

(2013) 07 P&H CK 0082
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 16108 of 2011

Vibhu Dayal Sharma

APPELLANT

Vs

The Director and Others

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 20, 21

Citation : (2013) 4 SCT 647

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : Rajni Kant Upadhyay, for Mr. Rakesh Kumar Sharma, for the Appellant; R.S. Bains, Advocate (Amicus Curiae), Mr. Puneet Sharma, Advocate for Respondent Nos. 1 and 2, Mr. A.S. Virk, Advocate and Mr. Rakesh Kumar Nagpal, Advocate, for UOI, for the Respondent

Final Decision : Disposed Off

Judgement

Rajiv Narain Raina, J.—The petitioner resides in Kurukshetra, Haryana. He wants to become an Engineer specializing in Computer Science

and Technology. Educational facilities for B.Tech are not available in his home town. Computer Science and Technology is a branch of engineering

not available at National Institute of Technology at Kurukshetra. Seats for the current session in other disciplines at the National Institute of

Technology at Kurukshetra stand filled up. The nearest place where he could receive such education in the branch of Computer Science is at NIT-

Jalandhar, where an unfilled seat is vacant. The petitioner is suffering from a rare medical condition called Medulloblastoma and is being treated for

malignant brain tumour. He pleads that he underwent major Neurosurgery in 1999 at PGI, Chandigarh and is being presently treated at the

Department of Neurosurgery and Department of Radiotherapy, PGI, Chandigarh.

Due to this condition, he is unable to travel far without help to pursue further studies and is anchored to Chandigarh for his continued treatment. He pleads that he appeared for the All India Engineering Entrance Examination AIEEE-2011. His result was declared. He obtained 35 marks in the examination. He claims that 18 marks are sufficient to be called to participate in AIEEE Counselling in the "Physically Handicapped Category". The Central Counselling Board-2011 met at Surathkal (Mangalore) Karnataka for admissions to the B.Tech degree course. He applied under the physically handicapped category. He claims that though there is reservation for physically handicapped students in the prospectus issued by the CCB-2011 but no seat has been reserved for a student suffering from Cancer. The petitioner made a representation on 10.08.2011 to the respondents for reservation of a seat in the Department of Computer Science and Technology at NIT-Jalandhar (P-6) and to consider his case for admission. That is where the matter is at a standstill. As there has been no consideration of his request he has approached this Court though this writ petition filed on 29.08.2011.

2. This Court issued notice of motion on the petition on 30.08.2011. On completion of service of summons, the contesting respondent Nos. 1 and 2 appeared and filed their written statement. Respondent No. 3-NIT, Kurukshetra has also filed a response stating that it has unnecessarily been impleaded as a party when no relief has been sought against it. The authority to make the admissions for the Academic Session 2011-12 vest in the first respondent, the HRD Ministry, New Delhi to make admissions for B.Tech/B.E/B.Arch. in all the NITs and other central institutes on the basis of the result of the AIEEE-2011. The NIT-Kurukshetra was made the nodal centre for reporting of candidates for admissions. It is stated that the process of admissions had been completed after the 7th round of counseling to fill up remaining vacant seats. This was conducted from 11.08.2011 to 13.08.2011. Then the admitted students were required to report to the institute concerned by 20.08.2011. The All India rank of the petitioner is 482147 in AIEEE-2011. It is further pleaded that the petitioner's ranking was lower than the ranking of the last admitted candidate even in the Physically Handicapped Category (General) for the first six rounds of counseling. When the 7th counseling took place all the seats for

physically handicapped general category were filled up and there was no vacant seat left and, therefore, the petitioner could not have filled up any

choice much less the NIT Kurukshetra. It is admitted in the written statement of the 3rd respondent that the petitioner could have reported to NIT,

Kurukshetra for seeking admission under PH(G) Category to compete against all vacant seats in any other NITs established across the country.

The petitioner, however, remained unsuccessful in spot counseling (7th round) as well. The first semester examination was over in November

2011.

