
(2014) 01 MAD CK 0042
In the Madras High Court
Case No : Writ Petition No. 10100 of 2010

S. Manoharan

APPELLANT

Vs

Government of Tamil Nadu

RESPONDENT

Date of Decision : 28-01-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 16(1)
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(k), 32, 33

Citation : (2014) 8 MLJ 30

Hon'ble Judges : T. Raja, J

Bench : Single Bench

Judgement

T. Raja, J.—A writ of mandamus has been sought for by Mr. S. Manoharan, a physically challenged person, who acquired his Master's Degree in Science with a pass in the National Eligibility Test conducted by the Agricultural Scientists Recruitment Board, New Delhi, on the ground that when he applied for the post of Assistant Professor (Agronomy) among the 334 vacancies to be filled up by the respondents 2 and 3, even after receipt of the interview card dated 2.10.2009 to attend the interview in the office of the second respondent-Tamil Nadu Agricultural University and after attending the said interview for the post of Assistant Professor in Agronomy on the said date, by showing all the original certificates including the physical disability certificate issued by the Medical Board, he did not receive any intimation from the respondents 2 and 3, namely, the Registrar, Tamil Nadu Agricultural University, Coimbatore and the Vice Chancellor, Tamil Nadu Agricultural University, Coimbatore. It is the contention of the learned counsel for the petitioner that when the petitioner gave his representation to the second respondent stating that he is a physically disabled person (orthopaedically handicapped) with 60 percent disability and he has not been selected under the physically handicapped category, there was no response. Therefore, he further pleaded that the respondents 2 and 3 did not follow the rule of reservation enumerated under Section 33 of the Persons with Disabilities

(Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, "the Act"). Alleging violation of the provisions of the Constitution of India, it was further canvassed before this Court that the action of the respondents 2 and 3 resulted in violation of the fundamental rights guaranteed under Articles 14 to 16 of the Constitution of India. Stating further, it was contended that Section 33 of the Act makes it mandatory that the appropriate Government shall appoint in every establishment such percentage of vacancies not less than three percent for persons or class of persons with disability, of which one percent each shall be reserved for persons suffering from (a) blindness or low vision; (b) hearing impairment; (c) locomotor disability or cerebral palsy in the posts identified for each disability. Continuing his submission, it was also pleaded that the petitioner is having all the qualifications as mentioned in the advertisement. Therefore, when he appeared for interview before the Selection Committee on 19.10.2009 for the post of Assistant Professor in Agronomy, he was under the impression that the respondents 2 and 3 would be considering his candidature and the reservation policy for the persons with disabilities. But, unfortunately, even when the Government issued G.O.Ms. No. 7, Higher Education (F2) Department dated 14.1.2008 implementing the order of this Court passed in W.P. No. 27231 of 2007 directing that all the Government Arts and Science Colleges should follow the reservation of three percent for teaching posts for the persons with disability, of which one percent shall be reserved for persons suffering from blindness, another one percent for persons suffering from hearing impairment and yet another one percent for persons suffering from locomotor disability, the respondents 2 and 3, by not implementing the order passed by this Court and the G.O.Ms. No. 7 dated 14.1.2008, have totally violated the statutes. Finally, it was contended that when applications were invited by the second respondent for filling up of the regular 334 vacancies of Assistant Professor in Agriculture, Horticulture, Agricultural Engineering, Home Science, Forestry and Allied Sciences in the Advertisement No. R.3/1/2008 dated 7.7.2008 and Advertisement No. R.3/1/08 dated 10.9.2008, more particularly, when this Court in the decision in Professor I. Elangovan v. Government of Tamil Nadu and Others LNIND 2008 MAD 923 : (2008) 3 MLJ 481 while considering a similar issue that the reservation of posts for persons with disabilities, has held that the provisions of Section 33 read with Section 2(k) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 would prevail over the Tamil Nadu State and Subordinate Service Rules, as the State Government is duty bound to provide reservation of not less than three percent in every establishment or department for the persons with disabilities in accordance with Section 33 of the Act and further directed the Tamil Nadu Public Service Commission to fill up all the 187 vacancies exclusively by appointing the eligible disabled candidates in respect of Group "C" and Group "D" posts, making it clear that the competency of the legislature of any State and the exclusive power to make laws for the whole of the State or any part thereof with respect to matters enumerated in List I of the Seventh Schedule, referred to as the State list in the Constitution, itself is subject to the power of Parliament to make any

