

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 8509 OF 2022

Ku. Sonal d/o Namdeo Meshram,
Aged about 26 years, Occupation – Nil,
R/o Mangali, Post – Jugnala, Taluka -
Brahmapuri, District – Chandrapur -
441206.

.... **PETITIONER**

VERSUS

1) The State of Maharashtra,
through its Secretary, Public Health
and Family Welfare Department,
Mantralaya, Mumbai – 400 001.

2) The Deputy Director,
Health Services, Nagpur Division,
Nagpur – 440 001.

.... **RESPONDENTS**

Mr. P.S. Sahare, Counsel for the petitioner,
Mr. M.K. Pathan, Assistant Government Pleader for the respondents.

CORAM : ROHIT B. DEO & MRS. VRUSHALI V. JOSHI, JJ.
DATED : 15th MARCH, 2023

ORAL JUDGMENT : (PER : R.B. DEO, J.)

Heard. **Rule.** Rule made returnable forthwith.

2. Petitioner is assailing the judgment dated 14-7-2022 rendered by the learned Administrative Tribunal, Nagpur (MAT) in Original Application 578/2021.

3. The petitioner approached MAT assailing the refusal of the respondents to appoint her to the post of Staff Nurse Private (50%) from the disabled category. The petitioner admittedly belongs to the Scheduled Caste (SC), she is suffering from low hearing impairment which disability is duly certified by the Medical Board and Civil Surgeon, General Hospital, Chandrapur. The MAT found substance in the submission of the respondents that Government Resolution dated 27-2-2009 earmarks the post of Staff Nurse for candidates suffering from orthopedic disability. As a sequitur, the MAT found that the petitioner was rightly refused appointment and dismissed the original application.

4. The petitioner averred in the original application that she belonged to the Scheduled Caste category, and having cleared the HSC examination, she has secured General Nursing and Midwifery Course Certificate.

5. The petitioner averred that on 20-2-2019 the Deputy Director, Health Services, Nagpur Division, Nagpur published an online advertisement to fill the post of Medical Staff (Class-III) in the State of Maharashtra. The online advertisement provided that seven posts are reserved for the disabled.

6. The petitioner responded to the online advertisement since she was qualified and eligible and was possessing the requisite Disability Certificate. She appeared for the written examination and on 28-4-2021 she received communication informing her that the select list is published online and in that regard the petitioner may appear for verification of documents on 04-5-2021.

7. The petitioner averred in the original application that on 14-5-2021 respondent 2-Deputy Director of Health Services sought certain clarifications from Director-2, Health Services, Pune. On 14-5-2021 the Deputy Director of Health Services informed the District Orthopedic Officer, General Hospital, Chandrapur conveying that the petitioner was selected for the post of Staff Nurse Private (50%) (SC) from the Disabled Category and that her documents were verified on 04-5-2021. The District Orthopedic Officer, General Hospital, Chandrapur was requested to verify the Disability Certificate produced by the petitioner.

8. On 22-6-2021 the petitioner received communication from the Deputy Director, Health Services which *inter alia* conveyed that in view of the Government Resolution dated 27-2-2009 the post of Staff Nurse Private (50%) is reserved for candidates who have physical impairment and not hearing impairment and the petitioner is declared not eligible

for appointment.

9. The petitioner addressed communication dated 24-6-2021 to respondent 2, putting on record that her documents were verified, she was interviewed and was informed that she would be appointed at the Rural District Hospital, Armori. The representation went unheeded which constrained the petitioner to approach the MAT.

10. An affidavit-in-response dated 31-12-2021 was filed on behalf of the Deputy Director of Health Services, Nagpur before the MAT and we may extract the relevant portion -

“6. It is submitted that the contentions raised by the Applicant in the Original Application about online application filled by the applicant and received the call letter for the written examination for Public Health Department – 2018 which is matter of record.

7. It is submitted that as per guideline and merit list received from Directorate Pune, Respondent No.2 called the Applicant for document verification and counseling process vide communication dated 28-4-2021.

8. It is submitted that the contentions raised by the Applicant in the instant Original Application about communication dated 14-5-2021 to get proper guidelines from Directorate Pune which is matter of record. It is further submitted that the averments raised by the Applicant in the

instant Original Application in respect of verifying the Disability Certificate submitted by the Applicant during document verification process which is matter of record.

