

(2008) 02 KL CK 0005

In the High Court Of Kerala

Case No : Writ Petition (C) No"s. 38243 and 38295 of 2007 and 1838 of 2008

Sreelekha and Another

APPELLANT

Vs

Kerala Public Service Commission and Another

RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 32, 33, 72

Citation : (2008) 117 FLR 537 : (2008) 1 ILR (Ker) 709 : (2008) 1 KLJ 852

Hon'ble Judges : V. Giri, J

Bench : Single Bench

Advocate : R.T. Pradeep, P.V. Asha and Vipin Das, for the Appellant;
Nandakumar, S.G.P. and Alexander Thomas, S.C., for the Respondent

Judgement

V. Giri, J.—Common issues arise for consideration in these cases and they are heard together and by consent of parties they are being disposed of by this common judgment. WP (C) No. 1838/2008 is taken as the leading case.

The petitioner applied for the post of LD Typist in Various Departments pursuant to Ext. P-2 notification issued by the Public Service Commission (for short "the Commission"). Apparently the petitioner is a physically handicapped person because of his visual incapacity in one eye. Petitioner is otherwise qualified for the post, as evidenced by Ext. P-1 series certificates. It is the case of the petitioner that he did not claim any weightage on the premise that he is a physically handicapped person. He was included in Ext. P-3 short list and he was asked to appear for the interview with the requisite certificates. He did so. According to him, the certificates were verified as well. But then, he was told that he cannot be considered for appointment as LD Typist in view of GO (P) No. 20/1998 dated 14/7/1998, Ext.P-11 because of the visual incapacity in one eye. The petitioner submitted Ext. P-5 representation along with the medical certificates issued by Dr. Lalitha Susan Thomas apparently certifying that the vision in his left eye does not disable him to carry out the duties in an office. The

petitioner again reiterated his request under Ext, P-6 along with which, he enclosed the medical certificate issued, by a Government Medical Officer certifying that he has normal vision in his left eye.

2. A list was published by the Commission. Petitioner was not included and hence this writ petition seeking a writ of mandamus commanding the 2nd respondent to include the name of the petitioner in the rank list for appointment to the post of LD Typist in Palakkad District in accordance with his performance in the test and to advise him for appointment in accordance with his ranking.

3. Almost similar facts are involved in the other two writ petitions. The only difference is that the petitioners in those writ petitions apparently indicated that they are Physically Handicapped persons. It is not very clear that they had claimed any weightage on the premise that they are Physically Handicapped persons. At any rate, the said issue does not loom large in the context of the issues which are agitated in these writ petitions.

4. A counter-affidavit has been filed in WP (C) No. 38243 and 32295 of 2007. The same counter-affidavit has been adopted in WP (C) No. 1838/2008.

5. The stand taken by the Commission in not including the petitioners in the rank list for LD Typist is explained in paragraphs 6 to 8 in the counter-affidavit, which are extracted -below:

It is respectfully submitted that the petitioners were called for verifications of documents to prove their claims made in the application. Both the applicants have claimed as PIT in their application hence they were called for assessing their suitability and the petitioners have produced medical certificates proving that they are having permanent visual disability of 40%. It may be noted that the Government, as per GO (P) No. 20/98/P & ARD, dated 14 July, 1998, had issued orders regarding the appointment of Physically Handicapped persons in class III and IV categories in Public Services, wherein the posts suitable for appointment of Physically Handicapped persons have been enlisted. As per the said list, the post of LD Typist is not included among those suitable for appointment: of Blind/partially blind persons. A candidate is deemed to be not eligible if the percentage of visual impairment is 40% or more. As the petitioners are suffering from 40% visual disability as certified by the Medical Authority, they are not suitable for appointment to the post of LD Typist. Hence the petitioners were not considered for inclusion in the final Ranked list published on 5.12.2007 and their applications were rejected.

It is respectfully submitted that as the post of LD Typist is not included among suitable for appointment of Blind/partially blind as enlisted by the Government, vide GO (P) No. 20/1998 dated 14th July, 1998, the Commission have not included any candidate having visual disability of 40% or more in the final Ranked list published for the post.

It is respectfully submitted that in this connection, it is also intimated that a total

number of 180 vacancies were reported, for the post of LD Typist in various departments in Thiruvananthapuram district and speedy steps are being taken to advise candidates against the aforesaid vacancies.

