
(2016) 05 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : LPA No. 167 of 2014

Anil Kumar Sharma

APPELLANT

Vs

Union of India and

RESPONDENT

Date of Decision : 28-05-2016

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 33

Citation : (2016) LIC 3178

Hon'ble Judges : N. Paul Vasanthakumar, C.J. and Dhiraj Singh Thakur, J.

Bench : Division Bench

Advocate : Z.A. Qureshi, Senior Advocate and Ms. Rehana, Advocate, for the Appellant; S.A. Makroo, ASGI and Ajaz Bedar, Advocate, for the Respondent

Final Decision : Allowed

Judgement

N. Paul Vasanthakumar, C.J.—This appeal is filed against the order of the Writ Court made in SWP No. 1967/2012 dated 30.06.2014

wherein the appellant prayed to quash the selection and appointment of respondents 3 to 5 who were selected as Firemen by respondent No. 2

and for directions, directing the respondents 1 and 2 to select and appoint the appellant for the said post under general category reserved for

handicapped persons in terms of the advertisement notice.

2. The case put forward by the appellant before the Writ Court was that an advertisement was issued on 04.11.2011 by respondent No. 2 for

filling up six vacancies of Fireman. The notified vacancies are Scheduled Caste 2, OBC 1, General Category 3. Applications were received from

the candidates all over India which were scrutinized by the Board of Officers convened by Headquarters 19th Infantry Division. After scrutiny of

applications, call letters were issued to the candidates whose applications were accepted for physical test, written test and interview w.e.f. 8th

August 2012 to 11th August, 2012. The appellant applied as a physically challenged person (deaf). The contention of the appellant was that as per

para 2(b) of the advertisement notice, the vacancies reserved for ESM and P-HP (HH) will have to be adjusted against the respective categories.

The appellant was issued a disability certificate by the Chief Medical Officer, Udhampur certifying that he has disability of hearing and speaking to

the extent of 100%. His application was made under UR (General) category, therefore, as per para 2(b) of the advertisement notice he had to be

considered and adjusted against one post meant for physically handicapped person. According to the appellant, he passed matriculation

examination in the year 2007 from Government Lady Noyce Secondary for the Deaf, New Delhi the examination of which was conducted by

CBSC New Delhi. Certificates were annexed along with the application form. He was treated as a handicapped person by the District

Employment Exchange, Udhampur which also issued identity card to him. According to the appellant after scrutiny of his application form he was

treated as a handicapped person and was asked to participate in the process of selection. He was subjected to outdoor test, written examination

and viva voce conducted on 8th, 10th and 11th of August, 2012. He was declared as successful in all the tests. According to the appellant, in the

viva voce test also certain questions were given to him in writing and he answered the same correctly. In the handicapped category 8 persons had

applied out of which the appellant alone was declared successful in all the tests. After 11th August, 2012 no information was received as to

whether the appellant was selected or not, however, he learnt that three persons arrayed as respondent Nos. 3 to 5 were selected in General

category as if the post reserved for handicapped category has been merged by the authorities in the general category.

3. The appellant represented before the authorities and no answer having been given, he filed the writ petition by contending that post being

available under the physically handicapped category, that too the turn being for deaf as blind was already selected and appointed, by not selecting

him the official respondents have committed an error in selecting respondent Nos. 3 to 5. The said writ petition was opposed by the official

respondents on the ground that appellant being suffering from dual disabilities, namely 100% deaf and 100% dumb, he falls outside the purview of the advertisement issued.

4. The Writ Court accepted the contention of the official respondents and held that appellant having dual disability, he is not satisfying the conditions mentioned in the advertisement, namely, deaf and, therefore, his non-selection is valid.

5. The said order is challenged in this appeal by contending that one post under general category having been reserved for physically handicapped

person, one vacancy has to be filled from the handicapped persons. The appellant having annexed certificate of deaf and dumb to the extent of

100% and he having been called upon to participate in the process of selection, namely, physical test, written examination and viva voce, instead of

selecting him the 5th respondents was selected against the post reserved for handicapped category. The Fireman post is coming under Category-C

and in the written test the appellant secured 19.75 marks out of 150, which were converted in the ratio out of 40 as 5.26. In the interview' the

appellant got 0.30 marks out of 20 and in to he got 45.26 out of 100 marks. According to the appellant Section 33 of the Persons with Disabilities

(Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) and as advertisement made in the employment news

dated 14-20 April, 2012, he is entitled to be selected and appointed, particularly when no minimum marks are prescribed either in the written test

or viva voce for selection.

6. When the matter was listed on 07.10.2015, the learned counsel appearing for the official respondents was directed to file an affidavit to state as

to how many posts were filled up under the physically handicapped category and whether six posts advertised can be treated as posts afresh or

continuation of the posts already filled up and whether any physically challenged person has been given appointment as on date. Pursuant to the

said direction issued, an affidavit on behalf of the official respondents was filed on 03.11.2015 wherein the deponent has stated that for Fire Staff,

in the years 2006 and 2007, 32 persons were appointed of which no vacancy was reserved for physically handicapped persons. In the year 2011,

7 persons were appointed of which one vacancy arose for physically handicapped

category. In the year 2013 five vacancies were carried forward and in the year 2014 one vacancy appointed against High Court order dated 01.07.2014. It is admitted in the affidavit that 3% vacancies are to be filled up under 100 point roster, namely, point Nos. 33, 67 and 100 are reserved for physically handicapped candidates. In the year 2011 one vacancy for physically handicapped candidate arose for recruitment in Fire Staff of 19 Inf. DOU. The availability of the second vacancy for deaf is admitted. In the affidavit it is further stated that appellant applied and he is suffering from 100% speaking disability and 100% hearing disability. During scrutiny of the applications, by over sight, the same was not noticed. It is further stated that keeping in view the nature of job, a fireman requires a high degree of physical strength and swift reaction on hearing of fire alarm raised or passing of orders to fellow firemen in case of emergency or fire breakout. The nature of the job is highly hazardous and requires swift mobility and depends upon ones hearing and speaking ability. It is further stated that the Chief Commissioner of Persons with Disabilities, Ministry of Social Justice and Empowerment by letter dated 11.04.2013 has intimated that as per the nature of the job and duties of fireman may be hazardous and may require swift mobility, the incumbent should be functionally able to complete the assigned task efficiently with aids and appliances whenever necessary. A person with 100% deaf and dumb is not to be appointed as Fireman as intimated vide letter dated 29.07.2013. Along with the affidavit the copy of the letter of the Chief Commissioner dated 11.04.2013 has also been annexed.

7. The learned senior counsel appearing for the appellant argued that the Circular issued by the Court of Chief Commissioner for Persons with Disabilities, Ministry of Social Justice and Empowerment, Department of Disability Affairs dated 11.04.2013 cannot be applied to the vacancies notified prior to the said date and the vacancies in this case having been notified in the year 2011 and the appointments having been made in the year 2012, the official respondents are not justified in contenting that the Circular issued in the year 2013 will apply to the case on hand. Learned counsel also cited two decisions of Honâ??ble the Supreme Court reported in (2003) 4 SCC 524 : (AIR 2003 SC 1623) (Kunal Singh v. Union of India), and (2010) 3 SCC 603 : (AIR 2010 SC (Supp) 674) (Syed Bashir-Ud-

Din Qadri v. Nazir Ahmad Shah and Ors.), and contended that

the Persons with Disabilities Act being a welfare legislation to give benefit to the physically handicapped persons and Section 33 of the Act

mandates not less than 3% of reservation to the physically handicapped persons at the ratio of blind, deaf and orthopedically disabled and the first

post having been given to a blind category person, the second post under physically challenged category has to be given to a deaf person and the

appellant having been certified as 100% deaf, he is fully satisfying the eligibility under the Act. Learned senior counsel also submitted that in the

Circular it is stated that hearing impairment must be above 40% but less than 100%. He relied on Section 33 which nowhere mentioned about the

percentage of disability for appointment.

8. The learned Assistant Solicitor General of India, appearing for the official respondents on the other hand argued that the Circular issued is

clarificatory in nature and the appellant being 100% deaf and also dumb, he is not fit to be appointed as Fireman hence the order of the Writ Court

is not sustainable and the appeal is liable to be dismissed.

9. We have considered the rival submissions.

10. It is not in dispute that the appellant is a deaf person with 100% disability. He is also not able to speak and is 100% dumb. Section 33 of the

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is relevant for deciding the issue raised in this

appeal which reads thus:

33. Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or

class of persons with disability of which one per cent each shall be reserved for persons suffering from -

(i) blindness or low vision:

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:

Provided, that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification

subject to such conditions, if any, as may be specified in such notification,

exempt any establishment from the provisions of this section.

