

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

W.P.(C) No. 315/2011

%

6th December, 2013

AMITA

.....Petitioner

Through: Mr. Pankaj Sinha and Ms. Nupur
Grover, Advocates.

VERSUS

INSTITUTE OF HOME ECONOMICS & ORS.

..... Respondents

Through: Ms. Beenashaw Soni, Adv. for R-1.

Mr. Ranjeet Kumar, Adv. for R-2.

Mr. Sourik Mukherjee and Mr.
Saurabh Banerjee, Advocates for R-3.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition, petitioner seeks directions from this Court for quashing of the appointment made of the respondent no.2- Ms. Sharmila Rathee, an orthopedically handicapped candidate, as Lecturer/Assistant Professor to the post for the Department of Bachelor of Elementary Education in the respondent no.1/Institute of Home Economics. Before me, four grounds are urged on behalf of the petitioner for quashing of the appointment of the respondent no.2. First ground which is urged is in terms WPC 315/2011

of Sections 33 and 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short 'the Act') by contending that respondent no.1 could not have appointed to the post reserved for Visually Handicapped (VH) person an Orthopedically Handicapped person. It is argued that interchange of category is not permissible as per Section 36 of the Act except from the third year whereas interchange has been done in the first year itself. The second argument which is urged is that once the action of respondent no.1 is legally incorrect, i.e the respondent no.1 could not have legally appointed the respondent no.2 in violation of Sections 33 and 36, any delay in filing of the writ petition cannot prejudice the petitioner and the appointment of the respondent no.2 has to be declared illegal and quashed. The third argument which is urged before me on behalf of the petitioner is that respondent no.1 by the impugned advertisement wrongly restricted the requirement of 55% marks at the Master's level for the subjects only of Social Science and Language for VH persons although the VH persons were sought to be appointed in the separate education stream which is a specialized subject, and for which stream the petitioner has the necessary qualification because petitioner has an M.Ed degree with more than 55% marks from a recognized institute. The fourth argument which is urged on behalf of the petitioner is that once the

petitioner has M.Phil qualification, there is no requirement for the petitioner to have 55% marks at the degree level.

2. For the purpose of appreciation of the arguments urged on behalf of the petitioner, it is necessary at this stage to reproduce and refer to Sections 33 and 36 of the Act and which read 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) hearing impairment;
- (iii) locomotor 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 departmental 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.

36. Vacancies not filled up to be carried forward-Where in 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 be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.”

3. The first two arguments which are urged on behalf of the petitioner can be taken together and are accordingly being decided together.

4. A reading of the aforesaid sections of the Act together does show that there are three separate categories of handicapped persons as per Section 33 and as per Section 36 so far as the first year is concerned, if the handicapped person of a particular category is not available, then the vacancy has to be carried forward for the next year. Section 36 then provides that in the second year (and not in the third year as argued by the petitioner) if the specific handicapped/disabled person under a particular category under Section 33 is not available, then another disabled/handicapped person of a different category as stated in Section 33 can always be accommodated in the post in question. In any case, this I am only stating to complete the narration for the purpose of decision because the issue in the present case will not turn on whether it is in the second year or in the third year(as argued by the petitioner) that interchanging can be done because in the present case it

could not be disputed before me on behalf of respondent no.1 that the interchange was done in the very first year itself, however, the interchange for a VH person to an orthopedically handicapped person is sought to be justified on the ground that there were many posts which were available and since in spite of repeated endeavours posts could not be filled in of the handicapped persons, thus, respondent no.1 appointed respondent no.2/orthopedically handicapped person against the post advertised for a visually handicapped person.

5. In my opinion, the argument which is urged on behalf of the respondent no.1 that they could interchange the post in the first year itself, and there was no need of carrying the vacancy for the second year on the ground that there were many posts which were available for being filled in of handicapped persons, the same is a misconceived argument because if such an argument is permitted, the same will violate the categorical language of Section 36 of the Act as per which in the first year if the specified handicapped category person is not available, vacancy of that specified disabled category will have to be carried to the next year. Therefore, if I was to go as per the language of Sections 33 and 36, and provided the other issues were also held in favour of the petitioner, then petitioner would have

been granted the relief because respondent no.2 was appointed by interchange of the category in the first year itself. However, the relief claimed of quashing of the appointment of the respondent no.2 cannot be granted because the writ petition is barred by delay and laches and the reasoning for which I am giving in detail hereinafter.

