

Delhi High Court

Ms. Anubha Bhargava vs Union Of India (Uoi) And Ors. on 4 December, 2007

Author: A Sikri

Bench: A Sikri, V Sanghi

JUDGMENT A.K. Sikri, J.

1. The petitioner herein is one of those 130 employees, working in different offices of the respondent-Airport Authority of India all over India, whose services were terminated, inter alia, on the ground that all these persons were appointed on ad hoc basis without any advertisement or calling candidates from Employment Exchange or following recruitment rules, which are required for any public appointment. Number of writ petitions came to be filed by all such employees challenging their termination on the plea that their appointments were later regularized after qualifying typing test or other tests and they were treated as regular employees. These writ petitions were heard together by a Division Bench of this Court. During the course of hearing, certain suggestions were mooted to resolve the problem as large number of persons were involved. After long deliberations spread over nearly three to four months, the parties were able to find an amicable solution of the problem and the Division Bench was able to dispose of the writ petitions on agreed terms with the following directions:

1. Petitioner as well as other employees whose services were terminated on similar grounds would be given an opportunity for selection in the proposed recruitment of Group C and Group D posts.

2. For Group D posts, suitability of the candidates would be adjudged by interview and wherever applicable, a trade test for the specific occupation. Additionally, suitability may be adjudged on the basis of familiarity with office procedures, basic knowledge of reading and writing, identification of files, nothings thereon etc.

3. For Group C posts, a written objective test, which would assess the aptitude, General Knowledge, the job knowledge, proficiency in English language would be held. A Typing Test would also be held. However, those of the petitioners/terminated employees, who have qualified the typing test of the respondents earlier, would be considered for exemption. This would be applicable where the record of Typing Test passed earlier is available. In addition, candidates would be interviewed.

4. Respondents would make available 50% of the vacancies for the petitioners and others whose services have been terminated, subject to their qualifying the objective written/trade test. 50% vacancies to be filled based on the merit amongst the petitioners and others, whose services were terminated subject to their qualifying the written objective and trade test being selected in interview.

5. Age relaxation would also be made available to the petitioner and others whose services have been terminated. As regards weightage for experience and knowledge peculiar to the respondent organization, the same stands provided by provision of 50% of the vacancies being made available to them.

2. There were approximately 200 vacancies and as 50% of these vacancies were reserved for those terminated employees, the Court expressed that it was sufficient to reassure those petitioners to have a fair chance. Direction was also given that entire selection process be completed within four months. Though the present petition was also included in the order dated 30.4.2007 whereby these petitions were disposed of on the aforesaid terms, the petitioner herein filed an application stating that as she was a disabled person, having visual handicap, her case would be on a different footing and, therefore, it was inadvertently disposed of along with other petitions. It was submitted that the matter was to be argued on merits. The respondents did not object to the hearing of the petition on merits and on this statement of the respondents, vide order dated 27.7.2007, it was clarified that the order dated 30.4.2007 would not cover this petition and as far as the instant petition is concerned, the said order was recalled. It is, in these circumstances, that we have heard this matter on merits.

3. We may also point out at this stage that the petitioner had filed another CM No. 11764/2007 wherein she has highlighted the peculiar facts of her case, which were absent in the other cases. These are:

a) The Applicant/Petitioner is a visually physically challenged girl;

b) The Applicant/Petitioner has lost her eye sight;

c) The Applicant/Petitioner is a Convent educated commerce graduate (i.e. B. Com) from Allahabad University and is a Computer literate from both NIIT, Allahabad and UPTEC, Allahabad;

d) The Applicant/Petitioner was appointed as a Receptionist under the Physically Handicapped Category on 25 September 2002 at Allahabad and worked uninterruptedly till 30 November 2004.

e) The Applicant/Petitioner cannot read Newspapers which carry objective questions and answers by way of puzzles and other materials;

f) The Applicant/Petitioner cannot/does not watch TV, where she could benefit from the programmes especially the one which enhance General Knowledge;

g) The National Institute for Physically Handicapped, Dehradun publishes books for visually impaired persons. No Braille book has ever been published by the Institute for objective tests;

h) The Applicant/Petitioner sought exemption from subjecting her to any written test on the basis of the quota reserved for the visually disabled/physically challenged person, i.e. the Applicant/Petitioner falls within 1% quota under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995;

i) The Applicant/Petitioner is entitled to be confirmed on that basis (i.e. as mentioned in Sub-paras (a) to (h) hereinabove).

