
(2015) 05 KL CK 0137

In the High Court Of Kerala

Case No : O.P. (KAT) Nos. 154 and 156 of 2015

Sivadasan O.R.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-05-2015

Acts Referred:

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

Citation : (2015) 147 FLR 1082 : (2015) 4 KHC 257 : (2015) 3 KLT 900 : (2016) 1 SCT 374

Hon'ble Judges : P.R. Ramachandra Menon, J; Babu Mathew P. Joseph, J

Bench : Division Bench

Advocate : Kaleeswaram Raj, for the Appellant; Joseph George, Senior Government Pleader, Advocates for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J—Whether the reservation envisaged under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, the Act) with reference to the posts identified under Section 32 of the very same enactment would extend to the case of promotion as well, is the moot question raised in these original petitions. Since the point to be considered is only with regard to the legal position, as no factual controversy is involved, both these original petitions are heard together. For convenience of the reference, the factual position is referred to as in OP (KAT) No. 154 of 2015. The petitioner joined the service initially as an LD. Typist in the Revenue Department on 29/05/1981. Later, he was promoted to the post of UD Typist after ten years, in 1991. There was a category change on 18/10/1995 as UD Clerk, when the petitioner was absorbed in the Rural Development Department, from the Revenue Department. Thereafter, the petitioner was promoted as Head Clerk on 29/10/2003 and thereafter as Accounts Officer on 08/01/2010. It is stated that there was a reversion to the post of Head Clerk in December, 2012, but, the same was subject to challenge by approaching the KAT

and it is stated that the petitioner is now occupying the chair of Accounts Officer.

2. The petitioner put up a claim for promotion to the post of Assistant Development Commissioner/Administrative Assistant in the Rural Development Department, by extending the benefit of reservation of 3% envisaged under Section 33 of the Act. The request was not acceded to. It made the petitioner to approach the Tribunal by filing OA No. 2433 of 2014. Before the Tribunal, the contention of the petitioner was mainly that no distinction could be drawn between "appointment", and "promotion", while giving effect to the provisions of the Act. It was pointed out that the matter was considered by the Bombay High Court in *National Confederation for Development of Disabled and Another v. Union of India and Others* wherein a positive direction was given to the Government to consider the case of the aspirants for promotion as well. Though the said verdict was challenged before the Apex Court by way of Civil Appeal No. 9096 of 2013, interference was declined, observing that reservation had to be there in respect of all categories, i.e., Group A, B, C and E posts. Placing reliance on the said verdict, petitioner sought to extend the benefit of reservation with reference to promotion as well and sought for interference of the Tribunal. After hearing the matter, interference was declined, referring to the fate of similar original applications as in the case of OA (EKM) No. 2 of 2015. Accordingly, the OA was dismissed holding that there was no provision of law so as to extend the benefit of reservation under Section 33 of the Act for promotion under any circumstance; which is under challenge before this Court.

3. Incidentally, it is to be noted that the verdict which is sought to be relied on, for passing the order in OP (KAT) No. 154 of 2015 is the order dated 15/01/2015 in OA No. 2 of 2015. The said verdict is under challenge in the other original petition; i.e. OP (KAT) No. 156 of 2015. A contention is also raised to the effect that the Government itself has issued Annexure-A6 letter dated 05/03/2014 addressing all the Heads of Departments and others concerned, to identify the posts and compute the number of vacancies so as to accommodate the disabled persons in terms of the "Act", which is cited as an instance to give effect to the provisions of the "Act" in the matter of "promotion" as well.

4. Heard the learned counsel appearing for the petitioners and the learned Government Pleader appearing for the respondents.

5. The learned counsel for the petitioners places heavy reliance on the verdict of the Bombay High Court, which is cited as the law, by virtue of dismissal of the case preferred before the Apex Court. The case considered by the Bombay High Court was in respect of recruitment to the IAS cadre. The scheme of the Statute was explained, so as to accommodate persons with disabilities as well, to come within the purview of the Act, observing that benefit of the Act had to be given in the case of higher posts as well. The Apex Court also found the necessity to identify posts in all categories, wherever it is possible, by virtue of advancement of technology, thus making a reference to category A, B, C and E posts.

