

Delhi High Court

Govt. Of Nct Of Delhi vs Bharat Lal Meena And Surinder ... on 29 August, 2002

Author: S Sinha

Bench: S Sinha, A Sikri

JUDGMENT S.B. Sinha, C.J.

1. These two writ petitions involving common question of law and fact, which arise out of the judgments and orders dated 17.10.2001 and 09.11.2001 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter for the sake of brevity referred to as, 'the Tribunal') in O.A. Nos. 1999 of 2000 and 2635 of 2001 whereby and whereunder the Original Applications filed by the respondents herein were allowed, were heard together and are being disposed of by this common judgment.
2. Whether the respondents herein, who are handicapped persons, can be appointed as Physical Education Teacher (in short, 'PET') is short question involved in these writ petitions.
3. The respondent in CWP No. 2490 of 2002, namely, Bharat Lal Meena holds a Bachelor of Physical Education degree with disability of 60% having right hand impugned below the elbow; whereas the respondent in CWP No. 2461 of 2002, namely, Surinder Singh is also an orthopedically handicapped person with locomotor disabilities.

COMMON FACTS :-

4. Public notices were issued by Delhi Subordinate Services Selection Board (hereinafter for the sake of brevity referred to as, 'the Board') to fill up the posts of Teachers including PET. Out of 143 posts, which were advertised, 4 posts were held to be reserved for handicapped persons. Pursuant to or in furtherance of the said advertisement, physically handicapped persons applied for the said posts and 3 of them passed the written test. They were recommended by the Board to the Directorate of Education for their appointment as PET and on or about 14.12.1999, they were nominated for appointment to the post of PET in the pay-scale of Rs. 5,500/- -- Rs. 9,000/-. They were asked to attend the Office of Deputy Director of Education along with their original documents/certificates and after being satisfied about their educational qualification, they were offered appointment on 03.02.2000, and posting orders were also issued in their favor.

The petitioner herein detected the purported mistake of nomination of 3 individuals in the physically handicapped category to the post of PET. Clarification had been sought for from the Chief Commissioner for Disabilities with regard to the appointment of orthopedically handicapped persons to the post of PET. The Deputy Chief Commissioner on or about 06.06.2000 vide letter No. F.No. 82/CCD/99/6020 clarified that as per the present arrangement for effecting reservation in Group 'A' & 'B' identified jobs for the disabled, it is not possible to appoint any category of persons with disabilities to the post of PET in the aforementioned pay-scale, which had been categorized as Group 'B' post by the Department of Personnel & Training, Government of India (hereinafter for the sake of brevity referred to as, 'DoPT').

C.W.P. No. 2461 of 2002 : -

5. The respondent, namely, Bharat Lal Meena was not allowed to join the said post. On or about 19.06.2000, he was, however, issued a show cause notice as to why his candidature should not be cancelled as he was selected in physically handicapped category for which he was not eligible for reservation for the post of PET.

Challenging the same, he filed the said Original Application bearing O.A. No. 1999 of 2000 before the Tribunal seeking directions that he be directed to given appointment to the said post. By the impugned order dated 19.10.2001, the learned Tribunal quashed the said Order dated 06.06.2000 issued by the Chief Commissioner of Disability and the said show-cause notice and gave directions to the petitioner to appoint him as PET in the physically handicapped category.

C.W.P. NO. 2490 OF 2002 :-

6. The respondent, namely, Surinder Singh had joined the said post of PET in terms of the letter of appointment dated 03.02.2000 issued by the Deputy Director. However, on or about 18.12.2000, a show cause notice was issued to him stating that since he was selected in orthopedic handicapped category, he is not eligible for reservation in physically handicapped category for the post of PET and as to why his services should not be terminated. Aggrieved by the said show cause notice, he filed an Original Application before the Tribunal, which was registered as O.A. No. 2708 of 2000. The said Original Application was disposed of by the Tribunal vide judgment and order dated 02.05.2001 with the direction that reply to the show cause notice and observations made by the Tribunal in the said order may be kept in mind while deciding the matter. Pursuant to or in furtherance of the said Order of the Tribunal, the petitioner allegedly considered the reply to the show cause notice given by the respondent and constituted a Committee of Officers to examine his ability in the field and to see whether with the disability which respondent is having, he can perform duties of the post of PET or not. The Committee submitted its report.

