

AT CHANDIGARH

CWP No.27019 of 2014 (O&M)

Date of Decision: **November 03, 2015**

Krishan Kumar Malik and others

...Petitioners

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: - Mr.Ram Niwas Sharma, Advocate
for the petitioners.

Ms.Gaganpreet Kaur, AAG, Haryana.

Mr.Amar Vivek, Advocate
for respondent - HSAMB.

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HARINDER SINGH SIDHU, J.

The petitioners are 100% disabled being diagnosed with bilate blindness i.e. blind by both eyes corneal opacity with iris coloboma with nystagmus. They were appointed under disability quota in the respondent – Haryana State Agricultural Marketing Board and the dates of their initial appointment and promotion as Secretary-cum-Executive Officer are tabulated below:

Name of the petitioner	Date of initial appointment	Date of promotion as Secretary-cum-Executive Officer
Krishan Kumar Malik	14.3.2008 as Assistant Secretary	31.10.2013
Rajbir Singh	17.3.2008 as Assistant Secretary	31.10.2013

Smt.Lata	21.6.2005 Accountant. Promoted Assistant Secretary on 22.8.2007	as	26.3.2013
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The services of the petitioners are governed by The Haryana State Agricultural Marketing Board Service Rules, 1974 (hereinafter referred as 'the Rules of 1974') and they were promoted as Secretary-cum-Executive Officer under the said Rules. The petitioners were posted at the places of their convenience after taking their consent as the State Government had taken decision that as far as possible, the handicapped and blind employees be shown due consideration while considering the question of their posting and transfers.

The grievance of the petitioners is that despite their holding the post of Secretary-cum-Executive Officer, they are not being allowed or assigned the duties attached to the post, rather they are forced to work under the officials of equal status and even those who are their juniors. It is stated that the same is being done by the respondent – Board under the presumption that the petitioners are unable to discharge the duties of the post held by them. Such action not only humiliates them, but also reinforces the feeling of disability. Specifically impugned is the order dated 24.12.2014 (Annexure P-9) whereby respondents Nos. 4, 5 and 6 who are DMEOs/ Secretary-cum-Executive Officers have been transferred and posted at the stations where

the petitioners are working as Secretary-cum-Executive Officers. Referring to the Persons with Disabilities (Equal) Opportunities, Protection of Rights and Full Participation) Act, 1995, it is stated that the action of the respondent Board is in violation of the said Act.

In the Written statement filed on behalf of respondent No.2 and 3, it has been stated that under Punjab Agricultural Produce Markets (General) Rules, 1962 the Secretary of a Market Committee has multifarious and diverse duties. Consequently it is imperative that the persons so deputed are able to discharge the duties in an effective and efficient manner. It has been asserted that the transfer orders of the private respondents to the posts of Secretaries have been made only to ensure the smooth functioning of the duties of Secretaries in the Committees. It has been asserted that by posting of the private respondents as additional hands, neither any loss nor any prejudice has been caused to the petitioners. In spite of the posting of the private respondents, the petitioners continue to enjoy all service benefits which appertain to their respective posts and there is no demotion or denial of any legal right of the petitioners.

I have heard Ld. Counsel for the parties.

A similar question arose before this Court in CWP No. 9773 of 2009 Amrit Pal Singh and another Vs. State of

Haryana , where the petitioners (both blind) were promoted as Principals along with other lecturers vide order dated 30.12.2008. Thereafter while they were working as Principals the State Government vide memo dated 2.6.2009 ordered conversion of 8 posts of physically handicapped Lecturers (Blind) into Principal, Academic. These posts included the posts which were held by the petitioners therein as Lecturers. Consequently the petitioners therein, were posted against the converted posts, which action was challenged. The action was sought to be justified by the State by stating that neither the status nor the emoluments of the petitioners therein was reduced. It was also contended that the Principal of a college has to carry out diverse duties, they have to perform administrative duties and manage day to day functions of the college, besides handling financial matters. After giving full details of the duties of Principal, it was stated that it would be difficult for the petitioners to perform those duties.

This Court disagreed. It was held that once a post of a Principal has been reserved for the blind, then it is not open to take the plea of inability of the blind persons to perform their duties. If, in the wisdom of the Government such a blind person is unable to perform the duties then it was essential to issue a statutory notification u/s 33 of the Act. That having not been done the defence of unsuitability could not be countenanced.

It was observed :

“The Parliament has enacted The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter called as Act) with a view to grant various protections and facilities to the disabled persons. Chapter 6 of the Act deals with the employment. Section 32 empowers the appropriate Govt. to identify the posts in the establishments to be reserved for persons with disabilities. Section 33 provides for reservation of 3% for persons suffering with disabilities. This section specifies following three kinds of disabilities:-

- (i) Blindness or low vision;*
- (ii) Hearing impairment;*
- (iii) Locomotor disability or cerebral palsy.*

1% reservation is prescribed for each disability. Proviso to Section 33, however, permits the appropriate Govt. to exempt any establishment from the provisions of this section having regard to the type of work carried in any department or establishment. Such exemption can only be by a notification. Section 39 of the Act imposes an obligation upon the Govt. educational institutions and other educational institutions receiving aid from the Govt. to reserve not less than 3% seats for persons with disabilities. A conjoint reading of all these three sections leads to one inference that it is the statutory obligation of the appropriate Govt. to identify the post to be reserved for the persons suffering from disabilities and make reservation for such posts. Section 39 particularly obligates the State Govt. to make reservation in all

