R

IN THE HIGH COURT OF KARNATAKA,

DHARWAD BENCH

DATED THIS THE 5TH DAY OF JANUARY, 2024

BEFORE

THE HON'BLE MR JUSTICE ANANT RAMANATH HEGDE

WRIT PETITION NO. 62966 OF 2011 (S-RES)

BETWEEN:

1 . SANJAY M PEERAPUR,

2. SHIVAPPA MARANABASARI,

3. KARNATAKA NURSES ASSOCIATION,
SHET ENCLAVE, NO. 205, 2ND FLOOR,1ST CROSS,
SHIRUR PARK,HUBLI, REP: BY ITS SECRETARY,

...PETITIONERS

(BY SRI MALLIKARJUNSWAMY B HIREMATH, ADVOCATE)

AND:

1 . THE UNION OF INDIA,
MINISTRY OF DEFENCE (ARMY),
R.NO.135A, SOUTH BLOCK, NEW DELHI - 110 001,
BY ITS SECRETARY.

2 . THE HEAD QUARTERS FOR MINISTRY OF DEFENCE,
ARMY ADJUTANT GENERAL'S BRANCH,
DTE GEN. OF MEDICAL SCIENCES (ARMY), DGMS-4B,
ROOM NO. 45,L BLOCK, HUTMENTS,
NEW DELHI - 110001.

3 . THE KARNATAKA STATE NURSING COUNCIL,
NO. 71, NIGHTINGALE TOWERS A STREET,
6TH CROSS, A.R. EXTENSION,
NEAR MOVILAND THEATER,
GANDHINAGAR, BANGALORE - 560 009, INDIA
REP. BY ITS SECRETARY.

4 . THE INDIAN NURSING COUNCIL
COMBINED COUNCILS BUILDING,
KOTLA ROAD, TEMPLE LANE,
OPP. MATA SUNDRI COLLEGE,
NEAR ITO, NEW DELHI -110002,
NEW DELHI, REP. BY ITS SECRETARY.

…RESPONDENTS

(BY SRI M B KANAVI : CGSC FOR R1 AND R2,
SRI SHIVARUDRA, ADVOCATE FOR R3-R4)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO: 1. STURCK DOWN THE WORDS "IF WOMAN" APPERARING IN SECTION 6 OF THE INDIAN MILITARY NURSING SERVICE ORDINANCE 1943. 2. QUASH THE WORD "FEMALE" APPEARING IN THE NOTIFICATION CALLING FOR APPLICATIONS FROM FEMALE CANDIDATES TO BE APPOINTED AS NURSING OFFICERS IN THE INDIA MILITARY SERVICES VIDE NOTIFICATION DATED:13-19th FEBRUARY 2010 AS PER ANNEXURE-B.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 04TH DECEMBER,2023 AND COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

Men are from Mars and Women are from Venus- thus goes the title of one of the popular non-fictions. Both men and women may agree or disagree

with the author's view who also said, one cannot live with them, and cannot live without them.

2. Be that as it may, the Constitution of India which embodies egalitarian principles at its core recognises both men and women as equal. At the same time, the framers of the Constitution being conscious of historical oppression and exploitation suffered by women devised constitutional measures to achieve the constitutional goal of equality by enabling the State to make special provisions for women, under Article 15(3) of the Constitution of India.

3. Yes, we agree that the State is enabled to make special provisions treating women as a 'separate class'. Yet Article 15 (3) cannot override constitutional guarantee under Article 16(2), in the matter of employment under the State. Assuming that Article 15(3) controls Article 16(2), the State cannot provide a hundred percent reservation for women in

employment under the State, is the contention of the petitioners. Thus, the challenge to the *vires* of Section 6 of the *Indian Military Nursing Services Ordinance, 1943 (for short 'Ordinance, 1943')* in so far as providing hundred percent reservation for women in the cadre of 'nursing officers'.

4. **Section 6 of the Ordinance 1943** reads as under.

> 6. Eligibility for appointment -(1) Any citizen of India**, if a woman** and above the age of 21, shall be eligible for appointment as an officer in the Indian Military Nursing Services, and, if she satisfies the prescribed conditions, may be appointed thereto in the manner laid down in section 5.
>
> (Emphasis supplied)

5. When the petition is listed for final hearing, the Union of India has raised a contention that the petition has become infructuous. In support, it is urged that;

(a) The cause of action does not survive as the recruitment process vide impugned notification of the year 2010 has concluded.

