

Madras High Court

Dr.G.Sureshkumar vs The Tamil Nadu Public Service ... on 13 July, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2010

CORAM

THE HONOURABLE MR.JUSTICE N.PAUL VASANTHAKUMAR

W.P.No.1781 of 2006

and

W.P.M.P.No.2033 of 2006

Dr.G.Sureshkumar .. Petitioner

Vs.

1.The Tamil Nadu Public Service Commission,
Omandurar Government Estate,
Anna Salai, Chennai 2.

2.Government of Tamil Nadu rep. By
Secretary to Government,
Health Department, Fort St. George,
Chennai 9. .. Respondents

Writ Petition filed under Article 226 of The Constitution of India praying for the iss

For Petitioner : Ms.AL.Ganthimathi
For Respondents : Ms.C.N.G.Ezhilarasi for R1
Mr.A.Suresh, Govt. Advocate
for R2

ORDER

The prayer in the writ petition is to quash the Notification dated 01.07.2005 issued by the first respondent insofar as Note No.(vii) "3% reservation for physically handicapped persons will not apply to this recruitment" and consequently direct the respondents to follow reservation for persons with disability and the recruitment in the post of Assistant Surgeon (General) and Assistant Surgeon (Speciality) notified under the said advertisement and consider the case of the petitioner under reservation for persons with locomotor disability or cerebral palsy as per the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act,

1995 and recruit the petitioner to one post under such reservation.

2.The case of the petitioner is that the first respondent issued Notification/Advertisement No.067 for recruitment of 1295 Assistant Surgeons (General) and 530 Assistant Surgeons (Speciality) in the State of Tamil Nadu by prescribing the qualification for the post. Recruitment is to be based on written test followed by oral test. The petitioner was given hall ticket and he also appeared for the written test on 16.10.2005. The petitioner is a physically handicapped person with locomotor disability suffering from "anterior polio" on his right lower limb and as such, he is coming within the definition of a person with disability as defined under Section 2(i) r/w Section 2(o) and 33(iii) of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the Act'). In the Notification, the first respondent has stated that 3% of reservation for physically handicapped persons will not apply to the recruitment under the said Notification.

3.The petitioner filed W.P.No.37321 of 2005 and prayed for issuance of a writ of mandamus directing the respondents to follow the reservation as provided in the said Act, without challenging the Notification issued by the first respondent. The said writ petition was withdrawn with liberty to challenge the Notification. According to the petitioner, he having secured high marks in the written test, was called for to attend the oral test held on 16.02.2006. According to the petitioner, only on account of failure to make 3% reservation in the recruitment, he was not selected. Therefore, this writ petition is filed with the above said prayer contending that failure to make reservation by the first respondent in the Notification is violative of Section 33 of the Act and if 3% reservation is provided, at least 1% of the vacancies could be reserved for persons with locomotor disability or cerebral palsy. The action of the respondents is arbitrary and he has sought for a direction to quash the Notification.

4.The first respondent has filed counter affidavit by stating that the first respondent issued Notification for 1825 vacancies i.e. 1295 vacancies including 1 Scheduled Tribe carried forward vacancy in the post of Assistant Surgeon (General) and 530 vacancies including 59 carried forward vacancies in the post of Assistant Surgeon (Speciality) in the Tamil Nadu Medical Service and in Note(vii) of the Notification, it was announced that 3% reservation for physically handicapped persons would not apply to this recruitment. The incorporation of said clause is justified by stating that the Tamil Nadu Public Service Commission is entitled to take such stand under General Rule 22(aa)/executive orders issued by the Government. According to the first respondent, 5th proviso to Rule 22(aa) of General Rules states that the reservation for physically handicapped candidates shall be made applicable in respect of posts in 'C' and 'D' Groups only. The Government issued orders in G.O.Ms.No.99 P & AR (Per-S) dated 26.02.1988 in respect of Executive Posts in 'A' and 'B' categories and no reservation need be made to physically handicapped persons.

5.It is also contended in the counter affidavit that in G.O.Ms.No.343 H & FW Department dated 06.07.1999, orders had been issued classifying the posts of Assistant Surgeon (both clinical and non-clinical), Medical Officer (Siddha) as Executive Posts and the said posts had been ordered to be brought under the list of Executive Posts annexed to in G.O.No.34 P & AR Department dated 12.01.1983. Relying on G.O.Ms.No.99 P & AR (Per-S) dated 26.02.1988 prohibiting reservation of

vacancies for physically handicapped persons in respect of Executive Posts in 'A' and 'B' Groups, orders were issued in G.O.Ms.No.343 H & FW Department dated 06.07.1999 classifying the post of Assistant Surgeon as 'Executive Post'. Therefore, no reservation was made in the Notification as the said posts are coming within Executive Posts.

6.It is also stated in the counter affidavit that the petitioner submitted an application under the General category. The petitioner has not signed in the required place provided in the OMR Application and consequently the petitioner's application was rejected at the first instance for the said lapse. The petitioner filed W.P.No.32946 of 2006 and challenged the order of Tamil Nadu Public Service Commission, rejecting the petitioner's application. This Court by way of interim order permitted the candidates including the petitioner herein to participate in all stages of recruitment process, pending disposal of the batch of writ petitions. Consequently, the petitioner was also permitted to appear for the main written examination and based on the marks secured by him, he was also permitted to attend the oral test. The petitioner attended the oral test on 16.02.2006. The petitioner did not reach the zone of selection either for inclusion in the main selection list or for placement in the reserve list on the basis of the total marks secured by him. The said batch of cases were dismissed by the Division Bench of this Court on 12.06.2006.

