
(2020) 02 RAJ CK 0151
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1325 Of 2020

Rekha Meena

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 27-02-2020

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(t)
Rights of Persons with Disabilities Act, 2016 — Section 2(r), 3(3), 4
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 2011 — Rule 35, 36, 56
Rajasthan Medical & Health Subordinate Service Rules, 1965 — Rule 13

Citation : (2020) 02 RAJ CK 0151

Hon'ble Judges : Dinesh Mehta, J

Bench : Single Bench

Advocate : Mahaveer Bishnoi, K.S. Rajpurohit, Rajat Arora

Final Decision : Disposed Of

Judgement

1. The petitioner has preferred the present writ petition with the grievance that though she had applied under the category of TSP-ST (Female), without claiming any reservation qua the category - Persons with Disabilities, yet the respondents have rejected her candidature, citing the following reason:

"Out of other PH category"

2. The facts apropos petitioner's predicament are that pursuant to advertisement dated 30.05.2018, issued for filling up 522 posts of Nurse Grade-II in TSP area, the petitioner submitted her application form as TSP-ST(Female) candidate.

3. It is pertinent that petitioner had not claimed any reservation under the Person with Disability category.

4. Petitioner having secured 50.825 marks was called for documents verification.

5. When petitioner appeared for documents verification, the respondents

conducted her medical examination. Thereafter, upon publication of provisional select list on 25.11.2019, the petitioner found her name missing, despite having secured 50.825 marks, whereas the cut-off for her category [TSP-ST (Female)] was 49.709 marks.

6. A list of rejected candidates, while indicating reasons for which their candidature have been rejected, was also published along with the provisional select list aforesaid. Petitioner's candidature was rejected, as according to the respondents, she was physically handicapped in other category.

7. The petitioner submitted online grievance by way of a representation dated 27.11.2019.

8. Petitioner's name could not find place in final select list, as her representation was not heeded to or considered favorably.

9. Faced with such situation, the petitioner has preferred the present writ petition.

10. Mr. Bishnoi, learned counsel for the petitioner, oppugning rejection of petitioner's candidature submitted that the petitioner had applied for the post in TSP-ST (Female) category, without claiming any reservation as a Person with Disability, hence, her right of being considered as a TSP-ST (Female) candidate could not be denied. He fervently added that the respondents cannot take into consideration petitioner's disability, which too is to the extent of 24% (less than 40%) in one arm (hand) to non-suit her. It was also argued that had the petitioner claimed reservation for the seats earmarked for persons with disabilities, the respondents would perhaps be justified in rejecting her candidature, for having a disability other than the one designated for the post in question.

11. Mr. K. S. Rajpurohit, learned Additional Advocate General appearing for the respondents, submitted that true it is, that the petitioner had neither claimed any reservation nor had she submitted her application form as a physically disabled person; but during her medical examination, when it transpired that she was having 24% disability in one of her arms, her candidature was rejected.

12. The basic plank of the respondents to justify their action has been that the post of Nurse Grade-II had been earmarked or identified for persons with locomotor disability - OL (One Leg) and as such a person with one leg impairment alone, is suitable or fit for appointment. According to learned Additional Advocate General, the petitioner, who is having 24% disability in one arm cannot be appointed.

13. Elaborating his stand aforesaid, learned counsel submitted that the determination of posts for Persons with Disabilities is based on scientific study, assessing suitability of persons with particular kind of disability. He argued that a conjoint reading of Rules 35 & 36 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 2011 (hereinafter referred to as 'the Rules of 2011') suggests that a person with a

particular disability alone is eligible for appointment to a particular post, which has been identified by the State Government.

14. Relying upon the judgment dated 08.01.2016 rendered by Jaipur Bench of this Court in SB Civil Writ Petition No.17118/2015 : Rajkumar Singh Vs. State of Rajasthan & Ors and another judgment dated 07.12.2015 in the case of Chhotu Lal Gurjar Vs. State of Rajasthan & Ors. : SB Civil Writ Petition No.16754/2015, learned Additional Advocate General contended that the persons with disability of one leg alone can be considered for appointment.