11. The section mandates reservation of not less than 3% of posts in an establishment by appointing physically challenged persons at the ratio of blind (1), deaf (2) and locomotor disability or cerebral palsy (3).

12. On a perusal of the pleadings it is evident that one person in the category of blind was already appointed as a fireman. The next vacancy

available for physically challenged persons is for the deaf category. The only contention of the respondents is that appellant is 100% deaf and

therefore he may not be in a position to effectively discharge his duties as a fireman if he is selected and appointed. When a person with 100%

blind can function as fireman, it is not known as to how the respondents are justified in contending that 100% deaf person cannot function for the

same post. For dousing the fire eye sight is very much essential than hearing. Unless a person is able to see the fire, effective steps cannot be taken

by him to douse the fire and stop it from spreading in the adjacent area.

13. The Act being enacted for welfare of the physically challenged persons i.e. blind deaf and orthopaedically disabled persons, without fixing any

upper percentage of disability for employment, the Circular issued in the year 2013 dated cannot give a restrictive meaning to the physically

challenged persons The Legislature having not fixed any upper limit, stating that 100% blind and 100% deaf person is not eligible, the respondents

cannot take a plea that a person applying for a post under physically challenged quota, namely deaf should be above 40% and below 100% deaf.

The validity of the Circular dated 11.04.2013 need not be gone into this case as the said Circular cannot be applied to the selection which was

initiated in the year 2011 and appointments were made in the year 2012. The restrictive meaning given in the Circular, if applied, will defeat the

purpose for which Section 33 was enacted.

14. Section 2 (I) defines the word "hearing impairment" as follows:

"hearing impairment" means loss of sixty decibels or more in the better year in the conversational range of frequencies.

Section 2 (t) defines a person with disability means a person suffering from not less than forty per cent of any disability as certified by a medical

authority.

15. Thus it is evident that the Act prescribes only minimum disability of 40% and not any maximum disability to disqualify a person of the physically handicapped category to claim i.e. post under the handicapped quota. If a physically challenged person with 100% blind, deaf or immobilized category is not to be appointed as fireman having regard to the type of the work to be carried out, it is for the respondents to seek exemption. Nothing prevented the respondents from seeking exemption from appointing a blind, deaf or orthopaedically handicapped person to the post of fireman as per proviso to Section 33. This Court is aware of the fact that for several sensitive posts the concerned departments have sought exemption and exemptions have also been granted, in the instant case no such exemption has been sought or granted, hence the respondents cannot say that a person with 100% deaf disability cannot be selected or appointed.

16. Honâ??ble the Supreme Court in the decision reported in (2007) 8 SCC 621 : (AIR 2007 SC 3136, para 13) (Mahesh Gupta and Ors. v.

Yashwant Kumar Ahirwar and Ors.) emphasized the need as to how the Act should be interpreted. In paragraph No. 14 it is held thus :

14. Furthermore, when the decision was taken, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation)

Act, 1995 (for short "the 1995 Act") had come into force. In terms of the 1995 Act, the States were obligated to make reservations for

handicapped persons. The State completely lost sight of its commitment both under its own policy decision as also the statutory provision.

The Honâ??ble Supreme Court in the decision reported in (2010) 7 SCC 626 : (AIR 2011 SC (Supp) 449) (Government of India through

Secretary and another v. Ravi Prakash Gupta and another) considered an identical issue wherein a 100% blind candidate appeared in Civil

Services Examination conducted by the Union Public Service Commission in the year 2006. After passing preliminary examination and final

examination, he was called for a personality test and he was placed in SI. No. 5 in the merit list prepared for visually handicapped candidates.

