

Kerala High Court  
Saritha S.Babu vs State Of Kerala

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 9TH DAY OF OCTOBER 2014/17TH ASWINA, 1936

WP(C).No. 7932 of 2014 (N)  
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PETITIONER:  
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SARITHA S.BABU, AGED 41 YEARS,  
W/O.SREEHARSHAN, PAYANTHIYIL PUTHENVEEDU,  
POOVAR P.O., THIRUVANANTHAPURAM,  
NOW RESIDING AT EANITHOTTATHU VEEDU,  
PIRAYUMOODU, NEYYATTINKARA,  
THIRUVANANTHAPURAM.

BY ADV. SRI.R.DIVAKARAN

RESPONDENT(S):  
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1. STATE OF KERALA,  
REPRESENTED BY ITS CHIEF SECRETARY,  
SECRETARIAT, THIRUVANANTHAPURAM.
2. DISTRICT OFFICER,  
KERALA PUBLIC SERVICE COMMISSION,  
PATTOM, THIRUVANANTHAPURAM-695004.
3. KERALA PUBLIC SERVICE COMMISSION,  
PATTAM, THIRUVANANTHAPURAM  
REPRESENTED BY ITS SECRETARY.
4. MANAGING DIRECTOR, DISTRICT CO-OPERATIVE BANK,  
THIRUVANANTHAPURAM.

\*ADDL. R5 IMPLAEDED

5. HARITHA RO,

CASHIER/CLERK, IN DISTRICT CO-OPERATIVE BANK,  
THIRUVANANTHAPURAM.

ADDL. R5 IS IMPEADED AS PER ORDER DATED 16/06/2014 IN IA 7871/2014.

R1 BY GOVERNMENT PLEADER SRI.T.J.MICHAEL  
R2 & R3 BY SRI.P.C.SASIDHARAN, SC  
R4 BY SRI.T.R.HARIKUMAR, SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD  
ON 09-10-2014, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:

mbr/

WP(C).No. 7932 of 2014 (N)

APPENDIX

PETITIONER(S)' EXHIBITS:

EXHIBIT P1 : ATRUE EXTRACT OF THE RANK LIST NO.252/10/DOT DATED 31-5-2010.

EXHIBIT P2 : ATRUE COPY OF LETTER NO.DTFSS(3) 5438/2009 DATED 21-1-2012 TO  
THE PETITIONER TO DIRECTING TO PRODUCE DOCUMENTS.

EXHIBIT P3 : ATRUE COPY OF THE ADDENDUM NOTIFICATION NO.DTFSS(3)5438/09  
DATED 27-12-2012.

EXHIBIT P4 : A PHOTO COPY OF THE CERTIFICATE DATED 19-4-2013 ISSUED BY THE  
MEDICAL BOARD STATING THAT THE PETITIONER IS ORTHOPEDICALLY  
HANDICAPPED AND HER DISABILITY IS 40%.

EXHIBIT P5 : ATRUE COPY OF THE LETTER ISSUED BY THE 2ND RESPONDENT  
DATED 1-3-2014.

EXHIBIT P6 : ATRUE COPY OF THE REPRESENTATION BEFORE THE 2ND AND  
4TH RESPONDENT DATED 1-3-2014.

EXHIBIT P7 : ATRUE COPY OF THE APPLICATION DATED 26.3.2014.

EXHIBIT P8 : ATRUE COPY OF THE REPLY FROM STATE PUBLIC INFORMATION  
OFFICER AND DISTRICT OFFICER, KERALA PUBLIC SERVICE  
COMMISSION DISTRICT OFFICE, THIRUVANANTHAPURAM  
DATED 22.4.2014.

RESPONDENT(S)' EXHIBITS:

EXT.R2(A) : TRUE COPY OF THE CIRCULAR NO.3 OF 2013.

/TRUE COPY/

P.S. TO JUDGE

mbr/

K. VINOD CHANDRAN, J.

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W.P.(C) No.7932 of 2014 - N

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Dated this the 9th day of October, 2014

J U D G M E N T

The petitioner is aggrieved by the non consideration of the petitioner for appointment, despite the petitioner having obtained second rank in the list prepared for the differently abled persons, as per Ext.P3. The petitioner is an orthopaedically handicapped candidate, who has been placed at the second rank in the list of differently abled persons. The petitioner contends that despite vacancies having arisen, which are reserved to such disabled candidates the petitioner has not been advised for appointment. A three percent of the vacancies are earmarked for such candidates under the Persons with Disabilities (Equal Opportunity, Protection of Rights and full Participation) Act 1995 (herein after referred to as 'the Disabilities Act').