3. Respondent Nos. 1 and 2 i.e. the NIT, Jalandhar in their response have stated that the petitioner could not make it through five rounds of

counseling to any of the 24 NITs due to its low rank and the petitioner could not secure any seat even under the PH Category. It is their case that

Clause 7 of the Information Brochure of CCB-2011 deals with reservation of seats. It is pleaded that persons suffering from Cancer are not

covered under the definition of disability. The definition of disability connotes physical disability covering any of the three types of impairment i.e.

mobility impairment, visual impairment and hearing impairment. Clause 7.3 is cited in this regard to contend that though Cancer is a disease it is not

a disability. It is stated that the petition is misconceived and is a result of misunderstanding of the provisions relating to permissible reservation

granted by the State. Though sympathy has been expressed with the petitioner but helplessness is pleaded. They have also expressed doubt that in

the medical condition it may be extremely difficult for the petitioner to face the rigours of the strenuous engineering course. It is further submitted

that a disease may be a temporary feature but disability is stable and of permanent nature. The contesting respondents have placed on record the

vacant seat position of persons with disability (PH) after the admission process ended in the 30 NITs. Admittedly, eight seats remain vacant from

the PH quota at Dr. B.R. Ambedkar National Institute of Technology, Jalandhar. The total number of seats for PH quota in 30 NITs is 303 of

which 72 seats remain vacant. This is demonstrated by Annexure R/2/1. Annexure R/2/2 shows the branch-wise vacant seat position among the

30 NITs. In the respondent institute one seat each remains vacant in branch codes CSE, ICE, BOT, CHE and CIV. The note is appended at the

end of Annexure R-2/2 that these seats have remained vacant either because of allotted students not joining or for lack of availability of eligible

students in AIEEE 2011. CCB admission process was completed as per original announced schedule on 20.08.2011. The classes in all NITs

started on July 21, 2011 and as per the decision of CCB, the vacant seats were not filled later since the academic session had progressed by more

than a month. On 13.12.2011 this Court passed the following order:-

Let counsel for the first respondent have instructions as to whether any seat in the category reserved for Physical Challenged Candidates is lying

unfilled in any of the NITs.

In response to the interim order dated 13.12.2011, Mr. Puneet Sharma, learned counsel appearing for the contesting respondents has stated on

instructions that a vacant seat cannot now be filled from amongst candidates who attempted the AIEEE-2011. In any case, the petitioner does not

fall under the category of "physically handicapped" in terms of the enumeration and restricted sphere of Clause 7.3 of the Information Brochure

and the respondents have no authority to extend the boundaries of the aforesaid Clause to include Cancer/Brain Tumour or any other illness or

disease as a disability qualifying for reservation of seats. Therefore, intervention of this Court in the instant matter would not be justified until the

scope of disability itself is enlarged by the policy makers.

Mr. R.S. Bains, learned counsel appearing as amicus curiae submits that the time has come while dealing with cases of persons suffering from

chronic debilitating illnesses, diseases should also be considered as disabilities and the conservative view of physical disability limiting it to the three

prototype of mobility impairment, visual impairment and hearing impairment should be broadened so as to bring it into conformity with modern

trends witnessed in jurisdictions abroad.

To advance his argument, he relies on a legislative enactment in the United Kingdom called Disability Discrimination Act, 1995 to contend that the

meaning of ""disability"" and ""disabled persons"" has undergone a huge transformation to include physical or mental impairment which has a substantial

long term adverse effect on a persons ability to carry out normal day-to-day activities. This Act prohibits discrimination against disabled people in a

range of circumstances covering employment and occupation, education,

transport and the provisions of goods, facilities, services, premises and the exercise of public functions and are entitled to the protection of the Act. The Act provides that people are deemed to meet the requirements of disability without having to show that they have an impairment which has (or is likely to have) a substantial, adverse, long term effect on the ability to carry out normal day-to-day activities and includes a person who has Cancer, HIV infection or Multiple Sclerosis (MS). One of the factors taken into account by the Legislators there is the time taken to carry out an activity to access the effect of that impairment being substantial since it is posited that substantial adverse effect is necessary to fall under definition in the Act. An example is given which goes like this; A ten-year-old child has cerebral palsy. The effects include muscle stiffness, poor balance and uncoordinated movements. The child is still able to do most things for himself, but he gets tired very easily and it is harder for him to accomplish tasks like eating and drinking, washing, and getting dressed. Although he has the ability to carry out everyday activities such as these, everything takes longer compared to a child of a similar age who does not have cerebral palsy. This amounts to a substantial adverse effect.