4. She also pointed out that in compliance with order dated 30.4.2007 disposing of the batch of other writ petitions, the respondent had published an advertisement No. 2007, which had appeared in the newspapers and bare perusal of the said advertisement would show that the respondents had not followed the policy of reservation vis-a-vis physically challenged persons for appointment. The grievance raised in this application is that the respondents had violated the provisions of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the 'Disability Act') inasmuch as there was no reservation to the extent of 1% quota meant for disabled persons. What is pointed out is that in the said advertisement, only two posts are reserved for physically handicapped persons, one for Orthopaedically handicapped and one for those disabled suffering from hearing impairment. There was no post reserved for visually handicapped persons. In these circumstances, the petitioner was even precluded from applying for the post under the handicapped quota, as she was suffering from visual disability for which no post was reserved. The submission, therefore, is that even if the petitioner succeeds, she cannot be recruited as there is no sanctioned post reserved for her/advertised in the advertisement. In this application, therefore, direction is sought that the respondents comply with the provisions of the Disability Act and keep a post vacant for the visually challenged persons till the final disposal of the petition. The respondents have filed reply to this application.

5. Since we heard the main petition itself, while discussing the issue at hand, we shall advert to the issues raised in this application as well.

6. After giving the aforesaid introduction, which gives a flavour of the controversy involved, we proceed to state the factual matrix leading to the filing of the present petition. The petitioner was appointed on 25.9.2002 as a Receptionist on ad hoc basis. She claimed that this appointment was given to her against physically handicapped quota, which is clear from the appointment letter dated 25.9.2002. The same is annexed as Annexure-2 to the petition and the caption/subject thereof reads as under:

Offer for appointment to the post of Receptionist on ad hoc basis in Airport Authority of India (National Division) against physically handicapped quota.

7. Part 1 of this appointment letter mentions the essential terms of appointment. We, therefore, reproduce the same:

1. The Chairman, AAI is pleased to offer you an appointment to the post of Receptionist on ad hoc basis in the scale of Rs. 5500-140-160-1060 for a period of six months in the office of the Principal, Civil Aviation Training College, Bamrauli, Allahabad vide CHQ. Letter No. A.11019/3/2002-EM dated 13.9.2002. During this period the services are liable to be terminated at any time without assigning any reason.

8. Though this appointment was initially for a period of six months, vide letter dated 4.9.2003, the petitioner was intimated that "The Competent Authority has approved the continuation of ad hoc appointment until further orders." On the basis of this order, the petitioner continued as Receptionist. However, vide order dated 30.11.2004, the services of the petitioner were abruptly put

to an end. This termination order states that she was appointed on ad hoc basis without any advertisement, without calling candidates from employment exchange and without following the recruitment procedure for any appointment. Her appointment was, therefore, irregular, illegal and void and in any case, invalid and thus, it was decided to terminate the said irregular appointment. Therefore, the services were terminated with immediate effect. In this letter it was also mentioned that as a gesture of goodwill, it was decided to give her one month's salary in view of notice period and retrenchment compensation although she was not entitled to any such notice or compensation. The respondents also granted her liberty to make application for regular appointments if and when made for such post and in that case she would be given age relaxation up to a period of five years.

9. In this petition the petitioner has challenged the aforesaid termination, inter alia, pleading that she was appointed on ad hoc basis against the physically handicapped quota as per the sanction of the Competent Authority; after completion of ad hoc period of six months the employee has to be on probation as per the recruitment rules and on completion of successful probation, the employee has to be confirmed. Therefore, her services could not have been terminated. It is also claimed that she was appointed after complete scrutiny of all the documents, experience certificate, medical fitness, character verification, proof of date of birth and educational qualification and, therefore, it cannot be said that proper criteria for recruitment had not been followed. In these circumstances, her services could not be terminated without any show cause notice or charge-sheet or inquiry. It is submitted that no preliminary inquiry or even warning was ever issued by the respondents before taking the impugned action which smacks of mala fides. It is stated that such termination violates the procedure prescribed under the Model Standing Orders and the provisions of the Industrial Disputes Act.

10. It is also stated that the petitioner fulfilled all the eligibility conditions for appointment to the post of Receptionist, which is Group 'C' Post; at the time of recruitment, there were vacancies with the respondents and her appointment was against a regular vacancy; since she was to be kept on probation and after completion of probation period of two years, she was to be confirmed, she having completed the aforesaid period was entitled to be treated as a confirmed employee, more so when she has unblemished service record and is physically handicapped.