law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries. However, when Section 33 makes reservation for persons with disabilities, finally made it clear that there is no distinction between Group "C" and "D" or Group "A" and "B", for, G.O.Ms. No. 7, Higher Education (FR2) Department dated 14.1.2008 makes it mandatory that the reservation of three percent to the Professor post for appointment of physically handicapped persons should have been implemented as directed by this Court in W.P. No. 27231 of 2007 dated 19.11.2007. As the respondents 2 and 3 have miserably failed to follow G.O.Ms. No. 7 dated 14.1.2008 that was issued in compliance of the order passed by this Court in W.P. No. 27231 of 2007 dated 19.11.2007, a direction should be issued to the respondents to appoint the petitioner, as the principles of carry forward also would apply from 2009 batch. It was also brought to the notice of this Court that once again the respondents 2 and 3 have issued an advertisement calling for fresh eligible candidates for filling up the post of Assistant Professor and the interview is also scheduled to be held on 4.2.2014 and the petitioner is also invited to attend the interview, in view of the subsequent development, this Court, he pleaded, may issue a suitable direction to meet the ends of justice.

2. A detailed counter affidavit has been filed by the second and third respondents. The learned counsel appearing for the respondents 2 and 3, referring to the prayer of the petitioner, contended that the petitioner, simply claiming to be a physically disabled person, for the purpose of securing appointment under the quota for disabled persons, has not mentioned the nature of his disability in his affidavit. Coming to the disability certificate showing 60 percent disability, except in column 10(b) of the certificate stating his physical disability as 60%, what is the exact 60 percent disability, has not been properly mentioned therein. Contending further, he stated that G.O.Ms. No. 99, Personnel and Administrative Reforms Department dated 28.2.88 clearly states that three percent posts shall be reserved for physically handicapped persons only in respect of "C" and "D" categories and not in other higher categories of posts. Following the said Government Order, even in Government service, no reservation is contemplated with respect to "A" and "B" categories, therefore, the reservation will apply only for "C" and "D" categories. Referring to G.O.Ms. No. 7, Higher Education (F2) Department dated 14.1.2008, the learned counsel for the respondents 2 and 3 submitted that the said Government Order is confined only to teaching posts in Government Arts and Science Colleges only and it is also made applicable with respect to the selection made by the Teachers Recruitment Board. While so, when the Tamil Nadu Agricultural University has made it clear in the advertisement that there will be no reservation other than the reservation as enumerated under the Constitution, it goes without saying that there is no reservation with respect to physically handicapped persons in respect of Group "A" and Group "B" posts. Since no such advertisement was made by the University, this fact is known to the petitioner also and moreover no person was selected on the basis of disability by the respondents 2 and 3.

Moreover, coming to the merits of the petition for his non-selection in 2009, it was further contended that the petitioner Dr. S. Manoharan, having studied B.Sc. Degree in the year 1998 with an overall grade point of 8.62/10.00, again studied M.Sc. (Agriculture) in Sri Venkateswara Agricultural College, Acharya N.G. Ranga Agricultural University, Tirupati and got his post graduate degree in the year 2000 with an overall grade point of 8.54/10.00. Further, he got a Ph.D., with specialisation in Agronomy at Agricultural College and Research Institute, Tamil Nadu Agricultural University, Coimbatore in the year 2004 and got an overall grade point of 9.72/10.00 marks. He also passed the Indian Council of Agricultural Research (ICAR) NET examination in Agronomy in the year 2005 and presently working as Agricultural Officer, Pesticide Testing Laboratory, Government of Tamil Nadu, Kovilpatti. Therefore, he pleaded that when he is employed, he cannot claim the benefit of the G.O.Ms. No. 7, Higher Education dated 14.1.2008 as cited by him, when it is applicable only to Government colleges under the Higher Education Department. Moreover, G.O.Ms. No. 99, Personnel and Administrative Reforms Department dated 26.2.88 specifically states that in respect of executive post in A & B categories, no reservation need be made to physically handicapped persons. Accordingly, he pleaded, that the prayer made by the petitioner is liable to be rejected.

