

SUPREME COURT OF INDIA

Rajasthan High Court, Jodhpur

Vs.

Neetu Harsh

C.A.No.6696 of 2019

(R.Banumathi and A.S.Bopanna,JJ.,)

29.08.2019

JUDGMENT

A.S.Bopanna,J.,

SLP(Civil)No.18973 of 2017

1. Leave granted.

2. The appellants herein were the respondent Nos. 2 and 3 in the writ petition bearing DBCWP No.692 of 2017 which was considered and disposed of by the High Court of Judicature for Rajasthan at Jodhpur. Through the order dated 04.05.2017 the writ petition was allowed and the appellants herein were directed to consider the candidature of the private respondent herein for appointment on the post of Civil Judge-cum-Judicial Magistrate in the Civil Judge Cadre against the two vacancies reserved for disabled candidates in the Rajasthan Judicial Service Examination, 2016 and provide appointment as per merit of said category, if she is otherwise eligible. The said order and direction of the High Court is assailed herein primarily on the contention that the private respondent herein had not applied against the vacancies advertised for the physically challenged category but had applied as a General Category candidate and as per the merit list she was not entitled to be appointed as there were more meritorious candidates in the General Category and the appointment having been made, the process has been completed.

3. The brief facts are that the appellants herein had issued a Notification calling for applications for recruitment to the post of Civil Judge-cum-Judicial Magistrate in the Civil Judge Cadre for 72 posts. Among the same, two posts were kept reserved for persons with disabilities. The private respondent herein had responded to the said Notification but filed the application indicating her category as "General" and in the column provided for indication of the claim under the Differently Abled Category had mentioned "No". Hence, for all purposes private respondent herein was considered as a General category candidate and had accordingly appeared for the preliminary examination. On being declared successful she had appeared for the main examination and thereafter in the interview also

as General category candidate without reliance being placed on the disability certificate. The result was declared on 15.11.2016. In the said list the marks obtained by all the candidates were disclosed. The petitioner had obtained 136 marks and she was placed at Serial No.137. As against the two vacancies for the differently abled persons, one of the applicants who had obtained 138 marks was at Serial No.57. It is subsequent thereto the private respondent made a representation dated 28.11.2016 with a request to consider her candidature under the category for Differently Abled persons as visually impaired and to provide the appointment. The said representation being taken note, the private respondent was informed that her candidature under the category of Differently Abled persons cannot be accepted. It is in that view the private respondent claiming to be aggrieved filed the writ petition seeking direction for consideration of her request. While seeking consideration under the Differently Abled category the claim is that the private respondent is having 80% disability as indicated in the certificate dated 05.07.2010 issued by the competent doctor.

4. The High Court while taking note of the contention, though had passed an elaborate order the main consideration appears to be that though two vacancies were kept reserved for Differently Abled persons, only one vacancy is filled in by way of providing appointment to the candidate named Ms. Renu Motwani at Serial No.57. In that regard, though there is no definite material on record the High Court has also observed that in the earlier examination for the same post held in the year 2013 the private respondent herein was allowed to appear in the physically handicapped category because she was having 80% disability. In that view, though it is not in dispute that the private respondent had indicated her category as "General" in the application, the High Court was of the view that even though a mistake was committed by the candidate, the representation submitted by her subsequently ought to have been considered sympathetically and in this regard it was observed that the object of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the "PWD Act") should have been kept in view. In that regard the position of law relating to the consideration under the said Act was taken note and the provisions contained therein not to fill up the vacancies by any other category but to carry forward the same was also taken into consideration. In that background the consideration required herein is as to whether the High Court was justified in its approach in applying the proposition of providing opportunity to Differently Abled Persons as provided under PWD Act, notwithstanding the fact that the issue presently related to the appointment of the Judicial Officer in the backdrop of the provisions contained in the Rajasthan Judicial Service Rules governing the same and the vacancy is filled up. Further, the issue also is as to whether the direction is justified when no application was filed seeking benefit of the reserved category.

5. We have heard Ms. Meenakshi Arora, senior advocate for the appellants, Mr. Pallav Shishodia, senior advocate for the private respondent and perused the appeal papers.