*educational institutions and may be more than 3%. Proviso to Section 33, however, permits the Govt. to exempt any establishment from the obligation of reservation by a notification, keeping in view the nature of duties to be performed. Admittedly, the State Govt. reserved the vacancies of Principals for visually (blind) disabled persons. This reservation is in accordance with provisions of Sections 32, 33 and 39. There is no statutory notification under proviso to section 33 exempting this category of posts in any establishment from the operation of Section 33. To the contrary the posts of Principals have been filled up from the reserved category of blinds in the educational institutions. After having made such reservation, it is impermissible to deny the benefit of to perform their duties. To make reservation of blind persons for the post of Principal is in consonance with Section 33. If, in the wisdom of the Govt. such blind persons are unable to perform the duties, then it was essential to have issued a statutory notification under proviso to section 33. No such notification has been issued. A similar controversy has been decided by this Court in case of **Balwinder Singh Vs. State of Punjab and others reported as 2004(2) RSJ**, wherein following observations have been made:-*

“5. Having considered the arguments addressed at the bar, we are satisfied that the claim of the petitioner is fully justified. Instructions dated 2.3.2001 are clearly contrary to the mandate of Section 33 of the Act of 1995. An exemption from the provisions of the

Act of 1995 can only be made by a notification at the hands of the Govt. No such notification is stated to have been issued as per pleadings filed in the instant case. Since in terms of the provisions of Section 33 of the Act of 1995, the State Govt. had issued an advertisement dated 9.3.2001 expressly indicating that the vacancies will be filled from amongst handicapped candidates, inter alia lower vision/blind candidates, it is not permissible now for the respondent-State to deny appointment to the petitioner in accordance with the merit obtained by the petitioner in the process of selection”.

Apart from the legal propositions referred to above, it is also noticed that as Principal petitioners have to perform different kinds of duties and mostly administrative. They are hardly require to teach. Vide Annexure P-5 and P-6 the petitioners have been deprived of their right to act as Principals and have been again assigned the job of teaching which they were doing as Lecturers. Even though, their emoluments have not been reduced but their status definitely gets changed and reduced particularly when they are require to work under the Principal for all administrative purposes. Even a junior to them can be appointed as a Principal and they will be subjected to his administrative control which is impermissible in law. It may not be reversion in the technical sense by protecting the emoluments and retaining the designation of Principal but in fact amounts to depriving the petitioners of various functions and duties enjoined upon the post of Principal. Under the statutory rules the designation of the post is Principal. There is no Principal, Academic Development or

Principal, Administration or any other kind of Principal. To create such fiction to circumvent the rules is inappropriate.

As a matter of fact the Principal is being subjected to the administrative control of another Principal of equal status and may be a person junior to the petitioners is appointed Principal in the college. This will be an embarrassing situation for the petitioners. The action of the respondents, thus, amounts to reversion. Otherwise also, the post of Principal, Academic Development does not exist in the rules. However, I do not agree with the contention of Mr. Arora regarding the change in quota of the post as prescribed under Rule 10 read with Appendix A. Proviso to Rule 3 do permit the Govt. to make additions or deductions in the number of posts or to create new posts even with different designations. The power to do so has been conferred upon the Govt. but this power has to be exercised in accordance with law, i.e. by a statutory notification by the competent authority in the Govt. in accordance with the rules of business of the Govt. Definitely, the Govt. has the power and authority to create new posts with different designations and even increase and decrease the number of existing posts but it has to be done in accordance with law by amending the rules. No such procedure has been adopted. Annexure P-5 is only an office memo, i.e. in the nature of administrative communication. It cannot attain the status of a rule or statute. It is settled law that administrative instructions cannot over ride or

supplant the statutory provisions. If, the Govt. had the intention to bring these posts out of the purview of Section 33 to create even a different kind of post for the disabled persons, it was appropriate to have issued a statutory notification under proviso to Section 33 or the rules of recruitment should have been amended. However, the respondents in violation of the law merely issued administrative instructions to convert the post. Such a recourse is not warranted by law. The impugned communications (Annexures P-5 and P-6) are, thus, liable to be set aside on this count as well.”

The ratio of the aforesaid case is fully attracted in the facts of this case. The petitioners having been appointed as Secretary-cum-Executive Officers, and there being no notification u/s 33 of the 1995 Act exempting the posts held by them from the operation of the Act, the action of the respondents in not entrusting the full responsibilities of their job and posting other Secretaries to perform the same duties, which are sought to be justified as being by way of assistance or help, cannot be sustained as being legal.

Accordingly, the writ petition is allowed. The order Annexure P-9 to the extent of transfer of respondents 4 to 6 to the stations where the petitioners are working as Secretary-cum-Executive Officers are quashed.

It is directed that so long as the petitioners remain

posted as Secretary-cum-Executive Officers, they will continue to discharge all the functions, duties and responsibilities of that office, independently, in the same manner as is discharged by the Secretaries-cum-Executive Officers, who do not suffer from any disability.

November 03, 2015

**(HARINDER SINGH SIDHU)
JUDGE**

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