

SUPREME COURT OF INDIA

Pradip Kumar Maity

Vs.

Chinmoy Kumar Bhunia

(2013) 8 SCALE 0205

(Altamesh Kabir CJ, Anil R.Dave and Vikramjit Sen JJ.)

01.07.2013

JUDGEMENT

Vikramajit Sen,J.

1. Leave granted. We have heard counsel for the parties in detail and hence proceed to deliver judgment.

2. The dispute pertains to the employment of the Appellant and Respondent no. 1 in the Group 'D' staff (non-teaching staff) of the Nazirbazar Harendranath High School, Nazirbazar, Medinipur, West Bengal (Respondent no.6). Pursuant to holding of the interviews, the Appellant was placed first in the merit list followed by the Respondent no.1 in second position. Respondent no.1, thereafter, challenged the appointment of the Appellant on the ground that he had crossed the permissible age prescribed for recruitment to this Group 'D' post even on the date when the interview was conducted and completed. However, the Appellant's contention is that he was entitled to relaxation in the maximum age as a consequence of his suffering from a hearing disability to the extent of sixty per cent (60%). The factum of his said affliction is not in dispute, although it has been faintly argued by Mr. Sanyal, learned counsel for Respondent no.1 that the applicable Rules and Regulations contemplate complete loss of audio powers for favorable treatment; and that the forty per cent (40%) disability, indubitably prescribed by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 [hereafter referred to as, 'Disabilities Act'] does not come to the succor of the Appellant. Despite the fact that the Appellant had not succeeded in the writ proceedings before the learned Single Judge and thereafter had also failed in his Appeal before the Division Bench of the Calcutta High Court, he appears to have been in the employment of Respondent no.6 throughout the duration of litigation and remained so on 01.10.2007 when the maintenance of status quo came to be ordered in the present proceedings. We may also underscore that concurrent findings are against the Appellant The Disabilities Act was passed by Parliament in the wake of the Proclamation that came to be adopted by the Economic and Social Commission for Asian and Pacific Region (ESCAP), the Endeavour and expectation of which was the attainment of full

participation and equality to persons with disabilities in the matter of protection of their rights, provision of medical care, education, training, employment and rehabilitation. Keeping in perspective that India was a signatory to the said Proclamation, necessitating its wholesome and holistic implementation, the Disabilities Act was introduced in the Lok Sabha on 26th August 1995 and came into force on 7th February 1996. The Disabilities Act, inter alia, ordains in Chapter VI, provisions relating to the employment of disabled persons through the device of reservation of posts, establishment of Special Employment Exchanges, the formulation of schemes for ensuring employment of persons with disabilities and the reservation and setting apart of not less than three per cent (3%) seats in Government educational institutions and other educational institutions receiving aid from Government etc. etc. The Disabilities Act also specifically stipulates that if in any recruitment year any vacancy cannot be filled up due to no availability of persons with disabilities, i.e., (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy, such vacancy shall be carried forward. If in the succeeding year the vacancies in the three allegories cannot yet again be filled up by an eligible candidate, the vacancy must first enure to the benefit of any of the other two categories, and only in the event that there are no candidates even there from, can the employer fill up such segregated or reserved vacancy by a general appointment. It is also noteworthy that the reservation of three per cent (3%) is a minimum requirement. So far as Government as well as aided educational institutions, also poverty alleviation schemes of appropriate Government and local authorities are concerned, the statute mandates a three per cent reservation for the benefit of persons with disabilities; failure to implement these provisions can be remedied by issuance of a writ of mandamus. The two sections', i.e., Sections 39 and 40 containing these stipulations are preceded by Section 38, which is germane to the conundrum at hand. It postulates that the appropriate Government and local authority shall formulate schemes for ensuring employment of persons with disabilities and such schemes may provide for the relaxation of upper age limits. Owing to the use of the word 'may' in the section, the question that immediately arises is whether even in the absence of an implemental scheme, can a superior Court issue an inviolable order with regard to the relaxation of upper age limits. *Chinnamarkathian v. Ayyavoo*¹ holds that whenever the word 'may' is employed in a statute it confers discretion to do something. It seems to us that in instances where the Legislature uses the words 'shall' and 'may' in close proximity of each other, as in Section 38, there is virtually no room to construe the word 'may' as mandatory. Indeed, the decisions in this context dwell predominantly on the scope of interpreting "shall" as merely obligatory, whereas the nodes in hand is the obverse. G.P. Singh in his treatise titled the 'Principles of Statutory Interpretation' remains steadfast in the opinion that when both words are used in the same Section, 'shall' imposes an obligation or imperative whilst 'may' connotes directive or discretionary power. The Disabilities Act should, therefore, explicitly postulate compulsory relaxation of age of candidates suffering from any of the statutorily recognized disabilities. The absence of this feature has become conspicuous by the dispute in hand. We think that the failure to mandate age relaxation is a lacuna in the legislation since it fails to comprehensively put in place affirmative action in favour of the disabled sections of our society with regard to employment in even the non-reserved posts. The critique that this would unfairly increase the percentage of

reservation does not pass muster since so far as non-reserved posts are concerned, the appointment has to be solely according to merit. Age relaxation enables disabled persons, otherwise outside the orbit of employment to general posts, an additional opportunity of being considered for such post. It is dissimilar to the regime of a reserved post where only a person in the postulated group is eligible for appointment. One readily recalls the self-deprecation of the saint who realized the triviality of his lament for not possessing a pair of shoes on his encountering a person who had no feet. When a relaxation of age is extended to the disabled, the post remains to be nevertheless filled up by adherence to merit.

3. Before departing from this skeletal narration of the provisions of the Disabilities Act, suffice it to state that Section 2(t) defines a 'person with disability' to mean a person suffering from not less than forty per cent of any disability as certified by a medical authority. Therefore, we cannot accept the argument of Mr. Sanyal that this definition would not ensure to the benefit of the Appellant for the reason that the Rules / Government Orders extant in the State of West Bengal speak to the contrary inasmuch as they postulate complete disability. On the coming into force of the Disabilities Act on 7th February 1996, the said definition in Section 2(t) thereof shall apply notwithstanding any State legislation or Rules irreconcilable or repugnant thereto. This proposition of law is too well settled to tolerate any explanation again; doing so would needlessly lead to prolixity. However, despite this legal posit, as will presently be seen, relief will still not be available to the Appellant. ;

1982 (1) SCC 159