(b) Petitioners No. 1 and 2, during the pendency of the petition have crossed the maximum age limit of 35 years prescribed for the post; as such they cannot be recruited as 'nursing officers'.

(c) Petitioner No.3 being an Association has no locus to challenge the vires of the provision.

6. After having considered the submissions on the merits as well as on the objection that the petition by petitioners No.1 and 2 does not survive for consideration on merit, for the following *combined reasons*, the technical objection is overruled and the petition is decided on merits.

(a) The maxim *actus curiae neminem gravabit,* which means that *an act of the court shall*

prejudice none, applies in full measure. Petitioners No. 1 and 2 had a cause of action to challenge the *vires* of Section 6 of the Ordinance, 1943, when the petition was filed in the year 2011. Then petitioners No.1 and 2 were within the prescribed age limit to apply for the post. For the reasons, not attributable to the petitioners, the petition was not listed and heard on merits. In such a scenario, the petition should not be dismissed as having become infructuous, more so in a situation where the *vires* of a provision of law is questioned and a case is made out on merits.

(b) This Court issued *Rule* vide order dated 10.12.2019 even after petitioners No.1 and 2 crossed 35 years. Then, the respondents

did not raise the plea that the petition has become infructuous

(c) Though petitioners No.1 and 2 have crossed the age of 35 years, the relief can be appropriately moulded, and petitioners No.1 and 2 can be permitted to apply for the post, in future, by directing the authority to exclude the time spent in prosecuting this petition while computing the eligibility vis-à-vis the prescribed age.

(d) The dismissal of the petition without answering the question on the *vires* of the impugned provision will keep the issue open and likely to give a cause of action to one or many more petitions in future.

For the reasons assigned above, the petition is considered on merits.

7. Sri Mallikarjunaswami Hiremath, the learned counsel for the petitioners raised the following contentions.

(a) In a matter of public employment, Article 15(3) has no role to play and employment under the State is entirely governed by Article 16 read with Article 14 of the Constitution of India.

(b) Assuming that Article 15 (3) has a role in a matter concerning employment under the State, said Article cannot override Article 16 (2) of the Constitution of India.

(c) The classification based on gender in Section 6 of the Ordinance, 1943 does not pass the twin test of reasonable classification and the rational nexus between the differentia and the object sought to be achieved.

(d) Section 6 of the Ordinance, 1943 was a temporary measure to overcome the emergency prevailing then, and the same has no relevance in today's context and does not conform to part III of the Constitution of India.

The petitioners place reliance on the following judgments: -

(i) Shamsher Singh vs The Punjab State and others – ILR (1970)2, 91.

(ii) Indra Sawhney vs Union of India – AIR 1993 SC 477.

(iii) Amita vs Union of India & Anr. – 2005 (13) SCC 721.

(iv) Jeeja Ghosh and another vs Union of India and others – (2016) 7 SCC 761.

(v) Mississippi University for Women vs Hogan – 458 U.S. 718 (1982).

(vi) K.C. Vasanth Kumar and another vs State of Karnataka – 1985 Supp SCC 714.

(vii) Budhan Choudhry vs State of Bihar – AIR 1955 SC 191.

(viii) Charu Khurana & Ors. vs Union of India & Ors – (2015) 1 SCC 192.

8. The Learned counsel for the respondents Sri M.B. Kanvi defending Section 6 of Ordinance, 1943 raised the following contentions.

(a) Exclusive reservation for women is provided to fill up the contingent temporary vacancy that may arise when the male nursing officers working in hospitals (who are recruited under a separate recruitment process), will be deployed to attend the soldiers during the war.

(b) Exclusive reservation is also provided for men for being employed as nursing officers under a separate recruitment process, as such, in practice there is no discrimination based on gender, and equality is ensured.

(c) Article 15 (3) enables the State to make a special provision for women and the Ordinance, 1943 is protected under the Article, and said Article controls Article 16(2) of the Constitution of India.

(d) The Ordinance, 1943 is protected under Article 33 of the Constitution of India, and in a matter concerning employees in the armed forces, there can be restriction or abrogation of any of the rights under Part III of the Constitution of India.

(e) The petitioners have not questioned the law providing hundred percent reservations for men to the similar post of nursing officers.

The respondents relied upon the following judgments.

(i) Hansraj Moolji vs State of Bombay 1957 AIR 497.

