

# SUPREME COURT OF INDIA

Charu Khurana

Vs.

Union of India

WP(Civil)No.78 of 2013

(Dipak Misra and Uday Umesh Lalit,JJ.,)

10.11.2014

## JUDGMENT

**Dipak Misra,J.,**

1. The present writ petition preferred under Article 32 of the Constitution of India, exposes with luminosity the prevalence of gender inequality in the film industry, which compels one to contemplate whether the fundamental conception of gender empowerment and gender justice have been actualised despite number of legislations and progressive outlook in society or behind the liberal exterior, there is a facade which gets uncurtained on apposite discernment. The stubbornness of the 5th respondent, Cine Costume Make-up Artists and Hair Dressers Association (for short, "Association" ) of Mumbai, as is manifest, thought it appropriate to maintain its pertinacity, possibly being determined not to give an inch to the petitioners who are qualified make-up artists by allowing them to become make-up artists as members of the Association on two grounds, namely, they are women and have not remained in the State of Maharashtra for a span of five years. The first ground indubitably offends the concept of gender justice. As it appears though there has been formal removal of institutionalized discrimination, yet the mindset and the attitude ingrained in the subconscious have not been erased. Women still face all kinds of discrimination and prejudice. The days of yore when women were treated as fragile, feeble, dependent and subordinate to men, should have been a matter of history, but it has not been so, as it seems.

2. Fight for the rights of women may be difficult to trace in history but it can be stated with certitude that there were lone and vocal voices at many a time raising battles for the rights of women and claiming equal treatment. Initially, in the West, it was a fight to get the right to vote and the debate was absolutely ineffective and, in a way, sterile. In 1792, in England, Mary Wollstonecraft in "A Vindication of the Rights of Women" advanced a spirited plea for claiming equality for, "the Oppressed half of the Species" . In 1869, "In Subjection of Women" John Stuart Mill stated, "the subordination of one sex to the other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other" . On March 18, 1869 Susan B. Anthony proclaimed "Join the

union girls, and together say, "Equal pay, for Equal work" . The same personality again spoke in July 1871: "Women must not depend upon the protection of man but must be taught to protect themselves" .

3. Giving emphasis on the role of women, Ralf Waldo Emerson, the famous American Man of Letters, stated "A sufficient measure of civilization is the influence of the good women" . Speaking about the democracy in America, Alexa De Tocqueville wrote thus: "If I were asked .... to what singular prosperity and growing strength of that people (Americans) ought mainly to be attributed. I should reply; to the superiority of their women" . One of the greatest Germans has said: "The Eternal Feminine draws us upwards" .

4. Lord Denning in his book Due Process of Law has observed that a woman feels as keenly thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom - develop her personality to the full - as a man. When she marries, she does not become the husband' s servant but his equal partner. If his work is more important in life of the community, her' s is more important in the life of the family. Neither can do without the other. Neither is above the other or under the other. They are equals.

5. At one point, the U.N. Secretary General, Kofi Annan, had stated "Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of reducing poverty, promoting sustainable development and building good governance."

6. Long back Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress."

7. At this juncture, we may refer to some international conventions and treaties on gender equality. The Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, is the United Nations' landmark treaty marking the struggle for women' s right. It is regarded as the Bill of Rights for women. It graphically puts what constitutes discrimination against women and spells out tools so that women' s rights are not violated and they are conferred the same rights.

8. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this Convention and other Declarations and is committed to actualize them. In 1993 Conference, gender-based violence and all categories of sexual harassment and exploitation were condemned. A part of the Resolution reads thus:

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"The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The World Conference on Human Rights urges governments, institutions, intergovernmental and non-governmental

organizations to intensify their efforts for the protection of human rights of women and the girl child.”

(Emphasis supplied)

9. The other relevant International Instruments on Women are : (i) Universal Declaration of Human Rights (1948), (ii) Convention on the Political Rights of Women (1952), (iii) International Covenant on Civil and Political Rights (1966), (iv) International Covenant on Economic, Social and Cultural Rights (1966), (v) Declaration on the Elimination of All Forms of Discrimination against Women (1967), (vi) Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), (vii) Inter-American Convention for the Prevention, Punishment and Elimination of Violence against Women (1995), (viii) Universal Declaration on Democracy (1997), and (ix) Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999).

10. In *Valsamma. Paul (Mrs) v. Cochin University*<sup>1</sup>, a two-Judge Bench observed thus:

"Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are interdependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and an indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth – cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW" ) was ratified by the UNO on 18-12-1979 and the Government of India had ratified as an active participant on 19-6-1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity."

11. Article 1 of the said Convention reads as follows:

"For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of

men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

12. Sub Article (1) of Article 11 of the Convention, which has its own signification, is as follows:

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”

13. On a perusal of the Articles of the aforesaid Convention, it is clear as crystal that apart from right to work being an inalienable right of all human beings, it has commended the right to same employment opportunity, including the application of same criteria for selection in matters of employment and all steps to be taken to eliminate discrimination against women in the field of employment in order to ensure equality among man and woman. It is founded on social security and many other facets.