6. There is no dispute with regard to the legal position that the Act draws no distinction among the categories of posts. But the very Statute itself takes care of the situation and visualizes the fact that the persons with disabilities who are sought to be extended the benefits of the Act, may not be in a position to man all the posts and it is with this intent, that Section 32 has been incorporated showing the necessity to identify the posts against which appointment can be effected. Section 33 of the Act speaks about the necessity to reserve the posts to a minimum extent (3%) in the establishments, while stipulating that a minimum extent of 1% each has to be reserved in the case of persons with-1) blindness or low vision, 2) hearing impairment and 3) locomotor disability. So these are the three categories which are mainly to be considered for identifying the posts. By virtue of the advancement of technology, more and more posts could be identified with reference to the "job specification" and the nature of duties to be performed by the persons concerned. In other words, this could not be confined to a particular category or posts and the totality of the circumstances has to be taken into consideration for identifying the posts, while giving effect to the reservation of 3% as mentioned above.

7. Coming back to the case in hand, there is no case for the petitioner that any violation of law has been committed by the respondents or that 3% reservation has not been provided or that the posts have not been identified by the employer/department. The claim put forth by the petitioner is only that provisions of the Act have to be applied for the purpose of promotion as well, however, without making any specific averment to the effect that the concerned post to which promotion is sought for, is an "identified post" under Section 32 of the Act. The legal position was meticulously considered by the Tribunal and it was observed that the petitioner could not succeed in pointing out any particular provision in the Statute enabling such an exercise to be conducted with reference to the question of promotion as well.

8. During the course of hearing, the learned counsel for the petitioners pointed out that even though the post of Assistant Development Commissioner/Administrative Assistant with the Rural Development Department involved in OP (KAT) No. 154 of 2015 is not an identified post for accommodating candidates with disabilities as envisaged under Section 32, the post of Research Officer to which promotion is sought for in the other OP (KAT) No. 156 of 2015, is a post identified in this regard, having placed at Serial No. 41 referring to the particular department, i.e., Department of Economics & Statistics and Planning Board and that the category is earmarked for persons with locomotor disability/cerebral palsy, hearing impairment and low vision. Learned counsel submits that the said post stands identified in this regard only for the purpose of direct recruitment and the grievance is for not considering the same for the purpose of promotion as well. The posts having been identified for the purpose of accommodating candidates with disabilities, there is no rationale in drawing a distinction between direct recruitment and promotion.

9. Going by the scheme of the Statute, it has been made obligatory for the employer to provide a minimum of 3% reservation in the matter of appointment. For the purpose of granting appointment and reservation, the establishment has to be taken as a whole, so as to get the desired extent of result. If it is to be made applicable in respect of the specific posts, to be taken separately, it may not be possible to provide the requisite extent of reservation; more so, when the number of posts is less than "ten", under which circumstance, not even a single person can be appointed. It is in the said circumstance, that the necessity to reckon the "vacancies", gathers momentum/importance as discussed by the Bombay High Court and explained by the Apex Court. It is with the very same intent, that the law makers have specifically incorporated Section 32, mentioning the necessity to identify the posts to which persons with disabilities could be accommodated. As such, the contention to the contrary, is only to be repelled. Even if the post is identified as in the case of OP (KAT) No. 156 of 2015, limiting the benefit only for the purpose of "direct recruitment" does not appear to be arbitrary or illegal. If the contention of the petitioner that the same is to be thrown open also for promotion, is to be accepted, the object to the Statute is likely to be defeated. This is for the obvious reason that, the petitioner by virtue of his appointment already obtained in the establishment is likely to be promoted in the normal channel; subject to satisfaction of the requirements with reference to his seniority, qualification and experience, if any. If the post which has already been identified with reference to Section 32, is left open to be accommodated by persons like the petitioner by promotion, then a deserving person with disability as envisaged under the Statute, still waiting in the queue to get appointment, will lose the chance to get appointed. This cannot but be an injustice to be resulted and is totally alien to the scheme of the Statute. This Court finds that the reservation envisaged under Section 32 of the Act can only be in respect of the direct recruitment, so as to compel the employer to identify and reserve the requisite extent of posts to be accommodated by persons with disabilities as specified. It can never be applied in the case of promotion as contended by the petitioner. The wordings of the Statute, never give any such impression that, it is to be applied also in the case of promotion. No such observation has been made by the Apex Court, to the effect that it has to be given with reference to promotion as well.

After hearing both the sides and after considering the materials on record, provisions of law and the precedents sought to be relied on by the petitioner, this Court finds that the idea and understanding of the petitioner is wrong and misconceived. No tenable ground is brought up, so as to call for interference with the verdicts passed by the Tribunal.

Both the original petitions fail and they are dismissed accordingly.