Though there were more than five vacancies available in the visually handicapped category, only one post was offered under the said category on

the ground that other posts were not identified by the Union of India. The said candidate approached the Central Administrative Tribunal and his

claim having been rejected, he approached the Delhi High Court, which allowed the writ petition and gave a direction to give posting to the

petitioner therein, taking note of the mandatory nature of the 3% reservation as provided under Section 33 of the Act. A plea was raised by the

Union of India in the S.L.P. stating that implementation of the provisions of Section 33 of the Act would be only after identification of posts suitable

for such appointment under Section 32. It is held that "to accept such a submission would amount to accepting a situation where the provisions of

Section 33 of the aforesaid Act could be deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court

was rightly rejected". It is also held that the identification of Grade A and B posts in the I.A.S. was undertaken after the year 2005 cannot also be

accepted as neither Section 32 nor Section 33 makes any distinction with regard to Grade B, C and D posts. They only speak of

identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to

exempt any establishment from the provisions of the said Section, having regard to the type of work carried on in any department or establishment.

No such exemption has been pleaded or brought to the notice of the Supreme Court and the Supreme Court held that the said contention is

unsustainable. Thus the plea raised by the respondents is rejected and the respondents are bound to implement 3% reservation to physically

disabled persons in all posts-Group A, B, C or D.

17. From the above judgment it is clear that even 100% blind or deaf cannot be a disqualification to claim the post under the physically

handicapped category. A similar issue was raised before Hon^{ble} the Supreme Court in the decision reported in (2010) 3 SCC 603 : (AIR

2010 SC (Supp) 674, paras 35, 36 & 37) Syed Bashir-Ud-Din Qadri v. Nazir Ahmad Shah and Ors.), wherein the candidate was suffering from

cerebral palsy therefore, the authorities contended that he cannot be continued as Rehbar-e-Taleem in J&K State, stating that his continuance

would be against the interests of the students. The Hon^{ble} Supreme Court having noticed (the definition given in Section 2(p) of the Jammu

and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998, which is identical to the above

referred provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, held that the High

Court decided the matter without bearing in mind the purpose for which the law was enacted. In paragraph Nos. 58, 60 and 61 it is held thus:-

58. The High Court appeared to be insensitive to the fact that as a victim of cerebral palsy, the appellant suffered from a slight speech disability

which must have worsened on account of nervousness when asked to appear before the Court to answer questions. As has been submitted by Mr.

Gonsalves, the intimidating atmosphere in which the appellant found himself must have triggered a reaction which made it difficult for him to

respond to the questions put to him.

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60. We are convinced that the approach of the local authorities, as well as the High Court, was not in consonance with the objects of the 1998 Act

and scheme of the State Government to fill up a certain percentage of vacancies with disabled candidates, and was too pedantic and rigid. The

order of the High Court cannot, therefore, be sustained and has to be set aside.

61. The appeals, accordingly, succeed and are allowed. The impugned order of the High Court and that of the Chief Education Officer, Pulwama,

dated 19th January, 2008, disengaging the appellant from functioning as Rehbar-e-Taleem, are hereby set aside. Consequently, the authorities are

directed to allow the appellant to resume his functions as Rehbar-e-Taleem in the Middle School, Kanjinag, immediately upon communication of

this order with continuity of service from the date of his disengagement as Rehbar-e-Taleem. The period during which the appellant was

disengaged from his service as Rehbar-e-Taleem till the date of his resuming duty in such post shall not be treated as break in service and he shall

be entitled to all notional service benefits for the said period.

18. Applying the principles laid down in the said judgments and having regard to the fact that the appellant applied for the post, participated in the

selection process and is entitled to selection under the physically disabled quota, the respondents are bound to give appointment to the appellant as

there is no minimum marks prescribed for selection in the overall merit i.e. written/oral test.

19. The only issue lingering is that the 5th respondent is already appointed by

not accommodating the candidate from the physically disabled category. The selection having been made in the year 2012 (notified in the year 2011) and having regard to the fact that four years have passed, vacancies are bound to have arisen within this four years period. Hence it is the duty of the respondents to accommodate the appellant as Fireman in any one of the vacant posts, so as to satisfy the requirement of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. If the same is not permissible, necessarily the post assigned to the S¹ respondent shall be given to the appellant as the appellant has established his right to get selected and admittedly the 5th respondent is appointed in the vacancy intended for the appellant. The respondent Nos. 1 and 2 are directed to find out the said fact and decide as to whether the appellant can be accommodated as Fireman in a vacant post or to replace the 5th respondent and appoint the appellant in his place as Fireman. Respondent Nos. 1 and 2 are directed to pass the said order within a period of two months from the date of receipt of copy of this order.

20. The appeal is allowed in the above terms. No costs.