14. In *Madhu Kishwar v. State of Bihar*<sup>1</sup>, this Court had stated that Indian women have suffered and are suffering discrimination in silence. A poignant line reads thus:

"28. ... Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.”  
(SCC p. 148, para 28)

15. In *Voluntary Health Assn. of Punjab v. Union of Indict*<sup>2</sup>, it has been observed that it would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilised. In the first part of the last century Swami Vivekanand had said:

"Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."

16. In the aforesaid backdrop, we are required to scrutinise the factual exposition and the relief sought. The petitioner no.1 is a Hollywood trained Make-up Artist and Hair Stylist and on 10.01.2009, she submitted an application to the respondent no.5-Association to issue her a membership card as a Make-up Artist and Hair Stylist. She was not allowed to have a card and she was compelled to delete the word Make-up Artist from her application and to apply only as a Hair Dresser. Under this situation, she sent a complaint on 09.07.2009 to many authorities that she was being deprived to work as a make-up artist and in her complaint she mentioned that when she was found working as a make-up artist, she was slapped with a fine of Rs.26,500/-. Being aggrieved by the action, the petitioner no.1 filed a complaint with the 6th respondent, Federation of Western India Cine Employees (for short, "the Federation" ). The respondent no.6, in its turn, sent a communication on 10.07.2009 requiring the 5th respondent to explain the reasons for refusal of membership of the petitioner no.1 as a make-up artist. The other female artists also sent similar complaints to the 6th respondent.

17. As the facts would unfurl, on receipt of the letter dated 10.7.2009 from the respondent no.6, the 5th respondent sent a reply on 01.08.2009. It reads as follows:

"To  
Hon'ble General Secretary,  
Federation of Western India Cine Employees,  
Andheri (West),  
Mumbai.

Sir,

Ref:- Your letter bearing Ref. No.FWICE/CCMA/ 670/2009 Date 10/7/2009.

We are in receipt of your aforesaid letter and in response hereto, we would like to write to you as under:-

1. The complaint made by Charu Khurana is totally incorrect. She had desired to have two cards, viz. Make-up artist Card and Hair-dresser's card. She was duly informed that there was no system of issuing two cards simultaneously. On being appraised of the said position, she of her own deleted the words "Make-up artist" in her application and counter-signed the same and had agreed to apply and take only hair Dresser's card. This is evident from the copy of the application made by Charu

Khurana. A copy of the said application is enclosed herewith for your immediate reference.

2. Insofar as the allegations of alleged discrimination and not issuing of cards to female members as make-up artist, are concerned, it is stated that make-up artist cards are issued only to male members from the date of formation of the Association, no make-up artist card has been issued to female members till date. This is done to ensure that male members are not deprived of working as make-up artists. If the female members are given make-up artist card then it will become impossible for the male members to get work as in make-up artists and they will lose their sources of livelihood and will be deprived of their earnings to support themselves and their families because no one would be interested to engage the services of a male make-up artist if the female make-up artists are available, looking to the human tendency. It would be appropriate to write to you that so far as hair dressers cards are concerned, that is exclusively given to females and never not issued to male members at all. There is absolutely no question of discrimination practiced by us and everybody is given equal opportunity to earn their livelihood by exploiting their best talents.”

18. After the receipt of the said letter, the 6<sup>th</sup> respondent sent a communication dated 12.08.2009 to respondent no.5 stating, inter alia, as follows:

"Here we would like to remind you that the FWICE is non-political organisation which does not allow any discrimination on the basis of religion, caste, community, gender etc. As such, the Gender Discrimination Policy followed by your association against Female Make-up Artistes as mentioned above, is in direct conflict with the basis Aims and Objects of the FWICE, and is a clear act of violation of the Constitution of India and several other laws in force, and also of the FWICE Constitution, and is against the interests of FWICE. Consequently, please be informed that in view of innumerable earlier directives and resolutions from FWICE and AIFCE in the said matter of membership to female make-up artist, we have no other option but to give our permission to Ms. Charu Khurana to work as a make-up artist in Films/TV Serials/Music Albums/ad films till she gets regular membership of your Association. Please note that our said permission shall be valid for all regions affiliated to the All India Film Employees Confederation (AIFEC)”

19. In view of the aforesaid communication, the respondent no.6 vide letter dated 4.9.2009 granted permission to petitioner no.1 to work as Make-up artist in Cine Films/ TV serials etc. till she gets regular membership and this permission was valid for all the regions affiliated to the All India Film Employees Confederation. Thereafter, the 5th respondent intimated the Federation that the decision taken by it was not binding on the Association. In that context, it is stated thus:

"Ms. Charu Khurana had specifically made an application for Hair Dressers Category. It is the rule of association to disallow the female members to work as Make-up

Artists. It is further to note here that Ms. Charu Khurana is also not exception to that the said rule was introduced for the betterment of the association and not to discriminate on the basis of gender. Ms. Charu Khurana has been called for the interview on 11 /09/2009. She did not made herself available for the interview. Her application to the association is still pending with the association. However it's clarifies here that she is not a member of association and hence not allowed to work as a Make-up Artist in any field. Hence your permission to Ms. Charu Khurana to work as Make-up Artist in Film/TV serials/Music Album/Ad films is illegal and I do hereby request you to kindly withdraw the said letter at your earliest and intimate the same to Ms. Charu Khurana immediately. Needless to state here that even if you have chosen to allow her to continue with the work, than the appropriate and strict action will be initiated against her of which please take note of.”

