

(2014) 10 KL CK 0216

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 27234 of 2011(D)

E. Dineshan

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 20-10-2014

Acts Referred:

Constitution of India, 1950 — Article 254
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 36

Citation : (2015) 1 ILR 235 : (2014) 4 KHC 898

Hon'ble Judges : A.V. Ramakrishna Pillai, J

Bench : Single Bench

Advocate : P.M. Pareeth, Advocate for the Appellant; Abdul Salam, Government Pleader, P.C. Sasidharan, SC, K.S. Anil, S.C., KSEB, Babu Joseph Kuruvathazha, S.C., KSRTC, E.K. Nandakumar, K. John Mathai, Koshy George, Advocates and P.M.M. Najeeb Khan, S.C, Advocate for the Respondent

Judgement

A.V. Ramakrishna Pillai, J.—The petitioner, a physically challenged person with 40% locomotor (ortho) disability, has approached this Court for quashing Ext. P5 to the extent it restricts the benefits of 3% reservation of handicapped persons mandated by Sections 32 and 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the "Act" for short) with effect from the date of Ext. P5, i.e. from 1.2.2010 only and also for a declaration that the physically handicapped persons defined under the Act are entitled to get the back log vacancies from 1996 in the post of Assistant Grade II/Clerk/Junior Clerk/LD Clerk/Cashier filled up while making appointments to the public sector undertakings and Government Companies under the first respondent by reserving 3% to the physically challenged persons. There is a further prayer for a direction commanding respondents 4 to 7 to report all the existing vacancies in the aforesaid cadre so as to enable the third respondent to advise suitable candidates from Ext. P4 list.

2. The petitioner alleges that despite clear mandate under Sections 32 and 33 of

the Act, because of the arbitrary restriction imposed by the first respondent, a large number of vacancies of Assistant Grade II/Clerk/Junior Clerk/LD Clerk/Cashier in Government owned companies and public sector undertakings earmarked for physically challenged persons under 3% quota were filled up by appointing the candidates of general and other reserved categories and consequently, the petitioner is denied appointment even though he is included in Ext. P4 ranked list. He alleges that the second respondent published Ext. P3 ranked list for appointment to the aforesaid posts and thereafter Ext. P4 addendum notification was issued publishing supplementary list of physically challenged persons in these categories. The petitioner is ranked No. 70 in Ext. P4 list in the "ortho" category.

3. The grievance of the petitioner is that the third respondent has restricted the advise against the vacancies which occurred only from 1.2.2010 on the ground that by Ext. P5 Government order, the aforesaid posts were identified for 3% quota of handicapped persons with effect from the date of the said order. The petitioner alleges that Ext. P5 to the extent it restricts the benefit of 3% reservation to physically challenged persons for appointment to the aforesaid posts in Government owned companies etc. from the date of the order is illegal. It was pointed out that the Apex Court in Ext. P6 judgment has declared the law that the reservation has come into effect from the date of commencement of the Act. Hence, any delay in the identification of the post cannot be made as a tool to deny appointment to the handicapped persons in the vacancies which arose earlier. He further points out that Exts. P7 and P8 series show that a total number of 3106 vacancies were filled up without appointing any handicapped person from the earlier list dated 17.11.2005 and Ext. P3 list. Therefore, he points out that 93 vacancies have to be filled up by appointing 31 handicapped persons in each category. Therefore, the petitioner prays that respondents 4 to 7 which are major public sector undertakings/Corporations/Boards have to be directed to report all the existing vacancies in the aforesaid posts to the third respondent forthwith.

4. In the counter affidavit filed by the respondents 2 and 3, they contended as follows:

"The Commission invited applications for selection to the post of Assistant Grade II/Jr. Clerk etc. in various Government owned companies/Corporations/Boards vide notification published in the gazette dated 28.3.2007 as Category No. 115/2007. The ranked list for the post was brought into force with effect from 25.8.2009. Thereafter an addendum notification to the above ranked list was published on 4.1.2011 exclusively for the physically challenged candidates. The petitioner Sri. Dineshan E. is included in the list of physically handicapped persons under the Orthopedic category with Rank No. 70."

It is contended that as per G.O.(P) No. 8/10/SWD dated 1.2.2010, orders were issued by the Government reserving 3% vacancies to physically challenged persons in the categories of posts identified as suitable for appointment of

physically disabled as per Government orders dated 14.7.1998, 1.1.1999, 6.8.2005, 10.2.2009 and 13.10.2009 are extended to the similar categories in the State Public Sector Undertakings/Autonomous Institutions under the State Government/Universities/Co-operative Institutions and such other bodies also with effect from the date of this order provided the qualifications are the same. The commission issued guidelines for the implementation of the said Government order vide Circular dated 27.3.2010 by which the 3% reservation to PH candidates were to be given in respect of vacancies reported after 1.2.2010.

It is also contended that the recruitment of physically disabled persons against the 3% quota as laid down under the Act has been brought within the purview of the commission from 2004 onwards. But the Government identified the posts that are suitable for PH reservation only at a later stage.

The Apex Court in their judgment dated 7.7.2010 in SLP (c) 14889/08 held that reservation under Section 33 of the Act is not dependent on identification etc. The Commission sought clarification regarding the issue and the Government clarified the matter vide G.O.(P) No. 29/11/SWD dated 17.5.2011 stating that 3% vacancies reserved to the physically handicapped persons is to be computed on the basis of total number of vacancies reported on or after 1.1.2008 irrespective of the date of identification of post as suitable for appointment of physically disabled persons. The Government has issued the above Government order taking into consideration all the grievances faced by the PH candidates with respect to appointment in Government establishments.

In compliance of the above order, the Commission issued Circular No. 25/11. As per the above circular 47 vacancies were set apart for filling up of 3% PH backlog for the period from 1.1.2008 to 31.1.2010 for the post of Assistant Grade II/LDC etc. in various Government owned companies/Corporations. Those vacancies were filled from the list of PH candidates published on 4.1.2011. PH candidates belonging to ortho category up to rank No. 67 were advised from the list. Petitioner was included as rank No. 70. The petitioner was not advised as his turn did not arise, while working out the rotation. The ranked list got exhausted on 6.2.2012 with the advice of all candidates included in the main list.

The latest advice position is as follows:

OC

E

SC

ST

M

LC

OBC

5992

S/L-2

S/L-307

S/L-130

S/L-322

S/L-120

S/L-2

V

SIUC

OX

D

BLIND

DEAF

ORTHO

S/L-8

S/L-2

S/L-56

5990

48

ALL

67

As against the averments that no PH candidate was advised from the previous ranked list (brought into force with effect from 17.11.2005), it is stated that no directions reserving 3% vacancies to PH candidates existed in that period. Though PH candidates were included in the Ranked List for the post as per the then existing rules, they were not categorized as blind, deaf or OH.

Respondents 2 and 3 further contended that the Government vide G.O.(P) No. 7/11/SWD dated 24.1.2011 have given directions for conducting special recruitment for filling up the backlog vacancies of PH for the period from 1.1.2004 to 31.12.2007. The Government order directs the departments to report the backlog vacancies to the commission.

In the instant case, the Commission had acted as per rules and the writ petition is devoid of merit; it was contended.

5. In the additional counter affidavit filed by the respondents 2 and 3, they further contended that the Ranked list was published on 25.8.2009. Thereafter on 4.1.2011 an addendum notification was issued exclusively for physically handicapped persons. The petitioner Sri. Dineshan E. was included in the said list under Orthopedic category with Rank No. 70 out of 47 vacancies set apart for filling up 3%. Physically handicapped backlog vacancies for the period from 1.1.2008 to 31.1.2010 for the post of Assistant Grade II/LDC etc. in various Government owned companies/Corporations P.H. candidates belonging to other category up to Rank No. 67 were advised from the list. The main rank list thereafter got exhausted on 6.7.2012. The petitioner was not advised as his turn did not arise.

6. Arguments have been heard.

7. The learned counsel for the petitioner inviting my attention to Ext. P6 judgment of the Apex Court, would submit that the said decision has laid down the law that the Act came into force on 1996 and hence, reservation has to be effected from that date. Therefore, the delay in identification of posts cannot be a reason to postpone the reservation.

8. The learned counsel for the petitioner would argue that backlog vacancies from 1996 onwards was filled up by reserving 3% to physically handicapped persons in Government departments. However, in the case of public sector undertakings, no reservation has been made in the post of Assistant Grade II/ Clerk/Junior Clerk/LDC/Cashier on the ground that the posts were not identified. It was pointed out that the same posts in the Government departments were identified earlier.

