

(2014) 10 KL CK 0327

In the High Court Of Kerala

Case No : OP (KAT) Nos. 31, 32, 322 and 338 of 2014

The Secretary

APPELLANT

Vs

Seema I.

RESPONDENT

Date of Decision : 17-10-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 320
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 36

Citation : (2014) 4 ILR 773 : (2015) LabIC 11

Hon'ble Judges : Antony Dominic, J; Anil K. Narendran, J

Bench : Division Bench

Advocate : P.C. Sasidharan, SC, Advocate for the Appellant; S.P. Aravindakshan Pillay, N. Santha, S.A. Anand, Advocates and S. Jamal, Sr. Government Pleader, Advocate for the Respondent

Judgement

Antony Dominic, J.—The main issue raised in these cases pertains to the rights of the physically handicapped persons, who are entitled to the benefit of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Act for short), to be considered against the posts which are identified and reserved under the said Act and notified by the PSC for appointment. Therefore, these cases were heard together and are disposed of by this common judgment.

2. We shall first refer to the facts in OP (KAT) Nos. 32 and 322/14 which arise from the proceedings in OA No. 2440/12 on the file of the Kerala Administrative Tribunal.

3. In terms of the provisions contained under the Act, Government of Kerala issued GO (P) No. 20/98/P & ARD dated 14th of July, 1998, reserving 3% of posts for physically handicapped persons. Appendix to the Government Order contains the scheme for direct recruitment of physically handicapped persons in public service, and in Annexure A1 thereof, H.S.A. (Languages and Social

Studies) is one among the posts in the subordinate service that are identified under Section 32 of the Act. In Annexure II, where the posts suitable for appointment of different categories of the physically handicapped are identified, H.S.A. (Languages and Social Studies) is included under the categories blind and partially blind. Subsequently, on 22nd November, 2011, the Government of Kerala issued GO (P) No. 57/11/SWD reviewing the list of the identified posts and also included in the list, the posts of L.P.S.A./U.P.S.A. also as suitable for the appointment of the blind and low vision category.

4. In the meanwhile, by Annexure A1 notification, the PSC invited applications for the post of U.P.S.A. (Malayalam). In response to the said notification, the 1st respondent herein applied for the post of U.P.S.A. (Malayalam) in Kollam District specifying that his application was for one of the posts in the 3% reservation provided for physically handicapped persons. Along with the application, he also produced Annexure A6, Standing Disability Assessment Board Certificate certifying that he is an ophthalmic handicapped having 90% disability. In the written test which was conducted, he appeared with the help of a scribe provided by the PSC, and on being successful, he was also shortlisted. Subsequently, he was called for a suitability assessment when the Board assessed him unsuitable. Finally, when Annexure A11 ranked list was published on 8/10/2012, he was not included in the ranked list, though four other persons who are also ophthalmically handicapped, were included in the list.

5. Aggrieved by his non inclusion in the ranked list, the 1st respondent filed a representation to which Annexure A12 reply was given by the PSC informing him that "the interview board had disqualified you in the interview held on 18/5/12 for the reasons that you cannot walk without assistance or read and write". It was in these circumstances, the 1st respondent filed OA No. 2440/12 before the Kerala Administrative Tribunal.

6. The PSC filed a reply statement dated 24th of January, 2013 where, in para 4, they justified the disqualification of the 1st respondent thus;

"4. The petitioner, Shri. Bejoy M.S. who is 90% blind attended the interview, but was disqualified by the interview board for the reasons mentioned below.

1) unable to move without help

2) can't read

3) can't write."

(emphasis supplied)

7. Considering the statement thus filed, the Tribunal passed Ext. P4 order dated 24/7/13, which is extracted below for reference.

