

HIGH COURT OF CHHATTISGARH AT BILASPUR**Writ Petition (S) No. 3743 of 2010**

Shashikant Prasad Gupta, S/o Shri Jiyut Prasad Gupta, Aged about 25 years, R/o New Munda, Ambedkar ward, Near Ran Basera, Jagdalpur, Bastar, Chhattisgarh.

---Petitioner

Versus

National Minerals Development Corporation Limited (NMDC), Through the General Manager, (Personnel), Bailadila Iron Ore Mine : Bacheli Complex South Bastar, Dantewada, Chhattisgarh.

--- Respondent

For Petitioner	:-	Mr. C. Jayant K. Rao, Advocate
For Respondent	:-	Mr. Vaibhav Shukla, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board (Through Video Conferencing)

10/08/2021

1. The instant writ petition has been preferred by the petitioner calling in question the legality, validity and correctness of order dated 25/06/2010 (Annexure P/1) by which the respondent has reiterated that petitioner is not entitled for appointment on the post of Maintenance Assistant (Trainee)/Diesel Mechanic.

2. In an advertisement issued by the respondent for inviting applications for the post of Maintenance Assistant/Diesel Mechanic, the petitioner applied under unreserved category and after the recruitment process, he was selected for Apprentice Trainee for a period of two years from 06/12/2005 to 05/12/2007 and thereafter, the order of appointment was issued on 20/09/2008 subject to medical test conducted by the medical board wherein the petitioner was declared as medically unfit for the said post as he was found to be 40 % physically handicapped on his right leg. Consequently, his appointment has been withdrawn by order dated 15/11/2008, against which the petitioner made a complaint to the Chief Commissioner for Persons with Disabilities constituted under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter "Act of 1995") in which vide orders dated 03/05/2010 and 18/05/2010, the Chief commissioner suggested/directed the respondent to consider the case of the petitioner for appointment on the post of Maintenance Assistant/Diesel Mechanic by undertaking repeat medical examination. The respondent authorities considered the case of the

petitioner and vide impugned order dated 25/06/2010 (Annexure P/1) and still remained stuck to their earlier decision of withdrawal of offer of appointment given to the petitioner. The impugned order has been assailed in this writ petition on the ground that the Chief Commissioner for Persons with Disabilities has already held that the post of Maintenance Assistant/Diesel Mechanic is deemed to be identified under the Act of 1995 and that petitioner is fully eligible and medically fit to the appointed on the post of Maintenance Assistant /Diesel Mechanic, therefore, the impugned order (Annexure P/1) passed by the respondent deserves to be set aside.

3.A detailed return has been filed by the respondent stating inter alia that the recommendation of the Chief Commissioner for Persons with Disabilities has been considered and with reference to the provisions contained under Sections 29(F)(1) and 29(L) of the Mines Rules, 1955 since the post of Maintenance Assistant/Diesel Mechanic is not an identified post for persons belonging to the physically handicapped category, therefore, the

recommendation made by the Chief Commissioner for Persons with Disabilities could not be accepted. It has also been stated by the respondent that petitioner suppressed the fact of him being physically handicapped in the application form submitted by him and did not disclose about it right on time and it has only been revealed at the time of medical examination, therefore, the instant writ petition deserves to be dismissed.

4. Mr. C. Jayant K. Rao, learned counsel for the petitioner, would submit that the impugned order passed by the respondent is absolutely illegal and without jurisdiction and without authority of law as respondent has no authority to pass the impugned order ignoring the recommendation made by the Chief Commissioner for Persons with Disabilities under Section 59 of the Act of 1995 and moreover, the petitioner has not been examined in line with the direction issued by the Chief Commissioner as the alleged disability of the petitioner will not interfere with his efficient working on the post of Maintenance Assistant/Diesel Mechanic, as such, the impugned order deserves to be set aside and respondent may

be directed to consider and appoint the petitioner on the said post forthwith.

5. Mr. Vaibhav Shukla, learned counsel for the respondent, would submit that the post of Maintenance Assistant/Diesel Mechanic is not a post identified under Sections 32 and 33 of the Act of 1995 and even the respondent has already held that the said post is not an identified post for differently abled persons. Furthermore, the Chief Commissioner for Persons for Disabilities has no jurisdiction under Section 59 of the Act of 1995 to hold that though the said post of Maintenance Assistant/Diesel Mechanic is not identified under the Act of 1995, but it will be deemed to be identified for the purpose of appointment of the petitioner. He would further submit that in the identical set of facts, the Supreme Court in the matter of **Bharat Sanchar Nigam Limited and Another v. G. Sarvothaman**¹ has clearly held that the Chief Commissioner has no power of direct inclusion of one more category among the identified categories and grant the benefit of appointment to physically handicapped persons. He would finally submit that petitioner has suppressed the fact of his disability in his

¹ 2013 (10) SCC 489

application form, as such, he is also guilty of suppression of material fact to be disclosed in the application form. Therefore, the instant writ petition deserves to be dismissed.

6. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

7. True it is that in the applications invited by the respondent for the post of Maintenance Assistant/Diesel Mechanic, petitioner applied for the said post wherein he was selected and sent for training for two years from 06/12/2005 to 05/12/2007 and thereafter, he was appointed on the said post and the order of appointment clearly states that the appointment is subject to medical fitness and in the event of anything found adverse in the medical examination report, the offer of appointment dated 20/09/2008 will be treated as withdrawn and cancelled. Petitioner was ultimately subjected to medical examination and by the medical examination report dated 16/10/2008 (Annexure R/4), the Chief Medical Officer informed the Assistant General Manager of the respondent company that petitioner is found

to be paralyzed in left lower limb by 22% and in light of Rule 29(F)(1) and 29(L) of the Mines Rules, 1955, there should be no deformity or paralysis which may interfere with the efficient employment in a mine. Accordingly, by order dated 15/11/2008 (Annexure P/2), petitioner's appointment has been withdrawn holding that since he is not medically fit for employment on the post of Maintenance Assistant/Diesel Mechanic as per Rules 29(F)(1) and 29(L) of the Mine Rules, 1955, therefore his appointment, as per Clause 5(a) of the order of appointment, is withdrawn and cancelled with immediate effect.

8. Thereafter, the petitioner questioned the order dated 15/11/2008 (Annexure P/2) of withdrawal of his appointment before the Chief Commissioner for Persons with Disabilities constituted under the Act of 1995, who considered the complaint of the petitioner and by order dated 18/05/2010 (Annexure P/8) directed for re-examination of the petitioner medically holding that since the posts of Motor Mechanic and Auto Mechanic are identified for persons with disabilities in one leg and as the job of Maintenance Assistant (Diesel) is identical to the job of Motor

Mechanic and Auto Mechanic, the post of Maintenance Assistant (Diesel) is deemed to be identified for locomotor disability in one leg. Paragraphs 6, 7, 8 and 9 of order dated 18/05/2010 (Annexure P/8), being relevant, are reproduced below :-

"6. It is observed that as per Form P-I prescribed under rule 29(F)(1) & 29(L) of Mines Rules, 1955, the Medical Standard of Fitness for Persons to be employed in Mines is as follows :-

"1. The person should be in good mental and bodily health and free from any physical defect likely to interfere with his efficient employment in a mine. Due allowance in the standard should be made for the age of a candidate.

2. *Locomotor system* – The limbs should be well formed and developed and the function of all the limbs should be within normal limits. Any deformity should be recorded. There should be no deformity or paralysis which may interfere with his efficient employment in a mine. Any deformity noted should be recorded.

3. *Skin* – There should be no evidence of extensive and chronic skin disease or ulceration.

4. (a) Distant vision of eye with or without glasses should be not less than the standard prescribed for better eye as 6/12 for workers employed on surface and in opencast workings and 6/6 for workers employed below ground."

7. AS per M/o Social Justice & Empowerment's Notification No. 16-70/2004-DD.III dated 15.03.2007, the post of Motor Mechanic is identified for persons with disabilities in one leg (OL), low vision and hearing handicapped candidates and the

post of Auto Mechanic is identified for persons with locomotor disability (OL) and HH. As the job of Maintenance Assistant (Diesel) is identical to the job of Auto Mechanic, the post of Maintenance Assistant (Diesel) is deemed to be identified for locomotor disability in one leg.

