their promotion as Inspectors when list 'F' is recast. As I have said above, the petitioner has challenged the promotion of only respondent 3 and 4 in this petition and of no other officer. The particulars with regard to these respondents are that respondent 3 was brought on list 'F' on March 4, 1961, was promoted as Inspector on May 19, 1961, and was further promoted as Deputy Superintendent of Police on December 1, 1967, while respondent 4 was brought on list 'F' on June 11, 1962. promoted as Inspector on November 5, 1962, and further promoted as Deputy Superintendent of Police on January 1, 1968,. When the name of the petitioner was brought on list 'F' on September 21, 1965, evidently these two respondents had gone out of that list because of their promotion as Inspectors of Police and the petitioner's seniority in list 'F' could not be fixed *vis-a-vis* these respondents. The petitioner can, therefore, have no grievance and is not entitled to any relief against them.

(6) The petitioner has been in possession of the seniority list since June 12, 1969, but he has not mentioned, in the writ petition, the names of Sub-Inspector of Police who were on list 'F' on September 21, 1965, when his name was brought on that list and whose seniority qua him had been fixed wrongly. Moreover, the seniority on list 'F' is no more of any importance as the petitioner has already been promoted as an Inspector of Police. His further promotion to list 'G' and the rank of Deputy Superintendent of Police will depend on his performance in the rank of Inspector of Police and not on his seniority in list 'F'. It is, therefore, not possible to grant any relief to the petitioner in this writ petition.

(7) For the reasons given above, I find no merit in this petition which is dismissed but without any order as to costs.

K.S.K.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and S. S. Sandhawalia, JJ.

MRS. RAGHUBANS SAUDAGAR SINGH,—*Petitioner.*

versus

THE STATE OF PUNJAB, ETC.—*Respondents.*

Civil Writ No. 1115 of 1966.

July 23, 1971.

Constitution of India (1950)—*Article* 16(2)—*Interpretation of*—*Disparity of sex detracting from the capacity to hold a particular post*—*Whether can be considered by the State*—*Order of the State Government making*

women ineligible to some posts in men's jails—Whether discriminatory on the ground of sex alone and invalid.

Held, that herein Article 16(2) of Constitution of India has to be viewed and construed in the particular context of the requirements of the public service. One of the paramount considerations for the public service must necessarily be the efficiency of its employees. The State must select and appoint persons most suitable to discharge the duties of a particular job which they are to hold. The main interest to be served is the public interest, not the personal interest of members of the official group concerned. With this object in view, it equally is the function of the State to select an incumbent who is most suitable for the performance of the peculiar duties which attach to a particular post or class of posts. Though no discrimination on the ground of sex alone is permissible in the public service under Article 16(2), it is evident that where disparities of either sex, patently add to or detract from, the capacity and suitability to hold a particular post or posts, then the State would be entitled to take this factor into consideration in conjunction with others. (Para 19)

Held, that inmates of men's jails have a large majority of hardened and ribald criminals guilty of heinous crimes of violence and sex. The duties of the Superintendent and his subordinate officials and warders involve a direct and continuous contact with these inmates. The difficulties which even male warders and other jail officials experience in handling this motely and even dangerous assemblage are too clear to need elaboration. A woman performing these duties in a men's jail would be even in a more hazardous predicament. Hence an order of the State Government making the women ineligible to posts in men's jails other than those of clerks and matrons is not discriminatory on grounds of sex alone. The order is grounded primarily on considerations of efficiency and suitability to hold a particular post. Equally so, it is supportable for reasons of propriety, of public morals, decency and decorum. It cannot be said to be discriminatory on ground of sex alone and hence is valid and immune from challenge.

(Paras 17 and 19)

Case referred by Hon'ble Mr. Justice A. N. Grover on 19th November, 1966 to a larger Bench for decision. The Division Bench consisting of Hon'ble Mr. Justice D. K. Mahajan and Hon'ble Mr. Justice S. S. Sandhawalia finally decided the case on 23rd July, 1971.

Petition under Articles 226 and 227 of the Constitution of India praying that a writ in the nature of mandamus or any other appropriate writ, order or direction be issued rescinding the orders dated 1st March, 1966 and a declaration to the effect that the order of the Governor dated 12th April, 1949 is void being violative of the provisions of Articles 14 and 16 of the Constitution of India and also directing the respondents to fix the petitioner's seniority according to the provisions of Rule 13 of the Punjab Prisons

Service Class II Rules, 1963 and to consider the petitioner's case for promotion on the basis as if the order of the Governor dated 12th April, 1949 is void and without taking into consideration the fact that the petitioner is woman.

BALDEV SINGH KHOJI, ADVOCATE, for the petitioner.

S. K. JAIN, ADVOCATE, for the respondents.

JUDGMENT

SANDHAWALIA, J.—(1) Whether the petitioner Mrs. R. S. Singh has been discriminated against on the ground of sex alone, is the solitary question that has been raised for determination in this civil writ petition, which is before us, on a reference.

(2) Though the facts have been marshalled with lucidity in the referring order of the learned Single Judge, it has, however, become necessary to restate them with particular relevance to the only issue that has been agitated before us. The petitioner was appointed as the Deputy Superintendent, Women's Jail, Lahore (now in West Pakistan) in the year 1941 and was confirmed in that post with effect from July 12, 1943. On January 1, 1947, she was shown at No. 2 in the order of seniority in the cadre of Deputy Superintendents (Class I). In the wake of the partition, the petitioner opted for service in East Punjab and on migration to India she was appointed as the Superintendent, Reformatory School, Dehli on March 4, 1948. The said school was later shifted to Hissar. It was on April 12, 1949, that the Governor of East Punjab made the impugned order (Annexure 'F') in exercise of the powers conferred by section 275 (b) of the Government of India Act, 1935 whereby it was directed that in the Jails Department, women shall be ineligible for appointment to all posts in Men's Jails except the posts of clerks and matrons. The constitutionality of this order after the coming into force of the constitution on January 26, 1950, is the primary issue in the case. There appears no dispute that in the erstwhile State of Punjab after the partition, there existed no regular jail for women. In order to accommodate the petitioner, therefore, a supernumerary post was created with effect from August 15, 1947 to December 17, 1951, and she was absorbed as Superintendent, Reformatory School. She continued to receive increments and admission to a higher revised grade of salary. Subsequently the two Departments, viz., the Reclamation of Criminal Tribes, and Jails, were amalgamated. On

April 4, 1960, the Inspector-General of Prisons addressed a letter to the Home Secretary, Government of Punjab, with reference to the orders of the Government dated March 22nd/23rd March, 1957, to the effect that the petitioner could not be considered for appointment as a Superintendent of Men's Jail by promotion. The Inspector-General took the view that as the petitioner had reached the maximum limit of her grade on December 18, 1959, she could not be promoted in the next higher vacancy. It was suggested that she may be considered for promotion to the Provincial Services which would compensate her for being debarred from further promotion which may be due to her. By means of a notification dated June 21, 1961, the Governor of Punjab accorded sanction to the creation of the Punjab Prison Service which was to include the various posts after classifying them into Class I and Class II as mentioned against each. The petitioner was placed at No. 8 in Class II which included the Assistant Inspector-General as also the Superintendents of Central Jails and District Jails and other officers. In the Punjab Civil List corrected up to January 1, 1962, and January 1963, (Annexures K-1 and K-2) the name of the petitioner appeared at serial No. 11 and 12 respectively amongst the Superintendents, District Jails. However, in the gradation list as it stood on March 1, 1966,—*vide* Annexure 'P', her name was not shown amongst the Superintendents of Jails but it appeared under Reclamation Department with a note 'not encadred with Superintendents of Jails'. On March 29, 1963 the Punjab Prisons Service (Class II) Rules, 1963 came into force after having been promulgated by the Governor in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The primary grievance of the petitioner is that by excluding her name from the cadre of Superintendents of Jails, she has been discriminated against on the ground of sex because her future chances of promotion to a superior post stand adversely affected thereby. This it is alleged is violative of Article 16 of the Constitution and the impugned order (Annexure 'F') dated April 12, 1949, by which she had become ineligible for appointment as Superintendent in Men's Jail, has been assailed as violative of the relevant provisions of the Constitution.