"Annexure A2 order dated 14.7.1998 permits appointment of fully blind persons in the post of Primary Teacher. Annexure - A12 would indicate the reasons why the applicant has been excluded from the rank list. He has been disqualified for

three reasons, namely, (1) he cannot move without the help of others (2) he is not able to read (3) he is not able to write. For these reasons, the Interview Board held him to be ineligible for the post. The applicant does not have any other physical deformity making him incapable of moving around. It is not anybody's case that he is crippled or paralysed, and therefore, incapable to move around. So, it is not clear what is meant by the Public Service Commission by saying that the applicant is disqualified as he cannot move around without the help of others. If a blind person is placed in an unfamiliar surrounding, he may require the assistance of others to move around. This is applicable to all persons, who are totally blind. In familiar places they can walk around using their stick. A totally blind person can read and write using "Braille system". We have not heard of any blind man who can read or write, otherwise. This is a disability suffered by all fully blind persons. If a totally blind man can normally read or write, then it can be described as a "miracle". If the PSC excludes all totally blind persons who cannot read or write, then probably, all the candidates who are completely blind would be excluded. In Annexure-A11 rank list, under the head "PH-Blind", four candidates are included. Probably, they must be partially blind candidates. So, if the standard applied by the PSC, which is manifested in Ext. A12 is allowed to stand, no fully blind candidate will be selected as P.D. Teacher. Though Annexure-A2 order of the Government issued under Section 33 of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995, permits appointment of totally blind person as primary teacher, the said order will become an illusion for all the fully blind candidates. Therefore, the Public Service Commission is bound to explain how the suitability of the candidates was assessed. If the stand of the PSC in Annexure A12 is upheld, then the promise under Annexure-A2 to the fully blind persons will become illusory and redundant. The same cannot be permitted.

2. We are not unmindful of the fact that the PSC is authorised to make selection from a group of candidates. On awarding marks, if the fully blind candidates do not rank within the range of required number of candidates, then they may be excluded. Those who score higher marks can be included in the rank list. But on going through Annexure-A12, we think that is not the case of the PSC.

3. So, the Public Service Commission is directed to file an additional statement explaining the above points including the method adopted by it in the selection of fully blind candidates. It shall also be specified in the statement, whether among the persons included, there is any totally blind person, and if so, whether he could write, read and move around without the help of anyone. The PSC may file this statement within three weeks.

Hand over copy of this order to both sides."

8. In compliance with the said order, the PSC filed an additional reply statement dated 5/11/13, a copy of which is Ext. P5. In this affidavit, the PSC placed reliance on GO (P) No. 158/73/PD dated 29/5/1973 and asserted that though the physically handicapped persons are also entitled to be considered in the selection

for appointment, that did not mean that they are entitled to be included in the ranked list. Therefore, according to the PSC, in terms of the above Government order, physically handicapped persons have to be interviewed by the Commission to assess whether they are capable of discharging the duties attached to the post notified.

9. Later, the Tribunal by its order dated 13/11/13 directed the PSC to produce records relating to the interview. This order was not complied with and therefore the Tribunal again passed order dated 7/1/14 directing production of the documents and that on failure thereof, the Secretary shall appear in person with the records. It was at that stage, OP (KAT) No. 32/14 was filed by the PSC challenging the aforesaid order dated 13/11/13.

10. The Tribunal by its order dated 16th of June, 2014 disposed of OA No. 2440/12 and para 14 and 15 of the order, being relevant, are extracted below for reference;

"14. In the light of the above provisions Annexure A2 GO was issued by the State Government identifying the post of Primary School Teacher as suitable for physically handicapped candidates and also further finding that the said post is suitable for blind and partially blind candidates. The learned Standing Counsel for the PSC argued that the GO dated 29.5.1973 authorised the PSC to assess the suitability of physically handicapped candidates along with others and to include them in the list if only they are otherwise suitable. We notice that the conditions cited by the PSC from the general conditions of the notification are those from the aforementioned GO dated 29.5.1973. This GO to the extent it is against Annexure A2 GO is unenforceable. Annexure A2 GO has identified Primary School Teacher's post as one suitable for the blind. So, the enquiry under the GO dated 29.5.1973 to find out whether a blind candidate can discharge the duties of a Primary School Teacher is not permissible now. The general conditions are a set of conditions annexed to all notifications issued by the PSC inviting applications. The vintage general condition pressed into service in this case is eclipsed by Annexure A2. So, the stand of the PSC that a totally blind candidate, who cannot move without the help of others or cannot read or write is unsuitable for the post cannot be upheld. A blind person placed in a strange place cannot move without the help of others and no fully blind person can read or write. So, if the standard applied by the PSC is upheld, then the protection available under Section 32 of the aforementioned Act and the reservation granted by the Government under Section 33 read with Section 32 of the said Act will become a teeming illusion for the blind candidates. The Public Service Commission exercising its powers of selection cannot ignore or overrule the mandate of the above quoted statutory provisions and the orders issued thereunder. We notice that PSC is only a recruiting agency. The qualifications and eligibility criteria for the post are the exclusive domain of the employer, the Government. Once the Government under Section 32 of the aforementioned Act has decided that a fully blind candidate is eligible/suitable for appointment to the post of Primary School Teacher, the

recruiting agency has no business to ignore it or act contrary to it. The stream cannot rise above the source.

15. Of course, the PSC can assess the relative merit and persons with cent per cent blindness can be ranked below when compared to partially blind candidates if sufficient number of blind candidates are there with reference to the vacancies, the persons ranked below can be excluded from the rank list also. But, that is not the case of the PSC here. According to the PSC, a blind candidate cannot move around without the help of others and he cannot read or write, so, he is unsuitable for the post and therefore, he is excluded from the select list. This stand of the PSC is irrational and perverse. The plea of good faith cannot save an irrational or perverse decision. Even if it is taken in good faith, it is cannot read and (iii) he cannot write is untenable. So, the PSC is directed to reassess the relative merit of the applicant and include him in the supplementary list of PH Blind if he is otherwise eligible to be included in the rank list having regard to the number of vacancies likely to arise in the post for PH Blind. This, the PSC shall do within three months from the date of receipt of a copy of this order. We refrain from saying anything on the contention of the applicant that we should draw adverse inference against the PSC that it has something to hide regarding the conduct of the interview of the blind candidates at Kollam. With the final disposal of this Original Application, the interim order directing to produce the records of selection no longer survives."

11. It is challenging the final order passed by the Tribunal allowing OA No. 2400/12, the PSC has again filed OP (KAT) No. 322/14. In so far as OP (KAT) No. 32/14 is concerned, since the final order is already passed, nothing further survives in the OP to be decided on merits.

12. In so far as OP (KAT) Nos. 31/14 and 338/14 are concerned, these are also filed by the PSC against the orders passed by the Kerala Administrative Tribunal in OA Nos. 1234/12 and 2031/12 respectively. Both these OAs were filed by candidates who had applied in response to the gazette notification dated 29/5/2009 whereby the PSC invited applications for appointment to the post of Lower Division Typists in various departments in various districts.

13. In so far as OP (KAT) No. 31/14 arising out of the order in OA No. 1234/12 is concerned, applicants 1 and 2 therein were applicants to the post of Lower Division Typist in Alappuzha District. Along with their applications, they had produced Annexures A8 and A9 disability certificates certifying hearing disability of 76% and 100% respectively. In so far as the 1st respondent in OP (KAT) No. 338/14 filed against the order in OA No. 2031/12 is concerned, he had applied for the post of Lower Division Typist in Trichur District, producing Annexure A1 disability certificate, which certified 78% hearing impairment. All of them passed the written test and were included in the short list of physically handicapped candidates. However, when the ranked list was published, they were not included. This led to the filing of OA No. 1234/12 by the candidates in Alappuzha district and OA No. 2031/12 by the candidate in Trichur district.

14. In both cases, identically worded reply statements were filed by the PSC. In paragraphs 4 and 5 of the reply statement, the PSC has stated thus;

"4. It is informed that after the verification of original documents, the applicants were admitted for a suitability assessment conducted by the Commission on 9.5.12. In the Suitability Assessment, Hon"ble Commission found that both the applicants were unsuitable for the post of LD Typist and hence their names were not included in the Ranked List published on 17.5.2012 in the 3% PH reservation Category.

5. As per the existing procedure physically handicapped candidates will be interviewed by the Commission to test.

(a) Whether they are in a position to discharge the duties satisfactorily in a post to which they may be appointed.

