

(2015) 02 RAJ CK 0175

In the Rajasthan High Court

Case No : Special Appeal (Writ) No. 1676/2014 in Civil Writ Petition No. 269 of 2014

University of Rajasthan

APPELLANT

Vs

Vinita Nair

RESPONDENT

Date of Decision : 09-02-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 33, 38, 39, 40

Citation : (2015) 3 RLW 2177

Hon'ble Judges : Sunil Ambwani, A.C.J;Prakash Gupta, J

Bench : Division Bench

Advocate : A.K. Sharma, Senior Counsel assisted by Rachit Sharma and Vishnu Kant Sharma, for the Appellant; Mohit Gupta and Party-in-Person, Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard learned counsel appearing for the parties. Ms. Vinita Nair, respondent, has also appeared and addressed the Court.

2. The University of Rajasthan has filed this Special Appeal against the judgment of learned Single Judge dated 13.08.2014, by which he had allowed the writ petition and has directed the University to provide appointment to Ms. Vinita Nair, petitioner(respondent herein), a visually impaired person, on the post of Assistant Professor in the subject of Philosophy within two months from the date a copy of the order is produced before the University. He has further directed that appointment of the petitioner will relate back to the date, on which last candidate in the Department of Philosophy was appointed. The petitioner has however, been made entitled to only notional benefits for the intervening period.

3. The University of Rajasthan issued a publication inviting application for appointment on 294 posts of Professors, Associate Professors and Assistant

Professors in 42 departments of the University, vide advertisement dated 01.11.2012, reserving 8 posts for differently abled persons. Note-16 of the advertisement, provided that the posts reserved for physically challenged candidates can be shifted by the selection committee according to availability of suitable candidates without reducing the total number of seats reserved in this regard. Note-16, appended to the advertisement provided:--

"16. Posts reserved for Physically challenged candidates can be shifted by the selection committee according to availability of suitable candidates without reducing the total number of seats reserved for this category."

4. Ms. Vinita Nair, the respondent possesses qualifications of B.A., M.A. and M.Phil. and had submitted her Ph.D. thesis at the time when the advertisement was issued. She was awarded Ph.D. degree subsequently. She has also passed National Eligibility Test(NET) and State Eligibility Test(SET) and has requisite experience of four years teaching as Lecturer in three recognized Degree Colleges, and was fully eligible for the post of Assistant Professor in Philosophy. She applied, but that since there was no reservation indicated in the advertisement for the differently abled persons on the post of Assistant Professor in the subject of Philosophy, she was not called for interview. She submitted a representation to the Vice Chancellor of the University of 14.11.2013, to which she did not get any response, on which she approached the Commissioner, Specially Abled Persons, Rajasthan, who, on considering her to be eligible and entitled to exemption to the extent of 5% in educational qualifications, and further finding that reservation should have been provided to the differently abled persons on the post of Assistant Professor in Philosophy, directed the University by his order dated 16.12.2013, to consider the case of the respondent for appointment, as per the provisions of Section 33 of the Persons with Disabilities(Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, "the Act of 1995"), as also Rule 40(i) of the Rajasthan Persons with Disabilities(Equal Opportunities, Protection of Rights and Full Participation) Rules, 2011 (for short, "the Rules of 2011").

5. In the absence of her Counsel, who was abstaining from work on a resolution passed by the Bar Association, the respondent argued her case before learned Single Judge, on which he observed in his order; "Petitioner Ms. Sunita Nair argued her case in person, meticulously referring to each relevant provisions of law, relevant documents with reference to the pagination in the paper book and contents thereof." We have also heard the respondent and find that she has a good command over English language and has a clear expression. She defended the order passed by learned Single Judge with ability, without any aid or assistance, and presented her case with ability and sufficient clarity.

6. By an interim order, the Court had provided that she may be allowed to appear in the selections, on which she applied and appeared in the interview. She was however not selected for appointment.

7. Learned Single Judge observed that 3% reservation, as provided in the Act of 1995 and the Rules of 2011, has not been correctly applied to the number of vacancies. Relying on the judgment of the Supreme Court in Union of India (UOI) and Another Vs. National Federation of the Blind and Others, (2013) 10 AD 613 : (2013) 139 FLR 811 : (2013) 13 JT 364 : (2013) LabIC 4447 : (2014) 2 LLN 19 : (2013) 12 SCALE 588 : (2013) 10 SCC 772 : (2013) 4 SCT 807 : (2014) 1 SLJ 88 , learned Single Judge held that reservation should have been applied by the University on all the posts in the cadre strength, and not to the vacancies. Since total number of posts advertised were 294, the reservation at 3% should have been 9 in number by rounding off 8.82% to 9, and thus, at least 3 of these 9 posts, should have been reserved for visually impaired candidates. Even if eight posts are taken to be reserved for differently abled persons, at least two of them should have been offered to the visually impaired candidates, whereas only one visually impaired candidate was given appointment, and that too on merit, after he was shifted from OBC category to unreserved as he had higher merit than last of the unreserved category.

8. Learned Single Judge found that the University has acted grossly arbitrarily in failing to round off 8.82% to 9, and denying reservation to the petitioner/respondent. Having held so, learned Single Judge allowed the writ petition with directions to provide appointment to the petitioner on the post of Assistant Professor in the subject of Philosophy, within two months.

9. Learned counsel appearing for the University of Rajasthan submits that learned Single Judge has erred in law, in giving direction for appointment of the respondent. No post was reserved, nor the selection committee had shifted reservation for differently abled person in the subject of Philosophy. In the absence of reservation on the posts of Assistant Professor in Philosophy in the advertisement many other eligible differently abled persons will lose an opportunity to apply, and to be considered for the post, in the quota of differently abled persons. He further submits that the selection committee had, after interviewing the respondent, found her to be unsuitable, and this fact was discovered only after this Court passed an order in this Special Appeal, directing the University to produce the proceedings of the selection committee, in a sealed cover. When the sealed cover was opened in the Court, it was found that though the selection committee had awarded total 44 marks to her out of 100 in the interview, a remark was made by it that she was not found suitable for selection/appointment.

10. Learned counsel appearing for the University further submitted that on the recommendations of the selection committee, under an Ordinance regarding teachers qualification and selection, notified on 17.10.2012, appointment is to be considered on the recommendations of the selection committee, by the Syndicate of the University. Learned Single Judge, without looking into the recommendations of the selection committee, has issued directions for her appointment. At best, without giving any concession, a direction should have

been given to the University, to consider her for appointment.

11. Learned counsel appearing for the respondent submits that firstly reservation was not applied by rounding off 8.82% to 9, out of 294 vacancies, and thus, there was one post short of quota, which should have been offered to differently abled persons. He has relied on the judgment in Bhudev Sharma Vs. District Judge, Bulandshahr and Another, (2008) 1 CLT 514 : (2007) 115 FLR 1006 : (2007) 13 JT 154 : (2007) 12 SCALE 642 : (2008) 1 SCC 233 : (2008) 1 SCC(L&S) 170 : (2007) 11 SCR 730 : (2008) 2 SLJ 136 , in which the Supreme Court held that in the case of determination of number of posts in any recruitment, to be offered to physically handicapped person, who are blind, deaf and dumb, and otherwise handicapped, if on application of percentage of the reservation to the physically handicapped persons, the number comes to more than half, it has to be rounded off. Paragraphs 2, 3 and 4 of the judgment, are quoted as below:--

"2. The appellant is a blind man. He appeared in the recruitment test held in the year 1992 for selecting candidates for Class-III Posts in Bulandshahr Judgeship in U.P. However, he was not selected and hence he filed a writ petition which was allowed by a learned Single Judge of Allahabad High Court by his judgment dated 25.09.1997. Against that judgment the State Government filed a letters patent appeal which has been allowed by the impugned judgment by the Division Bench. Hence this appeal.

3. The appellant has relied on G.O. Dated 26.08.1993 which is Annexure P-I to this appeal. That G.O. States that the U.P. Government has reserved 2 percent posts for physically handicapped persons for direct recruitment in all groups of Government services. The physically handicapped persons are those who are blind, deaf and dumb and otherwise handicapped. There were altogether 30 posts for which the selection was held. 2 percent of 30 is 0.6. Since 0.6 is more than half we found it off and hold that one out of 30 posts is reserved for physically handicapped persons. Since there was no other physically handicapped person who applied, in our opinion, the appellant was entitled to the post reserved for physically handicapped person.

4. In this view of the matter, the appeal is allowed, the impugned judgment of the Division Bench is set aside and it is directed that the appellant be appointed as a Class-III Post in Bulandshahr Judgeship forthwith."

12. In the present case, Note-16, appended to the advertisement, provided that the posts reserved for physically challenged candidates could be shifted by the selection committee according to availability of suitable candidates without reducing the total number of seats reserved in this regard (physically challenged), and thus, in our view, there is substance in the argument that since no post out of five advertised for Assistant Professor in Philosophy, was reserved in the subject of Philosophy for differently abled persons, the selection committee should have shifted the reservation and for which an opportunity was provided to

all the persons who had applied in view of rounding off the number and shifting of reservation for the physically challenged candidates, as provided in Note 16 of the advertisement, without reducing the total number of seats reserved for the category. Note 16, appended to the advertisement, provided an opportunity to all eligible differently abled persons to apply, irrespective of the reservation indicated on the posts, as indicated in the advertisement. There was thus no need for learned Single Judge to direct the advertisement to be issued afresh in allowing a fresh opportunity to differently abled persons to apply.

13. In our considered view, the application made by the respondent for appointment, should have been accepted for consideration, both on the ground that the reservation for differently abled persons could have been readjusted according to the availability of the suitable candidates without reducing the total number of posts reserved for the category, and further that there was direction issued on the eligibility of the respondent by the Commissioner, Specially Abled Persons, Rajasthan, which was ignored by the University.

14. We are pained to observe that the University did not care to reply to the respondent's applications, for which she had first approached the Vice Chancellor and thereafter the Commissioner, Specially Abled Persons, Rajasthan, who had, by its order dated 16.12.2013, directed the University to consider the case of the respondent, and thereafter having failed to get any response, the respondent had approached the High Court in a writ petition, giving rise to this Special Appeal, in which directions were issued by learned Single Judge to permit her to appear in the interview.

15. In this appeal, a direction was issued to the University to produce the proceedings of the selection committee, in a sealed cover. The proceedings were produced in a sealed cover, which was opened in the Court on 04.02.2015. A copy of the proceedings of the selection committee in the case of the respondent, was directed to be given to the Counsel appearing for the respondent, and from which, it was found that she was awarded 44 marks, in total, by the selection committee.

16. In order to appreciate the argument of learned counsel appearing for the University that a direction could not be given for her appointment, as the selection committee had found her unsuitable, we are reproducing the proceedings of the selection committee, in the case of the respondent, as follows:--

"UNIVERSITY OF RAJASTHAN JAIPUR

Candidate who was called for the interview (UR Category, in compliance to the order of Hon"ble High Court vide SB Civil Writ Petition No. 269/2014 dated 16/01/2014) for the Post of Assistant Professor in Philosophy held on 10th February, 2014

17. Learned counsel appearing for the University was not able to explain to us,

as to why the selection committee had not found the respondent to be suitable for selection/ appointment. The respondent had secured 57.66 marks in Graduation, 60.44% marks in M.A., and more than 65% marks in M.Phil, and had also cleared the NET and SET examinations. On the date when she was interviewed, she had submitted her Ph.D. thesis, and was awarded 12 marks out of 20 for her performance in the interview assessed by the selection committee. In the domain knowledge and teaching skills by Subject Experts during interview, she was awarded 16 out of 30 marks. She was given a total of 44 marks. She was awarded one mark, out of 20 for research performance based on API score and quality of publications calculated by the University Administration according to the formula prescribed by University Ordinance. It is admitted by the Counsel appearing for the appellant that Appendix-III of Table-II of the University Ordinance for teachers qualification, do not prescribe any minimum API score for Assistant Professor/equivalent cadres and thus, there was no relevance for awarding marks on API score. The selection committee had awarded one mark for quality of publication, as there was one publication to the credit of respondent for assessment by the selection committee.

18. Learned counsel for the University has not been able to point out any benchmark, which may have been fixed by the Selection Committee, or by any authority of the University or under University Ordinances regarding Teachers Qualification in Chapter-XXIX, nor any material has been produced to show that any benchmark was applied in selections to find out the suitability of the respondent for selection/appointment, or to record unsuitability of any candidate who is otherwise eligible .

19. It is admitted that out of total five posts advertised for Assistant Professor in Philosophy, two were shown to be allocated for unreserved category, one for SC, one for ST and one was reserved for OBC, against which only three have been appointed, leaving one post for Unreserved and one for ST unfilled.

20. Having examined the recommendations of the selection committee, we are unable to find as to on what criteria, the respondent was found unsuitable for selection/appointment. Learned counsel appearing for the University has not been able to place before us any material, which may give any indication about the unsuitability of the respondent for appointment, despite her qualifications, which made her eligible. She is also NET and SET qualified and had teaching experience. The selection committee had awarded her 12 marks out of 20 i.e. 60% marks on interview performance, and 16 out of 30 i.e. more than 50% marks on the assessment of domain knowledge and teaching skills assessed by the subject experts during interview, in which she was required to give a demonstration of her teaching ability. She submitted that in accordance with the Ordinances, she should have been awarded three marks for M.Phil, and seven marks on submission of thesis for Ph.D. Even if these ten marks were not awarded, there is absolutely no material or any reason to demonstrate as to why she was declared unsuitable candidate.

21. The record of the Selection Committee demonstrates that as the respondent was eligible and as being a candidate of the same University, which had awarded her M.Phil, and thereafter for accepting thesis, she has been awarded Ph.D. degree, that she was not found suitable, on the ground that the Selection Committee was not considering her for appointment as differently abled candidate.

22. In the facts and circumstances, we are of the view that except for the bias, which the selection committee appears to have harboured for a visually impaired person, there could be no other reason to find her unsuitable for selection/appointment.

23. In view of above, we do not find any substance in the contentions of learned counsel appearing for the University, that this Court should not have given direction to the University to appoint the respondent, and that in view of the finding recorded by him, he should have left the matter in the hands of the University authorities, to consider to appoint the respondent. He has relied on Pradip Kumar Maity Vs. Chinmoy Kumar Bhunia and Others, (2013) 138 FLR 769 : (2013) 9 JT 509 : (2013) 4 LLN 401 : (2013) 8 SCALE 205 : (2013) 11 SCC 122 : (2013) 3 SCT 706 : (2014) 1 SLJ 503 , in which the Supreme Court found that in view of use of word "may" for age relaxation for physically challenged persons under Section 38, 39 and 40 of the Act of 1995, the Court cannot issue any direction for age relaxation, and that unless there was any legislation or rules or orders, which would facilitate, support or legitimize his claim for being conferred with the advantage of age relaxation, such relaxation could not be given by the Court.

24. In our view, the reliance placed on Pradip Kumar Maity's case(supra), is wholly inappropriate. In the present case, the respondent had not claimed for any relaxation or exemption, to be given to her for considering her as an eligible person for appointment to the post of Assistant Professor in Philosophy, and for which her application was not entertained for participating in the selection process.

25. We are conscious of the fact that the Court should not ordinarily exercise powers under Article 226 of the Constitution of India, giving any mandatory directions, to a statutory authority to perform its functions. We are also conscious of the fact that in the present case, appointment is to be given by the Syndicate of the University and thus, instead of giving direction to the University to appoint the respondent as Assistant Professor in the subject of Philosophy within two months, the Court may have issued a writ of mandamus, directing the University, in view of the findings recorded by it, to consider for giving appointment to the respondent. The limitation on the jurisdiction under Article 226 of the Constitution of India, should be kept in mind in granting relief to the respondent.

26. In the present case, however we find that considering the arbitrariness and

discrimination which the respondent has faced from the University authorities, and in the circumstances in which she was not allowed to participate in the interview, despite the order passed by the Commissioner, Specially Abled Persons, Rajasthan, and further that having secured 12 marks out of 20 in interview performance, and 16 out of 30 in the assessment of domain knowledge and teaching skills assessed by the subject experts during interview, she was, without being any benchmark or criteria, declared unsuitable by the selection committee, of which the Vice Chancellor was a member, the respondent was not expected to get any justice from the University Authorities. We, therefore, share the concern of learned Single Judge that any order passed by the Court to consider the respondent for appointment, may have resulted into injustice to the respondent.

