

(2013) 10 BOM CK 0150
In the Bombay High Court
Case No : W.P. Nos. 523 and 749 of 2013

Jyoti

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 18-10-2013

Acts Referred:

Citation : (2014) 2 MhLj 110

Hon'ble Judges : Z.A. Haq, J;B.R. Gavai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Z.A. Haq, J.—Rule. Rule made returnable forthwith. This is a case of denial of the employment to the petitioner, who is physically challenged person by the State Bank of India which is a State within the meaning of Article 12 of the Constitution of India and thereby frustrating the mandate of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "Act of 1995").

2. The petitioner belongs to "Bhoi", Other Backward Class and is suffering physical disability of Diparesic of both upper limbs with Kyphoscoliotic deformity PL spine and has 60% permanent impairment. A certificate to this effect was issued by the General Hospital, Amravati on 22-3-2007. The petitioner has obtained the degree of B.Com. and has completed the certificate course in Information Technology recognized by the Maharashtra State - MSCIT.

3. State Bank of India had issued an advertisement for the posts of Bank Clerk (Assistant) wherein 20000 posts were advertised all over the country, out of which, 2980 posts were for State of Maharashtra. The petitioner has stated that as per section 33 of the Act of 1995, 29 posts were reserved for orthopaedically disabled candidates in the State of Maharashtra and in view of the provisions of section 32 of the Act of 1995, the post for which the petitioner is making claim was notified as reserved for orthopaedically disabled person as shown in the

Central Notification dated 15-2-2007. The petitioner had submitted her application and had appeared for the written examination held on 6-7-2008. The petitioner cleared the examination and was also successful in the personal interview and the respondent No. 2 informed her by letter dated 8-12-2008 that she is selected for appointment in the clerical cadre as Assistant in the Bank, subject to completion of the required formalities. The petitioner was asked to remain present before the Medical Board, Government Medical College. The petitioner was examined and the clinical notes dated 23-3-2009 show that the petitioner is found fit to perform the prescribed nature of work. The petitioner has stated that Dr. S.R. Mitra has taken note on 6-4-2009 that the petitioner has 95% of total permanent disability. It is submitted that the petitioner was informed by the communication dated 29-10-2009 that she will have to undergo further medical investigations. The petitioner was informed by the communication dated 1-4-2010 that she will be examined by the Senior Medical Officer along with a team of four specialists doctors on 5-4-2010 at the State Bank of India, Administrative Office, Nagpur. The petitioner was examined on 5-4-2010 and the Board submitted its report declaring the petitioner unfit for the said job for which the petitioner is selected. The petitioner is informed by the communication dated 21-4-2010 that she is found to be medically unfit by the specially constituted Medical Board and the State Bank cannot allow her to join the service. The petitioner obtained the copy of the report of the Medical Board of her medical examination, in which it is stated that the petitioner has severe Kyphoscoliotic deformity of spine and crowding of ribs and she may develop complications in view of her respiratory ailments in future and therefore the Medical Board was of the opinion that she was unfit for the job. The submission of the petitioner is that she is being denied the opportunity of employment on the ground of the disability and it frustrates the very object of reserving the post for the person with such disability. The petitioner had made complaint to the respondent No. 1, that is, the Commissioner u/s 62 of the Act of 1995. The respondent No. 1, Commissioner, after hearing the concerned parties, allowed the complaint of the petitioner by the order dated 17-7-2012 and directed the respondent Nos. 2 and 3 to appoint the petitioner to the post of Bank Clerk (Assistant) forthwith and to provide all necessary technology/equipments to the petitioner to enable her to discharge the responsibilities and duties. In spite of the directions given by the respondent No. 1 - the Commissioner, the respondent Nos. 2 and 3 have not given appointment to the petitioner and therefore the petitioner approached this Court to seek redressal of her grievance.

4. The State Bank of India has filed the Writ Petition No. 749 of 2013 challenging the order passed by the respondent No. 1 - the Commissioner on 17-7-2012. The State Bank of India has submitted that in the medical examination, it is found that the petitioner is suffering from severe restrictive lung disease, which is an organic ailment and according to the guidelines of the State Bank of India, any candidate suffering from organic ailments is unfit for appointment. The State Bank of India submitted that any candidate whether physically disabled or not, if

he is suffering from organic ailment, he is medically unfit for the appointment and therefore it cannot be said that the petitioner is being denied the employment on account of her physical disability, but the petitioner is found to be unfit for the appointment because of the organic ailment.

5. We have heard the advocates for the respective parties. It is not in dispute that the petitioner was referred to the Medical Board, Government Medical College and Hospital, Nagpur for the medical examination and after the medical examination, it was found that the petitioner is fit to perform the prescribed nature of work. The document at page No. 30 of the Writ Petition 523/2013 shows the endorsement dated 23-3-2009 as follows:

Pt. is fit to perform the prescribed nature of work.

The Medical report relied upon by the State Bank of India which is at page 38 of the Writ Petition 523/2013 states as follows.

She can also develop complications in view of her respiratory ailment in future.

(emphasis supplied.)

6. We had heard the writ petitions on 10-10-2013 and in view of the submissions made by the respective advocates on the basis of the two divergent medical reports, we had requested the learned advocate representing the petitioner to ask the petitioner to remain present in the Court on 17-10-2013. When the matter was called out on 17-10-2013 at 4.30 p.m., the petitioner was present in the Court Room and we made some queries with her and also asked her to write on a paper. We found that the petitioner, though physically disabled, is fit to discharge the duties of the post for which she is appointed. On inquiry, the petitioner has stated that she can operate the computer. It is an admitted fact that the petitioner has obtained the degree of B.Com. and the MSCIT Certificate. As the Court time was over, we had kept the matter for hearing on 18-10-2013.

7. After hearing the learned advocates for the parties, we are of the view that the State Bank of India is unnecessarily and illegally depriving the petitioner of her legitimate claim. We are not medical experts and we cannot sit as an appellate authority over the opinion given by the Medical Board. However, in the present case, the petitioner was declared fit for the job by the Medical Board to which the petitioner was referred by the State Bank of India and subsequently, another Medical Board of the State Bank of India has declared her unfit. But the factor which has to be noticed is that the Medical Board of the State Bank of India has put a remark that the petitioner can also develop complications in view of her respiratory ailment in future. Because of the above remark, we were required to undertake the exercise of requesting the petitioner to remain present in the Court room.

8. The Division Bench of this Court at the Principal Seat while considering Writ Petition No. 3294/2010 and other connected matters has passed an order on 15-1-2011. In paragraph No. 11 of the order, it recorded as follows.

11. The Health Department of State of Maharashtra shall issue instructions to all the Medical Boards and Superintendents of the Public Hospitals that when a candidate, selected for a post which is reserved for a physically challenged person, appears for medical examination, he cannot be declared unfit or unsuitable for the post by the concerned Medical Board or Superintendent of the Public Hospital on the ground that he is medically unfit because of that particular disability.

9. The learned advocate for the petitioner has relied on the judgment given by the Hon"ble Supreme Court of India in the case of Union of India and Anr. vs. National Federation of the Blind and Ors. in Civil Appeal No. 9096 of 2013 in support of his submissions. In paragraph No. 49, the Hon"ble Supreme Court has laid down as follows.

49. Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and in deplorable conditions. They are denied the right to make a useful contribution to their own lives and to the lives of their families and community.

The Hon"ble Supreme Court has issued directions in paragraph 54 of the judgment as follows.

54. In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, it is necessary to issue the following directions:

(i) We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29-12-2005 and the subsequent OM's consistent with this Court's Order within three months from the date of passing of this judgment.

(ii) We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

(iii) The appellant herein shall issue instructions to all the departments/public sector undertakings/Government companies declaring that the non observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and Nodal Officer in department/public sector undertakings/Government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default.

10. In view of the above, we have no hesitation to conclude that the petitioner is being unnecessarily and illegally deprived of her legitimate claim by the State Bank of India and the petitioner is entitled for relief as directed by the

respondent No. 1 - the Commissioner and for the appointment on the post. The learned advocate for the State Bank of India has strongly opposed the claim as made by the petitioner and has submitted that the petitioner is not being denied the appointment on the, ground of physical disability, but the petitioner is found to be unfit for the job because of the organic ailment and she cannot be appointed in view of the norms of the State Bank of India. The learned advocate for State Bank of India has relied on the judgments reported in State Bank of India Vs. G.K. Deshak, and Indian Council of Agricultural Research and Another Vs. Smt. Shashi Gupta, .

Both the above judgments are pronounced before the Act of 1995 had come into force. It is clear that the State Bank of India is illegally depriving the petitioner of her legitimate claim by overlooking mandate of the Act of 1995. The recalcitrant attitude of the State Bank of India to give appointment to the petitioner is unreasonable and unjustified. The medical report given by the Medical Board of the State Bank of India stating that the petitioner may develop complications in view of her respiratory ailment in future shows the unmindful attitude of the State Bank of India towards the physically challenged persons. The State Bank of India cannot deny the appointment to the petitioner on the spacious consideration that the petitioner who is a physically challenged person may develop some complications in future. In view of the above, the Writ Petition No. 523/2013 is allowed. The impugned order dated 21-4-2010 issued by the respondent No. 4 is quashed and set aside. The respondent Nos. 2 to 4 are directed to comply with the order dated 17-7-2012 passed by the respondent No. 1. The petitioner shall be given an appointment order within a period of two weeks from today. It is directed that the appointment of petitioner is to be treated from 8-12-2008, for the purposes of all the benefits including the seniority. However, it is made clear that the petitioner will not be entitled for the back-wages for the period for which she has not worked.

Rule is made absolute in above terms.

In view of the above, Writ Petition No. 749/2013 filed by the State Bank of India is dismissed.

In the circumstances, parties to bear their own costs.