
(2016) 03 KL CK 0007

In the High Court Of Kerala

Case No : W.P. (C) Nos. 29797 of 2014 (Y) and 2160 of 2015

Shiney T. Thomas and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 01-03-2016

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(k), Section 32, Section 33

Citation : (2016) 03 KL CK 0007

Hon'ble Judges : A.M. Shaffique, J.

Bench : Single Bench

Advocate : P.M. Pareeth, Advocate, for the Appellant; C.R. Syamkumar, Sr. Govt. Pleader, for the Respondent

Final Decision : Disposed off

Judgement

A.M. Shaffique, J.—1. Since common issues arise for consideration in the above writ petitions, these cases are heard and decided together.

2. W.P.C. No. 29797/2014 has been filed by the petitioners who claim to be handicapped persons with 40% loco motor (ortho) disability. They have approached this Court seeking for a direction to respondents 2 and 3 namely the Kerala Public Service Commission (for short "KPSC") to advise the petitioners for appointment to the post of Last Grade Servants from Ext. P5 rank list within a time frame and also for a declaration that handicapped persons are entitled for reservation of 3% in the post of Last Grade Servants to the Public Sector Undertakings and Government Companies and the action of KPSC in setting apart the vacancies for special recruitment is violative of the provisions of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the 1995 Act").

3. W.P.C. No. 2160/2015 has been filed by the very same petitioners wherein they sought to quash Ext. P10 by which steps had been taken by KPSC calling for

applications from qualified physically handicapped candidates for selection to the post of various Government offices, Government owned Companies/Corporations/ Boards in the post of Last Grade Servants and for a declaration that the 2nd respondent, KPSC has no jurisdiction to issue such a notification for filling up of existing vacancies of Last Grade Servants in the 3% quota when there is already a rank list from which no advice has been made in respect of handicapped persons.

4. The common facts involved in both writ petitions are as under:

"KPSC had issued a notification inviting applications from qualified candidates for appointment to the post of Last Grade Servants in various Companies and Boards owned by State of Kerala in terms of notification dated 30/11/2009. Petitioners were also such candidates and a rank list has been published on 16/06/2014 which is marked as Ext. P5. In Ext. P5 rank list, there are 2854 candidates excluding supplementary list which contains various reservation candidates. The first petitioner is Rank No. 2123 in the main list and the 2nd petitioner is Rank No. 94 in the supplementary list for Ezhava. It is stated that there are only five candidates with disability in the main list. The contention urged by the petitioners is that though five months have elapsed after issuance of Ext. P5 rank list, and though 940 candidates have been advised, and despite the statutory provisions which indicate that 3% of the vacancies are to be reserved for handicapped persons, no such attempt had been made by KPSC. It is contended that failure on the part of KPSC in advising any of the handicapped persons with disabilities in the 3% reservation quota is clearly in violation of the provisions of the 1995 Act and the law laid down by the Supreme Court in Government of India through Secretary and Another v. Ravi Prakash Gupta and Another [, (2010) 7 SCC 626]."

5. In W.P.C. No. 2160/2015, it is further contended that when information was sought from KPSC regarding the number of vacancies filled up from Ext. P5 rank list, it was informed that 19 posts were reserved for the 3% reservation for physically handicapped. Petitioners also relied upon the judgment in Union of India and Another v. National Federation of the Blind and Others [, (2013) 10 SCC 772]. It is also contended that in the rank list for appointment to the post of Assistant Grade II in the Kerala State Beverages Corporation, a supplementary list was published in terms with an addendum notification, two years after the issuance of main rank list. It is contended that when WP(C) No. 29797/2014 was filed, though KPSC took a stand that despite the fact that no supplementary list was published, it will be published soon and in the meantime, Ext. P10 notification had been issued, which, according to the petitioners, is contrary to the principles laid down by the Supreme Court in Ravi Prakash Gupta (supra).