9. The learned counsel would argue that the lapse on the part of the first respondent in identifying the posts cannot be a reason to deny the benefits of reservation by filling vacancies which occurred after 1996. Therefore, it was argued that Ext. P5 so far it operates with effect from 1.2.2010 has to be quashed.

10. Exts. P7 and P8 series of applications and replies show that 3106 vacancies were filled up in the post of Assistant Grade II/Clerk/Junior Clerk/LDC/Cashier without fulfilling the mandate under Section 33 of the Act. Therefore, it was pointed out that total 93 vacancies have to be filled up by appointing 31 candidates from each category. Therefore, no vacancy can be filled up in future with open competition candidates and candidates belonging to other reservation categories before filling up the quota earmarked for handicapped persons; so submitted the learned counsel for the petitioner. Therefore, it was argued that respondents 4 to 7 have to be directed to report the existing vacancies in the aforesaid categories so as to enable the third respondent to advise suitable candidates from Ext. P4 list.

11. Though it was vehemently argued by the learned Senior Government Pleader and the learned standing counsel for the PSC, the advice of the disabled persons

against backlog vacancies would disturb the appointments already made. This contention has no legs to stand. The petitioner is seeking advise against the backlog vacancies which were not filled up in the previous recruitment from the list 17.11.2005. It is clear from Ext. P8(a) that even though 1406 vacancies were filled up from the above list, not even a single disabled person was advised or appointed. 42 vacancies (3% of 1406) ought to have been filled up from among physically challenged persons. This fact is admitted in paragraph 11 of the counter affidavit filed by the respondents 2 and 3.

12. The next contention of the first respondent was that the restriction was made in Ext. P5 by way of a policy decision. According to me, the same is untenable as no policy decision can be taken to scuttle a legislative intention to reserve 3% vacancies for physically challenged persons.

13. It appears from the counter filed by respondents 2 and 3 that the Commissioner has followed Ext. P5 order with the restrictions now imposed. However as required in G.O. (P) No. 29/11/SWD dated 17.5.2011, the vacancies reserved for physically handicapped persons were computed on the basis of total number of vacancies on or after 1.1.2008 irrespective of the date of identification. Accordingly, 47 vacancies were set apart for filling up 3% PH backlog for the period from 1.1.2008 to 31.1.2010. That indicates that the restriction in Ext. P5 has been given a go by and advice has been issued against 47 vacancies. What is remaining is only backlog from 1.1.2004 to 31.12.2007. The last recruitment to public sector companies to the cadres stated above was conducted in 2005 from the list dated 17.11.2005.

14. As rightly pointed out by the learned counsel for the petitioner, not even a single disabled person was advised even though there was an advise for 1406 candidates.

15. Section 36 of the Act makes it clear that where in a recruitment year any vacancies under Section 33 cannot be filled up due to non-availability of suitable person with disability or for any other sufficient reason, such vacancies shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the 3 categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of person other than a person with disability.

16. In the instant case even though 42 disabled persons ought to have advised from the list dated 17.11.2005, none was advised for the reason that there was no identification and no direction to advise disabled candidates in the aforesaid categories. Going by Ext. P6 judgment, the said 42 backlog vacancies have to be set apart for physically handicapped persons.

17. Though it is stated in the counter affidavit filed by the PSC that the main ranked list exhausted on 6.2.2002, it was pointed out that no advise memo has been issued to the candidates up to the last candidate with rank No. 5992 so far.

Therefore, it was argued by the learned counsel for the petitioner, that it cannot be said that the main ranked list got exhausted.

18. It is crucial to note that the vacancies were reported sufficiently before the alleged exhaustion of Ext. P3 list. A large number of vacancies are still kept unadvised with the PSC only because of the restriction in Ext. P5 which is under challenge in this writ petition. The exhausting of the list during the pendency of the writ petition shall not affect the candidates in Ext. P4 list. Ext. P4 list has to be operated to advise backlog vacancies which were not filled up in the previous recruitment year. Therefore, the alleged absence of the main list will not stand in the way of action upon Ext. P4 list.