9. *It is submitted that the contentions raised by the Applicant in the instant Original Application are the intimation to the Applicant that she is not fulfill the eligible criteria which made after scrutiny of all documents done by the Respondent No.2 as per Government Resolution dated 27-2-2009 and hence declared to be unqualified for the post of Staff Nurse vide communication dated 22-6-2021.*

10. *It is submitted that the contentions raised by the Applicant in the instant Original Application about Applicants hearing impaired and work performed with the help of hearing machine. It is further submitted that as per Government Resolution dated 27-2-2009 in Appendix at Sr.No.149 shows reservation for the post of Staff Nurse is a person disabled with Orthopedic with one leg. It is submitted that the Applicant has produced her certificate of disabled with hearing impaired (B/L Severe SNHL) and as per certificate produced she was not eligible for the post of staff Nurse as per Government Resolution dated 27-2-2009 and hence declared to be unqualified for the post of Staff Nurse vide communication dated 22-6-2021. It is submitted that the action on the part of Respondent No.2 is just and proper without any prejudice mind and as per Government Resolution dated 27-2-2009. The copy of certificate produced by the Applicant is annexed herewith as Annexure-R-1.*

11. *It is submitted that as per Government Resolution*

*dated 27-2-2009i in Appendix at Sr.No.149 shows reservation for the post of Staff Nurse is a person disabled with **Orthopedic with one leg.** It is further submitted the Applicant has produced her certificate of disabled with hearing impaired (B/L Severe SNHL) and as per certificate produced she was not eligible for the post of staff Nurse as per Government Resolution dated 27-2-2009 and hence declared to be unqualified for the post of Staff Nurse vide communication dated 22-6-2021. It is submitted that the action on the part of Respondent No.2 is just and proper without prejudice mind and as per Government Resolution dated 27-2-2009.”*

11. The petitioner filed rejoinder to the affidavit-in-response filed on behalf of the Deputy Director, Health Services, Nagpur emphasizing that the subject advertisement makes no reference to the Government Resolution dated 27-2-2009 nor does the advertisement provide that the post is reserved for a particular disability. The petitioner further stated in the rejoinder that while filling up post at Pune, there was a specific reference to a particular disability, as was also the case with the advertisements issued for Aurangabad, Latur and Akola.

12. We have noted supra that the MAT accepted the submission of the respondents that Government Resolution dated 27-2-2009 earmarks the post for physically handicapped and that the petitioner who had hearing disability was not in the zone of consideration.

13. We have heard the learned Counsel for the petitioner Mr. P.S. Sahare and the learned Assistant Government Pleader Mr. M.K. Pathan for the respondents. Mr. P.S. Sahare has reiterated the submissions which did not find favour with the MAT. Mr. M.K. Pathan would support the judgment of the MAT placing reliance on Government Resolution dated 27-2-2009.

14. We may revisit certain admitted facts. The petitioner is duly qualified and eligible to hold the post. She cleared the written examination and the interview and attended the document verification and counseling. The material on record indicates that respondent 2 did contemplate issuing appointment order, and it was presumably in view of the clarificatory advice received, that the petitioner is found not eligible on the premise that Government Resolution dated 27-2-2009 earmarks the vacancy for physically handicapped and not low hearing impairment disability.

15. We have no hesitation in holding that the claim of the petitioner is unjustly rejected and that the MAT fell in error in dismissing the original application.

16. It is not in dispute that the subject advertisement issued to fill in the posts in Nagpur Division provided that seven posts shall be reserved

for the disabled. Perusal of the subject advertisement and in particular Clause 9B shows that seven posts which are reserved for the disabled are not reserved for any particular category of disability.

17. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act 1 of 1996) was enacted to give effect to the proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region to which India is a signatory.

18. Sub-section (2) is the definition clause. Sub-section (b) defines “blindness”, sub-section (e) defines “cerebral palsy”, sub-section (i) defines “disability” to mean ‘(i) blindness, (ii) low vision, (iii) leprosy-cured, (iv) hearing impairment, (v) locomotor disability, (vi) mental retardation, (vii) mental illness.’ (emphasis supplied)

“Hearing impairment” is further defined in sub-section (l) to mean ‘loss of sixty decibels or more in the better ear in the conversational range of frequencies’. Sub-section (n) defines “leprosy-cured person”, sub-section (o) defines “locomotor disability”, sub-section (r) defines “mental retardation”, sub-section (t) defines “person with disability” to mean ‘a person suffering from not less than forty per cent of any disability as certified by a medical authority, and sub-section (u) defines “person with low vision”.

19. Having noted the various definitions, we may straight away note the provision of Chapter VI which deal with “employment”. Section 32 of Act 1 of 1996 is referred to as the source of power for the issuance of Government Resolution dated 27-2-2009 and we may extract the said provision verbatim.

“32. Identification of post which can be reserved for persons with disabilities -

Appropriate Government shall -

- (a) identify posts, in the establishment, which can be reserved for the persons with disability;*
- (b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.”*

20. We note that having identified posts in the establishment which can be reserved for the persons with disability, the appropriate Government is obligated to review, at periodical intervals not exceeding three years the list of posts identified and up-date the list taking into consideration the developments in technology.

21. Section 33 Act 1 of 1996 deals with “reservation of posts” and reads thus :

“33. Reservation of posts

Every appropriate Government shall appoint in every

establishment such percentage of vacancies not less than three per cent. for persons for class of persons with disabilities 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 post identified for each disability :

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, except any establishment from the provisions of this section.”

