

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.01.2019

CORAM:

THE HONOURABLE Dr. JUSTICE S.VIMALA

Writ Petition No.30538 of 2018
& WMP No.35631 of 2018

R.Devika

... Petitioner

versus

- 1 The Chairman
Tamil Nadu Uniformed Recruitment Board
Bandhiyan Road Egmore Chennai - 600008
- 2 The Member
Tamil Nadu Uniformed Recruitment Board
Bandhiyan Road Egmore Chennai - 600008
- 3 The Member Secretary
Tamil Nadu Uniformed Recruitment Board
Bandhiyan Road Egmore Chennai - 600008 ... Respondents

Prayer:- Petition filed under Article 226 of the Constitution of India, seeking for the issuance of Writ of Mandamus directing the respondents to consider the petitioner's representation dated 03.10.2018 and further direct the respondents to select the petitioner for employment of Grade - II Police Constable/ Grade - II Jail Warden under the ground of mercy.

For Petitioner : Mr. R.Ramesh

For Respondents : Mr. V.Kathirvelu, Spl.G.P.,

सत्यमेव जयते
O R D E R

To realize the value of -
ONE YEAR, ask a student who failed a grade;
ONE MONTH, ask a mother who gave birth to a premature baby;
ONE WEEK, ask the editor of a weekly newspaper;
ONE HOUR, ask the lovers who are waiting to meet;
ONE MINUTE, ask a person who missed the trophy;
ONE SECOND, ask a person who just avoided an accident;
and
HALF A SECOND, ask the petitioner, who missed the post of Grade II Constable.

2. When children are the future and it is the duty of the parents as well as the society to nurture them and when the employed mother has the best opportunity of educating the child, will it be right to decline employment to a pregnant woman on the ground that her physical fitness during pregnancy is not a match as that of her counterparts, who are not similarly placed, is the issue raised in this writ petition.

3. The petitioner has filed this writ petition seeking a direction to the respondents to select the petitioner for employment as Grade II Police Constable / Jail Warden on taking a lenient view, which is equated to mercy.

4. The petitioner is a candidate to the common recruitment of Grade II Police Constable 2017-18, with enrollment No.5101840. The petitioner completed 100 Mts. running event in 18.20 seconds. As per the norms, she has to qualify in 100 mts. running event by completing the running within 17.50 seconds. Thus, by shortage of 0.30 seconds, the petitioner has been declared unsuccessful in the physical efficiency test.

5. The petitioner states that she was eight weeks pregnant on the day when the physical efficiency test was conducted and hence, she was not able to complete the running within the prescribed time.

6. The learned Special Government Pleader appearing for the respondents would submit that the norms and procedures as prescribed in the notification and brochure are followed scrupulously and no deviation is permitted for any reason, whatsoever. It is pointed out that allowing such candidates will open flood gate for other disqualified candidates, which will hamper the recruitment process; it would also create a negative precedent and would affect the future selection process; already, provisional selection list as per the notified vacancies was published on 31.10.2018 and selected candidates were given appointment orders; therefore, it is not possible to provide employment to the petitioner at this stage on the ground of mercy.

7. Whether these contentions are acceptable is the issue to be considered.

8. The learned Special Government Pleader appearing for the respondents relied upon the earlier order passed by this Court in W.P.No.21107 of 2017 wherein this Court directed the petitioner therein to wait and participate in the next recruitment process.

8.1. This decision was rendered when the petitioner therein sought for a direction to permit the petitioner to participate in the physical fitness test after the delivery of the child; when that request was rejected by the authorities and on approaching this Court, this Court confirmed the rejection order of the respondents. But, this is a case where the petitioner has participated, but has been declared unsuccessful.

9. Whether a pregnancy woman participating in the physical efficiency test can be declared unsuccessful, just because she was able to cross 100 Mts. by taking extra 0.30 second.

10. The decision reported in the case of Laxmi Devi vs State (Home Department) and Ors, decided on 30 May, 2017, by the Rajasthan High Court, speaks about the problems involved in the employment of women candidates in state of Pregnancy, which reads as follows:-

"We would refer to a passage occurring at page 166 of Swamy's Complete Manual on Establishment and Administration. The said passage reads ad infra:-

"Employment of women candidates in state of Pregnancy-

(a) For appointment against posts carrying hazardous nature of duties- Where a pregnant woman candidate is to be appointed against a post carrying hazardous nature of duties, e.g., in Police Organizations, etc., and she has to complete a period of training as a condition of service and who as a result of tests is found to be pregnant of twelve weeks standing or over shall be declared temporarily unfit and her appointment held in abeyance until the confinement is over. She should be re-examined for a fitness certificate six weeks after the date of confinement, subject to the production of medical certificate of fitness from a registered medical practitioner. The vacancy against which the woman candidate was selected should be (18 of 19) [CW-18808/2015] kept reserved for her. If she is found fit, she may be appointed to the post kept reserved for her and allowed the benefit of seniority in accordance with para 4 of Annexure to MHA OM No. 9/11/55-R.S, dated the 22nd December, 1959.

(b) For appointment against posts which do not prescribe any elaborate training, it shall no longer be necessary to declare a woman candidate 'compulsorily unfit' if she is found to be pregnant during medical examination before appointment against posts which do

not prescribe any elaborate training, i.e., she can be appointed straightway on the job."

Once it is observed & held that maternity is a human right of a woman and so longer the married woman is not disqualified from participating in the selection process and is not an impediment and after having qualified the written test, at the stage when she has to undergo the Physical Standard Test/Physical Efficiency Test became pregnant with advanced stage and the pregnancy being not a disability but one of the natural consequence of marriage, the woman candidate deserves indulgence of qualifying the physical standards after affording a reasonable time in attaining fitness which the authority may consider to be appropriate keeping in view the provisions of the Maternity Benefit Act, 1961.

Based on the aforesaid discussion, we are of the view that there can be no conclusion other than to hold that action of the respondents in not granting indulgence to the petitioners in failing to qualify Physical Standard Test / Physical Efficiency Test because of their advanced stage of pregnancy is illegal and arbitrary and the impugned provisions of the Standing Orders to the extent they lay down that pregnancy would render a candidate unfit is legally (19 of 19) [CW-18808/2015] not sustainable.

Consequently, the instant batch of writ petitions succeed & is hereby allowed. The respondents are directed to call upon the petitioners for their Physical Standard Test / Physical Efficiency Test after giving them due notice and if they qualify with the standards laid down under the relevant scheme of Rules and find place in the order of merit in their respective category, they may be considered for appointment in terms of their advertisements dt. 20.07.2013 / 14.07.2013 respectively. Necessary compliance be made within four months."

11. The facts of the case on hand have to be considered in the light of the decision, cited supra. Prescribing the same standards for a pregnant lady along with others, who are not similarly placed itself, is an unequal treatment.

11.1. There may be two circumstances for the pregnant women: (a) in the early stages of pregnancy, there may not be any risk to life of the women, still there may be discomfort or risk on account of likelihood of abortion; (b) in the later stages of pregnancy, there may be a risk involved in the life of the women

herself.

11.2. Apart from the pregnancy, mensuration may also be a problem for participation in the physical efficiency test.

11.3. It would be appropriate to quote the standing Order No.91, dated 15.09.2003 issued by the Commissioner of Police, Delhi, under Rule 21 of Rules, 1980, in respect of promotion of Female constables to the rank of Head Constables. There is a condition of qualifying in the physical test as a condition precedent to the eligibility for appearance at the written test and following provision have been made for female constables:

(i) Pregnant women constables are liable to submit medical certificate in support of their pregnancy for availing of chance after delivery supported with medical fitness certificate for out-door test;

(ii) Women constables, running on menstrual cycle can be given chance on the last date of test.

12. There is express provision in the Constitution of India that women shall be given special treatment in the matter of employment in order to eliminate socio-economic backwardness and to empower them in a manner that would bring about effective equality between men and women.

13. It is important to consider the Constitution provisions dealing with empowerment of women, viz., Articles 14, 15 (3), 16, 19, 21, 227 and 42 of the Constitution of India.

14. It would be appropriate to refer the decision reported in MANU/KE/0345/2014 : ILR2014(2)Kerala383, 2014 (2) KHC 388, 2014(2)KLJ637, 2014(2)KLT357, 2014(4)SCT69(Kerala), 2015(1)SLJ179(Kerala) (Kerala Public Service Commission and Anr. vs. Sini, K. (17.03.2014 - KERHC), wherein in paragraph 5, it has been held as follows:-

"5. In its net effect, the decision of the Division Bench in K. Jayasree's case (supra) read with the order on the review petition is that a pregnant woman cannot be denied an opportunity to have adequate means of livelihood merely on account of the biological reason that she was unable to appear for the physical efficiency test at a given point of time and that a pregnant woman cannot be compelled to undergo the endurance test at a time when it was dangerous to her life and that of the baby in her womb. It was held that the effect of refusal on the part of the PSC to grant extension of time for such a woman to participate in the physical efficiency test would amount to denial of opportunity to get employment which would enable her to have a decent life."