(ii) Union of India vs Prem Kumar Jain 1976 AIR 1856.

(iii) Jasbir Kaur vs Union of India 2004 AIR SC-0293.

(iv) Ram Sarup vs Union of India and another 1965 AIR 247.

(v) Shri Ram Krishna Dalmia vs. Sri Justice S.R. Tendolkar 1958 AIR 538.

(vi) Air India Etc. Etc. vs Nergesh Meerza and others 1981 AIR 1829.

(vii) Indra Sawhney vs Union of India AIR 1993 SC 477.

(viii) M. Nagaraj and others vs Union of India and others 2006.

(ix) Jarnail Singh vs Lachhmi Narain Gupta 2018.

(x) Sant Lal Bharti vs State of Punjab 1988 AIR 485.

9. The questions that need to be answered are;

(a) Whether Section 6 of the *Indian Military, Nursing Services Ordinance, 1943*, reserving the post of 'nursing officers' *en bloc* for women, violates the rights guaranteed under Articles 14,16,19 and 21 of the Constitution of India

(b) Whether the impugned provision is protected under Articles 15(3) and 33 of the Constitution of India.

10. Article 14 of the Constitution of India provides for equality before the law and equal protection of laws within India. Among other Articles in the Constitution, Articles 15 and 16, (relevant for discussion) are the enabling provisions to achieve the goal set out in Article 14.

11. Segregation of unequal to provide permissible protection or accommodation or to confer some advantage to the marginalised section of society is not only desirable but also a constitutional imperative. However, such an obligation has certain limitations. The classification must pass the well-established twin test. Though the Constitution in explicit terms does not specify the tests, in view of a series of judicial pronouncements by the Hon'ble Apex Court of India, the following two tests have acquired the status of a provision in the Constitution of India.

a) The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped from others left out of the group.

b) The differentia must have a rational nexus with the object sought to be achieved by the statute in which such classification is made.

12. Under Article 15(3) of the Constitution of India, women and children are indeed treated as a separate class and the State is enabled under Article 15(3) of the Constitution of India to make special provisions for the benefit of women and children. In other words, there can be a law which discriminates *in favour of women*. This position is well settled. However, the question is to what extent the accommodation in favour of women, by way of a special provision is permissible. Needless to say that the special provision in favour of women should also pass the twin test referred to above.

13. Though, Mr. Kanvi referring to the judgment in ***Shamsher Singh*** supra, urged that Article 15(3) overrides Article 16(2), the ratio in the said judgment does not say so. In ***Shamsher Singh***, the Court has not held that Article 15(3) overrides Article 16(2). In paragraph No. 19, the Court held that

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

14. Thus, the ratio in ***Shamsher Singh*** cannot be construed to hold that Article 15(3) overrides

Article 16(2). It only says Article 15(3) can be invoked to determine 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. What is noteworthy is, in the very same paragraph, it is held that the provisions made under Article 15(3) cannot render Article 16 (2) illusory.

15. The scope of Articles 15 (3) and 16 (2) was also considered in ***Indra Sawhney*** supra. At this juncture, it is relevant to quote para No.514 in ***Indra Sawhney.***

> ***"514.*** *It is necessary to add here a word about reservations for women. Clause (2) of Article 16 bars reservation in services on the ground of sex. Article 15(3) cannot*

save the situation since all reservations in the services under the State can only be made under Article 16. Further, women come from both backward and forward classes. If reservations are kept for women as a class under Article 16(1), the same inequitous phenomenon will emerge. The women from the advanced classes will secure all the posts, leaving those from the backward classes without any. It will amount to indirectly providing statutory reservations for the advanced classes as such, which is impermissible under any of the provisions of Article 16. However, there is no doubt that women are a vulnerable section of society, whatever the strata to which they belong. They are more disadvantaged than men in their own social

class. Hence reservations for them on that ground would be fully justified, if they are kept in the quota of the respective class, as for other categories of persons, as explained above. If that is done, there is no need to keep a special quota for women as such, and whatever the percentage limit on the reservations under Article 16, need not be exceeded."

(emphasis supplied)

16. On a reading of the above-mentioned paragraph, it is evident that in a matter relating to public employment, Article 16(2) governs the field, and Article 15(3) cannot override Article 16(2).

17. In addition, in ***Indra Sawhney***, the Apex Court has held that reservation in public employment cannot exceed more than 50%. Though, said judgment is delivered interpreting Article 16(4) of the

Constitution of India, the principle emanating from the said judgment in so far *percentage of reservation* has to be applied in the matters relating to employment under the State.

18. At this juncture, it is also relevant to state that there may be circumstances where the very nature or place of work, or the persons for whom *the work* is done require only women to be employed. For example, while recruiting employees in girls' or ladies' hostel, or any institution exclusively meant for women, then exclusive reservations in favour of women may find justification.

19. In the case on hand, no such justification is claimed. It is not the defence that the nursing officers appointed under Ordinance 1943, are required to discharge the duty in a hospital exclusively meant for

women or that the nature of work is such that it can be done by only women and not by men.

20. To the pointed question by the Court, whether the nursing officers recruited under Ordinance 1943 are made to work in hospitals where male nursing officers are not allowed, the learned Counsel on instructions submitted that women nursing officers employed under the Ordinance, 1943 are employed in the same or similar hospitals or where male nursing officers recruited under different recruitment provision are also working.

21. Validity of Section 6 of Ordinance, 1943 is also defended on the premise that there is one more law that exclusively provides reservation for men while recruiting nursing officers working under the armed forces, where women are not allowed to apply for the post. It is urged that because of the

exclusive reservation provided for men, in practice gender equality is ensured. This contention is untenable. While recruiting under the Ordinance, 1943 where the employment is reserved exclusively for women, and in recruitment under any other Act which provides exclusive reservation for men, there is no guarantee that the recruitment will take place simultaneously. Not going for recruitment under one Ordinance or law, when the recruitment takes place under another Ordinance or law, and if a particular sex is a disqualification to apply for the post, then it results in denial of an equal opportunity in employment guaranteed under Article 16 of the Constitution. Thus, the contention that the violation complained in view of exclusive reservation for women in Ordinance, 1943 is compensated by exclusive reservations provided for men in another law, in practice, will not ensure equality under Article 14

as there is no mandate that the recruitments should take place simultaneously for both men and women.

22. The contention that the petitioners have not questioned the provision of another Act, or Ordinance which provides exclusive reservation for men is not a ground to dismiss the petition. The constitutional validity of a provision of law or an Act for that matter cannot be upheld because the petitioners have not questioned an Act or a provision which discriminated in their favour. Each law or provision of a law or anything which has a force of law within the meaning of Article 13, must stand on its own strength when *vires* is questioned. The challenge to the *vires* cannot be defended on the premise that *vires* of a similar provision in another enactment has remained unchallenged.

23. Admittedly the Ordinance, 1943 was enacted in the year 1943. This was a colonial law till it was adapted post-independence through the mechanism provided under the Constitution. The preamble of the Ordinance,1943, as it stood in 1943, would reveal that the Ordinance was promulgated to tide over the emergency. The preamble does not indicate what was the emergency prevailing in 1943.

24. The learned counsel appearing for the respondents would contend that in 1943, on account of the Second World War, there was an urgent need to recruit nurses as male nursing officers were deployed on the battlefield. Though, it is urged that the exclusive reservation for women is also provided to encourage women to join the services under the Armed Forces as the women in those days were reluctant to join the Armed Forces, the emergency that was prevailing then in 1943 is no longer there.

Eight decades have elapsed since then. The Act, adapting the Ordinance, 1943 does not spell out the objects and reasons for providing the 100% reservation for women. Nevertheless, assuming that the Ordinance was adapted to encourage women from joining the Armed Forces, no grounds are made out to justify 100% reservation for women.

25. It is not out of place to mention in olden days and even today, it is women who are preferred for nursing jobs. If the women in 1940s were reluctant to join as nursing officers under the military establishments, no case is made out to suggest that such a situation is still prevailing to justify exclusive reservation for women.

26. In justification of exclusive reservation it is urged that during the war, the male nursing officers would be deployed to the war front and some of the

female nursing officers would be made to work in the hospitals in place of male nursing officers who are away in the waterfront. Said contention does not answer the question as to why there should be a hundred percent reservation. Such a requirement of temporarily deploying female nursing officers to a hospital or a place where male nursing officers were working during peacetime is not a justification for exclusive reservation when it is admitted that both male and female nursing officers will work together in the same or similar hospitals during peace period.

