

(2016) 01 KL CK 0010

In the High Court Of Kerala

Case No : W.A. Nos. 362, 403, 550 and 628 of 2015 in W.P. (C) . No. 27234 of 2011 (Against the Order/judgment in W.P. (C) . No. 27234 of 2011 of High Court of Kerala Dated 20.10.2014)

Kerala Public Service Commission

APPELLANT

Vs

E. Dineshan

RESPONDENT

Date of Decision : 06-01-2016

Acts Referred:

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

Citation : (2016) 2 KHC 910 : (2016) 3 KLT 27

Hon'ble Judges : Thottathil B. Radhakrishnan and Anu Sivaraman, JJ.

Bench : Division Bench

Advocate : P.C. Sasidharan, SC, KPSC, for the Appellant; P.M. Pareeth, Advocate, Joe Kalliath, Government Pleader, M. Gopikrishnan Nambiar, SC, KSRTC, K.S. Anil and P.M. Preeth, Advocates, P.M.M. Najeeb Khan, SC, KHWB, for the Respondent

Final Decision : Dismissed

Judgement

Anu Sivaraman, J.—The common question which arises for consideration in these appeals is with regard to the reservation of vacancies for appointment of physically handicapped persons in identified posts in public sector undertakings.

W.A. No. 362 of 2015

2. This appeal is filed by the Kerala Public Service Commission (KPSC) against the judgment dated 20.10.2014 in W.P. No. 27234 of 2011. The petitioner in the writ petition, who is the first respondent herein, was a candidate for selection to the post of Assistant Grade II/Clerk/Junior Clerk/LDC/Cashier in various State Government owned Companies/Boards/Corporations, pursuant to a notification dated 28.3.2007. He is an orthopaedically handicapped person. The writ petitioner, who had all the requisite qualifications, was an applicant in the said selection. A ranked list was published by the KPSC on 25.8.2009. Thereafter, it is

submitted that, by an addendum notification to the above ranked list, a supplementary list of persons included in selection who were eligible for reservation under the physically handicapped category was published. The petitioner was included in the list of physically handicapped candidates under the orthopaedic category at serial No. 70. By Exhibit P5 Government Order dated 1.2.2010, 3% reservation to physically handicapped candidates in identified posts was extended to similar categories in the State Public Sector Undertakings and other autonomous institutions with effect from the date of the order. Though the KPSC had published Exhibit P3 supplementary list of physically handicapped persons, it was contended that the reservation to physically handicapped persons would be operated in respect of vacancies which arose after 1.2.2010 alone. Relying on the judgments of the Apex Court clarifying that reservation under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, "the Act") is not dependent on the identification of posts, the writ petitioner claimed reservation with effect from 1.1.1996. In the meanwhile, in answer to a query raised by the KPSC, the Government, by order dated 17.5.2011 clarified that 3% vacancies reserved for physically handicapped persons is to be computed on the basis of the total number of vacancies reported on or after 1.1.2008, irrespective of the date of identification of posts as suitable for appointment of such persons. Accordingly, the Public Service Commission issued circulars identifying the vacancies available for physically handicapped persons from among the vacancies which arose during the period from 1.1.2008 to 31.1.2010 and these vacancies were filled up from Exhibit P3 list, following the ratio of 1:1:1 between blind, deaf and orthopaedically handicapped persons. Petitioner could not get advice, since he was included at serial No.70 and candidates in the orthopaedically handicapped category upto rank No. 67 alone were advised. Therefore, he filed the writ petition contending that the Act having come into force in 1996, the 3% vacancies to be set apart for physically handicapped persons have to be worked out reckoning the vacancies which arose from the date of coming into force of the Act. Material was produced before the learned single Judge to show that 3106 vacancies had been filled up from earlier lists to the posts in question and no physically handicapped person was appointed. In the above circumstances, it was contended that the KPSC having been entrusted for selection of candidates to these Companies and Corporations in the year 2004, the 3% reservation for physically handicapped persons has to be taken into account by reckoning all the vacancies earlier filled up from PSC lists as well as the vacancies reported to be filled up from Exhibit P1 list. As such, it is contended that 93 vacancies had to be filled up by appointing 31 candidates from each of the handicapped categories. If that were to be done, the petitioner would get appointment. Relying on the provisions of the Act as well as the judgment of the Apex Court on the point, the learned single Judge held that Exhibit P4, to the extent it restricts the benefit of 3% reservation to physically handicapped persons from 1.2.2010, is bad in law. It was declared that handicapped persons are entitled to get the 3% of vacancies in the post of Assistant Grade II/Clerk/Junior Clerk/LDC/Cashier from 1996 while

making appointments to public sector undertakings and Government Companies. Respondents 4 to 7 were therefore directed to report all existing vacancies in the aforesaid cadre to enable the third respondent to advise candidates from Exhibit P3 list.