(3) In the affidavit filed in reply, it has been stated that as the petitioner was appointed as Superintendent, Reformatory School, before the control of that institution was transferred to Punjab Jails Department in September 1952, she had ceased to have a lien on any post in the Jails Department with effect from December 17, 1951. It has been averred that there was no regular Women's Jail in existence

in the Punjab during the post-partition period and in fact as a concession to the petitioner and to protect her service interests, the respondent had created a supernumerary post of Deputy Superintendent in the scale of Rs. 450—550 from August 15, 1947 to December 17, 1951.

(4) As regards the position of the respondents on the crucial issue whether the petitioner has been discriminated on the ground of sex alone, it has been averred that the petitioner was appointed as Deputy Superintendent, Camp Jail, Delhi, as a temporary arrangement to deal with Rashtria Sewak Sangh Juvenile and adolescent prisoners from January 1, 1949 to May 26, 1949. It is reiterated that the record for this period shows that the petitioner's appointment in Men's Jail (Camp Jail Delhi) where adult prisoners were also kept, was not considered conducive to the maintenance of discipline and control over the prisoners. According to the assessment of late Shri B. C. Katoch, the then Inspector-General of Prisons, Punjab, the appointment of the petitioner as Deputy Superintendent (Camp Jail, Delhi) was considered to be embarrasing. In 1949, during the R.S.S. Movement she had proved a total failure as a Deputy Superintendent in Men's Jail while dealing with the Rashtria Sewak Sangh political prisoners in Camp Jail, Delhi. The substance of the position of the answering respondent is that the petitioner, for obvious reasons, has been adjudged unsuitable for appointment in the Men's Jail where hardened and ribald prisoners are to be kept in confinement. In regard to the impugned order, it has been expressly pleaded as follows :—

> "The orders of the Governor of Punjab dated April 12, 1949, is not violative of Article 16 of the Constitution. Obviously these orders take into consideration the suitability of persons for discharge of certain duties as distinct from sex. It may be submitted that in passing the said orders the Government were actuated by considerations other than that of sex. Accordingly, the order is valid even after the commencement of the Constitution."

(5) Before us Mr. B. S. Khoji, the learned counsel for the petitioner, with fairness stated that in terms the only issue which now arises in the petition is whether the impugned order of the Governor dated April 12, 1949, was discriminatory *qua* the petitioner on the

ground of sex alone and would hence become void on the enforcement of the Constitution. It has been conceded by the learned counsel on behalf of the petitioner that if the answer to the question is in the negative, then no other point arises for determination and in fact none was argued before us.

(6) It becomes necessary to notice *in extenso* the order, which is the subject matter of challenge—

> "In exercise of the powers conferred by section 275(b) of the Government of India Act, 1935 (as adapted), the Governor of the East Punjab is pleased to order that in the Jail Department women shall be ineligible for appointment to all posts in Men's Jails, except the post of clerks and matrons."

(7) For ease of reference we might also set down below the Article 16(1) and (2) of the Constitution on the specific language of which the attack against the impugned order above-said is based—

> "16 (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."

(8) In considering the primary issue in this case we notice a paucity of Indian authority bearing directly upon the point. Apart from principle, therefore, one may legitimately advert to the decisions of the Supreme Court of the United States on the point of discrimination based on the ground of sex. It has, however, to be borne in mind that the provisions of the United States Constitution do not have a provision which is in *pari materia* with the above quoted provisions of Article 16 of the Constitution. The problem of discrimination between sexes in the United States, therefore, has been dealt with under the guarantee of the "Equal Protection of the Laws Clause" of the Fourteenth Amendment to the Constitution of the United States.

(9) That there are patent physical disparities between the two sexes is so obvious that it would be platitudinous to advert to them

in detail. It suffices to refer to the classic observations of Mr. Justice Brewer speaking for the United States Supreme Court in *Curt Muller* v. *State of Oregon* (1)—

> "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 labor, 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 for 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."

And earlier the learned Judge had remarked—

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

(10) In the United States legislation, based on the classification of sex, coupled with other features as a ground has been repeatedly upheld by its Supreme Court. In *Joseph Radice* v. *People of the State of New York* (2), the constitutionality of a new York State Law which prohibited women from working in restaurants between the hours of 10 at night and 6 in the morning was at issue. Mr. Justice Sutherland noticed that the kind of night work prohibited could injuriously affect the physical condition of women and

(1) 208 U. S. 412.
(2) 264 U. S. 292.

threaten to impair their peculiar and natural functions, and would further expose them to the dangers and menaces incident to night life in large cities. It was held that the statute above-said was not unconstitutional as depriving women of the equal protection of the laws.

(11) In *West Coast Hotel, Company* v. *Earnest Parrish and Elsie Parrish* (3), a narrowly divided Supreme Court by a majority upheld a State of Washington Law entitled Minimum Wages for Women Act which authorised the fixing of minimum wages for women and minors without making any similar provision regarding men.

(12) In *Goesaert Et Al.* v. *Clearly Et. All.* (4), a Michigan Law debarring women from being licensed as bartenders unless such a Woman was the wife or daughter of the male owner of a licensed liquor establishment, was challenged. Upholding the said law Mr. Justice Frankfurter delivering the opinion of the majority of the Court observed as follows:—

> "The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women."

(13) It is evident from the above said authorities that sex is a sound classification and legislation which along with other factors takes the same into consideration, would be immune from constitutional challenge. Nearer home the constitutionality of Section 497 of the Indian Penal Code was challenged for being discriminatory on the ground of sex. Upholding the judgment of the Division Bench of the Bombay High Court and repelling the contention alleging discrimination, in *Yusuf Abdul Aziz* v. *State of Bombay and another* (5), Bose, J., speaking for the Court observed as follows:—

> "Article 14 is general and must be read with the other provisions which set out the ambit of fundamental rights. Sex

(3) 300 U. S. 379.
(4) 335 U.S.R. 464.
(5) A.I.R. 1954 S.C. 321.

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. The two Articles read together validate the impugned clause in Section 497, Penal Code."

(14) Equally obvious it is, however, that the Constitution bars a discrimination on the ground of sex alone. The language of Article 16(2) and Article 15(1), as regards the present point, is in *pari-materia*. In both the Articles salient significance attaches to the use of the word "only". What is forbidden is discrimination on the ground of sex alone. However, when the peculiarities of sex added to a variety of other factors and considerations form a reasonable nexus for the object of the classification, then the bar of Article 15 and 16(2) cannot possibly be attracted. Adverting to this point a Division Bench consisting of Chagla, C.J., and Dixit, J., in *Dattatraya Motiram More* v. *State of Bombay* (6), observed as follows:—

"It must always be borne in mind that the discrimination which is not permissible under Article 15(1) is a discrimination which is only on one of the grounds mentioned in Article 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."

(15) In *Girdhar Gopal* v. *State* (7), Dixist J., whilst upholding the constitutional validity of Section 354, Indian Penal Code observed to the same effect:—

"If the discrimination is based not merely on any of the grounds stated in Article 15(1) but also on considerations of pro-

(6) A.I.R. 1953 Bom. 311.
(7) A.I.R. 1953 M.B. 147.

priety, 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."

(16) Identical views have been expressed by Mukharji J., in *Sri Mahadeb Jiew and another* v. *Dr. B. B. Sen* (8), whilst holding that Order 25 Rule 1, Civil Procedure Code, is not *ultra vires* the Constitution because of infringing the bar of discrimination on the ground of sex. The Division Bench in *Sm. Anjali Roy* v. *State of West Bengal and others* (9), has also reiterated the enunciation of the law above said which now appears to be well settled.

(17) Applying the law can it be said that the impugned order of the Governor making the women ineligible to posts in men's jails other than those of clerks and matrons is discriminatory on the grounds of sex alone? We do not think so. In needs no great imagination to visualise the awkward and even the hazardous position of a woman acting as a warder or other jail official who has to personally ensure and maintain discipline over habitual male criminals. Necessarily the inmates of these jails have a large majority of hardened and ribald criminals guilty of heinous crimes of violence and sex. The duties of the Superintendent and his subordinate officials and warders involve a direct and continuous contact with these inmates. The difficulties which even male Warders and other jail officials experience in handling this motley and even dangerous assemblage are too clear to need elaboration. A woman performing these duties in a men's jail would be even in a more hazardous predicament.

(18) In the particular context of the petitioner's case, it deserves to be highlighted that she was tried as a Deputy Superintendent of Men's Jail and was found wanting. The affidavit of the State in reply is categorical in the following terms:—

"It is, however, a fact that the petitioner was appointed as Deputy Superintendent (Camp Jail Delhi) as a temporary arrangement to deal with Rashtria Sewak Sangh Juvenile and adolescent prisoners from 5th January, 1949 to 26th

(8) A.I.R. 1951 Cal. 563.
(9) A.I.R. 1952 Cal. 825.

May, 1949. The record shows that the petitioner's continued appointment in a Men's Jail (Camp Jail Delhi) where adult prisoners were also kept, was not considered conducive to the maintenance of discipline and control over the prisoners. According to the assessment of late Shri B. C. Katoch, the then Inspector-General of Prisoners, Punjab, the petitioner's continued appointment as Deputy Superintendent (Camp Jail, Delhi), was considered to be embarrasing and consequently Government ordered her reposting as Superintendent, Reformatory School, Delhi, (later shifted to Hissar). Apart from the consideration of unsuitability of petitioner's appointment in Men's Jail, she could not be appointed, as such, under the orders of the Governor of the East Punjab, as already stated in paragraph 2 above."

It is obvious from the above that the unsuitability of the petitioner to perform the functions of Deputy Superintendent or Superintendent of Mens' Jail was patent. Testing the proposition in reverse. it is possible to visualise that in an exclusively women's Jail, the State may for identical considerations consider 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 women inmates of such a jail. Another example was also cited on behalf of the respondents. In exclusively women's educational institutions, the State may well consider to employ woman teachers and employees only to the exclusion of men as in fact has been done in many institutions. We do not think that such reasonable classification (where sex enters as one of the many grounds taken into consideration) having a clear nexus to the object to be achieved is in any way an infringement of the relevant constitutional provision.

(19) Article 16(2) has to be viewed and construed in the particular context of the requirements of the public service. One of the paramount considerations for the public service must necessarily be the efficiency of its employees. The State must select and appoint persons most suitable to discharge the duties of a particular job which they are to hold. Professor D. White in his authoritative work on Public Administration which was noticed with approval by the Supreme Court in *Sant Ram Sharma* v. *State of Rajasthan* (10), has this to say on the point—

"The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while

(10) A.I.R. 1967 S.C. 1910.

maintaining the morale of the whole organisation. The main interest to be served is the public interest, not the personal interest of members of the official group concerned."

With this object in view, it equally is the function of the State to select an incumbent who is most suitable for the performance of the peculiar duties which attach to a particular post or class of posts. Though no discrimination on the ground of sex alone is permissible in the public service under Article 16(2), it is evident that where disparities of either sex, patently add to or detract from, the capacity and suitability to hold a particular post or posts, then the State would be entitled to take this factor into consideration in conjunction with others. We are, therefore, of the view that the impugned order of the Governor was grounded primarily on considerations of efficiency and suitability to hold a particular post. Equally so, it is supportable for reasons of propriety of public morals, decency and decorum. It cannot be said to be discriminatory on ground of sex alone and was hence valid and remains immune from challenge even after the enforcement of the constitution.

(20) In fairness to Mr. B. S. Khoji, we notice that he faintly had sought to place reliance on *Gazula Dasaratha Rama Rao* v. *State of Andhra Pradesh and others* (11), and *Kunj Behari Lal Agarwal* v. *Union of India* (12), but the ratio of neither of these cases is relevant to the point debated before us.

(21) Mr. Jain on behalf of the respondents had relied on an observation in *Yusaf Abdul Aziz's case* (5), for a contention that the impugned order is also saved by the provisions of Article 15(3) of the Constitution. In the view we have taken above, we deem it unnecessary to examine this contention.

(22) The petition, therefore, fails and is dismissed but in the circumstances we make no orders as to costs.

MAHAJAN, J.—I entirely agree.

K.S.K.

(11) A.I.R. 1961 S.C. 564.
(12) A.I.R. 1963 S.C. 518.