27. If the requirement is to ensure that enough women nursing officers are available to deploy them on duty in hospitals to make up for the temporary vacancies arising in a war situation where male nursing officers will be deployed on the battlefield, the course open is to make law for women in such a way that it does not violate guarantee under Article 16(2)

of the Constitution of India. One of the ways probably is to provide reservation for both men and women in both units where as of now the reservation is exclusively provided either for men or women.

28. The underlying philosophy of reservation is to accommodate and include, but not to exclude. However, if such an accommodation which is termed as a reservation, becomes exclusive and hundred percent, without justifiable grounds, then such exclusive reservation ceases to be a reservation in its true sense and it amounts to an exclusion which is not envisaged under the Constitution at all.

29. Women are justifiably considered to be a separate class under the Constitution. However, it does not mean that there can be hundred percent reservations in employment for women to the exclusion of all others when the classification is solely

based on the sex without having any rational nexus to the object sought to be achieved. The law providing for exclusive reservations without any intelligible differentia having nexus to the object sought to be achieved violates the Constitutional guarantee under Article 14 and Article 16 (2) of the Constitution of India and is not saved by Article 15(3) of the Constitution.

30. In a recent judgement in ***ABHAY KUMAR KISPOTTA and others vs STATE OF CHHATTISGARH and others*** in Writ Petition No.7183/2021, the Division Bench of the Chhattisgarh High Court relying on ***Indra Sawhney***'s case has held that hundred percent reservation for women in employment under the State is unconstitutional.

31. The next question that requires consideration is; whether the impugned Section 6 of Ordinance,

1943 is saved by Article 33 of the Constitution of India.

Article 33 reads as under:-

> ***"33.*** *Power of Parliament to modify the rights conferred by this Part in their application to forces, etc.- Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,*
>
> *(a) the members of the Armed Forces; or*
>
> *(b) the members of the Forces charged with the maintenance of public order; or*
>
> *(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or*
>
> *(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau, or organisation referred to in clauses (a) to (c),*
>
> *be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.*

32. On a reading of Article 33, the following will emerge:

(a) The power is conferred *only* on the Parliament to make law, and to determine to what extent the rights conferred under Part III can be restricted;

(b) The power to make law under Article 33 of the Constitution of India is confined to the subjects specified in the said Article.

(c) The law under Article 33 can be made only to ensure the proper discharge of the duties and maintenance of the discipline among the persons named in said Article.

33. The expression "*to what extent any rights conferred by this Part*" appearing in Article 33 makes it clear that there is a limitation on the power. The expression "*be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of*

discipline among them'' appearing in the said Article would also mean that restrictions can be imposed only to achieve the purpose specified in the said Article namely *the proper discharge of their duties and the maintenance of discipline* and not beyond.

34. As already noticed Article 33 empowers the Parliament to make special provisions affecting rights conferred under Part–III. The power is given only to the Parliament and none other. Thus the question is,

"Whether the Ordinance, 1943 is promulgated by the Parliament"? The answer is “No”.

Admittedly, the Ordinance, 1943 was promulgated by the then British Crown, and later, it was adapted under the adaptation laws, Orders 1950. The adaptation of laws, Orders 1950 is by the President in exercise of the power conferred under Clause-2 of Article 372 of the Constitution of India.

The law adapted under Article 372(2) of the Constitution of India, cannot be equated with the law enacted by the Parliament under Article 33 of the Constitution of India. This question was settled as early as 1962 in ***DALBIR SINGH AND OTHERS vs STATE OF PUNJAB*** (AIR 1962 SC 1106).

35. Even otherwise, the subject matter of discussion in this petition does not come under the categories of the subjects enumerated in Article 33 of the Constitution of India. The power conferred under Article 33 to make laws restricting or abrogating the rights conferred under Part - III of the Constitution cannot be extended to make law on any or all matters which are not covered under Article 33. This being the position, the defence that the Ordinance, 1943 is protected under Article 33 of the Constitution of India has no substance.

36. It is necessary to refer to the judgments cited by the learned counsel for the respondents. In ***Hansraj Moolji,*** the Apex Court dealt with the effect of the Ordinance passed before the independence. The said judgment has no application to the present petition as the petitioners admit that the Ordinance was adapted in 1950 as provided under Article 372 (2) of the Constitution of India.

