

(2019) 09 RAJ CK 0045
In the Rajasthan High Court
Case No : Civil Writ Petition No. 1354 Of 2019

Sushila Khichar

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 05-09-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2019) 09 RAJ CK 0045

Hon'ble Judges : Arun Bhansali, J

Bench : Single Bench

Advocate : O.P. Sangwa, Birja Ram, Kailash Choudhary, Manish Vyas

Final Decision : Allowed

Judgement

This writ petition has been filed by the petitioner seeking a direction to the respondents to call the petitioner for PST/PET and appoint her on the post of Constable (General) pursuant to the advertisement dated 25.05.2018.

It is, inter-alia, indicated in the writ petition that the petitioner participated in the recruitment for Constable (General) pursuant to the advertisement dated 25.05.2018; the result of the written examination was declared, wherein the petitioner scored 44.25 marks and was called for PST/PET on 02.09.2018 vide Annex.4. However, as the petitioner had given birth to a child on 18.08.2018, she was not in physical condition to participate in the PST/PET and claims to have sent a representation to the respondents for postponing her PST/PET, however, the same was not accepted and the petitioner on account of non-participation in the PET/PST could not get selected.

Submissions have been made that this Court in Raju Devi v. State of Rajasthan & Ors. : SBCWP No.13486/2018, decided on 28.09.2018, pertaining to the same recruitment, relying on the Division Bench judgment in the case of Laxmi Devi v. State of Rajasthan & Ors. : DBCWP No.18808/2015, decided on 30.05.2017 at Jaipur Bench, ordered for extension of period for undergoing PET/PST by the

petitioners therein on account of their pregnancy and it was further directed to extend the time for PST/PET by sixty days from the date of their delivery.

Further submissions have been made that the post of Constable (General) in petitioner's category is vacant and therefore, the petitioner may be granted one opportunity to undergo the PST/PET and as a result, if she falls within the merit be placed in the waiting list / reserve list and she may be accorded appointment in accordance with law.

Learned counsel appearing for the respondents made submissions that the stipulation in the advertisement was specific, whereby the candidates, who were pregnant at the time / physically unfit to undertake PET, were specifically debarred from further participation in the recruitment and therefore, the petitioner on that count alone is not entitled to seek any relief.

Further submission has been made that the plea raised regarding making representation for extension in time for PET/PST was never made by the petitioner and therefore also, the petitioner is not entitled to any relief.

Though a submission has been made in the reply to the writ petition that no post in the category of the petitioner is vacant, a reply to the rejoinder has been filed, inter-alia, indicating that on account of the fact that 05 candidates (02-General, 01- OBC, 01-SC & 01-ST) were not found medically fit in the medical test and were not given appointment and one selected candidate of OBC (Ex-serviceman) category did not join the post, 06 posts remained vacant due to the said reason and that the department has initiated review proceedings as per the provisions of standing order No.12/2018 for filling of the remaining vacant posts from the remaining candidates of the combined select list and the same is still pending.

I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

The facts are not in dispute, wherein the petitioner had participated in the written examination pursuant to the advertisement dated 25.05.2018 and obtained more marks than the cut-off and therefore, was called for PST/PET on 02.09.2018.

As based on the documents produced by the petitioner alongwith the writ petition pertaining to her pregnancy and the date of birth of the child were not very clear, the respondents were directed by order dated 29.05.2019 to file a specific reply / response to the contentions raised in the writ petition regarding petitioner's pregnancy / delivery on the date indicates in the writ petition, to which a specific reply has been filed post investigation that the averments made in this regard were correct, the respondents have also produced a birth certificate regarding birth of the child on 18.08.2018, on record.

In view of the fact that the petitioner had given birth to a child on 18.08.2018, apparently, she was physically not fit to participate in the PET on 02.09.2018, which involves a run of 5 kms. within a stipulated time i.e. maximum 30 minutes

and therefore could not participate in the PST/PET resulting in her disqualification in the recruitment process.

So far as the condition in the advertisement pertaining to prohibition of pregnant woman from further participation in the recruitment process is concerned, the said condition was held to be arbitrary and violative of Article 14 of the Constitution by the Division Bench in the case of Laxmi Devi (*supra*) and following the said judgment, in the case of Raju Devi (*supra*). It was, inter-alia, laid down by this Court as under :-

"The issue raised by the petitioners apparently is no more *res integra* as the same has exhaustively being dealt with by the Division Bench of this Court in the case of Laxmi Devi (*supra*).

While dealing with the said issue, it was inter-alia observed by the Division Bench as under :-

"At the outset, it may be noticed that the married woman is not disqualified for appointment and the fact that she is pregnant in itself is not a disqualification for participating in the selection process nor the pregnancy can be treated as a bar for appointment under the scheme of Rules, 1960/1989 respectively. What is to be looked into is that if any unforeseen inability occurs because of pregnancy during the months before and after child birth while seeking employment or while in service which can be taken care of by granting maternity leave for the period required or because of service hazards one has to qualify with the standards of Physical Efficiency Test/Physical Standard Test how far the right of seeking public employment of a woman candidate, for which she is eligible, can be denied to her.

