

(2015) 09 BOM CK 0142
In the Bombay High Court
Case No : Writ Petition No. 3972 of 2015

Maheshkumar

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 21-09-2015

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2

Citation : (2015) 09 BOM CK 0142

Hon'ble Judges : S.S. Shinde and A.M. Badar, JJ.

Bench : Division Bench

Advocate : S.B. Bhosale, Advocate, for the Appellant; A.V. Deshmukh, AGP, for the Respondent

Final Decision : Disposed Off

Judgement

S.S. Shinde, J.—Heard.

2. Rule. Rule made returnable forthwith, and heard with the consent of the parties.

3. This Petition takes an exception to the letter dated 3rd January, 2015, written by the Respondent No. 3 i.e. the Chief Executive Officer, Zilla Parishad, Ahmednagar, to the Dean, Medical Board, Sasoon Hospital, Pune. It appears that, the letter dated 24.11.2014 was addressed to the petitioner, giving reference of the letter written by the Chief Executive Officer, Zilla Parishad, Ahmednagar, to the Block Development Officer, Panchayat Samiti, Rahata. By letter dated 10th November, 2014, it was communicated by the Chief Executive Officer, Zilla Parishad, Ahmednagar to all the Head of the Departments of Zilla Parishad, Ahmednagar and Block Development Officers of Panchayat Samities, to send names of all those employees, who are appointed from the handicapped / hearing impaired and low vision categories, so as to refer them for medical re-examination. The petitioner was asked to appear before the Civil Surgeon for medical re-examination, and submit medical certificate after re-medical

examination. Aggrieved by the same, the petitioner has filed the present Writ Petition.

4. It is the case of the petitioner that, the petitioner has entered in the service of respondent No. 3 as a Junior Assistant in the Year 1996. The petitioner's father, unfortunately died during the course of employment with the respondent No. 3 as a Primary Teacher. The petitioner was appointed on compassionate ground. The petitioner, thereafter, successfully passed the Departmental Examination, and thereafter, he was promoted on the post of Senior Assistant. Since the petitioner was appointed from unreserved category candidate and being physically handicapped candidate, he has applied for further promotional post of Office Superintendent with the office of the respondent No. 3 along with his disability certificate. The petitioner applied the office of the respondent No. 3, placing on record disability certificate. He did produce the Audiogram report as well.

5. It is further the case of the petitioner that, the under Secretary, Rural Development and Water Conservation Department, Mantralaya, Mumbai, has communicated to all the Divisional Commissioners by its letter dated 5th January, 2010 that, there is provision in the Government Resolution dated 05.03.2002 issued by the General Administration Department, that appointments by nomination [direct] cannot exceed 75%, it means 25% posts are to be filled in by promotion. The aforesaid communication was in response to the query made about reservation to the post of Office Superintendent from the handicapped category.

6. It is further the case of the petitioner that, the Divisional Commissioner, Nashik Division, Nashik by his letter dated 16.06.2010 communicated the respondent No. 3 that, perception of respondent No. 3 that, in case of direct recruitment, there can not be reservation for handicapped category for the post of Office Superintendent is not in consonance with the afore mentioned Government Resolution, and the policy of State Government.

7. It is further the case of the petitioner that, the respondent No. 3 by his order dated 10.10.2010 / 13.10.2010 issued promotional order in favour of various candidates from the post of Senior Assistant to the post of Office Superintendent, and avoided promotion to the petitioner intentionally and with a view to deprive the legitimate right of the petitioner to be appointed on the post of Office Superintendent.

8. It is the further case of the petitioner that, since the petitioner has noticed that, the respondent No. 3 is avoiding the petitioner to be appointed on the post of Office Superintendent from the Physically handicapped category, the petitioner had, therefore, approached the Divisional Commissioner, Nashik Division, Nashik, by filing Appeal under Rule 14 of the Maharashtra Zilla Parishad District Services [Discipline & Appeal] Rules, 1964, praying therein that, the respondent No. 3 intentionally avoided to give promotion to the petitioner on the post of Office

Superintendent from the reserved category of physically handicapped candidate, though the petitioner is eligible and entitled on the said post, and the direction may be issued to respondent No. 3 to appoint the petitioner on the post of Office Superintendent. The Divisional Commissioner by its Judgment and Order dated 25.10.2011 passed in Appeal No. 41/2011, was pleased to partly allow the appeal filed by the petitioner, and was pleased to direct the respondent No. 3 to examine the petitioner's case under the provisions of Government Resolution dated 14.01.2011, and take appropriate decision.

