

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2015/20TH KARTHIKA, 1937

OP(KAT).No. 39 of 2015 (Z)

AGAINST THE ORDER IN O.A.NO. 2453/2013 of KERALA ADMINISTRATIVE TRIBUNAL,
THIRUVANANTHAPURAM DATED 25-07-2014.

PETITIONER/RESPONDENT:

THE KERALA PUBLIC SERVICE COMMISSION,
REPRESENTED BY ITS SECRETARY,
PATTOM, THIRUVANANTHAPURAM.

BY ADV. SRI.P.C.SASIDHARAN, SC, KPSC

RESPONDENT/APPLICANT:

SAMMON K.S.,
KOCHUPURACKAL, SAMCRANTHI,
PERUMBAIKADU P.O.,
KOTTAYAM, KERALA-686 028.

BY ADVS. SRI.K.SHAJ
SRI.SAJJU.S
SRI.S.VISHNU (ARIKKATTIL)
SRI.RENJIT GEORGE
SRI.S.K.SUJITH KRISHNA

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING BEEN FINALLY HEARD ON
11-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.T.O.

OP(KAT).No. 39 of 2015 (Z)

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1- TRUE COPY OF THE O.A.NO. 2453 OF 2013 WITH ANNEXURES.
- EXHIBIT P2- TRUE COPY OF THE DETAILED REPLY STATEMENT BY THE COMMISSION HAS FILED.
- EXHIBIT P3- TRUE COPY OF REJOINDER FILED BY APPLICANT WITH ANNEXURES.
- EXHIBIT P4- TRUE COPY OF THE ORDER DATED 25-07-2014 ISSUED IN OA. 2453 OF 2013.
- EXHIBIT P5- TRUE COPY OF THE JUDGMENT IN T.A.NO. 6849 OF 2012.
- EXHIBIT P6- TRUE COPY OF THE JUDGMENT IN O.P.(KAT)NO. 4568 OF 2013.

RESPONDENT(S)' EXHIBITS:

- EXHIBIT R1(A): TRUE COPY OF THE ORDER OF THIS HONOURABLE COURT DATED 17.10.2014 IN O.P.(KAT) 31/2014.

//TRUE COPY//

P.S. TO JUDGE

St/-

C.R.

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

O.P.(KAT) No.39 of 2015

Dated this the 11th day of November, 2015

JUDGMENT

Surendra Mohan, J.

The Kerala Public Service Commission has filed this Original Petition, challenging Ext.P4 order of the Kerala Administrative Tribunal ('KAT' for short) in O.A.No.2453 of 2013, evidenced herein by Ext.P4. As per Ext.P4, the KAT has found that, the petitioner was not entitled to conduct (suitability) test in respect of the physically handicapped candidates who are considered for appointment to posts identified by the Government as suitable for the appointment of such physically handicapped persons.

2. The Respondent was an applicant for selection and appointment to the post of Assistant/Auditor (Category No.436/2012) in the Secretariat/P.S.C/Local Fund Audit etc., pursuant to a notification issued by the petitioner inviting applications for the same. The Respondent is a person who is suffering from 40% orthopaedic disability. He had produced

his disability certificate before the KAT along with the O.A. as Annexure-A1. The application was considered and he was included in Annexure-A6 probability list of candidates published by the P.S.C. He got 63 marks in the written test that was conducted and it was for the said reason that, he was included in the main list of probable candidates. Later on, he was called for a verification of the certificates and interview including the suitability assessment on 23.03.2013. When Annexure-A8 rank list was published on 08.04.2013, he was not included in it. His number was included under the heading "unsuitable" at the bottom of the said list.

3. It was in the said circumstances that, the Respondent had approached the KAT with O.A.No.2453 of 2013. According to the Respondent, he was not liable to be excluded for more reasons than one. It was contended that except asking him to write something on a paper, no other suitability test was conducted by the petitioner. It was further contended that, the Government having identified the post as "suitable for appointment of physically handicapped persons" it was not open to the petitioner to have conducted another suitability test and excluded the petitioner. It was contended

that, after the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the 'Disabilities Act', for short), it was for the appropriate Government to identify the posts to which physically handicapped persons could be appointed. Such an identification having been conducted by the appropriate Government, the petitioner had no authority to conduct a further suitability test.

4. The contentions of the Respondent were resisted by the petitioner pointing out that the authority to conduct a suitability test had been conferred on the basis of an order by the Government and is part of the general power to make selection and advise candidates for appointment to the notified posts. Therefore, it was contended that the action of the petitioner was justified and not liable to be interfered with.

5. The Administrative Tribunal considered the contentions of the parties and allowed the application of the Respondent finding that, the notified posts having been identified by the appropriate Government as one to which appointment of physically handicapped persons could be made,

it was not open to the petitioner to have conducted a further suitability test to override the same. The petitioner is aggrieved by the said order of the KAT.

6. According to Sri. P.C. Sasidharan, learned Standing Counsel who appears for the petitioner, the power to decide whether the applicant is suitable or not vests with the P.S.C. The suitability of a particular candidate for advice to the notified post would depend on the facts and circumstances of each case. The suitability is assessed with respect to the requirements of the notified post and varies with the nature of the post that is notified. Therefore, according to the learned counsel, the KAT seriously erred in denying to the petitioner such power which is a necessary concomitant of the Constitutional power to select and advise candidates to the posts notified by it. In view of the above, according to the learned counsel, Ext.P4 order of the KAT is unsustainable and liable to be set aside.