(b) Whether the physically handicapped claim is feigned or real.

In all cases of selection except those specifically excluded, the physically handicapped candidates will be given grace marks at the discretion of the commission subject to a maximum of 12% marks to the deaf and dumb candidates. In the instant case, the selection is made on the basis of written test alone."

(emphasis supplied)

15. As is evident from the averments in the reply statement, selection was made on the basis of written test alone. However, the Commission admits that, for physically handicapped candidates alone, a suitability assessment was conducted. It was in such a suitability assessment, the applicants were found unsuitable for the post notified. For this purpose, the PSC is mainly relying on GO (P) No. 158/73/PD dated 29.5.1973. This, according to the Commission, was the reason for non inclusion of these candidates in the ranked list for physically handicapped reservation category.

16. The contentions raised were considered by the Kerala Administrative Tribunal and in so far as OA No. 1234/12, which is the subject matter of OP (KAT) No. 31/14 is concerned, the Tribunal passed Ext. P3 order allowing the OA and the relevant portion of the order reads thus;

"4. Section 32 of the said Act authorises the Government concerned to identify the posts suitable for physically challenged candidates. In exercise of that power, the aforementioned orders were issued. So the PSC cannot, based on the Government Order dated 29.5.1973, hold that deaf persons are unsuitable. Of course, if there are several candidates, the PSC can assess their relative merits and the best among them can be included in the list, having regard to the vacancies available. But in the case on hand, no person with hearing disability has been included in the rank list. They have been totally excluded and the PSC justifies their exclusion based on the finding that they are unsuitable relying on

the Government Order dated 29.5.1973 mentioned earlier. We are of the view that the said action of the PSC is ultra vires and unauthorised, in view of the aforementioned Act and the orders issued thereunder. Accordingly, it is declared that the exclusion of the applicant from Annexure-A10 rank list only for the reason that he is deaf and therefore unsuitable is untenable. The PSC is directed to reconsider the claim of the applicant and other deaf candidates, if any, assess their relative merits and include the required number of deaf candidates in Annexure-A10."

17. Coming to OP (KAT) No. 338/14, the Tribunal followed the order passed in OA No. 2440/12 (challenged in OP (KAT) No. 32/14) and held thus in para 6 of Ext. P3 order;

"6. In this case, if the applicant has all requisite qualifications, he is eligible to be included in the ranked list as a deaf candidate. In view of decision in OA No. 2440 of 2012, it is held that the PSC has no power or authority to consider the suitability of the candidate once the Government have issued a statutory order stating that deaf persons are suitable for the post of Typist. So, the first respondent is directed to include the applicant in Annexure A-10 ranked list in the supplementary list of Physically Handicapped candidates under the Head "Deaf" provided he is having all the requisite qualifications for the said post."

It is in this background these OPs are filed by the PSC.

18. We heard the learned counsel for the PSC and the learned counsel appearing for the 1st respondent in OP (KAT) No. 31/14.

19. The contention raised by the PSC is essentially that it being a constitutional body created under Article 320 of the Constitution of India and entrusted with the task of selecting suitable candidates for appointment in public service, it is entitled to assess the suitability of candidates who respond to the vacancies that are notified to be filled up. According to the Commission, it was in exercise of that constitutional power that is conferred on it that it had assessed the suitability of the candidates and that in such an assessment, the party respondents were found unsuitable. It is stated that by the impugned orders passed by the Tribunal, the Tribunal has virtually deprived the freedom of the Commission to assess the suitability of the candidates and that therefore the orders impugned are illegal.

20. In support of this contention, learned counsel for the PSC placed reliance on the provisions of the Act, the PSC Rules of Procedure and the judgments of the Apex Court in *Shri Parvez Qadir Vs. Union of India (UOI)*, , *Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others*, , *Hoshiar Singh Vs. State of Haryana and Others*, and *Secy. (Health) Deptt. of Health and F.W. and Another Vs. Dr. Anita Puri and Others*, .

21. Although it is true that the PSC has been constitutionally ordained with the duty to select suitable candidates for appointment in public service, the issue to

be resolved in far as these cases are concerned, is unconnected with the conferment of such power. In so far as these cases are concerned, admittedly, the post of U.P.S.A. (Malayalam) to which the 1st respondent in OP (KAT) No. 322/14 had applied and the post of Lower Division Typist against which the party respondents in OP (KAT) Nos. 31/14 and 338/14 had applied and considered, are posts which are identified by the State Government under Section 32 of the Act as suitable for the appointment of physically handicapped persons and reserved under Section 33 thereof.

22. In so far as OP (KAT) No. 32/14 is concerned, we have already extracted the relevant paragraphs from Ext. P2 reply statement filed by the PSC, which shows that the 1st respondent therein, a 90% blind, was disqualified by the interview board as unsuitable for the reason that he was unable to move without help and that he cannot read or write. These are inabilities of any blind person and undoubtedly, these disabilities arose out of the 90% blindness of the 1st respondent. Thus, in this case, when a person who is 90% blind was considered for appointment to a post identified and reserved by the Government as suitable for the appointment of partially and totally blind persons, in an assessment of his suitability for such post, the PSC, the recruiting agency, has found him unsuitable on account of his inabilities arising out of his disability, viz., blindness. In other words, by this exercise, the PSC has virtually defeated the very purpose and object of identification and reservation of the post in question.

23. As rightly held by the Tribunal, when the appointing authority, the Government, have identified the post of U.P.S.A. (Malayalam) as one suitable for appointment of persons suffering from the disability of total blindness as well (by Annexures A2 and A14 Government orders dated 14/7/1998 and 22/11/2011), it is not open to the recruitment agency, viz., the Public Service Commission, to disqualify a candidate based on his blindness alone, as done in this case. Otherwise, as found by us, the PSC will be defeating the purpose sought to be achieved by the Act and the identification of the post done by the appointing authority, the Government, in exercise of its powers under Section 32 of the Act. It was therefore that the Tribunal has rightly observed that the stream cannot rise above the source.

24. Learned counsel for the PSC contended that as a result of the directions of the Tribunal, the PSC is deprived of its power to assess suitability of the candidates, which according to him, it is entitled to, in terms of the provisions contained in GO (P) No. 158/73/PD dated 29/5/1973, Government Order dated 14/7/98 and Section 36 of the Act. GO (P) No. 158/73/PD dated 29/5/1973 relied on by the learned counsel provides for a process of selection by an interview and an assessment whether the candidates can discharge their duties attached to the post. The provisions contained in the Government Order are bodily lifted and incorporated in Clause 2(vii) of the general conditions in Part II to the notification. In so far as the Government order dated 29.5.1973 is concerned, it was issued long prior to the introduction of the Act and at a time

when the system of identification or reservation of posts for physically handicapped candidates was not in existence. Therefore, this obsolete Government Order issued at that point of time or the terms thereof cannot survive after the introduction of Act 1 of 1996 and that too when appointments are sought to be made to posts identified and reserved under the Act.

25. As far as Annexure A2, the Government Order dated 14/7/98, is concerned, what was relied on by the learned counsel for the PSC is mainly clause 10 which provided that selected candidates in each category of posts shall be arranged in the order of merit and the candidates allotted in the order of their rank to the District Officers/appointing authorities of the concerned department for issuing the appointment orders. Section 36 of the Act provides that in any recruitment year any vacancy under Section 33, cannot be filled up due to non availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and that if in the succeeding recruitment year also, suitable person with disability is not available, it may first be filled up by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability. It is true that the provisions of Annexure A2 and Section 36 of the Act contemplate ranking of candidates in the order of merit and availability of suitable candidates for appointment and in that sense, the PSC has the freedom to choose the suitable persons. However, neither of these would entitle the PSC to disqualify a candidate as done in this case.