20. The petitioners in the petition have referred to certain conferences held and how the petitioner no. 1 has been treated at other places, but to deal with the lis, it is not necessary to advert to the same. The Association, as has been asseverated, is registered under the Trade Unions Act, 1926 (for brevity, ‘the Act’ ).

21. After notices were issued to the parties, the Registrar of Trade Unions, Maharashtra, respondent no.4 herein, through its counsel submitted that after receiving the complaint from the petitioners, it had taken up the issue with the respondent No.5 and issued directions to delete the clause that has given rise to discrimination, which is not constitutionally permissible, but the Association has not taken any steps.

22. When the matter was taken up on 4th July, 2014, certain aspects were noted, which are as follows:

“It is submitted by Ms. Kalra that the two grounds which are being taken up by this kind of trade unions are that women cannot get the status of make-up persons and they can only practice as hair dressers. It is very fairly put forth by her that the petitioners have no objection if the male artists are called hair dressers as well as make-up men. In essence, the submission of learned counsel is that this differentiation which has been made by the association despite the directions made by the Registrar of Trade Unions have not only let them feel humiliated but also affected their constitutional rights to be treated with equality, apart from the various affirmative provisions contained in the Constitution of India.”

23. To put the controversy to rest, as far as the film industry in Mumbai in the State of Maharashtra is concerned, we have heard Ms. Jyotika Kalra, learned counsel for the petitioners, Mr. L.N. Rao, learned Additional Solicitor General, and Mr. Maninder Singh, learned Additional Solicitor General for Union of India, Mrs. Meenakshi Arora, learned senior counsel for National Commission for Women, Mrs. Asha G. Nair, learned counsel for the State of Maharashtra and Mr. K.H. Holambe Patil, learned counsel for the respondent No.5, the Association.

24. It is submitted by learned counsel for the petitioners that the 5th respondent has incorporated the discriminatory clause as a consequence of which their rights to carry on their avocation is absolutely hampered and there is no such justification for the classification, for the petitioners are qualified to work as make-up artist. It is urged by her unless they have the membership card, they would not be engaged as make-up artist and this has created a hazard in earning their livelihood. It is urged by her that the Association has obstinately been making a distinction between the male and female by categorising them as make-up artists and hair dressers respectively, as a result of which, the women, who are eligible and qualified to become make-up artist, never become make-up artist and only function as hair dressers. The learned counsel would also contend that the women have been harassed at the workplace whenever they get an engagement as a make-up artist. It is also canvassed by Ms. Kalra that the eligibility criteria that he/she must be a resident of Maharashtra for five years is absolutely unconstitutional and despite the direction of the Registrar of Trade Unions, the said clauses are not deleted and hence interference of this Court is called for. It is further put forth by her that similar situation has been prevalent in Tamil Nadu, Andhra Pradesh, Karnataka, Kerala and many other parts of the country.

25. Mr. L.N. Rao, learned Additional Solicitor General submitted that this Court in the case of *Vishaka and Others vs. State of Rajasthan and Others*<sup>4</sup>, has referred to the 1993 Convention and framed certain guidelines regard being had to the sexual harassment at work places. It is contended by him that in Vishaka case, a three-Judge Bench has observed that with the increasing awareness and emphasis on gender justice, there is increase in the effort to guard against such violations and in the present case the discrimination which is founded on the basis of gender deserves to be lanced. It is canvassed by him that the clauses relating to discrimination and the action taken by the Association are squarely hit by Articles 14, 19(1)(g) and 21 of the Constitution of India. It is submitted by the learned Additional Solicitor General that when a trade union is brought into existence, it has to function only after they get a licence from the Registrar of trade union and when the clauses in the constitution of trade union are constitutionally unacceptable, they are under legal obligation to be deleted and it is an unfortunate case that where the Association, the respondent No.5 herein has expressed its adamant propensity not to delete the same. Mr. Rao has also contended that the spirit of Article 39A of the Constitution of India should also be taken into consideration while dealing with the controversy.

26. Ms. Meenakshi Arora, learned senior counsel appearing for the Commission has submitted that this Court while acting as a protector of the rights, should never permit such an Association to perpetuate such kind of illegality, by which the women artists are deprived of employment and that too not for any acceptable or normative reasons, but solely because of some kind of obsessive gender bias.

27. Learned counsel appearing for the respondent No.5 has submitted that the application was not rejected because she was a woman, but on the other grounds. He has drawn our attention to the communication dated 14th December, 2009, to which we shall advert to at a later stage.

28. The sixty-four thousand dollar question that emanates for consideration in this writ petition whether the female artists, who are eligible, can be deprived to work in the film industry as make-up man and only be permitted to work as hair dressers, solely because the Association, the respondent No.5 herein, which is controlled by the Trade Unions Act, 1926, has incorporated a clause relating to this kind of classification and also further stipulated that a person to work must be a resident of Maharashtra for a period of five years and nonchalantly stood embedded on its stand.

