

(2015) 07 KL CK 0015
In the High Court Of Kerala
Case No : O.P. (KAT) No. 21 of 2015

Kerala Public Service Commission and Others

APPELLANT

Vs

Sujith Kumar, E.N.

RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33

Citation : (2015) 4 ILR Ker 307 : (2015) 4 KLJ 596

Hon'ble Judges : P.R. Ramachandra Menon and Babu Mathew P. Joseph, JJ.

Bench : Division Bench

Advocate : P.C. Sasidharan, S.C., for the Appellant; Kaleeswaram Raj, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J.—Does the Public Service Commission (PSC) have any power to assess the suitability of physically challenged candidates in respect of recruitment to the posts which have been identified by the Government in favour of such candidates/class, under Section 32 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the PWD Act" for short), read with the extent of reservation under Section 33 of the Act, is the basic point to be answered in this original petition. If any power is vested in this regard [presumably with reference to G.O.(P) No. 158/73/PD dated 29-5-1973], to what extent can it be exercised by the PSC, is the further point to be considered.

2. The original petition has been preferred by the PSC, challenging the order of the Kerala Administrative Tribunal (KAT) dated 20-11-2014 in O.A. No. 1435 of 2012, whereby the O.A. filed by the respondent herein seeking for a specific direction to include him in Annexure A-18 rank list for the post of "Last Grade Servants" in various departments in Thrissur District was allowed. The contention is that the Tribunal could not have given any such positive direction, as it is

always open for the PSC to assess "suitability" of the candidates concerned. It is also contended that, though it is of course for the Government to identify the posts with reference to the mandate of the "Act", such identification is only a general declaration as to the eligibility to apply by all concerned belonging to the class and that the "suitability", in fact, has to be considered based on the qualification, experience etc. with reference to the relevant documents to be verified by the PSC.

3. The sequence of events reveals that Annexure A-1 notification was issued by the PSC for selection of candidates as mentioned above, way back on 31-12-2009. The respondent herein is a physically challenged person, having the disability certified to an extent of 75% as per Annexure A-2. Pursuant to the application preferred by the respondent, he was called for a written test, which was conducted on 24-7-2010. It is stated that the respondent came out in flying colours, having obtained "73" marks out of 100 and accordingly, he was included in the short list published on 24-1-2012. Subsequently, the PSC called the respondent for a "suitability test" scheduled on 9-5-2012. According to the respondent, he was asked some simple questions and personal details which were answered and thereafter, Annexure A-18 rank list was published by the PSC on 29-6-2012. Unfortunately, the respondent came to be excluded and hence the grievance.

4. In the Original Application filed by the respondent, the stand of the PSC was sought to be explained by filing a reply statement, a copy of which has been produced as Ext. P-2. After hearing both the sides, the Tribunal rendered Ext. P-3 verdict, holding that the course pursued by the PSC was not correct or sustainable. Reliance was sought to be placed on a similar judgment passed by the KAT in O.A. No. 2440 of 2012 with regard to the selection of "UPSA, wherein posts were identified in favour of "blind" candidates as well, as ordered by the Government. The said O.A. was allowed by the KAT, which was upheld by this Court as per judgment dated 17-10-2014 in OP (KAT) 322 of 2014. It was accordingly, that the present O.A. was allowed as per Ext. P-3 verdict, which is under challenge in this original petition preferred by the PSC.

5. Heard both the sides in detail. During the course of hearing, the learned Standing Counsel for the PSC/petitioners submits that Ext. P-3 order has been passed by the Tribunal without any regard to the order passed earlier under similar circumstances, particularly by way of the verdict dated 22-10-2013 in T.A. 6849/2012. Though the matter was sought to be challenged by filing OP (KAT) 4568 of 2013 by the aggrieved party, interference was declined and the original petition was dismissed as per judgment dated 14-10-2014 upholding the rights of the PSC to have assessed the candidates in the "suitability test". This being the position, Ext. P-3 requires to be intercepted, submits the learned Standing Counsel.

6. Learned counsel for the respondent, submits that the idea and understanding of the PSC are wrong and misconceived and that the verdict passed by the

Tribunal in T.A. No. 6849 of 2012 [which has been upheld by this Court as per judgment dated 14-10-2014 in O.P. (KAT) No. 4568 of 2013] stands on a different footing. The relevant portions as contained in the judgment are referred to, contending that the post involved therein was not an identified post as per the "Act", at the time of notification. As such, the present ruling rendered by the Tribunal, after having the post identified and declaring the right/eligibility of a "blind" person to contest for the post, can no more be governed by the judgment in O.P. (KAT) No. 4568 of 2013. It is also added that, the decision sought to be relied on by the Tribunal in Ext. P-3 was sought to be challenged by the PSC before this Court by filing O.P. (KAT) No. 322 of 2014. The said case was considered along with the connected cases. The course pursued by the PSC was deprecated and the petitions were dismissed as per the common judgment dated 17-10-2014 reported in Secretary, KPSC, Thiruvananthapuram v. Seema, I. and others 2014 K.H.C. 716.

7. The learned counsel further submits that, in so far as the PSC is concerned, they were taking decisions, according to their whims and fancies and not with reference to any pre-set norms/guidelines to assess the suitability in the so-called test which was being conducted. Reference is made to Annexure A-5 rank list issued by the PSC for the Thiruvananthapuram District (similar to Annexure A-18 rank list for Thrissur, which is involved herein). The persons placed Sl. Nos. 7, 12, 16 and 39 are stated as 100% blind. In spite of total blindness of the said persons, the PSC found them suitable in the "test" and they were accordingly included in the rank list for Thiruvananthapuram District. This was specifically pointed out from the part of the respondent in "paragraph 9" of the O.A. filed before the Tribunal, but the said factual position has not been controverted by the PSC in any manner.

8. Still further, reference is made to the proceedings pursued by the PSC in Annexure A-5 rank list in respect of Kottayam District (as similar to the process of selection involved in this case). In the said rank list, the person placed at Sl. No. 1 is a "blind" person having 80% disability and still, the PSC did not find it necessary to non-suit him; whereas in the case of the respondent herein, despite the fact that he was having only 75% visual impairment, he has been simply thrown out, arbitrarily contending that the evaluation committee of the PSC found that the respondent was unsuitable.

9. When the matter came up for consideration before this Court earlier, an interim order of stay was pressed for from the part of the PSC, which was refused to be granted and three weeks' time was given to comply with the direction given by the Tribunal. The said order dated 27-1-2015 reads as follows:

"Admitted. Issue notice to the respondent. The impugned order of the Tribunal requires the directions issued through paragraph 6 thereof to be carried out within a period of six weeks. Even if we were to take that period of six weeks to run from the date of delivery of free copy to Public Service Commission on 2-12-2014, that time limit had already expired on 13-1-2015. We are not

inclined to grant stay of operation of the directions contained in the impugned order of the Tribunal. However, the PSC is granted three weeks" time from today to carry out the directions of the Tribunal as are contained in the impugned order provisionally and subject to further orders in this original petition. Handover and communicate copy of this order to the respondent."

Thereafter, this Court passed another order on 26-6-2015, which reads as follows:

"Filling up of NJD vacancy, if any, as projected from, the part of the petitioner shall be kept in abeyance till such time."

It is stated that, pursuant to the order dated 27-1-2015, the PSC has assigned appropriate rank to the respondent herein at Sl. No. 3B of Annexure A-8 rank list in respect of "physically handicapped category", besides placing at Sl. No. 2A in respect of supplementary list for the "Ezhava" category. An Addendum Notification has been issued in this regard, a copy of which has been produced and marked as Ext. R-1(a) along with I.A. No. 7928 of 2015 filed by the respondent.

10. The respondent has filed different interlocutory applications to accept some additional documents and seeking for a direction to advise him to be appointed against the "NJD" vacancy arisen in the meanwhile, pursuant to non-joining of a person by name Akhil, who is placed as Sl. No. 12 in Annexure A-18 rank list. It is stated that persons from Annexure A-18 rank list have been given advices in respect of candidates upto Sl. No. 14, avoiding the respondent even after correcting the rank list by issuance of Ext. R-1(a), giving a placement at "Sl. No. 3B" pursuant to the interim order passed by this Court.

11. The above relief sought for in I.A. No. 7928 of 2015 is opposed by the learned Standing Counsel for the PSC, contending that the "NJD" vacancy pointed out by the respondent belongs to another stream, which cannot be given to the respondent. It is stated that the concerned vacancy should go to the candidate under the "special recruitment quota" and that the prayer of the respondent, if acceded to, the rights and liberties of other persons, who are standing in the queue might be adversely affected. Reference is made to paragraphs 4 and 5 of the affidavit dated 4-7-2015 filed by the PSC, pursuant to the direction given by this Court, which are extracted below for convenience of reference.

"4. Regarding Ezhava candidates Male upto Rank 1119 and Female upto Rank 883 have been advised so far. Petitioners is assigned Rank 2A in the supplementary list of the ranked list with reference to physically challenged person. Candidate upto Rank 14 in the PH (Blind) category has been advised so far.

5. No candidates from the said category is advised after the provisional inclusion of petitioners in the ranked list. 1 NJD vacancy for "PH Blind" advised from the

ranked list of SR for PH (back log vacancy) that is to be compensated from this ranked list is pending for advise. The petitioner is included provisionally in the Ranked List for the post as per the interim order of Hon"ble High Court in 27-1-2015 in OP (KAT) 21/15 and that presently he cannot be advised to the post since there is no vacancy to accommodate him in his turn."

12. The learned counsel for the respondent submits that, what is stated by the PSC in paragraph 5 of the above affidavit, is something different from the version now put forth during the course of arguments and that the same does not reconcile with each other. It is also pointed out by the learned counsel, that no rank list is available in respect of the "special recruitment quota" and that the PSC has been rightly giving advice to the candidates placed at Sl. Nos. 11, 12, 13 and 14 from Annexure A-18 rank list. Copies of the "appointment chart" made available in the website of the PSC is placed for perusal of this Court. With reference to the nature of the post sought to be filled up in respect of the "blind" category and the last date of advice, it is mentioned under the "Note" given, that the concerned candidate was advised for the post of LGS (SR for PH) (Blind) from the LGS (various) rank list (Annexure A-18) for want of partially Blind candidates in the rank list LGS (SR for PH).

13. It is pointed out by the learned counsel for the respondent that, since the candidate at Sl. No. 12, by name Akhil, did not join duty, the said vacancy, which is admittedly available as pointed out by the PSC in paragraph 5 of the affidavit dated 4-7-2015, could be filled up by advising and appointing the respondent; so that the entire issue can be solved once and for all, without affecting anybody. This Court does not propose to express anything in this regard, as it does not form the subject-matter of the original petition filed by the PSC challenging the correctness of the order passed by the Tribunal; where the only point required to be considered is whether any interference is required with regard to the order passed by the Tribunal.

14. The notification in respect of the concerned post was issued way back in the year 2003, when the post in question was never identified and reserved under the 3% quota earmarked under the Act, which came to be effected only in the year 2009. The observation made by the Tribunal in paragraph 10 of the order dated 22-10-2013 in TA No. 6849 of 2012, to the extent it is applicable, is as given below:

"It is not in dispute that when the notification inviting applications was issued in this case, the post of Assistant Grade II in the Administrative Secretariat was not identified as a post suitable for deaf persons/persons suffering from hearing impairment and notified under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Government issued an Order in 2009 identifying the said post also as suitable for persons with hearing impairment. As notification in this case was issued in 2003, the applicant cannot claim the benefit of the Government Order issued in 2009. But the learned counsel for the applicant would point out that the assessment of

suitability made by the Public Service Commission was improper and irregular."

15. The above verdict was challenged by the aggrieved party by filing OP (KAT) No. 4568 of 2013. The observation made by this Court in paragraph 6 of the judgment therein is extracted below:

"In so far as the second contention is concerned, first of all, we would like to say that the post against which the petitioner had responded in pursuance of the notification dated 17-6-2003 was not an identical (presumably identified) post at that point of time. Therefore, the petitioner was a general candidate. When such a candidate appears before the PSC, the Commission is entitled to assess the suitability of that candidate for the posts notified. If in the process of such assessment, the Commission finds that the candidate is unsuitable, such decision taken by it cannot be said to be vitiated or discriminated as was made out by the learned counsel."

Inapplicability of the decision rendered by the Tribunal in the aforesaid case has been considered by a subsequent Bench of this Court in the decision reported in 2014 K.H.C. 716 (supra), particularly in paragraph 31, which reads as follows:

"31. We have gone through the said order passed by the Tribunal. Reading of that order shows that the notification in that case was issued by the PSC long prior to even the identification of posts by the Government and that the physically handicapped applicant therein applied as a general candidate, contested against the general candidates and it was in the context of such a selection that the Tribunal recognized the freedom of the PSC to apply the rules of selection applicable to all candidates to the physically handicapped candidates also. Therefore, on facts, the case dealt with by the Tribunal in TA No. 6849/12 is totally incomparable to the facts of these cases and therefore this Order cannot be relied on by the PSC to substantiate its contentions."

16. Coming to the case in hand, there is no dispute that the post in question has already been identified by the Government, who is the employer, in exercise of the powers conferred under Section 32 of the Act, to the effect that appointment could be effected to such post by accommodating "blind" candidate as well. The so-called "suitability test" conducted by the PSC was only with reference to the "ability to read and write" and according to the PSC, such job cannot be performed by the candidate. As mentioned already, the scope of power to assess "suitability" of the candidate, as explained by the Tribunal on an earlier instance while rendering the verdict in TA 6849 of 2012, takes its origin/source from the judgment rendered by the Apex Court in *Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others*, . Paragraph 12 of the said judgment reads as follows:

"12. It will thus appear that apart from the fact that the High Court has rolled the cases of the two appointees in one, though their appointments are not assailable on the same grounds, the court has also found it necessary to sit in appeal over

the decision of the Selection Committee and to embark upon deciding the relative merits of the candidates. It is needless to emphasize that it is not the function of the court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved mala fides affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant statutes. The committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so-called comparative merits of the candidates as assessed by the court, the High Court went wrong and exceeded its jurisdiction."

17. After hearing both the sides, this Court finds that there cannot be any dispute with regard to the power of the PSC to conduct selection so as to assess the merit and demerits of the candidates concerned, especially with reference to the duties to be performed and qualification prescribed for holding the post. But, the point to be considered is, whether such power could be exercised without any regard to the mandate of the subsequent legislation, i.e. the "PWD Act".

18. The power of the PSC to conduct "suitability test", according to them, was projected before the Tribunal in the earlier round of litigation, with reference to G.O. (P) No. 158/73/PD dated 29-5-1973. After commencement of the "PWD Act", it is exclusively within the realm of the Government to identify the posts for providing reservation to an extent of 3%, to be filled up by physically challenged candidates, distributing the same in an appropriate manner among the different categories (Blind, Deaf and orthopaedically handicapped). This depends upon various facts and circumstances and a proper analysis has to be done by the Government with reference to the job specification, the qualification for the post in question and also the duties to be discharged. It was accordingly, that a notification was issued by the Government, identifying the post in question. The Government/Employer is very much satisfied that, such post could be filled up by a "Blind person" as well, if otherwise qualified. As it stands so, there cannot be any further "elimination exercise" by the PSC, with reference to the so-called "suitability assessment", but for restricting such exercise to the requisite extent, so as to evaluate the "inter se merit" among the different candidates, who contest for the post in question. This Court finds support in this regard from the view expressed in the decision reported in 2014 K.H.C. 716 (supra).

19. By virtue of the general power vested with the PSC, it can be said that the PSC can conduct the suitability test; however subject to satisfaction of the mandate of the "PWD Act". In other words, the candidature of the person

concerned can be assessed in the light of other circumstances, if any, which may prevent the candidate from holding the post, despite the fact that he/she happens to be a person suffering from the impairment, although an eligible member of the class to hold such post, by virtue of the notification issued by the Government, pursuant to the identification for the post. There is no case for the PSC that the "test" conducted by the PSC had brought into light any other impediment, say, whether the respondent was paralyzed or was suffering from any mental abrasion or such other restrictive circumstances. Similarly, there is no case for the PSC, that the respondent came to be excluded by virtue of better merit/credentials of other candidates, who have been included in Annexure A-18 rank list. It is only, by virtue of the merit of the respondent, that he could secure "75" marks out of 100, though he had made use of a scribe for participating in the test, which of course is permissible. Based on the said merit rating, the PSC has given a placement at "Sl. No. 3B" in Annexure A-18 rank list, as borne by Ext. R-1(a), pursuant to the interim order passed by this Court. This shows that the merit of the respondent herein stands on a much higher pedestal, than that of many other candidates who are included in Annexure A-18 rank list. It cannot but be said, that the merit has always to be honoured and the right of the respondent to have advised and appointed cannot be defeated.

20. Another aspect to be considered is that the PSC themselves had conducted a "suitability test" in respect of similar candidates for the "Thiruvananthapuram District" and have included totally blind persons (having "100%" impairment) at Sl. Nos. 7, 12, 16 and 39 in Annexure A-5 ranked list. The specific pleading raised by the respondent in this regard was never controverted by the PSC by filing any counter-affidavit before the Tribunal, nor has filed any counter-affidavit before this Court as well. Similar course has been pursued by the PSC, while issuing Annexure A-6 ranked list for "Kottayam District" wherein the person at Sl. No. 1 is suffering from 80% blindness.

21. More importantly, a reference is necessary to the document produced by the respondent as Ext. R-1(d), which is the rank list published by the PSC for selection and appointment to the post of "Villageman". On completion of the selection procedure, including the so-called "suitability test", the PSC found that the respondent herein was a "fit person" to be included in the rank list for the post of "Villageman". Accordingly, he has been enlisted in the relevant rank list, giving appropriate place at Sl. No. 4. There is no case for the PSC that he was unsuitable in any respect, with reference to the qualification and nature of duties to be performed as a Villageman. No much difference is brought out with regard to the duties to be performed by the "Last Grade Servant" as involved herein and a "Villageman" forming the subject-matter of Ext. R-1(d) rank list. This by itself reveals that the version of the PSC, that a proper merit rating was done in the case of the respondent herein, while adjudging the suitability, is not correct or sustainable and the course pursued by them is per se arbitrary and illegal in all respects. It is declared accordingly.

22. In the above circumstances, this Court finds that the original petition filed by the PSC is devoid of merit and none of the grounds raised in support of the contentions can be held as tenable. Interference is declined and the Original petition is dismissed. It is for the PSC to pursue further steps to take the proceedings to a logical conclusion by issuing advice memo to the respondent, which shall be done at the earliest, at any rate, within one month from the date of receipt of a copy of this judgment.

The interim order dated 26-6-2015 passed by this Court against the filling up of "NJD vacancy" will continue till such time.

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