7.It is also stated in the counter affidavit that though the writ petition filed by the petitioner viz., W.P.No.32946 of 2006 was omitted to be included in the judgment in the batch of cases, the ratio of the judgment will apply to the petitioner's case and the petitioner's application cannot be treated as a valid application as he has admittedly not signed in the relevant place in the OMR Application. As against the order of the Division Bench, Dr.Anjana Rekha and others have filed S.L.P.No.12271 of 2006 before the Supreme Court and the said S.L.P. was also dismissed by the Supreme Court on 19.09.2007. Thereafter, the order of the Division Bench dated 12.06.2006 has become final.

8.Learned counsel for the petitioner submitted that the petitioner, being a physically handicapped person, has got a right to maintain the writ petition, challenging the Notification which failed to provide 3% reservation for the physically handicapped persons which is a mandatory provision to be followed by the respondents as per Section 33 of the Act. The learned counsel for the petitioner further submitted that the physical disability of the petitioner being proved by way of a certificate issued by the Medical Board, Coimbatore District on 09.03.2005, certifying that the petitioner is 50% blind, he is entitled to be considered for selection.

9.In answer to the said submission, learned counsel for the first respondent submitted that the State Government has not permitted to fill up Group 'A' and 'B' posts by following the reservation provided to physically handicapped persons in Executive Posts viz., Group 'A' and 'B' posts and even after providing 3% reservation under Section 33 of the Act, unless the posts are identified by the second respondent, the first respondent, which is a recruiting body is not in a position to implement the same. Learned counsel for the second respondent also made submission on the said line.

10.I have considered the rival submissions of the learned counsel for the petitioner as well as the respective counsel for the respondents.

11.The Hon'ble Supreme Court in the decision in Mahesh Gupta and Others Vs. Yashwant Kumar Ahirwar and Others (2007 (8) SCC 621) held that the States were obligated to make reservations for the physically disabled persons in terms of Act 1 of 1996 (Central). In para 14, the Supreme Court has held as under:

"14...the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the 1995 Act") had come into force. In terms of the 1995 Act, the States were obligated to make reservations for handicapped persons. The State completely lost sight of its commitment both under its own policy decision as also the statutory provision."

Similar issue was considered by the Division Bench of this Court insofar as appointment of lecturers in Government Colleges in R.Parthiban Vs. State of Tamil Nadu (2010 (4) MLJ 499).

12.On 07.07.2010, the Supreme Court in S.L.P.(C) No.14889 of 2009 (Government of India through Secretary and Another Vs. Ravi Prakash Gupta and Another) considered the identical issue. In the said judgment, the handicapped person who suffers from 100% blindness appeared for Civil Services examination conducted by Union Public Service Commission in the year 2006. After passing preliminary examination and final examination, he was called for a personality test and he was placed in Sl. No.5 in the merit list prepared for visually handicapped candidates. Though there were more than five vacancies available in the visually handicapped category, only one post was offered under the said category on the ground that other posts were not identified by the Union of India. The said candidate approached the Central Administrative Tribunal and his claim having been rejected, he approached the Delhi High Court, which allowed the writ petition and gave a direction to give posting to the petitioner therein, taking note of the mandatory nature of the 3% reservation as provided under Section 33 of the Act. A plea was raised by the Union of India in the S.L.P. stating that implementation of the provisions of Section 33 of the Act would be only after identification of posts suitable for such appointment under Section 32. It is held that "to accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected". It is also held that the identification of Grade 'A' and 'B' posts in the I.A.S. was undertaken after the year 2005 cannot also to be accepted as neither Section 32 nor Section 33 makes any distinction with regard to Grade 'A', 'B', 'C' and 'D' posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said Section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to the notice of the Supreme Court and the Supreme Court held that the said contention is unsustainable. Thus the plea raised by the respondents is rejected and the respondents are bound to implement 3% reservation to physically disabled persons in all posts- Group 'A', 'B', 'C' or 'D'.

13.In the light of the said judgment of the Supreme Court, the stand taken by the respondents in the counter affidavit cannot be sustained. The respondents cannot now rely on proviso to Rule 22 of Tamil Nadu State and Subordinate Service Rules as the said rule is declared as ultravires by the Division Bench of this Court in W.P.Nos.21078 and 21079 of 2004 dated 11.03.2008 as it is contrary

to statutory provisions of Act 1 of 1996. The petitioner's application submitted under General category having been rejected on the ground of not signing the application and the said decision having been upheld by the Supreme Court in a connected matter, I am unable to give any relief to the petitioner in respect of the selection already made. Further the selected persons have already joined and they are not made as parties in this writ petition. However, it is made clear that the respondents shall implement 3% reservation to all the posts including Group 'A' and 'B' and for all future recruitments in terms of Section 33 of the Act. The respondents are restrained from inviting applications for filling up the posts without reserving 3% to physically disabled persons hereafter.

14. The writ petition is ordered accordingly. No costs. Consequently, connected miscellaneous petition is dismissed.

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1. The Tamil Nadu Public Service Commission, Omandurar Government Estate, Anna Salai, Chennai

2.

2. The Secretary to Government, Health Department, Fort St. George, Chennai 9