3. Aggrieved by the above directions, the KPSC has come up in appeal raising contentions to the effect that only those vacancies that arose during the currency of the list can be filled up from the ranked list and the backlog vacancies can be filled up only by resorting to a special recruitment. It is the further contention of the KPSC that the direction to make appointments from the supplementary list was erroneous, since the main list had been exhausted on 6.2.2012 and the supplementary list cannot be operated thereafter.

W.A. No. 628 of 2015, W.A. No. 403 of 2015 and W.A. No. 550 of 2015:

4. These appeals are filed by the KPSC from a common judgment of the learned single Judge in W.P(C). Nos. 2715, 661 and 3584 of 2014. The selection was for appointment to the post of lower division clerk in the Kerala State Beverages Corporation. Applications were invited to the post by notification dated 27.11.2008. Ranked list was brought into force with effect from 18.10.2012. A total of 513 vacancies were reported to the Commission, out of which, 274 vacancies were reported before 1.1.2008. Three percent reservation was provided for physically handicapped candidates only considering the vacancies which arose after 1.1.2008 relying on the clarificatory Government order dated 7.5.2011. The petitioner in WP(C) 2715/2014 claimed appointment in the 3% quota earmarked for persons with disability, taking into account all the vacancies, which were reported to the Commission. The petitioners in WP(C) Nos. 661 and 3584 of 2014 challenged the cancellation of the advice already issued to them by the KPSC on the ground that they had been wrongly advised against vacancies which arose before 1.1.2008. Relying on the judgment of the Apex Court reported in Government of India and Another v. Ravi Prakash Gupta and Another [(2010)7 SCC 626], the learned single Judge found that the 3% reservation provided to persons with disability under the Act should have been applied to all the vacancies reported to the Commission. The petitioners in the two writ petitions, who had earlier been advised against the turns kept apart for physically handicapped hands in respect of vacancies reported prior to 1.1.2008 and who had been sent out of service, were directed to be reinstated. The petitioner in WP(C) 2715/2014 was directed to be advised for appointment in his turn reckoning the vacancies reported prior to 1.1.2008 as well.

5. In these appeals, it is contended that entrustment of selection through KPSC was made only with effect from 1.1.2004 by Government Order dated 28.2.2007 and the turn of advice of the physically handicapped candidates was fixed by the Government as Sl.Nos. 33, 66 and 99 in a roster of 100 vacancies only by G.O. (P).No. 46/2008/SWD dated 19.7.2008. The Government also by G.O.(Ms).No. 29/11/SWD dated 7.5.2011 made it clear that 3% reservation of Physically handicapped candidates to be filled up from the ranked list of general

recruitment may be worked out on the basis of total number of vacancies reported on or after 1.1.2008. Hence, turn of 3% reservation of physically handicapped persons i.e. Sl.Nos .33, 66 and 99 in cycle of 100 vacancies are to be calculated on the basis of number of vacancies reported after 1.1.2008. Hence, the 274 vacancies reported prior to 1.1.2008 could not be considered for advising physically handicapped candidates in the turn of Sl.Nos. 33, 66 and 99 in cycle of 100 vacancies.

6. Heard Sri. P.C. Sasidharan, learned Standing Counsel for the Kerala Public Service Commission, Sri.P.M. Pareed, learned counsel for the first respondent in W.A. 362 OF 2015, Sri.P. Narayanan, learned counsel appearing for the first respondent in W.A.No.622 of 2015, Sri.S.K. Balakrishnan, learned counsel appearing for the first respondent in 403 of 2015, Sri. C. Unnikrishnan, learned counsel appearing for the first respondent in W.A. No. 550 of 2015, Sri. C.S. Ajith Prakash, learned Standing Counsel for the Beverages Corporation and other learned Standing Counsel appearing for the Public Sector Undertakings concerned.