2. The Kerala Public Service Commission (PSC) has W.P.(C) No.7932 of 2014 - N 2 filed a counter affidavit, in which it has been specifically noticed that the reservation applicable to physically handicapped persons is 3% and as per the rules of rotation on a roster of 100 points, the turns allotted for physically handicapped candidates are at points 33, 66 and 99. The implementation of the said reservation policy is in such a manner that 33rd and 66th vacancies are set apart respectively for blind and deaf candidates and the 99th vacancy is set apart for the physically handicapped (ortho category).

3. Ninety vacancies were notified for appointment half of which were to be made respectively on direct recruitment and from in-service candidates. Hence only one vacancy is reserved in the first 45 to the disabled. The present recruitment to the post of cashier/clerk is to a post not identified for the blind candidates. The first post hence is interchanged in favour of the deaf candidates and so would the second post also be reserved for the deaf candidates which has to go to an in-service candidate. The petitioner, W.P.(C) No.7932 of 2014 - N 3 who is orthopaedically handicapped will have to wait till the 99th vacancy arises and herein the petitioner is only the second rank holder.

4. The post, to which selection is made being not one identified for the blind, such reserved vacancy will have to be interchanged between the other two categories being deaf and physically handicapped. The present reserved vacancy of the blind, having gone to the deaf; in the next 100 point roster, the said reserved vacancy of the blind would be conceded to the category of physically

handicapped. Hence, such alternate vacancy reserved for the blind in a 100 point roster, would be adjusted between the deaf and physically handicapped. The present selection having set apart the first and second vacancies to the deaf; the physically handicapped will have to wait till the third vacancy at the 99th point arises; is the contention.

5. The respondent PSC also relies on the Circular produced at Ext.R2(a). Section 36 of the Disabilities Act, provides for carry forward of vacancies, which cannot be W.P.(C) No.7932 of 2014 - N 4 filled up due to non availability of a suitable person with disability. Ext.R2(a) Circular would indicate that the PSC has taken a decision not to re-notify the vacancies, since, in a selection made by the PSC, the selection year is not a calendar year, but, the period of the validity of a rank list. It is decided by the Commission, to keep vacant the reserved vacancies for the disabled, which could not be filled up from a rank list, for reason of non-availability of suitable candidates. This vacant post would be filled up from the next selection and the rank list prepared thereon, from the category entitled to.

6. The counter affidavit of the PSC also indicates that there being no candidate with hearing impairment, in the rank list, the vacancy at the 33rd position, would be kept vacant and the same filled up from the next rank list prepared in the next selection. If candidates are even then, not available in the category, only then, the same would be filled up with physically handicapped candidates. The 66th vacancy coming within the vacancies set apart for in-service W.P.(C) No.7932 of 2014 - N 5 candidates cannot be filled up with direct recruits. On such candidates also being not available, the post would only then be conceded to a general candidate, definitely, the said prescription is a reasonable one, but the same has to be tested on the anvil of the provisions of the Disabilities Act.

7. It is undisputed that, 3% of the vacancies, are to be ear-marked for persons with disabilities and Section 32 of the Disabilities Act provides for identification of posts, which can be reserved for persons with disabilities. Out of the 3%, mandated under Section 33 of Disabilities Act, 1% each shall be reserved for persons suffering from

(i) blindness or low vision

(ii) hearing impairment and

(iii) locomotor disability or cerebral palsy

8. A reading of Sections 32 and 33 of the Disabilities Act would support the case of the PSC, insofar as identification of posts and the category change effected to the 1% reserved to the blind. For reason of the post being not one identified for appointment to the blind, the same W.P.(C) No.7932 of 2014 - N 6 would have to be interchanged equally to the other two categories. That however, does not result in any reduction of the total percentage, since that post would have to be conceded to the other categories, maintaining a balance in the 100 point roster.

9. We are however, concerned with a situation, as has been projected, wherein, no candidates are available in one of the categories, being persons with hearing impairment and the first two posts, in the 100 point roster; being reserved as per the system devised by the PSC to that category. Can those be kept vacant till the next year when there are available two orthopaedically handicapped persons, in the current rank list, is the specific question, which has to be answered. Despite there being two candidates available in the disabled category, two posts are not filled up for want of persons from a particular category; is the disturbing consequence.

10. In answering such question, this Court has to keep in mind a situation in which, in the next selection year also W.P.(C) No.7932 of 2014 - N 7 there are no candidates available in the category of deaf persons. Then, if there are no candidates from the category of physically handicapped also, the 33rd post reserved in the 100 point roster would have to be filled up with general merit candidates. This is despite the existence of two candidates in the physically handicapped category, in the present list. The reserved post would go unfilled and would be in the above circumstance, be filled up with a general candidate. That definitely is not the intention of the law makers.