11. In the counter affidavit filed on behalf of the respondents it is stressed that the appointment was made in total contravention of the recruitment rules and the recruitment procedure. It was in violation of the Employment Exchange Act. All these appointments were made at the instance of the then Civil Aviation Minister and also from various VIPs and higher-up officials. The policy of reservation had not been followed. After these appointments were made which included the appointment of the petitioner as well, the respondents started receiving serious complaints from the Central Vigilance Commission, Prime Minister's Office, CBI and Government Audit Party etc. with regard to violation of rules in making these appointments. Matter was gone into and on finding that such appointments were without jurisdiction and void, the services of all such persons were terminated.

12. We may state at the outset that the petitioner could not demonstrate that her appointment was made after following the proper procedure, as laid down in the rules. Neither there was any public

advertisement nor any requisition was sent to the Employment Exchange for sending the names nor any selection process for appointment to these posts in the form of written test or otherwise was followed. It is apparent that all these appointments were, therefore, de hors the recruitment rules. Even otherwise as per the documents produced by the petitioner herself, she was appointed only on ad hoc basis initially for a period of six months, which period was extended till further orders, meaning thereby her status remained as that of an ad hoc employee. The contention of the petitioner that after six months she was to be treated as a probationer and after two years of service she was to be deemed as a regular employee is clearly misconceived and untenable. A person can be put on probation only if he/she is selected after following proper procedure in accordance with the recruitment rules. No such exercise was undertaken and when that essential formality is not completed, such a casual/ad hoc employee cannot lay claim for regular appointment. It is not even necessary to discuss this aspect of the matter in greater details as this issue now stands resolved finally by a Constitution Bench of the Apex Court in the case of Secretary, State of Karnataka and Ors. v. Umadevi and Ors. .

13. In fact, it was because of this reason that those persons who were similarly appointed and given the same treatment by similar type of termination orders, extracted a bargain from the respondents with the intervention of the Court and all those writ petitions are disposed of by giving certain directions vide orders dated 30.4.2007, already reproduced above. Since the nature of appointment as also the nature of termination of the petitioner herein is identical to those persons, the petitioner's case would have also been governed by the said directions. The only reason for detaching the present petition from the said batch of writ petitions is the plea of the petitioner that she is a handicapped person. Whether this disability of the petitioner, which is otherwise not in dispute, entitles her to a different treatment, is the only aspect which needs to be attended to. It is not in dispute that there is a quota for physically handicapped persons. This is statutorily guaranteed under Section 33 of the Disability Act, which provides as under:

33. Reservation of posts.--Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. for persons or class of persons with disability of which one per cent. each shall be reserved for persons suffering from-

(i) Blindness or low vision;

(ii) Bearing impairment;

(iii) Loco motor 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.

14. 'Disability' is defined in Section 2(i) of the Disability Act. The kinds of disabilities mentioned therein includes within its categories visual disability as well. Since there is no dispute about the fact that the petitioner is suffering from visual disability and is virtually blind, she meets the

requirement of those who are eligible to be considered against this quota. However, the implication of the aforesaid provisions is that the employer, as defined in Section 2(j) of the Disability Act is under obligation to reserve vacancies, not less than 3%, for persons or class of persons with disability and 1% out of that is to be reserved for persons suffering from blindness or low vision. That would not mean that for filling up of these vacancies, reserved for persons suffering from the kind of disability mentioned in Section 33, recruitment rules specifying the eligibility or the procedure for filling up of these vacancies is to be given a go-by. Once the vacancies are reserved for a particular category, appointments are to be made to those vacancies from that category alone. At the same time, all those persons belonging to that category and are fulfilling the requisite eligibility conditions are entitled to be considered. Therefore, even these vacancies are to be filled through public notice/advertisement and after notifying these vacancies to the Employment Exchange, so that the persons suffering from a particular kind of disability for which vacancies are reserved are in a position to apply. To put it simply, even for filling up of these posts, back door entry is not permissible. In fact, Disability Rules, 1996, framed under the Disability Act throw light on this aspect as well. Chapter V thereof under the Head 'Employment' covers Rule 36 to Rule 41. Rule 37 stipulates that such vacancies would be notified to the Special Employment Exchanges. Form and manner of notification of these vacancies to such Special Employment Exchanges is provided in Rule 38. The purpose is more than obvious, namely, enabling the Special Employment Exchange to forward the names of eligible candidates who have registered themselves with such exchanges. It is to ensure wide publicity and wider the zone of consideration, so that the process is transparent and persons among the particular category are employed. This also ensures compliance with the letter and spirit of Article 14 of the Constitution of India.

