
(2013) 08 P&H CK 0507
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 3087 of 2011

Ritesh Sinha

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 02-08-2013

Acts Referred:

Constitution of India, 1950 — Article 21
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(o), 32, 33, 47

Citation : (2013) 172 PLR 505

Hon'ble Judges : Augustine George Masih, J

Bench : Single Bench

Advocate : Veena Kumari, for the Appellant; Rajeev Malhotra, A.A.G., Haryana for the State and Mr. Gaurav Chopra, Advocate for Respondent Nos. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

Augustine George Masih, J.—Petitioner, who is suffering from spastic cerebral palsy, which falls under the category of orthopedically impaired as defined u/s 2(o) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the Disability Act"), applied for the post of a Clerk in pursuance to an advertisement dated 23.2.2010, Annexure P-4, issued by the District and Sessions Judge, Karnal (respondent No. 3), inviting applications for 71 posts of Clerks, out of which 39 posts were meant for the general category and one of these post was reserved for physically handicapped. Eligibility for the candidates prescribed therein was a degree of Bachelor of Arts or Bachelor of Science or equivalent thereto from a recognized University, passed matriculation examination with Hindi as one of the subjects and having proficiency in operation of computers. Candidates were required to take a written examination in English composition and general knowledge consisting of maximum 50 marks each with qualifying marks as 33%. A candidate, who does not obtain 40% marks in the aggregate of written

examination in the above two subjects, would not be considered for appointment, apart from having proficiency in operation of computers. Preference was to be given to candidates having higher qualification, experience and to the retrenched staff. Last date for submission of the application was 10.3.2010. Since the petitioner fulfilled the requisite qualifications prescribed, he applied for the post of Clerk under the physically handicapped category, for which one post was reserved. In pursuance to the application submitted by the petitioner, he was called on 25.4.2010, for the written examination of English composition, general knowledge and to test the proficiency in operation of computers vide letter dated 15.4.2010, Annexure P-5. Petitioner was thereafter called for computer practical test and personal interview, which was to be held on 23.5.2010, vide letter dated 15.5.2010, Annexure P-6. After having participated and clearing in the written test of two subjects i.e. English composition and general knowledge and the proficiency test in operation of computers and thereafter clearing the computer practical test and personal interview, the petitioner found his name in the select list of successful candidates at Sr. No. 26, having secured 57.5 marks, which was prepared as per Rule 7(d) of the Haryana Subordinate Courts Establishment (Recruitment and General Conditions of Service) Rules, 1997. Out of the 71 advertised posts, only 63 candidates were selected and as mentioned earlier, the petitioner, as per his merit, was placed at Sr. No. 26.

2. Petitioner was sent offer of appointment as Clerk on 23.10.2010 vide Annexure P-8. In pursuance thereto, he submitted his joining report on 28.10.2010, Annexure P-9. It would not be out of way to mention here that the petitioner prior to joining service was called upon to submit certificate of fitness on first entry into Government service. The competent authority, vide certificate dated 3.11.2010 (Annexure R-1), declared the petitioner as a case of cerebral palsy (100% handicapped) and fit for office work under the handicapped category. As per the terms of appointment, his appointment was purely on temporary basis and was to be on probation for a period of two years in accordance with the service rules. It was mentioned in the appointment letter of the petitioner that his services were liable to be terminated at any time without assigning any reason or without any prior notice. Petitioner continued to serve the respondents, when an order dated 5.2.2011, Annexure P-11, passed by the District & Sessions Judge, Karnal, respondent No. 3 was served on the petitioner, stating therein that his services are no longer required. The result thereof was termination of his services, which forced the petitioner to approach this Court by way of present writ petition, challenging the order of termination dated 5.2.2011, Annexure P-11.

3. While issuing notice of motion on 21.2.2011, the operation of the impugned order was stayed by this Court and, thus, the petitioner is serving as of now.

4. Upon notice, reply has been filed by respondent Nos. 2 and 3. The facts, as disclosed by the petitioner in the writ petition, have not been disputed in the said

reply. The stand taken by the respondents is that the services of the petitioner have been terminated as per the terms of his appointment letter, according to which the petitioner was appointed purely on temporary basis and was kept on probation for a period of two years. As per Clause 4 of the appointment letter, the services of the petitioner could be terminated at any time without assigning any reason and without prior notice. As the petitioner was unable to perform any kind of office work with his own hands and of his own, he being suffering from cerebral palsy, he could not be continued in service. As per the respondents, petitioner is unable to perform any work on the computer and, therefore, faced with this situation, the services of the petitioner have been dispensed with as per the terms of his appointment without casting any stigma on him. It has been stated that the officials in the office of District and Sessions Judge have been helping the petitioner at every step and at every moment but still he was unable to do any office work and, thus, respondent No. 3 was left with no option but to take a decision to dispense with the services of the petitioner in the interest of office administration. In this light, prayer has been made for dismissal of the writ petition.

5. Counsel for the petitioner has submitted that the respondents are insensitive of the difficulties, which a disabled person is faced with. In the case of the petitioner, he is suffering from spastic cerebral palsy, which is a disease where a person has stiff muscles and their movements could be awkward. Under usual circumstances, they learn to move their muscles in a coordinated and smooth way, although they face difficulty in standing and performing physical activities. The purpose and intent of the Disability Act, especially the statement of objects and reasons of the said Act have not been taken into consideration by the respondents.

6. Section 32 of the Disability Act enjoins a responsibility on the appropriate Governments to identify posts in the establishments, which can be reserved for the persons with disability and on that basis, reservation of posts have to be made. As per Section 33 of the said Act, every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three percent for persons or class of person with disability of which one percent each shall be reserved for persons suffering from three categories specified in the said Section. Locomotor disability or cerebral palsy has been termed as one of the category of which if a post is identified for that disability, the same has to be filled in with the said category of person. As the State of Haryana has identified the post of a Clerk as one which could be filled through a disabled person, which would include locomotor disability or cerebral palsy and having found the petitioner fit for appointment, especially in the light of medical certificate dated 3.11.2010, which has been issued by the competent authority, declaring him fit for office work in the handicapped category, it cannot be said that the petitioner could not perform any of his duties.

7. Further submission of counsel for the petitioner is that as per Section 47 of

the Disability Act, there can be no discrimination in government employment and the services of an employee cannot be dispensed with nor can he be reduced in rank because of his disability, if acquired during service. He can be shifted to some other post with the same pay scale and if there is no post available against which he can be adjusted, he can be kept on a supernumerary post. She, on this basis, contends that mandate of the Disability Act has totally been ignored and instead of giving benefit of said Act and providing congenial atmosphere to the petitioner so that he may continue in service and could integrate with the Society, respondent No. 3 has chosen to terminate his services and, thus, violated Article 21 of the Constitution of India. It has been contended by counsel for the petitioner that the principles as laid down by the Supreme Court in Civil Appeal Nos. 2281-2282 of 2010 (Syed Bashir-ud-din Qadri Vs. Nazir Ahmed Shah and Ors.), decided on 10.3.2010 have also been totally ignored by the respondents.

8. Counsel for the petitioner has also placed reliance on the Division Bench judgment of Delhi High Court in Union of India (UOI) Vs. Jagmohan Singh, to contend that it is not only the constitutional mandate but the requirement of the statute under the Disability Act that the human rights perspective, which have been recognized under the said Act, entitles enjoyment of the full range of guaranteed rights and freedoms without discrimination despite there being a disability. In these circumstances and keeping in view the provisions of Disability Act, counsel for the petitioner has prayed for setting-aside the impugned order and allowing the writ petition.

9. On the other hand, counsel for the respondents, has primarily contended that the petitioner has not been discriminated because of his handicap but the orders have been passed in accordance with the statutory rules governing the service and especially the terms and conditions of the appointment letter, which stipulate the appointment of the petitioner to be purely on temporary basis with a further rider of probation for a period of two years. His services have been terminated in accordance with the terms of appointment. In the order of termination that has been passed, no aspersion as to work and conduct of the petitioner has been made and, thus, there being no stigma attached to him, the petitioner has no right to challenge the said order, which is in accordance with law. During the period of probation, if the work and conduct of the employee is not found upto the mark and to be suitable for the post, he has no vested right to continue in service. He has contended that all efforts have been made to make the petitioner comfortable at his work place but when it was found that he could perform no official work, the respondents were having no option but to pass an order of termination of his services. Every effort was made to accommodate the petitioner at the work place and his co-workers and other officials had rendered every help to him throughout at every step and at every moment but without any result, which would facilitate his continuation in service. He accordingly contends that the order of termination being in accordance with the terms of his appointment, deserves to be upheld.

10. I have considered the submissions made by counsel for the parties and with their assistance have gone through the records of the case.

11. As is apparent from the statement of objects and reasons of the Disability Act, the said Act has been enacted in accordance with and to implement the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region as adopted in the meeting held in December 1992 at Beijing convened by the Economic and Social Commission for Asia and Pacific to launch the Asian and Pacific Decade of Disabled Persons 1993-2002, to which India is a signatory. The enactment is to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; to create barrier free environment for persons with disabilities; to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis non-disabled persons; to counteract any situation of the abuse and the exploitation of persons with disabilities; to lay down a strategy for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities; and to make special provision of the integration of persons with disabilities into the social mainstream.

12. This Act provides for constitution of Co-ordination Committees and Executive Committees at the Central and State levels to carry out the various functions assigned to them. The appropriate Governments and the local authorities within the limits of their economic capacity and development, will have to undertake various measures for the prevention and early detection of disabilities, creation of barrier-free environment, provision for rehabilitation services, etc. The Act also provides for education, employment and vocational training, reservation in identified posts, research and manpower development, establishment of homes for persons with severe disabilities, etc. This Disability Act, thus, is an Act which looks into each and every aspect of a disable person and the intention of the legislation is to make a disable person as comfortable as possible so that he can integrate with the Society and lead a comfortable life as a normal citizen of the Country with support from various quarters and sources as provided for in the Disability Act and the Rules framed thereunder. Persons with disabilities were generally segregated and excluded from the main stream of the Society and as per the earlier policy special schools, shelter workshops, special housing and transportation etc. were provided. This resulted in persons with disabilities to lead a life with societal barriers and impediments, resulting in a feeling of being a lesser human being. Discrimination was faced by them in employment, access to public spaces, transportation etc. and, thus, felt as a neglected lot to the extent that the family also treated them as a burden and an object of pity by the Society. No meaningful effort to assimilate them in the mainstream of the Society were being made.

13. Through the Disability Act, however, steps are taken and efforts have been

made to reverse this process and change the mind set of the public at large but for that implementation of this Act in its true spirit is essential. The support and strength for this has to come from all sources and above all the employer where the disabled person is given an opportunity to translate the intent of the legislation into reality so that the benefit of reservation, as provided in the Act, is reaped by the disabled person. A mechanical approach at the hands of the employer has to be shed and by appreciating the situation of a disabled person from the human rights perspective, which enjoins enjoyment of the guaranteed rights and freedom under the Constitution without discrimination and that too on the ground of disability, should be given effect to.