29. The unconcerned and insouciant stand is depicted from the communication dated 14.12.2009. The relevant part is as follows:

"We are pleased to inform you that you had applied for the membership as a Hair Dresser on 10 January, 2009. All the Certificates are from Delhi and courses certificates are from Mumbai & Delhi. You had not provided any original documents of Ration card, Telephone Bills or any other proof of been in Maharashtra for 5 years or more than that. You had provided the Xerox Copy of HP Gas Bill, but it is issued on yours mother named, as Mrs. Neelam Khurana. You have Election Card, Passport from Delhi itself. You have provided the bank certificate as a proof of been in Maharashtra for 9 years but Bank can be operated from any part of India. And Bank itself had specifically said that "This certificate is issued at the party's own request without any risk & responsibility on the part of the bank or any of its signing officials."

We are sorry to inform you, as per our Constitution Rules you don't have any residential proof for being in Maharashtra for 5 years. Therefore, your application for membership has been rejected."

The aforesaid letter read in conjunction with the communication made on 01.10.2009 which we have reproduced hereinbefore, have created an impediment on the part of the petitioners to become members of the Association as make-up artists, which has deprived them the access to have employment, despite being qualified, in the films industry/TV serials/music albums/ad films. Their entry at the threshold is banned. The barriers, as is perceivable, are two-fold, first, the petitioners are women, and second, they have not produced the domicile certificates to the effect that they have resided in the State of Maharashtra for five years.

30. First, we shall take up the issue of discrimination on the ground of gender. Article 39A in Part IV of the Constitution that deals with Directive Principles of State Policy, provides that the State shall direct its policies towards securing that the citizens, men and women equally, have the right to adequate means of livelihood. Clause (d) of the said Article provides for equal pay for equal work for both men and women and Clause (e) stipulates that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter into avocations unsuited to their age or strength. In *Minerva Mills Ltd. V. Union of India*<sup>5</sup>, the Constitution Bench has found that the

Fundamental Rights and the Directive Principles are the two quilts of the chariot in establishing the egalitarian social order. In *Society for Unaided Private Schools of Rajasthan V. Union of India and Another*<sup>6</sup>, it has been held that the Court is required to interpret the Fundamental Rights in the light of the Directive Principles. The said principle was reiterated by the Constitution Bench in *Paramati Educational and Cultural Trust (Registered) and Others V. Union of India and others*<sup>7</sup>.

31. In this regard, it is apposite to refer to two passages from *Ramlila Maidan Incident, In Re*<sup>8</sup>, wherein it has been observed thus:

"While these are the guaranteed fundamental rights, Article 38, under the directive principles of State policy contained in Part IV of the Constitution, places a constitutional obligation upon the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice—social, economic and political—shall inform all the institutions of the national life. Article 37 makes the directive principles of State policy fundamental in the governance of the country and provides that it shall be the duty of the State to apply these principles in making laws. With the development of law, even certain matters covered under this Part relating to directive principles have been uplifted to the status of fundamental rights, for instance, the right to education. Though this right forms part of the directive principles of State policy, compulsory and primary education has been treated as a part of Article 21 of the Constitution of India by the courts, which consequently led to the enactment of the Right of Children to Free and Compulsory Education Act, 2009. Article 51-A deals with the fundamental duties of the citizens. It, inter alia, postulates that it shall be the duty of every citizen of India to abide by the Constitution, to promote harmony and the spirit of common brotherhood, to safeguard public property and to abjure violence. Thus, a common thread runs through Parts III, IV and IV-A of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts."

32. The purpose of referring to the same is to understand and appreciate how the Directive Principles of State Policy and the Fundamental Duties enshrined under Article 51A have been elevated by the interpretative process of this Court. The Directive Principles have been regarded as soul of the Constitution as India is a welfare State. At this juncture, it is apt to notice the view expressed by a two- Judge Bench of this Court in *Ashoka Smokeless Coal India (P) Ltd. V. Union of India*<sup>9</sup> wherein it has been laid down that the Directive Principles of State Policy provide for a guidance to interpretation of fundamental rights of a citizen as also the statutory rights.

33. In this context, a reference may be made to Article 51-A. Clauses (e) and (j) and provide as follows:

"(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;"

34. On a condign understanding of Clause (e), it is clear as a cloudless sky that all practices derogatory to the dignity of women are to be renounced. Be it stated, dignity is the quintessential quality of a personality and a human frames always desires to live in the mansion of dignity, for it is a highly cherished value. Clause (j) has to be understood in the backdrop that India is a welfare State and, therefore, it is the duty of the State to promote justice, to provide equal opportunity to see that all citizens and they are not deprived of by reasons of economic disparity. It is also the duty of the State to frame policies so that men and women have the right to adequate means of livelihood. It is also the duty of the citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. In *AIIMS Students' Union V. AIIMS and others*<sup>10</sup>, a three-Judge Bench, while dealing with the reservation in All India Institute of Medical Sciences, observed:

"Pushing the protection of reservation beyond the primary level betrays the bigwigs' desire to keep the crippled crippled for ever. Rabindra Nath Tagore's vision of a free India cannot be complete unless "knowledge is free" and "tireless striving stretches its arms towards perfection". Almost a quarter century after the people of India have given the Constitution unto themselves, a chapter on fundamental duties came to be incorporated in the Constitution. Fundamental duties, as defined in Article 51-A, are not made enforceable by a writ of court just as the fundamental rights are, but it cannot be lost sight of that "duties" in Part IV-A Article 51-A are prefixed by the same word "fundamental" which was prefixed by the founding fathers of the Constitution to "rights" in Part III. Every citizen of India is fundamentally obligated to develop a scientific temper and humanism. He is fundamentally duty-bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. State is, all the citizens placed together and hence though Article 51-A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State."