7. It is the argument of the learned counsel for the appellants that the identification of the posts to which the 3% reservation is to be provided under the provisions of the Act and the turns against which such reservation was to be effected having been fixed by the Government only in 2010, and in the light of the clarificatory order of the Government providing that such reservation is to take effect only from 1.1.2008, no earlier date could have been adopted by the KPSC for effecting the reservation under the Act. It is further contended that even in case it is found that backlog vacancies were available to be filled up by appointing persons with physical disability, such appointments could only be made after conducting a special recruitment as provided in the relevant Rules for appointments against backlog vacancies. It is also contended that the judgment of the learned single Judge in so far as it directed the appointments of persons from a supplementary list, when the main list already stood exhausted, was per se erroneous and is liable to be corrected in appeal.

8. The learned counsel appearing for the party respondents would, on the other hand, submit that the questions raised by the appellant in these writ appeals are squarely covered against the appellant by the binding judgments of the Honourable Supreme Court in Government of India and another v. Ravi Prakash Gupta and another [(2010)7 SCC 626] and Union of India and another v. National Federation of the Blind and others [(2013)10 SCC 4816] and that the appeals are only to be dismissed. It is further contended that none of the employers have preferred appeals or even taken a stand supporting the appellant in these cases. As regards the contention that in the judgment appealed against in W.A. 362 of 2015, the direction is to make appointments from a supplementary list when the main list had already been exhausted, It is contended that the writ petition had been filed in October, 2011, when the main list was in force. The contention was that the vacancies of physically handicapped

persons were to be filled up from Exhibit P3 supplementary list attached to Exhibit P1 list. In the above circumstances, relying on the provisions of the KPSC Rules of Procedure and the decisions of the Apex Court in Swapna Sukumar & Ors v. State of Kerala and others (2013(3) HLT 53) and State of UP v. Ram Swarup Saroj [(2000) 3 SCC 699], it is contended that since the party respondents had approached the Court during the currency of the list itself, the expiry or exhaustion of the main list thereafter, during the pendency of the writ petition would not stand in the way of their rights for appointment as found by the Court.

9. In Ravi Prakash Gupta's case (supra) it was held that while it cannot be denied that unless posts are identified for the purpose of Section 33 of the Persons with Disabilities Act, no appointments from reserved categories contained therein can be made, the extent of such dependence would be for the purpose of making further appointment and not for the purpose of making reservation. It was categorically held that reservation under Section 33 of the Act is not dependent on identification of the posts and a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act. Since the posts were not reserved under Section 33, it was held that the question of carrying forward or lapse of vacancies, would not arise. The judgment of the Delhi High Court directing the appointment of the employee concerned against the vacancies available considering the reservation as against vacancies arising from the year 1996 was upheld and the Special Leave Petitions were dismissed with costs.

10. In National Federation of the Blind's case (supra) the three member Bench of the Honourable Supreme Court had analysed the statutory provisions and the case law on the issue of reservation of physically handicapped persons and held that communal reservation under Article 16 of the Constitution of India was vertical in nature while reservation for persons with disabilities is horizontal and cuts across the vertical reservation in what can be termed as interlocking reservation. Examining the Government orders and the office memoranda issued by the Union Government, the Apex Court came to the conclusion that reservation had to be worked out on the basis of the total number of vacancies available in a cadre and not against the identified posts. It was further held by the Apex court in paragraph 48 of the judgment as follows:

"48. However, the decision in R.K. Sabharwal is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST and OBC, which is vertical reservation whereas reservation in favour of persons with disabilities is horizontal. We harmonise with the stand taken by the Union of India, the appellant herein in this regard. Besides, the judgment in R.K. Sabharwal was pronounced before the date on which the Act came into force, as a consequence, the intent of the Act must be given priority over the decision in the above said judgment. Thus, in unequivocal terms, the

reservation policy stipulated in the Act is vacancy-based reservation.

11. The Apex Court recorded the following conclusions in paragraphs 49 to 53 of the judgment:

"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.

50. The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various international treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today.

51. Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz. "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29-12-2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new office memorandum(s) consistent with the decision rendered by this Court.

52. Further, the reservation for persons with disabilities has nothing to do with the ceiling of 50% and hence, Indra Sawhney is not applicable with respect to the disabled persons.

53. We also reiterate that the decision in R.K. Sabharwal is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST and OBC, which is vertical reservation, whereas reservation in favour of persons with disabilities is horizontal."

12. Thereafter, the following directions were also issued by the Apex Court in paragraph 54 of the judgment:

"(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 OMs 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."