However, on or about 21.09.2001, services of the respondent herein were terminated on the ground that he is not fit to perform duty of the said post of PET.

Aggrieved by the said order, he filed another Original Application being O.A. No. 2635 of 2001 before the Tribunal. By reason of the impugned Order dated 09.11.2001, the said Original Application was allowed by the Tribunal directing the petitioner herein to reinstate the applicant in service with all consequential benefits.

7. Before the Tribunal as also before us, the plea taken by the petitioner herein is that the physically handicapped persons including those suffering from locomotor disabilities cannot perform the duties of the post of PET inasmuch they are required to work in the field and for the said purpose, the person concerned must be physically fit with all the four limbs as he has to impart training to the students in various sports activities. It was pointed out that by mistake the respondents were appointed inasmuch as they merely appeared at the written examination held by the Board and in relation thereto neither any interview nor any practical test was held.

8. Before the Tribunal a plea had been taken that the post of TGTs were in Group 'C', which were upgraded to Group 'B'. It was contended by the respondent that had the handicapped persons been not able to perform their duties, they would have not been selected for the said course, i.e., Bachelor of Physical Education Degree. Even as disabled persons, they were admitted to the said degree course and passed the said examination.

9. It had been pointed out that the Government of India issued an Office Memorandum dated 28.02.1986 in terms of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 being Act NO. 1 of 1996 (hereinafter for the sake of brevity referred to as, 'the said Act'), which came into force w.e.f. 01.01.1996; entry Nos. 56 to 58 and 64 to 67 mentioned in Appendix-2 thereto read thus:-

56. 151.10 Higher Secondary & Secondary School Teacher SE H SF OLBL MW OA(for Social Subjects)Â BPB (for Special Science & Humanities and Music)

57. 151.20 Language Teacher, Higher Secondary & Secondary School SE H SF OL BLMW OA PBB

58. 151.90 Higher Secondary & Secondary School Teachers, other than those listed elsewhere SE H SF OL BL MW OA

64. 154.10 Teacher, Infant School SE H FS OL OA BL FT MW

65. 155.10 Teacher, Blind H S F BPB OL BL OA FT MW

66. 155.20 Teacher, Deaf SE S F OL BL OA FT MW

67. 150.60 Art Teachers SE S F ST H OL OA BL It was submitted that the disabled suffering from locomotor disabilities are not excluded for being considered for appointment in the said posts.

#### FINDINGS OF THE TRIBUNAL:

10. The learned Tribunal by reason of the impugned judgments held that alterations in the grouping of the post would not alter the situation as regard identification of a job. It has been held that physical requirements of the aforementioned job can be met by orthopedically handicapped persons and, thus, he was suitable for appointment to the said of Assistant Teacher, Trained Graduate Teacher and Primary Teacher, all included in Group 'B' posts.

11. The Original Application bearing O.A. No. 1999 of 2000 was allowed by the Tribunal directing:-

"16. For all the reasons brought out above, the present OA is found to have force as well as merit. The same succeeds and is allowed. The letter dated 6.6.2000 issued by the Chief Commissioner of disabilities is quashed and set aside and respondent No. 1 is directed to appoint the applicant to the post of PET from the date from which he would have been appointed but for the aforesaid erroneous view taken by him leading to issuance of show cause notice to the applicant. The said notice, if

issued, also stands quashed. The applicant will, therefore, have the advantage of seniority from the date of his appointment as above. Pay etc. will be paid to him, however, only from the date he joins the post of PET."

12. The Original Application bearing O.A. No. 2635 of 2001 was allowed by the Tribunal with the following observations and directions:-

"6. In the result and having regard to the reasons recorded above, having reiterated the decision in Bharat Lal's case (supra) I follow the same and allow the OA. The impugned order dated 21.9.2001 is quashed and set aside. The respondents are directed to reinstate the applicant in service with all consequential benefits within a period of two months from the date of receipt of a copy of this order. No costs."

SUBMISSIONS :-

13. Mr. Ahlawat, the learned counsel appearing on behalf of the petitioner, would submit that the learned Tribunal went wrong in passing the impugned judgments insofar as it failed to take into consideration that the respondents herein were appointed by mistake inasmuch as they by reason of their physical disabilities were/are not in a position to perform their duties. The learned counsel would contend that apart from the clarification made by the Commissioner, a Committee was appointed for the purpose to find out as to whether the respondents herein were capable of performing the said job. In any event, contends the learned counsel, as the aforementioned letter dated 06.06.2000 had not been challenged, the impugned orders could not have been passed.

14. Mr. Rungta and Mr. Tomar, the learned counsel appearing on behalf of the respondents, on the other hand, would support the judgments of the learned Tribunal.

HISTORICAL OF THE LEGISLATION :-

15. With a view to realize the objective, namely, people with disabilities have same right, hopes and aspirations as everyone else and they are to be provided with equal opportunities and rather better incentives for their rehabilitation in the society, a meeting was held in Beijing on 1st and 5th December, 1992, called the 'Meet to Launch the Asian and Pacific Decades of Disabled Persons'. A proclamation was adopted by the Asian and Pacific countries to ensure 'full participation and equality of people with disabilities in the Asian and Pacific Regions'.

16. India was a signatory to the said proclamation and with a view to implement the same, the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 was enacted, which came into force on 1st January, 1996.

Various kinds of right are recognized in the legislation, which are on the statute book for last about 7 years now. The year 2002 is also the last year of the decade of disabled persons.

Concrete empowerment is envisaged in the Constitution guaranteeing equality of status and opportunity to its citizens and other progressive directives (Article 39A, Article 41). The 1st International forum for Universal Declaration of Human Rights proclaimed by the United Nations General Assembly is a landmark, for Article 25 of the Declaration states that each person has, "the right to security in the event of unemployment, sickness, disability, widowhood, old age, and other lack of livelihood in the circumstances beyond his control. In the year 1971, the General Assembly stipulated that mentally retarded persons be accorded the same rights as other human beings, as well as special rights corresponding to their needs in the medical, educational and social fields; and in 1975 the General Assembly adopted the "Declaration on the Rights of Disabled Persons" which proclaimed equal civil and political rights of disabled persons, and the subsequent adoption of the standard Rules in the equalization of opportunities for Persons with Disabilities in 1993 served as an instrument for policy making and a basis for technical and economic cooperation. The evaluation of these international standards relating specifically to disability reflects on a move to place the rights of persons with disabilities within the category of universal human rights. In spite of a significant broadening of perception and significant legislation, very few steps have been taken to translate these legislative provisions into reality. Discrimination is still the common experience shared by all disabled people and the biggest problems of discrimination are more and more entrenched and more conspicuous as employment bias. According to a research study done by NCPEDP where a questionnaire was sent to the 'Super 100' companies of India of whom 70 responded. The key findings are as follows:-

(1) Percentage of disabled employees in the respondent companies : 0.40% (2) Percentage of employees with disabilities in the Public Sector : 0.54% (3) Percentage of employees with disabilities in the Private Sector : 0.28% (4) Percentage of employees with disabilities in the Multinationals : 0.05% (5) Out of the 70 respondent companies, 20 companies did not employ any disabled person at all (6) Out of 70 respondent companies, only 10 were found to have 1% or above disabled employees (7) There was no company amongst the 'Super 100' where even 2% of the workforce was comprised of disabled person."

17. The said Act seeks to deal with the problems, which had been faced by the disabled for a long time. However, we may take notice of a few provisions in the Act.

18. The said Act intends to provide for the following, as is apparent from the statement of objectives and reasons:-

"(i) to spell out the responsibility of the state towards the prevention of disabilities, protection of rights, provision of medical care education, training, employment and rehabilitation of persons with disabilities;

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against the persons with disabilities in the sharing of development benefits, vis a vis non disabled persons;

(iv) to counter act any situation of the abuse and the exploitation of persons disabilities;

(v) to lay down strategies for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

(vi) to make special provision for the integration of persons with disabilities into the social mainstream."

It defines blindness, cerebral palsy, and disability in general. It also provides definition for hearing impairment, locomotor disability, mental illness, mental retardation. The whole Act is designed for rehabilitation of persons with disabilities. Rehabilitation refers to the process aimed at enabling persons with disabilities to reach and maintain optimal physical, sensory, intellectual, psychiatric or social functional levels.

Chapter-II provides for the formation of Central Coordination Committee and Central Executive Committee to perform the functions under the said Act. Chapter III provides for the formation of the State Coordination Committees and State Executive Committees to carry out the mandate of the said Act.

Chapter VI provides for identification of posts which can be reserved for person with disability and Section 33 provides for reservation of posts of not being less than 3% for the class of persons with disability and the action mentioned therein. Section 36 provides that the vacancies not filled up are to be carried forward. Section 38 provides for schemes for ensuring employment of persons with disability and inter alia provides for-

(a) the training and welfare of persons with disabilities

(b) the relaxation of upper age limit

(c) regulating the employment

(d) health and safety measures and creation of a non-handicapping environment in places where persons with disabilities are employed.

(e) The manner in which and the persons by whom the cost of operating the schemes is to be defrayed; and

(f) Constituting the authority responsible for the administration of the scheme.

Section 39 mandated that Education Institutions receiving aids from the government have to carry out reservation of seats for persons with disability.

The Act elaborates the provisions for social security, calls for affirmative action, making schemes for preferential allotment and non-discrimination in transport and on roads, in built environmental and

in government employment.

As per Section 36, where in any recruitment year any vacancy under Section 33 cannot be filled up due to non-availability of suitable persons with disability or, for any other sufficient reason, such vacancy is to be carried forward in the succeeding recruitment year. If in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by inter changed among the three categories and only when there is no person with disability is 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. Section 38 imposes an obligation on the Government or local authorities to formulate schemes, by notification, for ensuring employment of persons with disabilities. All Government educational institutions and other educational institutions receiving aid from the Government are also obliged to provide reservation of not less than 3 per cent for such persons with disabilities (Section-39). Similar reservation is to be provided in all poverty alleviation schemes for the benefit of persons with disabilities (Section-40). Those public and private sectors who ensure at least 5% of their work force constituting of persons with disabilities are to be provided incentives by the Government (Section-41).

In so far as rights of the first kind are concerned, as it has already been stated, Section 33 of the Act provides for 3 per cent reservation of vacancies for persons with disability. However, experience has shown that the Government hardly gave effect to this provision of reservation. It is because, notwithstanding such provision, there is a general conception among non-disabled that persons with disability are not capable of doing any job. Such kind of perception brings out discriminatory treatment qua persons with disability when selection is to be made. More often, it would be seen, the employer would conclude that even if the reservation was made, the employer could not find suitable persons under this category for a particular job. It would thus become easy for the employer not to select anybody even if the advertisement provided for such a reservation. This mindset of the employer is creating difficulties in the implementation of the provision.

Here again, notwithstanding the aforesaid provision, the experience has shown that proper respect has not been given to this provision.

19. Besides, the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, The Rehabilitation Council of India (RCI) Act 1992 and The National Trust (for Welfare of Persons wit Autism, Cerebral Palsy, Mental Retardation and Multiple Disability) Act (NTA), 1999 have focused on the issue and Welfare of persons with disability.

FINDINGS:-

20. In the aforementioned backdrop of events, we may consider the factual matrix of the matter.

The advertisement dated 06.03.1999 published in Dainik Jagran, Delhi is in the following terms:-

"Extracts of advertisement dated 6.3.1999 published in Dainik Jagran, Delhi Post Code SR./ Group Post/ Name of Department No.

of Posts Pay Scale Age Limit (Year) Educational Qualification & Experience 74/1999 Group -'B'  
Physical Education teacher, Directorate of Education, Govt. of N.C.T. Delhi 143 (Unreserved 66 OS-

17 (Sports) SC - 14, OS-4 (Sports) ST-7 OS

-2 (Sports) OBC

- 25 OS 8 (Sports) Physically handicapped (Visually handicapped - 4) are included.

5500

- 9000 30 male 40 female Diploma from any recognized Institute/ University in P.E.T. along with graduation from any University, CPL from any recognized Institute recognized by the Directorate CBSE....

Translated True copy from Hindi to English

21. The Joint Secretary, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued an order dated 20.04.1998 being S.O.332(E) whereby and whereunder classification of posts was linked with their salary payable, which reads thus:-

"ORDER New Delhi, the 20th April, 1998.

S.O. 332(E). In exercise of the powers conferred by the proviso to Article 309 and Clause (5) of Article 148 of the Constitution read with Rule 6 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 and in supersession of paragraph 2 of the notification of the Govt. of India in the Deptt. of Personnel and Administrative Reforms No. S.O. 5041 Dt. 11-11-75 as amended by the notification of Ministry of Personnel Public Grievances and Pension (Deptt. of Personnel and Training) number SO 1752 Dt. 30th June, 1987, and after consultation with the Comptroller and Auditor General of India in relation to persons serving in the India Audit and Accounts Deptt. the President hereby directs that with effect from the date of publication of this order in the official Gazette, all Civil posts under the Union shall be classified as follows:-

Sl. No Description of Posts Classification of posts

1. A Central Civil post carrying a pay or a scale of pay with a maximum of not less than Rs. 13500.

Group A

2. A Central Civil post carrying a pay or a scale of pay with a maximum of not less than Rs.9000 but less than Rs.13500/-.

Group B



3. A Central Civil post carrying a pay or a scale of pay with a maximum of over Rs.4000/- but less than Rs.9000/-.

Group C

4. A Central Civil post carrying a pay or a scale of pay the maximum of which is Rs.4000/- or less.

Group D Explanation:- For the purpose of this order-

(i) 'Pay has the same meaning as assigned to it in F.R. 9(21) 9(a) (1);

(ii) 'Pay or scale of pay' in relation to a post, means the pay or the scale of pay of the post prescribed under the Central Civil Services (Revised Pay) Rules, 1997.

F.No. 13012/1/98-Estt.(D) Harinder Singh, Jt. Secy."

22. The Central Government in exercise of its power conferred upon it under the provisions of the said Act identified jobs, which were capable of being held by physically handicapped persons vide entry Nos. 56 to 58 and 64 to 67, as noticed hereinbefore. The respondents come within the classification of OA and MW, which are:-

"Code Functions ... ..

OA (v) one arm affected (R or L)

(a) impaired reach;

(b) weakness of grip;

(c) ataxia;

... ..

MW (viii) muscular weakness and limited physical endurance"

23. The aforementioned O.M. dated 28.02.1986 contains a list of jobs identified for being held by physically handicapped persons. Its physical requirements and the categorization of disabled persons suitable therefore had also been indicated therein. A bare perusal thereof leads us to the conclusion that the post of Higher Secondary & Secondary School Teacher (in short, 'HSSST') is one of the posts identified for the said purpose. Orthopedically handicapped persons constitute one of the categories, which are found suitable for job of the said post of HSSST, as would appear from entry at S.No. 56 aforementioned.

The submission of Ms. Ahlawat, in the aforementioned situation, that the posts relate to teaching subject, cannot be accept inasmuch as from a perusal of entry at S.No. 58, which refers to the post of HSSST, orthopedically handicapped persons also constitute a category, who are found suitable therefore. As the post of PET is not included in entry at S.No. 56, they would be deemed to have been included in the entry at S.No. 58.

24. The letter dated 06.06.2002 issued by the Deputy Chief Commissioner is in the following terms:-

"6.6.2000 F.No. 82/C.C.D./99/6020 Clarification regarding appointment of Orthopaedically Handicapped persons to the post of Physical Education Tr.

Dear Sir, Please refer to your letter No. DE. 4(3) / PET / E IV / 2432 dated 24.4.2000 in the above captioned subject.

As per the present arrangement for effecting reservation in Group 'A' & 'B' identified jobs for the disabled, it is not possible to appoint any category of persons with disabilities to the post of Physical Education Teacher in the pay scale of Rs. 5500-9000.

Yours sincerely, (Anuradha Mohit)"

25. We may notice that an Expert Committee appointed by the Ministry of Social, Justice and Empowerment dealt with the matter of identification of posts in Groups 'A', 'B', 'C' and 'D' for reservation. The said Committee in its report notified by the said Ministry vide their notification dated 31.05.2001 made the following recommendations:-

"(b) The nomenclature used for respective jobs in these recommendations shall also mean & include any nomenclature used for the comparable post with identical function of the identified post.

(c) ... However, no establishment on its own discretion can exclude any post out of the purview of identified post for effecting reservation under Section 33 of the Act. In case any establishment feels that it required exemption from filling up a vacancy against an identified post by the appropriate Govt. the establishment under Section 33 of PWD Act, 1995 can approach the inter department committee constituted for the purpose to look into the matter regarding exemption from Section 33 of the PWD Act. Other than this no authority has the jurisdiction to accord exemption from filling up a vacancy against an identified post for persons with disabilities.

(d) List of the identified jobs proposed to be notified herein under is in addition to and not in derogation of the earlier list published by Ministry of Personnel Public Grievances and Pensions, Department of personnel & Training, Govt. of India in the year. 1986. This is in accordance with Section 72 of Persons with Disabilities Act, 1995.

(e) If at any stage due to change in the pay scale of post, identified for persons with disabilities gets shifted from one group or grade to another group or grade the post shall remain identified for the

purpose of effecting 3% reservation. For example the post of post graduate teacher, if at the time of identification of post for persons with disabilities is a group 'B' post but due to some policy change if the same post is reduced to Group 'C' the same shall remain identified though its pay scale and grade has been changed."

From a bare perusal of the said recommendations of the Expert Committee, it is clear that a Department or an Establishment can be exempted from filling up a vacancy of physically handicapped person only after the appropriate Government has considered the report of an inter-departmental committee constituted for the purpose and further no authority, not even the Chief Commissioner, has any jurisdiction to accord an exemption.

#### CONCLUSION :-

26. In this view of the matter, in our opinion, the learned Tribunal has rightly held that the letter of the Chief Commissioner of Disabilities dated 06.06.2000 was an invalid document. The said letter was not issued upon giving an opportunity of hearing to the respondents herein. The respondents have questioned their order of termination and/or non-allowing them to join their duties and as such they cannot be held to be aware of the said letter dated 06.06.2000 issued by the Chief Commissioner. The said letter was not necessary to be specifically questioned in the writ petition, as has been submitted by Ms. Ahlawat.

It will bear repetition to state that exception, if any, must be provided in terms of the proviso appended to Section 33 of the said Act and not otherwise.

27. Furthermore, the findings of the learned Tribunal are fortified by the fact that in the event the physically handicapped persons were totally debarred from becoming PET, such a restriction ought to have been placed if they would not have been admitted to the said courses of studies at all.

28. In the aforementioned situation, it was the duty of the petitioner herein to issue necessary instructions. A person after acquiring a degree, which is necessary for holding the jobs of the post of PET, cannot at a later stage be told that he is not otherwise suitable. It is for the institutions to see as to whether the disability of the persons concerned would be such so as to disable him from performing his duties for which he had been taking training. Once they have passed the examination, it must be held that they were physically fit to perform their duties and any report of any Committee or clarification made by the Commissioner contra shall not be relevant for the aforementioned purpose.

29. For the reasons aforementioned, we are of the opinion that the impugned judgments are unassailable. These writ petitions are dismissed with costs quantified at Rs. 5000/- each.