15. Heard rival counsel.

16. Facts of instant case are to be adjudicated on the anvil of various statutory provisions, hence in a bid to keep them handy, they are being quoted hereinfra:

(a) Rule 13 of the Rajasthan Medical & Health Subordinate Service Rules, 1965 (hereinafter referred to as 'the Rules of 1965'):-

"13. Physical Fitness :- A candidate for direct recruitment to the Service must be in good mental or bodily health and free from any mental or physical defect likely to interfere with the efficient performance of his duties as a member of service and if selected must produce a certificate to that effect from a Medical Authority notified by the Government for the purpose. The Appointing Authority may dispense with production of such certificate in the case of candidate promoted in the regular line of promotion, or who is already serving in connection with the affairs of the State if he had already been medically examined for the previous appointment and the essential standards of medical examination of the two posts held by him are to be comparable for efficient performance of duties of new post and his age has not reduced his efficiency for the purpose.

(b) Rules 35 & 36 of the Rules of 2011:-

"35. Eligibility.- Notwithstanding anything contained in any rules or orders for the time being in force regulating the recruitment and conditions of service of persons appointed to the various services or posts in connection with the affairs of every establishment including the Government Department. Persons with Disabilities shall be eligible for appointment to the posts identified for them under rule 36 of these rules provided they fulfill the qualifications laid down in the relevant recruitment or service rules for the posts and are functionally able to perform the duties of the posts of the said services.

36. Reservation for Persons with Disabilities.- In every establishment three percent of the vacancies shall be reserved for persons or class of Persons with Disabilities of which one percent each shall be reserved for persons suffering from;-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) Locomotor disability or cerebral palsy.

In the posts identified for each disability by the Government of India under section 32 and such reservation shall be treated as horizontal reservation:

Provided that where the nomenclature of any post in the State Government is different from the post in Government of India or any post in the State Government does not exist in any department of the Government of India, the matter shall be referred to the Committee constituted under rule 38 for identification of the equivalent post in the State Government. The Committee shall identify the equivalent post on the basis of nature of job and responsibility of each post."

(c) Section 2 (t) of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the Act of 1995'):-

"2(t)."person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority;"

(d) Section 2(r) and Rule 2(s) of the Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as 'the Act of "Definitions.-

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xxx xxx xxx xxx

2(r) "Person with benchmark disability" means a person with not less than forty per cent. of specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;

2(s) "Person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;"

17. Rule 35 of the Rules of 2011 instills in or confers upon a Person with Disability, an eligibility to hold post identified by the State Government. Rule 35, which begins with a non-obstante clause, not only insulates but also assigns a handicap to a person suffering from the designated disability so that he is treated eligible to be appointed on the posts identified under Rule 36 of the Rules of 2011, regardless of the physical challenges such persons are faced with(Downloaded. on 02/06/2020 at 12:24:34 PM)

18. Rule 35 of the Rules of 2011 has been enacted to eclipse the effect of the service rules relating to physical fitness such as Rule

13 in the Rules of 1965, in the manner that if a person is suffering from the disability enumerated in Rule 36 of the Rules of 2011, irrespective of being physically unfit, he/she is to be offered appointment on the earmarked posts.

19. But at the same time, it cannot be said as a natural corollary, that a person with less than 40% disability in one leg is unfit to be appointed on the post of Nurse Grade-II, in case he is not claiming reservation for such post.

20. The bar of 40% is a lower line for claiming reservation and not a yardstick to fathom functional capacity of an incumbent. If a person with more than 40% can be treated to be fit to perform daily chores of a Nurse Grade-II, it is beyond any body's comprehension, how a person with less percentage of disability can be held incapacitated to perform such work, unless he is examined on some practical or scientific criteria.