9. It is further the case of the petitioner that, the petitioner has also approached to the appropriate authority and Commissioner for Handicapped Welfare, Maharashtra State, Pune, by filing complaint under Clause 62 of the Handicapped Persons [Equal Opportunity, Protection of Rights and Full Participation] Ordinance, 1995, thereby prayed that, the respondent No. 3 is intentionally avoiding to issue promotional order in favour of the petitioner on promotional post of Office Superintendent from reserved category of physically handicapped candidate. The learned Commissioner for Handicapped Welfare, Maharashtra State, Pune was pleased to partly allow the complaint filed by the petitioner, thereby directing the respondent No. 3 to take appropriate decision for appointing the petitioner on higher promotional post of Office Superintendent under the provisions of Government Resolution dated 05.03.2002 and 17.03.2011, in consonance with the guidelines issued by the Central Government dated 29.12.2005 and pass an appropriate order within two months from 17.02.2012.

10. It is the further case of the petitioner that, since both the higher authorities have directed the respondent No. 3 to take appropriate decision, appointing the petitioner on higher promotional post of Office Superintendent from the reserved category, the respondent No. 3 did not pay heed towards the oral requests made by the petitioner. Therefore, the petitioner was constrained to file detailed representation dated 23.02.2012, thereby requesting the respondent No. 3 to appoint him on higher promotional post of Office Superintendent with immediate effect. It is further the case of the petitioner that, the Divisional Commissioner, Nashik Division, Nashik, by his letter dated 27.06.2012 informed the respondent No. 3 that, appropriate orders are passed in Appeal No. 41/2011 thereby partly allowing the appeal filed by the petitioner, and it was, therefore, directed to the respondent No. 2 that, appropriate further action may be taken in respect of the petitioner's case.

11. It is further case of the petitioner that, since the respondent No. 3 had not paid heed to the Judgment and Order dated 25.10.2011, passed in Appeal No. 41/2011 by the Divisional Commissioner, Nashik, and not initiated further appropriate action appointing the petitioner on a promotional post of Office Superintendent, therefore, the petitioner again constrained to file representations dated 14.10.2012 and 15.10.2012 with the office of Additional Divisional Commissioner, Nashik Division, Nashik. It is further the case of the

petitioner that, in order to harass the petitioner, the respondent No. 3 by his letter dated 3rd May, 2013 communicated the District Civil Surgeon, Ahmednagar to examine the disability certificate issued in favour of the petitioner from his office, and also submit a report as to whether the said certificate is issued from Civil Surgeon's office or not, knowing the fact that, the petitioner has already submitted the said certificate of examination by the Expert Medical Board along with audiogram way back in the Year 2009. It is further the contention of the petitioner that, though it was not legal and proper to go before the same Medical Board for same physical examination, which is already done, and issued the said certificate in favour of the petitioner, to obey the orders of Higher authority, the petitioner again remained present with the office of the Civil Surgeon, Ahmednagar for his physical examination, and the office of Civil Surgeon issued examination certificate dated 21.05.2013, mentioning therein that, the petitioner is fit to be appointed on promotional post of Office Superintendent.

12. It is further the case of the petitioner that, the office of the Civil Surgeon, Ahmednagar, by his letter dated 08.08.2013, communicated to the office of the respondent No. 3 that, the disability certificate issued in favour of the petitioner is a genuine certificate, and it was issued after examination of the petitioner by the Expert Medical Board and the entry in this regard is also available in the record of the Civil Hospital. It is further the case of the petitioner that, the representation dated 17.11.2009, the orders passed in Appeal No. 41/2011 and the orders passed in Appeal No. 418/2012 dated 17.02.2012, were came to be obeyed by the respondent No. 3 after more than four years, and that too after extreme mental as well as physical agony suffered by the petitioner, thereby appointing the petitioner on the post of Office Superintendent, Group-II on a promotional post, to which the petitioner was legally eligible and entitled.

13. It is further the case of the petitioner that, on 10.11.2014, since the respondent No. 3 was compelled to issue promotion order in favour of the petitioner, appointing him on the promotional post of Office Superintendent, the Secretary, Maharashtra State Handicapped Association, Mumbai has filed some complaint in respect of the Physically Handicapped Candidates with the office of the respondent No. 3, therefore, the respondent No. 3 had communicated all the head of Department and Block Development Officer to get medically re-examined all the physically handicapped employees serving under their control.

