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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2021

CORAM :

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

Writ Appeal No.1812 of 2021

1. State of Tamil Nadu,
rep. by its Secretary,
School Education Department,
Fort St. George.
Chennai 600 009.
2. The Director of School Education,
DPI Complex,
College Road, Nungambakkam,
Chennai 600 006.
3. The Chief Educational Officer,
Cuddalore District,
Cuddalore.
4. The District Educational Officer,
Virudhachalam,
Cuddalore District. ... Appellants/Respondents

vs.

V.Karthikeyan ... Respondent/petitioner

Writ Appeal filed under Clause 15 of Letters Patent against the order dated 28.10.2020 passed by this Court in W.P.No.13072 of 2019.

W.P. Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying writ of Certiorarified Mandamus to call for the concerned records from the 3rd respondent and quash the order of the 3rd respondent dated 20.03.2018 bearing Na.Ka.No.8602/A1/2014 and order of the 3rd Respondent dated 11.04.2019 bearing Na.Ka.No.8602/A3/2014 as illegal, arbitrary and contrary to law and consequently direct the respondents to consider the petitioner to the post of Lab Assistant in the existing



vacancies earmarked for MBC PWD - PSTM based on the marks secured in the written exam and in the certificate verificant pursuant to the issue of the notification dated 22.04.2015 of the 2nd respondent and appoint the petitioner in the Post of Lab Assistant with all consequential benefits.

For Appellants : Mr.K.V.Sajeev Kumar,
Government Advocate

For Respondent : Mr.Balan Haridass

J U D G M E N T

(Judgment of the Court delivered by S.VAIDYANATHAN,J.)

This Writ Appeal is directed against the order dated 28.10.2020 passed by the learned Single Judge in W.P.No.13072 of 2019.

2. The Writ Petitioner is the Respondent herein. The case of the Writ Petitioner is that, he is a physically challenged person with 70% disability. He belongs to Most Backward Community. He had applied for consideration of his candidature in response to the Notification issued on 22.04.2015, inviting Applications for recruitment to the post of Lab Assistant in Government Schools in the State of Tamilnadu. Out of the total number of invited vacancies, 3% was earmarked for candidates with disability. The Writ Petitioner secured 92 marks out of 150 in the written examination and was awarded 13 marks out of 17 marks in the certificate assessment.

3. It is further stated by the Writ Petitioner that, the total number of Lab Assistant posts invited was 166 and out of the said vacancies, 3% of the same works out to 4.8. In the said circumstances, 5 posts were earmarked for persons with disability. It is the case of the Writ Petitioner that, in the selection, he was overlooked and two other persons were accommodated in the disability category, though vacancies were available in the earmarked posts.

4. In the counter Affidavit filed in the Writ Petition, it was stated by the Government that, overall 5 posts were reserved for disabled persons and out of the same, 3 posts were reserved for visually impaired, hearing impaired and speech impaired and only 2 posts were reserved for physically challenged persons. The 2 posts reserved for physically challenged persons had been filled up by two candidates who had secured more marks than the Writ Petitioner. However, the Writ Petitioner is the next person to be posted in the reserved category meant for physically challenged persons.



5. It was brought to the notice of the learned Single Judge that, one selected candidate viz. Kavitha, who secured more marks than the Writ Petitioner, did not choose to join, and that, the vacancy earmarked under the quota 'physically challenged' was available as on that date. Hence, finding that, there is no legal impediment in appointing the Writ Petitioner in the existing vacancy, the learned Single Judge allowed the Writ Petition with a direction to the Respondents to grant appointment to the Writ Petitioner as Lab Assistant in the existing vacancy earmarked for physically challenged persons and grant consequential posting order to him.

6. Learned Government Advocate appearing for the Appellants vehemently contended that, the learned Single Judge ought to have considered the aspect that, the posts reserved for Blind, Deaf and Dumb candidates cannot be filled up by other physically challenged candidates like that of the Respondent/Writ Petitioner.

7. To substantiate his stand, learned Government Advocate drew the attention of this Court to Sections 33 and 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short '1995 Act') and Sections 33 and 34 of the Rights of Persons with Disabilities Act, 2016 (in short '2016 Act'). For better appreciation, said provisions are extracted hereunder:

Sections 33 and 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995:

33. Reservation of posts:- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent. Each shall be reserved for persons suffering from.

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:



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Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

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.

Sections 33 and 34 of the Rights of Persons with Disabilities Act, 2016:

33. Identification of posts for reservation:-

The appropriate Government shall ...

(i) identify posts in the establishments which can be held by respective category of persons with benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of section 34;



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(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and

(iii) undertake periodic review of the identified posts at an interval not exceeding three years.

34. Reservation:- (1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent for persons with benchmark disabilities under clauses (d) and (e), namely:-

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may having regard to the type of work carried out in any Government establishment, by notification and subject



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to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five 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 five categories with the prior approval of the appropriate Government.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit.

8. It is contended by the learned Government Advocate that, in the case on hand, vacancies have been notified based on 1995 Act and not under the 2016 Act. According to him, neither Section 36 of the 1995 Act nor Section 34 of the 2016 Act will be applicable to the case of the Writ Petitioner, as there are sufficient vacancies for the year in question and the question of carrying forward the vacancies for the subsequent year does not arise. He went on to contend that, candidates need to be appointed only based on the reservation available for them, i.e. to say that, a person with locomotor disability has to be appointed only under the said quota and he cannot be appointed in any other quota, say, under 'visually impaired and hearing impaired'. Since, a candidate has already been appointed under the 'physically challenged' quota, the Writ Petitioner is not eligible to be appointed in the said vacancy.

9. Heard the learned counsel on either side and perused the material documents available on record.



10. In the case on hand, the Writ Petitioner is a physically challenged person. It is not in dispute that, there was an Advertisement for the post of Lab Assistant with a reservation of 3% in terms of the Notification issued on 22.04.2015. It is also not in dispute that, in the overall 5 posts reserved for disabled persons, 1% is reserved for visually impaired, hearing impaired and locomotor disability, respectively. If more persons in the aforesaid category are available, after filling up these categories at 1% for each category, extra posts can be given to category no.(iii), if no candidates are available in category nos.(i) and (ii) as per the 1995 Act.

11. As per 1995 Act, the total number of posts reserved by the Government for persons with disability, is 3%, If 2016 Act is made applicable, the reservation for disabled persons will be 4%. Thus, the total number of vacancies as per Section 33 of the 1995 Act, which is only '5', will be more than 6, if 2016 Act is applied.

12. As contended by the learned Government Advocate, the posts reserved for Blind and Deaf candidates cannot be filled up by other physically challenged candidates like that of the Respondent/Writ Petitioner. Even though the Writ Petitioner is next in the line to be appointed under the category 'locomotor disability', there is no provision to appoint him under the other categories, i.e. visually impaired and hearing impaired.

13. When candidates are not available under a particular category, vacancies have to be filled up in any other category depending upon the eligibility of the candidates. Merely because, one percent is reserved for 'visually impaired', and there are more number of eligible candidates in that category, it does not mean that, they cannot be appointed. If eligible candidates are not available under the category 'locomotor disability' and if there are vacancies in other categories, they should be considered for appointment in the available vacancies, as per the Act.

14. In the case on hand, one candidate viz. Kavitha, who is physically challenged has secured more marks than the Writ Petitioner. As she did not choose to join, and that, her vacancy was available on that date, the Writ Petitioner, who was placed next in the line, was considered for appointment to the post of 'Lab Assistant', by the learned Single Judge.

15. Hence, we are of the view that the learned Single Judge was right in interfering with the order impugned in the Writ Petition and granting the relief sought by the Writ Petitioner. Hence, finding no reasons to interfere with the



order of the learned Single Judge, this Writ Appeal is dismissed. No costs. Consequently, connected C.M.P.No.11338 of 2021 is closed.

Sd/-
Asst. Registrar

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Sub Asst. Registrar

(vm/aeb)

TO

1 The Secretary,
School Education Department,
Fort St.George, Chennai - 9

2 The Director of School Education,
DPI Complex,
College Road, Nungambakkam,
Chennai - 6

3 The Chief Educational Officer,
Cuddalore District, Cuddalore District.

4 The District Educationl Officer,
Virudhalam, Cuddalore District.

+1 C.C.to GOVERNMENT PLEADER, HIGH COURT, MADRAS,
SR.NO.50480/2021

+1 C.C.to MR.BALAN HARIDAS, ADVOCATE, SR.NO.50035/2021

Judgment in
W.A.No.1812 of 2021

AK-11(CO)
RA 20/10/2021