22. It is discernible from language of Section 32 of Act 1 of 1996 that the legislative intent is that the posts which can be reserved for persons with disabilities shall be identified, and a periodic review is envisaged inasmuch as with the technological developments, a person with a particular disability may conceivably be in a position to discharge the duties assigned to a particular post, which he may have not been in a position to discharge effectively pre-technology developments.

23. Act 1 of 1996 is repealed by Section 102 of the Right of Persons with Disabilities Act, 2016 (Act of 2016). However, sub-section (2) of Section 102 is the saving clause which provides that anything done or

any action taken under the Repealed Act, shall be deemed to have been done or taken under the corresponding provisions of this Act.

24. Act of 2016 is enacted to give effect to the United Nations Conventions on the Rights of Persons with Disabilities and for matters connected therewith or incidental thereto. Section 2(r) of Act 1 of 1996 defines “persons with benchmark disability”, and sub-section (s) defines “person with disability” to mean ‘a person with long-term physical, mental, intellectual or **sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.** (*emphasis supplied.*)

Section 33 of the Act of 2016 deals with “identification of posts for reservation” which reads thus -

“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;*
- (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.”

25. Section 33 of the Act of 2016 provides that appropriate Government shall identify posts which can be held by respective category of persons which benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of Section 34. Sub-section (ii) mandates that an expert committee shall be constituted by the appropriate Government with representation of persons with benchmark disabilities for identification of such posts, and sub-section (iii) envisages that the appropriate Government shall undertake periodic review of the identified posts at an interval not exceeding three years.

26. Section 34 of the Act of 2016 deals with reservation and reads thus :

“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 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.”

27. Inasmuch as the reference in the aforesaid statutory provision is to “benchmark disability”, it would be necessary to consider the definition of “person with benchmark disability” in Section 2(r) of the Act of 2016. The said definition reads thus;

“2(r) “person with benchmark disability” means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by certifying authority.”

28. It is discernible from the definition that if the disability is specified, a person with not less than forty per cent of the specified disability where specified disability has not been defined in measurable terms and a person with disability where the specified disability has

been defined in measurable terms, as certified by the certifying authority, is a person with “benchmark disability”.

29. Section 33 of the Act of 2016 mandates the identification of the posts in the establishment, 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 of the Act of 2016. However, such identification is required to be done by an expert committee with representation of persons with benchmark disabilities, constituted for identification of the posts. We note that in Act 1 of 1996, the identification of posts which could be reserved for the persons with disability was left to the appropriate Government and there was no mandate that an expert committee be constituted which shall be entrusted with the task of identification.

30. In our considered view, the reliance placed on the Government Resolution dated 27-2-2009 is clearly misplaced. The subject advertisement makes no reference to the Government Resolution dated 27-2-2009 nor is it specified in the subject advertisement, in contradiction with the advertisements issued for filling in vacancies in certain divisions other than Nagpur Division, that the posts shall be reserved for a particular disability. The statutory scheme of Section 32 of the Act 1 of 1996 and Section 33 of the Act of 2016 is vastly

different, inasmuch as while Act 1 of 1996 empowers the State Government to identify the posts, the Act of 2016 entrusts the task of identification of posts to an expert committee with representation of persons with benchmark disabilities for identification of such posts.

31. Considering the schematic difference between the provisions of the Act 1 of 1996 and Act of 2016, the Government Resolution dated 27-2-2009 cannot be deemed to have been issued under a corresponding provisions of the Act of 2016, with the aid of saving clause of Section 102 of the Act of 2016.

The aspect articulated supra apart, inasmuch as even the provisions of the Act 1 of 1996 mandated a periodic review within a period not exceeding three years, the respondents cannot be heard arguing that the posts were reserved for a particular disability in the Government Resolution dated 27-2-2009, particularly since the subject advertisement is conspicuously silent and makes no reference either to the Government Resolution or to any particular disability.

32. We have no hesitation in holding that the claim of the petitioner is unjustly rejected and the MAT fell in serious error in not redressing her grievance.

33. We may observe that in all fairness, the learned Assistant

Government Pleader Mr. M.K. Pathan did not question the qualification and eligibility of the petitioner to hold the post nor is it argued that there is any candidate from the disabled category who has faced better than the petitioner.

34. We quash the judgment dated 14-7-2022 rendered by the learned MAT in Original Application 578/2021.

35. We hold and declare that the petitioner is entitled to be appointed as Staff Nurse Private (50%) (Group-C) with effect from the date on which the other candidates in the recruitment process are issued appointment orders. We, however, clarify that the petitioner shall be entitled only to notional benefits and that no arrears of salary etc. shall be payable.

36. We direct the respondents to issue the appointment order in favour of the petitioner, as directed supra, within the next four weeks.

(Mrs. Vrushali V. Joshi, J.)

(Rohit B. Deo, J.)

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