By a restriction which has been imposed by the respondents in the standing orders that the women candidates who are pregnant, there shall be no provision for additional/extra chance and they are required to submit a Doctor's report in this respect and it will be at their own risk, appears to be an ingenious attempt made by the respondents just to defeat the claim of the women candidates. Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the mandate of law and the same if very from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Here is a case of a married woman who chooses to have a child, can the State or an authority like the respondents impose itself and curtail this life or personal freedom of the woman? No detailed discussion is required in the matter of appointment against such post which prescribes for Physical Standard Test/Physical Efficiency Test and it shall no longer be necessary to declare woman candidate completely unfit if she is found to be unfit during the period when she is ordinarily required to appear in the Physical Standard Test/Physical Efficiency Test for qualifying in the selection process.

In the given facts & circumstances, she certainly deserves indulgence of relaxation which she has to qualify after the reasonable period which the authority in the given circumstances considers appropriate in affording her an opportunity to qualify the Physical Standard Test/Physical Efficiency Test depriving or eliminating her from the selection process for the reason that she is at the advanced stage of pregnancy on the date notified by the respondents to appear in the Physical Standard Test/Physical Efficiency Test, in our considered view, is certainly arbitrary & violative of Art.14 of the Constitution.

The restriction which has been imposed by the respondents fundamentally does not hold good and it is certainly prejudicial & against Indian womanhood which pervades the service Rules and there is a reasonable basis for the charge of bias under the Rules and it makes an ominous indifference of the executive to bring about the banishment of discrimination in the service Rules.

It cannot be forced upon a woman to have a choice between bearing a child and employment as it interferes both - with her reproductive rights and her right to employment and such an action cannot have any place in the present modern era.

Once it is observed & held that maternity is a human right of a woman and so longer the married woman is not disqualified from participating in the selection process and is not an impediment and after having qualified the written test, at the stage when she has to undergo the Physical Standard Test/Physical Efficiency Test became pregnant with advanced stage and the pregnancy being not a disability but one of the natural consequence of marriage, the woman candidate deserves indulgence of qualifying the physical standards after affording a reasonable time in attaining fitness which the authority may consider to be appropriate keeping in view the provisions of the Maternity Benefit Act, 1961.

Based on the aforesaid discussion, we are of the view that there can be no conclusion other than to hold that action of the respondents in not granting indulgence to the petitioners in failing to qualify Physical Standard Test/Physical Efficiency Test because of their advanced stage of pregnancy is illegal and arbitrary and the impugned provisions of the Standing Orders to the extent they lay down that pregnancy would render a candidate unfit is legally not sustainable.

Consequently, the instant batch of writ petitions succeed & is hereby allowed. The respondents are directed to call upon the petitioners for their Physical Standard Test/Physical Efficiency Test after giving them due notice and if they qualify with the standards laid down under the relevant scheme of Rules and find place in the order of merit in their respective category, they may be considered for appointment in terms of their advertisements dt.20.07.2013/ 14.07.2013 respectively. Necessary compliance be made within four months."

A perusal of the above would indicate that the Division Bench found that a married woman is not disqualified for appointment and the fact she is pregnant in itself is not a disqualification for participating in the selection process;

restriction imposed in the standing order was found to be an attempt by the respondents to defeat the claim of the women candidates; a pregnant woman deserves indulgence of relaxation to qualify after reasonable period in the PST/PET; a woman cannot be forced to make a choice between bearing a child and employment and that the standing order providing for such a condition was not sustainable.

The submission sought to be made by learned counsel for the respondents seeking to distinguish the above judgment based on the fact that in the above case, there was a difference of two years between the written examination and PST/PET, whereas there is no hiatus between the written examination and PST/PET in the present case, is wholly baseless in view of the ratio of judgment in the case of Laxmi Devi (supra), which has held the very standing order, based on which condition has been imposed in the advertisement, as unsustainable and therefore, the submissions, which are sought to be made, deserve rejection and are consequently rejected. The petitioners are entitled to grant of reasonable time post their delivery period for appearing in the PST/PET, which reasonable time in the circumstances of the case based on the submissions made by learned counsel for the parties appears to be 60 days from the date of delivery.

In view of the above discussions, the writ petitions filed by the petitioners are allowed. The denial of the respondents to extend the period for undergoing PST/PET by the petitioners on account of their pregnancy is not sustainable. The respondents are directed to extend the time for PST/PET by sixty days from the date of their delivery."

In view thereof, the reliance placed on stipulation made in the advertisement is of no consequence.

So far as the plea raised regarding the petitioner not making a representation seeking extension of time is concerned, even if, it is accepted that the petitioner did not make any representation, the said aspect is of no consequence, inasmuch as, even if such a representation was made, in view of the stipulation in the advertisement, the respondents, even otherwise, would not have granted any relaxation to any candidate so as to claim that if such a representation was not made, the petitioner is not entitled to any relief from this Court.

At least 03 posts are vacant to which the petitioner can make a claim i.e. 02-General & 01-OBC, therefore, the petitioner deserves an opportunity to undergo PET/PST and in case, she succeeds therein, her candidature requires consideration for appointment based on her position in the waiting list.

Consequently, the writ petition filed by the petitioner is allowed. The respondents are directed to undertake PST & PET of the petitioner on a date to be fixed by the respondents, which date shall not be later than two weeks from today and in case, the petitioner clears PST and succeeds in PET, she may be included in the waiting list / reserve list and if based on the wait list appointments are accorded, her case may also be considered as per her merit position.

No order as to costs.