

Kerala High Court

Lali.D.S. vs Mahatma Gandhi University on 1 June, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

WP(C).No. 35077 of 2009(D)

1. LALI.D.S. D/O. D.K.SREEDHARAN,
... Petitioner

Vs

1. MAHATMA GANDHI UNIVERSITY, PRIYADARSINI'
... Respondent

2. STATE OF KERALA REPRESENTED BY PRINCIPAL

3. NAVAS.O.S., OLICKAL PLAVIL HOUSE,

For Petitioner :SRI.SIJI ANTONY

For Respondent :SRI. T.A. SHAJI, SC, M.G.UNIVERSITY

The Hon'ble MR. Justice K.T.SANKARAN

Dated :01/06/2010

O R D E R

K.T.SANKARAN, J.

W.P.(C).No.35077 of 2009

Dated this the 1st day of June, 2010

JUDGMENT

The scope and ambit of Sections 32 and 33 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Act) and the extent of the power of the appropriate Government arise for consideration in this Writ Petition.

2. The petitioner is a Graduate. She has completed P.G.Diploma in Computer Application. She is blind. According to her, the percentage of her blindness is 100%. The Medical Board has certified that the petitioner is blind. Mahathma Gandhi University invited applications from suitable candidates for being appointed to the post of Assistant Grade-II. The petitioner applied for the same. After holding a screening test in 2006, the University invited the petitioner to appear for the written test held in 2009. She appeared for the written test. The petitioner was successful in the written test. The petitioner W.P.(C) No.35077/2009 2 had appeared for the written examination with the help of a scribe, as sanctioned by the University.

3. The University issued Ext.P2 notification dated 2.11.2009 directing all the physically handicapped candidates, who had appeared for the written examination, to appear for an interview to assess their suitability to the post. The names of 13 persons were included in Ext.P2 list of which petitioner was No.13. The petitioner appeared for the interview. The University prepared the rank list. It is stated that from out of 13 persons in Ext.P2 list, 8 persons were included in the rank list. All those 8 persons are in the category of Orthopedically Handicapped. It is not in dispute that more than 200 candidates were selected to the post of Assistant Grade II. The contention of the petitioner is that going by the number of persons selected, at least two of them should be from the category of blind persons. In view of Section 33 of the Act, it is contended that since the University did not adhere to Section 33 of the Act, there was violation of Article 16(1) of the Constitution.

W.P.(C) No.35077/2009 3

4. The petitioner prays for the issue of a writ of certiorari to quash the rank list and to direct the University to issue a revised list to include the petitioner in the rank list. There is also a prayer for the issue of a writ of mandamus directing the University to appoint blind candidates to the post of Assistant Grade II from out of the candidates in Ext.P2.

5. The petitioner stated in the Writ Petition that she was appointed as Assistant Grade II in the University on a temporary basis on daily wages in the year 2004 and for short durations thereafter, as evidenced by Exts.P4, P4(a) and P4(b). It is also stated by the petitioner that the posts of Telephone Operator, Ronco Operator, Booth Attender, Photocopier Operator and Front Office Assistants in PRO Section were also included in the category of Assistant Grade II in M.G.University.

6. In the counter affidavit, the Registrar of the University stated that 13 physically handicapped candidates were called for the interview to assess suitability of the candidates. It is also stated in the counter affidavit as follows: W.P.(C) No.35077/2009 4

"9. The committee took the decision to exclude two candidates including the petitioner as they were found not suitable to the post of Assistant Grade II as per G.O.(P) No.20/98/P&ARD dated 14.7.1998. As stated above, in Annexure II of the G.O. the posts suitable for appointment of different categories of physically handicapped in subordinate service (entry cadre) are identified. The post of clerks are not identified as suitable for appointment of blind and partially blind candidates in

the entry cadre of subordinate services of the state. In class III subordinate service of the University the entry cadre is the post of Assistant Grade II. The duties and responsibilities of the Assistants in the University is clerical in nature such as nothing, drafting, tabulation of marks in examination branch in the University and maintenance of various records in the administration, academic, exam and finance branches of the University.

10. The Statutory Selection Committee in strict adherence to the G.O.(P) No.20/98.P&ARD dated 14.7.1998 excluded the Visually Handicapped persons.

17. As far as permanent vacancies are W.P.(C) No.35077/2009 5 concerned a candidate who get regular appointment in the post of Assistant Grade II is entitled to get promotion up to the post of Joint Registrar, which is equivalent to that of Joint Secretary to Government in the State Secretariat, based on seniority and merit. The petitioner's contention that the Telephone Operator, Ronco Operator, Booth Attender, Photocopier Operator and Front Office Assistant in PRO Section were designated as Assistant Grade II category employees is fully baseless. Such works are done by class IV employees and Clerical Assistants. Assistants are never posted in such cadre."

7. Along with the reply affidavit, the Writ Petitioner produced copy of G.O.(P)No.20/98/P&ARD dated 14th July 1998 (Ext.P5). The petitioner produced the notification dated 13.12.2004 (Exhibit P6) issued by the University inviting applications to the post of Assistant Grade II, in answer to the contentions raised in the counter affidavit. It is contended that Ext.P6 does not indicate that blind persons are not entitled to apply to the post. With reference to Ext.P5 Government Order, W.P.(C) No.35077/2009 6 the contention of the petitioner is that in the category of posts suitable for appointment for blind, the posts of Booth attender, Telephone Operator and Photocopier Operator are included. It is submitted that the candidates who got appointment under these categories were appointed to the post of Assistant Grade II in M.G.University. It is therefore contended that in view of the mandatory nature of the provisions of the Act, blind persons should have been appointed by the University.

8. The University filed an additional counter affidavit wherein it is stated inter alia thus:

"6. It is submitted that Assistant Grade II is not a post identified for blind. The claim of the petitioner is that she must be appointed as telephone operator in the cadre of Assistant Grade II. The said claim is plainly unsustainable.

7. The staff pattern in the University is governed by the Kerala University First Ordinance 1978. By virtue of Section 99(2) of the M.G.University Act the Kerala University Ordinance as it stood as on the date of commencement of the M.G.University Act is W.P.(C) No.35077/2009 7 applicable to M.G.University. The M.G.University Act came into force 2.10.1983. Item No.21 in the schedule is Assistant Grade II.

8. The qualification prescribed is University degree and good handwriting.

Relaxation from the prescribed qualification of University degree is permissible only in case of clerical assistants. The method of appointment is as follows:

"By recruitment on the basis of competitive test and/or interview by inviting applications by advertisement in the Press or by promotion on the basis of seniority, subject to such norms as may be prescribed, from the cadre of clerical assistants who have acquired a minimum of seven years of service of which five years shall be as qualified clerical assistants and have passed the prescribed eligibility test."

9. The qualification prescribed and the method of appointment itself are suggestive of the nature of the work of an Assistant Grade II.

10. There is no category of post as telephone operator in the M.G.University. The job of a telephone operator, if and when necessary can be carried out by a class IV W.P.(C) No.35077/2009 8 employee. A telephone operator does not require any of the above qualifications either to discharge the functions. At present, the work of telephone operator in the University is done by engaging persons for Rs.180/- per day from the list of ex-servicemen forwarded by the Zila Sainik Welfare Officer, Kottayam on provisional basis for a period of 179 days."

9. For the purpose of considering the question involved in the Writ Petition, it is apposite to refer to the relevant provisions in the Act. Section 2(k) of the Act defines "establishment" thus:

"(k) "establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government Company as defined in Section 617 of the Companies Act

1956 (1 of 1956) and includes Departments of a Government ;"

10. There is no dispute that M.G.University is an establishment coming within the purview of Section 2(k) of the W.P.(C) No.35077/2009 9 Act. The expression "blindness" is defined in Section 2(b). Disability is defined in Section 2(i) as follows:

- (i) "disability" means :
 - (i) blindness;
 - (ii) low vision;
 - (iii) leprosy-cured;
 - (iv) hearing impairment;
 - (v) locomotor disability;
 - (vi) mental retardation;
 - (vii) mental illness;

11. Sections 32 and 33 of the Act read as follows:

"32. Identification of posts which can be reserved for persons with disabilities:- Appropriate Governments shall-

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of posts:- Every appropriate Government shall appoint in every establishment such percentage of vacancies W.P.(C) No.35077/2009 10 not less than three percent for persons or class of persons with disability of which one percent each shall be reserved for persons suffering from-

- (i) blindness or low vision;
- (ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability; Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

12. Section 2(a) defines appropriate Government;

"(a) "appropriate Government" means,-

(i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924 (2 of 1924), the Central Government;

(ii) in relation to a State Government or W.P.(C) No.35077/2009 11 any establishment wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government;

(iii) in respect of the Central Co- ordination Committee and the Central Executive Committee, the Central Government;

(iv) in respect of the State Co-ordination Committee and the State Executive Committee, the State Government;"

13. Section 32 empowers the appropriate Government to identify the posts which can be reserved for the persons with disability. Though Section 32 is not referred to in Exhibit P5 Government Order, it cannot be disputed that the Government Order was issued in exercise of the power under Section 32. In Ext.P5, it is stated that the Government of India has decided that 3% reservation for the Physically Handicapped in Group C and Group D posts shall be allowed on the basis of total number of vacancies occurring in all Group C and Group D posts respectively under each Head of Department. In tune with the decision of the Central Government, the State Government W.P.(C) No.35077/2009 12 provided in Ext.P5 thus :

"Government, after examining the matter in detail, are pleased to order that 3% vacancies in Class III and Class IV posts in Public Services will be reserved for appointment from Physically Handicapped Persons as done by the Government of India in accordance with the provisions in the "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act. 1995".

14. The scheme for appointment of physically handicapped persons in the public service is modified and a revised scheme is provided under Ext.P5 Government Order. The scheme is shown as appendix in Ext.P5. Going by the scheme, 3% of vacancies arising under class III and class IV categories shall be reserved for appointment of physically handicapped persons. The posts to which appointment will be made under the scheme are enumerated in Annexure I. The "post suitable for

appointment of different categories of physically handicapped" are given in Annexure II of the scheme appended to Ext.P5. In Annexure II of the scheme, the category of W.P.(C) No.35077/2009 13 physically handicapped are shown as (A) Orthopaedically Handicapped (B) Deaf, Deaf and Dumb (C) Partially Deaf (D) Blind and (E) Partially Blind. Against each category, the posts in the subordinate service and posts in the last grade service that are considered suitable for appointment in each category are also mentioned in Annexure II.

15. Though Section 33 provides for appointment of not less than 3% of persons belonging to the three categories of persons under disability, it is qualified by the words "in the posts identified for each disability". Provision for identification of posts under Section 32, the expression "in the posts identified for each disability" and the proviso to Section 33 providing for exemption of any establishment would indicate that what is contemplated is not a blind application of Section 33 and appointment of persons with disability under the three categories mentioned in the Section, but appointment of those persons in the appropriate posts identified by the appropriate Government for each disability. In other words, in a given case where three persons with disability are to be appointed, a person W.P.(C) No.35077/2009 14 coming under Clause (i), (ii) or (iii) of Section 33 cannot as of right claim appointment, disregarding the identification of the posts made by the appropriate Government in the exercise of power under Section 32 of the Act. The Act undoubtedly is a social welfare measure. It provides for the right of the physically disabled persons to claim appointment in public service and also in the establishments which come under the definition of 'establishment' in the Act. But, that right is subject to the identification of posts reserved for each category of persons having disabilities under Clause (i) to (iii) of Section 33. Reservation of appointment of persons with disability is not intended to affect the efficiency of functioning of the establishments, but to provide assistance to the persons with disability without affecting the efficiency of the establishment. A person having a particular disability can aspire only for reservation to the post which is suitable for being filled by the candidates of that category of disabled persons. It would not be possible for the legislature to identify the various posts and categories of jobs which could be undertaken by the persons with disabilities in various establishments. That is the reason W.P.(C) No.35077/2009 15 why the power is vested on the appropriate Government to identify the posts which can be reserved for the persons with disability. Ext.P5 Government Order cannot, therefore, be said to be in violation of the provisions of Section 33 of the Act. In fact, there is no challenge in the Writ Petition against Ext.P5.

16. The learned counsel for the petitioner relied on Amita vs. Union of India and another (2005 (13) SCC 721). In that case, the Writ Petitioner, a visually handicapped lady, applied for the post of Probationary Officer in a Bank. She had the required qualification. But, she was blind. She was not allowed to appear for the written test, which was challenged in the Writ Petition. The Supreme Court held that the rejection of the application of the Writ Petitioner was unsustainable. It was held thus:

"From the aforesaid observations of this Court, we are confident that a visually impaired candidate would be entitled to sit and write the examination for selection for the post of Probationary Officer in a Bank but the only restriction that would be standing in the way of W.P.(C) No.35077/2009 16 the writ petitioner for selection is

that the nature of duties attached to the office/post would be unsuitable for the visually impaired candidate. As found herein earlier, it cannot be doubted that a visually impaired candidate is entitled to sit and write the Probationary Officer examination along with other general candidates where any post is not earmarked for handicapped persons, as a general candidate."

It was also held that rejection of the application of the Writ Petitioner was arbitrary and violative of Article 14 and 16(1) of the Constitution of India. It was noticed in Amita's case that the Writ Petitioner, though a visually impaired lady, had not asked for any special favour for selection to the post of Probationary Officer and she had only applied for appearing for the examination for selection not as a reserved handicapped candidate but along with the other general candidates. Paragraph 29 in Amita's case makes the position clear that the Union of India categorically stated that a visually impaired candidate would be entitled to appear for the examination for W.P.(C) No.35077/2009 17 selection to the post concerned and that the petitioner could compete with the general candidates.

17. In Sreelekha vs. Kerala Public Service Commission (2008(1) KLT 966) it was held thus:

"Counsel submits that the petitioner did not require any privilege as a Physically Handicapped person, but only requested that he be considered on a par with persons with no disability. Obviously, the conditions contained in Ext.P11 should not be applied in a manner as to prevent the Commission from considering the suitability of Physically Handicapped persons along with persons with no disability. That is to say, do not concede any privilege to the Physically Handicapped person on the premise that he/she is a Physically Handicapped person, but consider him/her as any other person. Do not treat the handicap as an albatross around his neck, so that he is not considered, even if he is otherwise suitable for the post.

In my view, any subordinate order issued W.P.(C) No.35077/2009 18 under the provisions of the Disabilities Act like Ext.P11 cannot be construed in a manner as to impose conditions in any recruitment which is normally undertaken by the Commission, so as to prevent the Physically Handicapped person from competing on an even platform with any other normal person."

18. The learned Government Pleader referred to the Division Bench decision in Ray John Varghese vs. State of Kerala (2001(3)KLT 782) wherein it was held that unless and until the particular post is identified by the State Government as per Section 32, a claim for appointment cannot be raised by a person with disability. The Division Bench held thus:

"3. The Act was enacted by the Parliament so as to give effect to the decisions taken pursuant to the objects and reasons stated at the meeting which was convened at Beijing by the Economic and Social Commission for Asian and Pacific Region which adopted the proclamation on the Full Participation and Equality of People with Disabilities in the Asia and Pacific Region. India was a signatory to the

said Proclamation and it was found W.P.(C) No.35077/2009 19 necessary to enact suitable legislation providing for various matters. It was proposed to provide for the constitution of Co-ordination Committee which would serve as the national focal point on disability matters and facilitate the continuous evolution of comprehensive policy towards solving the problems faced by persons with disabilities. There is also provision for constitution of a Central Executive Committee which would be Chief Executive body of the Central Co-ordination Committee and shall be responsible for carrying out the decisions of the Central Co- ordination Committee. Provision for constitution of a State Co-ordination Committee is also there in the Act. State Co-ordination Committee is to be constituted by the State Government.

4. Chapter VI deals with Employment.

S.33 deals with reservation of posts which stipulates that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability of which one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment and locomotor disability or W.P.(C) No.35077/2009 20 cerebral palsy in the posts identified for each disability.

5. Section 32 of the Act provides that appropriate Government shall identify posts in the establishments which can be reserved for persons with disability and at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology. We are informed by the Government Pleader that State Government has not so far identified post of A.M.V.I. as per Section 32 of the Act. Since post of A.M.V.I.

has not been identified by the State
Government, appellant cannot be given

appointment even though he is a person suffering more than 40% disability. He cannot be appointed on the basis of the Act. This Court in State of Kerala vs. Mary Joseph (2001 (3) KLT 26) considered the ambit and scope of the Act."

In Roy Varghese vs. High Court of Kerala (2007(3) KLT

491), it was held :

"7. Ext.P1 is a notification issued in the W.P.(C) No.35077/2009 21 light of the Special Rules prescribing the qualifications and method of appointment to the post of Munsiff-Magistrate. The role of the High Court is in the nature of a recruiting agency, like Public Service Commission, which makes the selection and advises the Government as to who are the persons to be appointed. As per the rules, the Government is the appointing authority. The High Court is not competent to take any decision regarding reservation under the provisions of the Act or otherwise. Of

course, the Government have the power and authority and also the duty to identify the posts, to which reservation for appointment is to be made in favour of physically handicapped persons. Persons suffering from 40% disability are considered as physically handicapped persons. Among them, there may be certain persons, whose disability may not stand in the way of functioning as Munsiff-Magistrate. That is the reason why, the High court, while issuing the notification, provided that physically handicapped persons will get the application forms at concessional rate. As long as the post of Munsiff-Magistrate is not identified and included in Ext.P3 Government Order, the petitioner cannot claim W.P.(C) No.35077/2009 22 any reservation."

19. In the light of the facts stated in the counter affidavit and additional counter affidavit, it cannot be said that Assistant Grade II is a post earmarked for any reservation under the scheme issued by the Government in Ext.P5. Therefore, the petitioner is not entitled to claim any reservation to that post under Section 33 of the Act.

20. So long as no restriction is placed for a person with disability from applying for the post, such a person cannot be denied the opportunity to apply for that post, only on the ground that he/she has disability. However, a person with disability cannot be appointed to a particular post disregarding the nature of the work attached to the post. Depending on the nature of the work, such exclusion must be explicit or else a person under disability cannot be excluded from consideration for being appointed along with other general candidates. However, if a person claims reservation under Section 33 of the Act, such reservation could be had in the light of the identification of posts W.P.(C) No.35077/2009 23 made by the Government exercising the power under Section 32 of the Act. In the case on hand, the post to which the application is made and reservation is claimed, does not come under the category of posts which is earmarked for reservation to blind persons.

21. The petitioner is not entitled to the reliefs prayed for in the Writ Petition.

The Writ Petition is accordingly dismissed.

K.T.SANKARAN, JUDGE csl