Mr. Bains would refer to Schedule I Part 1 of the United Kingdom law which deals with disability and determination of disability. Item 6(1) of the Schedule lists cancer as a disability though it is a medical condition. Therefore, illness, disease etc. would constitute disability provided they have substantial adverse effect in normal day-to-day activities. He says that the State of the law in India is highly conservative and has not taken advance strides in expanding the meaning of disability as in other jurisdictions. Mr. Bains then submits that the Government of India is in the process of rationalizing the law. In the light of presentation of a Bill by a Committee appointed by the Ministry of Social Justice and Empowerment, Government of India on 30.06.2011 on a research prepared by the Centre for Disability Studies, NALSAR University of Law, Hyderabad, India in its effort to enact a new law in harmony with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). The UNCRPD Convention is for full realization of all human rights and fundamental freedoms for all Persons with Disabilities without discrimination of any kind on the basis of disability. India is under an international commitment

and is obligated to enact suitable legislation in furtherance of the rights recognized in the UN Convention. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 has been on the Statute Book in India for 18 years but the Act does not incorporate the number of rights recognized in the UNCRPD or the recognized rights are not in total harmony with the principles of the Convention. It has been suggested that the Constitution of India needs to be amended in order to remove discrimination on grounds of disability so as to include the term disability in Articles 15 & 16 of the Constitution as one of the prohibited grounds. Disability prejudicial references should be removed from the Constitution, it is urged, for example ""disabled"" and the unemployed"" in List II and ""handicapped"" and ""mentally retarded"" in Schedules XI and XII which are out of tune and anachronistic.

In the World Report on Disability released by the World Health Organization the famous British theoretical physicist Stephen Hawking who has

amyotrophic lateral sclerosis in his Foreword has stated as follows:-

We have a moral duty to remove the barriers to participation for people with disabilities, and to invest sufficient funding and expertise to unlock their vast potential. It is my hope this century will mark a turning point for inclusion of people with disabilities in the lives of their societies

The aforesaid proposed Bill is now in the shape of the Draft Rights of Persons with Disabilities Bill, 2012 issued in September 2012. This new Bill

seeks to define a person with benchmark disability to have not less than 40% of a specified disability, as certified by competent authority. "Persons

with Disability" contemplates to mean a person with long term physical, mental, intellectual or sensory impairment which, in interaction with various

barriers, may hinder his full and effective participation in society on an equal basis with others. "Barrier" if enacted would mean any factor including

attitudinal, communicational, cultural, economic, environmental, institutional, political, religious, social or structural factors which hampers the full

and effective participation, of persons with disabilities in society. Specified Disability in the draft Bill means:-

- i. autism spectrum disorder;
- ii. blindness;
- iii. cerebral palsy;

- iv. chronic neurological conditions;
 - v. deaf blindness;
 - vi. hemophilia;
 - vii. hearing impairment;
 - viii. intellectual disability;
 - ix. leprosy cured;
 - x. locomotor disability;
 - xi. low vision;
 - xii. mental illness;
 - xiii. muscular dystrophy;
 - xiv. multiple sclerosis;
 - xv. specific learning disability;
 - xvi. speech and language disability, and
 - xvii. thalassemia;
 - xviii. Multiple disability;
- as defined in the Schedule.

Cancer has not been specified in the Draft Bill.

Though a great lead forward to replace the old 1995 Act it appears to still fall short of the advancements made in the United Kingdom. The UN

Convention had adopted the social model of disability and recommended to the signatories of the Convention to define disability as including those

who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective

participation in society on an equal basis with others.

In *Entertainment Network India Ltd. vs. Super Cassette Industries Ltd.*, which is a matter under the Copyright Act, 1957, the Supreme Court

while referring to international Covenants observed:-

While India is a signatory to the International Covenants, the law should have been amended in terms thereof. Only because laws have not been

amended, the same would not by itself mean that the purport and object of the Act would be allowed to be defeated. If the ground realities

changed, the interpretation should also change. Ground realities would not only

depend upon the new situations and changes in the societal conditions vis-à-vis the use of sound recording extensively by a large public, but also keeping in view of the fact that the Government with its eyes wide open have become a signatory to International Conventions.