21. A person with impairment in one leg (OL) has been notified to be appointed for the post of Nurse Grade-II, as required by Rule 36. It means that 3% seats are required to be reserved for persons with impairment in one leg. It is pertinent that such reservation is available only to persons having disability to the extent of 40% or more. Consequent to the provisions contained in Rule 35, no one can say that a person with 40% or more disability in one leg is not fit to be appointed a Nurse Grade-II.

22. Learned Additional Advocate General alternatively submitted that a person with less than 40% disability in one leg may, perhaps be considered against open category but a person having less than 40% disability in other category (one arm or ear or eye) cannot be considered against the remaining 97% seats.

23. In considered opinion of this Court, if such stance of the respondents is accepted, it will lead to discrimination and creating a class without any intelligible criterion.

24. According to me, Rule 36 of the Rules of 2011 is not only the fountain head of reservation, but is also a source from which flows the categories or classes of persons with the disabilities which be given one or three percent reservation, as the case may be. Rule 36 mandates that persons with blindness; low vision; hearing impairment; locomotor disability or cerebral palsy, shall each be entitled for one percent reservation.

25. On an overall appraisal of Rules 35 & 36 of the Rules of 2011, object of the Persons With Disabilities Act, 1995, under which these Rules were promulgated; so also the Rights of Persons With Disabilities Act, 2016; this Court is of the view that Rule 35, which starts with non-obstante clause provides that irrespective of any provision in the concerned service rules governing appointment to the posts in the Government, the Persons with Disabilities such as blindness, low vision, hearing impairment, locomotor disability and cerebral palsy shall be given appointment on the posts identified.

26. But at the same time, it cannot be said that persons with physical challenges cannot be considered for appointment at all, if they have applied under open category, without claiming any reservation to compete with their more fortunate counter parts, if he/she is otherwise able to perform the duties attributable to

such post.

27. As a matter of fact, the petitioner, having 24% disability in one arm cannot be treated to be a person with disability, as defined in Section 2(t) of the Act of 1995 nor can she be treated to be a person with benchmark disability, as provided in Section 2(r) of the Act of 2016, as she is faced with less than 40% challenge.

28. Moving on to the factual matrix of the case: a perusal of the subject advertisement dated 30.05.2018, particularly Note-1 appended with Clause-3 stipulates that a person having disability other than OL - one leg will not be eligible/entitled for appointment qua the reserved post. Whereas Note-2 provides that the benefit of reservation shall be available to disabled person only on the basis of opinion of Medical Board constituted/certificate issued by the Department. Note-1 & 2 are reproduced hereunder :

"3. आरक्षण

नोट:- 1. 40 प्रतिशत या इससे अधिक One Leg Locomotor (OL) Disability होने पर ही दिव्यांग अभ्यर्थियों के लिये आरक्षित पदों हेतु पात्र माना जायेगा। 40 प्रतिशत से कम OL Disability होने पर अपने पैतृक वर्ग में सामान्य अभ्यर्थियों की तरह आवेदन का पात्र होगा। One Leg के अतिरिक्त किसी अन्य प्रकार की निःशक्तता होने पर विशेष योग्यजन अभ्यर्थियों के लिये आरक्षित पदों के विरुद्ध नियुक्ति हेतु पात्र नहीं होगा।

2. इस विज्ञप्ति के संदर्भ में विभाग द्वारा गठित मेडिकल बोर्ड की राय/प्रमाण पत्र के आधार पर ही विशेष योग्यजन अभ्यर्थियों को आरक्षण का लाभ देय होगा।

29. Clause-VII of para No.13 of the advertisement giving general directions is also to the same effect, which is also being reproduced :

"13. सामान्य निर्देश :-

(vii) विशेष योग्यजन अभ्यर्थियों को इस भर्ती हेतु विभाग द्वारा गठित मेडिकल बोर्ड की राय/प्रमाण पत्र के आधार पर ही आरक्षण का लाभ देय होगा। जिसके लिये अभ्यर्थी को विभाग द्वारा आमंत्रित किये जाने पर मेडिकल बोर्ड के समक्ष उपस्थित होना होगा।"

30. A look at the aforesaid conditions of the advertisement clearly suggests that persons with disability in one leg (OL) alone can claim reservation for the post reserved for disabled person, because OL, as a category of disability, has been specified for the purpose of reservation.

