes. Having regard to the nature of duties to be performed, it is open to the State Government to decide that the institutions which are exclusively meant for women or lady officers. The Government cannot be compelled to appoint male officers to head such institutions, if it does not consider it advisable to do so. If a special provision is made for women, the petitioners cannot made grievance that they have been discriminated against. In view of Art. 15(3) the Probations Officers in the common cadre cannot contend that they should be considered to be eligible for promotion to the posts of Lady Superintendent."

As the scope of Article 15 of the Constitution was considered in isolation and without reference to the settled proposition of law, the judgment of the Single Bench of the Gujarat High Court in *B. R. Acharya's case* (supra) cannot be held to be a good law.

(41) A reference has already been made to the judgment of this Court in *Shamsher Singh's case* (supra) which we approve.

(42) In the present case, the reservation made in favour of the women,—*vide* the Rule impugned cannot be justified only on the ground of sex. It is to be seen as to whether such a reservation was valid and reasonable on the touch-stone of the constitutional guarantees.

(43) If it is found that there was no principle or criterion involved for making classification contrary to the provisions of Articles 14, 15 and 16, the Court would interfere by striking down such provision holding it as discriminatory. However, if the rule making authority is in a position to justify the making of provision in favour of women not only on the ground of sex but also for other reasons, the Court may not interfere in that event.

(44) In order to justify the Rule, the respondents have submitted that the rules framed by the Syndicate in its wisdom for appointment of teachers in Women Colleges provide that as far as possible only women teachers be appointed in a women colleges, but the Hostel Superintendent, Medical Officer and the Principal i.e. the

persons on the administrative and executive side of the College must be the women only so that the girl students can have a frank communication with them in respect of their problems. No effort appears to have been made to justify the appointment of only a female as a Principal in the Girls College as required under the law on the basis of the test laid down while interpreting the Articles 14, 15 and 16 of the Constitution.

(45) In order to ascertain the basis for making classification in favour of a women Principal, it would be appropriate to have a glance into the powers and functions of the Principal of an affiliated College. Panjab University Calendar, Chapter XIX has enumerated the powers and functions of the Principal as under :—

> "The Principal shall have full powers and discretion, consistent with the rules framed by the University in all matters pertaining to internal administration of the College viz—
>
> (i) Distribution of work amongst the staff.
>
> (ii) Admission, promotion and detention of students.
>
> (iii) Grant of fee concessions and award of stipends to deserving students.
>
> (iv) Imposition of fines and remission thereof.
>
> (v) Disciplinary action and imposition of penalities.
>
> (vi) Expenditure out of amalgamated fund.
>
> (vii) Appointment and dismissal of Peons, Laboratory Assistants, Bearers etc.
>
> (viii) Grant of leave to the staff.
>
> (ix) Organisation of extramural activities.
>
> (x) To meet an emergency, temporary appointment of a member of the teaching staff and other staff upto a period of six months against a sanctioned post.
>
> (xi) Writing off a loss of at least three library books per thousand at the time of annual taking."

None of the functions enumerated herein indicate or justify the exclusion of a male for consideration to appointment as Principal. None of the functions postulates its performance by a female Principal only as would be the case of a Warden of a Hostel or a Doctor in

College dealing with the Women. Keeping in view the nature of the duties which are required to be performed by the Principal in relation to the Girl Students it cannot be deduced that such students could be subjected to any sort of exploitation. For dealing with the students, the Head of the Department has equal and similar powers as are conferred upon the Principal, which if misused may result in disastrous consequences. It has not been argued before us that no male can be appointed as Head of the Department in Women 'Colleges. It has rather been admitted that the males (as the petitioners are) have been and are discharging the duties of the Head of the Department in a Womens Colleges. One fails to understand as to what is the basis for depriving a male to become Principal but allowing him to discharge the duties of the Head of the Department in a women' institutions. Most of the powers and functions exercisable by the Principal relate to the staff and the administration of the institution. It is not even suggested that a member of the staff can be subjected to sexual lust or exploitation if a male was appointed as Principal in a Women College. It has been conceded before us that in Chandigarh Colleges, either for Boys or Girls Lecturers of both the sexes are appointed. It has further been admitted that whenever there is a vacancy in the Boys College no bar in provided for a female for being appointed as Principal there on the basis of the merit and ability. The petitioner has admittedly been serving in the Government College for Girls firstly as a Lecturer and the thereafter as Head of the Department of Sanskrit. If the petitioner could be appointed and allowed to continue as a Teacher in a College for girls, he could not be deprived of his right of promotion as Principal merely on the ground of sex particularly when such a discrimination has not been justified. The offending provision in so far as it provides that Principal of a Women College shall be a lady is *ultra vires* of the provisions of the Constitution as guaranteed by Articles 14, 15 and 16. The respondents have not been in a position to justify the discrimination made in favour of a woman on the ground of sex alone.

(46) Under the circumstances, the reference is answered and Civil Writ Petition Nos. 11694 and 17185 of 1994 are disposed of by holding Rule 5 of Chapter VII(ii) of the Panjab University Calendar Volume III to be unconstitutional and *ultra vires* not in any manner affecting the service right of the petitioners who are entitled to be considered for promotion alongwith others if otherwise eligible for appointment as such. No order as to costs.

JUDGMENT DELIVERED BY HON'BLE MR. JUSTICE G. S. SINGHVI.

G. S. Singhvi, J.

(47) I have gone through the detailed judgment of brother Sethi, J. I fully share his opinion that the objection raised by the respondents to the maintainabily of the writ petition on the ground of bar contained in Section 28 of the Central Administrative Tribunal Act, 1985 is without any substance and that this Court has the jurisdiction to adjudicate on the constitutional validity of Rule 5 contained in Chapter VI(ii) of the Panjab University Calender Volume-II. I also agree with Sethi, J., that this Court is competent to grant a mere declaratory relief in an appropriate case and in this matter also, it is appropriate to examine on merits the prayer made by the petitioner to declare Rule 5 of Chapter-VI(ii) of the Panjab University Calender Volume-II as unconstitutional. However, with great respect I am unable to agree with the opinion of Sethi, J., that the impugned rule is unconstitutional being violative of Article 14, 15 and 16 of the Constitution of India.

(48) Before proceeding further, it would be profitable to reproduce Rule 5 contained in Chapter-VI(ii) of the Panjab University Calendar Volume-II. The same reads as under :—

> "The Principal of a Womens' College shall be a lady who shall possess atleast Master's degree in 1st or 2nd Class or an equivalent degree with experience of teaching in a College. This rule shall not apply to Women's College whose men or women Principals have already been approved. Provided that on their retirement a qualified lady Principal shall be appointed."

(49) The Rule has been challenged mainly on the ground that exclusion of male candidates from the zone of eligibility for appointment as Principal of Women's College is unconstitutional because it brings about discrimination only on the ground of sex. It has been argued by Shri Mansur Ali and Shri S. D. Sharma, Advocates for the petitioners in the two writ petitions, that the Rule which excludes the petitioners and other similarly situated persons does not have any nexus with the object of appointment on the post of Principal. Learned counsel submitted that a common seniority list of lecturers for men and women colleges is maintained and, therefore, the post of Principal cannot be reserved exclusively for women. They

heavily relied on the judgment of the Delhi High Court in *Walter, Alferd Baid, Sister Tutor (Nursing), Irwin Hospital, New Delhi* v. *Union of India and others* (17).

(50) Article 14 of the Constitution of India speaks of equality before law, Article 15 prohibits discrimination on the ground of religion, race, caste, sex or birth and Article 10 deals with the equality of opportunity in the matter of public appointments. These three articles are inter-related and have bearing on the issue involved in these petitions and therefore, they are also reproduced for ready reference :

"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 resturants, 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 the 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 Schedule Tribes.

(17) 1977 S.L.J. 55.

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 them 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 describe of appointment 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.

(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 prefessing a particular religion or belonging to a particular denomination."

(51) Article 14 says that the State shall not deny to any person equality before law or equal protection of laws, Article 15 declares that the State shall not discriminate against any citizen *on the ground only* of religion, race, caste, sex, place of birth or any of them. Similarly, Article 15(2) prohibits discrimination *only on the ground* of religion, race, caste, sex, place of birth or any of them with regard to various matter specified therein. At the same time, Article 15(3) empowers the State to make special provisions for women and children and Article 15(4) authorises the State to make special provisions for socially and educationally backward class as well as Scheduled Castes and Scheduled Tribes. Article 16(1) declares that in the matter of public employment or appointment to any office under the State, the citizens of this country shall have equal

opportunity. Clause 2 of the Article 16 declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex descent, place of birth, residence or any of them. At the same time, care has been taken in clause (4) that the State shall have the power to make provision for reservation in 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.

(52) Thus, Article 14 is genus while Articles 15 and 16 are species although all of them occupy the same field. The doctrine of 'equality' embodied in these Articles has many facets. In short, the goal set out in the Preamble of the Constitution of India with regard to equality of status and opportunity is embodied in these Articles as well as Articles 17 and 18 and while interpreting the provisions of equality clauses, it will always be appropriate to take into consideration the various provisions contained in Part-IV of the Constitution of India. The Directive Principles of State Policy can in an appropriate case furnish guidelines for examining the constitutional validity of a particular provision. It is also important to note that most of the Democratic Constitutions speal of either "equality before law" or "equal protection of the laws". Section 1 of the 14 Amendment of the U.S. Constitution incorporates the expression "the equal protection of laws". The Australian Constitution, the Irish Constitution and the West German Constitution use the expression "equality before law". Article 17 of the Universal Declaration of Human Rights, 1948 declares that all are equal before the law and are entitled without any discrimination to the equal protection of laws. In our Constitution, different facts of "equality before law" are incorporated not only Articles 15, 16, 17 and 18 but also in Articles 38, 39, 39-A, 41 and 46.