6. In effect, therefore, the Commission contends that as per Ext. P-11 GO (P) No. 20/1998, dated 14.7.1998, the Government had issued orders regarding the appointment of Physically Handicapped persons. Clauses 3 and 4 in the appendix to the said order provide for separate scheme for special recruitment of Physically Handicapped persons. The Annexure to the said order lists the posts which are considered suitable for different categories of Physically Handicapped persons. The post of LD Typist has not been included among those suitable for appointment of Blind/partially blind persons and therefore, the candidate is deemed not eligible if the percentage of visually impairment is 40%. Since the petitioners in these cases admittedly suffer from 40% visual disability on one eye as certified by the medical board, they are not suitable for appointment to the post of LD Typist. The Commission submits that no person with a visual disability of 40% has been, included in the final rank list for the post of LD Typist.

7. I heard learned Counsel for the petitioners Ms. P.V. Asha, Mr. Vipin Das the learned Standing Counsel for the PSC Mr. Alexander Thomas and Senior Government Pleader Mr. Nandakumar.

8. There are certain facts which could conveniently be taken as either admitted or not disputed. Firstly the petitioners are qualified for the post of LD Typist. Secondly, no other factor has been put forth by the Commission to contend that the petitioners are ineligible to be included in the final rank list for the post in question. The only reason put forth by the Commission is on the basis of Ext. P-11 Government Order viz., GO (P) No. 20/1993, dated 14.7.1998 and the inference which the Commission apparently draws to the effect that the post of LD Typist is not specifically listed as one of the posts suitable for visually handicapped persons, unlike in the case of orthopaedically handicapped or even hearing impaired persons for whom significantly the post is considered to be available to be filled up by Physically Handicapped persons.

9. Since Ext. P-11 Government Order is stated to be sourced to the provisions of the Central enactment viz., Persons with Disabilities (Equal. Opportunities, Prelection of Rights and Equal Participation) Act, 1995 (hereinafter referred to as the "Disabilities Act"), it is profitable to refer to the said enactment to appreciate the stand taken by the Commission.

10. The Disabilities Act proclaims to be an Act to give effect to a proclamation on the full participation and equality of the people with disabilities in the Asian Pacific Regions. Disability has been defined in Section 2(i) of the Disabilities Act, as to include blindness and low vision as well. A person with disability is defined in Section 2(t) of the "Disabilities Act as to mean a person suffering from not less than 40% of any disability as certified by a Medical Authority. Sections 32 and 33 of the Disabilities Act is relevant in the context and are extracted hereunder:

32. Identification of posts which can be reserved for persons with disabilities.--

Appropriate Government shall:

(a) identify posts, in the establishments, which can be reserved for the persons with disability.

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of posts.--Every 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--.

(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.

11. Therefore, there is a mandate on the appropriate Government which means the State Government in respect of posts in the Government Service to identify posts in the establishments which could be reserved for persons with disabilities. The said list is to be subjected to amendments periodically. Apparently as an addendum to Section 32 Section 33 provides that the Government shall reserve such percentage of posts not less than 3% to persons/class of persons with disabilities, 1% for persons/class of persons with blindness/partial blindness, 1% for hearing impaired and 1% for persons with locomotor disability or cerebral palsy in the posts identified for each disability. In", other words, there is a mandate on the appropriate Government either to provide by a law or provide with instructions akin thereto, with 3% of vacancies in posts identified in that behalf should be set apart for persons with disability. What is contemplated by the Statute is an identification of the posts in the first instance, followed by a provision for reservation of a specific percentage of the vacancies in such posts for persons with disabilities. The provisions of the Disabilities Act would indicate that thereafter it will be open to the Government to provide for & separate scheme to fill up such vacancies in such posts which are identified and reserved in terms of Sections 32 and 33 of the Disabilities Act.

12. It is also apposite in this context to refer to Section 72 of the Disabilities Act which provides for an overriding effect so far as the provisions of the Disabilities Act are concerned. They apply not in derogation, but in addition to such law or

any order or instructions issued/indicated for the benefit of persons with disabilities.

13. Ext. P-11 Government Order is apparently a step taken by the Government particularly having in mind the mandate of Sections 32 and 33

14. Ms. Asha, learned Counsel appearing in WP (C) No. 1838/08 and Mr. Vipin Das contend that Ext. 11 I Government Order will have to be confined in its application to the area wherein the Government purported to exercise its jurisdiction viz., to identify the posts, which it according to the Government are suitable for the purpose of Physically Handicapped persons, in the context of Sections 32 and 33 of the Disabilities Act. In other words, the scope and ambit of Ext. P11 will have to be confined to identification, of posts in the establishments which can be reserved for the persons with disability and the prescription of a percentage of vacancies not less than 3% in relation to such posts which are identified in terms of Section 32 of the Act. It is contended that it may not be possible for the Government while exercising the powers under Sections 32 and 33 of the Disabilities Act to expressly bring about an exclusion of Physically Handicapped persons from being; considered for a post in public service, if otherwise they are not considered to be unsuitable for the post.

