

Jammu & Kashmir High Court

Anjeel Kumar vs State Of J&K on 9 March, 2015

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

LPASW No. 163 OF 2014

1. Anjeel Kumar
2. Narmeen Singh
3. Shifali Sharma.
4. Sahil Khajuria

Petitioners

1. State of J&K,
2. J&K Service Selection Recruitment Board
3. Chairman, J&K Service Selection Recruitment Board,
4. Sayeed Jaziba Geelani

Respondent

!Mr. Abhinav Sharma, Advocate.

^Mr. Gagan Basotra, Sr. AAG for R-1. Mr. K. M. Bhatti, Advocate for R-2 & 3

Hon ble Mr. Justice N. Paul Vasanthakumar, Chief Justice,

Hon ble Mr. Justice Dhiraj Singh Thakur, Judge

Date: 09.03.2015

:J U D G M E N T :

N. Paul Vasanthakumar, CJ

1. This Letters Patent Appeal is filed against order made in SWP no. 2247/2011 dated 21.11.2014 wherein the appellants and three others have sought for directions to the Jammu and Kashmir Services Selection Board to recommend eleven candidates for the post of Junior Engineer (Civil) Grade-II from amongst the candidates belonging to Handicapped category pursuant to advertisement notice No. 08 of 2010 dated 24.12.2010 and consequently consider and select the appellants against those posts. The learned Single Judge dismissed the writ petition.

2. The writ petition was originally filed by seven persons and only four persons filed the Letters Patent Appeal.

3. The brief facts, necessary for disposal of this appeal, are as follows.

4. The Jammu and Kashmir Services Selection Board (for brevity the Selection Board?) issued an advertisement notice No. 08 of 2010 dated 24.12.2010 inviting applications for 357 posts of Junior Engineer (Civil) Grade-II for the Public Works (R&B) Department among other posts. The qualification prescribed was three years diploma in Civil Engineering from Government recognized

institute/ Indian University Degree in Civil Engineering or AMIE Section (A&B) India. The posts were divided in the following categories:- OM: 203 SC: 29 ST: 36 RBA: 71 ALC: 11 OSC: 07 Total: 357 3% reservation was provided to the physically handicapped persons in terms of Order No. 62-SW of 2001 dated 13.03.2001. All the appellants, who possess three years diploma course in Civil Engineering and all are physically handicapped either by upper limb or lower limb deformity, applied for the said posts. The candidates were short listed by the Selection Board and a provisional select list of 326 candidates was published and the appellants could not get birth in the said select list. The appellants contended that out of 357 posts notified, only 326 candidates were selected leaving 31 posts under various categories as unfilled and out of 357 posts, 10 posts were to be filled up from the category of physically handicapped persons in view of 3% reservation meant for the said category. As per Section 22 of the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998, 3 percentage of vacancies from amongst persons with blindness, low vision, hearing impairment or locomotor disability or cerebral palsy are to be selected. In the notification the Selection Board failed to earmark 10 posts of the candidates belonging to the physically handicapped category, hence the appellants along with three others, as stated supra, filed the writ petition before this Court with the above said prayer.

5. The writ petition was opposed by the Selection Board, stating that the total vacancies for physically handicapped persons came to 10 and in terms of the advertisement the candidates suffering from disability of partially deaf alone were eligible for the posts. As the appellants did not conform to the nature of disability in terms of the Government order issued in Order No. 62-SW of 2001 dated 13.03.2001, they were not found eligible for selection in the post of Junior Engineer (Civil) Grade-II, although four other candidates were found eligible in the said category. Merely because the appellants applied and participated in the interview that will not confer any right to seek their selection and appointment and the vacancies under the said category could not be filled up for want of eligible candidates. It is also contended that a Division Bench of this Court in the decision reported in 2009 (2) JKJ 48 (HC), (Jyotsna Mengi v. Chairman, J&K PSC and others) directed the Government to identify the posts for all the three categories for filling up the vacancies under the physically challenged quota and the Government issued Order No. 231-SW of 2011 dated 22.12.2011 identified the posts and the said identification having been made after the advertisement was issued i.e. on 24.12.2010, the appellants' category of disability cannot be included in the reserved category (physically challenged) in the advertisement and the Government order issued on 22.12.2011 will apply only prospectively. The learned Single Judge accepted the said stand of the Selection Board and dismissed the writ petition.