And, thereafter opined,

"Fundamental duties, though not enforceable by a writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51-A, can serve as a

guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by courts as a tool to tab, even a taboo, on State action drifting away from constitutional values.”

35. From the aforesaid enunciation of law, it is clear as day that the duty of a citizen has been extended to the collective duty of the State. To elaborate, it becomes the duty of the State to provide for opportunities and not to curtail the opportunities.

36. At this juncture, we must appreciably note that Mr. Rao, learned Additional Solicitor General has submitted with all fairness at his command that State is making all efforts to frame such policies so that men and women are treated equally and they can have the rights and means of livelihood and no room is allowed to conceive any gender bias. Learned Additional Solicitor General would submit that the policies are framed by the State to fulfil the goals of the Constitution.

37. Having referred to the aforesaid provisions of the Constitution, and taking note of the submissions, we may presently refer to Articles 14, 19(1)(g) and 21 of the Constitution of India. Article 14 provides that the State shall not deny to any person equality before the law, or the equal protection of laws within the territory of India. Article 19(1)(g) provides that all citizens have the right to practise any profession or to carry on any occupation, trade or business. Needless to emphasise the said right is subject to reasonable restrictions to be imposed, as permissible under Article 19(6) of the Constitution. Article 21 deals with the concept of life, which has been extended to a great extent by this Court.

38. At this stage, it is seemly to note that the Association is not a State under Article 12 of the Constitution of India. It is submitted by Ms. Meenakshi Arora, learned senior counsel appearing for National Commission for Women, that the Association is not a State or may not be amenable to writ jurisdiction under Article 226 of the Constitution of India, but its constitution and the bye-laws which have been accepted/ratified by the Registrar of Trade Unions, who have been authorised by the competent Government cannot violate the mandate of the Act or any of the constitutional commands. In essence, the submission of the learned senior counsel is, it has to be in consonance with the statutory framework and the Association, by incorporating certain stipulations, cannot create a discrimination for women which is contrary to the international treaty, that has been ratified by India and further debar all qualified and eligible women to enter into the film industry to carry their profession as make-up artists, which in the ultimate eventuate, stifle and smother their sources of livelihood. Mr. Rao, learned Additional Solicitor General, supporting the said submission, would further contend that this Court in Vishaka (supra) has clearly observed that violation of Fundamental Rights of gender equality "Right to Life and Liberty" and "right to practise profession" , attract the remedy under Article 32 for enforcement of these fundamental rights of women.

39. Before we dwell upon the relevant provisions of the Act, we may profitably delve into the concept of equality in the backdrop of gender justice. In *Mrs. Neera Mathur V. Life Insurance Corporation of India* and Anr.11, a female candidate was required to furnish information about her menstrual period, last date of menstruation, pregnancy and miscarriage. The Court declared that calling of such information are indeed embarrassing if not humiliating. The Court directed that the employer i.e. Life Insurance Corporation would do well to delete such columns in the declaration. In *Maya Devi*, the requirement that a married woman should obtain her husband's consent before applying for public employment was held invalid and unconstitutional. The Court observed that such a requirement is an anachronistic obstacle to women's equality.

40. In *Mackinnon Mackenzie and Co. Ltd. V. Audrey D' Costa*, the Court was deliberating the issue of equal pay for equal work in the context of female stenographers and male stenographers. Dealing with the aspect of discrimination, the Court opined:

"It may be that the management was not employing any male as a Confidential Stenographer attached to the senior executives in its establishment and that there was no transfer of Confidential Lady Stenographers to the general pool of Stenographers where males were working. It, however, ought not to make any difference for purposes of the application of the Act when once it is established that the lady Stenographers were doing practically the same kind of work which the male Stenographers were discharging. The employer is bound to pay the same remuneration to both of them irrespective of the place where they were working unless it is shown that the women are not fit to do the work of the male Stenographers. Nor can the management deliberately create such conditions of work only with the object of driving away women from a particular type of work which they can otherwise perform with the object of paying them less remuneration elsewhere in its establishment".

41. The aforesaid pronouncement clearly spells out that there cannot be any discrimination solely on the ground of gender. It is apt to note here that reservation of seats for women in Panchayats and Municipalities have been provided under Articles 243(d) and 243(t) of the Constitution of India. The purpose of the constitutional amendment is that the women in India are required to participate more in a democratic set-up especially at the grass root level. This is an affirmative step in the realm of women empowerment. The 73rd and 74th amendment of the Constitution which deals with the reservation of women has the avowed purpose, that is, the women should become parties in the decision making process in a democracy that is governed by rule of law. Their active participation in the decision making process has been accentuated upon and the secondary rule which was historically given to women has been sought to be metamorphosed to the primary one. The sustenance of gender justice is the cultivated achievement of intrinsic human rights. Equality cannot be achieved unless there are equal opportunities and if a woman is debarred at the threshold to enter into the sphere of profession for which she is eligible and qualified, it is well nigh impossible to

conceive of equality. It also clips her capacity to earn her livelihood which affects her individual dignity.