6. The Notification dated 12.03.2016 issued by the appellants herein inviting online application in the prescribed format for the competitive exam for the direct recruitment to Civil Judge Cadre, 2016 relating to the reservation and the procedure for consideration of Differently Abled Persons reads as hereunder:

Total No. of Posts	Year	Reserved			Persons with disabilities (Differently abled)	
70	Current Vacancies	37 out of which 11 posts reserved for woman	11 out of which 3 posts reserved for women	8 out of which 2 posts reserved for woman	14 out of which 4 posts reserved for woman	Out of 70 vacancies, 2 posts reserved for persons with disabilities
2	Backlog	-	-	2 (Backlog)	-	-

“3. Regarding the reservation for disabled persons:

A. According to Rajasthan persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 2011, aforesaid posts shown to have been reserved for disabled persons are reserved for applicants having Locomotor Disability and Cerebral Palsy (L.D & C.P) and visual impaired. Aforesaid reserved posts have been reserved for applicants having under mentioned disabilities. Locomotor Disability And Cerebral Palsy (L.D. & C.P)

O.L. - One leg affected (R or L)

B.L. - Both legs affected (Mobility not to be restricted)

O.A. - One Arm affected (R or L)

Visual Impaired (Blind & Low Vision)

B - Blind (Mobility not to be restricted)

LV - Low Vision (Mobility not to be restricted)”

“5. In case of non-availability of fit and suitable candidate for the posts reserved for women and disabled candidates, these posts shall be filled as per the procedure and manner prescribed in Rajasthan Judicial Services Rules, 2010 (as amended).

6. A married woman candidate in order to receive benefit of reserved category shall have to present caste certificate (S.C./S.T./O.B.C.) issued on the basis of the name, place of residence and income of her father.”

“5. Exam fee:

Applicant shall have to pay exam fee in accordance with his/her category.

A. Exam fee for the candidates belonging to general category, creamy layer from backward class/special backward class/applicants from other States shall be Rs.250/-.

B. Examination fee for the candidates of non-creamy layer from other backward class/special backward class shall be Rs.150/-.

C. Examination fee of Candidates belonging to scheduled caste/scheduled tribe of Rajasthan and all eligible disabled applicants shall be Rs.50/-.”

7. In response to the above said Notification the private respondent submitted her application and in Column 2.4 - ‘Category’ it was indicated as “General”, in Column 3.1 - ‘Persons with Disability’ - it was indicated as “No”. Further in the declaration it is stated that the private respondent has carefully read the terms and conditions of the Notification, instructions and relevant rules before filling up the application form online and to abide by them. It is also declared that the informations made are true, complete and correct. In the Column for payment of the application fee the sum of Rs.250/- prescribed as the fee for General Category Candidate along with the commission charges of Rs.10/-, in all amounting to Rs.260/- is paid. Pursuant to the application being in order the admission card was generated providing the Roll No.5046 and the category was indicated therein as “General”. It is on the said basis the private respondent had appeared for the preliminary examination, main examination and the interview. Based on the same the statement of marks of all the candidates in the order of merit was published on 15.11.2016. It is only thereafter the private respondent made a representation dated 28.11.2016 wherein she claims that she is visually impaired more than 80% and the Medical Board issued the disability certificate dated 05.07.2010. It is further indicated in the representation that she had inadvertently not mentioned the physically handicapped category in the application form. She has also stated that during the previous year she had appeared as a candidate under the category of Persons with Disabilities and therefore she be considered against the other vacant post.

8. The learned senior counsel for the appellants has contended that the private respondent did not make a claim under the quota for the category of Differently Abled Persons in the application and the claim presently made is merely because only one of the posts was filled up by a Differently Abled Person with locomotor disability and the other post if there was a claim would have been for visually impaired and as such the private respondent is claiming visual impairment at this stage. As per the Rajasthan Judicial Service Rules, 2010 the unfilled seat will have to be filled up in accordance with the normal procedure and, such vacancy will not be carried forward to the subsequent year. In that circumstance, it is contended that out of the vacancies which was reserved for Differently Abled Persons, the second vacancy which was available to a visually impaired person has been filled in by a more meritorious candidate from the General category in the absence of a visually impaired candidate, which is the normal procedure referred to in the Rules.

9. The learned senior counsel for the private respondent on the other hand has made a detailed reference to the provisions of the PWD Act, 1995, more particularly to the definitions as contained in Sections 2 (b) to (e), (o), (p), (t) as also to Sections 18 to 32, 33 and 36 as contained therein.

10. However, we do not find it necessary to advert more in detail to the said provisions

since in the instant case it is not as if no reservation for Differently Abled Persons was made in the Recruitment Notification concerned nor is it a case where the Recruitment Notification is under challenge on the ground of not providing reservation. Further the decisions relied upon by the learned senior counsel for the private respondent in the case of Government of India through Secretary & Anr. vs. Rani Prakash Gupta (2010) 7 SCC 626; in the case of Union of India & Anr. vs. National Federation of the Blind (2013) 10 SCC 772 and in the case of Rajeev Kumar Gupta & Ors. vs. Union of India & Ors. (2016) 13 SCC 153, wherein this Court has addressed the issues relating to backlog of vacancies, the employer having not identified the post, the duty cast on the Government and the statutory bodies as per cadre strength and the number of posts to be reserved, would not be of assistance since the very writ petition in the instant case before the High Court was not predicated on the basis that the Notification issued in the year 2016 did not make enough provisions for Differently Abled Persons. Further though the learned senior counsel for the private respondent has contended before us that enough representation was not given from the earlier years and the unfilled vacancies of the earlier year were also required to be carried forward, the same was also not the contention before the High Court nor has the private respondent herein challenged the said Notification dated 12.03.2016 on those grounds by offering herself as a candidate under the Category of Differently Abled Persons.