14. It is further the case of the petitioner that, the respondent No. 4 by its communication dated 24.11.2014 directed the petitioner to submit himself for medical re-examination within 8 days, and submit medical certificate / report issued by the District Civil Surgeon, Government Hospital.

15. It is the case of the petitioner that, the respondent No. 2 by his Circular dated 19.10.2011, forwarded the guidelines of the Central Government published on 10.06.2009 to all concerned. It is the case of the petitioner that, the Government of Maharashtra, by Government Circular dated 06.05.2004, formulated and circulated the common guidelines, in respect of reservation

meant for persons from handicapped category on various posts, and the procedure to fill in those posts. In the said explanation at serial No. 8, the State Government was pleased to state that, the certificate issued from the District Hospital, in which medical examination / check up, has been conducted of the handicapped candidates, such certificate should be treated as basic certificate. It is the case of the petitioner that, the under Secretary, Public Health Department, Mantralaya, Mumbai was pleased to issue Circular dated 29.04.1999, thereby clarifying the fact that, all the District Hospitals, Medical Board, the District Civil Surgeon and Medical Superintendents are the Presiding Officers for the protection of Section 2 of sub-section (T) of Handicapped Persons [Equal Opportunity, Protection of Rights and Full Participation] Ordinance 1995. It is the case of the petitioner that, the respondent No. 1 by Government Resolution dated 05.03.2002, clarified the fact that, as per the policy of Central Government, the promotional posts for physically handicapped i.e. Blind, Low Vision, Deaf should be reserved up to 3%.

16. It is the case of the petitioner that, on 14.01.2011, the Social Welfare and Special Aid Department, Mantralaya, Mumbai by his Circular dated 14.01.2011, formulated and issued the guidelines in respect of handicapped Persons [Equal Opportunity, Protection of Rights and Full Participation] Ordinance 1995, in which in clause No. 5, it is specifically clarified that, the physical examination of handicapped person should be done like the candidates from General Category.

17. It is further the case of the petitioner that, the Dean, Medical Board, Sasoon Hospital, Pune was informed by letter dated 03.01.2015 by the respondent No. 3 and the petitioner was also directed to attend the physical examination, and also verification of his disability certificate immediately at the Sasoon General Hospital, Pune, stating therein that, the petitioner was given promotion on the post of Office Superintendent, but whether petitioner is eligible to be allowed to work on the said promotional post of office Superintendent as the petitioner is physically deaf. The respondent No. 3 was also pleased to inform the Medical Board, Sasoon Hospital, Pune to specify the percentage of disability and capacity to hear by ear and to submit such fact finding report to the office of respondent No. 3. It was informed to the petitioner that, if he fails to attend the Medical Board at Sasoon Hospital, Pune for verification of his disability certificate within 15 days, he would be reverted back to his original post of Senior Assistant from the post of Office Superintendent and also liable to take further disciplinary action under Section 4 of Maharashtra Zilla Parishad District Services [Discipline and Appeal] Rules, 1964. Therefore, the learned counsel appearing for the petitioner submits that, the Petition may be allowed.

18. On the other hand, the learned counsel appearing for the respondent No. 3 invited our attention to the averments in the affidavit-in-reply and made the following submissions:

19. It is submitted that, the petitioner was given promotional order, and he was posted in Health Department of Zilla Parishad, subject to the result of the appeal

pending before the Additional Commissioner, Nashik. The Zilla Parishad received anonymous complaint on 09.07.2014, regarding promotion of the petitioner. It is stated that, as per the Government Resolution dated 05.03.2002, the deaf persons cannot be promoted on the post of Office Superintendent. The Maharashtra Rajya Apang Karmachari Sanghatana sent a letter dated 18.10.2004 to the Zilla Parishad, requesting to do re-verification of Disability Certificate of the employees as the said Association has noticed that, percentage of handicapped employees is increasing and their disability certificates are doubtful. As per the Circular dated 14.01.2014, the re-verification of the Disability Certificate of the handicapped employees is also necessary. In view of this, the petitioner was asked to appear before the Medical Board of Sasoon Hospital as the Disability Certificate of the petitioner dated 21.05.2013 bears a mark that ""except handicap not examined"" and there are also obliterations by scratching the words ""Senior Assistant"" and by writing thereon, ""Office Superintendent"". But, the said obliteration is not signed by anyone. It is further submitted that, the post of Office Superintendent is a key post in the administration and coordinates between Higher Officers and their Subordinates. Equally, the Office Superintendent is also required to receive phone calls, and act on the said phone calls. It is somewhat difficult for deaf persons to receive phone calls and make further communications with the various authorities. In view of this, guidance of the Medical Board was sought, as to whether the petitioner would be competent regarding receiving phone calls and making further communication with various authorities. Therefore, the learned counsel appearing for the respondent No. 3 prays that, the Petition may be dismissed.