27. We find another reason to support our observations in sustaining the directions issued by learned Single Judge, namely that the University was not only reluctant in considering the candidature of the respondent, she was also treated with apparent bias towards her in the interviews by the selection committee presided by the Vice Chancellor of the University. The respondent has narrated before us the manner in which she was interviewed. She stated in an unquestionable way that the first question put to her was, as to why did she approach the Court, and thereafter the entire line of questioning was to challenge her abilities as a visually impaired person to teach the students. The Selection Committee proceeded with a closed mind, and with a preconceived notion, questioning her ability to teach, to declare her unsuitable, which is evident from the remark making her unsuitable despite giving her 12 marks out of 20 in interview, and 16 out of 30 by subject experts in domain knowledge, and teaching skills. With her eligibility and score of marks awarded by Selection Committee, there could be no reason, except for bias towards differently abled persons to declare her unsuitable. The manner in which she was interviewed, clearly demonstrates that the University authorities including the Vice Chancellor of the University, was biased towards a differently abled person. It is sad to observe that despite the legislation and rules for reservation, the society including the intelligentsia has not accepted and is not sensitive to the differently abled persons. The proceedings in the Court, have also clearly demonstrated to us that any direction, in view of the facts and circumstances, to consider the respondent for appointment, will only result into further miseries and injustice to her.

28. In Union of India (UOI) and Others Vs. Sanjay Jethi and Another, (2013) 14 JT 23 : (2013) 13 SCALE 82 : (2014) 1 SCT 281 , the Apex Court, considering the plea of bias, relying on Secretary to Government, Transport Deptt., Madras Vs. Munuswamy Mudaliar and Another, AIR 1988 SC 2232 : (1989) 1 ARBLR 50 : (1988) 4 JT 730 : (1988) 2 SCALE 1070 : (1988) 2 SCR 673 Supp : (1989) 1 UJ 217 ; Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others, AIR 2001 SC 24 : (2000) 87 FLR 877 : (2000) 2 JT 206 Supp : (2001) 1 LLJ 583 : (2000) 7 SCALE 19 : (2001) 1 SCC 182 : (2001) SCC(L&S) 189 : (2001) 2 UJ

1185 : (2000) AIRSCW 3826 : (2000) 7 Supreme 112 ; G.N. Nayak Vs. Goa University and Others, AIR 2002 SC 790 : (2002) 92 FLR 901 : (2002) 1 JT 526 : (2002) 1 SCALE 491 : (2002) 2 SCC 712 : (2002) 1 SCR 636 : (2002) 1 SCT 1052 : (2002) 2 SLJ 308 : (2002) AIRSCW 442 : (2002) 1 Supreme 391 ; Delhi Fin. Corpn. and Another Vs. Rajiv Anand and Others, (2006) 131 CompCas 285 : (2004) 11 SCC 625 ; and State of Gujarat and Another Vs. Hon'ble Mr. Justice R.A. Mehta (Retd.) and Others, (2013) 1 AD 325 : AIR 2013 SC 693 : (2013) 1 JT 276 : (2013) 1 RCR(Civil) 610 : (2013) 1 SCALE 7 : (2013) 3 SCC 1 : (2013) 1 SCC(L&S) 490 : (2013) AIRSCW 671 : (2013) 1 Supreme 33 , held that there may not be case of actual bias, or an apprehension to the effect that the matter most certainly will not be decided or dealt with impartially but where the circumstances are such so as to create a reasonable apprehension in the minds of others that there is likelihood of bias affecting the decision, the same is sufficient to invoke the doctrine of bias. Where actual proof of prejudice is available the same will naturally make the case of a party much stronger, but the availability of such proof is not a necessary precondition, for what is relevant, is actually the reasonableness of the apprehension in this regard in the mind of such party. In case such apprehension exists the trial/judgment/order etc. would stand vitiated for want of impartiality and such judgment/order becomes a nullity. The trial become coram non iudice. The Apex Court held in para 45 of the judgment, that the question of bias depends on the facts and circumstances of the case. The Court or Tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy of interdiction in such matters. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. To adjudge the attractability of plea of bias, a tribunal or a Court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition.

29. In view of the special facts and circumstances, we do not find any good ground to interfere with the reasonings and the directions given by learned Single Judge.

30. The Special Appeal is dismissed.