15. So far so good. The discussion up to now would have prompted us to say that the petitioner's case be also covered by the directions contained in the orders dated 30.4.2007 and it can be considered against the post reserved for persons suffering from disability. However, there are certain peculiar facts of this case and certain events which took place after the appointment of the petitioner and the advertisement issued by the respondents for filling up of the post in compliance with the directions contained in the order dated 30.4.2007, which is somewhat disturbing, though these aspects are mentioned above, we highlight the same so that we are able to properly focus on them. These are:

(i) The petitioner is visually/physically challenged girl with good academic record. She is a Convent educated Commerce graduate, i.e. B. Com. from Allahabad University. She is also a computer literate from both NIIT, Allahabad and UPTEC, Allahabad.

(ii) At the time of her appointment on ad hoc basis under physically handicapped category, though she was visually impaired, during this period her eye sight had deteriorated and she is virtually a blind person today.

(iii) She cannot read. Therefore, reading of the newspapers or other material, including books etc. on general knowledge and other topics by her is out of question. She cannot watch TV as well and, therefore, is deprived of the benefit of those programmes which could enhance her general knowledge. She has stated in her application that though National Institute for Physically

Handicapped, Dehradun publishes books for visually impaired persons, no Braille book has ever been published by the Institute for objective tests. Therefore she has no means to update or enhance her knowledge which could enable her to acquire competitive skills and appear in the examination.

(iv) To add insult to this injury, the respondents, in the advertisement, have not reserved any post for visually handicapped persons. Therefore, she cannot even apply in the quota reserved for such persons under Section 33 of the Disability Act. The respondents want her to compete in the general category along with other persons whose services were terminated as well as outsiders, who are otherwise able persons, physically and mentally. Therefore, there is no level-playing field for the petitioner if she is made to compete with such persons.

(v) Since there are only two posts reserved for the persons suffering from disability, the respondents were asked to give the statistics and demonstrate as to how only two posts were reserved and not a single post was reserved for persons falling in the category of visually handicapped. We wanted to know as to whether posts to the extent of 3% are reserved for disabled persons. We were not supplied with any such figures on the basis of which the respondents could demonstrate that by making provision for two posts only, the requirement of 3% reservation is fulfilled. As notice above, about 200 vacancies have to be filled. The respondents have not been able to show that the quota meant for visually handicapped person, i.e. 1% of the posts, have already been filled, including in respect of the posts now sought to be filled. Therefore, one can safely assume that there would be at least one, if not two clear vacancies to be filled by visually handicapped persons.

16. This Court in *Ravi Kumar Arora v. Union of India (UOI) and Anr.* held that the disabled cannot be told that the Government is not ready with identified posts for them. They had waited enough. In that case the petitioner, Ravi Kumar Arora had appeared for the UPSC examination in 2000 but was unsuccessful. Next year, he cleared the exam successfully. However, he was disqualified during the medical examination on account of his 'visual disability.' So, in 2002, Arora appeared for the Civils again but in category of the visually challenged. However, he was rejected on the grounds that he just had myopia and could not be given the concession due to blind candidates. The Court said the petition had "brought to light some shocking facts". No candidate applying in the category of a visually impaired had been selected in the last four years. In fact, in the 26 services of the UPSC exam, no post had been identified for the visually impaired in all these years. The Court further said that Arora had been declared successful in the General category when he qualified in 2001. He was only disqualified on the grounds of disability of vision. However, this impairment had not prevented the petitioner from carrying out his duties as a non-gazetted employee in the Health Ministry. Before this, he was even an I-T inspector. The Court in its order observed that even if the petitioner had succeeded in the reserved category in 2002, there were no posts carved out in that category. The Court observed that the UPSC had washed its hands of the issue claiming that it was merely conducting the examination.