8. From the above provisions of the Mines Rules, 1955, it is amply clear that a person with disability/deformity/paralysis can work even in a mine if his disability/deformity/paralysis does not interfere in his efficient employment. It does not debar all persons with disabilities from employment even in the Mines/organizations dealing with Mines. The degree and type of disability of a person would have to be considered to determine whether such a person can perform the functions of a particular post efficiently. As the threshold for efficient functioning would generally be based on subjective criteria, whether a person can function efficiently or not can best be determined by making him/her work on the relevant job. The complainant had already worked successfully as an apprentice in the respondent's organization for two years without any complaint from either side about his performance. This perhaps was the true test of the complainant's ability to perform the functions of the post efficiently and that his disability does not interfere with efficient performance of duties by him. The complainant had cleared the written test, trade test and the interview on the general standard in open category without any relaxation whatsoever.

9. There seems to be no justification to declare the complainant as ineligible for the post and deprive him of the benefit of appointment to the post which is an identified post for which he has been trained and has proven his capability to function efficiently in the respondent's organization itself. In this case, admittedly, the Maintenance Assistant (Diesel) is required to work in the Mines area which is in opencast working. The

incumbent of the post is not required to work under the ground. NMDC is therefore advise to cancel its letter No. D5/Per/Rectt/MA(Tr)/2008/BA 5000191 dated 15.11.2008 and allow the complainant to join the post."

9. After receiving the direction from the Chief Commissioner for Persons with Disabilities, the respondent company again considered the case of the petitioner and by impugned order dated 25/06/2010 (Annexure P/1) reached to the conclusion that petitioner's appointment has rightly been withdrawn as he is suffering from 40% disability and in light of Rules 29(F)(1) and 29(L) of Mines Rules, 1955, he cannot be allowed to work in a mine.

10. At this stage, it would be appropriate to notice the decision rendered by the Supreme Court in the matter of **Indian Council of Agricultural Research v. Smt. Shashi Gupta**² in which Their Lordships have held that opinion of the Medical Board cannot be over-ridden by the Tribunal and it is beyond jurisdiction of the Tribunal where medical fitness of a candidate is condition precedent for offering appointment and held as under :-

"7. We do not agree with the reasoning and the conclusions reached by the tribunal. We are of the view that once the medical board and the Appellate Medical Board found the

respondent medically unfit for the post of Scientist Grade S the tribunal had no jurisdiction whatsoever to have got over the medical opinions and directed her appointment to the service. The Tribunal outstepped its jurisdiction and acted with an utter perversity. Medical fitness is the sine qua non for appointment to public services. It is the inherent right of an employer to be satisfied about the medical fitness of a person before offering employment to him/her."

11. Similarly in the matter of **G. Sarvothanam**

(supra), their Lordships of the Supreme Court have considered the issue as to whether direction can be given by the Chief Commissioner for Persons with Disabilities under the Act of 1995 for inclusion of Telecom Office Assistants (TOA) cadre in the BSNL Corporation among identified categories of posts for grant of promotion to physically handicapped persons and held that no such direction can be given by the Chief Commissioner for Persons with Disabilities as he cannot confer or create a right. Paragraphs 12 and 13 of the judgment state as under :-

"12. We are of the view that the Chief Commissioner as well as the High Court have failed to appreciate that the respondent was working in a cadre in which there was no reservation for promotion under physically handicapped quota. Further exclusion of TOA cadre from the promotional post of physically handicapped persons is due to a policy decision of the Government of India taken by the then Department of Telecommunications. In such circumstances, the Chief Commissioner

has no power under Section 59 of the Act of 1995 to direct the inclusion of TOA cadre in the list of identified posts and then to order preparation of reservation register for physically handicapped persons and to consider the claim of the respondent for promotion under the reserved vacancies for the various Grades under TOA.