In *Vishaka and others Vs. State of Rajasthan and Others*, , the Supreme Court while dealing with sexual harassment of women at workplace dealt with international conventions and observed that it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

In *Partap Singh vs. State of Jharkhand*, the Supreme Court while dealing with the Juvenile Justice Act which refers specially to international law spoke as follows:-

The relevant provisions of the Rules are incorporated therein. The international treaties, covenants and conventions although may not be a part of our municipal law, the same can be referred to and followed by the courts having regard to the fact that India is a party to the said treaties. A right to a speedy trial is not a new right. It is embedded in our Constitution in terms of Articles 14 and 21 thereof. The international treaties recognize the same. It is now trite that any violation of human rights would be looked down upon. Some provisions of the international law although may not be a part of our municipal law but the courts are not hesitant in referring thereto so as to find new rights in the context of the Constitution. Constitution of India and other ongoing statutes have been read consistently with the rules of international law. Constitution is a source of, and not an exercise of legislative power. The principles of International Law whenever applicable operate as a statutory implication but the Legislature in the instant case held itself bound thereby and, thus, did not legislate in disregard of the constitutional provisions or the international law as also in the context of Articles 20 and 21 of the Constitution of India. The law has to be understood, therefore, in accordance with the international law. Part III of our Constitution protects substantive as well as procedural rights. Implications which arise therefrom must effectively be protected by the judiciary. A contextual meaning of the statute is required to be assigned having regard to the Constitutional as well as International Law operating in the field.

(See Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, .

Mr. Nagpal appearing for the Union of India submits that proposed or draft legislation though based on international conventions cannot be applied in this case.

I have no doubt on the correctness of his statement. He further submits that even this Court on its administrative side in its employment notice for

filling up of vacancies of Clerks on the establishment of the Punjab & Haryana High Court, Chandigarh has restricted reservation for physically

handicapped persons to persons suffering from low vision, hearing impairment and orthopaedic handicaps. There is no doubt that at present, there

are serious limitations on the definition of Persons with Disabilities and little can be done till the law is not amended and the only limited direction

that this Court can give at this stage, if it is sufficiently moved, is to ask the Central Government to examine the issues raised in this petition in the

light of the above submissions and in the context of international conventions and UK law and other laws like that in foreign jurisdictions and take a

final decision whether or not to include Cancer etc. as a disability for the purposes of reservation in educational seats over which it exercises right

of admission. Persons may be suffering from different kinds of carcinoma/cancer and in various degrees and extent including brain tumour as in this

case. The UK though makes no distinction within the disease classifies it as a disability provided it has long term substantial adverse effect on a

day-to-day basis.

It is said that the law has always lagged behind and cannot keep abreast of the immediate felt necessities of the time. Once the law is enacted

amendments may take years together. The most opportune time for knocking at the doors of the executive and the legislature is now, therefore,

Mr. Bains urges that this Court should issue a direction to the Union of India to consider in its wisdom and after full fledged debate amongst the

stake-holders to consider expanding the scale of the Draft Bill to include a case as presented on facts in the instant petition. Although no immediate

relief is capable of being granted to the petitioner but it is suggested that adopting such a course would not be a mere academic exercise as fruit

may still appear in aid of the petitioner and others like him in the future.

For all the many reasons above, the writ petition which raises many questions regarding Persons of Disability, I deem it fit in the future interest of stake holders that the respondents and particularly the Union of India to consider whether Cancer, illnesses and diseases which may medically qualify as disabilities in its generic sense which adversely effect such persons day-to-day basis, can fall as disability sufficient to merit reservation in educational seats etc. In view of the complexities involved, it would not be appropriate for this Court to fix any time line and would only hope that the matter is examined holistically for the attention it deserves before the new law is enacted replacing the 1995 Act to keep pace with International Conventions, United Nations declarations and charters on the subject to consider if can be brought into domestic law and make it dynamic and ahead of times.

With the above observations, hope and requests for timely intervention, informed thinking and reasoned debate on expansion of the meaning of Persons of Disability the petition stands disposed of.