6. Mr. Abhinav Sharma, learned counsel appearing for the appellants, argued that the deformity of the appellants having not been denied and they having applied and participated in the selection process, and in the light of availability of vacancies under the physically challenged quota, which was admitted by the respondents, the appellants are entitled to get selection and no one will be affected by accommodating the four appellants, and, in terms of the provisions of the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998, and the appellants having produced the disability certificates from the competent authority, which is not disputed, and in light of Section 22 of the Act which mandates reservation to not less than 3% of the vacancies for persons or class of persons with disability and merely because

the Government failed to identify the posts up to year 2011, the appellants cannot be denied of selection as their right to get selection is conferred under the statute and, therefore, the appeal is bound to be allowed.

7. Learned counsel also submitted that the notification inviting applications was issued on 24.12.2010 in defiance to the judgment of the Division Bench of this Court in *Jyotsna Mengi's* case (supra) wherein this Court having noted that there was no identification of posts for the disabled categories, gave seven directions and one such direction was to identify posts in all establishments which can be reserved for persons with disabilities and the said direction was directed to be complied with before making new direct recruitments. The said judgment was rendered on 30.03.2009, the advertisement was issued on 24.12.2010, i.e. before identifying the posts is in fact violation of the Division Bench order and the respondents cannot be allowed to take advantage of the delay in identifying the posts. Learned counsel also argued that any decision taken contrary to the Court orders are to be treated illegal. However, the appellants are not praying for such relief as they can be accommodated in the light of availability of those vacancies. Learned counsel also submitted that non-identification of posts by the Government cannot be a reason to deny appointment as the said issue was already considered by Hon^{ble} the Supreme Court and the said issue was not considered by the learned Single Judge and, therefore, the order of the learned Single Judge is liable to be set aside and the Letters Patent Appeal may be allowed.

8. Mr. K. M. Bhatti, learned counsel appearing for the Selection Board submitted that the posts in question having been identified only in the year 2011 and the same having been given prospective effect, the appellants' category of physically handicapped were not included in the advertisement and the advertisement having been already issued, the learned Single Judge was right in dismissing the writ petition. Mr. Gagan Basotra, learned counsel for the State submitted that the advertisement issued on 24.12.2010 having not been challenged by the appellants, the prayer sought for in the writ petition is not maintainable.

9. In reply to the said submissions, learned counsel appearing for the appellants submitted that the appellants need not challenge the advertisement notice as the advertisement made contrary to the provisions of Section 22 of the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998 is not valid insofar as in reserving the posts for physically handicapped persons to one category and the appellants having established their right to get selected under the Statute, which is also binding on the respondents, any advertisement made contrary to the statutory provisions is not valid and the appellants are not praying to quash the selection as there are vacancies available to accommodate the appellants and the relief can be moulded without disturbing the candidates already selected.

10. We have considered the rival submissions, gone through the documents filed, the provisions of the Act and the judgments relied on.

11. The point in issue is as to whether the appellants are justified in demanding their selection under physically disabled persons in the post of Junior Engineer (Civil) Grade-II, for which they applied, attended the interview and in the light of the availability of vacancies.

12. There is no dispute regarding the physical disability of the appellants. The appellant nos. 1, 2 and 4 are Orthopaedically handicapped and are suffering from locomotor disability and appellant no.3 is visually impaired and is suffering from low vision. The Jammu and Kashmir State had enacted the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998 which is in tune with the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 enacted by the Parliament. Sections 21 and 22 of the said Act reads as follows:

21. Identification of posts which can be reserved for persons with disabilities The Government shall:-

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

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

22. Reservation of posts The Government shall appoint in every establishment such percentage of vacancies not has than three percent, for persons or class of persons with disabilities 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 disabilities:

Provided that the 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. From the above cited provisions, it is clear that State is duty bound to identify the posts in all establishments which can be reserved for persons with disabilities and the said identification of posts can be reviewed at periodic intervals not exceeding three years after taking into consideration the development in technology. Section 22 mandates the Government to appoint not less than 3% of persons with disabilities in every establishment of which one percent, each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment; and (iii) Locomotor disability or cerebral palsy, in the posts identified for each disabilities. The proviso to this Section empowers the Government to exempt any establishment from the provisions of this Section. Insofar as the post of Junior Engineer (Civil) Grade-II is concerned, admittedly no exemption was issued by the Government. It is a fact that though the Act was enacted in the year 1998, the posts in the Public Works (R&B) Department were not identified up to the year 2011 and only after the directions issued by this Court in the decision cited supra, the Government thought it fit to identify the posts. The belated identification of posts is now put against the appellants who are otherwise eligible to be appointed under Section 22 of the Act which mandates reservation of not less than 1% of the posts in each category in all establishments, namely, blindness or low vision, hearing impairment, and Locomotor disability or

cerebral palsy. The appellants are coming within the disabilities of blindness/low vision, and Locomotor disability. Up to the year 2011 persons suffering with hearing impairment alone were identified for the posts. The bureaucratic delay in identifying the posts for these disabled persons cannot be a ground to deny appointment to the deserving physically challenged persons. Similar issue came up before Hon^{ble} the Supreme Court in respect of reserving of posts for physically disabled persons and Hon^{ble} the Supreme Court deprecated the stand of the respondents regarding non-identification of posts due to which the selection was not made in the physically disabled category. In (2007) 8 SCC 621 (Mahesh Gupta and others v. Yashwant Kumar Ahirwar and ors) in paragraph 14 Hon^{ble} the Supreme Court held thus:- when the decision was taken, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the 1989 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. Again Hon^{ble} the Supreme Court in the decision reported in (2010) 7 SCC 626, (Government of India and another v. Ravi Prakash Gupta and another). In paragraph nos. 24 and 25 it is held thus:- 4. The other question which is connected with the first question and which also requires our consideration is whether the reservation provided for in Section 33 of the Disabilities Act, 1995, was dependent on identification of posts suitable for appointment in such categories, as has been sought to be contended on behalf of the Government of India in the instant case.

25. Although, the Delhi High Court has dealt with the aforesaid questions, we wish to add a few observations of our own in regard to the objects which the legislature intended to achieve by enacting the aforesaid Act. The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission made on behalf of the Union of India that identification of Group A and B posts in the IAS was undertaken after the year 2005 is not of much substance. In the said case the plea of non-identification of posts raised by the Union of India was not accepted and a direction was issued to select the person for IAS if he was otherwise qualified under the physically disabled quota. Again in the decision reported in (2013) 10 SCC, 772 (Union of India and anr v. National Federation of the Blind and others), Hon^{ble} the Supreme Court considered a similar issue and in paragraph 24 held thus:- 4. Although, the Disability Rights Movement in India commenced way back in 1977, of which Respondent No. 1 herein was an active participant, it acquired the requisite sanction only at the launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002, which gave a definite boost to the movement. The main need that emerged from the meet was for a comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995 viz., the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which empowers persons with disabilities and ensures protection of their rights. The Act, in addition to its other prospects, also seeks for better employment opportunities to persons with disabilities by way of reservation of posts and establishment of a Special Employment Exchange for them. For the same, Section 32 of the Act

stipulates for identification of posts which can be reserved for persons with 21Page 22 disabilities. Section 33 provides for reservation of posts and Section 36 thereof provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, in any recruitment year such vacancy is to be carried forward in the succeeding recruitment year. The difference of opinion between the appellants and the respondents arises on the point of interpretation of these sections.

13. It is also not in dispute that the Division Bench of this Court in Jyotsna Mengi s case (supra) on 30.03.2009 issued positive directions to identify the posts and till the posts are identified, a prohibitory order was issued not to advertise any post. In defiance to the said order the posts were advertised without identifying the posts. The said violation of the Court order is a serious matter and the respondents cannot take advantage of the violation of the Court order to deny the relief to the appellants who are otherwise eligible.

14. Hence the appellants are entitled to succeed in this Letters Patent Appeal. Consequently the order of the learned Single Judge is set aside and the writ appeal is allowed. The respondents 2 and 3 are directed to consider the candidature of the appellants as per Section 22 of the Act and issue selection order within a period of four weeks and the 1st respondent is directed to appoint the appellants within a period of four weeks from the date of selection order.

15. The Letters Patent Appeal is disposed of with above directions. No costs.

(Dhiraj Singh Thakur) (N. Paul Vasanthakumar)
Judge Chief Justice
Jammu

09.03.2015
Anil Raina, Secy