

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

LPASW no.205/2006

Date of decision: 30.03.2009

Jyotsna Mengi.

v

Chairman, J&K PSC & ors.

Coram:

Hon'ble Mr. Justice Barin Ghosh, Chief Justice

Hon'ble Mr. Justice Mansoor Ahmad Mir, Judge

Appearing counsel:

For the appellant(s) : Appellant in person.

For the respondent(s): Mrs. Seema Shekher, AAG
Mr. D. C. Raina, Sr. Advocate with
Mr. F. A. Natnoo, Advocate.

i) Whether approved for reporting in
Law journals etc.: Yes

ii) Whether approved for publication
in press: Optional

Per Barin Ghosh, CJ:

The Jammu and Kashmir Public Service Commission invited applications for filling up of 124 posts in eight different services by a notification dated December 28, 2001. Subsequently, by notification dated November 27, 2002, the number of posts was raised to 138. The notifications mentioned that two posts have been reserved for disabled persons. The appellant made a representation

that, having regard to the number of posts to be filled up, the number of posts reserved for disabled persons should be more. The said representation was not addressed to. The appellant is a disabled person, for, she has locomotor disability. She responded to the advertisement and sought to be considered for the posts reserved for disabled persons. She was, accordingly, considered and, having regard to what has been stated in the judgment and order under appeal, she was adjudged fourth best amongst disabled candidates. The appellant having thus been adjudged was not accommodated in the two posts reserved for disabled persons and, hence, she filed the writ petition. The writ petition having been dismissed, the present appeal has been preferred.

On the basis of the papers and records produced before us there is now no dispute that the person who was adjudged best amongst disabled persons was, in fact, not a disabled person and, accordingly, he was not considered in the category of disabled persons. Accordingly, the second and third candidates, adjudged amongst disabled persons,

have been accommodated in the advertised two posts reserved for disabled persons. In the event a third post is available. It is the contention of the appellant she should be accommodated in such post.

We have made an endeavour to ascertain whether, in fact, a third post was available or not and will discuss it hereinafter, but before doing so, we must highlight that the manner in which steps have been taken to fill up posts reserved for disabled persons, the State has given a go-by to the law made by it, namely, the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998, which came into force on May 19, 1998.

In this connection, one must note sections 21 and 22 of the Act, which are set out below:

"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 more 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.”

A look at sections 21 and 22 of the Act would amply make it clear that, unless the State Government exempts any establishment from the provisions of section 22 of the Act, it is mandatory upon the Government to appoint in every establishment disabled persons and, for that matter, to identify the posts where disabled persons can be accommodated. Periodical review for identifying the posts,

where disabled persons can be accommodated, is also a mandate of law. The law, at the same time, mandates that such review should be made at intervals not exceeding three years.

The records show that a number of establishments of the State have identified posts in which displaced persons cannot be appointed, and while doing so, did not identify even one single post, where they can be appointed. At the same time, the Government by notification did not exempt any such establishment from the provisions of section 22 of the Act. The Government, therefore, acted and is still acting in breach of the law made by the Legislature.

Further more, section 22 of the Act mandates reservation for disabled persons of at least 3% of the total vacancies. The Government appears to have made such reservation, i.e., the minimum. Section 22 of the Act further directs that 1% of the minimum of 3% vacancies shall be reserved for persons suffering from blindness or low vision; 1% of 3% for persons suffering from hearing impairment and the remaining 1% of 3% for persons suffering from

locomotor disability / cerebral palsy. The Government has not done so. Records placed before us demonstrate that all the reserved vacancies created for disabled persons are being supplied by persons suffering from locomotor disability. The Government, therefore, is acting in breach of the law with impunity. We hope that the Government would act in the manner the Legislature wants it to act. It is the duty of the Government to identify posts in all establishments which have not been exempted and which may be supplied by a person suffering from blindness or low vision and the percentage thereof should not be less than 1% in the establishment. Similar identification is required to be made for persons suffering from hearing impairment and from locomotor disability or cerebral palsy and those identified posts are required to be supplied by the persons having such disability. In course of dealing with the matter, we have found that all posts reserved for disabled persons are being supplied by persons suffering from locomotor disability. We hope and expect that the Government mend its ways and act in discharge of its statutory duty and

obligation owing to disabled persons as recognized by the Legislature.

Coming to the case at hand, initially the appellant contended that since in terms of the notifications, 138 posts were to be filled in, there should have been at least 4 posts available for being filled up by disabled persons. Later, on realization that 3% reservation in every establishment being the mandate, she contended before us that no information has been supplied by the State as to how many vacancies were available in different establishments for which recruitment process was initiated by issuing the subject notifications. Accordingly, we directed production of appropriate records, including the roster and the notifications pertaining to maintenance of roster, fixing the roster points to accommodate persons with disabilities. Such records have been produced along with appropriate notifications.

It appears that on September 29, 1998 a notification was issued when it was directed that to effect the reservation for physically disabled persons, a separate

register of 100 points shall be maintained in each identified class of posts filled through direct recruitment in which point nos.1, 34 and 67 will be reserved for the physically disabled persons and every Head of Department may start point no.1 with any category of disability. The appellant contended that, in view of such direction, in the event a post in any establishment is filled in which it is the 34th post, there must be 2 posts available for physically disabled persons. The appellant contended that in Community Development and National Extension (Gazetted) Service 34 posts were filled in and, at the same time, in the Social Welfare (Gazetted) Service 44 posts had been filled in and, accordingly, there must be at least 4 posts available for filling up by disabled persons.

learned counsel for the State submitted that Government order dated September 29, 1998 was not acted upon. She submitted that maintenance of a separate register of 100 points for disabled persons and then filling up the same by disabled persons only in point nos. 1, 34 and 67 did not work out. In the circumstances, the

Government came up with another order dated March 13, 2001 based on Cabinet decision dated February 8, 2001. The said order, according to the learned counsel for the State, authorised 3% reservation in direct recruitments under the provisions of the said Act in gazetted and non-gazetted posts as identified by expert committee and detailed in annexure thereto. The said annexure, as aforesaid, only identified posts where physically handicapped people cannot work. It was submitted that based on the said Government order, three percent posts have been reserved for persons with disability and, accordingly, 1% is accommodated within the first 33 posts in an establishment and then another in the next 67 posts available and the third upto the 99th post available. The manner, in which the Government has acted, as aforesaid, is in breach of their obligation bestowed upon them by the Legislature as contained in sections 21 and 22 of the Act. The net result is that no person suffering from blindness or low vision or from hearing impairment has been given the benefit of reservation made for them. All those vacancies of 3% of the total vacancies are being supplied by persons

suffering from locomotor disability. Further, it has not come on record that even one single person suffering from cerebral palsy has obtained the benefit of reservation for persons suffering from such disability. Though suffering from locomotor disability and suffering from cerebral palsy are quite different things, but since the Legislature has classified them in one category, it goes without saying that persons suffering from cerebral palsy are required to compete with persons suffering from locomotor disability for supplying one vacancy reserved for them.

There is no dispute that the 2 posts reserved for physically handicapped persons have been supplied by persons with locomotor disability who were above the appellant in the merit list of persons suffering from locomotor disability. At the same time, there is no dispute that upto 34th post in Community Development and National Extension (Gazetted) Service and upto 44th post in the Social Welfare (Gazetted) Service have been supplied and, accordingly, percentage-wise, 2 posts were available in the said departments for physically handicapped persons.

Though the 44th post in Social Welfare (Gazetted) Service has been supplied by a physically handicapped person, but no post in the Community Development and National Extension (Gazetted) Service has been supplied by a physically handicapped person. The other post which has been supplied by a physically handicapped person was in the Accounts (Gazetted) Service. Therefore, there cannot be any dispute, as contended by the appellant, that there was at least one more post available for physically handicapped persons in addition to the two posts as were notified.

