

(2019) 09 RAJ CK 0054

In the Rajasthan High Court

Case No : Civil Writ Petition No. 13228 Of 2019

Neha Sankhla

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 06-09-2019

Acts Referred:

Rights Of Persons with Disabilities (Equal Opportunities Protection Of Rights & Full Participation) Act, 2016 — Section 2(y), 3(5), 34(1)
Indian Medical Council Act, 1956 — Section 58, 59
Constitution Of India, 1950 — Article 12, 14, 16(4)

Citation : (2019) 09 RAJ CK 0054

Hon'ble Judges : S. Ravindra Bhat, CJ;Ashok Kumar Gaur, J

Bench : Division Bench

Advocate : Dr. Nupur Bhati, Kuldeep Mathur

Final Decision : Allowed

Judgement

1. The petitioner, a candidate for the post of Civil Judge, impugns Note to Clause-7 of the guidelines contained in the advertisement dated 15.11.2018 which stipulates that candidates of SC/ST category should secure minimum 40% marks to qualify for the main written examination and the candidates of all other categories have to secure 45% marks in the preliminary examination.

2. The petitioner is a specially abled candidate, inasmuch as she has 40% visual impairment; she relies upon a certificate issued in this regard on 8.2.2012. The petitioner completed her graduation from Jai Narain Vyas University, Jodhpur and further acquired the law degree (LL.B.) in 2018. It is not in dispute that the petitioner fulfilled other eligibility stipulations and her application for participating in the selection process for filling up vacancies in the Rajasthan Judicial Service was accepted; an admit card was issued to her. The selection process comprises of a preliminary screening test, followed by the written (main) examination and lastly an interview. On 25.1.2019 the schedule of examination was issued and a preliminary examination was conducted on 31.3.2019. The petitioner, however,

secured 39 marks and was declared "failed".

3. The petitioner contends that the marks secured by her were later recomputed pursuant to the order of the Supreme Court made with respect to the issues concerning re-evaluation on 31.7.2019 as a result of the directions in Rajasthan High Court, Jodhpur & ors. V/s Arti Meena & ors. Upon re-computation her marks were revised to 40. It is stated that several representations were addressed to the establishment of the High Court, especially (including those dated 20.7.2019, 24.7.2019 and 13.8.2019) asking for parity of persons with disability, who were candidates, with scheduled caste/scheduled tribe (SC/ST) candidates, for whom the minimum marks were 40%; however these representations went unheeded.

4. Dr. Nupur Bhati, learned counsel submitted that the grievance articulated in these proceedings is that a person with bench mark disability under the Rights of Persons with Disabilities (Equal Opportunities Protection of Rights & Full Participation) Act, 2016 (hereafter referred to as "the Act") means one who possesses 40% or more of a specified disability. It is stated that under Section 34(1) of the Act blindness or low vision is also considered a disability with reservation to be given. The petitioner relies upon a judgment of this Court in National Federation of the Blind & anr. V/s State of Rajasthan & ors. (D.B.Civil Writ Petition No.4907/2019, decided on 22.7.2019) to say that the appropriate Government should ensure reasonable accommodation for persons with disabilities under Section 3(5) of the Act.

5 Dr. Bhati argued that reasonable accommodation under Section 2(y) of the Act means appropriate modification and adjustments. Relying on National Federation of the Blind (supra), it was argued that the Court issued a direction to the State and the Rajasthan Secondary Education Board to grant the benefit of 20% concession to the extent of unfilled vacancies of 2017 and also on-going recruitment process of 2019.

6. Explaining "reasonable accommodation" Dr. Bhati said that in the present context it meant equating candidates with disability such as the petitioner with the ST/ST category candidates. Learned counsel relied upon the judgments of the supreme Court in Justice Sunanda Bhandare Foundation V/s Union of India & anr. ((2014) 14 SCC 383) and All India Confederation of the Blind & anr. V/s Union of India & anr. ((2017) 3 SCC 525). It was submitted that like in that case a direction should be issued to the appropriate Government to grant such relaxation as is granted to SC/ST candidates in the present case as well.

7. It was argued that the benefit of relaxed standard i.e. lowering of minimum marks would ensure that the vacancies earmarked for persons with disability are meaningfully filled up. In the absence of lowered standard, counsel argued, there is real possibility that the vacancies for such persons with disability would remain unfilled, thus defeating the purpose of reservation under the Act.

8. The Rajasthan High Court was represented by counsel, Mr. Kuldeep Mathur. He submitted that the petitioner has admitted that the advertisement in the present

case was issued long ago, i.e. on 15.11.2018. The conditions were then made known to her; concededly she participated in the preliminary examination held on 31.3.2019. The marks secured by her, which were made known rendered her ineligible to claim any relief as she had obtained 39 marks .

9. Mr. Mathur pointed out that by fortuitous circumstance on account of Supreme Court's direction the petitioner's marks were revised to 40. He urged that this petition ought not to be entertained for various reasons. Counsel pointed out that the stipulation with respect to minimum marks was made known to all on 15.11.2018; the petitioner never protested or made any attempt to challenge that; rather she participated and failed to even secure the minimum marks which she now demands should be the norm. It was argued that on the ground of accepting the stipulations and participating in the selection process itself the writ petition ought to be rejected.

