

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5238 OF 2014

The Chief Executive Officer and another ... Petitioners
Vs.
Hanumant Malhari Kale and another ... Respondents

Mr. Vijay Killedar for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : 12TH FEBRUARY, 2015

ORDER :

Heard Mr. Killedar, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 09.05.2011 passed by the Competent Authority-cum-Commissioner for Persons with Disabilities, Maharashtra State, Pune (for Short 'Commissioner') in Complaint dated 06.07.2010 made by the respondent No.1 herein. By that order, the complaint made by respondent No.1 was allowed. The petitioners herein are directed to relax condition of minimum 90% passing marks and complete the prescribed selection process by appointing respondent No.1 on the post of Live Stock Supervisor. The relevant and material facts are as under.

3. By circular dated 29.10.2005 and communication dated 05.05.2006, the petitioners were directed to fill up the vacancies or posts reserved for the Persons With Disabilities (PWD). Government Resolution dated 14.01.2011 lays down 3% reservation in the posts for PWD whose disabilities are to the extent of at least 40%. Government Resolution dated 19.10.2007 lays down the conditions and procedure for filling up the posts in 'C' group by way of nomination by the District Selection Committee (Petitioner No.2 in the present case).

4. Mr. Killedar submitted that the Government Resolutions dated 19.10.2007 and 27.06.2008 lay down that PWD who apply for the post and appear for qualifying examinations conducted by District Selection Committee have to score 45% out of the total marks. As per the Circular dated 06.02.2010 issued by the Department of Rural Development and Irrigation, State of Maharashtra, out of total 200 marks, written examination and viva-voce is for 180 marks and 20 marks respectively.

5. Respondent No.1 made complaint to the respondent No.2 on 06.07.2010 being Complaint No.29 of 2010 inter alia contending that he was the only candidate who had applied for the post of Live Stock Supervisor in the category of PWD. Since he was the only suitable candidate, the petitioners ought to have appointed him after relaxing the condition of obtaining qualifying marks of 45% out of total marks. Mr. Killedar submitted that respondent No.1 was required to score minimum 90 marks out of 200 marks corresponding to 45%. Respondent No.1 however, scored 76.83 marks which comes to 38.42%, which is less than 45% qualifying marks. By the impugned order, the Commissioner has directed the petitioners to relax the requirement of 45% in case of the respondent No.1 and appoint him on the post of Live Stock Supervisor.

6. Mr. Killedar submitted that in the first place, the Commissioner has no power to relax minimum qualifying marks. He submitted that Section 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1955 (for short 'Act') lays down that vacancies which are not filled up have to be carried forward. In other words, even if, no suitable candidate is found, the vacancy is to be carried forward in terms of Section 36. Secondly, though Clause 22 of the Office Memorandum dated 29.12.2005 provides

for relaxation of standard of suitability, that will not include power to relax minimum qualifying marks. Even the Commissioner will have no power to direct the petitioners being the Appointing Authority to relax minimum qualifying marks. That apart, though the impugned order is passed on 09.05.2011, respondent No.1 has not approached the petitioners for implementation of the said order. He, therefore, submitted that the Petition requires consideration and impugned order deserves to be stayed.

7. I have considered the submissions advanced by Mr. Killedar. I have also perused the material on record. It is evident from the record that the advertisement was issued on 23.03.2010 for filling up 9 posts of Live Stock Supervisor. Out of these 9 posts, 4 posts were reserved for PWD. It is also material to note that 2 posts out of the 4 posts were filled in. Though 1 post was filled in by candidate with physical disability of visually impaired, he was subsequently found to be unfit. Thus, out of 4 posts reserved for PWD, the petitioners have filled in 2 posts and 2 posts are lying vacant.

8. Government of India, Ministry of Personnel, Public Grievances & Pensions Department of Personnel & Training had issued Office Memorandum on 29.12.2005 laying down reservations for PWD. The said memorandum sets out that with a view to consolidating the existing instructions, bringing them in line with the Act and clarifying certain issues including procedural matters, the instructions are issued with regard to the reservation for PWD in the posts and services under the Government of India. These instructions superseded all previous instructions issued on the subject so far. Clauses 22 and 29 thereof read as under:

“22. **Relaxation of standard of suitability:** If sufficient number of persons with disabilities are not available on the basis of the

general standard to fill all the vacancies reserved for them, candidates belonging to this category may be selected on relaxed standard to fill up the remaining vacancies reserved for them provided they are not found unfit for such post or posts. Thus, to the extent the number of vacancies reserved for persons with disabilities cannot be filled on the basis of general standards, candidates belonging to this category may be taken by relaxing the standards to make up the deficiency in the reserved quota subject to the fitness of these candidates for appointment to the post / posts in question.

29. All the Ministries / Departments are requested to bring the above instructions to the notice of all appointing authorities under their control.”

9. Principal Secretary to the State of Maharashtra issued circular / communication dated 05.05.2006 for implementing the guidelines issued in the Office Memorandum dated 29.12.2005 directing all the departments to fill up the posts reserved for PWD by 31.07.2006 and submit the report accordingly. General Administration of the State Government issued Government Resolution dated 27.06.2008, which lays down that while implementing clause 5 (2) of the Government Resolution dated 19.10.2007, candidates have to secure minimum 45% marks. Now, it is not in dispute that respondent No.1 scored 72.50 out of 180 marks in the written test and 4.33 out of 20 marks in viva-voce. Thus, respondent No.1 scored 76.83 marks out of total 200 marks corresponding to 38.42%. Mr. Killedar submitted that since respondent No.1 did not score minimum 45% marks in all, the Commissioner had no power to relax minimum qualifying marks.

10. It is not possible to accept this submission for more than one reason. In the first place, perusal of clause 22 extracted hereinabove clearly shows that if sufficient number of PWD are not available on the basis of the **general standard** to fill all the vacancies reserved for them, **candidates belonging to this category may be selected on relaxed standard to fill up the remaining vacancies reserved for them**

provided they are not found unfit for such post or posts. It is nobody's case that respondent No.1 is otherwise unfit for such post. The only grievance of the petitioners is that he did not score 45% marks. It is also not in dispute that 2 posts are lying vacant. In view of clause 22 read with clause 29 extracted hereinabove, the Appointing Authorities have the necessary powers to relax the standard of suitability. Since this was not relaxed by the Appointing Authority, respondent No.1 approached the Commissioner by filing complaint. In exercise of power under Section 62 of the Act, the Commissioner has directed the petitioners to implement the office memorandum by relaxing the minimum qualifying marks. Section 62 of the Act reads as under:

“62. Commissioner to look into complaints with respect to matters relating to deprivation of rights of persons with disabilities.- Without prejudice to the provisions of section 61, the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to-

- (a) deprivation of rights of persons with disabilities;
- (b) non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities, and

take up the matter with the appropriate authorities.”

11. If the submission of Mr. Killedar that minimum qualifying marks cannot be relaxed either by the Commissioner or by the Appointing Authority is accepted, the said clause 22 would be rendered otiose. The very object of issuing Office Memorandum dated 29.12.2005 will be defeated. Secondly, Section 62 of the Act extracted hereinabove empowers the Commissioner to look into complaints with respect to matters relating to deprivation of rights of PWD as also non-implementation of executive orders, guidelines or instructions issued by the Government or the local authorities for the welfare and protection of rights of PWD. For all these reasons, in my opinion, no case is made

out for invocation of powers under Article 227 of the Constitution of India. The Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab