



2023:KER:79422

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

FRIDAY, THE 24TH DAY OF NOVEMBER 2023 / 3RD AGRAHAYANA, 1945

OP (KAT) NO. 507 OF 2023

AGAINST THE ORDER DATED 03.11.2023 IN O.A.NO.1772/2023 OF KERALA
ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM

PETITIONER:

DR. ATHIRA P., AGED 30 YEARS,

BY ADVS.
VISHNU BHUVANENDRAN
B.ANUSREE
ABHILASH C.V.
VARUN JACOB

RESPONDENTS:

- 1 STATE OF KERALA, REPRESENTED BY GOVERNMENT PLEADER, HIGH COURT OF KERALA, PIN - 682031.
- 2 THE DIRECTOR, DIRECTORATE OF MEDICAL EDUCATION, THIRUVANANTHAPURAM, PIN - 695011.
- 3 KERALA PUBLIC SERVICE COMMISSION, THULASI HILLS, PATTOM PALACE P.O., THIRUVANANTHAPURAM, PIN - 695004.

BY SENIOR GOVERNMENT PLEADER, SMT.VINITHA B.

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING BEEN FINALLY HEARD ON 24.11.2023, ALONG WITH OP(KAT).521/2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



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O.P (KAT) Nos. 507 and 521 of 2023

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

FRIDAY, THE 24TH DAY OF NOVEMBER 2023 / 3RD AGRAHAYANA, 1945

OP(KAT) NO. 521 OF 2023

AGAINST THE ORDER IN O.A.NO.1846/2023 OF KERALA ADMINISTRATIVE
TRIBUNAL, THIRUVANANTHAPURAM

PETITIONER:

DR.ARYA G.KRISHNAN, AGED 31 YEARS,

BY ADVS.
VISHNU BHUVANENDRAN
B.ANUSREE
ABHILASH C.V.
VARUN JACOB

RESPONDENTS:

- 1 STATE OF KERALA, REPRESENTED BY SECRETARY TO GOVERNMENT,
DEPARTMENT OF HEALTH AND FAMILY WELFARE, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695001.
- 2 THE DIRECTOR, DIRECTORATE OF MEDICAL EDUCATION,
THIRUVANANTHAPURAM, PIN - 695011.
- 3 KERALA PUBLIC SERVICE COMMISSION,
THULASI HILLS, PATTOM PALACE P.O., THIRUVANANTHAPURAM,
REPRESENTED BY ITS SECRETARY, PIN -
695004.

BY SENIOR GOVERNMENT PLEADER, SMT.VINITHA B.

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING BEEN FINALLY HEARD ON 24.11.2023, ALONG
WITH OP(KAT).507/2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



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A.MUHAMED MUSTAQUE & SHOBA ANNAMMA EAPEN, JJ.-----
O.P (KAT) Nos. 507/2023 and 521/2023

"C.R."

Dated this the 24th day of November, 2023**J U D G M E N T****A.Muhamed Mustaque, J.**

Two young lady doctors are before us in these original petitions. They became mothers while they were undergoing post-graduation in MD Radiodiagnosis. Dr.Athira P., the petitioner in O.P.(KAT) No.507/2023 availed maternity leave for six months and Dr.Arya G. Krishnan, the petitioner in O.P.(KAT) No.521/2023 availed maternity leave for four months. They successfully completed post-graduation in the month of December 2022. As a result, their compulsory senior residency programme commenced belatedly. Dr.Athira will complete her one-year compulsory senior residency programme only on 17/01/2024 and Dr.Arya will complete her senior residency programme only by 15/01/2024.