10. Mr. Mathur next argued that unlike SC/ST candidates whom reservation is envisioned in the Constitution, reservation under the Act is known as "horizontal"; the claim for lowering eligibility standard therefore is to be examined independently. Learned counsel submitted that in other words equation of SC/ST candidates with persons with disability cannot be done mechanically by the Court as it would involve a careful exercise of policy making.

11. It was lastly argued that the submission with respect to vacancies not being filled is unfounded. It is stated that as against a total number of 6 posts advertised for persons with disabilities, 18 candidates (out of 562 who had applied in this category) have qualified. Clearly, three times the number of vacancies have qualified. All the vacancies would therefore be filled.

12. The writ petitioner as is evident seeks a direction that all candidates with disabilities are entitled to reservation under the Act and should be treated at par with SC/ST candidates, in regard to the lowering of the minimum marks stipulated for passing.

13. At the outset, this Court is of the opinion that relief claimed -apart from being highly belated- is fraught. The lower standard of eligibility or minimum marks, as the case may be, in the case of SC/ST candidates is to enable their adequate representation in public services as envisioned by Article 16 (4) of the Constitution. The Constitution makers were cognizant of the centuries of oppression which individuals who fall in such description were subject to. To ensure their full participation in nation building and in public services, (which ensures empowerment), the State (in all its manifold expressions under Article 12) consciously provided for relaxed standards in the matter of recruitment, selection etc.

There is an element of policy involved in such concession, because it is the state which has data and facts relating to the general level of backwardness or educational standard which these communities labour under. Therefore, the policy is relaxation is calibrated, depending upon the nature of the post, the

needs of the communities which are to be adequately represented, and the extent of their educational backwardness, which plays a dominant part in deciding the extent of the minimum standard expected of such sections of the society.

14. There are other categories which derived the benefit of reservation (such as Other Backward Classes, and, in some instances women, persons with disabilities etc.) Women, persons with disabilities, sports persons etc. enjoy the benefit of what is called as "horizontal reservation". This is not constitutionally mandated but is separately provided for. Nevertheless, the State to ensure fuller participation of these categories, provides for their reservation.

15. In the opinion of the Court, the direction to equate such categories, which are entitled to "horizontal reservation" with SC/ST candidates for whom the benefit of relaxed standard has been consciously provided, would not fall within the domain of the Courts. This would entail a careful scrutiny of the extent of backwardness (social and educational) or the deprivation which the category (in this case persons with disabilities) have suffered and whether as a general policy, they ought to be accorded a relaxed standard. There cannot be a bland generalization that all persons with disabilities suffer from the same level of social or educational backwardness as those belonging to scheduled caste or scheduled tribe communities are subjected to. Disabilities of the kind envisioned by the Act, are inborn or occur at any stage in life; they have nothing to do with social or educational backwardness of the individual or the social background she comes from. However, the kind of backwardness which SC/ST candidates experience is entirely different: it is on account of barriers which existed for millennia preventing their meaningful participation in society as a whole.

16. The petitioner had relied upon the judgment in Justice Sunanda Bhandare Foundation (supra) and All India Confederation of the Blind (supra). In that case the Court had directed the UGC to consider whether concession to the extent granted to SC/ST candidates (in terms of the Maintenance of Standard of Universities, 1998) could be granted to persons with disability. On the basis of the Court's order, the University Grants Commission (UGC) had considered the issue and granted a similar benefit. Both Justice Sunanda Bhandare Foundation (supra) and All India Confederation of the Blind (supra) are instances where the Courts did not direct the State or its authorities to grant the relaxation or equate the persons with disability with SC/ST category candidates, but rather required the concerned agency to consider the issue. In the opinion of the Court, there is a vast difference between the nature of relief sought in this case- which is a direction to the respondents to grant equation, as opposed a direction to consider.

17. As far as the reliance upon the recent Division Bench ruling in National Federation of the Blind (supra) is concerned, the Court had taken note of the concession of 20% given by the State of Rajasthan, by an order of 2009. After noticing a previous Supreme Court ruling, this Court observed that that concession had never been withdrawn or modified and consequently directed that

it ought to be granted to persons with disabilities in the on- going recruitment process. Here again, what the Court enforced was an existing concession.

18. It is also noteworthy that the Rajasthan Rights of Persons with Disabilities Rules, 2018 does not stipulate any relaxation of minimum marks for the purpose of recruitment to services under the state.