14. A perusal of the relevant provisions as contained in Sections 32, 33 and 47 of the Disability Act (although Section 47 may not be directly applicable to the present case) would show that the scheme of the Act with regard to providing employment is based upon the purpose of giving economic freedom to a disabled person so that he is not treated as a dependent or a burden in the family and the Society. The first step towards this goal to be achieved is provided in Section 32 of the Disability Act, which mandates identification of posts which can be reserved for persons with disabilities by the appropriate Governments. Once the said exercise has been completed, this exercise has to be carried out in periodical intervals, not exceeding three years and update the list of posts by taking into consideration the developments in technology. First step having been completed, the second step is the reservation of the posts as provided u/s 33 of the Act. According to this Section, every appropriate Government is mandated to appoint in every establishment not less than 3% out of the vacancies from persons or class of persons with disability of which 1% each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability. However, proviso to this Section empowers the appropriate Government to exempt any establishment from the provisions of this Section keeping in view the type of work carried on in any department or establishment subject to such conditions, if any, as may be specified in the notification.

15. In the present case, it is not in dispute that a post of Clerk has been identified by the competent authority to be earmarked for the disabled persons and there is no notification issued by the appropriate Government, which would exempt the establishment from the provisions of this Section. Locomotor disability, which includes cerebral palsy also, is a category of disability and the person suffering with this disease can be appointed on the post of Clerk. Admittedly, the petitioner participated in the written examination, albeit with the help of a Writer, who was provided to him on his request at the time of written examination. He fulfilled the requisite standards fixed as per the advertisement and the statutory rules. Thereafter, he participated in the computer test, where no help was provided to him and he cleared the same as well. As a matter of fact, in the merit list prepared by respondent No. 3, the name of the petitioner figured at Sr. No. 26 out of 63 posts, which were filled up. Petitioner had secured

57.5 marks out of 100 marks, which shows the competence and capability of the petitioner. It was well known to the respondents that the petitioner was suffering from cerebral palsy and had the said disability, especially when he had been appointed against the post reserved for physically handicapped person. It is an admitted fact that the petitioner cleared the computer proficiency test without any assistance and of his own.

16. That apart, once the provisions u/s 33 of the Disability Act having been given effect to by the respondents, identifying and earmarking the post of a Clerk for physically handicapped persons, appointment of the petitioner on the said post, who was suffering from cerebral palsy, must be deemed to be proper and he be treated as fit for the job assigned to him in the light of categorical reservation conferred by the legislature for that particular category. The identification of the post for disabled person keeping in view the capability of a particular category and when a person has achieved the bench marks specified under the statutory rules under the said category, the respondents now cannot turn around and conclude that the petitioner is unable to perform the duties on the said post. The identification of the post is usually done in furtherance of the recommendation of the Expert Committee set up for the said purpose and, therefore, it would not be open to the respondents to now assert that a person suffering from an identified disability would not be fit for continuation in service and should be terminated from his post. It needs to be kept in mind that the Civil Surgeon, Karnal, vide certificate dated 3.11.2010 (Annexure R-1) declared the petitioner fit for office work under the handicapped category.

17. It need to be highlighted here that it is a comprehensive legislation for safeguarding the rights of a person with disability with an intention to enable them to enjoy equal opportunities and help them to participate fully to get with the Society. The object of the Disability Act need to be kept in view, especially in the light of the fact that the petitioner has completed his Masters in Information Technology and is well versed with the computer. It is well known that efforts are being made at the subordinate level in the judiciary that the use of more and more computers for doing various clerical works is being resorted to. If the petitioner is capable of handling such assignment, which can easily be given to him and where there may not be much physical activities to carry out, such job should be assigned to him, especially keeping in view his qualifications and that he had passed the computer test on his own.

18. During the pendency of the writ petition, vide order dated 19.1.2012 passed by this Court, wherein the Court Administration was given liberty to have the petitioner medically appraised for assessing the motor skills and the type of activity that can be entrusted to him within realm of the service that may be necessary in a Court Administration. The report was placed on record. The Medical Board, which was duly constituted to examine the petitioner, opined that the petitioner can only do typing work slowly with one hand. In the light of the said report, vide order dated 13.8.2012, the District and Sessions Judge, Karnal,

was directed to look into the feasibility of assigning an appropriate job/task to the petitioner. In pursuance thereto, report dated 22.8.2012 was submitted by the District and Sessions Judge, Karnal, according to which a firm view was expressed that the petitioner being a case of cerebral palsy cannot be assigned any job/task in the Court establishment at Karnal. It was stated that the petitioner cannot even start the computer himself nor could even move a paper from one place to other and cannot open a file and operate a printer.

