



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.04.2018

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THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.(MD) No.2257 of 2015
and M.P.Nos.1 and 2 of 2015

J.Ashokkumar

... Petitioner

-vs-

1. Union of India,
Rep. by its Secretary,
Ministry of Personnel, Public Grievances & Pension,
Department of Personnel & Training,
New Delhi
2. State of Tamil Nadu,
Rep by its Principal Secretary
Department of Welfare of Differently Abled Persons,
Secretariat, Chennai.
3. State of Tamil Nadu
Rep. by its Principal Secretary
Department of Higher Education,
Secretariat, Chennai.
4. The Teachers Recruitment Board,
rep. by its Secretary,
4th Floor, EVK Sampath Maligai, DPI Compound,
College Road,
Chennai.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned selection list dated 27.01.2015 on the file of the respondent No.4 published in the 4th respondent Website and quash the same as illegal and consequently for a direction, directing the respondent No.4 to appoint the petitioner in the post of Assistant Professor, Commerce by interchanging the backlog vacancy reserved for Scheduled Caste (Deaf) or General Turn (Deaf) in accordance with the Section 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and the Office Memorandum issued by the respondent No.1 dated 29.12.2005 within a time period stipulated by this Court.



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For Petitioner Mr.T.Aswin Rajasimman
for Mr.T.Lajapathi Roy
For Respondents: Mr.S.Muthukumar for R1
Central Government Standing Counsel
Mr.D.Muruganandham, AGP., for R2 & R3
Mr.VR.Shanmuganathan,
Special Government Pleader, for R4

O R D E R

The prayer in the writ petition is for a writ of Certiorarified Mandamus to call for the records pertaining to the impugned selection list dated 27.01.2015 on the file of the respondent No.4 published in the 4th respondent Website and quash the same as illegal and consequently for a direction, directing the respondent No.4 to appoint the petitioner in the post of Assistant Professor, Commerce by interchanging the backlog vacancy reserved for Scheduled Caste (Deaf) or General Turn (Deaf) in accordance with Section 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and the Office Memorandum issued by the respondent No.1 dated 29.12.2005 within a time period stipulated by this Court.

2. Heard the learned counsel for the petitioner, learned standing counsel for the 1st respondent, the learned Additional Government Pleader for the respondents 2 and 3 and the learned Special Government Pleader for the 4th respondent.

3.The short facts, which are required to be noticed for the disposal of this writ petition are as follows:

The petitioner is a qualified person to hold the post of Assistant Professor in Commerce. The 4th respondent Teachers Recruitment Board has issued notification inviting applications from the eligible candidates by Advertisement No.4/2013 dated 28.05.2013. The petitioner is a physically challenged person and his disability is in Ortho and a certificate to that effect was also issued by the competent authority. Therefore, with the educational qualification of the petitioner, the petitioner had applied to the said recruitment for selection to the post of Assistant Professor (Commerce) under physically challenged quota.

3.1. According to the said Notification issued by the 4th respondent, there were five backlog vacancies for the subject Commerce earmarked for the physically challenged persons and other reserved categories. Out of the five, two posts from the said backlog vacancies were earmarked for General Turn - Deaf and one vacancy was for Scheduled Caste - Deaf and another vacancy was for General Turn - Blind.

3.2. Since the petitioner is a scheduled caste candidate, he applied under the said quota of communal reservation as well as for General Turn.



3.3. After selection process, the provisional list of candidates selected after oral interview was released by the 4th respondent, where they have shown for the category of the said backlog vacancies earmarked for General Turn - Deaf and Scheduled Caste General - Deaf that there was no suitable candidates available and accordingly, they have gone for other category candidates.

3.4. The petitioner being the physically challenged person would be entitled to be considered for selection under the said category of General Turn - Deaf and Scheduled Caste General - Deaf by interchanging the disability among the three categories under the provision of Section 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the Act'). Since the said exercise has not been undertaken and because of such inaction on the side of the 4th respondent/selection authority, the petitioner's chance of getting selection was affected and therefore, the petitioner, challenging the said provisional selection of candidate, approached this Court with the aforesaid prayer.

4. The learned counsel for the petitioner would submit that, as per Section 36 of the Act, if no suitable person is available with disability for any recruitment or appointment, such vacancy shall be carried forward to the next succeeding year and in the next succeeding year also, if no suitable person is available with disability, the said post can be filled up by interchanging among the three categories of disability and if at all there is no person with disability, even after interchange taken place, is available, then only, employer can fill up by appointing a person other than the person with disability.

5. In view of this mandatory provision, as has been provided under Section 36 of the Act, since the said interchanging process was not undertaken by the 4th respondent, the provisional selection list, which is impugned herein showing such two vacancies, as if there was no suitable candidate available in that category, shall be interfered with. In support of his contention, the learned counsel has relied upon a Division Bench judgment of the Karnataka High Court made in ***W.P.No.41267/2010 [Mr.Shamashuddin M Savadatti v. The Karnataka Public Service Commission and others]***.