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2. The Kerala State Public Service Commission (PSC) invited applications for the post of Assistant Professor in Radiodiagnosis on 16/10/2023, for 9 vacancies. The last date fixed for receiving the application was 15/11/2023. One of the prescribed qualifications is that candidates should have one year experience as Senior Resident in Radiodiagnosis in a NMC recognised Medical College after acquiring post-graduate degree. As we observed earlier, the petitioners would complete their senior residency programme only in 2024 January. They were not able to apply for the post notified as they did not have the prescribed qualifications as on the last date of receipt of the application. They approached the Secretary to Government (Health and Family Welfare Department) and the Director of Medical Education with a representation. They highlighted their problem that the delay occurred in completing the residency programme is due to the maternity leave availed by them and therefore, they may be permitted to apply for the post as they will complete their senior residency programme before the date of written examination proposed for the selection. The Government did not respond. The petitioners approached the Tribunal. The Tribunal noting that they do not possess the requisite qualification as on the last date of



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receipt of application, held that they cannot be permitted to apply for the post. They came with these original petitions under Article 227 of the Constitution. We, by an interim order, permitted them to apply for the post before the deadline provisionally; accordingly, they applied.

3. These original petitions depict a peculiar problem on the aspiration of women in public employment. And that calls upon us to answer whether becoming a mother entails denial of aspirations in public employment and should women be compelled to choose between career and motherhood. We may have to answer these questions touching upon constitutional principles qua the substantive equality.

4. The biological differences that exist may result in conscious or unconscious bias while developing rules and regulations in the matter of public employment. Our Constitution states about both formal and substantive equality. Formal equality is the result of a conscious approach to treat them equally without there being distinction or differences on gender attributes. Substantive equality on the other hand focuses on the space, if that space is not allowed to exist, it may result in discrimination based on sex. Thus, substantive equality allows us to create



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space, removing barriers that exist in gender attributes and accommodating differences. *Sandra Fredman*, Faculty of Law, Oxford University, in her article "*Substantive equality revisited*"¹ analysed substantial equality after adverting to judgments of US Courts and Canada and stated that right to equality should be capable of responding to real wrongs which must be sensitive to the wrongs experienced by women and other out-groups on account of their status and, further opined as follows:

The right to equality should move beyond a formal conception that likes should be treated alike, a substantive conception resists capture by a single principle. Instead, drawing on the strengths of the familiar principles in the substantive equality discourse, a four dimensional principle is proposed: to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change. Behind this is the basic principle that the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored.

5. Indian Constitution has recognized both formal equality and substantial equality. See the judgment of the Apex Court in

¹ Sandra Fredman, *Substantive equality revisited*, Article in *International Journal of Constitutional Law* · July 2016. (I.CON(2016)Vol.14 No.3,712-738), https://www.researchgate.net/publication/308182296_Substantive_equality_revisited , last visited on 11/12/2023



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Ravinder Kumar Dhariwal v. Union of India, [(2023) 2 SCC 209];

para.37 reads as follows:

37. Article 14 of the Indian Constitution states that “[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. The right to equality under the Indian Constitution has two facets – formal equality and substantive equality. While formal equality means that every person, irrespective of their attributes, must be treated equally and must not be discriminated against; substantive equality is aimed at producing equality of outcomes through different modes of affirmative action. The principle of reasonable accommodation is one of the means for achieving substantive equality, pursuant to which disabled individuals must be reasonably accommodated based on their individual capacities. Disability, as a social construct, precedes the medical condition of an individual. The sense of disability is introduced because of the absence of access to facilities.

6. A woman in employment or in aspiration of employment though stands on equal footing along with men in regard to consideration in the affairs or chances in the public employment, may face disadvantages in having fair opportunities in life due to biological differences. These biological differences may result in indirect discrimination. Indian Courts by and large recognised indirect discrimination and ordered for remedial action.



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7. The Apex Court in **Joseph Shine v. Union [(2019)3 SCC 39]** of India noted that: "In consonance with constitutional morality, substantive equality is "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society. To move away from a formalistic notion of equality which disregards social realities, the Court must take into account the impact of the rule or provision in the lives of citizens."