19. On the report being disputed by counsel for the petitioner, this Court vide order dated 28.9.2012, directed that it would be appropriate and also in the interest of the petitioner himself to be examined with regard to his feasibility of performing appropriate office job in the High Court itself. Petitioner accordingly appeared in this Court on 30.10.2012, when the Registrar (Administration) of this Court was requested to ascertain as to whether the petitioner was in a position to operate the computer, give appropriate commands etc. Respective counsel for the parties were directed to remain present while the petitioner was assigned such a task.

20. Registrar (Administration) submitted his report dated 1.11.2012, wherein he stated as follows:-

As per directions of the Hon''ble Bench, computer operation test of Mr. Ritesh Sinha, petitioner of CWP No. 3087 of 2011, was conducted today on 30.10.2012 in ILI Section in the basement of this Court in the presence of Ld. Counsels for the parties i.e. Ms. Veena Kumari, Advocate for the petitioner and Mr. Gaurav Chopra, Advocate for respondents No. 2 & 3. Mr. Ritesh Sinha was asked to write an application to District & Sessions Judge, Karnal for grant of casual leave. He was given 5 minutes time for this assignment. Matter typed by him on desktop may be perused at Flag "A". Thereafter, he was asked to do the same on his Laptop and he was again given 5 minutes time and matter typed by him on Laptop may be perused at Flag "B".

While taking test of Mr. Ritesh Sinha, it has been observed that although his reflexes and muscles coordination were weak, yet he could do some work on desktop and laptop. He was typing on desktop with index finger and thumb of right hand but he was not using other hand for typing work. He was also facing difficulty in operating mouse. He was asked to give printing command and he did it but he was facing difficulty to take the paper from the printer while handing over it to me. He also shut down the computer and again started it but could not open it due to secret password. He could operate desktop when it was opened with password by the Stenographer on whose desktop test was being conducted.

In compliance of the orders dated 30.10.2012 passed by Hon''ble Bench in CWP No. 3087 of 2011, this report is submitted for kind perusal of the Hon''ble Bench.

(HARNAM SINGH THAKUR) Registrar Administration 1.11.12

21. From the above report of the Registrar (Administration), it is apparent that

the petitioner can do some work on the computer, though slowly. Otherwise also, the Hon''ble Supreme Court in Syed Bashir-ud-din Qadri's case (supra) has laid down that the beneficial piece of social legislation is to enable persons with certain forms of disability to live a life of purpose and human dignity. Such type of cases have to be handled with sensitivity and not with bureaucratic apathy and when person has been found to be fit and suitable for a post, which has been identified and reserved for a particular category, the employee cannot be terminated and efforts be made to provide a congenial atmosphere to the said employee keeping in view his disability and mechanical orders should not be passed in a routine manner.

22. In the light of the above discussion, it can safely be said that the petitioner may be slow in handling the computer but could perform the duties on a computer and can be assigned such a task, which can be handed over to him in the office primarily relating to computer. The detail of the Sections where the work is done on computers, has been given in the replication, which indicates that there are plenty of places where the petitioner can easily be accommodated where he can perform his duties as a Clerk in the light of his qualifications while keeping in view his capacity, capability and competence. With same support, encouragement and cooperation, this Court is quite sure that the petitioner would be able to perform his duties and the object of the Disability Act would be given effect to in true spirit. In view of the above detailed discussion, the present writ petition is allowed and the impugned order dated 5.2.2011, Annexure P-11, is hereby quashed, entitling the petitioner to all consequential benefits.