6. The facts which emerge from the record are that the advertisement in question for the post was issued on 2.6.2009. Pursuant to this selection process, the respondent no.2 has been appointed by respondent no.1 in January, 2010. The writ petition however has been filed only one year later in January, 2011. The issue is that the respondent no.2 having got employment, and having worked for one year, whether the writ petition should be allowed and vested rights which the respondent no.2 has got by appointment should be negated by quashing of her appointment on the ground of violation of Section 36 of the Act by the respondent no.1.

7. At this stage, I may also refer to another argument being the third argument because that argument will also have to be rejected on the ground of delay and laches, and which is the argument that respondent no.1 has wrongly restricted the appointment of Lecturers/Assistant Professors in the Department of Bachelor of Elementary Education only to persons having

Social Science and Language in post graduation degrees, although, appointment is being made of Lecturers/Assistant Professors in another specialization of education for which M.Ed degree is sufficient as per serial no.9(iv) of the subject advertisement dated 2.6.2009.

8. It is an undisputed proposition of law, and for this purpose I need not refer judgments, that if a thing has to be done in a particular manner the same should be done in that particular manner and if the required thing is not done in a particular manner, the action is illegal and has to be quashed. However, this doctrine is necessarily conditioned by the fact, and more so with respect to exercise of extraordinary and discretionary jurisdiction under Article 226 of the Constitution of India, that a person who claims to be aggrieved approaches the Court either within the limitation period or so far as a writ petition under Article 226 is concerned with sufficient amount of alacrity ie without delay and laches so that in the intermediate period no third party rights come into existence which will then have to be extinguished. No doubt, a legal right is always enforceable, however, that legal right unless exercised in accordance with law and as per the time and doctrine prescribed by law requiring necessary expedition, then, such legal right claimed can be lost. It is not as if that the legal rights can never be lost

or have at all times and always to be enforced by Courts, much less while exercising discretionary jurisdiction under Article 226 of the Constitution of India.

9. I cannot agree with the arguments urged on behalf of the petitioner that delay of one year cannot make a difference on the ground that once the required thing ought to have been done in a particular manner and was not done in a particular manner and hence the impugned action must fall, inasmuch as, if I accept this argument then why not a period of one year but also a period of 2 years or any larger period and so on because such larger periods can be argued to be not material for justifying the non-cancellation of appointment of respondent no.2. However, as already stated above, legal rights if arise, unless they are exercised at the proper time, such legal rights get destroyed on account of creation of third party rights in the interregnum. Since petitioner has approached the Court with delay and laches, in the pecuniary facts of this case I hence refuse to grant relief to the petitioner for quashing an appointment of respondent no.2, another disabled person. The first three arguments urged on behalf of the petitioner are rejected for the reason that I cannot believe that petitioner should have kept quiet although the advertisement was issued in June, 2009, petitioner would have well

known if the petitioner was diligent that interviews would have been conducted thereafter on the due dates in January, 2010, that the selection process would have been completed and the appointments would have been given within a short time thereafter. In my opinion, I cannot permit the petitioner to sleep over the matter from June 2009 till January, 2011 and in any case, not from June 2010 till January 2011 (when the writ petition was filed) inasmuch as the petitioner if would have taken steps at the right point of time, petitioner would have known that respondent no.2 has been appointed by the respondent no.1 in January, 2010. Inaction of the petitioner goes against the petitioner for rejecting the first three arguments urged on behalf of the petitioner.

10. In the present case, so far as the challenge by the petitioner to restriction upon the petitioner to have Master's degree percentage of 55% only for Social Science and Language subjects, though appointment is being made in an education stream, taking that this is the correct argument under law, but this argument ought to have urged by filing this petition when the advertisement was issued in June 2009 or before the final date for submission of the applications, and not in January 2011 ie after one year of completion of the selection process and appointment of the respondent no.2.