6. Counter affidavit has been filed on behalf of respondents 2 and 3 in WP(C) No. 29797/2014. It is stated that even in the gazette notification dated 30/11/2009 inviting applications, it was mentioned that paragraphs 5, 6 and 7 of general conditions are not applicable. Paragraph 5 related to awarding of grace marks to

physically disabled candidates. Further it is indicated that the categories of posts identified as suitable for appointment of physically disabled candidates were made applicable to State Public Sector Undertakings/Autonomous Institutions under the State Government only as per Government Order dated 01/02/2010. It is stated that as far as Ext. P5 rank list is concerned, physically disabled candidates are included purely on merit basis and no grace marks have been granted. It is stated that the notification clearly indicates that paragraph 5 of the general condition is not applicable. Majority of the physically handicapped persons would not have applied for the post. It is stated that out of the 959 vacancies reported for the post, 940 vacancies have been filled up and 19 vacancies have been set apart to be filled up by physically disabled candidates, taking into consideration 3% of 663 vacancies reported after issuance of Government Order dated 01/02/2010. KPSC therefore supported the stand taken in the matter. Counter affidavit has also been filed in WP(C) No. 2160/2015 wherein also KPSC had taken the very same stand in support of the stand taken in inviting fresh applications in terms of Ext. P10 to be made applicable to physically handicapped candidates.

7. Heard the learned counsel for the petitioners, learned Standing Counsel appearing on behalf of KPSC and the learned Government Pleader appearing on behalf of the State.

8. There is no dispute about the fact that by virtue of the provisions of the 1995 Act, it is the obligation of the State Government to identify the posts in the establishment of the State Government which could be reserved for persons with disability. Section 33 of the 1995 Act clearly indicates that not less than 3% of the post shall be reserved for persons with disability of which 1% each shall be reserved for persons suffering from i) blindness or low vision ii) hearing impairment, iii) locomotor disability and cerebral palsy. Proviso to Section 33 further indicates that it is for the appropriate Government having regard to the type of work carried on in any department or establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of the said section.

9. The learned counsel for the petitioners relied upon the judgment of the Apex Court in Ravi Prakash Gupta (supra). That was a case in which a person suffering from 100% blindness appeared in a civil service examination conducted by Union Public Service Commission in the year 2006. He was declared successful in the preliminary examination and main examination and was called for a personality test. Out of 474 candidates who were selected, only one candidate having visual impairment was included in the list. It was contended that although more than 5 vacancies were available in the visually impaired category, only one post was offered under the said category. Hence the candidate filed a writ petition before the Delhi High Court which was later withdrawn with liberty to approach the Central Administrative Tribunal (CAT) wherein he made a claim based on Section 33 of the 1995 Act. The candidate was Sl. No. 5 among the visually impaired

candidates. The claim was rejected by the Tribunal and thereafter he moved before the Delhi High Court and the High Court set aside the order of the CAT and allowed his application observing that a clear vacancy was available in which the said candidate could be accommodated on the basis of his position in the tests. Government of India challenged the matter before the Apex Court. The question considered was whether on account of the failure of the Government to identify the post for persons falling within the ambit of Section 33 of the 1995 Act, the candidate could be deprived of the benefit of selection on the ground that there were no available vacancies in the said category. The other question was whether reservation provided under Section 33 of the 1995 Act was depending on identification of post suitable for appointment of such candidates. It was held at paragraphs 25, 27 and 29 as under:

"25. Although the Delhi High Court has dealt with the aforesaid questions, we wish to add a few observations of our own in regard to the objects which the legislature intended to achieve by enacting the aforesaid Act. The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission made on behalf of the Union of India that identification of Groups A and B posts in the IAS was undertaken after the year 2005 is not of much substance."

"27. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in every establishment." "29. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been

noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise."

10. Another judgment relied upon is *Sanoop. P. v. Kerala Public Service Commission* [WP(C) No. 2715/2014 dated 21/11/2014]. In this case, the learned Single Judge of this Court was considering the claim made by the petitioners who were disabled and had applied for appointment to the post of Lower Division Clerk in Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd., pursuant to a notification issued by the KPSC on 27/11/2008. In that case, a separate rank list was published by the Commission on 18/10/2012 for appointment against 3% quota earmarked for persons with disability as per the provisions of the Act. Though the petitioners were advised and were appointed, later the Commission cancelled their advice on the basis of the Government Order directing that the quota earmarked for the persons having disability need be filled up only against the vacancies reported after 01/01/2008. The cancellation of advice were challenged by the petitioners and another writ petition was filed for not advising the candidates against the reported vacancies. The learned Single Judge relying upon the judgment in *Ravi Prakash Gupta* (supra) held that the Government Order is contrary to the provisions of the Act and was illegal. It was also held that the 3% reservation provided for persons with disability under the Act is applicable to all the vacancies reported to the Commission after the commencement of the Act.