6. Per contra, the learned Special Government Pleader appearing for the 4th respondent would submit that, there were totally 1093 vacancies, for which, the selection process went on, out of the 1093, 80 posts were earmarked for Commerce subject and out of 80, 5 vacancies are backlog vacancies.

7. The learned counsel would further submit that, five backlog vacancies have been distributed, as has been stated above, as two were given General Turn - deaf, one was given General Turn - blind and another one was given Scheduled Caste (Deaf), one more was given for Scheduled Tribe - General. Therefore, for the purpose of



physically challenged persons quota for the backlog vacancies, four vacancies were earmarked as above.

8. The learned standing counsel would rely upon the estimate and distribution of vacancies as per the notification, according to which, the faculty code D20 is Commerce, for which, one backlog vacancy was earmarked for blind and two were earmarked for candidate with deafness under General turn category. Like that, one post for deaf under Scheduled Caste category also was earmarked. Insofar as the two posts earmarked for General Turn - deaf and one post earmarked for Scheduled Caste Deaf, since there were no suitable candidates available in that category with the disability of deafness, the said posts could not be filled up.

9. When the legal position under Section 36 was pointed out, the learned counsel for the 4th respondent would submit that, under Section 36 of the Act, vacancy earmarked for physically challenged person, if not able to be filled up in that year, it shall be carried forward to the next year and next year also, if there are no suitable candidates available for the concerned category of disability, then, the post shall be interchanged among the three categories of disability and shall be further carried forward to the next or succeeding recruitment, where the post can once again be filled up based on such interchange depending upon the candidates availability therein.

10. By giving such interpretation, the learned counsel for the 4th respondent would submit that, in view of the said position under Section 36 of the Act, the three posts as referred to above were not filled up, as there were no suitable candidates available in that category and therefore, it would be interchanged and to be carried forward to the next recruitment, he submitted.

11. I have heard the learned counsel on both sides and also perused the materials available on record.

12. There is no controversy with regard to the fact that the petitioner is a qualified person to be considered to compete for selection to the post of Assistant Professor(Commerce) under the Physically challenged quota. The petitioner also applied for the selection and his application was also considered. It is also not in dispute that, there were five backlog vacancies for the subject "Commerce". Out of the five vacancies, four earmarked for physically challenged persons. Among the four, the distribution of vacancy had also been mentioned that, two were deaf candidates (general), one was deaf candidate (Scheduled Caste) and one was blind candidate (General). Out of these four vacancies, now, the impugned provisional list says that, one out of two earmarked for general turn deaf and one earmarked for Scheduled Caste, were not filled up, as there was no suitable candidate available. The fact that there was no suitable candidate in that category of disability ie., deafness, is also not disputed by both sides. However, the case of



the petitioner is that, in such situation, Section 36 of the Act shall be pressed into service. In order to appreciate the said argument, Section 36 of the Act is extracted hereunder for easy reference:

*"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 cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

13. Having a plain reading of Section 36 of the Act, it discloses that, if any vacancy for any recruitment under Section 33 is not able to be filled up due to non availability of suitable candidate with disability, such vacancy shall be carried forward to the next succeeding recruitment year and even in the next succeeding recruitment year also suitable person with disability is not available, then, it is mandated that it may be first filled by interchange among the three categories. The interchange among the three categories meant, blind or low vision, hearing impairment and locomotor disability or cerebral palsy.

14. Here in the case in hand, the petitioner comes under the category of locomotor disability, according to the certificate issued by the competent authority in this regard. Since there is no suitable candidate available, with blind or low vision or the category of deaf, since two posts, ie, one is for general turn deaf and another one is for Scheduled Caste deaf were not able to be filled up for want of suitable candidates, certainly, the next action on the part of the selection agency must be to follow the mandatory requirement of Section 36 of the Act, thereby, those posts shall be filled up by interchanging the vacancy among the three categories as stated above.

15. This is the only possible interpretation of Section 36 and in order to take support of this interpretation, the judgment cited by the learned counsel for the petitioner in **Mr. Shamashuddin M Savadatti v. The Karnataka Public Service Commission and others**, cited supra, can be pressed into service. The Division Bench of the Karnataka High Court in a similar situation in the said decision has

held by giving interpretation to Section 36 of the Act in the following terms:

"17. The provisions of Section 36 of the said Act clearly indicate that 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 i.e., blind or low vision, hearing impairment; and locomotor disability or cerebral palsy in the posts identified for each disability and as contemplated under Section 33 of the said Act. 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. Which means, for two succeeding years, the appointing authority cannot appoint any person other than the disability category as mandated under Section 36 of the said Act. Ultimately on 2nd occasion, if any such person cannot be employed, the vacancy may be interchanged among the three categories with prior approval of the Government."