(53) Before proceeding further, it would be useful to refer to some precedents on the inter-pretation of Articles 14, 15 and 16 of the Constitution of India and their inter-relation.

(54) In one of the earliest decisions in *Yusuf Abdul Aziz* v. *State* (18), the Bombay High Court examined a challenge to the constitutional validity of Section 497 of the Indian Penal Code. Chagla, C.J.,

(18) A.I.R. 1950 Bombay 470.

speaking for the Court referred to Article 15(1) of the Constitution and observed :—

> "Article 15(1) speaks of discrimination on grounds only of religion, race, caste, sex, place or birth or any of them. *If religion, sex, caste, race*, sex or place of birth is merely one of the factors which *the Legislature has taken into consideration, then, it would not be discrimination only on the ground of that fact*, but if the Legislature has discriminated only on one of these grounds and no other factor could possibly have been present, then undoubtedly the law would offend against Art. 15(1)."

> "What led to discrimination in S. 497 in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in S. 497 a position law which takes a sympathetic and charitable view of law would offend against Art. 15(1)."

This judgment of the Bombay High Court has been upheld by the Supreme Court in *Yusuf Abdul Aziz* v. *State of Bombay and another* (19). Their Lordships of the Supreme Court observed :

> "Sex is a sound classification and although other can be no discrimination in general on that ground the Constitution itself provides for special provisions in the case of women and children by clause (3) of Art. 15. Articles 14 and 15 thus read together validate the last sentence of S. 497 I.P.C. which prohibits the women from being punished as an abetter of the offence of adultery."

(55) In *Dattatraya Motirm More* v. *State of Bombay* (20), a Division Bench of the Bombay High Court upheld the provisions contained in Section 10(1)(c) of the Bombay Municipal Boroughs Act, 1925 for reservation of seats for women. While repelling the argument that the provision contravened Articles 15(1) and 15(3) of the Constitution of India, the Bombay High Court held :—

> "Articles 15(3) is obviously a proviso to Art. 15(1) and proper effect must be given to the proviso. The proper way to

(19) A.I.R. 1954 S.C. 321.
(20) A.I.R. 1953 Bombay, 311.

construe Art. 15(3) is that whereas under Art. 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Art. 15(3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Art. 15(1). *Therefore, as a result of the joint operation of Art.* 15(1) *and Art.* 15(3) the State may discriminate in favour of women against *men, but it may not discriminate in favour of men against women.*

Even if in making special provision for women by giving them reserved seats the State has discriminated against men, by reason of Art. 15(3) *the Constitution has permitted the State to do so even though the provision may result in discrimination only on the ground of sex. Therefore, S.* 10(1)(c) of the Bombay Act does not offend against.

(56) Art. 15(1) by reason of Art. 15(3)".

The Bombay High Court also considered inter-relationship between Articles 15 and 16 and observed :—

"Article 16 deals with a limited subject, the subject of employment or appointment by the State. The expression "the State" is used in the wide sense in which Art. 12 defines and Art. 16 emphasises that the State in appointing or in employing persons shall give equal opportunity to all citizens and will not make any person ineligible to hold an office or discriminate against him in respect of that office on ground of religion, race, caste, sex or place of birth. *Article* 15 *is more general in its application and it deals with all cases of discrimination which do not fall expressly under Art.* 16. *Therefore, although a case of discrimination may not fall under Art.* 16, *it may still fall under Art.* 15(3)."

In *Smt. Anjali Roy* v. *State of West Bengal and others* (21), a challenge was made to the refusal of the College authorities to admit the petitioner in a mixed college. The State pleaded that the object of this refusal was to develop a Women's College as a step towards advancement of the female education. While upholding the

(21) A.I.R. 1952 Calcutta 825.

contention of the State, the Calcutta High Court observed :—

> "The discrimination which is forbidden by Art. 15(1) is only such discrimination as is based solely on the grounds that a person belongs to a particular race or caste or processes a particular religion or was born at a particular place or is of a particular sex and on no other ground. *A discrimination based on one or more of these grounds and also on other grounds is not hit by the Article.*
>
> Article 15(3) really contemplates provision in favour of women, although grammatically and etymologically 'for' may mean 'concerning' and although, theoretically, it is possible to think of reasonable discrimination against women and children such as that they shall not be admitted to certain sections of a public museum or an art gallery where exhibits of a certain kind are to be seen. But the ordinary meaning of 'provision for' is certainly 'provision in favour of'.
>
> *Clause (3) is obviously an exception to cls. (1) and (2) of Art. 15 and since its effect is to authorise what the Article otherwise, forbids, its meaning seems to be that notwithstanding that cls. (1) and (2) forbid discrimination against any citizen on the ground of sex, the State may discriminate against males by making a special provision in favour of females.*" (Underlining is mine).

In Girdhar Gopal versus *State*, AIR 1953 Madhya Bharat 147, a learned Single Judge has held :—

> "the discrimination that is prohibited under Art. 15(1) is a discrimination based on the ground of sex, or race, etc. alone. If the discrimination is based not merely on any of the grounds stated in Art. 15(1) but also on considerations of propriety, public morals, decency, decorum and rectitude, the legislation containing such discrimination would not be hit by the provisions of Art. 15(1)."

In *University of Madras by the Registrar* v. *Shantha Bai* (22), a Division Bench of Madras High Court upheld the directions issued by the University regarding admission to the educational institutions. While interpreting Article 15(3) as having overriding effect *qua*

(22) A.I.R. 1954 S.C. 67.

Article 15(1) the Madras High Court observed :

> "The true scope of Art. 15(3) is that notwithstanding Art. 15(1), *it will be lawful for the State to establish educational institutions solely for women and that the exclusion of men students from such institutions would not contravene Art.* 15(1). That is not inconsistent with the authorities of educational institutions not falling within Article 15(3) from being clothed with power to admit or exclude women students from those institutions. The combind effect of both Arts. 15(3) and 29(2) is that while men students have no right of admission to women's college the right of women to admission in other colleges is a matter within the regulation of the authorities of these colleges. Art. 29(2) is a special Article and is the controlling provision when the question relates to the admission to colleges."

(57) In *Mt. Choki* v. *The State* (23), the validity of provisions contained in Section 497 of the Code of Criminal Procedure was upheld by the Rajasthan High Court and it has been held :—

> "the State may make laws containing special provisions for women and children, but no discrimination can be made against them on account of their sex alone."

In *Shamsher Singh Hukam Singh* v. *The Punjab State and others* (24), a Full Bench of this Court examined the constitutional validity of the provision made for grant of more pay to the women Principals of the Punjab Education Services, Non-Gazetted (Class III) School Cadre. The issue referred to the Full Bench was :

> "Whether the provisions of clause (3) of Article 15 can 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 kind of cases ?"

Sarkaria, J. referred to the observations made by the Supreme Court in *Gazula Dasaratha Rama Rao* v. *State of Andhara Pradesh* (25),

(23) A.I.R. 1957 Rajasthan 10.
(24) A.I.R. 1970 P. & H. 372.
(25) A.I.R. 1961 S.C. 564.

General Manager, Southern Railway v. *Rangachari* (26), *Yusuf Abdul Aziz* v. *State of Bombay* (27), and that of Bombay High Court in *Dattatraya* v. *State of Bombay* (28), and observed :—

> "If I may say so with respect, the above is a correct statement of the law on the point. If clauses (1) and (2) of Article 15, as held in Dattatraya's case, AIR 1953 Bom. 311 *ibid*, cover the entire field of State discrimination, including the field of public employment specifically dealt with in Article 16, then it will not be wrong to say that, in a way, it overlaps and supplements what is said in Article 16. *It follows as a necessary corollary therefrom 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.* Thus construed, clause (3) of Article 15 is 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)."

He answered the reference in the following words :—

> "Articles 14 15 and 16, being the constituents of a single code of constitutional guarantees, supplementing each other, clause (3) of Article 15 can be invoked for construing and determining the scope of Article 16(2). And, if a particular provision squarely falls within the ambit of Article 15(3), it cannot be struck down merely because it may also amount to discrimination solely on the ground of sex. Only such special provisions in favour of women can be made under Article 15(3), which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Article 16(2)."

S. C. Mittal, J. agreed with Sarkaria, J. while R. S. Narula, J. gave a dissenting opinion. Therefore, by a majority, the action of the State was upheld.

(58) In *Mrs. Raghubans Saudagar Singh* v. *The State of Punjab through Home Secretary Incharge Jails Department, Government of Punjab and others* (29), a Division Bench of this Court considered a

(26) A.I.R. 1962 S.C. 36.
(27) A.I.R. 1964 S.C. 321.
(28) A.I.R. 1953 Bombay 311.
(29) 1971 (1) S.L.R. 688.

provision made in the Punjab Prisons Service (Class-II) Rules, 1963 whereby women were rendered ineligible for posting in Men's Jails other than clerks and Matrons. A. N. Grover, J. who heard the matter referred the case to a larger Bench. Thereafter, a Division Bench consisting of D. K. Mahajan and S. S. Sandhawalia JJ. considered the issue and upheld the provision. While doing so, the Division Bench observed :

> "*Testing* the proposition in reverse ; *it is possible to visualise that in an exclusively women's jail, the State may for identical considerations confer it desirable to exclude men from the post of warder and other jail officials who may have to come in direct and close contact with the woman inmates of such a jail. In exclusively women's educational institutions, the State may well consider to employ women teachers and employees only to the exclusion of men as in fact has been done in many institutions.*" (underlinging is mine).

(59) In *B. R. Acharya and another* v. *State of Gujarat and another* (30), a learned Single Judge of Gujarat High Court considered a case which is similar to the cases before us. There also, the cadre of Probation Officers was common for male and female. However, for the post of Head of the Institute for Destitute Women, Unmarried Mothers and other similarly situated women, only females were treated eligible. The petitioner challenged the promotion on the ground that when there was a common cadre of male and female, the State could not discriminate him in the matter of promotion on the ground of sex. While upholding the promotion of female officer, the learned Single Judge observed :—

> "The institutions which are headed by lady Superintendents are exclusively for women, and it is for the Government to decide as a matter of policy whether or not such institutions should be headed by only lay officers. *Merely because at some stage there is a common cadre in which the officers of both the sexes are appointed, does not mean that all posts in the higher cadre must also be filled in by persons belonging to both the saxes. Having regard to the nature of duties to be performed, it is open to the State Government decide that the institutions which are*

(30) 1988 Lab.I.C. 1465.

exclusively meant for women should be headed by only women or lady officers. The Government cannot be compelled to appoint male officers to head such institutions, if it does not consider it advisable to do so. If a special provision is made for women, the petitioners cannot make grievance that they have been discriminated against. Incidentelly it may be pointed out that Art. 15 of the Constitution of India prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Clause (3) of the said Article, however, provides "Nothing in this Article shall prevent the State from making any sepcial provision for women and children". I, therefore, do not find any substance in the petitioners' contention that they should be considered to be eligible for promotion to the post of Lady Superintendent."

(60) In *Air India* v. *Nargesh Mirja* (31), their Lordships of the Supreme Court reiterated the view expressed in *Yusuf Abdul Aziz* v. *State of Bombay* (supra), namely, that the Articles 15 and 16 prohibit discrimination only on the ground of sex alone and not on the ground of sex coupled with other circumstances.

(61) In *Government of Andhra Pradesh* v. *P. S. Vijaykumar and another* (32), the Supreme Court examined the correctness of the judgment of Andhra Pradesh which had struck down Rule 22-A of the A.P. State and Subordinate Service Rules providing for preference to women in the matter of direct recruitment to the posts for which women are better suited than the men and which also provided for those posts being filled from amongst women only which are exclusively reserved for women. One of the contentions raised in support of the judgment of the High Court was that Rule 22-A contravenes Article 16(2) and it could not be upheld on the anvil of Article 15(3) of the Constitution. While considering the scheme of Articles 14 and 15, the Supreme Court observed :

"In other words, while Article 15(1) would prohibit the State from making any discrimination law *inter-alia* on the ground of sex alone, the State, by vitrue of Article 15(3), is permitted, despite Article 15(1), to make special provisions for women, thus, clearly carving out a permissible departure from the rigours of Article 15(1).....

(31) 1981 (4) S.C.C. 335.
(32) A.I.R. 1995 S.C. 1648.

The ambit of Article 16(2) is more limited in scope than Article 15(1) because it is confined to employment or office under the State. Article 15(1), on the other hand, covers the entire range of State activities. At the same time, the prohibited grounds of discrimination under Article 16(2) are somewhat wider than those under Article 15(2) because Article 16(2) prohibits discrimination on the additional grounds of descent and residence apart from religion, race, caste, sex and place of birth."

While repelling the argument founded on the absence of a provision in Article 16 similar to Article 15(3), the Apex Court held :—

"This argument ignores Article 15(3). The inter-relation between Articles 14, 15 and 16 has been considered in a number of cases by this Court. Art. 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."

The Supreme Court further held that :

"Therefore, in dealing with the 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.*"

The Supreme Court went on to say :

"*The insertion of clause (3) of Article 15 in relation to women is a 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 limp 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."

The Supreme Court also repelled the contention that Rule 22-A brings about the discrimination on the ground of sex alone and held that the Rule can be read as a manifestation of the power vesting in the State under Article 15(3). The following observations of the Anex Court would show that Article 15(3) has been construed as promoting reservation as well as affirmative action :

"We do not however, find any reason to hold that this rule is not within the ambit of Article 15(3), nor do we find it in any manner violative of Article 16(2) or 16(4) which have to be read harmoniously with Articles 15(1) and 15(3). Both reservation and affirmative action are permissibie under Article 15(3) in connection with employment or posts under the State. Both Articles 15 and 16 are designed for the same purpose of creating an egalitarian society. As Thommen, J., has observed in Indra Sawhney's case (1992 AIR SCW 3682) (supra) (although his judgment is a minority judgment), "Equality is one of the magnificent cornerstones of Indian democracy." We have, however, yet to turn that corner. For that purpose it is necessary that Article 15(3) be read harmoniously with Article 16 to achieve the purpose for which these Articles have been framed."

(62) Before concluding this aspect of the matter, I consider it appropriate to take note of some of the observations made by the Supreme Court in *Indra Sawhney and others* v. *Union of India and others* (33). Speaking for the majority Jeevan Reddy, J. referred

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(33) 1992 Suppl. (3) S.C.C. 217.

to the observations made by the Supreme Court in *M. R. Balaji* v. *State of Mysore* (34), *T. Devadasan* v. *Union of India* (35), and *State of Kerala* v. *N. M. Thomas* (36), and then observed :—

> "Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put into place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1)."

(63) In the light of the above enunciation of law by various High Courts and the Apex Court, the impugned rule needs a close scrutiny. The rule has been challenged on the ground that it seeks to make discrimination in favour of women only on the ground of sex. In this context, it is significant to note that the petitioners have not challenged the Government's action to establish colleges exclusively for women. Any such challenge would have ordinarily been rejected because it is primarily within the domain of the Government to determine what types of educational institutions it should establish. *Ex facie* the object of establishing exclusively women's colleges is to encourage female students to go for higher education. In our social structure women has been recognised as a weaker and handicapped section of the society for many centuries. In order to create an atmosphere in which the female students can aspire for higher learning and thereby make their contribution to the development of the nation, the Government has not only established colleges exclusively for women but even exclusive Universities have been established in the country. This has led to a large influx in the colleges of female students having rural background. Those who could hardly imagine of going for higher learning are now able to join colleges exclusively meant for women.

(34) 1992 S.C. 649.
(35) A.I.R. 1964 S.C. 179.
(36) A.I.R. 1975 S.C. 490.

(64) If no exception can be taken to the establishment of the exclusively women colleges and Universities, there is little merit in the challenge to the rule by which the headship of such colleges is sought to be earmarked to for women. A Principal of Women's College is expected to keep a close co-ordination between the teachers and staff on the one hand and the teachers and students on the other hand. The Principal is also required to take special care for the Welfare of the female students and involve them in activities, apart from education, which would help them in development of their personality in all dimensions. This can be possible only if the Principal keeps personal touch with the students. As compared to a male Principal, a female Principal is better suited for this job. The powers and functions of the Principal enumerated in Chapter 19 of the Panjab University Calendar, Volume III are merely illustrative and not exhaustive. Apart from undertaking administrative decisions, a Principal is supposed to work as a catalyst for over all development of the institution and create an atmosphere where female students can help in achieving the objective of bringing female segment of the society in the main national stream. Thus, the primary object of the impugned rule is to provide for smooth and efficient functioning of Women's Colleges. The sex of the person to be appointed as Principal happened to be one of the factors. Such a provision would fall within the ambit of Article 15(3) and would not offend Article 16(2) of the Constitution of India.

(65) In my opinion, the law laid down by the Full Bench in *Shamsher Singh's case* (supra) and the observations made by the Division Bench in *Mrs. Raghubans Saudagar Singh's case* (supra) represent the correct proposition of law. Moreover, the Supreme Court in *Government of Andhra Pradesh* v. *P. B. Vijay Kumar* (supra) unequivocally recognised the same principle which has been laid down by Bombay High Court in *Dattatrya Motiram More* v. *State of Bombay* (supra) and which has been followed by the Full Bench of our Court, namely, that Article 15(3) is wide enough to cover the field of employment as well. Thus, in my opinion, the impugned rule does not offend the equality clauses enshirned in Articles 14, 15 and 16 of the Constitution of India and the Writ petitions are liable to be dismissed.

N. K. Sodhi, J.

(66) I have had the advantage of going through the judgments prepared by my learend Brother R. P. Sethi, J. (now Hon'ble the Acting Chief Justice) and G. S. Singhvi. J. but with all respect to them, I have not been able to pursuade myself to agree with their view that the first preliminary objection regarding maintainability

of the writ petitions as raised by the respondents deserves to be over-ruled. Facts of the two cases which are being disposed of by this Full Bench have been succintly stated by Brother Sethi, J., and those need not be recapitulated here. Suffice it to mention that petitioners in both the cases claim to be the senior most Lecturers working in the Government Colleges at Chandigarh and, therefore, eligible for being appointed as Principal in a Government College in the Union Territory of Chandigarh. Post of Principal in Government College for Girls, Sector-11, Chandigarh fell vacant on 31st July, 1994 and both the petitioners have been held to be ineligible for being considered for the said post as they are males in view of Regulation 5 contained in Chapter VII(ii) of the Panjab University Calender Volume III which governs the Government colleges in Chandigarh. It is common ground between the parties that the petitioners are employees of the Chandigarh Administration which is a Union Territory and are borne on the U.T. College cadre in Chandigarh and that there is a common seniority list of men and women working as Lecturers in Government Colleges at Chandigarh. It is also not in dispute that the Government Colleges in Chandigarh are affiliated to the Panjab University and by reason of such affiliation they are governed by its rules and regulation. Regulation 5 contained in Chapter VII(ii) of the Panjab University Calendar Volume III clearly states that the Principal of a Women's College shall be a lady. The action of the Chandigarh Administration in not considering the petitioners for the post of Principal of a Women's College has been impugned in the present petitions filed under Article 226 of the Constitution in which vires of the aforesaid Regulation 5 have been challenged.