11. The learned Counsel appearing for KPSC also placed on record the Government Order dated 01/02/2010, by which the Government had already identified many categories of posts in Government Departments suitable for appointment for different categories of physically handicapped candidates. It is indicated that the Government, having examined the matter in detail, have ordered that 3% reservation to physically handicapped candidates in the categories of posts identified as suitable for appointment for physically handicapped candidates as per Government Orders issued earlier were applicable to State Public Sector Undertakings/Autonomous Institutions under the State Government/Universities/Co-operative Institutions and such other bodies with effect from the date of the order.

12. Having regard to the aforesaid submissions, there cannot be any dispute regarding the fact that 3% of the vacancies have to be reserved in identified posts for physically handicapped persons in terms of Section 33 of the 1995 Act. Establishment is defined under Section 2(k) as meaning a Corporation established by or under a Central, Provincial or State Act, or an authority or body owned or controlled or aided by the Government or a local authority or a Government Company as defined in Section 617 of the Companies Act, 1956 and

includes Departments of a Government. Therefore, reservation has to be provided in the identified posts in all the establishments as defined under Section 2(k) of the 1995 Act. After the 1995 Act having come into force, it is the obligation of the State Government to identify the post. In fact, it cannot be disputed that the benefit of the Act has to be extended to all the persons who suffer from disability.

13. The main contention urged by KPSC for not providing the 3% reservation quota in terms of Ext. P5 rank list is on account of the fact that when the notification was issued, no specific reservation was provided to physically handicapped persons whereas it was mentioned that physically handicapped persons will not be given any reservation or additional marks. It is therefore their contention that none of the physically handicapped persons would have applied for the post.

14. This view, according to me, cannot be accepted. Going by the scheme of the 1995 Act, it is apparent that when applications are invited for appointing Last Grade Servants, the posts which are suitable for physically handicapped persons ought to have been identified and the applications ought to have been invited from physically handicapped persons as well. What has been done by KPSC is that when applications were invited, specific provision had been made that the notification does not contemplate any reservation or concession for physically handicapped. This approach is absolutely illegal and in violation of the provisions of the 1995 Act.

15. However, it is evident that this mistake had been taken note of by KPSC and a fresh notification has been issued for inviting applications from physically handicapped persons for selection to the post of Last Grade Servants in order to fill up the 3% vacancies. In the Counter affidavit filed by KPSC, it is stated that since 959 vacancies were reported for the post based on Ext. P5 rank list and 940 vacancies have been filled up, it is stated that 19 vacancies are set apart to be filled up for physically handicapped candidates. 19 vacancies were kept apart, which is 3% of 653 fresh vacancies reported after 01/02/2010 Government Order. In fact, there is no rationale in reducing the 3% vacancies. 3% vacancies had to be computed with reference to total vacancies which were reported during the currency of the rank list.

16. The petitioners have also placed reliance on Ext. P11 Government Order dated 24/01/2011 by which the Government had decided to fill up backlog vacancies which were not filled up and earmarked for physically disabled persons from 01/01/2004 to 31/12/2007. Contention of the petitioners is that the idea is to have a special recruitment to fill up the backlog vacancies.

17. The facts being so, I do not think that there is any reason to deny advice to the petitioners by resorting to a special recruitment process in terms of Ext. P10 notification.

18. Having regard to the aforesaid factual situation, the writ petitions are

disposed of as follows:

"i) That while inviting applications for appointment to the post of Last Grade Servants, 3% vacancies ought to have been set apart for physically disabled persons and a supplementary list should have been prepared by KPSC.

ii) Though no separate reservation has been provided for physically handicapped persons, the respondents are bound to appoint physically handicapped persons from Ext. P5 rank list.

iii) 3% of the posts for physically disabled persons shall be based on the total number of vacancies reported by the respective Government Departments and advised by KPSC.

iv) If any backlog or sufficient number of candidates are not available to be appointed from Ext. P5 rank list, such vacancies shall be filled up in terms with the selection made in terms of Ext. P10 notification dated 31/12/2014."