7. The learned counsel for the Respondent, Sri. K. Shaj, on the other hand, contends that the very same contention had been raised by the petitioner before this Court in O.P.(KAT) No.31 of 2014. Another Division Bench of this

Court had considered the contentions and had rejected them by its judgment dated 17.10.2014, a copy of which has been produced as Ext.R1(a) along with the Counter Affidavit filed by the Respondent. In view of the above, it is contended that this Original Petition is only to be dismissed, confirming the order of the KAT.

8. We have heard the learned counsel appearing for the respective parties at length. We have also considered the contentions advanced before us *in extenso*.

9. It is worth noticing that, the Respondent is a person who is presently working as a Lower Division Clerk at the Vijayapuram Panchayat. A copy of his appointment order is Annexure-A2 forming part of Ext.P1. He was appointed pursuant to an advise issued by the petitioner which is Annexure-A3. Annexure-A2 is dated 21.03.2013 and according to him, he has been working in the said post continuously ever since and discharging his duties without cause for complaint from any quarter. Annexure-A4 shows that, prior to his present appointment, he had been working as an Office Attendant, Grade-II in the Law Department, Government Secretariat, Thiruvananthapuram. In the face of

the above documents, the allegation of the Respondent that, his suitability for being advised to the notified post was not considered by the petitioner properly, assumes significance. However, it is not necessary for us to go into the above aspects, in view of the larger question that has been raised.

10. According to the petitioner, the P.S.C has the power to assess the suitability of a candidate for being advised for appointment to the notified posts. It is true that the P.S.C has the power to assess the suitability of a candidate for advise and appointment to the notified posts. However, the "suitability" that requires to be considered here is not relatable to the said power and is confined to a consideration as to whether the disability from which a candidate suffers renders him unsuitable for advise and appointment to the notified post. It is with respect to the above aspect that, we would have to be consider whether the P.S.C has power. The KAT has noticed that, the Government by G.O.(P) No.11/2009/SWD dated 10.02.2009 has identified the post of Assistant as suitable for the physically handicapped candidates of the categories "Orthopaedic - Upper Extremities (Minor), Lower Extremities, Deaf and Partially Blind." The post was identified

after the matter was examined by a High Level Committee and also a panel of doctors. Therefore, it has been held by the KAT that once the said post was identified as suitable for physically handicapped candidates, the P.S.C has no power to make a suitability assessment based on the powers conferred on it by an earlier order G.O.(P) No.158/73/PD dated 29.05.1973. This is for the reason that, the Disabilities Act had not been enacted at that time. With the coming into force of the said enactment, as per Sections 32 and 33, special provisions have been made for identification of posts which could be reserved for persons with disabilities and for reservation of such posts. Sections 32 and 33 of the Disabilities Act read as under:

"32. Identification of posts which can be reserved for persons with disabilities.--
Appropriate Government shall--

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

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 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."

11. As per the above provisions, it is the appropriate Government that has been empowered to identify the posts that could be reserved for persons with disabilities. Accordingly, the post of Assistant has been identified by the appropriate Government as suitable for the appointment of physically handicapped candidates. Once such an identification has been done by the appropriate Government in terms of the statutory provisions extracted above, the P.S.C does not and cannot be said to have any power to conduct a further suitability test to set at naught such statutory exercise. This Court finds support for the above proposition from the decisions of the two Division Benches of this Court.

12. In the judgment in '**Kerala Public Service Commission and another v. Sujith Kumar E.N.**' [ILR 2015 (4) Kerala 307], a similar contention put forward by the P.S.C

that it had the power to determine the suitability of a candidate for the test of his physical disability, has been rejected by this Court in the following words:

"18. x x x x x x x x
x x x x x x x x

The Government/Employer is very much satisfied that, such post could be filled up by a 'Blind person' as well, if otherwise qualified. As it stands so, there cannot be any further 'elimination exercise' by the P.S.C, with reference to the so-called 'suitability assessment', but for restricting such exercise to the requisite extent, so as to evaluate the 'inter se merit' among the different candidates, who contest for the post in question. This Court finds support in this regard from the view expressed in the decision reported in 2014 K.H.C 716 (supra)."

13. The issue has been considered by another Division Bench of this Court in the judgment dated 17.10.2014 in O.P. (KAT) No.31 of 2014, a copy of which has been produced as Ext.R1(a). In Ext.R1(a) also, it has been held that where the suitability of a particular post or posts for the appointment of physically handicapped persons has been identified under Sec.32 and reserved under Sec.33 of the Disabilities Act, the only power available to the P.S.C is to assess the *inter se* merit of the candidates. The P.S.C does not have a further power to

assess the suitability of the candidate for advise and appointment to the post *vis-a-vis* the physical disability suffered by him. To concede such power to the P.S.C would tantamount to negating the statutory protection that is guaranteed by the provisions of the Disabilities Act. Therefore, we are not prepared to accept the contentions of the P.S.C on the above aspects. We are satisfied that, Ext.P4 order has considered the issue in the proper perspective and has rightly granted relief to the Respondent. In view of the above, we find no grounds to interfere with Ext.P4, the impugned order.

For the foregoing reasons, this Original Petition is dismissed.

Sd/-

**K. SURENDRA MOHAN
JUDGE**

Sd/-

**SHAJI P. CHALY
JUDGE**

//true copy//

P.S. to Judge

St/-

11.11.2015