13. Going by the ratio of the decision of the Apex Court in Ravi Prakash Gupta's case (supra), the vacancies which were in existence in the case of the recruitment in question in W.A. No. 362 of 2015 would have to be considered as existing vacancies as on the date of the notification issued by the KPSC. In that view of the matter, no question of backlog vacancies or filling up of the same by resorting to a special recruitment would arise in the instant case. Therefore, in view of the unassailed factual findings that the contesting respondent would be entitled to appointment, if the 3% of vacancies from 1.1.2004 to 31.12.2007, which were liable to be kept apart for physically handicapped persons, were filled up from the supplementary list, the contention that a special recruitment has to be made in respect of those vacancies fails, since such vacancies can be considered as current vacancies. Since the filling up of the vacancies could have been taken up only after the identification of the posts by the Government, the vacancies could be deemed to have arisen after such identification. Therefore, they can be considered as having arisen during the currency of Exhibit P3 list and therefore liable to be filled up therefrom. Even otherwise, since after the identification of the posts a process of selection having been carried out by the KPSC for the purpose of publishing Exhibit P3 list, Exhibit P3 list, which was intended only to fill up the vacancies of physically handicapped candidates, can be reckoned as being a list published pursuant to a special recruitment for the purpose of the persons with disabilities Act. We also find that the provisions of Rule 15(a) and Rule 17A of Part II KS&SSR have no strict application to the case on hand in view of the fact that specific provisions contained in the 1995 Central enactment govern the appointments of physically disabled persons. The reservation of posts and the mode in which such reservation is to be worked out having been set forth in the Act which has been interpreted by the Apex Court by binding precedents, we are of the considered opinion that the judgments under appeal have only followed the law laid down on the point.

14. In view of the categoric findings of the Apex Court in the afore noted and other judgments, the question whether reservation available to physically handicapped persons under the Act has to be computed on the basis of the vacancies which arose with effect from 1.1.1996 is no longer res integra. The Act

having come into force with effect from 1.1.1996, reservation, which has been held to be not dependent on the identification of the posts would come into operation with effect from the date of the effect of the Act. At best, what can be contended is only that the reservation can be operated by the KPSC only with effect from the dates from which that authority was entrusted with the function of making selections and appointments to the public sector undertakings involved. Even if that be the case, if the vacancies which arose after the KPSC was entrusted with the function of making selections and appointments is considered, all the party respondents would be entitled to succeed in their respective writ petitions. The vacancies earmarked for physically handicapped persons are therefore to be reckoned not with effect from the date of the Government Order identifying the posts or with effect from 1.1.2008, the date on which the Government directed by its clarificatory order that the reservation is to take effect, but with effect from 1.1.1996 or at least with effect from the date when the KPSC was entrusted with the selection and the number of vacancies as well as the quota and the rota available, would be capable of being ascertained. Looked at from this angle also, the judgments under appeal are perfectly in order and in strict conformity with the principles set out by the Apex Court in the matter of implementation of the reservation available to physically handicapped persons.

15. Another Bench of this Court in *Kavitha Balakrishnan v. Prasanna Kumari* (2015(4) KLT 700), which had occasion to consider the various aspects of the implementation of the reservation available to physically handicapped persons, has held as follows:

"16.the Act was brought into force recognising the country's obligation as a signatory to the proclamation that was adopted on the Full Participation and Equality of the People with Disabilities in the Asia Pacific Region. The object of the Act is to (1) integrate persons with disabilities into social mainstream (2) lay down a strategy for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities and for education, training, employment and rehabilitation amongst other responsibilities and (3) to give effect to the proclamation on full participation and equality of people with disabilities in Asian and Pacific Regions. Act being a social welfare legislation, it has to be liberally interpreted so that the purpose of the enactment is fully achieved. Every establishment which is bound by the Act should imbibe the true spirit of the Act and implement the statutory provisions...."

16. The Hon"ble Supreme Court in *Sunanda Bhandare Foundation v. Union of India* (2014)14 SCC 383] alerted the appropriate Governments of the need to expedite steps for implementing the mandate of Sections 32 and 33 of the Act in letter and in spirit at the earliest.

17. In view of the facts and circumstances involved in this case and in view of the binding precedents, we are satisfied that the judgments under appeal suffer from no errors of fact or law. The writ appeals fail.

18. In the result, the appeals are dismissed.