42. Having regard to the aforesaid legal exposition and factually expose, the legal provisions of the Act are to be scanned. Section 5 of the Act provides for application for registration. It stipulates that every application for registration of a trade union shall be made to the Registrar, and shall be accompanied by a copy of the Rules of the trade unions. It is the duty of the Registrar of the Trade Unions to see that no rule is framed by any trade union which is inconsistent with the Act. Section 6 stipulates that a trade union shall not be entitled to registration under the Act, unless the executive thereof is constituted in accordance with the provisions of the Act and the rules thereof. It also provides for certain aspects some of which are, the whole of the objects for which the trade union has been established and the whole of the purposes for which the general funds of the Trade Union shall be applicable. Section 10 deals with the cancellation of registration. It provides that the certificate of registration of a Trade Union can be withdrawn or cancelled by the Registrar if the certificate has been obtained by fraud or mistake or Trade Union has ceased to exist or wilfully and after notice from the Registrar contravened any provision of the Act or allowed any rule to continue in force inconsistent with the provision or rescinded any rule providing for any manner as required by Section 6. At this juncture, it is apt to refer to Sections 21 and 21A, which read as under:-

21. Any person who has attained the age of fifteen years may be a member of a registered Trade Union subject to any rules of the Trade Union to the contrary, and may, subject as aforesaid, enjoy all the rights of a member and execute all instruments and give all acquittances necessary to be executed or given under the rules: 21A - Disqualifications of office-bearers of Trade Unions

(1) A person shall be disqualified for being chosen as, and for being member of the executive or any other office-bearer of a registered Trade Union if-

(i) he has not attained the age of eighteen years;

(ii) he has been convicted by a Court in India of any offence involving moral turpitude and sentenced to imprisonment, unless a period of five years has elapsed since his release.

(2) Any member of the executive or other office-bearer of a registered Trade Union who, before the commencement of the Indian Trade Unions (Amendment) Act, 1964, has been convicted of any offence involving moral turpitude and sentenced to imprisonment, shall on the date of such commencement cease to be such member or office-bearer unless a period of five years has elapsed since his release before that date.]

[(3) In its application to the State of Jammu and Kashmir, reference in subsection (2) to the commencement of the Indian Trade Unions (Amendment) Act, 1964, shall be construed as reference to the commencement of this Act in the said State.]

The aforesaid provisions make it graphically clear that Section 21A only prescribes the age and certain other qualifications. The aforesaid statutory provisions do not make a distinction between a man and woman, and rightly so.

43. As is evincible, the respondent no.5-Association has been registered under the Trade Unions Act having registration No.1871. Its aims and objects are as follows:

- “a) To organize and unite the Motion Picture Costume Artist’ s Make-Up Artist’ s and Hair Dressers and their Assistants with a view to protect their interests.
- b) To secure to the members fair conditions of life and services and to protect them from unfair labour practice in the Trade, keeping the relations with other Trade Unions in the Film Industry.
- c) To try to standardize minimum wages and contractual remuneration, as devised from time to time.
- d) To try by all legal means to redress their grievances.
- e) To endeavour to regulate the relations of the members among themselves as and for their employers, and to secure them fair conditions of life service and career.
- f) To endeavour to secure compensation for members in case of accidents under the Workmen’ s Compensation Act.
- g) To provide the members against unemployment, sickness, infantry, old age if funds permit.
- h) To provide legal assistants to members in respect of matters arising out of or incidental to their employment if in the opinion of the Executive Committee it is found necessary and expedient.
- i) To endeavour to render aid to the members during any strike or lockout brought accident with the sanction of the Association.
- j) To co-operate and federate with other Organisations in India and abroad having similar object.
- k) To help in accordance with Indian Trade

Unions Act, working classes in India and outside in the promotion of the objects mentioned in this clause.

44. The Association has its own bye-laws. Clause 4 of the bye-laws reads as follows:

"Membership: Membership of the Association shall comprise of Make-up men, Costume men, and Hair Dressers who were admitted as members by the Association & who continue to be members 14.4.85 and all those who shall be admitted hereafter under clauses 6 & 7 of the constitution of the Association including the membership in Family Relief fund, provided he/she agrees & abide by the rules & sub-rules that may form by the Association from time to time."

Clause 6 deals with admission of new members. It reads as follows:

**ADMISSION OF NEW MEMBERS:-**

Any person desiring to become the member of the Association who has attained the age of majority of 18 and who possess a good moral character shall send an application in prescribed form and duly recommended by two members with its prescribed fees.

A. Applicant should have been a resident of Maharashtra at least for 5 years.

B. Son or Daughter of members who have completed 15 years of membership shall be eligible to be enrolled as members of the Association, provided they fulfil other conditions relating to age and domicile status of 5 years in the State of Maharashtra.

45. These bye-laws have been certified by the Registrar of Trade Unions in exercise of the statutory power. Clause 4, as is demonstrable, violates Section 21 of the Act, for the Act has not made any distinction between men and women. Had it made a bald distinction it would have been indubitably unconstitutional. The legislature, by way of amendment in Section 21A, has only fixed the age. It is clear to us that the clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, Article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood. In this regard, we may refer to certain authorities. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*<sup>14</sup>, it has been held thus:

"The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive

spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person”

46. In *Olga Tellis v. Bombay Municipal Corpn*<sup>18</sup>. , the Constitution Bench speaking through Chandrachud, C. J., observed thus:

"An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life” .’

