
(2012) 11 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : LPA No. 126 of 2011

Chairman J. and K. S.S.R.B.

APPELLANT

Vs

Ghulam Hassan Bhat

RESPONDENT

Date of Decision : 02-11-2012

Acts Referred:

Jammu and Kashmir (Persons with Disabilities Equal opportunities, Protection of Rights and Full Participation) Act, 1998 — Section 21, 22

Citation : (2013) LabIC 1043

Hon'ble Judges : M.M. Kumar, C.J;Hasnain Massodi, J

Bench : Division Bench

Advocate : M.I. Qadri, General, for the Appellant; R.A. Gadda, for the Respondent

Final Decision : Allowed

Judgement

Hasnain Massodi, J.—Letters Patent Appeal on hand is directed against writ court judgment dated 8-12-2010 in SWP No. 687/2008 titled

Gh. Hassan Bhat v. State of Jammu and Kashmir and others, whereby writ court has directed the appellants ""to consider and offer appointment to

the petitioner to the post of teacher"" and conclude the exercise within two months from the date of copy of the order was served on them. The

appeal arises against the following factual backdrop.

2. The appellant-Board vide Notification No. 10 of 2005 dated 29-12-2005 advertised 489 posts of teachers. In terms of the notification, 279

out of 489 posts were set apart for open merit category whereas 39, 49, 98, 15 and 19 posts were identified for SC, ST, RBA, ALC and OSC

categories respectively. Furthermore 6% and 3% vacancies were earmarked across the board for Ex-Servicemen and Physically handicapped

candidates respectively.

3. The respondent/writ petitioner responded to the Advertisement Notice under open merit Category though he claimed benefit of horizontal

reservation under Handicapped category. The respondent/writ petitioner in his application form, claimed to suffer from visual disability (40%

impairment in right eye) and therefore entitled to be considered for appointment against one of the vacancies reserved for handicapped category.

4. The respondent/writ petitioner did not find place in the select list published by the Appellant-Board on completion of the selection process.

Aggrieved with his non-selection, he approached the court with the writ petition - SWP No. 687/2008 and sought a writ of mandamus

commanding the respondents to appoint him as teacher under handicapped category. The respondent/writ petitioner's case was that in terms of J.

& K. Persons with Disability (Equal Opportunity, Protection of Rights and Full Participation) Act, 1998 ("the Act" for short) the appellant Board

was under statutory obligation to select 13 out of 489 advertised posts under handicapped category and that as against 13 only 8 candidates were

selected against the said category 5 posts under the category were left unfilled. The respondent/writ petitioner insisted that as he was eligible for the

advertised post and in terms of the certificate issued by the Medical Board, suffered from disability within meaning of the Act, he had a right to be

considered for appointment against one of the left out 5 posts. The respondent/writ petitioner was also aggrieved that the appellant-Board

erroneously ignored him on the ground that he was suffering from total blindness and therefore not entitled to be considered under the said

category. It was pleaded that the Medical Board and not the Chairman, J. & K.S.S.R.B was competent to determine extent of his disability.

5. The writ petition was opposed by the appellants on the ground that the respondent had secured only 20.65 points as against 49.20 points fixed

as cut off points in the handicapped category and therefore did not deserve to be selected for advertised post. The appellants insisted that the

respondent was considered alongside all eligible candidates under the handicapped category and was not selected as his merit was far below to the

merit of last selected candidate.

6. The writ court vide judgment dated 8-12-2010 allowed the writ petition and

directed the respondents to consider and offer appointment to the respondent to the post of teacher. The writ court was of the view that in terms of section 22 of J. & K. Persons with Disability (Equal Opportunity, Protection of Rights and Full Participation) Act, 1998, a candidate with visual disability was also to be appointed and as the appellant Board had not selected any candidate under visually disabled category the respondent irrespective of his merit, was to be considered and appointed against the advertised post under said category.

7. The writ court judgment is questioned in the present Letters Patent Appeal on the grounds set out in the memorandum of appeal. It is pleaded that in the event the writ court judgment is allowed to operate, all the handicapped category candidates who secured merit more than that of the respondent and less than the cut off merit, are required to be considered for appointment against the advertised posts. It is further pleaded that all the posts set apart for the handicapped category have been duly filled up and it is no more possible for the appellants to implement the judgment and select the respondent against a non-existing post.

8. We have gone through the memo of appeal as well as writ record. We have heard Ld. Counsel for the parties.

9. Sections 21 and 22 of the Act, read conjointly, lead to the conclusion that in order to make the reservation under handicapped category

operational, the Government has to identify posts in the establishment which can be reserved for the persons with disability and review the list of

posts so identified after periodical intervals. It is only after a post is identified that a handicapped person satisfying the requirement of rules gets a

right to be considered for appointment against a vacancy reserved for handicapped category. The Government is under an obligation to set apart

3% of the available posts identified in terms of section 21 of the Act, for candidates under handicapped category. The aforesaid reservation is to

be sub-divided amongst the persons suffering from (i) blindness or low vision (ii) hearing impairment and (iii) locomotor disability or cerebral palsy.

10. It follows that if a post say of Junior Assistant is identified by the Government as the post which can be reserved for persons with disabilities

and at a given point of time 100 vacancies of teachers are advertised under open merit category, three vacancies out of advertised vacancies are to

be set apart for candidates under handicapped category and out of the three posts reserved, one each has to go to persons with (i) blindness or low vision (ii) hearing impairment and (iii) locomotor disability or cerebral palsy. However, the Government is vested with the power to restrict the post reserved under handicapped category to one or more of sub-categories. In other words the Government is well within its powers to direct that post in the establishment identified for the purpose of reservations for persons with disabilities, may be earmarked only for the candidates suffering from hearing impairment or blindness or locomotor disabilities or two of such disabilities having regard to the type of work carried on in any department or establishment.

11. The State Government vide Government Order No. 62-SW of 2001 dated 13-3-2001 in terms of section 21 of the Act. identified the post of teacher for reservation for the handicapped persons with partial hearing impairment and one leg disability. The persons suffering from blindness or low vision were left out and not identified for appointment as teacher under handicapped category. It follows that a person suffering from visual disability could not claim consideration under Handicapped category for the post of teacher.

12. The respondent suffers from visual disability (40% impairment in right eye) and in terms of Government Order No. 62-SW of 2001 dated 13-3-2001 could not claim benefit of reservation under handicapped category. The State Government vide Government Order No. 231-SW dated 22-12-2011 has included blindness and low vision in the list of disabilities that make a person entitled to reservation under handicapped category for the post of teacher. However, the aforesaid Government order is prospective in character and cannot be of any help to the respondent as in terms of Government Order No, 62-SW of 2001 in force on the date of selection process was initiated and concluded, the respondent was not entitled to any reservation under handicapped category.

13. The above discussion apart, the respondent never pleaded before the writ court that the candidates suffering from visual disability were not given their share out of the vacancies proposed to be filled up from handicapped category. The appellant did not question the Government Order No. 62-SW of 2001 dated 13-3-2001 whereunder the post of teacher was not

reserved for the persons with visual disability but restricted to partial hearing impairment and one leg disability. The appellants' case on the other hand was that out of 489 advertised teacher posts, 13 posts were to be set apart for handicapped category candidates and that as the respondent only filled up 8 posts. 5 posts under said category were available and the respondent could be considered against one of such posts. Be that as it may, the writ court, unmindful of Government Order No. 62-SW of 2001 dated 13-3-2001, took the view that the candidates suffering from visual disability were entitled to 1% reservation and that the respondent therefore deserved to be appointed as teacher against 1% of posts required to be reserved for candidates suffering from visual disability. The view taken by the writ court obviously runs contrary to the Government Order 62-SW of 2001 dated 13-3-2001 and therefore not permissible in the facts and circumstances of the case.

14. The appellants' case, it may be recalled was that 13 out of 489 advertised posts were to be set apart for candidates belonging to handicapped category. The plea was made oblivious to the Sections 21 and 22 of the J. & K. Persons with Disability (Equal Opportunity, Protection of Rights and Full Participation) Act, 1998 whereunder the reservation for handicapped category is horizontal. In other words the appellant - Board, whenever the posts are referred to it, has to distribute the posts amongst different categories like Open Merit. RBA, SC, ST, OSC, ALC etc. It is after the posts are so distributed that out of every category 3% posts are to be reserved for the handicapped category. In the present case the respondent did not claim to be member of SC, ST, RBA or any other reserved category. The appellant Board set apart 279 out of 489 advertised posts for the Open Merit category and out of said number of posts 8 posts were to be reserved for handicapped category representing 3% of the posts set apart for Open Merit category. Therefore the respondent claim that 13 posts were to be filled up from Open Merit category by the candidates belonging to handicapped category, is devoid of any merit.

15. The respondent neither questioned Government Order No. 62-SW of 2001 dated 13-3-2001 nor assailed the selection of the candidates selected under handicapped category. The appellants filled up all the 8 vacancies set apart for handicapped category and the selected candidates

stand appointed and are in place. The respondent therefore, even if he is found to be entitled to be considered for appointment against

handicapped category- a right to which in view of the above discussion he is not entitled, still he cannot be considered for appointment for the

simple reason that there is no post under the handicapped category against which he can be selected and thereafter appointed. The respondent

ought to have questioned Government Order No. 62-SW of 2001 dated 13-3-2001 where by reservation under handicapped category was

restricted to the candidates suffering from partial hearing impairment and one leg disability only and the candidates with visual disability excluded. If

for any reason the respondent was convinced that reservation under handicapped category irrespective of Government Order No. 62-SW, was

available to a candidate suffering from visual disability, he ought to have questioned the selection of candidates selected under handicapped

category - suffering from partial hearing impairment or one leg disability and pleaded that such candidate had usurped share that was to fall to

candidates like respondent, suffering from visual disability. In that event the court in case, the claim was found to have any substance, would have

set aside the selection of the candidates having lowest merit selected under the handicapped category - partial hearing impairment or one leg

disability and asked the appellants to consider the respondent against such post. The respondent, for the reasons best known to him, has not

questioned the Government Order No. 62-SW of 2001 dated 13-3-2001 or selection of candidates selected under handicapped category. There

is therefore merit in the appellants' case that the respondent cannot be considered against the non-existing vacancy. For the reasons discussed, we

find merit in the appeal. The appeal is accordingly allowed and the writ court judgment dated 08-12-2010 is set aside.