19. This Court notices that in MD.Shah Afzal V/s Medical Council of India & anr. (WP(C) No.1352/2008 decided on 6.7.2010 by the Delhi High Court), an identical plea that minimum qualifying marks should be relaxed to 40% (for admission to medical graduation seats) at par with the standard applicable for SC/ST category candidates, was made. The minimum marks prescribed for the purpose of reckoning eligibility was 50%. After considering the provisions of the prevailing Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and analyzing the powers conferred upon the Chief Commissioner, juxtapose with the provisions of the Indian Medical Council Act, the Court held as follows:-

"33. Going back to the provisions of Sections 58 and 59 of the said Act, we find that the Chief Commissioner's powers and functions are in relation to the rights and facilities made available to the persons with disabilities. Obviously, those rights and facilities have reference to the provisions made in respect thereof in the said Act. We have already pointed out that nowhere in the said Act is it specified that persons with disabilities would be entitled to any relaxation insofar as the minimum qualifying marks are concerned while considering admission to educational institutions. Prescribing minimum standards for medical education is clearly within the domain of MCI and cannot be altered or interfered with by the Chief Commissioner under the said Act. We agree with the submission made by Mr. Maninder Singh, the learned senior counsel appearing on behalf of MCI, that the Chief Commissioner can certainly ensure and take steps to safeguard the rights of persons with disabilities but he cannot, by himself, create a right which the said Act does not give to the persons with disabilities.

34. The argument on behalf of the petitioner could very well be that even if we ignore the powers and functions of the Chief Commissioner and forget about the order passed by him, this Court, can certainly issue directions to ensure that discrimination and arbitrariness is removed whenever there is any violation of Article 14 of the Constitution. In this backdrop, it could be argued that because the SC and ST candidates have been given a concession or relaxation of 10% in the minimum qualifying marks, the physically disabled candidates should also get the same relaxation. There are two answers to this. The first answer being that every differentiation does not necessarily entail discrimination. The fact that the physically disabled fall in a different class to the candidates belonging to the SC/ST category, in itself, implies that they could be treated differently just as candidates belonging to the general category are, indeed, treated differently from those belonging to the SC/ST category. The second answer is that what has been given to the SC/ST candidates is a concession. The petitioner, belonging to

a physically disabled category, cannot claim such a concession as a right. The right that the petitioner can claim or for that matter any person belonging to the physically disabled category can claim is of a minimum 3% reservation in the matter of admission to the MBBS course as that right is given under the said Act. That right has not been taken away inasmuch the Delhi University has reserved 3% seats for physically disabled candidates. Therefore, the mere fact that physically disabled candidates have not been given the same relaxation/concession as given to the SC/ST candidates does not entail that they have been deprived of their rights.

35. The minimum standards of medical education are to be stipulated by the MCI. They have done that and it is not for this Court to examine as to whether that is right or wrong because we do not have the expertise to do so. There has always been the argument and debate of maintenance of standards V. reservation. At one level, the argument is - why should there be any reservation at all because reservation has an opportunity cost itself in the sense that one seat reserved for somebody means that someone else, who is deserving, is deprived of that seat. However, because of our constitutional guarantees given to SC/ST candidates, reservation is part of the constitutional scheme and the logic behind it is that persons belonging to such categories have been subjected to hundreds of years of discrimination and they require definite positive action on the part of the State to enable them to participate in the mainstream of social and economic life. However, beyond reservation there is the further issue of relaxation of standards. There is an argument and a very compelling one, too, that while reservation of seats may be justified, lowering of standards by relaxing the minimum requirements is certainly not justifiable. In this context, it may be argued that once seats have been reserved, the lowering of standards along with it, would be violative of Article 14. There are also arguments on the other side that unless and until the reservation is coupled with a relaxation or a concession, reservation by itself would be meaningless inasmuch as the seats would go a begging. We are not entering into that controversy, though we feel that someday a fresh look would be required to be given to the concept of reservation coupled with relaxation of marks particularly in the field of professional education. For the present, it is sufficient for us to observe that insofar as physically disabled persons are concerned, they have a right to reservation but there is no right to relaxation or a concession in the minimum standards. And unless and until such a right is established, no mandamus or writ can be issued to any authority to give them the relaxation/concession that they seek. It is for this reason also that we feel that the Chief Commissioner travelled beyond his powers to direct that the relaxation in marks should be extended to the physically disabled candidates so as to bring them at par with the SC and ST candidates in respect of admission to the MBBS course in Delhi.

36. For all these reasons, although we feel that physically disabled persons should be extended all the rights, privileges and benefits under the said Act so as to ensure that they are not discriminated against and that they come within the

social mainstream, we do not agree with the contentions made on behalf of the petitioner that the petitioner, as of right, can claim parity with SC/ST candidates insofar as the relaxation in the minimum marks required is concerned. Consequently, the writ petition Nos. 1352/2008 and 8750/2009 are dismissed. Insofar as WP(C) 6759/2008 is concerned, it is disposed of with the direction that the order passed by the Chief Commissioner on 08.09.2007 is recommendatory and is not binding on the respondents. However, the respondents are required to give a serious view to the said recommendation so as to ensure that physically disabled persons are not deprived of their rights, privileges and facilities under the said Act."

20. In view of the foregoing discussion, this Court is of the opinion that the petitioner cannot claim a direction that persons with disabilities ought to be granted same benefit of relaxed eligibility standard of minimum 40% marks (as in the case of SC/ST category candidates) given that no other reserved category candidate has been provided such a benefit. This would entail a conscious decision by the State and the High Court establishment.

21. As a result, the writ petition has to fail; it is accordingly dismissed. All pending applications are disposed of.