11. However, one aspect of the matter which is to be taken note is with regard to the contention of the learned senior counsel for the private respondent that the mandamus issued by the High Court is sustainable since the vacancy could not have been filled up by any other category but ought to have been carried forward and in that circumstance if the provision as contained in Section 36 of PWD Act is kept in view, the action of the appellants herein in operating Rule 10(4) of the Rajasthan Judicial Service Rules, 2010 would not be sustainable. It is, therefore, contended by the learned senior counsel for the private respondent that in such circumstance in any event one post reserved for the Differently Abled person in the selection for the year 2016 should have been kept vacant to be carried forward to the next recruitment for want of candidate and in that background keeping in view Section 36 of the PWD Act, instead of carrying forward to the next recruitment the same being ordered to be filled up by an available Differently Abled person is justified.

12. In order to appreciate this aspect of the matter it would be necessary to take note of the provision as contained in Section 36 of the PWD Act, 1995 which reads as hereunder:

“Vacancies not filled up to be carried forward - Wherein any recruitment year any vacancy under section 33 cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability.

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.”

13. In that backdrop what is to be taken note is also the Rajasthan Judicial Service Rules, 2010 framed under the Notification dated 18.01.2010 which is in exercise of the power conferred by Article 233 and 234 read with proviso to Article 309 of the Constitution of India. The Notification reads as hereunder;

“ DEPARTMENT OF PERSONNEL (A-Gr.2) NOTIFICATION Jaipur, January 18, 2010

G.S.R.81 - In exercise of the powers conferred by Article 233 and 234 read with proviso to Article 309 of the Constitution of India and all other powers enabling him in this behalf, the Governor of Rajasthan in consultation with the Rajasthan Public Service Commission and the High Court of Judicature for Rajasthan hereby makes the following rules regulating recruitment to the posts in, and the conditions and other matters related to the service of persons appointed to the Rajasthan Judicial Service, namely:- ”

In the said Rajasthan Judicial Service Rules, Rule 10(4) reads as hereunder:

“(1) x x x x x x

(2) x x x x x x

(3) x x x x x x

(4) Reservation of posts for Persons with Disabilities as defined in the Rajasthan Employment of Disabled Persons Rules, 2000, shall be 3% category-wise which shall be horizontal and shall be available only at the time of initial recruitment. In the event of non-availability of eligible and suitable persons with disabilities in a particular year, the vacancy so reserved for them shall be filled in accordance with the normal procedure and such vacancies shall not be carried forward to the subsequent year. Provided that the total number of posts reserved for all such categories in a direct recruitment shall not exceed 50% of the total vacancies.”

14. The Rule therefore framed is under the provisions of the Constitution of India which relates to the selection of the Judicial Officers, for which the yardsticks could be laid down in the Rules. On this aspect of the matter the decision relied on by the learned senior counsel for the appellants in the case of *V. Surendra Mohan vs. State of Tamil Nadu & Ors*¹. would be apposite. In the said case, this Court in a matter relating to the selection for the post of Civil Judge (Junior Division) to the Tamil Nadu Judicial Service was confronted with a situation whereunder the Notification prescribed the percentage of disability at 40 to 50 % for partially blind and partially deaf for selection. The candidate

who had assailed the action possessed the disability certificate mentioning the disability at 70 %. Since under Section 33 of the PWD Act, 1995 no restriction on disability to the extent of 40 to 50 % can be put, the restriction on disability as per the Notification was assailed before the Madras High Court which culminated in the appeal before this Court. In that context while considering the matter, this Court had adverted to the issue as to whether the restriction on disability is in breach of the provisions of the PWD Act, 1995 and is it to be set aside. In that context, the validity of the Tamil Nadu State Judicial Service (Cadre and Recruitment) Rules, 2007 vis-a-vis the provisions of the PWD Act, 1995 was examined and the power under which the Rules 2007 (which is akin to the Rajasthan Rules, 2010) being framed, as empowered under the provisions of the Constitution was taken note with reference to the earlier judgments of this Court. Though the said decision is not in relation to Section 36 of the PWD Act, 1995, prima facie when it is noticed that Rule 10(4) is contained in the Rules, 2010 framed in exercise of the powers conferred under Article 233 and 234 read with proviso to Article 309 of the Constitution of India, the Rule being operated will be justified. As already noted, neither the notification nor the Rule were under challenge. In terms thereof the appellants on taking note that there is no other application/applicant seeking the appointment under the category reserved for Differently Abled Persons has filled up by selecting the next meritorious candidate from the other category. Hence in a circumstance where no challenge is laid to the Rule the action to that extent would be justified.