31. The advertisement also contains a condition that the persons vying for the post reserved for disabled person would be subjected to examination by a Medical Board.

32. In considered opinion of this Court, the medical examination before selection was required to be done only for the candidates, who had applied under disabled/ PH category, being an integral part of examining their assertion in the application form. It is like examining the documents or veracity of their certificate of disability.

33. But the petitioner having applied under TSP-ST (Female) category could not have been subjected to medical test before her selection. The selection was required to be done on the basis of her eligibility i.e. educational qualification; subject of course to verification of her credentials relating to qualification.

34. The petitioner having secured more marks than the cut off for TSP-ST (Female) was, therefore, required to be shown in the select list. The respondents' action in placing the petitioner's name in list of rejected candidates is clearly illegal and contrary to the norms set for the recruitment.

35. This Court cannot but lose sight of the aspect that the respondents have erred in rejecting petitioner's candidature for having 24% disability in one arm.

36. It is pertinent to note that the Act of 1995; the Act of 2016; so also the Rules of 2011 have been enacted with a view to not only provide equal opportunities, but also to ensure full participation of the person having physical or mental challenges.

The provisions of the Act and Rules of 2011 are beneficial and reformative in nature and thus, even in a case of ambiguity, an endeavor should be made to harmonize the provisions to achieve the object for which they were enacted.

37. The nature has already been unkind and unjust to the petitioner. The State cannot add salt to her injury by denying her legitimate right and make her think the worst, that alas her disability was 16% more, so that she could at least claim reservation, if not equality. In an egalitarian society like ours, such regressive approach of the State cannot be tolerated on the touchstone of our Constitutional framework.

38. This Court is at pains to record that the provisions which have been enacted to provide crutch* to one class of disabled, have been used to crush another class.

39. The State cannot be oblivious of Rule 56 of the Rules of 2011, which enjoins upon it to give employment to disabled person. Rule 56 of the Rules reads thus:

"Employment/Training - Disabled persons shall be given employment/training commensurate as per their ability."

40. In the present era, where the parliament has enacted the Rights of Persons with Disabilities Act, 2016 - an Act to give effect to United Nations Convention on the Right of Persons with Disabilities and matter connected therewith or incidental thereto, while keeping in mind the avowed object of empowering Persons with Disabilities, the impugned action of the respondents turns out to be wholly unsustainable, against human rights and emerges as inhumane, to say the least.

41. It will be apt to be reminded of some of the salutary provisions of the Act of 2016, which are being reproduced hereinbelow:

"2(h). "discrimination" in relation to disability, means any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation."

"3(1). The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.

(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.

(4) No person shall be deprived of his or her personal liberty only on the ground of disability.

(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities."

"4 (1) The appropriate Government and the local authorities shall take measures to ensure that the women and children with disabilities enjoy their rights equally with others.

(2) The appropriate Government and local authorities shall ensure that all children with disabilities shall have right on an equal basis to freely express their views on all matters affecting them and provide them appropriate support keeping in view their age and disability."

42. A combined reading of above provisions, particularly the highlighted part(s), reveals that the Act of 2016 casts a duty upon the appropriate Government, which, in the present case is the State Government, to ensure that Persons with Disability are not discriminated against.

43. In this regard a look at Rule 13 of the Rules of 1965 shows that so far as physical fitness is concerned, the same is required to be ascertained only after a candidate is selected, whereas the respondents have put the petitioner to medical test, inspite of the fact that she had not claimed any reservation as a disabled person. Such action/act amounts to discrimination and the same is violative of not only Sections 3(3) of the Act of 2016, but also infringes Article 14 and 21 of the Constitution of India guaranteed to the petitioner.