20. We have given careful consideration to the submissions of the learned counsel appearing for the petitioner, and the learned AGP appearing for the Respondent -State and the learned counsel appearing for the respondent No. 3. With their able assistance, we have carefully perused the pleadings in the Petition and grounds taken therein, annexure thereto, and the copies of the Medical Certificates produced on record by the petitioner. Upon careful perusal of the copies of the certificates, it appears that, the Medical Officer, General Hospital, Ahmednagar has issued audiogram, and disability certificate in favour of the petitioner is also issued by the Civil Surgeon, District Hospital, Ahmednagar. It further appears that, the petitioner was required to approach the various authorities, since he was not being promoted on the higher post from hearing impaired category.

21. Upon careful perusal of the documents placed on record, the Government Resolution dated 5th March, 2002 provided promotion for class-III post from Class-IV post from the handicapped category.

22. Upon careful perusal of the Government Resolution dated 14th January, 2011, issued by the Social Justice and Special Assistance Department, Government of Maharashtra, and in particular clause No. 5 thereof, it is abundantly clear that, while conducting medical examination of the candidates

from handicapped category, the medical examination should be conducted like in case of candidates being selected from the general category. No questions should be raised about handicapped certificate, as per the relevant clause No. 5 of the said Government Resolution. Clause No. 5 of the said Government Resolution reads thus:

The true translation i.e. as translated by the office Translator of the said clause, reads thus:

5. The appointing authority should give clear cut instructions to the concerned Medical Officer by the letter that the candidates who have selected and sought benefit under Physically Challenged category by way of reservation meant for Physically Challenged persons and said candidates have selected in the category of Blind / Orthopedic / Deaf and Dumb before their appointment. And accordingly those candidates should be medically examined as if general category candidates. Issues of their Physically Challenged Certificate or disability should not be raised. The criteria laid down by the Government while issuing such certificates if followed and detailed aspects in this regard are verified and if it is made available to the appointing authority the said authority will decide as to whether said person is entitled for reservation meant for Physically Challenged Category or not.

23. Upon perusal of the documents placed on record, in the light of the Government Resolution dated 6th May, 2004, issued by the General Administration Department, Government of Maharashtra, the certificate submitted by the petitioner from the category of ""hearing impairment"" is in conformity with the said Government Resolution. It further appears that, before appointment of the petitioner, the petitioner did appear before the Civil Surgeon, General Hospital, Ahmednagar and the disability certificate has been issued by the said Authority, mentioning therein that, the petitioner's disability is more than 40%.

24. As already observed, the audiogram was also submitted. Therefore, having been submitted such disability certificate issued by the Civil Surgeon, General Administration, Ahmednagar with audiogram, the impugned communication asking the petitioner to submit himself once again for medical examination appears to be contrary to the Government Resolution dated 14th January, 2011. As already observed, the petitioner, on fulfilling parameters laid down as guidance in the Government Resolution dated 6th May, 2004, issued by the General Administration Department, was promoted to the post of Office Superintendent.

25. Therefore, by issuing the impugned communication contrary to the spirit of the above mentioned Government Resolutions, asking the petitioner to re-examine himself, and submit fresh medical certificate, appears to be without any legal basis. If the respondents feel that, the petitioner should be medically re-examined for compelling reasons, they have to do the said exercise within the

permissible limits of provisions of said Act, Government Resolutions issued by the State Government on subject, and not contrary to the spirit of the provision of said Act or Government Resolutions issued by the State Government. However, in absence of any such exercise in adherence to provisions of Act / Government Resolutions, the impugned communication cannot sustain, accordingly, the impugned communication dated 24.11.2014 issued by the Block Development Officer, Panchayat Samiti, Rahata, and impugned letter dated 3rd January, 2015, issued by the Respondent No. 3 i.e. the Chief Executive Officer, Zilla Parishad, Ahmednagar, qua the present petitioner, in the peculiar facts of the present case and in the light of documents placed on record, stands quashed.

26. Rule made absolute in above terms. Writ Petition stands disposed of accordingly.