37. Much emphasis is laid on the judgment of the Apex Court in ***Jasbir Kaur vs. Union of India*** to contend that the Ordinance, 1943 is already declared as constitutional. In the said case, the validity of the Regulations made in exercise of the powers conferred under Section 10 of the Ordinance, prescribing different kinds of uniforms to the employees was called into question. The said judgment cannot be said to be a judgment upholding the constitutional validity of impugned Section 6 of Ordinance, 1943.

The Apex Court in the said judgment has only held that there is no scope for the application of Article 14 in a matter relating to uniforms prescribed for the employees of the Indian Military Nursing Service.

38. In ***Ram sarup*** supra, the Apex Court has taken a view that every provision under the Army Act is a law coming under Article 33 of the Constitution of India. The said judgment has no application as Ordinance, 1943 is not a law made by the Parliament.

39. In ***Ramkrishna Dalmia,*** supra the Apex Court has recognised the concept of reasonable classification under the Indian Constitution and when such classification is permissible and to what extent it is permissible.

39. In ***Nargesh Mirza****, supra the* Apex Court was dealing with the service regulations governing employees of Air India, and the said judgment did not

deal with the question of 100% reservation for women in employment.

40. In ***M. Nagaraj,*** supra the Apex Court has considered the questions of the validity of the 77^{th,} 81st, 82^{nd,} and 85th amendments to the Constitution.

41. In ***Jarnail Singh,*** supra the Apex Court was dealing with the question, whether the ratio in ***M. Nagaraj,*** supra is to be revisited by referring to a larger Bench.

42. In ***Santlal Bharti***, supra the Apex Court has held that the challenge to the Constitutional validity of a provision must be considered in the context of the facts and not in the abstract.

43. Having considered the aforementioned judgments, this Court is of the view that the ratio in the aforementioned judgments cannot be made

applicable to the present case to hold that Section 6 of the Ordinance, 1943 is intra vires.

44. For the reasons already recorded, this Court is of the view that exclusive reservation conferred on women while recruiting "nursing officers" under Ordinance, 1943 does violate the rights guaranteed under Articles 14, 16(2), and 21 of the Constitution of India as the classification does not qualify the twin test referred to above.

45. Though it is urged by respondents that the Ordinance, 1943 has been in force for over eight decades and several recruitments have taken place under the said Ordinance, 1943 and holding the said Ordinance as unconstitutional at this point in time leads to several complications in the matters concerning cadre, promotion, and hierarchy of officers, such a contention cannot have any place

when the vires of a provision is questioned. The length of time for which the provision remained unchallenged and the rights and liabilities created under such provision is no defence to uphold the validity of a provision if it is otherwise *ultra vires*. Hence, the petition succeeds.

46. When the law is declared ultra vires, it is void from its inception. However, the Court cannot turn a blind eye to the fact that appointments have been made under the said provisions since 1943 and even during the pendency of this writ petition. The consequences that follow after declaring the expression "*if a woman*" in Section 6 of the Ordinance, 1943 as unconstitutional needs to be clarified to ensure complete justice to those who are not parties to the proceeding.

47. In a situation like the one on hand, a Court that declares a law as ultra-vires, in exercise of its plenary power under Article 226 of the Constitution, can save the rights accrued to the persons under the law which is now declared ultra-vires. Both justice and equity warrant the Court to exercise its plenary jurisdiction, to pass such order.

48. For the reasons recorded supra, this Judgment cannot be construed to hold a view that all appointments made under Ordinance, 1943 as void. Such an interpretation will have far-reaching, undesirable consequences and unsettle many things that have settled long back.

49. Since there is no challenge to the appointments made earlier and to the appointments which have taken place during the pendency of the petition, this Court is of the view that notwithstanding

that provision is held to be ultra-vires, all appointments made hitherto under Ordinance, 1943 and consequences flowing from such appointments are required to be saved and hence saved.

50. Hence the following:

ORDER

(i) The writ petition is **allowed-in-part**.

(ii) The expression "if woman" found in Section 6 of the Indian Military Nursing Services Ordinance, 1943 is struck down as unconstitutional.

(iii) Since, appointments have already taken place under the impugned notification dated 13.02.2010 at Annexure- B, during the pendency of the writ petition, the prayer to quash Annexure - B, the notification for recruiting 'nursing officers' is rejected.

(iv) In case petitioners No.1 and 2 apply for any posts under the Ordinance, 1943 in the future, while computing their age prescribed for applying to the

post, the time spent in prosecuting the petition shall be excluded.

(v) No order as to cost.

Sd/-
JUDGE

CHS