3. Again assailing the submissions made by the learned counsel for the petitioner, the learned counsel for the respondents 2 and 3 stated that the petitioner failed to distinguish between the University and the Government and the entire writ petition is filed without knowing the vast difference between the Government and the University. Adding further he pleaded that since the University is not a limb of the Government, as the University is an autonomous body, the petitioner's case misquoting and misapplying the Government Order to his advantage, not backed by any legal or statutory provisions, cannot be accepted.

4. Disability has drawn the attention of the world wide community. A disabled is a disabled. He cannot be expected to compete with the ordinary men and women, for, the physical disability is thrust upon a person by birth or accident. The hardship, agony and humiliation faced by the disabled can be realised precisely by the family members, only when a disabled person is born in their family or has suffered disability on account of accident or disease. Realising that the people with disabilities have the same right, hopes and aspirations as every one else, and they are to be provided with equal opportunities and rather better incentives for their rehabilitation in the society, a meeting was held in Beijing from 1st to 5th December, 1992 called the "Meet to Launch the Asian and Pacific Decade of Disabled Persons". Thus, a proclamation was adopted by the Asian and Pacific countries to ensure "full participation and equality of people with disabilities in the Asian and Pacific regions." Fortunately, India was also a signatory to the said proclamation and with a view to implement the same, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was enacted. The statement of objects and reasons to

the said Act reads as under:

"The meeting to launch the Asian and Pacific Decade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, held at Beijing on 1st to 5th December, 1992 adopted the proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. India is a signatory of the said proclamation and it is necessary to enact a suitable legislation to provide for the following:

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provisions of medical care, education, training, employment and rehabilitation of persons with disabilities;

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis, non-disabled persons;

(iv) to counteract any situation of abuse and exploitation of persons with disabilities;

(v) to lay down a strategy for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities; and

(vi) Accordingly, it is proposed to provide inter alia for the constitution of Co-ordination Committees and Executive Committees at the Central and State Levels to carry out the various functions assigned to them. Within the limits of their economic capacity and development, the appropriate Government and the local authorities will have to undertake various rehabilitation services, etc. The Bill also provides for education, employment and vocation training, reservation in identified posts, research and manpower development and establishment of homes for persons with severe disabilities, etc. For effective implementation of the provisions of the Bill, appointment of the Chief Commissioner for persons with disabilities at the Central level and Commissioners for persons with disabilities at the State level clothed with powers to monitor the funds disbursed by the Central and State Governments and also to take steps to safeguard the rights of the persons with disabilities is also envisaged."

5. In this context, it is pertinent to extract Section 33 of the Act, which reads as follows:

"33. Reservation of posts.--Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent, for persons or class of persons with disability of which one per cent 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.

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

A mere reading of the aforesaid provision shows that the appropriate Government is statutorily enjoined to appoint in every establishment such percentage of vacancies not less than 3% for persons with disabilities, of which 1% each shall be reserved for three categories mentioned in Section 33 of the Act.

6. While considering the question whether the provisions of the Act shall prevail over the Tamil Nadu State and Subordinate Service Rules insofar as providing reservation in favour of persons with disabilities in the services of the State, the Hon'ble First Bench of this Court in the case of Professor I. Elangovan v. Government of Tamil Nadu and Others (supra), by upholding the legislative competency of the State for enacting the Act, held that the rule of reservation shall apply to each departmental unit and further held that the provisions of the Act shall prevail over the Tamil Nadu State and Subordinate Service rules insofar as providing reservation in favour of persons with disabilities in the services of the State. In fact, the Division Bench held as follows:

"11.....Therefore, each department of the Government has to be treated as an "establishment", and the Government is bound to reserve not less than 3% vacancies in an establishment in posts identified in accordance with Section 32 of the Act. There is no dispute that the present recruitment is in respect of Group "C" and "D" services and all the posts can be reserved for persons with disability."