15. I find considerable force in the said submission. In my view, the scope and ambit of GO (P) No. 20/1998, dated 14.7.1998 or for that matter any order issued by the Government purportedly sourced to Sections 32 and 33 of the Disabilities Act will have to be read in such a manner that it is not ultra vires the provisions of the Disabilities Act. The orders will have to be read subject to the provisions of the Disabilities Act and its sweep will have to be restricted to the power which is conferred on the Government under Sections 32 and 33 of the Act. All that the Government is required to do u/s 32 of the Act is to identify the posts which can be reserved for persons with disabilities. Section 33 is only addendum to that. Essentially, when the Government exercises its powers under Sections 32 and 33, it only identifies those posts which in its opinion should be made available for special recruitment of Physically Handicapped persons, in the manner provided in Section 33 of the Disabilities Act, Thus, while issuing any Government Order purportedly in terms of Sections 32 and 33 of the Disabilities Act, it would not be open to the Government to provide for an additional condition, qua Physically Handicapped persons which they will have to satisfy for being considered eligible to be appointed to any post, on a par with persons who do not suffer any handicap. I am also of the view that the conditions which are either expressly provided in the Appendix to Ext. P-11 or discernible from Annexures thereto ate conditions which would more appropriately be applicable in the case of any special recruitment undertaken thereunder. It is my further view that since the Government is vested with the power to reserve a percentage of vacancies for Physically Handicapped persons against posts which are also identified in that regard, it would be certainly open to the Government to prescribe conditions, in relation to the Special recruitment. Such conditions

prescribed for Special recruitment cannot obviously be imposed in the matter of general recruitment undertaken by the Public Service Commission, as part of its normal duties for recruitment to a post in any public sector which also happens to be a post that is identified for Special recruitment in terms of Section 32 of the Disabilities Act.

16. I also find force in the submission made by Ms. Asha that no order which is sourced to Sections 32 and 33 of the Disabilities Act should be construed to place a Physically Handicapped person in a situation where he is disabled from competing with persons with no disability. Counsel submits that the petitioner did not require any privilege as a Physically Handicapped person, but only requested that he be considered on a par with persons with no disability. Obviously the conditions contained in Ext. P-11 should not be applied in a manner as to prevent the Commission from considering the suitability of Physically Handicapped persons along with persons with no disability. That is to say; do not concede any privilege to the Physically Handicapped person on the premise that he/she is a Physically Handicapped person, but consider him/her as any other person. Do not treat the handicap as an albatross around his neck, so that he is not considered even if he is otherwise suitable for the post.

17. In my view any subordinate order Issued under the provision of the Disabilities Act like Ext. P-11 cannot be construed in a manner as to impose conditions in any recruitment which is normally undertaken by the Commission, so as to prevent the Physically Handicapped person from competing on an even platform with any other normal person.

18. Mr. Alexander Thomas also makes a reference to the general condition No. (vii). Learned Counsel of the petitioners also refers me to the general conditions forming part of the notification issued by the Commission. Sub-clause (vii) thereof reads as follows:

Physically handicapped persons (the blind, the deaf and dumb and the orthopaedically handicapped) may also apply if they satisfy all the prescribed qualifications except age. The case of each such applicant, will be considered on merit if he is found to be otherwise suitable and provided he can discharge the duties attached to the post satisfactorily. Age concession upto 15 years will be granted to the blind and the deaf and dumb and 10 years to the orthopaedically handicapped persons. "They shall produce a certificate from the Standing Disability Assessment Board constituted as per GO (P) No. 16.1.1997/H & FWD dated 15.5.1997 to prove that they are physically handicapped as and when required by the Commission." The term physically handicapped includes the following categories:....

19. It is pointed out that it might still be open to the Commission to assess the suitability of a Physically Handicapped candidate in the context of the duties attached to the post. Mr. Alexander Thomas submits that this obviously is a power conferred on the Commission. I agree with the same. I also find that the

petitioners are not in any manner reluctant to subject themselves to -any such assessment in the context of Condition No. (vii).

20. In the result, the writ petitions are allowed. The commission is directed to reconsider the case of the petitioners herein for selection to the post of LD Typist in the respective districts, and subject to assessment of their suitability as mentioned in Sub-clause (vii) referred to in the last para, they shall be included in the appropriate place in the rank list. An endeavour shall be made in this regard by the Commission to complete the process without any delay, at any rate, within one month from the date of receipt of a copy of this judgment. The Commission shall also keep the main rank list alive and available to be operated upon to accommodate the petitioners, if they are found suitable. Since the action is to be taken by a constitutional body like the Public Service Commission, I only think it necessary to suggest that it will be appropriate that a specific number of vacancies are kept apart to be filled up by Physically Handicapped persons, in the context of the observations contained in this judgment and the further process to be undertaken by the Commission as indicated above.