47. Recently, in *Centre for Environment & Food Security v. Union of India* , a three-Judge Bench had opined as follows:

"The Framers of the Constitution, in the Preamble to the Constitution, guaranteed to secure to its\ citizens justice social, economic and political as well as equality of status and opportunity but the "right to employment” was not incorporated in Part III of the Constitution as a fundamental right. By judicial pronouncements, the Courts expanded the scope of Article 21 of the Constitution of India and included various facets of life as rights protected under the said article despite the fact that they had not been incorporated by specific language in Part III by the Framers of the Constitution” .

The said views were expressed in the context of the scheme of National Rural Employment Guarantee Act, 2005.

48.

From the aforesaid enunciation of law, the signification of right to livelihood gets clearly spelt out. A clause in the bye-laws of a trade union, which calls itself an Association, which is accepted by the statutory authority, cannot play foul of Article 21.

49. Presently, we shall advert to the law laid down in *Vishaka* case. The Court referred to the 1993 Treaty and opined that the meaning and content of Fundamental Rights in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. In that context, the Court observed thus: "The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions

and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs vs. Teoh*. 128 ALR 535, has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia” . The three-Judge Bench, while noting the increasing awareness on gender justice, took note of the increase in the effort to guard against such violations. The Court observed that when there is violation of gender justice and working woman is sexually harassed, there is violation of the fundamental rights of gender justice and it is clear violation of the rights under Articles 14, 15 and 21 of the Constitution.

50. Thus, the aforesaid decision unequivocally recognises gender equality as a fundamental right. The discrimination done by the Association, a trade union registered under the Act, whose rules have been accepted, cannot take the route of the discrimination solely on the basis of sex. It really plays foul of the statutory provisions.

51. It is absolutely violative of constitutional values and norms.

If a female artist does not get an opportunity to enter into the arena of being a member of the Association, she cannot work as a female artist. It is inconceivable. The likes of the petitioners are given membership as hair dressers, but not as make-up artist. There is no fathomable reason for the same. It is gender bias writ large. It is totally impermissible and wholly unacceptable.

thus:

"What is fundamental, as an enduring value of our polity, is guarantee to each of equal opportunity to unfold the full potential of his personality. Anyone anywhere, humble or high, agrestic or urban, man or woman, whatever be his language or religion, place of birth or residence, is entitled to be afforded equal chance for admission to any secular educational course for cultural growth, training facility, speciality or employment. It would run counter to the basic principle of equality before the law and equal protection of the law if a citizen by reason of his residence in State A, which ordinarily in the commonality of cases, would be the result of his birth in a place situate within that State, should have opportunity for education or advancement which is denied to another citizen because he happens to be resident in State B. It is axiomatic that talent is not the monopoly of the residents of any particular State; it is more or less evenly distributed and given proper opportunity and environment, everyone has a prospect of rising to the peak. What is necessary is equality of opportunity and that cannot be made dependent upon where a citizen resides. If every citizen is afforded equal opportunity, genetically and environmentally, to develop his potential, he will be able in his own way to manifest his faculties fully leading to all round improvement in excellence. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of our founding faith and constitutional creed

” .

52. Recently, in *Nikhil Himthani v. State of Uttarakhand*, the Court, while dealing with eligibility criteria for appointment to the post-graduate medical/dental course, fixed by the Department of Medical Education, Government of Uttarakhand, Dehradun, adverted to clause 2 and 3 which basically related to domicile of Uttarakhand. In the said context, the Court, placing reliance on *Saurabh Chaudri V. Union of India* and in that backdrop, decided the constitutional validity of clauses 1, 2 and 3 of the eligibility criteria in the information bulletin. Clause 5 of the bulletin prescribed that eligible candidates who get selected through NEET-PG 2013/NEET (MDS)-2013 will be given admission on available seats in postgraduate courses according to their rank in State merit list, made available by NBE/MCI/DCI/AIIMS and the seats available at that time. Clause 6 stipulated that having name in the State merit list

eligible candidates provided by MCI/DCI/NBE/AIIMS will not confer the right on the candidate for getting PG seats unless he/she fulfils all the eligibility criteria regarding domicile, reservation policy, provisions of bond, etc mentioned in the information bulletin and/or amendments made thereafter till the time of counselling. Clause 1 of the eligibility criteria stipulated that a candidate must have passed an MBBS examination from Uttarakhand in any of the colleges named therein and must have been admitted through the competitive examination, namely, Uttarakhand State PMT. The petitioner in the said case was not admitted through the Uttarakhand State PMT to the medical college and, therefore, did not fulfil the eligibility criteria for admission to the medical post graduate course under clause 1 of the eligibility criteria. Clause 2 of the eligibility criteria stipulated that the candidates who were domicile of Uttarakhand and passed MBBS examination from medical colleges from other States and were admitted through 15% All India quota, were also eligible for admission to the post graduate medical courses. But as the petitioner was not a domicile of Uttarakhand and passed MBBS examination from a medical college of other States, was not eligible for admission to the post-graduate course. Under Clause 3 of the eligibility criteria, who were domicile of Uttarakhand and had passed MBBS from medical colleges of other States in India, were admitted through pre-medical test conducted by the State Government as they were eligible for admission. While dealing with these clauses, the Court noted the submission of learned counsel for the State of Uttarakhand that as per the Constitution Bench decision in *Saurabh Chaudri (supra)* institutional preference is a matter of State Policy which alone can be invalidated in the event of being violative of Article 14 of the Constitution of India and as the State of Uttarakhand was entitled to make its own Policy with regard to institutional preference, the clauses could not be invalidated. The Court posed the question whether the clauses 1, 2 and 3 of the eligibility criteria in the information bulletin are ultra vires of Article 14 of the Constitution of India. In that context, the Court held: "We are thus of the considered opinion that to exclude the petitioner from consideration on the basis of his merit only on the ground that he was not admitted to the MBBS course through the Uttarakhand PMT would be to deny him equality of opportunity in matter of admission to the postgraduate medical course and to violate his right to equality under Article 14 of the Constitution as explained by this Court in *Pradeep Jain v. Union of India*.

We now come to Clauses 2 and 3 of the eligibility criteria in the Information Bulletin. Under Clauses 2 and 3, a domicile of Uttarakhand who has passed MBBS from a

medical college of some other State having been admitted either through the 15% all-India quota or through the pre-medical test conducted by the State Government concerned has been made eligible for admission to a postgraduate medical course in the State quota. Obviously, a candidate who is not a domicile of Uttarakhand State is not eligible for admission to the postgraduate course under Clauses 2 and 3 of the eligibility criteria. Preference, therefore is given only on the basis of residence or domicile in the State of Uttarakhand under Clauses 2 and 3 of the eligibility criteria and such preference on the basis of residence or domicile within a State has been held to be violative of Article 14 of the Constitution in Pradeep Jain v. Union of India and Magan Mehrotra v. Union of India .

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Thus, it will be clear from what has been held by the three-Judge Bench of this Court in Magan Mehrotra v. Union of India that no preference can be given to the candidates on the basis of domicile to compete for the institutional quota of the State if such candidates have done their MBBS course in colleges outside the State in view of the decisions of this Court in Pradeep Jain v. Union of India. Hence, Clauses 2 and 3 of the eligibility criteria in the Information Bulletin are also violative of Article 14 of the Constitution” .

53. In the case at hand, it does not relate to reservation but relates to having access to employment. Here, as we find the concept of domicile, as stipulated, has no rationale. It invites the frown of Articles 14, 15 and 21 of the Constitution of India. At this juncture, we must note with profit, as submitted by Mr. Rao, learned Additional Solicitor General that in the matter of public employment there has to be special provision. He has drawn our attention to Article 371D(1) of the Constitution. It reads as follows:

“371D. Special provisions with respect to the State of Andhra Pradesh (1) The President may, by order made with respect to the State of Andhra Pradesh, provide, having regard to the requirements of the State as a whole, for equitable opportunities and facilities for the people belonging to different parts of the State, in the matter of public employment and in the matter of education, and different provisions may be made for various parts of the State” .

It is submitted by him that the State is extremely careful to see that equitable opportunities and facilities are provided to all the citizens of the country. Unless the special provision is made, a trade union, which is registered under the statutory provision, cannot make a rule/regulation/bye-law contrary to the constitutional mandate and the statutory authority cannot accept the same. Be it stated, realising this, the Registrar of Trade Unions had directed the 5th respondent to delete the said rules. Despite the said direction, the 5th respondent has not done so.

54. It is really shocking that the respondent no.5 has maintained such an adamant attitude. In ordinary circumstances, the Registrar would have been directed to cancel the registration

but we do not intend to do so. As the clauses relating to the membership and the domicile, namely, clause 4 and 6, are violative of the statutory provisions and the constitutional mandate and taking further note of the fact that the Registrar would have been, in normal circumstances, directed by us requiring the trade union to delete the clauses, we quash the said clauses and further direct that the petitioners shall be registered as members of the 5th respondent within four weeks. It will be the obligation of the Registrar of Trade Unions to see that they are registered as make-up artists. If the Association would create any hurdle, it will be obligatory on the part of the police administration to see that the female make-up artists are not harassed in any manner whatsoever, for harassment of a woman is absolutely unconscionable, unacceptable and intolerable. Our directions close the matter as far as the State of Maharashtra is concerned.

55. Let the matter be listed in the first week of January, 2015, in respect of other States.

Judgment Referred.

<sup>1</sup>(1996) 3 SCC 0545

<sup>2</sup>(1996) 5 SCC 0125

<sup>3</sup>(2013) 4 SCC 0001

<sup>4</sup>(1997) 6 SCC 0241

<sup>5</sup>(1980) 3 SCC 625

<sup>6</sup>(2012) 6 SCC 0001

<sup>7</sup>(2014) 8 SCC 0001

<sup>8</sup>(2012) 5 SCC 0001

<sup>9</sup>(2007) 2 SCC 0640

<sup>10</sup>(2002) 1 SCC 0428

<sup>11</sup>(1992) 1 SCC 0286

<sup>12</sup>(1986) 1 SCR 0743

<sup>13</sup>(1987) 2 SCC 0469

<sup>14</sup>(1981) 1 SCC 0608

<sup>15</sup>(1985) 3 SCC 0545

<sup>16</sup>(2011) 5 SCC 0676

<sup>17</sup>(1987) 3 SCC 0654