At the very best the filing of the petition to challenge the terms of the advertisement can be extended instead of June 2009 till the selection procedure/process is not completed in January 2010 only. Once however the selection process is completed by January 2010, Courts in January 2011 would rightly hesitate to set aside the selection procedure because it is because of the inaction of the aggrieved person/petitioner that the selection process was completed. This position becomes further accentuated in equity and law against the petitioner when after completion of the process there takes place appointment of a candidate. This accentuated position becomes far far more accentuated if the appointed candidate in fact has thereafter worked for as much as one year in the post and in which period possibly other opportunities may have come up and lost to the appointed candidate whose appointment is sought to be quashed.

11. The final argument which is urged on behalf of the petitioner is that once the petitioner in accordance with the requirement meets the M.Phil qualification, then petitioner is not required to have 55% marks at the post graduation level and imposition of such a criteria by the impugned advertisement is illegal. Once again, this argument not only would stand rejected in terms of the discussion given with respect to the first three

arguments urged on behalf of the petitioner because the same has been raised with delay, however, this argument is liable to be rejected even independently because it is for the employer to decide what are the terms and conditions which an employee must satisfy i.e what should be the eligibility criteria which an employee must satisfy for seeking employment is decided by the employer. Of course, such criteria will have to be in accordance with the rules which are laid down, however, unless the requirement is found to be beyond the rules i.e the respondent no.1 could not have prescribed a requirement of 55% marks at the post graduation level, respondent no.1 was entitled to put such an eligibility criteria. Merely because a candidate has a higher qualification cannot mean that for the lower qualification a specific criteria which is prescribed by the employer does not have to be met. It is open to the employer to require that a candidate must have consistent good academic record, and therefore, requirement of having 55% marks and above at the post graduation level cannot be avoided or exempted merely because the candidate has a higher qualification of M.Phil. I therefore reject the fourth argument as urged on behalf of the petitioner.

12. Finally I may state that there is another reason for me to not exercise my extraordinary jurisdiction under Article 226 of the Constitution of India.

This is because it has come out in course of hearing that respondent no.1 subsequently to the appointment of respondent no.2 in January 2010 in the subsequent year had issued an advertisement for appointment to the post of Visually Handicapped person in the stream of Resource Management, and the counsel for the petitioner does not dispute that petitioner met the eligibility requirement for applying to that post, however, it is urged that petitioner did not apply to the post only for the reason that this post was not reserved by the University for a Visually Handicapped person and therefore University could not have advertised the post for being filled in by a Visually Handicapped person. I have found this argument most unimpressive to say the least because how can a petitioner, who claims appointment as a Visually Handicapped person, be said to be prejudiced if the University is appointing Visually Handicapped persons to streams other than the streams which are already identified ie there is a proactive action of the University which benefits the candidates such as the petitioner. Such action taken by the University cannot be prejudicial for the petitioner. Merely because the post was not reserved in the roster point system for Visually Handicapped person does not mean that the same entitled the petitioner not to apply the post in question once University advertises for such a post by giving an additional stream for appointment to a Visually

Handicapped person and no one except the petitioner had challenged this action of the University. Therefore it is clear that petitioner had a further opportunity to seek appointment to the post of Visually Handicapped in the Resource Management category with the respondent no.1, and which she failed to avail of, and it is not a valid argument for the petitioner to contend that merely because the post was not an identified post in the roster point system for a Visually Handicapped person, hence the petitioner could have ignored the selection process for that post. As already stated, a beneficial action by extending appointment to a non-reserved category by giving the same to a Visually Handicapped person, cannot be said to have prejudiced in any manner to a person such as the petitioner.

13. In view of the aforesaid reasoning, the reliefs prayed for in the writ petition cannot be granted, and the same is therefore dismissed, leaving the parties to bear their own costs.

DECEMBER 06, 2013
ib

VALMIKI J. MEHTA, J.