44. Expanse of right to life guaranteed under Article 21 of the Constitution of India has been held to be wide enough to include within its lap, right to live with dignity.

45. Rejection of petitioner's candidature, consequent to her physical challenge in her arm amounts to denial of fair opportunity to public employment; thus, the same is violative of Section 4 of the Act of 2016 also, which adjures or requires the State Government to take all measure to ensure that the women and children with disabilities enjoy equal rights.

46. Final conclusion cannot be arrived at without dealing with the judgments, which were so zealously cited by Mr. Rajpurohit. Adverting to the first judgment in the case of Rajkumar Singh (supra), suffice it to note that the petitioner therein (Rajkumar Singh) claimed benefit of reservation for the post of Nurse Grade-II, which was reserved for OL category, regardless of the fact that his both upper limbs were effected. This Court negated his claim of reservation inter alia holding that the posts are earmarked for Locomoter disability (one leg) and thus, the petitioner having disability in both arms cannot claim reservation.

47. The second judgment in the case of Chhotu Lal Gurjar (supra) relied upon by learned Additional Advocate General is also distinguishable on facts; as the petitioner therein having disability in both the legs claimed reservation. If compared carefully, the facts of the extant case turn out to be altogether different. The petitioner herein challenged with one arm, has staked her claim in her own category i.e. TSP-ST (Female), without claiming any reservation under PH category.

48. The petitioner in the present case, has come with a plea that she deserves to be considered on the basis of her own merit in her category [TSP-ST (Female)] and not qua the post meant/reserved for persons with disability.

49. In considered opinion of this Court, petitioner's case is to be adjudicated on its own merit, independent of the two judgments cited by Mr. Rajpurohit, which have been held to be inapplicable to the present facts.

50. As against the judgments aforesaid, the Court is reminded of the judgment in the case of Varsha Narwani Vs. State of Rajasthan & Ors : SB Civil Writ Petition No.13034/2018, decided on 14.05.2019, facts whereof are more closer to the facts of the case at hands.

51. In the case of Varsha Narwani (supra), the petitioner having 40% visual impairment, applied for the post of Assistant Radiographer; while such post was reserved for OL and HI. The petitioner having applied under general category though found place in merit list, but was denied appointment. She approached the Court by way of a writ petition, in which it was held that the respondents have wrongly rejected her candidature. A Medical Board was ordered to be constituted to submit a report regarding her fitness to perform duties of a Radiographer. Report was favourable to the petitioner and so was the decision of this Court.

52. In considered opinion of this Court, the respondents ought to have placed the petitioner in select list; however, they could have required her to produce a

certificate of fitness as required under Rule 13 of the Rules of 1965.

53. As an upshot of the discussion and enunciation foregoing, the writ petition is allowed. It is held that the respondents were not justified in subjecting the petitioner to medical examination, as she had not applied under PH category. It is also held that respondents were not justified in rejecting petitioner's candidature treating her to be from other PH Category, as she was having 24% disability in one arm. It is declared that a person with physical disability (more or less than 40%) cannot be denied appointment in case he/she does not claim reservation available to disabled. But such appointment will remain subservient to production of certificate of fitness of Medical Officer as provided in concerned service rules. In absence of such rule, it shall be dependent upon objective satisfaction of the appointing authority that the incumbent is capable of performing the functions/duties required to be discharged by a person holding such post.

54. The respondents are directed to issue appointment order to the petitioner, of course after her credential in relation to the educational qualification (ignoring her physical disability) are found in order.

55. The petitioner shall produce a certificate of fitness issued by a competent Medical Authority notified by the Government for this purpose. The certificate should clearly indicate that her physical difficulty is not likely to interfere with the efficient performance of her duties as Nurse Grade-II, as stipulated in Rule 13 of the Rules of 1965.

56. Appointment order be issued by 20th March, giving at least 2 weeks' time to the petitioner to produce a certificate and join.

57. Stay petition too stands disposed of accordingly.