26. The contention now raised is that by the impugned order, the Tribunal has deprived the PSC of its freedom to select the suitable candidates. A reading of the impugned order in OA No. 2440/12 shows that all that the Tribunal has ordered is that the PSC shall reassess the relative merit of the applicant and include him in the supplementary list of PH Blind, if he is otherwise eligible to be included in the rank list having regard to the number of vacancies likely to arise. This, therefore, shows that the PSC is required to assess the relative merit of the candidate and it is on that basis PSC has to decide on his inclusion in the supplementary list of blind candidates. In other words, by the aforesaid direction, the Tribunal has not curtailed any of the constitutional rights of the PSC and the contention to the contrary is only to be rejected.

27. Coming to OP (KAT) Nos. 31/14 and 338/14, in these cases, OAs were filed by the candidates who came out successful in the written test and were disqualified in the suitability assessment by a process of interview. We have already extracted paragraphs 4 and 5 of the reply filed by the PSC, from which it can be seen that the stand of the PSC is that while selection was made on the basis of a written test alone, in so far as candidates who are physically handicapped are concerned, their suitability assessment was conducted. It is on that basis the PSC finally disqualified the applicants for appointment against posts reserved for persons suffering from disabilities.

28. First of all, the PSC was not justified in adopting such a process of selection. As we have already seen, the very purpose of the Act is to remove any discrimination against persons with disabilities and to make special provisions for the integration of persons with disabilities into the main stream of the society. It is with that object, posts are identified under Section 32 and reserved under Section 33. While selection to the posts which are not reserved under the Act is finalised based on written test alone, physically handicapped candidates who are considered against posts which are reserved under Section 33 of the Act alone are subjected to process of elimination by a suitability assessment on the basis of an interview. This, according to us, amounts to a discriminatory treatment of the persons suffering from disability offending the provisions of the Act itself and Article 14 of the Constitution of India. It was in the light of these facts that the Tribunal has frowned upon the action of the PSC particularly because in pursuance of the notification in question, persons with hearing disability have been completely excluded in the ranked list. The Tribunal therefore found that the reasons for disqualifying the party respondents are untenable and directed that the claim of the applicant and other deaf candidates shall be considered afresh assessing their relative merit.

29. In so far as OP (KAT) No. 338/14 is concerned, Tribunal went a step further and ordered that the applicant therein shall be included in the ranked list. It is true that in this order, the Tribunal has also held that the PSC has no power or authority to consider the suitability of the candidate. That finding of the Tribunal was in the context of the fact that the Government have already identified the post and PSC has finalised the selection of all the candidates other than physically handicapped persons, who were considered against the reserved posts, based only on the written test. Therefore, that finding also, in the facts of this case, cannot be said to be untenable.

30. The learned counsel for the PSC referred us to the order passed by the Tribunal in TA No. 6849/12, which is produced as Ext. P4 in OP (KAT) No. 338/14. According to him, in that order, the Tribunal has already recognized the power of the PSC to subject the physically handicapped candidates for a suitability test and that therefore, the view taken by the Tribunal in these cases is contradictory to the same.

31. We have gone through the said order passed by the Tribunal. Reading of that order shows that the notification in that case was issued by the PSC long prior to even the identification of posts by the Government and that the physically handicapped applicant therein applied as a general candidate, contested against the general candidates and it was in the context of such a selection that the Tribunal recognised the freedom of the PSC to apply the rules of selection applicable to all candidates to the physically handicapped candidates also. Therefore, on facts, the case dealt with by the Tribunal in TA No. 6849/12 is totally incomparable to the facts of these cases and therefore this order cannot be relied on by the PSC to substantiate its contentions.

32. In so far as the judgments that are relied on by the learned counsel for the PSC are concerned, in those judgments, the Apex Court has explained the concept of suitability, the assessment of suitability and the role and power of the PSC to discharge its constitutional obligations. We are bound by the principles laid down by the Apex Court, but however, we find that these principles have no application to the facts of these cases. Therefore, we do not think that the principles laid down in these judgments will be of any assistance to the PSC.

33. For all these reasons, we do not find any reason to invalidate the orders passed by the Kerala Administrative Tribunal.

OP (KAT) Nos. 31, 322 and 338/14 will stand dismissed. OP (KAT) No. 32/14 is dismissed as infructuous.