The question is should we direct that one additional available post be supplied by the appellant. The appellant has relied upon a judgment of the Hon'ble Supreme Court rendered in the case of ***State of UP v Pawan Kumar Tiwari***, 2005(1) Supreme 3. In that case the Hon'ble Supreme Court was concerned with filling up of 93 posts of Civil Judge (Junior Division) in UP Judicial Service. The Hon'ble Court was not concerned with an issue pertaining to reservation for persons with disability; they were concerned

with reservation of 3 posts horizontally for the category of freedom fighters and ex-servicemen, but in the general quota. The said judgment, therefore, is of no help to the appellant. The next judgment of the Hon'ble Supreme Court, cited by the appellant, was rendered in **Bhudev Sharma v District Judge Bulandshahr**, 2007(8) Supreme 192. In that case, the appellant before the Hon'ble Supreme Court was a blind person. He was not given the benefit of reservation, although 2% reservation for physically handicapped persons was available. The Hon'ble Supreme Court found that when altogether 30 posts were to be filled in, 2% thereof works out to 0.6 and the same being more than half, should have been rounded to one and, accordingly, one post was available for filling up by a physically handicapped person. The Hon'ble Supreme Court, accordingly, ordered. The person who succeeded before the Hon'ble Supreme Court in that case was a blind person which must be kept in mind.

The Legislature in section 22 of the Act did not stop by saying that there should be reservation of 3% in the

vacancies for disabled persons; they categorised disabled persons and said that each such category shall be entitled to 1% reservation. They also gave the chronology of such category. The first category has been identified as blindness or low vision. Therefore, the first 1%, out of the 3% of vacancies to be reserved for disabled persons, is to be supplied by a person suffering from blindness or low vision. The second 1%, out of the 3% of such vacancies, should be supplied by a person suffering from hearing impairment and the last 1% by a person suffering from locomotor disability or cerebral palsy. In the case before the Supreme Court, referred to above, the appellant being a blind person, was entitled to the first post available for disabled persons; whereas the appellant in the case at hand is entitled to the third post available for disabled persons. That is the distinction. In the circumstances, and despite holding that one more post was available for disabled persons, we are unable to issue a direction for appointment of the appellant.

We, however, direct the State as follows:

- i) to identify posts in all establishments which can be reserved for persons with disabilities. Those

posts must not be less than 3% of the posts available in each of the establishments of the State which have not been exempted;

- ii) while identifying those posts, it must be ascertained whether the vacancies therein can be supplied by a person suffering from blindness / low vision, or whether the same can be supplied by a person suffering from hearing impairment or whether the same can be supplied by a person suffering from locomotor disability / cerebral palsy;
- iii) the posts to be so identified must not, in any case, be less than 1% of the total posts available in such establishments which can be supplied by persons suffering from blindness / low vision, and, similarly, at least 1% of such posts to which can be supplied by persons suffering from hearing impairment and at least 1% of such posts which can be supplied by persons suffering from locomotor disability / cerebral palsy;
- iv) not exceeding 3 years, a review shall be made in each such establishment of the State to re-identify such posts and to update the same taking into consideration the development in technology;

- v) the first of the 3% of the total vacancies should be supplied by a person suffering from blindness / low vision; the second by the person suffering from hearing impairment and the third by the person suffering from locomotor disability / cerebral palsy;
- vi) reservation for persons suffering from disability shall be horizontal and, accordingly, a disabled person shall fill up that post which is available in the category to which he belongs, but as a disabled person; and
- vii) deficiencies in each establishment shall be supplied soon and directions as above, would be complied with before making new direct recruitments.

With the directions as above, we dispose of the appeal.

(Mansoor Ahmad Mir)

Judge

(Barin Ghosh)

Chief Justice.

Jammu,

.03.2009

A. H. Khan, JR.