

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) No. 5979/2013 & CM No. 13168/2013 (Stay)

% **23rd March, 2015**

GURU GOBIND SINGH INDRAPRASTHA UNIVERSITY

..... Petitioner

Through: Mr.S.Rajappa, Advocate.

versus

SH. KAMAL KANT AGARWAL

..... Respondent

Through: Mr.Abinash K.Mishra, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition filed under Article 226 of the Constitution of India, the petitioner/University impugns the order dated 09.04.2013 passed by the Commissioner for Persons with Disabilities, New Delhi (vested with power of Civil Court under the Persons with Disability (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995) whereby, the Commissioner has effectively passed a judgment and issued directions for giving benefits to the respondent of seniority, promotion and monetary

claims along with the back wages. The operative portion of the impugned order reads as under:-

“7 (ix) The argument of the University that they found Sh. Kamal Kant Aggarwal suitable for the post of Laboratory Assistant Grade-I and could not find him suitable for the post of Technical Assistant/Workshop Instructor based on the same aspects of technical know-how appears to be quite intriguing. The reliance put on the judgment of the Hon’ble Apex Court that an oral test is important to judge overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, quality of leadership etc does not appear to be fully relevant in this case as the requirement of the job of a Technical Assistant/Workshop Instructor may be well tested by a written examination which was held and in which the petitioner secured a total of 44 marks (i.e. 55% marks). He was not selected and candidates securing less marks were selected in the General Category. There is no doubt that an oral test is important from the point of view of ascertaining suitability of the candidate for a post; however the requirement for each post is different and in any case the selection cannot be based entirely on the basis of the performance in the oral test. The requirement of the job of Lab Assistant Grade-I and Technical Assistant/Workshop Instructor may not be very much different as both require the same aspects of technical know-how as asserted by the University themselves and therefore rejecting the candidature of Sh. Kamal Kant Aggarwal is not justified. The petitioner should not have been interviewed at par with general category candidates. He should have been selected on relaxed standard to fill up the vacancy reserved for PH category as he (the petitioner) was otherwise fit having secured 55% marks in the written examination.

7 (x) In conspectus of the matter I am of the considered view that the petitioner is entitled to be appointed to the post of Technical Assistant/Workshop Instructor advertised by the University for Physically Handicapped Persons. The University is therefore directed to consider the case of Sh. Kamal Kant Aggarwal in view of the instructions/guidelines of the Government of India on the subject; requirement of the reasonable accommodation as also provided u/s 38 of the Persons with Disabilities Act 1955 and the orders/judgments of the Hon'ble Supreme Court of India and the Hon'ble High Court. He will also be given all the consequential benefits of seniority, promotion and monetary emoluments from the date others joined through the selection process conducted by the University in 2008 i.e. he would be treated as having joined along with his batchmates for purpose of determination of his seniority, promotion and monetary benefits. In so far the monetary benefits/backwages for the past are concerned; since the petitioner has been working as Lab Assistant Grade-I the petitioner would be entitled to all benefits for the past also less the amount received by the petitioner in the course of his employment. The arbitrariness on the part of the University is such that it cannot be argued by the respondent (the University) that the petitioner should not be given benefit of the past as he has not worked on the post. If the petitioner has not worked it is also the responsibility of the respondent as they have defied the mandate of the Parliament as provided under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995. The petitioner was the only candidate in the category of physically handicapped persons against one post advertised by the University as reserved for PH category.

7(xi) Ordered accordingly.”

2. Learned counsel for the petitioner relies upon a recent judgment of the Supreme Court in the case of *State Bank of Patiala & Ors. Vs. Vinesh*

Kumar Bhasin (2010) 4 SCC 368 in which the Supreme Court has held that the Chief Commissioner acting under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 does not act as a court and has no power to pass various judgments and orders, directions or injunctions etc etc. The relevant paragraphs of this judgment are paras 14 to 19 and which paras read as under:

“14. The Chief Commissioner also overlooked and ignored the fact that as an authority functioning under the Disabilities Act, he has no power or jurisdiction to issue a direction to the employer not to retire an employee. In fact, under the Scheme of the Disabilities Act, the Chief Commissioner (or the Commissioner) has no power to grant any interim direction.

15. The functions of the Chief Commissioner are set out in Sections 58 and 59 of the Act. Section 58 provides that the Chief Commissioner shall have the following functions:

- “58. (a) coordinate the work of the Commissioners;
- (b) monitor the utilisation of funds disbursed by the Central Government;
- (c) take steps to safeguard the rights and facilities made available to persons with disabilities;
- (d) submit reports to the Central Government on the implementation of the Act at such intervals as the Government may prescribe.”

16. Section 59 provides that without prejudice to the provisions of Section 58, the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints and take up the matter with the appropriate authorities, any matters relating to (a) deprivation of rights of persons with disabilities; and (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. The Commissioners appointed by the State Governments also have similar powers under Section 61 and 62.

17. Section 63 provides that the Chief Commissioner and the Commissioners shall, for the purpose of discharging their functions under this Act, have the same powers as are vested in a court under the Code of Civil Procedure while trying a suit, in regard to the following matters:

“63.(a) summoning and enforcing the attendance for witnesses;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record or copy thereof from any court or officer;

(d) receiving evidence on affidavits; and

(e) issuing commissions for the examination of witnesses or documents.”

Rule 42 of the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Rules, 1996 lays

down the procedure to be followed by the Chief Commissioner.

18. It is evident from the said provisions, that neither the Chief Commissioner nor any Commissioner functioning under the Disabilities Act has power to issue any mandatory or prohibitory injunction or other interim directions. The fact that the Disabilities Act clothes them with certain powers of a civil court for discharge of their functions (which include power to look into complaints), does not enable them to assume the other powers of a civil court which are not vested in them by the provisions of the Disabilities Act. *In All India Indian Overseas Bank SC and ST Employees' Welfare Association v. Union of India : 1996 (6) SCC 606* this Court, dealing with Article 338(8) of the Constitution of India (similar to Section 63 of the Disabilities Act), observed as follows:(SCC pp.609 & 611, paras 5 & 10)

“5. It can be seen from a plain reading of Clause (8) that the Commission has the power of the civil court for the purpose of conducting an investigation contemplated in Sub-clause (a) and an inquiry into a complaint referred to in Sub-clause (b) of Clause (5) of Article 338 of the Constitution

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10. All the procedural powers of a civil court are given to the Commission for the purpose of investigating and inquiring into these matters and that too for that limited purpose only. The powers of a civil court of granting injunctions, temporary or permanent, do no inhere in the Commission nor can such a power be inferred or derived from a reading of Clause (8) of Article 338 of the Constitution.”

19. The order of the Chief Commissioner, not to implement the order of retirement was illegal and without jurisdiction.”
(emphasis added)

3. The Supreme Court in the case of *Vinesh Kumar Bhasin (supra)* has relied upon the earlier judgment of the Supreme Court in the case of *All India Indian Overseas Bank SC and ST Employees’ Welfare Assn. and Ors. Vs. Union of India and Ors. (1996) 6 SCC 606* wherein the Supreme Court has observed and laid down the ratio that a Commissioner acting under specific provisions of law, cannot *dehors* those provisions start acting like a court and issue directions or injunctions etc etc. In view of the above, it is clear that the impugned order dated 09.04.2013 passed by the Commissioner for Persons with Disabilities is without jurisdiction.

4. Learned counsel for the respondent sought to place reliance on *Geetaben Ratilal Patel Vs. District Primary Education Officer (2013) 7 SCC 182*, however, reference to this judgment shows that the said judgment did not deal with the issue of whether the Commissioner for Persons with Disabilities has jurisdiction to pass a judgment or order or directions or injunction etc etc. In fact assuming that the judgment in case of *Geetaben Ratilal Patel (Supra)* holds that the Commissioner for Persons with Disabilities has power to pass any directions, though the said judgment does

not so hold, the said judgment will not be the law inasmuch as it has now been repeatedly held by the Supreme Court that the later judgment of a Division Bench of equal number of Judges cannot pronounce upon differently than what is held earlier by a Division Bench of equal number of Judges of the Supreme Court. The judgment in case of ***Vinesh Kumar Bhasin (Supra)*** is of a Division Bench of two Judges of the Supreme Court and judgment in case of ***Geetaben Ratilal Patel (Supra)*** is also of a Division Bench of two Judges of the Supreme Court, and therefore, it is the judgment in the case of ***Vinesh Kumar Bhasin (Supra)*** which will bind this Court and not judgment in the case of ***Geetaben Ratilal Patel (Supra)***.

5. In view of the above, the impugned order of the Commissioner for Persons with Disabilities is set aside.

6. Petition is allowed accordingly.

7. No costs.

VALMIKI J. MEHTA, J

MARCH 23, 2015

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