17. The Apex Court in *Consumer Education & Research Centre v. Union of India* observed as under:

21. In a developing society like ours steeped with unbridgeable and ever-widening gaps of inequality in status and of opportunity, law is catalytic, rubican to the poor etc. to reach the ladder of social

justice. Justice K. Subba Rao, the former Chief Justice of this Court, in his Social Justice and Law at page 2, had stated that: "Social justice is one of the disciplines of justice and the discipline of justice relates to the society." What is due cannot be ascertained by absolute standard which keeps changing depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven practical content of 'life'. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.

22. Article 1 of the Universal Declaration of Human Rights asserts human sensitivity and moral responsibility of every State that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." The Charter of the United Nations thus reinforces the faith in fundamental human rights and in the dignity and worth of human person envisaged in the Directive Principles of State Policy as part of the Constitution. The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality.

18. In this backdrop, we may also note that though the petitioner was appointed on ad hoc basis, she worked for more than two years and during this period it is not pointed out that her work and conduct was not satisfactory. The reason for termination, as aforesaid, was that she was appointed without following the recruitment rules. In these circumstances, asking her to compete with general category candidates and come out triumphantly would be requiring her to achieve an impossible feat. Moreover, this blindness is atleast partially the result of her performing duties and had there been a regular appointment, she would have been entitled to protection against termination under Section 14 of the Disability Act. (See: Kunal Singh v. Union of India ). Where the government provided 3% reservation for the physically handicapped individuals but did not provide 1:1:1 reservation in favor of visually handicapped, hearing handicapped and orthopaedically handicapped, the High Court of Andhra Pradesh in Perambaduru Murali Krishna and Ors v. The State of Andhra Pradesh and Ors. directed the Government of Andhra Pradesh to create a supernumerary post for the candidate, Perambaduru, who had not been selected because the provisions of the Act had not been followed. It held that he should be appointed as a Secondary Grade Teacher.

19. Therefore, in view of these circumstances peculiar to this case, we are of the view that if she is given the same treatment as meted out to others, it would be travesty of justice. The case poses a challenge to ensure that substantial justice is done to a physically challenged person. Further, it is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire facts and pass appropriate orders to bestow on the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is

normally exercisable keeping in mind the principles of equity. The Apex Court in U.P. State Brassware Corporation Ltd. and Anr. v. Udai Narain Pandey observed as under:

40. It is one thing to say that the court interprets a provision of a statute and lays down a law, but it is another thing to say that the courts although exercise plenary jurisdiction will have no discretionary power at all in the matter of moulding the relief or otherwise give any such reliefs, as the parties may be found to be entitled to in equity and justice. If that be so, the court's function as court of justice would be totally impaired. Discretionary jurisdiction in a court need not be conferred always by a statute.

20. Having regard to the special circumstances, we are of the opinion that ends of justice would be subserved by giving the following directions:

1. The petitioner is entitled to be exempted from appearing in the written test. Though while reserving the judgment on 22.10.2007, we had passed the orders that the petitioner may appear in the examinations, which were scheduled for 28.10.2007, without prejudice to her rights and contentions in the writ petition, we had also categorically recorded in the order that the counsel for the petitioner had pleaded for exemption from appearing in the written test and we had indicated that this aspect shall be considered while pronouncing the judgment. In the totality of circumstances we are inclined to accept this submission of the learned Counsel for the petitioner.

2. On the basis of service record, since she had served from 25.9.2002 to 30.11.2004, her case for regular employment shall be considered. The petitioner shall be given the job which she can conveniently handle keeping in view her aforesaid handicap. We may place on record that though she became totally blind when she was still in service, she continued to discharge her duties as a Receptionist to the satisfaction of her employer. Therefore, it is not a case where the petitioner will not be able to perform any duties. Having regard to the fact that the respondent-AAI is a massive organisation, it would not be difficult to find suitable work for her. One vacancy out of the vacancies advertised, thus, shall be earmarked for the petitioner. It would be up to the respondents to take this vacancy from the general quota prescribed and adjust it against the quota reserved for physically handicapped persons after undertaking the exercise as to how many posts under the said quota are still available. Alternatively, it would be open for the respondents to create a supernumerary post for the petitioner immediately, to be adjusted against the disability quota. The petitioner shall not be entitled to any salary for the interim period. The appointment given shall be treated as a fresh appointment without giving any benefit of the past service rendered.

21. The writ petition is allowed in the aforesaid terms. No order as to costs.

22. Since the order is passed having regard to the peculiar facts, as emerged above, it be not treated as a precedent.