(67) The first preliminary objection taken by the respondents during the course of arguments is that since the petitioners are employees of the Union Territory Administration they should approach the Central Administrative Tribunal constituted under the Administrative Tribunals Act, 1985 (hereinafter called the Act) for the redressal of their grievances and that in view of the bar contained in Section 28 of the Act, the writ petitions are not maintainable. I am of the considered opinion that there is merit in this objection and the same deserves to be upheld. Learned counsel for the petitioners sought to meet the objection by contending that what they were challenging in the writ petitions were the vires of Regulation 5 of the Panjab University which is not amenable to the jurisdiction of the Tribunal and, therefore, the vires of the said Regulation could

not be challenged before the Tribunal. They conceded that the petitioners being employees of the Union Territory could not claim any relief from this Court under Article 226. In view of the objection raised by the respondents, the petitioners took the stance that this Court should only declare Regulation 5 as *ultra vires* and thereafter leave the petitioners to approach the Tribunal for the necessary relief. In my view, this cannot be done.

(68) The Act has been enacted by Parliament in exercise of the powers vested in it under Article 323-A which was brought into the Constitution by the 42nd Amendment Act in 1977. The Act is intended to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or Union Territory or of any State or of any local or other authority within the territory of India or under the control of the Government of India and for matters connected therewith or incidental thereto. Section 28 of the Act excludes the jurisdiction of the High Courts in regard to service matters of such employees and it is being reproduced hereunder for facility of reference :—

> "28. *Exclusion of jurisdiction of Courts except the Supreme Court.*—On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post. (no Court except—
>
> (a) the Supreme Court ; or
>
> (b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1977 (14 of 1947) or any other corresponding law for the time being in force.
>
> shall have), or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or suhc service matters."

The vires of the Act in general and that of Section 28 in particular were challenged before the Apex Court in *S. P. Sampath Kumar* v. *Union of India* (37). While upholding the exclusion of jurisdiction of the High such recruitment or such service matters."

(37) A.I.R. 1987 S.C. 386.

The vires of the Act in general and that of Section 28 in particular were challenged before the Apex Court in *S. P. Sampath Kumar* v. *Union of India*, A.I.R. 1987 S.C. 386. While upholding the exclusion of jurisdiction of the High Courts in service matters, their Lordships observed that such exclusion does not totally bar the judicial review inasmuch as judicial review by the Apex Court has been left untouched. Their Lordships observed in para 15 of the judgment as under :—

xx xx xx xx

> This Court in Minerva Mills' case, (AIR 1980 SC 1789) did point out that "effective alternative institutional mechanisms or arrangements for judicial review" can be made by Parliament. Thus it is Possible to set up an alternative institution in place of the High Court for providing judicial review."

and again in para 16 it has observed as under :—

xx xx xx xx

> Under Sections 14 and 15 of the Act all the powers of the Courts except those of this Court in regard to matters specified therein vest in the Tribunal-either Central or State. *Thus the Tribunal is the substitute of the High Court and is entitled to exercise the powers thereof.*" (emphasis supplied).

It is not disputed before us—and perhaps it could not have been—that a Tribunal constituted under the Act exercise all the powers which the High Court has been exercising hitherto before in regard to service matters and that the Tribunal can also examine the vires of any Act or rules which have a bearing on such matters. Sections 14 and 15 make it absolutely clear that the Central Administrative Tribunal or the State Administrative Tribunal, as the case may be, shall exercise all the jurisdiction, powers and authority exercisable immediately before the appointed day by all Courts including the High Courts except the Supreme Court. This being so, the petitioners can challenge the validity of Regulation 5 as framed by the Punjab University which is standing in their way and disentitles them from being considered for the post of a Principal in a Women's College before the Tribunal. After all what they are challenging before us is only the validity of this Regulation and since this can be challenged before the Tribunal, the jurisdiction of this Court to entertain these petitions is clearly barred by Section 28 of the Act.

The argument that Regulation 5 has been framed by the Punjab University which is not amenable to the jurisdiction of the Tribunal and, therefore, the same cannot be challenged before the Tribunal cannot, in my opinion, be accepted. No doubt, the Regulation is framed by the Punjab University but the same is being implemented and acted upon by the Chandigarh Administration thereby affecting the right of the employees of the Union Territory and it is the action of the latter in not considering the petitioners for the post of a Principal in a Women's College that is being challenged. The Regulation will be deemed to have been adopted by the Chandigarh Administration no matter that it has been framed by the Punjab University. There is thus no reason why this Regulation which governs the employees of the Union Territory could not be challenged before the Tribunal. The University need not be party before the Tribunal and if the Regulation was to be declared *ultra vires* by the Tribunal, it would direct the Chandigarh Administration not to implement the same *qua* its colleges. The alleged anomaly that is pointed out by the petitioners is that in such an eventuality Regulation 5 would be invalid *qua* the colleges run by the Chandigarh Administration but the same would be valid for colleges outside Chandigarh which are affiliated to the Punjab University. That may be so, but this would not confer jurisdiction on this Court to entertain the petitions on behalf of the employees of the Union Territory. Even if the Regulation is valid for the colleges affiliated to the Punjab University outside Chandigarh, the same would continue to operate *qua* them till it is declared invalid by any competent Court including this Court under Article 226 of the Constitution and I find no anomaly in such a situation. To my mind, it will be rather anomalous if the contention of the petitioners was to be accepted. This Court would first entertain a petition and give a declaration that the Regulation is *ultra vires* but find itself helpless in giving any relief to the petitioners because of the bar of Section 28 they being employees of a Union Territory and thereafter they will have to go to the Tribunal for getting the necessary relief. In my opinion, the law could not have envisaged such a situation where the petitioners would be driven to file two petitions in different formus to get the necessary relief. If they straightaway file a petition before the Tribunal and successfully challenge the vires of the Regulation, they would get the necessary relief from the Tribunal. I, therefore, accept the first preliminary objection and hold that the present petitions are not maintainable. The petitions are consequently returned to the petitioners to be presented before the Central Administrative Tribunal set up for the purpose.

(69) As regards the second preliminary objection raised by the respondents, I agree with my learned Brothers that this Court in the exercise of its jurisdiction under Article 226 of the Constitution does not normally grant or issue mere declaratory writs unless the person aggrieved has asked for and can be granted the consequential relief as well but in the facts and circumstances of a given case, the High Courts may mould the relief and grant the same by way of a mere declaration. However, in the present case, have already held that the writ petitions are not maintainable and therefore, the question of granting any relief by way of declaration to the petitioners does not arise.

(70) Since I am upholding the preliminary objection and directing the return of the petitions to be presented before the Tribunal, it is not necessary for me to express any view in regard to the validity of Regulation 5 referred to above. Parties to bear their own costs.

(71) I was of the opinion that the petitions were barred under section 28 of the Act, and, therefore, they had to be returned for presentation to the Central Administrative Tribunal. In this view of the matter I did not express any opinion regarding validity of Regulation 5 in Chapter VII(ii) of the Panjab University Calender. Volume III. This view of mine on the preliminary objection has not been concurred by the Brother judges constituting the Full Bench who are equally divided in regard to the validity of the Regulation in question. It has, therefore, become necessary for me to Regulation as well.

(72) I have carefully gone through the judgments of my Brother judges and with all respect to the views expressed by them, I agree with Sethi, J., that the impugned Regulation is *ultra vires* and unconstitutional. There is no retionable behind this Regulation which should deprive a senior most member of the teaching staff in a womens' college from being appointed as Principal in the same college solely on the ground that he happens to be a male member. no matter that he may be otherwise suitable and eligible. There is a common seniority list of the teaching staff and a male member of the staff can be the Head of a Department in a women's college but not its Principal. This to my mind is very anomalous. Considerations for not appointing a male as a hostel warden or the doctor incharge in a women's college are however, different. I need not dilate any further and for the detailed reasons recorded by Sethi, J. it must be held that the impugned Regulation is unconstitutional.

K. S. Kumaran, J.

(73) Being in an advantageous position of having perused the judgments of my learned brothers Sethi, J., Singhvi, J., and Sodhi, J. I propose to straightway consider the arguments advanced by both the sides without taking time to narrate the facts. The three important questions that arise for consideration in this petition have been formulated by my learned brother Sethi, J. The first question is as to the maintainability of the writ petition before this Court, the second is whether a mere declaration without the consequential relief can be granted by this Court, and the third is whether the impugned Rule 5 of Chapter VII(ii) of the Panjab University Calender is constitutionally valid. The first two questions have been elabortately dealt with by my learned brother Sethi, J. After discussing various aspects learned brother. Sethi, J., has held that this writ petition is maintainable before this Court and that this Court can in appropriate cases grant a mere declaratory relief without any consequential relief. Brother Singhvi, J. has also agreed with this view taken by brother Sethi, J. On the other hand learned brother Sodhi, J., while taking the view that this Court can grant a mere declaratory relief in appropriate cases has held that this Court has no jurisdiction to entertain these petitions and that these petitions be returnned for presentation to the Central Administrative Tribunal. With very great respect to brother Sodhi, J., I respectfully disagree with the view taken by him and I am in total agreement with the view taken by my learned brothers Sethi, J., and Singhvi, J., on these two questions.

(2) The third question is regarding the constitutional validity of the impugned provision (which my learned brother Singhvi, J., has extracted in his judgment) by and under which the Panjab University has chosen to reserve the post of the Principal of Women's College to a lady only, to the exclusion of a gentleman. While considering this aspect learned brother Sethi, J., after analysing the relevant provisions of the Constitution and the decisions of the various Courts including those of the Hon'ble Supreme Court, has come to the conclusion that this provision is *ultra vires* of the provisions of the Constitution offending the equally clause and that the respondents have not justified the discrimination. Whereas brother Singhvi, J. has disagrees with brother Sethi, J., and upheld constitutional validity of this provision, brother Sodhi, J., has not chosen to express any view on this aspect in view of his finding that this writ petition is not maintainable before this court and that it is only the Administrative Tribunal that has the jurisdiction to go into the

question raised before us. With great respect to the other two Brothers, I fully agree with the view expressed by brother Sethi, J., for the reasons given by him in his elaborate judgment. But, I would like only to add the following in support thereof :—

(3) Colleges can be divided into two categories i.e. 'Women's colleges' and 'other colleges'. The State cannot and does not impose any restrictions on the appointment of men in other colleges where students of both sex are given education, though it may be open to the Institutions themselves either to take in women students or not. But, the fact remains that they are imparted education. In such Institutions where both men and women study, the Panjab University does not impose a condition that the Principal of such institution should only be a lady. The impugned Rule-5 madates that only a lady should be appointed as Principal of a women's college. Article 14 of the Constitution enjoins a duty on the State not to deny to any person equality before law and equal protection of laws. This article has been held to be the genus of which Article 15 and 16 are its species. Article 15 compells the State not to discriminate against any citizen on ground only of sex, religion etc., but article 15(3) enables the State to make special provisions for women and children. Such a provision is not found in Article 16 of the Constitution which confers upon the citizen the right to equality of opportunity in matters of employment. Even Article 15 prohibits discrimination only on the ground of sex, but, if there are other considerations, then the State is certainly entitled to discriminate on other considerations along with the gender preference. Therefore, we will have to consider whether there are any other considerations than the ground of sex only, which could have prompted the Panjab University in making this rule providing for appointment only a lady to the post of Principal in Women's College.

(4) It appears from the impugned Rule 5, that the intention is to confer the benefit of the reservation not on the appointee but on some others i.e. the women students who are imparted education in the Institution to which the appointment is made. It is contended on behalf of the respondents that female students could have better relations and understanding with a lady principal than a male Principal. Can this be considered the justification. The action on the part of the State in having a college for imparting education exclusively for ladies can certainly be for their advancement, but, at the same time the argument that only a lady Principal can have a better understanding of the problems peculiar to the females, or

it is only a lady principal who can make the students to involve themselves in all spheres of the activities for the betterment of their career cannot be accepted. Only to buttress this view that I have at the out-set mentioned about two categories of colleges namely 'Women's colleges' and 'other Colleges'. In the 'other colleges' both men and women study and the Principal of such colleges can be a male. If a male-Principal in such colleges can shape the career of women students for the betterment of their career, a male principal appointed in a college meant exclusively for women can also do the same thing. If at all any protection or help is needed for women students, it could be in a college where both men and women study, because, the women students are likely to be exposed to more risk in such colleges where the students population from the other sex will be more. In such a college a female student may require the understanding, the affection and the motherly care of a female principal. Whereas, this may not be the situation in a college where education is imparted exclusively for women students.

(5) I will also approach this aspect from a different angle also. A college for the education of the females cannot be equated to a Jail or a Police Station for women, or any Institution for keeping the destitute women. By their very nature these institutions require a head who is a female. We very often come across cases where women accused of a crime and taken to the Police Station are subjected to sexual assault by the police in Police Stations 'manned' by males only. Therefore, it is only appropriate that police stations for lodging female accused 'manned' by female police officers are constituted. Similar is the case of the Jails for imprisoning female convicts. In these two cases we find the females would be without any protection whatsoever in case they are to be under the control/ custody of males. Similarly in the case of an Institution meant for keeping destitute women, a female is more suited to understand the peculiar problems of such helpless females kept there. Whereas we are now dealing with the question whether the female students who study in a college require only a lady principal to be helped in their pursuits of study or advancement in their career. In my humble opinion, it is not. After all a Principal is only going to administer the college and it may be that he/she may be taking up the work of teaching also occasionally. Virtually the female students will be under the control and guidance of the respective teachers and Heads of Departments. The rules of the Panjab University do not completely prohibit a male from being appointed as the head of the department. It is only under the control and the guidance of such male-Heads of departments that the female students

actually undertake their studies and it is up to them the female students have to look to for clarifying their doubts and solving their problems. The female students are not going to look to the Principal for such problems. Even from the list of the power and functions of the Principal enumerated in Panjab University Calendar and which have been extracted in the judgment of my learned brother Sethi, J., we do not find anything which could stand in way of appointing a male as a Principal. May be that this list is not exhaustive, even then I am unable to find anything to hold that there is any other consideration than sex which stands in the way of a male from being appointed as a Principal in a ladies' college. In this case we have to remember that we are now testing the constitutional validity of the provision which deprives males of an opportunity to be promoted and appointed as principal of a college simply on the ground that the college happens to be one which imparts education exclusively for women students. If we are to uphold the validity of such a provision then the respondents should be able to support their claim by giving sound and acceptable reasons, which in my humble opinion they have not done. The provisions of article 15(3) which are intended to act as a shield to safeguard the interests of women should not be used as a sword to cut the heads of males. Because in a given case, such a provision can be used to deprive a male of his legitimate right of getting promotion and appointed as 'Principal'. with ulterior motives, by creating vacancy in the 'Ladies College' whenever his turn comes. While there can be no objection for the reservation of certain numbers of posts of Principal to women, there should be compelling reasons to reserve the post of Principal in a ladies college to a women only. Unless and otherwise there are convincing and compelling reasons, the reservation as is sought to be made cannot be upheld merely on the basis that Article 15(3) of the Constitution enables the State to make special provisions with regard to women. In these present days women compete with the men on all spheres of life, and they have come to occupy top posts in the Executive, Legislature and the Judiciary. They have even taken their due place not only in the police but also in the defence forces. Gone are the days when women were confined to the kitchen or found themselves in totally helpless situations. They have come to occupy key positions meant for shaping the destiny of nations. Therefore, I am even emboldened to say that this special provision reservation as is sought to be made by the Panjab University in the shape of Rule 5 is only an anachronism.

(74) So with very great respect to the learned brother Singhvi, J. I disagree with the view expressed by him, and with respect I agree

with the view taken by learned brother Sethi, J. Consequently I am also of the view that this writ is maintainable, that this Court can in appropriate cases grant mere declaratory reliefs without granting any consequential relief, and also that rule 5 of Chapter VII (ii) of the Panjab University Calendar, Volume III is uconstitutional and *ultra-vires.*

T. H. B. Chalapathi, J.

(75) I have had the privilege of going through the opinions expressed by my learned brother on the questions referred to the Full Bench.

(76) In view of the importance of the questions posed, I propose to express my view and conclusions, thereof.

(77) It is not necessary to state the facts in detail as they have been succinctly stated in the judgement of My Lord the Acting Chief Justice.

(78) Suffice to say that the petitioners in these two writ petitions who are working as Lecturers in the Government College run by the Chandigarh (U.T.) Administration, affiliated to Panjab University, are ivoking the extra-ordinary writ jurisdiction of this Court under Articles 226 of the Constitution of India seeking a declaration that Regulation V, Chapter VII(ii) of the Panjab University Calendar Volume-III whereby a male lecturer is debarred from being appointed as Principal in Girls' College, as unconstitutional as violative of Articles 14, 15 and 16 of the Constitution of India.

(79) The Division Bench consistng of Mr. Justice R. P. Sethi (as his Lordship then was) and Mr. Justice S. S. Sudhalkar came to the conclusion "that for an authoritative pronouncement on the point, the plea raised by the petitioner regarding constitutional validity of Regulation 5 requires determination by a Larger Bench" and accordingly directed to be heard by a Bench consisting of more than three Judges, obviously, for the reason they were of the opinion that the decision of the Full Bench of this Court in *Shamsher Singh* v. *Punjab State* (38), "could be held to be distinguishable". This is how this matter came before us.

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(38) A.I.R. 1970 P. & H. 372.

(80) During the course of arguments, two questions have been posed for our consideration, namely,—

(1) Whether the writ petition under Article 226 of the Constitution of India is maintainable in view of the specific exclusion of the jurisdiction of the High Court under Section 28 of the Administrative Tribunals Act, 1985 read with clause 2(d) of Article 323-A of the Constitution of India.

(2) Whether Regulation V, Chapter VII(ii) of Panjab University Calender, Volume III which provides 'that the Principal of a Women's College shall be a lady, is unconstitutional as violative of Articles 14, 15 and 16 of the Constitution of India.

(81) I shall proceed to deal with the first question, i.e. with regard to the jurisdiction of this Court to entertain the writ petition. This argument advanced by the learned counsel for the respondents in this regard is based on the ground that the petitioners are the lecturers of the Government Colleges run by the Chandigarh Administration which is a 'Union Territory' and the petitioners are seeking promotion to the post of Principal in Women's College and, therefore, the dispute relates to a service matter falling within the purview of Section 14 of the Administrative Tribunals Act, 1985, and, therefore, this Court cannot issue a writ and the jurisdiction of the High Court has been taken away by the provisions contained in section 28 of the Administrative Tribunals Act, 1985 read with clause 2(d) of Articles 323 of the Constitution.

(82) It is, therefore, to be seen whether we are required to adjudicate any service matter which falls within the purview of the Administrative Tribunals Act, 1985. Section 3(g) of the said Act defines what is service matter. It reads as follows :—

"In this Act, unless the context otherwise requires,—

x x x

x x x

(q) "service matters", in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any

State or of any local or other authority within the territory of India or under control of the Government of India, or, as the case may be, of any corporation (or society) owned or controlled by the Government, as respects—

(i) remuneration (including allowances), pension and other retirement benefits ;

(ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation ;

(iii) leave of any kind ;

(iv) disciplinary matters ; or

(v) any other matter whatsoever."

(83) It is not the case of the petitioner that there is any violation of the conditions of service by the Chandigarh (U.T.) Administration. The U.T. administration is not denying promotion to the petitioners on the ground of any policy taken by it. The real dispute in this matter is not between the employer and the employee. The real and substantial question involved in this case is whether U.T. Administration is bound to follow a rule or regulation prescribed by the Panjab University if such a rule or regulation is found to be unconstitutional as violative of the fundamental rights of the citizens. Therefore, the real controversy in this case is between the Panjab University on one hand and the U.T. Administration and its employees working in its colleges on the other.

(84) Admittedly, the Government Colleges in the City Beautiful, Chandigarh, are run by the U.T. Administration but they are affiliated to Panjab University. There is no dispute that the Union Territory Administration which runs the Colleges is bound to follow the rules and regulations prescribed by the Panjab University to which the Colleges of the U.T. Administration are affiliated. If the U.T. Administration does not follow the rules and regulations of the Panjab University, the administration invites the risk of derecognition or withdrawal of affiliation of its Colleges by the University. The petitioners in these writ petitions are challenging the regulation of the Panjab University which debars the U.T. administration appointing male Principals in the Women's Colleges. Therefore, in substance the petitioners are seeking the relief against the Punjab University restraining it from enforcing the said regulation on the ground of its unconstitutionality. In order to have the

affiliation of the College continued the U.T. administration is bound to follow the regulations of the University until and unless a competent Court declares the regulation of the University as unconstitutional and violates the fundamental rights of the citizens.

(85) There is no dispute that the Central Administrative Tribunal constituted under the Administrative Tribunal Act, 1985, has no jurisdiction over the Panjab University and it cannot declare the regulation of the University as not binding on the U.T. Administration on the ground of its invalidity nor can it strike down the regulation as unconstitutional. The Panjab University cannot be made a party before the Central Administrative Tribunal. The Tribunal cannot give any relief to the petitioners without putting the U.T. Administration into jeopardy of incurring the unpleasant situation of having its college de-recognised or its affiliation withdrawn. If the affiliation is withdrawn the College has to be closed and it is not at all in the interest of the petitioners or the U.T. Administration and the student community at large. There can not be any dispute that the Panjab University is within the jurisdiction of this Court and any rule or regulation of the Panjab University can be struck down by this Court and the decision of this Court is binding on all the parties in these writ petitions including the Panjab University.

(86) When a regulation of the University is under challenge, it leads to anomoly if we direct the petitioners to approach the Central Administrative Tribunal to seek an appropriate remedy from the Tribunal. Suppose the Tribunal directs the U.T. Administration not to follow the regulation on the ground of its invalidity, the said decision is binding only on the Colleges run by the U.T. Administration. Admittedly, there are several other Colleges affiliated to Panjab University in other parts of the State of Punjab. The decision rendered by the Central Administrative Tribunal is binding neither on the University nor on the management or employees of those College situated in the State of Punjab. The managements or the employees of the other Colleges situated outside the City (or in the limits of the Union Territory) have to necessarily approach this Court if they want to seek similar relief as given to the U.T. Administration or its employees. This will lead to multiplicity of proceedings and conflicting decisions if the High Court takes a view different from that of the Central Administrative Tribunal. Such a situation is not conductive to administration of justice.

(87) This aspect can be looked at from another angle. Suppose the Central Administrative Tribunal declares the regulation as invalid and *ultra vires* of the Constitution and the U.T. Administration implements the orders of the Central Administrative Tribunal and the University withdraws the affiliations on the ground of non-observance of its regulations by the U.T. Administration, then in such a situation what will be the remedy of the U.T. Administration against the withdrawal of the affiliation. The only appropriate remedy available to the U.T. Administration is to approach this Court quastioning the withdrawal of affiliation. Then this Court is bound to examine the validity of the regulation afresh as this Court is not bound by the decision rendered by the Central Administrative Tribunal. It is open to this Court to come to a different conclusion and sustain the order of withdrawal of affiliation on the ground that the regulation does not offend the constitutional provisions.

(88) Thus, any decision rendered by this Court is effective while the decision rendered by the Central Administrative Tribunal is not that effective as a decision of this Court. The primary object of law is not flexibility but certainty.

(89) In *M. B. Mojundar* v. *Union of India* (39), the Supreme Court held that the Administrative Tribunals constituted under the 1985 Act cannot be equated with the High Court for all purposes. Tribunals cannot be treated as deemed High Courts with all the logical consequences. Equating the Tribunal with the High Court therein was only as the forum for adjudication of disputes relating to service matters and not for all purposes.

(90) In *R. K. Jain* v. *Union of India* (40), Justice Ramaswamy opined that "the Tribunals set up under Articles 323-A and 323-B of the Constitution or under an Act of Legislature are creatures of the Statute and in no case can claim the status as Judges of the High Court or Parity or as substitutes.

(91) A Full Bench of three Judges of the High Court of Andhra Pradesh in *Sakinala Harinath* v. *State of A.P.* (1993 (2) ANWR 484), held that Article 323-A (2) (d) of the Constitution of India as unconstitutional to the extent it empowers parliament, by law, to exclude the jurisdiction of the High Court under Article 226 and

(39) A.I.R. 1990 2263.
(40) 1993 (4) S.C.C. 119.

consequently declared that Section 28 of the Administrative Tribunals Act, 1985 as unconstitutional to the extent it divests the High Court of its jurisdiction under Article 226.

(92) A larger Bench of five Judges of A.P. High Court referred to the decision of the Full Bench in *Sakinda Hariath* v. *State of A.P.* with approval in *S. Fakrudin* v. *Government of A.P.* (41).

(93) I need not dwell upon this matter any further in view of the fact that the validity of clause 2(d) of Article 323-A and section 28 of the Administrative Tribunal Act has been referred to a Constitution Bench of the Supreme Court on appeal against the judgment of the Full Bench of the A.P. High Court in *S. Harinath* v. *State of A.P.* (42), in C.A. No. 169/94.

(94) In these circumstances, I need not express any opinion on the constitutional validity of clause 2(d) of Article 323-A of the Constitution of India Section 28 of the Administrative Tribunal Act, 1985.

(95) In the view I have taken as indicated above, I am of the opinion that it is the High Court and the High Court alone has the power to decide the constitutionality of Reuglation V. Chapter VII (ii) of the Punjab University Calendar Vol. III.

(96) It is, therefore, not necessary for me to deal with the question whether a mere declaration without consequential relief can be granted. However, as the point is raised and argued before us I feel it obligatory to express my views on this point also.

(97) My Lord the Acting Chief Justice after referring to the decision of the Supreme Court in *Ramaraghave Reddy* v. *Seshu Reddi* (43), and the provisions of Section 42 of the Specific relief Act, 1871 and Section 39 of the Specific Relief Act, 1963, came to the conclusion that in exceptional cases, the High Court may be justified to grant a declaratory relief.

(98) Though ordinarily a mere declaratory relief cannot be granted when the petitioner is entitled to a consequential relief, it

(41) A.I.R. 1996 A.P. 37.
(42) 1993 (2) A.N.W.R. 234.
(43) A.I.R. 1967 S.C. 436.

is now well settled in England that when the circumstances warrant a declaratory relief can be granted.

(99) Laws on has pointed out in his Remedies in English Law 1972 Ed. at page 266 that the declaratory judgment, unaccompanied by coercive relief, is in England not more than a hundred years old, though it had long been a regular remedy in Scotland under the name of "declarator."

(100) Lord Denning played a particularly prominent part in the development of the declaratory judgment as a major public law remedy. In his Hamyn Lectures (Freedom under law P. 125) he concluded as follows :—

> "This brings me to the end of these lectures. Reviewing the portion generally the chief point which emerges is that we have not settled the privileges upon which to control the new powers of the executive. No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will some times do things which they ought not to do. But if and when wrongs are thereby suffered by any of us what is the remedy ? Our procedure for securing our personal freedom is efficient, but our procedure for preventing the power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of *mandamus*, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence."

In *Taylor* v. *National Assistance Board* (44), it has been held as follows :—

> "The remedy declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with law and this is no matter whether the determinations are judicial or disciplinary, or, as here, administrative determinations.
>
> .....
>
> Parliament gives the impress of finality of the decisions of

(44) 1957 (1) A.U.E.R. 183.

the Board only on the condition that they are reached in accordance with law and the Queen's Courts can issue a declaration to see that this condition is fulfilled."

In *R.* v. *H. M. Treasury* (45), "I conceive that in at least most such cases the only appropriate form of relief (if any) could be by way of declaration."

(101) There appears to be divergence of opinion among several High Courts in India on the powers of High Court to issue a mere declaratory relief under Article 226 of the Constitution.

(102) In the following cases, it has been held that proceeding under Article 226 cannot really have any affinity to a declaratory suit and a petition for a declaration on the validity or constitutionality of an Act is not competent.

(1) *Sheo Shankar* v. *M. P. State Government* (46).

(2) *Pheku Chamar and others* v. *Harish Chandra and others* (47).

(3) *Anumati Sadhukhan* v. *Assistant Regional Controller, Procurement, Alipur* (48).

(4) *Durga Das* v. *Muni Lal and others* (49).

(5) *General Manager, Eastern Rly and another* v. *Kshirode Chndra Khasmobis* (50).

(6) *The Employees in the Caltex (India) Ltd. Madras and another* v. *The Commissioner of Labour and Conciliation Officer, Government of Madras and another* (51).

(7) *The Wholesale Grain and Seed Merchants' Association, Nagpur and others* v. *The State of Maharashtra through Secretary, Food Department Bombay and another* (52).

(45) 1982 (1) A.U.E.R. 589.
(46) A.I.R. 1951 Nagpur 58.
(47) A.I.R. 1953 All. 406.
(48) A.I.R. 1953 Cal. 187.
(49) A.I.R. 1953 Pb. 133.
(50) A.I.R. 1966 Cal. 601.
(51) A.I.R. 1959 Madras 441.
(52) A.I.R. 1968 Bom. 75.

(8) *Gurbax Singh and others* v. *Union of India and others* (53).

(9) *N. Balaraju and others* v. *The Hyderabad Municipal Corporation through the Commissioner Municipal Corporation Hyderabad and others* (54).

(103) A contrary view, namely, that a declratory relief falls within the purview of Article 226 and can be granted in proper and appropriate case, was taken in the following cases :—

(1) *Monthly Rated Works of M/s Perice Leslie and Co. Ltd.* v. *The Labour Commissioner and the Chief Conciliation Officer and others* (55).

(2) *Yogendra Nath Handa and others* v. *State and others* (56).

(3) *Dr. Swayambar Prasad Sudrania* v. *State of Rajasthan and another* (57).

(4) *Sharafat Ali Khan* v. *State of Uttar Pradesh and others* (58).

(104) In *Charanjit Lal* v. *Union of India* (59), Justice Mukherjee held as follows :—

> A proceeding under this Article (Art. 32) cannot really have any affinity to what is known as a declaratory suit. The first prayer made in the petition seeks relief in the shape of a declaration that the Act is invalid and is apparently inappropriate to an application under Article 32."

It has been further stated in the same decision as follows :—

> "Any way, Article 32 of the Consttiution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for."

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(53) A.I.R. 1973 P. & H. 310.
(54) A.I.R. 1960 A.P. 234.
(55) A.I.R. 1966 Kerala 55.
(56) A.I.R. 1967 Raj. 123.
(57) A.I.R. 1972 Raj. 69.
(58) A.I.R. 1960 All. 687.
(59) A.I.R. 1951 S.C. 41.

(105) In *Ebrahim Vadir Mavat* v. *State of Bombay* (60), the Apex Court declared that Section 7 of Influx from Pakistan (Control) Act to be void under Article 13(1) in so far as it conflicts with the fundamental right of a citizen of India under Article 19(1) (e) of the Constitution.

(106) In *K. K. Kochunni* v. *State of Madras* (61), it has been observed by the Supreme Court as follows after considering the cases referred to above.

> "But on a consideration of the authorities it appears to be well established that this Court's powers under Article 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party."

(107) Thus, on a consideration of a various authorities referred to above, I am of the firm view that a declaratory relief can be granted in an appropriate and proper case. However, I may add that as I have taken the view that the Central Administrative Tribunal has no jurisdiction to decide the validity and constitutionality of the Regulation of the Panjab University, there is no question of granting a mere declaratory relief but the Regulation if found unconstitutional, can be struck down and the University which admittedly comes within the jurisdiction of this Court could be directed not to give effect to, in which case the U.T. administration will be free to appoint male Principal or lady Principal in the Women's College run by Chandigarh Administration.

(108) I shall now take up the second question, which is the main issue to be decided.

(109) As already stated that Regulation V of Chapter VII (ii) of the Panjab University Calender makes it obligatory on the managements of the Colleges to appoint lady Principals in a Women's College. According to the petitioners, this regulation is unconstitutional as violative of Articles 14, 15 and 16 of the Constitution of India.

(110) Therefore, we have to see whether the regulation affects the equality clause.

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(60) A.I.R. 1954 S.C. 227.
(61) A.I.R. 1959 S.C. 733.

(111) The contention of the learned counsel for the petitioners in that the Regulation favours women and gives preferential treatment to women to the exclusion of men to be appointed as Principals of Women's College and the preference given is based on the ground of sex and, therefore, violative of Articles 14, 15 and 16 of the Constitution. Admittedly. the discrimination is in favour of women and against men.

(112) Articles 14, 15 and 16 components of the equality clause as enshrined in the Preamble of the Constitution guaranteeing to secure equality of status and of opportunity to all the citizens of the Sovereign Socialist Secular Democratic Republic of India.

(113) Thus, it is clear that is a recognised fact that all the citizens of this great country were not meted out with equal treatment before the advent of the Constitution of India. Then what was and what is the position of the women in India before and after independence.

(114) There cannot be any doubt that the Indian Society was and is predominantly dominated by male chauvinism. It is long and unfortunate history of sex determination. Traditionally such discrimination has been rationalised by an attitude of paternalism which in practical effect, placed women not on a pedestal but in a cage.

(115) Discrimination of individuals of group of individuals cannot exist in a civilised society or a society which believes in human rights and dignity of individuals. Free India in its first important legislation the Constitution declared its faith in the equality of men and women as a pre-condition to ushering in a society where there would be justice-social, economic and political for all. It affirmed not only to bring about equality of status but also provide for equality of opportunity for women. The policy makers realised that equality of status was meaningless unless there could be participation of women in national economy. However, customs and traditions which were against the principles of equality take a long time to be eliminated. With commendable foresight the Constitution makers, therefore, added that special provisions for women may be enacted which would not violate the fundamental right of equality. There was little doubt then and the position has not changed today, that special provisions for women are needed to bring about a status change. It is then only that they would be in a position to avail of the opportunities which are offered.

The necessity to make special efforts for Indian women at the time the Country attained freedom is best explained by the father of the nation, Mahatma Gandhi. He described the position of women as being "somewhat in the position of slaves" and added that every women have been taught to regard themselves as slaves of men. Mahatma Gandhi also drew the attention to the fact of the inferior position of Indian women when he wrote "Today the sole occupation of a women amongst us is supposed to be to bear children, to look after her husband and otherwise drudge for the household.....not only is the women condemned to domestic slavery but when she goes out as a labourer to earn wages though she works harder than male she is paid less."

(116) The discrimination against women appears to be common throughout the world.

(117) Indeed, the position of women in the United States at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in Society decision making councils. (*See* M. Gembag, Women in American Politics 4(1969). How the women are treated in United States can better be demonstrated by citing a century old decision of America Supreme Court in *Bredwell* v. *Iunion* (62), wherein it is stated thus :—

> Man is, or should be, women's Protector and defender. The natural and proper timidity and declicacy which belongs to the female sex evidently unfits it for many of the occupations of the civil life. The Constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity of interests and views which belong or should belong to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.....
>
> The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of Creator.

(62) (1873) 83 USF 30.

The position and status of a women in India was in no way better.

(118) The 18th century ideas about the limitations of women by their nature has, however, given place to an urge for equal treatment in all respects owing to changes in the social and economic spheres together with the activities of the women's liberation movement.

(119) Even the United Nations, which stands for the equality of all human beings in respect of the basic human rights, do not consider protective measures in favour of women discriminatory. Article 10.3 of the Declaration on Elimination of Discrimination Against Women 1967 says ". .....measures taken to protect women in certain types of work, for reasons inherent in their physical nature, shall not be regarded as discriminatory."

(120) Article 122 of the Soviet Constitution provides that "women in U.S.S.R. are accorded equal rights with men in all spheres of economic, governmental, cultural. political and other public activity.....".

(121) Article 14 of the Japanese Constitution says that "..... there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family rights."

(122) Article 14 of the European Convention guarantees that no discrimination shall be made between the sexes in the enjoyment of their rights and freedom set forth in the Convention.

(123) By Section 1 of the 27th amendment to the Constitution of United States, classification of women on the ground of sex has been dispensed with, Section 1 of the amendment declares "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. This amendment has been passed by the Congress in 1972 and ratified by the States in 1973.

(124) The Indian Constitution while incorporating the equal protection clause in Article 14, specifically prohibits discrimination between the sexes in Article 15 (1) and 16(2) guranteeing that the State shall not discriminate between citizens only on the ground of sex : at the same time, providing an exception in Article 15(3) to enable the State to make special provisions.

(125) Thus, there cannot be any denial of the fact that throughout world, women have been discriminated against men and in all the countries attempts have been made to remove the discrimination

and provide special treatment to uplift the status of women in all walks of life.

(126) The debates in the constituent assembly of India on Article 9 of the draft Constitution (Article 9 of the draft Constitution is renumered as Article 15 of the Constitution of India) clearly show that the clause providing to make special provision for women is intended to provide for discrimination in favour of women and this discrimination is in favour of particular classes of society which, owing to an unfortunate legacy of the past, suffer from disabilities or handicaps. Any section of the community which is backward must necessarily the progress of the rest and it is only in the interest of the community itself, therefore. that is right and proper we should provide facilities so that they may be brought up to date so to say and the uniform progress of all be forwarded.