8. Delhi High Court in **Ravina v. Union of India [2015 SCC OnLine Del 14619]** and **Madhu v. Northern Railway [2018 SCC OnLine Del 6660]** has upheld challenges to conditions of employment, which though appear to be neutral, have adverse effect on one section of society. The Apex Court in **Nitisha v. Union of India [(2021)15 SCC 125]** approved Delhi High Court judgment in the above cases enunciating principles relating to indirect discrimination and in para.52 opined as follows:

52. We must clarify here that the use of the term "indirect discrimination" is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a



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provision, practice or a criterion [Interchangeably referred as "PCP"].]

9. The reproductive rights of a woman are part of the right to life under Article 21 of the Constitution. Reproductive rights of a woman include the right to become a mother or choose not to become a mother. Motherhood is also integral to the dignity of women.

10. The Apex Court in **Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC 1**] acknowledged reproductive choice as a facet of personal liberty. Relevant excerpt from the judgment is provided below:

22. "There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."

11. In an article "Substantial equality and reproductive rights" published by the Center for Reproductive Rights (2014)², states about reproductive rights as follows:

² Center for Reproductive Rights, Newyork.Substantive Equality And Reproductive Rights, A Briefing Paper On Aligning Development Goals With Human Rights



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“Reproductive rights lie at the heart of human rights for women. Because reproductive health services are services that primarily women need, due to their different reproductive capacities, ensuring access to reproductive health services such as contraception, abortion, and maternal health services is essential to ensuring that women can equally exercise their human rights. Upholding reproductive rights is essential to ensuring gender equality for women so that women are able to exercise autonomy and make meaningful choices about their lives, not limited by discrimination or lack of opportunities or possible results and without undue influence or coercion”

And further relates how violation of reproductive rights affects substantial equality as:

“Substantive equality can then also play an important role in analyzing and addressing reproductive rights violations, because substantive equality empowers women to make choices about their own reproductive health and lives while also requiring states to address the historical causes of health-related gender inequalities”

12. Reproductive right of women are explicitly included in Article 16(1) (e) of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which reads as follows:



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Article 16 (1): States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

13. Article 11 of CEDAW then states about non discrimination against women on the grounds of maternity. Article 11(2) is reproduced herewith.

Article 11(2): In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

14. In an article "*Substantial Equality Revisited*"³, Sandra Fredman, referencing the capability theory formulated by Amartya Sen, Indian economist and philosopher and Martha Nussbaum, American philosopher, expressed the viewpoint as;

"Disadvantage can also be understood as a deprivation of genuine opportunities to pursue one's own valued choices. This draws on the insights of the "capabilities" theory developed by

³ Sandra Fredman, Substantive equality revisited, Article in International Journal of Constitutional Law · July 2016. (I.CON(2016)Vol.14 No.3,712-738), https://www.researchgate.net/publication/308182296_Substantive_equality_revisited , last visited on 11/12/2023



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Amartya Sen and Martha Nussbaum. Starting from the premise that each individual should be able to be and do what she values, this theory stresses the importance of considering the extent to which people are actually able to exercise their choices, rather than simply having the formal right to do so. The capabilities approach is richer than equality of opportunity, because it incorporates both individual autonomy and the differing needs of differently situated individuals. It recognizes that it may not be feasible for a person to achieve the goals she values due to social, economic, or physical constraints, as well as due to political interference. "What people can achieve is influenced by economic opportunities, political liberties, social powers and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives. Thus it is not enough to treat everyone equally, since the same treatment of individuals with very different constraints can replicate disadvantage. One of the functions of the right to substantive equality is therefore to redress disadvantage by removing obstacles to genuine choice."

15. Professor Christine A. Littleton in her article "Reconstructing Sexual Equality"⁴ argues that Women's biological and cultural differences from men, regardless of whether they are natural or constructed, are real and significant. Women's inequality, she contends, results when society devalues women because they differ from the male norm. "Acceptance" would reduce

⁴ Christine A. Littleton, *Reconstructing Sexual Equality*, California Law Review, Vol. 75, No. 4 (Jul., 1987), pp. 1279-1337 <https://apmj.pt/files/92/Teoria-Feminista-do-Direito/14/Reconstructing-Sexual-Equality.pdf>, last visited on 11/12/2023



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inequality not by eliminating women's differences but by reassessing the value society accords to traditionally female occupations and lifestyles.

16. In the **Anuj Grag v Hotel Association of India and Others [(2008) 3 SCC 1]**, the Apex Court noted the interplay between stereotype roles and the right to options. Drawing on Professor William's perspective in his article "*The Equality Crisis: Some Reflections on culture, courts and feminism*", the Court articulated its observation in the following manner:

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



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17. As we observed, motherhood is a dignity as well. This Court in **Mini v. Life Insurance Corporation of India [2018 (1) KLT 530]** citing **K.S. Puttaswamy v. Union of India [(2017) 10 SCC 1]** deliberated on the question of whether motherhood is integral to the dignity of women or not. Relevant part of the **Mini's** case (*supra*) reads as follows:

.. The issue involved in this Writ Petition calls for determination based on the status, dignity and self-respect and also on the ground of discrimination. The status essentially involves a question whether motherhood is integral to the dignity of a woman or not. In Justice K.S.Puttaswamy's case (*supra*), the Hon'ble Supreme Court while advertng to the privacy of individual observed that privacy is an essential aspect of dignity. It is further observed that dignity has both intrinsic and instrumental values. According to the Apex Court an intrinsic value of human dignity is an entitlement or a constitutional protection interest in itself. Thus, it was concluded that the family, marriage, procreation and sexual orientation etc., are integral to the dignity of individual. To understand the dignity of a woman, the societal background has to be considered. The value cherished and nourished by a society that matters for recognition of such dignity..

18. Motherhood also produces complex disadvantages. This may result in a gender gap. Non-consideration of disadvantages attributable to motherhood will result in discrimination.



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19. Gender equality has to be realistic. Situational analysis is imperative to bridge the gap of gender differences. If situational reality is not responded to, it may lead to denial of opportunity because of biological factors. Men and women are part of procreation but men have the advantage of having no burden of bearing the womb and will be able to march over women in the public appointments and women will have to face disadvantages of carrying the womb as the period of maternity may operate to her disadvantage. Becoming a mother is not wrong and, pregnancy or motherhood cannot be seen as a burden or clog on the aspiration of women in public employment. The space that addresses the situational reality of a woman is to eliminate adversity and enable women to compete with men on equal parameters. In a substantive approach, the barriers that may come in between the aspirations of women and her motherhood are eliminated. Law and regulations need to address such situational reality of women based on maternity while framing rules and regulations related to public employment.

20. We realize that many situations that may be encountered by women due to maternity cannot be responded to by allowing her to have fair opportunities on account of the scheme of time frame that need to be given priority. Balancing individual rights of women and larger interest of public employment is an exercise that



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has to be carried out by the State or by PSC after adverting to such individual rights of the women. Non advertence itself may result in indirect discrimination.

21. We are not looking at this case for relaxation of necessary qualifications. If the last date for submitting experience of residency programme is extended to those who have been affected by maternity leave, that hurdle faced by women could have been addressed easily. PSC exams will not be over overnight. Written tests and interviews are prescribed for selecting candidates. The candidates' credentials are verified only after examinations and written tests are over. We are not stipulating the timeframe for production of such a certificate. We are only pointing out that if such a certificate can be made available by those candidates who have availed maternity leave, before the rank list is published, the claim of such candidates can be easily accommodated. Balancing public interest by insisting on production of requisite qualifications in the matter of public employment and accommodating individual's need for recognition of fundamental rights is a balancing act to be done by the State or recruiting agencies. Non consideration of such peculiar disadvantages of women, which have got the recognition of



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fundamental rights would entail discrimination towards women. In such a situation, constitutional courts will have to interfere.