16. When that being the position, the interpretation sought to be given to Section 36, especially, the word "**it may be first filled up interchanging among the three categories**" by the learned counsel for the 4th respondent that in the second year if the vacancies still are not able to be filled up, the same shall be interchanged and thereafter be carried over to the next succeeding year, is beyond the scope of Section 36, because, the words, "**it may be first be filled by interchange among the three categories**" clearly envisages that, the post shall be filled in that year by making any interchange among three categories of disabilities. Even after making the exercise of interchange among the three categories of disabilities, still, the employer finds no suitable candidate, then only the employer can fill up the same by appointing a person other than a person with disability. Since the words "**employer shall fill up the vacancy by appointment of a person other than a person with disability**" clearly says that in that year i.e., the second year, the vacancy, at any case, should be filled up. Therefore, there is no scope for carry forward the vacancy, which is already a carried forward vacancy, from the previous recruitment year, to the next recruitment year. Therefore, the interpretation sought to be given by the learned counsel for the 4th respondent is liable to be rejected and accordingly, it is rejected.

17. If this is the legal position, where the exercise of interchange among the three categories of disability was admittedly has not been undertaken by the 4th respondent, there is every force



in the submission made by the learned counsel for the petitioner and therefore, the petitioner's case can be accepted prima facie for the purpose of considering the candidature for the said recruitment.

18. In view of the said legal position, what shall be the benefit now can be extended to the petitioner is the next issue. The petitioner claims that he is a physically challenged having all qualification and he further claims that he is the only person claiming such exercise of interchanging among the three categories of disabilities, under Section 36 of the Act and therefore, he shall be considered for selection and appointment.

19. However, the learned counsel for the 4th respondent would submit that, assuming that the fourth respondent has to undertake the process of interchanging among the three categories of disabilities, on making such exercise, however, if eligible candidates for the physically challenged category are available before the fourth respondent for the concerned recruitment, it shall be taken into account and the more meritorious candidate alone shall be given posting. This Court accepts the said view expressed by the learned counsel for the 4th respondent. Merely because, the exercise of interchange is to be undertaken, it need not be straight away to be undertaken in favour of the petitioner and it shall be done by making the interchange among all the available candidates and based on the inter-se merit among the interchanged candidates, after completing the interchange, the selection can be made to fill up for the two posts, which were not filled up for want of suitable candidates.

20. In the result, this writ petition is disposed of with the following directions:

(i) That the fourth respondent's action in not undertaking the interchange exercise as has been mandated under Section 36 of the Act, is unlawful;

(ii) Consequently the declaration made in the impugned provisional list declaring the one post earmarked for General turn deaf and one post earmarked for Scheduled Caste deaf for Assistant Professor (Commerce) is not available is also unlawful ;

(iii) Consequently, the 4th respondent is directed to undertake the interchange exercise as contemplated under Section 36 of the Act among the three categories of disabled persons and after making such exercise of interchange, make a list among the available candidates under that category and giving options for appointment to the more meritorious candidate and in the order of merit, if the petitioner comes, he shall be considered for such selection ;

(iv) It is made clear that, after identifying the meritorious candidates, including the petitioner, based on the merit and educational qualifications, written intimation shall be sent to all meritorious candidates including the petitioner and if the most meritorious candidate comes forward to take up the post, he shall be given first preference. Accordingly, selection shall be made for the two posts of Assistant Professor, "Commerce", under the category of

General Turn Deaf and Scheduled Caste Deaf for the recruitment of 2012 ;

(v) The aforesaid exercise shall be undertaken by the fourth respondent within a period of twelve weeks from the date of receipt of a copy of this order and the needful to be done accordingly.

No costs. Consequently connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar (CS-)

To:

1. The Secretary
Union of India,
Ministry of Personnel, Public Grievances & Pension,
Department of Personnel & Training,
New Delhi
2. The Principal Secretary
State of Tamil Nadu,
Department of Welfare of Differently Abled Persons,
Secretariat, Chennai.
3. The Principal Secretary
State of Tamil Nadu
Department of Higher Education,
Secretariat, Chennai.
4. The Secretary,
Teachers Recruitment Board,
4th Floor, EVK Sampath Maligai, DPI Campus,
College Road,
Chennai.

+ 1 CC TO SPECIAL GOVERNMENT PLEADER IN SR No. 61319
+ 1 CC TO Mr.T.LAJAPATHI ROY, ADVOCATE IN SR No. 61105

RR

TE/RSK/SAR-2 : 29/11/2018 : 8P/7C

W.P. (MD) No.2257 of 2015
and WMP Nos.1 and 2 of 2015
12.04.2018