13. The Chief Commissioner under Section 59 of the Act of 1995 has got only the power to examine the matters relating to "deprivation of rights" of persons with disabilities. The Commissioner can only examine whether the persons with disabilities have been deprived of any "rights" for which the Commissioner has to first examine whether the complainant has any "rights" under the laws. The Commissioner cannot confer or create any right for the Appellants. The respondent could not establish that any right has been conferred on him and such right has been denied to him by the Department. The Respondent wanted conferment of a right which was extended only to specific five categories of posts on the basis of the report of a High Power Committee. The Chief Commissioner has no power to direct inclusion of one more category among the identified categories and to grant the benefit. Under Section 59(b) the Chief Commissioner has got the power to look into the complaints with respect to the matters relating to non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Government and the local authorities for the welfare and protection of rights of persons with disabilities. It is not the case of the respondent that the Department has failed to implement either any laws, rules or regulations. The Respondent prayed for positive direction, claiming certain rights, which had not been conferred on him either by any law, regulations or orders. Consequently, the directions given by the Chief Commissioner for the inclusion of TOA cadre among the identified categories cannot be sustained and the Commissioner while passing such order has exceeded the powers conferred on him under Section 59 of the Act of 1995. "

12. Reverting to the facts of the case in light of the principle of law laid down by the Supreme Court in the aforesaid judgments, in the instant case also the post of Maintenance Assistant/Diesel Mechanic is not identified post under Sections 32 and 33 of the Act of the Act of 1995 for physically handicapped persons and the Chief Commissioner for Persons with Disabilities, while entertaining the complaint of the petitioner (Annexure P/8), has compared the post of Maintenance Assistant/Diesel Mechanic with Motor Mechanic and Auto Mechanic and held that since the job of both the posts are similar, therefore, the post of Maintenance Assistant/Diesel Mechanic is deemed to be identified for persons with disabilities. Their Lordships of the Supreme Court in the matter of **G. Sarvothanam** (supra) have clearly held that direction cannot be given by the Chief Commissioner for Persons with Disabilities for inclusion of a post which is identical to the identified post for grant of promotion to physically handicapped persons. Since the post of Maintenance Assistant/Diesel Mechanic is not an identified post for physically handicapped persons, therefore, by making comparison and by

applying the principle of equivalence, the Chief Commissioner for Persons with Disabilities was totally without jurisdiction to hold that the post of Maintenance Assistant/Diesel Mechanic is deemed to be identified post for physically handicapped persons and petitioner is eligible for appointment on the said post whereas it is not an identified post and petitioner cannot be said to be eligible for appointment on the said post for one more reason being that petitioner has applied for the said post under unreserved category which is apparent from his application form (Annexure R/1) wherein he did not even disclose that he is a person belonging to the physically handicapped category and the said fact was revealed only in the medical examination conducted by the Medical Board constituted by the respondent. The petitioner ought to have revealed the said fact in his application form that he belongs to physically handicapped category.

13. Thus, in view of the authoritative pronouncement of the Supreme Court in the matter of G. Sarvothanam (supra), it is quite vivid that the Chief Commissioner for Persons with Disabilities has no authority and jurisdiction to

direct the respondent company for inclusion of the post of Maintenance Assistant/Diesel Mechanic as identified post for physically handicapped persons especially when the respondent company has also issued their internal circular in which it has clearly been held that the post of Maintenance Assistant/Diesel Mechanic is not an identified post for physically handicapped persons. Similarly, since medical fitness of the petitioner was sine qua non for his appointment on the post of Maintenance Assistant/Diesel Mechanic, which he was found unfit in view of provisions of Rules 29(F)(1) and 29(L) of Mines Rules, 1955, learned Chief Commissioner could not direct for appointment subject to fresh medical examination contrary to the opinion of the Medical Board as held by the Supreme Court in the matter of Indian Council of Agricultural Research (supra).

14. In the considered opinion of this Court, the decision that has been arrived upon by the respondent vide impugned order dated 25/06/2010 (Annexure P/1) rejecting petitioner's candidature for the post of Maintenance Assistant/Diesel Mechanic upon consideration of order dated

18/05/2010 (Annexure P/8) passed by the Chief Commissioner for Persons with Disabilities under the Act of 1995 is strictly in accordance with law which is neither perverse nor contrary to the record. I do not find any good ground to interfere with the impugned order.

15. Accordingly, the instant writ petition stands dismissed leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet