

Before Hemant Gupta and Jora Singh, JJ.

NEELAM RANI,—Petitioner

versus

STATE OF PUNJAB AND OTHERS,—Respondents

C.W.P No. 12275 of 2000

8th January, 2010

Constitution of India, 1950—Arts.15, 16 and 226—Punjab State Education Class III (School Cadre) Service Rules, 1978—Rls. 3 and 11—Appointment to posts of Lecturers—Creation of separate cadre for male and female candidates—Whether discriminatory and violative of Art.16(2)—Women cannot be excluded from competing against posts specified to be filled up from amongst men—Neither Article 15 nor Article 16 contemplates reservation of posts in favour of men—Such posts are required to be filled in on basis of merit alone and if on basis of merit women are meritorious, they are entitled to be appointed against posts described as reserved for men to the extent of posts meant for women.

Held, that Clause (3) of Article 15 of the Constitution empowers the State Government to make special provision for women and children to uplift their economic and social status. Therefore, fixing posts for women *per se* cannot be said to be violative of either Article 15 or 16 of the Constitution of India. Such reservation is a horizontal reservation and not vertical reservation as in the Rules. The horizontal reservation for women is in tune with the constitutional mandate and not the vertical reservation. Therefore, creation of vertical reservation for women is not sustainable.

(Para 34)

Further held, that in respect of the posts which are said to be meant for men category, women cannot be excluded from competing against the posts specified to be filled up from amongst men. Neither Article 15 nor Article 16 contemplates reservation of posts in favour of men. Such posts are required to be filled in on the basis of merit alone and if on the basis

of merit women are meritorious, they are entitled to be appointed against the posts described as reserved for men to the extent of posts meant for women.

(Para 36)

Further held. that a combined merit list of all the candidates is required to be prepared. If on such merit, women candidate are not selected to the extent of posts reserved for them, only then women lower in merit will be selected and appointed to fill up the requisite posts meant for such women candidates. Such course alone will be an act of horizontal reservation and in accordance with the mandate of Articles 14 to 16 of the Constitution of India.

(Para 37)

Further held. that we read down Rule 3 and the Appendix 'A' to mean that posts other than the posts meant for female candidates are required to be filled up on the basis of merit without any classification on the basis of sex. Thus the words—Headmaster, Lecturer (Male) and Masters wherever they appear in the Rules will include the persons of both sexes. However, such declaration of law is without examining the extent of reservation in favour of women and that whether such extent of reservation violates any law.

(Para 38)

Rajiv Atma Ram, Senior Advocate with Saurabh Arora, Advocate
for the petitioners.

Mahesh Gupta, Advocate, D. R. Bansal, Advocate *for the*
petitioners in CWP No. 16106 of 2000.

J. S. Puri, Additional Advocate General, Punjab.

R. K. Malik, Senior Advocate with R. S. Rana, Advocate *for*
respondents No. 5 and 6 in CWP No. 12275 of 2000.

HEMANT GUPTA, J.

(1) This order shall dispose of a group of writ petitions bearing Nos. 11928, 12275, 12276, 12277, 12278, 15867 and 16106 of 2000 wherein the creation of separate cadre for male masters, lecturers and

headmasters under “The Punjab State Education Class III (School Cadre) Service Rules, 1978” (for short “the Rules”) is challenged being violative of Article 16 of the Constitution of India. For facility of reference, the facts are being taken from CWP No. 12275 of 2000.

(2) An advertisement inviting application for the post of Lecturers in various subjects was issued on 18th October, 1996. The name of the petitioner, a female candidate, appears at serial No. 24 having obtained 67.69 marks. There are two categories of lecturers-General Male and General Female. The Departmental Selection Committee initially recommended the names of female general candidates obtaining marks up to 66.20% including that of the petitioner. The petitioner was appointed and is working on the post by virtue of an interim order passed by this court.

(3) A writ petition was filed by one Ravinder Kumar challenging the appointment of the petitioner as well as other female lecturers on the ground that the appointment of female lecturers is contrary to clause 7 of the advertisement which stipulates preparation of separate merit list for categories of male and female lecturers and that all the posts are to be equally divided among male and female candidates. The petitioners were not impleaded as respondents. An order was passed on 4th February, 1999 on the basis of statement of counsel for the State that there are mistakes in the selection of candidates and the department undertakes to review the entire selection. The order reads as :—

“The petitioner has prayed for issuance of a writ in the nature of mandamus directing the respondents to appoint him as Lecturer in Biology.

In the written statement filed on behalf of respondent No. 1 and 2, it has been averred that some mistakes have been committed in the selection of candidates and the department is undertaking an exercise to review the entire selection and action to nullify illegal appointment will be taken after giving notice to the affected persons.

Shri Khosla also stated that the exercise for review of the selection will be finalised within three months.

In view of the averments made in the reply and the statement made by the learned Deputy Advocate General, the writ petition is disposed of with the observation that if the petitioner comes in the merit list as a result of review exercise, then an order appointing him shall be issued by the competent authority”.

(4) The petitioner alleges that the said order is not binding on the petitioner as she was not party to the aforesaid writ petition. The petitioner has alleged that categorization of posts of teachers into male and female categories is hit by Article 16(2) of the Constitution of India and that the petitioner cannot be discriminated being higher in merit than the males in the selection list, if prepared separately. It is alleged that classification can only be made if there is any nexus in categorization of the posts. There can be reservation as in police force, army but the job of the educating classes +1 and +2 can be undertaken by a women effectively. Reference was made to the decision of the Supreme Court in case reported as **Miss C. B. Muthama versus Union of India and others. (1)**. The petitioner has thus sought quashing of the Rules providing separate cadre for male and female candidates ; clause 7 of the advertisement ; the show cause notice and the order terminating her services.

(5) In the written statement, it is pointed out that the Departmental Selection Committee advertised 50 posts of Lecturers in Biology but only 21 posts were available. 70 candidates belonging to different categories were recommended by the Departmental Selection Committee. Only 18 female general category’s candidates were offered appointment. It is averred that the selection and appointment of the petitioner was not in conformity with the settled law that posts cannot be advertised in excess of the available posts at the time of advertisement. In respect to challenge to ratio of 50 : 50 between male and female candidates, reliance was placed upon interim order passed in CWP No. 15867 of 2000 on 21st November, 2000 wherein bifurcation of the cadre of teachers in male and female categories was noticed and was negated in view of the order passed in CWP No. 5266 of 1998 decided on 30th March, 2000. It is also pleaded that

(1) AIR 1978 S.C. 1868

21 posts of Lecturers in Biology were available at the time of advertisement and such posts were required to be filled in as per following details :—

- | | | | |
|-------------------------|---------------|------------------------|---|
| “1. General Male : | 5 | General Female : | (6th being higher in merit than the male) |
| 2. S. C. Male : | 3 | S. C. Female : | 3 |
| 3. B. C. Male : | - | B. C. Female : | 1 (being higher in merit than the male) |
| 4. Handicapped Male : | Not available | Handicapped Female : | 1 |
| 5. Ex-serviceman Male : | 1 | Ex-serviceman Female : | 1”. |

(6) It is also pointed out that had 21 posts have been filled upon as per ratio stated above, the petitioner would not have come within the zone of consideration, therefore, the offer of appointment has been withdrawn after serving show cause notice upon the petitioner. It may be noticed that 5th candidate in the general male list has obtained 59.63 marks as against 67.69 marks obtained by the petitioner.

(7) Before we refer to the contentions raised, certain provisions and the Rules need to be extracted.

The Punjab State Education Class III (School Cadre) Service Rules, 1978

“3. The service shall have two branches, namely, Men Branch and Women Branch and shall comprise the posts shown in Appendix ‘A’ of these rules :

Provided that nothing in these rules shall affect the inherent right of Government to add or to reduce the number of such posts or to create new posts with different designation and scales of pay whether permanently or temporarily.

11. The seniority in each cadre of Service shall be determined on the basis of continuous length of service on a post in that cadre of the service :

Provided that—

xx xx xx xx xx xx"

APPENDIX "A" (SEE Rule 3)

Sr. No.	Designation of Post	Grade	No. of Posts					
			Total	Perma- nent	Tempo- rary	Total	Perma- nent	Tempo- rary
			(i)	(ii)	(iii)	(iv)	(v)	(vi)
1	Headmaster (15%)	-	73	73	-	-	-	-
2	Headmistress (15%)	-	-	-	-	18	-	18
3	Headmaster	-	605	100	505	-	-	-
4	Headmistress	-	-	-	-	328	56	272
5	Lecturer (Men)	-	917	-	917	-	-	-
6	Lecturer (Women)	-	-	-	-	577	-	577
7	Master or Block Education Officer	-	10542	5592	4950	-	-	-
8	Mistress or Block Education Officer	-	-	-	-	5425	2120	3305
9	J.S.T. Mistress	-	-	-	-	139	139	-

The Constitution 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 of any of them, be subject to any disability, liability, restriction or condition with regard to—

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

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

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

(4) and (5) xx xx xx xx”

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) to (5) xx xx xx xx”

(8) A perusal of the Appendix to the Rules would show that the cadre of Lecturers consist of 917 men and 577 women posts, whereas that of Masters consist of 10542 for men and 5425 for women posts, Similar is the situation in respect of cadre of Headmaster and Headmistress.

(9) Learned counsel for the respondents have raised a preliminary objection that the vires of the Rules have been upheld by this Court, therefore, the issue need not be re-examined. Reference is made to Single Bench judgment of this Court reported as **Rameshwar Parshad and others versus State of Haryana and others, (2)** and Division Bench decisions of this Court in **CWP No. 5266 of 1998** titled **Ranuka Daaiya and others versus State of Haryana and others, decided on 30th March, 2000** and **CWP No. 8116 of 1999** titled **Mandeepwant Kaur versus State of Punjab and others, decided on 24th September, 2002.**

(10) Learned counsel for the petitioners have vehemently argued that in terms of Article 15(3) of the Constitution of India, special provisions can be made for women and children but there cannot be any cadre for men alone. There is justification for creating a separate cadre for female Lecturers as the object sought to be achieved is a precautionary, preventive and protective measure based on public morals and particularly in view of the young age of the girl students to be taught. But restricting woman to

teach boy students in a Boys School is said to be unintelligible, without any rationale and nexus with the objective to be achieved. It is, thus, contended that separate cadre of School Masters, Headmaster or Lectures (Male) is violative of Article 16(2) of the Constitution of India as there cannot be any affirmative reservation for male candidates. All such posts are required to be filled up on the basis of merit irrespective of any classification on the basis of religion, race, caste and sex etc.

(11) Learned counsel for the petitioners have also argued that none of the judgments referred to by learned counsel for the respondents, the question that there cannot be any reservation for male candidates has been raised and considered. It is argued that in respect of the posts falling to the category of men, women are also eligible and are required to be considered to avoid the vice of discrimination prohibited under clause (2) of Article 16 of the Constitution of India. It is also argued that though Full Bench of this Court in case reported as **Dr. M. C. Sharma versus Punjab University, Chandigarh and others**, (3) have taken a view that the post of Principal in a girls college cannot be reserved for a female but such decision of the Full Bench of this Court has been reversed by the Supreme Court in **Vijay Lakshmi versus Punjab University and others**, (4). Therefore, there cannot be exclusive cadre for men.

(12) The following questions require our consideration in view of rival contentions of the parties :—

1. Whether separate cadre for men in the service i.e. Punjab State Education Class III (School Cadre) Service Rules, 1978, is discriminatory and violates Article 16(2) of the Constitution of India ?
2. Whether such cadre will include women as well to avoid vice of discrimination prohibited under Article 16 of the Constitution of India ?

(13) One of the first cases which considered the scope of Articles 15 and 16 of the Constitution in **Dattatraya Motiram More versus State of Bombay**, (5). In the aforesaid case, seats were reserved for women in

(3) AIR 1997 Pb. 87

(4) (2002) 8 SCC 440

(5) AIR 1953 Bombay 311

respect of an election to municipality. Such challenge was negated. It was held that discrimination in favour of women is permissible. It was held to the following effect :-

“.....It must always be borne in mind that the discrimination which is not permissible under Art. 15(1) is a discrimination which is only on one of the grounds mentioned in Art. 15(1). If there is a discrimination in favour of a particular sex, that discrimination would be permissible provided it is not only on the ground of sex, or in other words, the classification on the ground of sex is permissible provided that classification is the result of other considerations besides the fact that the persons belonging to that class are of a particular sex, and there is force in the Advocate General’s argument that if Government have discriminated in favour of women in reserving seats for them, it is not only on the ground that they are women, but there are various other considerations which have come into play.....The proper way to construe Article 15(3), in our opinion, is that whereas under Article 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Article 15(3) discrimination in favour of women is permissible, and when the State does discriminate in favour of women, it does not offend against Article 15(1). Therefore, as a result of the joint operation of Article 15(1) and Article 15(3) the State may discriminate in favour of women against men, but it may not discriminate in favour of men against women. In this particular case, 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, in our opinion, the legislation we are considering does not offend against Art. 15(1) by reason of Art. 15(3).”

(14) Later, Gujarat High Court in **B.R. Acharya versus State of Gujarat, (6)** considered the reservation of posts in the institutions where destitute women, unmarried mothers etc. are kept. It was held to the following effect :-

“.....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 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. Incidentally it may be pointed out that Article 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 special provision for women and children’. I, therefore, do not find any substance in the petitioner’s contention that they should be considered to be eligible for promotion to the post of lady Superintendent.”

(15) The Full Bench of this Court examined the scope of Article 15 and 16 in **Shamsher Singh Hukam Singh versus The Punjab State and others, (7)**. After considering the judgment of Bombay High Court in **Dattatraya’s case (supra)**, it was held that Constitution is an organic whole. It has to be read as a whole. It does not mean one thing at one time and another subsequently. After holding so, it proceeded to observe as under :-

“12.Similarly, in *Moss versus Elphick*, (1910) 1KB 465, at page 468, it was laid down that where there are two sections dealing with the same subject-matter, one section being unqualified and the other containing a qualification, effect must be given to the section containing the qualification. When in clause (3) of Article 15, which covers the entire field of discrimination, the framers of the Constitution clearly stated that special provisions may be

(6) 1988 Lab. I.C. 1465

(7) AIR 1970 Pb. & Hy. 372

made in favour of women (even if they amount to discrimination in their favour against men), it would have been needless tautology to reapt the same clause in Article 16, which is only in instance of the same right which has been guaranteed in general and wider terms by Article 15 (1)".

(16) The Court further held that Article 15(3) must be read to mean that only those special provisions for women are permitted which do not result in discrimination against men. It was held that unreasonable provision in favour of women cannot be made under Article 15(3), which would, in effect, either efface the guarantee contained in Article 16(2) or make it illusory. The question posed was answered in the following terms :-

“Articles 14, 15 and 16 being the constituents of a single code of constitutional guarantees supplementing each other, Cl. (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)”.

(17) Supreme Court in **Government of Andhra Pradesh versus P.B. Vijay Kumar, (8)** has examined the scope of clause (3) of Article 15 of the Constitution while examining Rule 22-A introduced in Andhra Pradesh State and Subordinate Service Rules. Such Rules contemplated that in the matter of direct recruitment to posts for which women and men are equally suited, other things being equal, preference shall be given to women and they shall be selected to an extent of at least 30% of posts in each category. It was held that the power conferred under the aforesaid rule is not whittled down in any manner by Article 16. It also held that special provisions 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 fixed at 50% at the maximum. The same reasoning would apply to Article 15(3) which is worded similarly.

The object of making reservation in favour of women was also considered. The Court held to the following effect :-

- “7. 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 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.
9. In the light of these constitutional provisions, if we look at Rule 22-A (2) it is apparent that the rule does make certain special provisions for women as contemplated under Article 15 (3). Rule 22-A(2) provides for preference being given to women to the extent of 30% of the posts, *other things being equal*. This is clearly not a reservation for women in the normal sense of the term. Reservation normally implies a separate quota which is reserved for a special category of persons. Within that category appointments to the reserved posts may be made in the order of merit. Nevertheless, the category for whose benefit a reservation is provided, is not required to compete on equal terms with the open category. Their selection and appointment to reserved posts is independently on their inter se merit and not as compared with the merit of candidates in the open category. The very purpose of reservation is to protect this weak category against competition from the open category candidates.

11. 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 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".

(18) Hon'ble Supreme Court in **Vijay Lakshmi's case** (*supra*) was considering the question whether a decision that woman shall be appointed as Principal of the Government College for Girls is violative of Articles 14 and 15 of the Constitution of India. The Court culled down the following as established propositions of law interpreting Articles 14 to 16-

- “1. Article 14 does not bar rational classification.
2. Reasonable discrimination between female and male for an object sought to be achieved is permissible.
3. Question of unequal treatment does not arise if there are different sets of circumstances.
4. Equality of opportunity for unequals can only mean aggravation of inequality.
5. Equality of opportunity admits discrimination with reasons and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus with constitutionally permissible objects. It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination do not require identical treatment. Equality means the relative equality, namely, the principle to treat equally what are equal and unequally what are unequal. To treat unequals differently according to their inequality is not only permitted but required (**Re: St. Stephen's College versus University of Delhi 1992) 1 SCC 558**)”.
6. Sex is a sound basis for classification.

7. Article 15(3) categorically empowers the State to make special provision for women and children.
8. Articles 14, 15 and 16 are to be read conjointly".

(19) The Supreme Court held that there could be classification between male and female for certain posts and such classification cannot be said to be arbitrary or unjustified. It was held that if separate colleges and schools for girls are justifiable, then rules providing appointment of a lady Principal or teacher would also be justified. Therefore, it held that it would be difficult to hold that the rules empowering the authority to appoint only a lady Principal or a lady Teacher or a lady Doctor or a woman Superintendent are violative of Article 14 to 16 of the Constitution.

(20) Though the Court has referred to another earlier judgment **Toguru Sudhakar Raddy versus Government of A.P., (9)** wherein it was held that reservation beyond 50% for a woman was permissible under Article 15(3) of the Constitution but the said issue need not be examined for the present in further details as none of the parties have addressed this Court on the question of legality of extent of posts to be filled up from amongst women candidates.

(21) In **Rajesh Kumar Gupta versus State of Uttar Pradesh (10)** a Government order dated 3rd August, 2001 was being examined. It provided that 50% of the candidates to be selected shall be from science stream and 50% from the Arts stream and further 50% would be female candidates and 50% would be male candidates. The learned Single Judge of Allahabad High Court which dealt with the matter in the first instance held that reservation of 50% to Arts and 50% to Science group and 50% for males and 50% for females was not warranted by the constitutional provisions, being over and above the constitutional reservations in favour of backward classes.

(22) In appeal, the Division Bench held that Article 15(3) of the Constitution enables the State Government to make special provision for women and children notwithstanding the prohibition contained in Article 15(1). The Court took into consideration that a large number of young girls below the age of 10 years were taught in the primary school and recognizing that it would be preferable that such young girls are taught by women, the

(9) 1993 Supp. (4) S.C.C. 439

(10) AIR 2005 S.C. 2540

reservation of 50% of the posts in favour of the female candidates was held to be justified. The Supreme Court agreed with the aforesaid view of the Division Bench when it held to the following effect :-

“14. The Division Bench took the view that Article 15(3) of the Constitution enables the State Government to make special provision for women and children notwithstanding the prohibition contained in Article 15(1). Particularly viewed in the background of the fact that a large number of young girls below the age of 10 years were taught in the primary school and recognising that it would be preferable that such young girls are taught by women, the reservation of 50% of the posts in favour of female candidates was held to be justified. The classification made was justified and cannot be styled as arbitrary or liable to be hit by Article 14.

15. We agree with the Division Bench of the High Court that there was no violation of Articles 14, 15 and 16 of the Constitution”.

(23) In the aforesaid case, the challenge was to the reservation of posts in favour of female candidates. The question whether the remaining posts are required to be filled up on merit alone was not raised in the said case.

(24) In **Rajesh Kumar Daria versus Rajasthan Public Service Commission**, (11) the Court was considering the validity of horizontal reservation for the category of women. After considering **Indira Sawhney versus Union of India**, [1992 Supp. (3) S.C.C. 217] it was held that a special provision for woman made under Article 15(3) in respect of employment is a special reservation as contrasted from the social reservation under Article 16(4). The method of implementing special reservation, which is a horizontal reservation, cutting across vertical reservations was explained in **Anil Kumar Gupta versus State of U.P.** 1955(5) S.C.C. 173. The Court gave example how the posts for women can be reserved when it observed as under :-

“6. We may also refer to two related aspects before considering the facts of this case. The first is about the description of horizontal reservation. For example, if there are 200 vacancies

and 15% is the vertical reservation for S.C. and 30% is the horizontal reservation for women, the proper description of the number of posts reserved for S.C., should be. "For S.C. 30 posts, of which 9 posts are for women." We find that many a time this is wrongly described thus: "For SC: 21 posts for men and 9 posts for women, in all 30 posts." Obviously, there is, and there can be, no reservation category of "male" or "men".

(25) The method of reservation which has not found favour with the Supreme Court is one which is contemplated in Appendix A to the Rules. The correct method of reservation of posts for women is described as 30 posts of which 9 posts are for women. It necessarily mean that the remaining posts, other than the posts meant for women candidates, are required to be filled up on the basis of merit alone. The Court applied the aforesaid principle in the matter of selection to the Rajasthan Judicial Service in Para No. 9 of the judgment which reads as under :-

"In this case, the number of candidates to be selected under general category (open competition), were 59, out of which 11 were earmarked for women. When the first 59 from among the 261 successful candidates were taken and listed as per merit, it contained 11 woman candidates, which was equal to the quota for "general category women". There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven woman candidates selected on their own merit (candidates at Sl. Nos. 2, 3, 4, 5, 9, 19, 21, 25, 31, 35 and 41 of the selection list) and another eleven (candidates at Sl. Nos. 54, 61, 62, 63, 66, 74, 75, 77, 78, 79 and 80 of the selection list) included under reservation quota for "general category women". This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation".

(26) The issue raised in the present writ petitions is similar which was before the Supreme Court in **Rajesh Kumar Daria's case** (*supra*). The reservation in the matter applied by the Rajasthan Public Service Commission was found to be not sustainable. In the said case, posts were earlier filled up on merit which included women but after such selection, another 11 women candidates were appointed in terms of the Advertisement. Thus women were considered for appointed not only against the posts meant for women but on merit in the General Category as well. 11 women candidates were selected on the basis of merit amongst general candidates. Therefore, filling up of 11 posts from women thereafter were found to be unjustified. The posts reserved for women are horizontal reservation whereas the separate cadre for men and women as in Appendix A creates vertical reservation for men and women which is not permissible.

(27) In **Andhra Pradesh Public Service Commission versus Baloji Badhavath and others**, (12) was held that reservation for women and handicapped etc. is on horizontal basis. It also found that reserve category candidates have two options. If they are meritorious enough to compete with the open category candidates, they are recruited in that category. The candidates below them would be considered for appointment in reserved categories. The Court held to the following effect :-

“43. One other aspect of the matter must be kept in mind. If category wise statement is prepared, as has been directed by the High Court, it may be detrimental to the interest of the meritorious candidates belonging to the reserved categories. The reserved category candidates have two options. If they are meritorious enough to compete with the open category candidates, they are recruited in that category. The candidates below them would be considered for appointment in the reserved categories. This is now a well settled principle of law as has been laid down by this Court in several decisions. (See for example, **Union of India versus Satya Parkash**, (2006) 4 SCC 550 paras 15 to 20; **Ritesh R. Shah versus Dr. Y. L. Yamul**, (1996) 2 SCR 695, SCR at pp. 700-701 and **Rajesh Kumar Daria versus Rajasthan Public Service Commission**, (2007) 8 SCC 785, SCC para 9).

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45. Reservation of women, handicapped, etc. is on a horizontal basis. Reservation to the category of candidates has to be given irrespective of the class or category of candidates. A final selection has to be made. If such a procedure, as directed by the High Court, is to be taken recourse to, the same would give rise to a complexity”.

(28) In **Kasambhai F. Ghanchi versus Chandubhai D. Rajput**, (13) it was held that the reservation is to ensure that specified number of persons belonging to that category become members of the municipality and if a person is elected by more popular votes then he should not be debarred from contesting the election of President when the office is to be filled from reserved category person. It was held as under :—

- “14. The idea of providing reservation for the benefit of the weaker sections of the society is not only to ensure their participation in the conduct of the affairs of the municipality but it is also an effort to improve their lot. The reservation ensures that the specified minimum number of persons belonging to that category become members of the municipality. If because of their popularity a larger number of Scheduled Castes, Scheduled Tribes, Backward Classes or women get elected to the municipality than the number of reserved seats that would be welcome. When the idea is to promote the weaker sections of the society, and to improve their lot, it would be a contradiction in terms if members belonging to that section are debarred from standing to the office of the President because such a candidate is popular enough to get elected from a general constituency”.

(29) Though the aforesaid case was regarding an election to a municipality but the principle laid down in the aforesaid judgment is *pari materia* applicable in respect of public post as well. A candidate who is meritorious is entitled to be appointed against the post without giving him advantage of reservation. It is only when he is not able to seek employment on merit, the question of reservation and appointment comes into play.

(30) Somewhat similar controversy came up for consideration before Rajasthan High Court is case reported as **Miss Neelam Sharma versus Rajasthan Public Service Commission (14)** wherein it was held that a woman candidate who is meritorious is to be appointed not against the post meant for reserved category but on merit. In the aforesaid case, 47 vacancies were for general category out of which 9 vacancies were reserved for women candidates. The cut off marks for women candidate in general category was 154 whereas cut off mark for general male candidate was 148 marks. The writ petitioner obtained 153 marks in the written test but was not called for interview though a candidate called for interview had obtained only 148 marks. Rajasthan Judicial Rules contemplated reservation for women candidates at 30%. It was the case of the writ petitioner that reservation to the extent of 30% would clearly mean that 30% are required to be reserved for women candidates although in case of merit this percentage of reservation can go high as women candidates are also eligible to be appointed in general category without banking upon reservation for men and women. The Court held as under :-

“9.It may be mentioned at the very outset that the sole criteria for reserving or earmarking vacancies for the women candidates, is to have such minimum vacancies to be occupied by women candidates. Reservation for women in service is made so that may have a proper representation in the service. It is keeping in view this object that in the Rules of 1955, 30% seats have been reserved for women candidates. *It is too well-settled that whereas women candidates have to be appointed against the vacancies meant for their quota, their strength in the service can always be more than the reserved seats. In other words, whereas it is not possible to reduce vacancies earmarked for women candidates it shall always be permissible and rather desirable to have more women candidates appointed on the post under consideration. That being so, there would be no bar for women candidates to compete on the basis of their own merit while applying under a*

particular category. A Division Bench of this Court in **Hari Om Awasthi versus Rajasthan Public Service Commission, 2003(3) Raj LRI**, while dealing with Rule 9(3) of the Rules of 1955 itself has held that in case the women candidates are selected on the basis of their own merit in an open competition category, they will not be counted against the quota fixed for them in the reserved category. The facts of the case aforesaid reveal that the Commission had advertised 116 posts of Munsif and Judicial Magistrates under various categories. Some of the petitioners in the case aforesaid had applied in the general category i.e. under the open merit category. Petitioners No. 4 and 5 applied under open merit category as well as under the O.B.C. category. They appeared in the written test held by the Commission and were declared successful in the written examination. They were called for interview as well. After interviews, 97 candidates were selected as against 116 posts and the select list was notified accordingly. Petitioners did not figure in the select list. Aggrieved by their non selection, they filed writ petition in this Court. In support of their writ petition, it was contended on their behalf that the women candidates were selected in excess of the quota prescribed for them and in case they were selected as per the quota, the petitioners would have found their place in the select list. *The aforesaid contention was repelled by observing that learned counsel for the petitioners is labouring under a mistaken belief that the advertisement makes a reservation in favour of the male candidates. As already pointed out, no reservation could be made exclusively for male candidates.....* The Division Bench of this Court then placing reliance upon the judgments of Supreme Court in **Indra Sawhney versus Union of India, 1993(1) SCT 448 (SC) : (AIR 1993 SC 477), R.K. Sabharwal versus State of Punjab, 1995(2) SCT 646 (SC), Ritesh R. Sah versus Dr. Y.L. Yamul, 1996(2) SCT 524 (SC) : (AIR 1996 SC 1378) and Union of India versus Virpal Singh Chauhan, 1995(4) SCT 695 (SC) : (AIR 1996 SC 448)**, held that “it is clear that women candidates who get

selected in the open competition filed on the basis of their own merit, will not be counted against the quota fixed for them in seats or posts reserved for them in different categories. Thus, the argument of the petitioners must be rejected as the Supreme Court has clearly enunciated that the reserved category candidates are entitled to compete for the non-reserved posts and once selected to the said posts, their number cannot be added and taken into consideration for computing the percentage of reservation. The same logic would apply in the case of female candidates selected under reserved categories, after competing with the male candidates, on one hand, and competing exclusively with candidates of their own sex, on the other hand.”
(*Emphasis supplied*)

10. The matter, in view of the Division Bench decision of this Court in Hari Om Awasthi, [2003(3) Raj LR 1] (*supra*) which is based upon a number of Supreme Court judgments referred to above, is thus no more *res integra*. The petitioner herein was entitled to compete with male candidates as well and in case she had obtained cut off marks meant for male candidates to be called for interview, she had also to be treated at par with them and called for interview.....
11. This Court would have examined challenge to lesser cut off marks provided for male candidates as compared to the women candidates but inasmuch as the petitioner deserves to be appointed on the principle that she could not be denied competition in the general category of male candidates, there is no need to deal with this aspect of the case even though this Court would hasten to add that *prima facie*, providing lesser cut off marks for male candidates in general category than that of female candidates of general category appears to be discriminatory and thus violative of Article 14 of the Constitution of India. The same also appears to be against the very object of giving minimum representation as per reservation of the women candidates under the rules.

12. In view of the above discussion, this writ petition is allowed and direction is given to the respondents to issue appointment letter to the petitioner....”

(31) A Division Bench of this Court in case reported as **Lakhwinderjeet Kaur versus State of Punjab and others, (15)** has examined the issue whether the women can be excluded from consideration for appointment to the post of Agriculture Master described in clause 3 (iv) of Appendix B to the Rules. It has been held that such posts cannot be restricted to men alone as the expression person used in Rule 5 is a common gender and by no stretch of imagination it could be confined to only men candidates. The Court concluded as under :—

- “11.There is no provision in the constitution to conclude that post can be reserved for male candidate whereas protective discrimination in favour of female could always be made. Therefore, the right of the petitioner under Article 14 and 16 of the Constitution cannot be violated by adopting an interpretation which is wholly unacceptable”.

(32) In **Rameshwar Parshad’s case (supra)**, a male teacher has sought preparation of joint seniority list for purposes of further promotion. It was found that the petitioner can have a grievance only when a person from their branch is promoted without considering their claim. Though there is no reference to clause (3) of Article 15 but separate cadre for women was not found to be illegal. In **Ranuka Daaiya’s case (supra)**, the petitioner has sought appointment against the post of Science teacher (General Category). The minimum marks fixed for short listing the female candidates were 36 as against 26 fixed for male candidates. The Court found that Appendix A refers separate cadre of teachers for male and female. This has been the position since 1955 and all recruitments have so far been made separately advertising the posts of male and female teachers.

(33) The Court has upheld the bifurcation of cadre into male and female as a part of distribution of number of posts amongst male and female teachers keeping in view separate schools for the male and female students. Similarly in **Mandeepwant Kaur's case** (*supra*), the question examined was-Does the constitution of separate cadres infringe the equality clause as enshrined in the Constitution? Though the Court has found that separate cadres are permissible but the question whether there could be reservation in favour of male candidate was neither raised nor examined in both the above said judgments. The decisions of this court relied upon by the learned counsel for the respondent runs counter to the Supreme Court judgment in **Rajesh Kumar Daria's case** (*supra*). Therefore, the said judgments cannot be said to be binding judgments.

(34) Clause (3) of Article 15 of the Constitution empowers the State Government to make special provision for women and children to uplift their economic and social status. Therefore, fixing posts for women per se cannot be said to be violative of either Article 15 or 16 of the Constitution of India. Such reservation is a horizontal reservation and not vertical reservation as in the Rules. The horizontal reservation for women is in tune with the constitutional mandate and not the vertical reservation. Therefore, creation of vertical reservation for women is not sustainable.

(35) The policy decision of the State Government that girl students studying in exclusively girls schools should be taught by women teachers can not be said to be bad. In fact, the argument of learned counsel for the petitioners is that such reservation is permissible and justified in view of Article 15(3) of the Constitution. Therefore specified number of posts in exclusive girl's schools can be filled from amongst the women candidates. Such policy decision cannot be said to be unjustified. However, whether the extent of number of posts reserved for women is justified or not or it violates the other provisions of the Constitution has not been examined as no such argument was raised before us.

(36) However, in respect of the posts which are said to be meant for men category, we are of the opinion that women cannot be excluded from competing against the posts specified to be filled up from amongst men.

Neither Article 15 nor Article 16 contemplates reservation of posts in favour of men. Such posts are required to be filled in on the basis of merit alone and if on the basis of merit women are meritorious, they are entitled to be appointed against the posts described as reserved for men to the extent of posts meant for women.

(37) As per the judgments mentioned above, a combined merit list of all the candidates is required to be prepared. If on such merit, women candidate are not selected to the extent of posts reserved for them, only then women lower in merit will be selected and appointed to fill up the requisite posts meant for such women candidates. Such course alone will be an act of horizontal reservation and in accordance with the mandate of Articles 14 to 16 of the Constitution of India.

(38) Therefore, we read down Rule 3 and the Appendix A to mean that posts other than the posts meant for female candidates are required to be filled up on the basis of merit without any classification on the basis of sex. Thus the words-Headmaster, Lecturer (Male) and Masters wherever they appear in the Rules will include the persons of both sexes. However, such declaration of law is without examining the extent of reservation in favour of women and that whether such extent of reservation violates any law.

(39) It is since the year 1955, Rules prescribe separate cadre of men and women. Such cadres have been found to be not tenable. Therefore, principles laid down in this judgment shall be applied prospectively. All the previous appointments shall not be reopened or can be said to be invlaid on the basis of law declared by this judgment but all future appointments shall be made on the basis of merit in the manner discussed above.

(40) The petitioners who were initially appointed on merit will be adjusted in the cadre from the date of initial appointment and shall be entitled to pay and allowances and seniority from the dates of their initial appointment with any break in service as leave of the kind due.