19. It was argued by the learned counsel for the petitioner that the respondent Commission has prepared a list of handicapped persons even after the expiry of the main list in the case of Laboratory Assistants in Higher Secondary Education Department in Kannur District as evidenced by Ext. P10. In that instance, the main list came into force on 21.12.2006 and expired on 1.5.2010. However, through an addendum notification dated 21.10.2011, the Kannur District Office of the Public Service Commission issued a ranked list in respect of partially deaf persons. The petitioner made Ext. P11 application before the Information Officer of the District Office, Kannur of the PSC for information as to the advise made from Ext. P10 list. In response to that he was informed by Ext. P12 that the main ranked list has come into force on 20.12.2006 and it has expired on 1.5.2010 and the supplementary ranked list was published on 21.10.2011. It was also informed that two candidates were advised from the supplementary list. Exts. P10 and P12 would tend to indicate that the contentions of the respondent Commission would not stand.

20. In answer to the aforesaid argument, the learned standing counsel for respondents 2 and 3 argued that the reliance placed by the petitioner has no relevance at all since in the case of the ranked list published for the post of Laboratory Assistant in the Kerala Higher Secondary Education Department, the said ranked list which published on 20.12.2006 expired on 1.5.2010. Since no candidates belonging to the category of "partially deaf" were available in the ranked list against the vacancy reserved for them (turn 33 & 66), the commission decided to prepare a list for partially deaf candidates by including 8 candidates who appeared in the OMR test held on 27.5.2006. It is in the above circumstances, the addendum notification was published to the ranked list on 21.10.2011 and 2 candidates were advised from that list.

21. The learned standing counsel for respondents 2 and 3 has argued that the said action on the part of the Commission have no application in the instant case. In the case at hand, an addendum notification for PH candidates for 3% reservation was published on 4.1.2011 within the validity period of the ranked list and candidates are advised from the list of PH candidates. The said list was published as supplementary to the main list. Once the main list was exhausted, there is no independent existence for the supplementary list is the settled legal

position; it was argued.

22. The PH candidates are advised based on their respective turn of 33, 66, 99 in a roster point of 100. As against the reported vacancies, advice was made by the commission based on rules of rotation. Since the main list of the Rank list already exhausted and that the addendum notification was already published and worked out, the reliance placed by the petitioner to Ext. P10 has no application at all; so submitted the learned standing counsel for respondents 2 and 3.

23. When Ext. P4 addendum list is there, the Government has no authority whatsoever to resort to special recruitment to defeat the right of candidates included in Ext. P4 list. Even though vacancies were kept pending, the Public Service Commission has not made the advice only because of the restriction in Ext. P5. The recruitment of handicapped persons being a mandatory obligation under the Central Act shall not be affected by the exhaustion of the main list. As per Rule 14 of the Rules of procedure in respect of the Public Service Commission, the Commission shall advise candidates for all vacancies reported and pending before them and vacancies which may be reported to them for the period during which the ranked list shall kept alive.

24. It is crucial to note that even though the vacancies were kept pending with the Public Service Commission, the advice has not been made only because of the restriction in Ext. P5 which is under challenge.

25. The Act which is passed by the Parliament will prevail over the State acts or regulations as envisaged by Article 254 of the Constitution of India. Hence any repugnance in the state acts or regulations shall not stand in the way of implementing the mandate in the Act and the State is duty bound to implement Sections 33 and 36 of the Act and no contentions would lie against its implementation. As per Ext. P6 judgment, reservation has to take effect from 1996 which is the year of enactment of the legislation.

26. In the instant case, the backlog vacancies from 1.1.2004 to 31.12.2007 or at least the backlog vacancies numbering 42 which was left unfilled in the previous recruitment has to be filled up in order to comply with Ext. P6 judgment.

27. On a consideration of the entire materials now placed on board, this Court is of the view that the petitioner is entitled to succeed.

Therefore, this writ petition is allowed. Ext. P4 is quashed to the extent it restricts the benefit of 3% reservation of handicapped persons mandated under Section 33 of the Act from the date of Ext. P5 order i.e. 1.2.2010.

It is hereby declared that the handicapped persons defined under the Act are entitled to get the backlog vacancies from 1996 in the post of Assistant Grade II/ Clerk/Junior Clerk/LDC/Cashier while making appointments to the public sector undertakings and Government companies under the first respondent by reserving 3% to the handicapped persons.

Respondents 4 to 7 are directed to report all existing vacancies in the aforesaid cadre so as to enable the third respondent to advise suitable candidates from Ext. P4 list.