7. It is not out of context to mention one another Division Bench judgment of the High Court of Andhra Pradesh in Perambaduru Muralikrishna and Others v. State of Andhra Pradesh and Others, (2005) 1 PDD (CC) 231, wherein the Division Bench, while concerning with the State Rules which did not provide for 1:1:1 reservation for visually handicapped, hearing handicapped and orthopaedically handicapped candidates, finding that though 3% reservation was provided under the Rules, precisely held that the provisions of Section 33 of the Act would prevail over the A.P. State and Subordinate Service Rules insofar as providing 1:1:1 reservation in favour of the persons with disabilities in the services of the State. Therefore, pausing for a while, it must be made clear that the dispute as to whether 3% vacancies reserved for disabled persons would apply to "C" and "D" categories alone, is no longer res integra, as held in Professor I. Elangovan v. Government of Tamil Nadu and Others (supra). However, while coming to the main contention raised by the learned counsel for the respondents 2 and 3 that the reservation of three percent vacancies for the persons with disabilities cannot be applied to "A" and "B" categories, a reference can be made to the G.O.Ms.

No. 7, Higher Education (F2) Department dated 14.1.2008. The said Government Order was issued to implement the order passed by this Court in W.P. No. 27231 of 2007 dated 19.11.2007 and the relevant portion of the said Government Order reads as under:

When the Higher Education Department has also implemented the judgment of this Court as mentioned above to provide three percent reservation in favour of persons with disabilities in the educational institutions run by the Government in respect of "A" and "B" posts also, it is incumbent upon the respondents 2 and 3 to reserve three posts for persons with disabilities even during 2009. But having failed to do so, resultantly, the petitioner suffered more for the fault of the respondents in addition to his personal disability, although the petitioner, as admitted by the respondents 2 and 3 in their counter affidavit, has acquired B.Sc. (Agriculture), M.Sc.(Agriculture) and Ph.D., with specialisation in Agronomy from the Agricultural College and Research Institute, Tamil Nadu Agricultural University, Coimbatore in the year 2004 and also passed the Indian Council of Agricultural Research (ICAR) NET examination in the subject Agronomy in the year 2005.

8. It is also pertinent to refer to one another judgment of the Hon"ble Apex Court in Govt. of India through Secretary and Another Vs. Ravi Prakash Gupta and Another, wherein the Hon"ble Apex Court, while dealing with an argument advanced by the Government of India that only after identification of posts suitable for appointment the reservation can be made, rejected the said contention holding that to accept such a submission would amount to accepting a situation where the provisions of Section 33 of the Act would be deferred indefinitely by bureaucratic inaction, accordingly, the submission made on behalf of the Union of India that identification of "A" and "B" posts in the Civil Services was undertaken in the year 2005 is not of much substance. In the said judgment, when the Apex Court, while upholding the judgment of the High Court for giving reservation of three percent to the physically handicapped persons in civil services examination viz., I.A.S., examination, made it absolutely crystal clear that the persons with disabilities did not make any distinction between "A" and "B" posts or "C" and "D" posts. Therefore, in this case, the argument advanced by the learned counsel for the respondents 2 and 3 that no reservation can be sought for by the petitioner for application of three percent reservation in favour of physically disabled persons in "A" and "B" posts which are kept away from the purview thereof, cannot be accepted. As mentioned above, when the G.O.Ms. No. 7, Higher Education (F2) Department dated 14.1.2008 has also complied with the judgment of this Court for providing three percent reservation for the persons with disabilities, there cannot be any more dispute that the respondents 2 and 3, although being autonomous, are bound by the said Government Order.