In the light of the interim order we passed, making the interim order absolute, we allow the original petitions by setting aside the impugned orders. However, we make it clear that the petitioners will have to produce the experience certificate within such time as PSC insists upon them.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

SHOBA ANNAMMA EAPEN, JUDGE

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APPENDIX OF OP(KAT) 521/2023

PETITIONER'S ANNEXURES:

- ANNEXURE A1 TRUE COPY OF THE MBBS DEGREE CERTIFICATE OF THE PETITIONER ISSUED BY THE KERALA UNIVERSITY OF HEALTH SCIENCES.
- ANNEXURE A2 TRUE COPY OF THE MD DEGREE CERTIFICATE OF THE PETITIONER ISSUED BY THE KERALA UNIVERSITY OF HEALTH SCIENCES.
- ANNEXURE A3 TRUE COPY OF LETTER ISSUED BY HOD DATED 10.10.2022.
- ANNEXURE A4 TRUE COPY OF THE PROCEEDINGS OF THE PRINCIPAL, GOVERNMENT MEDICAL COLLEGE, KOLLAM, ADMITTING THE PETITIONER AS A SENIOR RESIDENT.
- ANNEXURE A5 TRUE COPY OF THE DNB PRACTICAL RESULT OF THE PETITIONER ISSUED BY THE NATIONAL BOARD OF EXAMINATIONS IN MEDICAL SCIENCES.
- ANNEXURE A6 TRUE COPY OF THE NOTIFICATION DATED 16/10/2023 ISSUED BY THE 3RD RESPONDENT.
- ANNEXURE A7 TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DATED 06.11.2023.
- ANNEXURE A8 TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT DATED 06.11.2023.
- EXHIBIT 1 TRUE COPY OF THE ORDER DATED 13.11.2023 PASSED BY THE LEARNED KERALA ADMINISTRATIVE TRIBUNAL IN O.A.1846/2023.
- EXHIBIT 2 TRUE COPY OF THE ORIGINAL APPLICATION NO. 1846/2023 ALONG WITH ANNEXURES THEREIN (ANNEXURES A1 TO A8).

APPENDIX OF OP(KAT) 507/2023

PETITIONER'S ANNEXURES:

- ANNEXURE A1 TRUE COPY OF THE MBBS DEGREE CERTIFICATE OF THE APPLICANT ISSUED BY THE KERALA UNIVERSITY OF HEALTH SCIENCES.
- ANNEXURE A2 TRUE COPY OF THE MD DEGREE CERTIFICATE OF THE APPLICANT ISSUED BY THE KERALA UNIVERSITY OF HEALTH SCIENCES.
- ANNEXURE A3 TRUE COPY OF THE PG ATTENDANCE STATEMENT ISSUED BY THE DEPARTMENT OF RADIO DIAGNOSIS, MEDICAL COLLEGE, THIRUVANANTHAPURAM INDICATING THAT THE APPLICANT AVAILED MATERNITY LEAVE FOR 7 MONTHS.
- ANNEXURE A4 TRUE COPY OF THE PROCEEDINGS OF THE PRINCIPAL, GOVERNMENT MEDICAL COLLEGE, MANJERI, ADMITTING THE APPLICANT AS A SENIOR RESIDENT.
- ANNEXURE A5 TRUE COPY OF THE DNB PRACTICAL RESULT OF THE APPLICANT ISSUED BY THE NATIONAL BOARD OF EXAMINATIONS IN MEDICAL SCIENCES
- ANNEXURE A6 TRUE COPY OF THE NOTIFICATION DATED 16/10/2023 ISSUED BY THE 3RD RESPONDENT.
- ANNEXURE A7 TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE APPLICANT BEFORE THE 1ST RESPONDENT DATED 25.10.2023
- ANNEXURE A8 TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE APPLICANT BEFORE THE 2ND RESPONDENT DATED 25.10.2023
- EXHIBIT P1 TRUE COPY OF THE ORDER DATED 03.11.2023 PASSED BY THE LEARNED KERALA ADMINISTRATIVE TRIBUNAL IN O.A.1772/2023.
- EXHIBIT P2 TRUE COPY OF THE ORIGINAL APPLICATION NO. 1772/2023 ALONG WITH ANNEXURES THEREIN (ANNEXURES A1 TO A8).