(127) Article 15(3) of the Constitution of India makes specific provision for protective discrimination in favour of women. It reads thus :—

> "Nothing in this article shall prevent the State from making any special provision for women and children."

The ordinary distionary meaning of the word 'for' is "in the interest of, to the benefit of, intended to go to. in defence, support. in favour of."

(128) It is by now well accepted that in interpreting the law, the spirit of the Constitution has to be kept in mind. Therefore, when it is possible without straining the words of a Statute, to give an interpretation which helps and not hinders social justice, the former must be taken. This view was taken by Khalid, J., (as his Lordship then was) in *Kunhi Mohin* v. *Pathumma* (63), who after referring to the fact that women in India "suffer manifold disabilities while men have always an upper hand," added that in "considering the social welfare legislation the Courts will be justified in straining the language a little to achieve the object of the enactment."

(129) Dealing with Section 125. Cr.P.C. Justice Krishna Iyer observed as follows in *Ramesh Chander* v. *Veena Kaushal* (64) :—

> "This provision is a measure of social justice and specially enacted to protect women and children and falls within

(63) 1976 K.L.T. 87.
(64) A.I.R. 1978 S.C. 1807.

the Constitutional sweep of Art. 15(3) reinforced by Art. 39. We have no doubt that sections of Statutes calling for construction by Courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation of it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause-the cause of the derelicts."

(130) Thus, it is clear that Art. 15(3) is intended to favour women who have been neglected for centuries and whose upliftment is a must for the progress of the country.

As already stated, Arts. 14, 15 and 16 forms part of one composite scheme which is termed as 'equality code'. Therefore, Art. 15(3) is an exception not only to Art. 15(1) but also to Art. 14 and 16(2) of the Constitution of India.

(131) In a recent judgment in Government of *A.P.* v. *P. B. Vijay Kumar* (65), the Supreme Court observed as follows :—

"The interrelation between Arts. 14, 15 and 16 has been considered in a number of cases by this Court. Art. 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 Art. 15(1). There is, therefore, no reason to exclude from the ambit of Art. 15(1) employment under the State. At the same time Art. 15(3) permits special provisions for women. Both Arts. 15(1) and 15(3) go together. In addition to Art. 15(1) Art. 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). These 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

(65) A.I.R. 1995 S.C. 1648.

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 the 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."

Again in para 11 of the said judgment, it is stated thus :—

"We do not, however, find any reason to hold that this rule is not within the ambit of Article 15(3), nor do we find it in any manner violative of Article 16(2) or 16(4) which have to be read harmoniously with Articles 15(1) and 15(3). Both reservations and affirmative action are permissible under Article 15(3) in connection with employment or posts under the State. Both Articles 15 and 16 are designed for the same purpose of creating an egalitarian society. As Thommen, J. has observed in Indira Sawhney's case (1992 AIR SCW 3682) (Supra) (although his judgment is a minority judgment). "Equality is one of the magnificent cornerstones of Indian democracy." We have, however, yet to turn that corner. For that purpose it is necessary that Article 15(3) be read harmoniously with Article 16 to achieve the purpose for which these articles have been framed." (emphasis added).

Thus, it is obvious that Article 15(3) is an exception to Article 14 and 16 of the Constitution.

(132) The earliest case on Article 15(3) is that of Chief Justice C. *agla in Yusuf* v. *State* (66), where his Lordship said "Therefore

(66) A.I.R. 1951 S.C. 470.

what led to this discrimination in this country is not the fact that women had a sex different from that of men, but women in this country were so situated that special legislation was required in order to protect them." This decision was affirmed by the Supreme Court in *Yusuf* v. *State* 1954 SCR 630. wherein it is stated that "Art. 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex is a sound classification and although there can be no discrimination in general on that ground, the Constitution itself provides for special provisions in the case of Women and children." It has also been held that the two articles have to be read together.

(133) In *P. Sagar* v. *State* (67). Chief Justice Jagan Mohan Reddy (as his Lordship then was) speaking for the Bench held as follows:—

> "The 30 per cent reservation for women candidates also has been challenged and the ground that it is meant for those who cannot come up in open selection and that the procedure sought to be adopted by the Government in bringing all women candidates into the reservation quota without there being tested for open selection is uncalled for and unwarranted under rules and is, therefore, illegal. This contention ignores the provisions of Article 15(3) which is an exception engrafted to clause (1) of the said Article. which provides that nothing in that article shall prevent the State from making any special provision for women and children. In view of this special provision for women and children. In view of this specific provision, that reservation cannot be assailed. Further, the reservation is a general one for the class as a whole and the rule is so designed as to take into account women candidates who have secured seats under the other valid reservations as well as on the general competition in merit pool. Nothing has been urged to show what provision of the constitution this reservation offends. While dealing with a similar contention in 1966-1 Andhra WR 294 (supra) one of us (the Chief Justice) had held that the reservation could not be impugned. It was there held that the reservation for women. sportsmen. etc. all admit general categories and do not confine them to any particular class or caste ; nor offend the provisions of Art. 15(1) or Art. 29(2) of the Constitution."

(67) A.I.R. 1968 A.P. 165.

Even His Lordship Justice Jeevan Reddy expressed the view that the reservation for women can be sustained under Article 16 of the Constitution. In *P. B. Vijaya Kumar* v. *Government of A.P.* (68), Justice Jeevan Reddy (as his Lordship then was) observed as follows :—

> "From this point of view, it must be held that classifying certain posts as posts for which women are more suitable than men or as posts which must be filled exclusively by women only, is not impermissible in law, so long as the classification is based not merely on sex but is based upon the nature of the post, the requirements and duties attached thereto and the suitability of women therefor."

(134) In *Indra Sawhney* v. *U.O.I.* (69), Justice Jeevan Reddy reiterated his view by saying that "Article 16(1) does permit reasonable classification for ensuring attainment of equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situation to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality."

(135) In *Mel Kahn etc.* v. *Robert L. Shevin etc.* (70).

> "It was held that the statute does not violate the equal protection clause of the Fourteenth Amendment because the State's differing treatment of widows and widowers rests upon some ground of difference having a fair and sustantial relation to the object of the legislation, that is, the State Policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."

While holding so it was observed as follows :—

> There can be dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing man. Whether from overt discrimination or

(68) 1989 (1) A.P.R.J. 208.
(69) 1992 Suppl. 3 S.C.C. 217.
(70) 416 U.S. 351.

from the socialization process of a male dominated culture, the job market is inhospitable to the woman, seeking any but the lowest paid jobs."

(136) I need not multiply the authorities as the decisions of various High Courts and Apex Court have been dealt with by my respected learned brother Justice Singhvi.

(137) Reserving the post of Principal in Women's College is in fact laudable and commendable. Apart from the powers and functions of the Principal of an affiliated College as enumerated in Chapter XIX of Panjab University Calendar Vol. III, 1985 the Principal of a College whether affiliated or not is expected to function as the executive head of the College and exercise general control over its working, ensure whole some teacher-student relations, promote the welfare of the students and healthy interest among the students. In a women's college, these functions can effectively be performed if there is lady Principal heading the institution. The girl students feel homely and friendly atmosphere if their Principal also belongs to their sex and they can freely ventilate their grievances and the problems faced by them because of their gender. Thus, the classification is reasonable and satisfy the criteria enunciated by Justice Jeevan Reddy in *P. B. Vijaya Kumar's* case (*supra*) for sustaining the classification under Article 16(1) of the Constitution of India.

(138) I am, therefore, of the view that Regulation V Chapter VII (ii) which provides for appointment of lady Principal is valid, Constitutional and does not violate the Articles 14, 15 and 16 of the Constitution of India.

(139) To sum up my conclusions on the questions that arose for our consideration are :—

1. The Writ Petitions are maintainable and the High Court in exercise of its extra ordinary jurisdiction conferred under Article 226 is competent to issue the substantial relief to the petitioners if it is found that the impugned Regulation is invalid and unconstitutional.

2. Regulation V of Chapter VII (ii) of Panjab University Calendar is valid and constitutional and does not violate the fundamental rights of the petitioners.

(140) In the view I have taken on the 2nd question, the necessary result that follows, is that the writ petitions fail, and are accordingly liable to be dismissed.

Order dated 16th May, 1996 passed by the Full Bench.

As per majority (N. K. Sodhi, J. contra)—

(141) Under the peculiar circumstances of the case, the writ petitions are held maintainable.

As per majority (G. S. Singhvi and T.H.B. Chalapathi, JJ. contra)—

(142) Regulation 5 Chapter VII (ii) of the Panjab University Calendar Volume III is struck down being unconstitutional and *ultra vires* not in any manner affecting the service rights of the petitioners who are entitled to be considered for promotion alongwith others if otherwise eligible for promotion as such.

R.N.R.

Before Hon'ble Dr. Sarojnei Saksena, J.

SUKHPAL SINGH,—*Petitioner.*

versus

SHINGAR KAUR,—*Respondent.*

C. R. No. 3927 of 1995.

19th April, 1996.

Hindu Marriage Act, 1956—S. 24—Code of Civil Procedure, 1908—S. 115—Under Section 24 of Hindu Marriage Act, wife failed to allege that she has no independent income to support herself—Would not disentitle her to maintenance—Court is duty bound to decide question whether or not wife can or cannot support herself—Potential earning capacity of wife not to be taken into consideration—While granting maintenance separate income if any, can be taken into consideration.

Held, that no doubt in the petition filed under section 24 of the Act, petitioner-respondent-wife has not alleged that she has no