14.1. This decision also refers to the various provisions in

the maternity protection convention of International Labour Organizations which were adopted in the general conference of ILO, Geneva, on 30.05.2000. It has been observed that it is within the ambit of Constitutional sanctions that the said documents can be relied on from the International domain to decipher and give effect to India's obligation in the said field and the relevant observation reads thus:-

"6. While we are in agreement with the reasoning in K. Jayasree's case (supra), making reference to Article 42 of the Constitution of India and varied provisions in the Maternity Protection Conventions of the International Labour Organisation which were adopted in the General Conference of ILO at Geneva on 30-5-2000, we may state that though the said precedent was rendered noting that India had not ratified that convention, we are of the view that sharing responsibility of Government and society to provide protection for pregnancy as enunciated therein has to be applied in India as a seminal doctrine relatable to the right to life under Article 21 of the Constitution and inexcusable as a salutary human right, not only of the pregnant woman and the child in the womb, or the mother and the child, but of the family as a basic unit of society. There is also nothing in Indian law which can be pointed out running contrary to the said content of the Maternity Protection Convention. Therefore, it is within the ambit of the constitutional sanctions that the said document can be relied on from the international domain to decipher and give effect to India's obligations in the said field."

15. It is delightful to refer the verdict of Central Administrative Tribunal, Allahabad Bench, in MANU/CA/0820/2017 : 2017(4)ESC170(CAT) O.A.No.330/00450 of 2014, dated 02.05.2017 (Vandana v. Union of India and Others), wherein the meaning of the expression "special provision for women" occurring in Article 15 (3) of the Constitution of India has been interpreted and the interpretation by Hon'ble Justice Sujata v. Manohar, has been quoted, which reads as under:-

"The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socioeconomic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to

strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15(3), job opportunities for women cannot be created would be to cut at the very root of the underlying Inspiration behind this article. Making special provision for women in respect of employment or posts under the state is an integral part of Article 15 (3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16."

16. The provisions of the Constitution and the decisions of the various Courts clearly show that effective equality and elimination of general bias require special treatment to women who are facing special needs of that time, the treatment meted out to those of them by declining even the normal protection is highly objectionable.

17. Coming back to the facts of the case on hand, the participation by the petitioner in a running test itself is a sign of courage, as persons similarly placed would be afraid of because of fear of losing the child through abortion. This aspect, though not a factor to be considered in the running test, it is the overall factor to be considered for selection to the post of the Constable.

17.1. In the early stages of pregnancy, the Doctors always advice bed rest initially, at least for a period of three months.

17.2. Taking 0.30 seconds extra should have been considered negligible under the given context as well as under the International Standards prescribed for evaluation.

18. Before issuing next notification, the respondents are directed to take into account the constitutional provisions of India and the maternity protection and convention of the International Labour Organization, to frame guidelines by providing the best possible measures to support women candidates who are at difficult circumstances on account of pregnancy or maternity or other natural causes.

19. Considering the fact that the petitioner would be in fifth / sixth month of pregnancy, the respondents are directed to select the petitioner for employment as Grade II Police Constable / Grade - II Jail Warden, as on 31.10.2018, with all attendant benefits. The said exercise shall be completed by the respondents within a period of four weeks from the date of receipt of a copy of this order. If further intensive physical training is required as per rules of the recruitment, it shall be postponed till the maternity leave of the petitioner is over.

20. The pregnancy and the child birth should not be considered as the impediment for discharge of duty. The concessions given to pregnant women shall not be construed as a concession towards personal comfort of the women. The child birth should be considered as a contribution to continuity of generations, without which the existence of the world is impossible.

21. With the above directions, this writ petition is disposed of. No costs. Consequently, the connected WMP is closed.

Sd/-
Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

srk

To

- 1 The Chairman
Tamil Nadu Uniformed Recruitment Board
Bandhiyan Road Egmore Chennai - 600008
- 2 The Member
Tamil Nadu Uniformed Recruitment Board
Bandhiyan Road, Egmore, Chennai - 600008
- 3 The Member Secretary
Tamil Nadu Uniformed Recruitment Board
Bandhiyan Road Egmore Chennai - 600008

+1cc to Mr.R.Ramesh, Advocate SR.No.2117

+1cc to Government Pleader, High Court, Madras, SR.No.1908

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& WMP No.35631 of 2018

GP(CO)
GMY(21/01/2019)

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