9. While concluding the issue, it is also pertinent to refer to the latest judgment of the Hon"ble Apex Court in Union of India (UOI) and Another Vs. National

Federation of the Blind and Others, which has dealt with one of the issues raised in the present writ petition relating to reservation in Group "A" and "B" posts that the computation of reservation against the total vacancies in the cadre strength in Group "A" and "B" posts will violate the rule of 50% ceiling of reservation in favour of SC, ST and OBC as laid down by this Court in *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, , the Apex Court, rejecting the said contention, held that this contention was not tenable and was against the aforesaid judgment, in the following words: "40....It is difficult to understand as to how the computation of reservation against total vacancies in the cadre strength in Group A and B will violate 50% ceiling when its computation on that basis in Group C and D will not violate the said ceiling. There is no rationale of distinguishing between the manner of computation of reservation with regard to Group A and B posts on the one hand and manner of computation of reservation with regard to Group C and D posts on the other on this ground.

41. A perusal of *Indra Sawhney v. Union of India and Others* (supra) would reveal that the ceiling of 50% reservation applies only to reservation in favour of other Backward Classes under Article 16(4) of the Constitution of India whereas the reservation in favour of persons with disabilities is horizontal, which is under Article 16(1) of the Constitution. In fact, this Court in the said pronouncement has used the example of 3% reservation in favour of persons with disabilities while dealing with the rule of 50% ceiling. Para 95 of the judgment clearly brings out that after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%. Para 95 is reproduced as follows:

"95....all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as "vertical reservations" and "horizontal reservations". The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16) can be referred to as horizontal reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same....."

The aforementioned case clearly shows that there are two types of reservations, namely, "vertical reservation" and "horizontal reservation". While the reservation in favour of Scheduled Castes, Scheduled Tribes and other backward classes being called "vertical reservation", the reservation of three percent of vacancies in favour of physically handicapped persons is relatable to "horizontal reservation", inasmuch as the person selected against three percent quota meant for physically handicapped will be placed in the appropriate category, namely, if he belongs to Scheduled Caste category, he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition category, he will be placed in that category by making necessary adjustments, therefore, when the three percent reservation for persons with disabilities has nothing to do with the ceiling of 50% per se, the application of three percent reservation is justified.

When the aforementioned decided cases clearly show that the computation of reservation for persons with disabilities has to be computed in Group A, B, C & D posts in an identical manner, namely, computing three percent reservation of total number of vacancies in the cadre strength, which is the intention of the legislature, the respondents 2 and 3 are duty bound to reserve not less than three percent vacancies for the persons with disabilities, of which one percent each shall be reserved for the three categories mentioned in Section 33 of the Act, as highlighted above. However, since the petitioner has asked for only a writ of mandamus or direction to consider the petitioner for appointment to the post of Assistant Professor in the respondents 2 and 3 University by applying the rule of reservation as per the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, in view of the peculiar situation that all the posts had been filled up, this Court is not inclined to disturb the persons who were appointed four years ago viz., in 2009. However, today, the learned counsel for both sides stated that the respondents 2 and 3 have again issued an advertisement calling for suitable candidates for filling up of various categories of Assistant Professor posts. That shows that there are vacancies available now. Therefore, although a case is made out that the petitioner has been denied appointment for no fault of him to direct the respondents to create supernumerary post and appoint him as Assistant Professor, as the respondents 2 and 3 are going to fill up the post of Assistant Professor for which interview is also going to be held on 4.2.2014, by taking note of the subsequent development that the vacancies are available, without creating supernumerary post, by considering the qualifications possessed by the petitioner that he is a Ph.D., holder with specialisation in Agronomy and also passed the NET examination conducted by ICAR, this Court hereby permits the petitioner to appear for the interview on 4.2.2014 or on any subsequent date and on his appearance, the respondents 2 and 3, applying the rule of reservation of three percent for persons with disabilities, are directed to consider his candidature for the ensuing selection, if he satisfies both the eligibility and reservation criteria. With these observations and directions, the writ petition

stands disposed of accordingly. Consequently, M.P. No. 1 of 2010 is closed. No costs.