15. That apart, though it is contended by the private respondent that it was a mistake in indicating “No” against the Column 3.1 - ‘Person with Disability’, what is necessary to be taken note is that against Column 2.4 - ‘Category’, it has been stated as “General”. That apart the examination fee fixed for General candidates is Rs.250/- while for the eligible disabled applicant it is fixed at Rs.50/-. The private respondent in addition to indicating her category as ‘General’ has paid the fee of Rs.250/- as applicable. Further, though the disability certificate dated 05.07.2010 is presently relied upon, there is no material to indicate that the same was enclosed along with the application or produced till the completion of interview. On this aspect, to contend that the private respondent cannot make a contrary claim, the learned senior counsel for the appellants herein has relied on the decision in the case of *J&K Public Service Commission vs. Israr Ahmad*² wherein it is held in para 5 as hereunder:

5. We have considered the rival contentions advanced by both the parties. The contention of the first respondent cannot be accepted as he has not applied for selection as a candidate entitled to get reservation. He did not produce any certificate along with his application. The fact that he has not availed of the benefit for the preliminary examination itself is sufficient to treat him as a candidate not entitled to get reservation. He passed the preliminary examination as a general candidate and at the subsequent stage of the main examination he cannot avail of reservation on the ground that he was successful in getting the required certificate only at a later stage. The nature and status of the candidate who was applying for the selection could only be treated alike and once a candidate has chosen to opt for the category to which he is entitled, he cannot later change the status and make

fresh claim. The Division Bench was not correct in holding that as a candidate he had also had the qualification and the production of the certificate at a later stage would make him entitled to seek reservation. Therefore, we set aside the judgment of the Division Bench and allow the appeal. No costs.

16. Further the decision in the case of *Registrars General, Calcutta High Court vs. Shrinivas Prasad Shah & Ors*³. is relied on, wherein this Court has disallowed the claim in a case where in the application the category of reservation was indicated but certificate was not produced and the fee applicable to general candidate was paid. In addition, the learned senior counsel for the appellants herein also refers to the inherent contradictions in the claim of the private respondent apart from the fact that the claim for consideration under the category reserved for Differently Abled Persons is not made.

17. In that regard it is pointed out that even as per the disability certificate dated 05.07.2010 sought to be relied on at present, the description of permanent disability is shown as Hemiplegia - Non-functional hand. It is in that background pointed out that though that is the nature of disability indicated therein which will be locomotor disability, in the representation dated 28.11.2016 which was made belatedly the private respondent has claimed that she is visually impaired, more than 80% and the reference made is to the same disability certificate dated 05.07.2010. The learned senior counsel for the private respondent no doubt has referred to an article relating to Hemiplegia wherein reference is also made to the difficulties in seeing. The very nature of the contention would indicate that in the instant facts the claim in the application under the category should have been made and the disability certificate was required to be produced along with the application since the nature of the disability was a matter which was to be considered by the recruiting authorities concerned, if need be on medical examination. If visual impairment as a consequence of Hemiplegia was to be considered, the percentage of disability by visual impairment will also be relevant and the same was required to be determined at the appropriate stage.

18. Therefore, in a circumstance where the issue is whether the disability claimed is locomotor disability or visual impairment and the same itself being a question to be debated, it would not be possible for the Court to act as an expert and in such circumstance a mandamus to consider the same in a particular manner would not also be justified. It is no doubt true that the employment opportunities to the differently abled persons is to be provided as a matter of right when a case is made out and there is no need for sympathetic consideration. However, in the instant facts when the claim was not made and there are debateable issues, though we could empathise with the cause of the private respondent the nature of direction issued by the High Court in any event cannot be considered as justified. This is more so, in a circumstance where the appellants had acted in terms of the Rajasthan Judicial Service Rules, 2010 when no other claim was available and had appointed a candidate from the other category and when such appointment has been made, disturbing such candidate at this juncture also will not be justified. Hence for all the afore stated reasons, we find the order dated 04.05.2017 passed by the High Court to be unsustainable and the same is accordingly set aside.

19. Accordingly, the appeal is allowed with no order as to costs. All pending applications stand disposed of.

Judgment Referred.

¹(2019) 4 SCC 0237

²(2005) 12 SCC 0498

³(2013) 12 SCC 0364