11. This Court in Jayaprakash v. Joint Registrar of Co-operative Societies [2013(4) KLT 788], considered the question of which post is to be identified for reservation under the Disabilities Act, as per the provisions of Section 80(5) of the Co-operative Societies Act, 1969. Proviso to sub-Section 5 mandated that in all Societies where there are more than 10 employees, but less than 33; there shall be one post reserved to the disabled. Whether it has to be the 11th post or the 33rd post, was the question decided. W.P.(C) No.7932 of 2014 - N 8 This Court considering the binding precedents of the Hon'ble Supreme Court in Govt. of India v. Ravi Prakash Gupta [(2010) 7 SCC 626] and Union of India v. National Federation of the Blind [2013 (4) ILR Kerala 279] held so in paragraph 9:

9. National Federation of the Blind (supra) affirmed Ravi Prakash Gupta (supra) and comprehensively dealt with the various Government Orders issued by the Union of India to dilate upon how the reservation for the disabled, as provided under the Disabilities Act, has to be implemented. There also, the question arose as to whether the reservation of 3% has to be made to the posts in the total cadre strength or in the identified vacancies alone. The intention of the legislature, on a reading of Section 33 as also Ravi Prakash Gupta (supra) was held to be:

"... reservation of 3% for differently abled persons should have to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts" (para 30).

The contention of the Union of India that reservation in terms of Section 33 has to be computed against identified posts only was held to be not tenable and was rejected as completely misconceived.

12. When reservation is contemplated to the cadre, on the basis of the cadre strength, the above scheme devised by the PSC, would go against the reservation policy brought in by the Disabilities Act. When candidates are available in one of the categories, entitled for reservation under the

W.P.(C) No.7932 of 2014 - N 9 enactment, the same cannot be denied for reason only of the working of the system being effected. As was noticed above, since carry forward is mandated only for one year, the same would result in a disabled candidate, entitled to reservation being denied of such reservation, only by virtue of the balancing consideration, between the categories, as devised by the PSC.

13. On the ground only of the system devised for implementation of the reservation going against such appointments, the legislative mandate cannot be subverted. In Ravi Prakash Gupta (supra), the contention on behalf of the Central Government was that reservation of post as mandated under Section 33 of the Disability Act is dependent upon the identification of the post as per Section 32 of the Disabilities Act and any reservation can only take effect from the date of identification. The Hon'ble Supreme Court rejected the said contention and held that the mere lack of identification, resulting only from the executive lethargy to identify posts, cannot be a tool to deny the W.P.(C) No.7932 of 2014 - N 10 benefits conferred by the enactment.

14. The principle enunciated by the Hon'ble Supreme Court in the aforecited decisions, would be equally applicable herein. True the vacancy identified for the blind in the present 100 point roster is said to be conceded to the deaf. Thus making the first two vacancies reserved for the category of deaf persons. Admittedly there is no deaf person available in the rank list and there are two persons with physical handicap, available in the rank list to satisfy the legislative mandate of reservation, to disabled persons. Necessarily the post reserved from those set apart for direct recruitment would have to be filled up by the physically handicapped persons to ensure implementation of such legislative command of reservation. Adjustment between categories is permitted by the legislation and an adjustment made cannot hold good for all time in circumstance of there being no candidate in that category. If candidate from that category also is not available, then a further category change shall be made to the third W.P.(C) No.7932 of 2014 - N 11 category. Only if no candidate is available in that category also, can the vacancy be kept vacant, and carried forward. The statute does not restrict the category change to the first instance alone and the legislative intention is to provide reservation to the disabled in either of the categories. Hence, from the 3% vacancies reserved in the present 100 point roster, 33rd should have been filled up with physically handicapped; since they are the only persons with disability figuring in the rank list.

15. Merely for reason that one of the categories alone rank in the list, there can be no denial of appointment. If the physically handicapped are appointed in any year, to all the three reserved vacancies and in the subsequent year, there exists hearing impaired candidates, along with physically handicapped candidates, then all the vacancies will have to be conceded to the deaf, for reason of the orthopaedically handicapped having been granted appointment in the previous year. A categorization permitted within the mandate of reservation cannot work W.P.(C) No.7932 of 2014 - N 12 itself in a manner destructive of the reservation as such. This would ensure reservation to the disabled as envisioned by the legislature, which vision cannot be defeated merely on the working of a system devised for implementation of the legislative command.

16. In the present case, after considerable hearing, the learned Standing Counsel for the respondent PSC would submit that in fact the Commission had made the publication without indicating the

reservation for disabled candidates. Even when the rank list was prepared the prescription for such reservation was not noticed. That is why in Ext.P8, it is stated that the 33rd position was filled up by a general candidate and the 41st position is kept reserved for the disabled candidate. By the time, the omission was noticed, the 33rd candidate was advised and hence, the next available vacancy being the 41st point was reserved for the disabled candidate. In the context of such omission, having occurred the PSC has also called for fresh application from disabled candidates specifically "hearing impaired" W.P.(C) No.7932 of 2014 - N 13 candidates by a notification on 15.03.2014.

17. Only in the context of such notification having been published, this Court would not issue any positive direction to appoint the persons from the rank list produced herein as Ext.P3. It is made clear that if the respondent PSC does not get any suitable candidates, definitely, the 41st position reserved for disabled candidate from open merit shall be filled up in accordance with Ext.P3 rank list. The specific direction is issued since on non-availability of suitable candidates in the second notification published, the vacancy would be conceded to the general category.

18. The system devised by the PSC being not a subject matter of challenge, this Court would not venture to issue any writ on that aspect. But, however, PSC would do well to introspect on the observations made herein. In making such introspection, this Court has to point out one another anomaly. The observations in Jayaprakash (supra) regarding the post/point, which has to be conceded for reservation, is relevant and the same as indicated in W.P.(C) No.7932 of 2014 - N 14 paragraphs 11 and 12 are extracted herein.

11. We are, in the instant case, not really concerned with such computation, since the reservation has to be decided in terms of the proviso to the sub-section. In deciding how the reservation has to be applied, the Office Memorandum issued by the Government of India can supply some guidance, especially the maintenance of rosters in effecting reservation:

"15. Effecting Reservation - Maintenance of Rosters:

(a) all establishments shall maintain separate 100 point reservation roster registers in the format given in Annexure II for determining/effecting reservation for the disabled - one each for Group A posts filled by direct recruitment, Group B posts filled by direct recruitment, Group C posts filled by direct recruitment, Group C posts filled by promotion, Group D posts filled by direct recruitment and Group D posts filled by promotion.

(b) Each register shall have cycles of 100 points and each cycle of 100 points shall be divided into three blocks, comprising the following points:

1st Block - Point No.1 to point No.33 2nd Block - Point No.34 to point No.66 3rd Block - Point No.67 to point No.100

(c) Points 1, 34 and 67 of the roster shall be earmarked reserved for persons with disabilities - one point for each of the three categories of disabilities. The head of the establishment shall decide the categories of disabilities for which the points 1, 34 and

67 will be reserved keeping in view all relevant facts.

(d) All the vacancies in Group C posts falling in direct recruitment quota arising in the establishment shall be entered in the relevant roster register. If the post falling at point No.1 is not identified for the disabled or the head of the establishment considers it desirable not to fill up by a disabled person or it is not possible to fill up that post by the disabled for any other person, one of the vacancies falling at any of the points from 2 to 33 shall be treated as reserved for the disabled and filled as such. Likewise a vacancy falling at any of the points from 34 to 66 or from 67 to 100 shall be filled by the disabled. The purpose of keeping points 1, 34 and 67 as reserved is to fill up the first available suitable vacancy from 1 to 33, first available suitable vacancy from 34 to 66 and first available suitable vacancy from W.P.(C) No.7932 of 2014 - N 15 67 to 100 persons with disabilities.

xxx xxx xxx".

12. On a reading of the above, it is clear that, in a 100 point roster, what was intended was to identify the vacancies arising at the 1st point of time in a block of 33 (being 1/3rd). The same procedure can safely be adopted in the instant case also, since what is intended by the statutory mandate is to provide reservation to the disabled and it cannot be left to the caprice of the employer to decide as to when and to which post he would make such reservation.

19. Hence, the identification of the 33rd, 66th and 99th vacancies would not be proper and the 1st, 34th and 67th vacancies would have to be reserved in a 100 point roster, even as per the implementation norms issued by the Government of India. This is so since the legislation intends at a fair representation of the disabled, in the cadre. The legislation is not merely intended at providing reservation to the vacancies prospectively; but ensuring fair representation in the cadre as such. The intention clearly is to set right an injustice perpetrated over the years. A Division Bench of this Court also in an appeal from Jayaprakash, while confirming the aforesaid decision, held so in Thenhipalam Service Co-operative Bank Limited and another v. Jayaprakash P.K and another [W.A No. W.P.(C) No.7932 of 2014 - N 16 103 of 2014, dated 26.11.2013]:

Going by the principles enunciated by the Apex Court in the judgment in Union of India and another v. National Federation of the Blind and another [ILR 2013 (4)Kerla 279], the purpose of the reservation provided is to improve the condition of the differently abled. If such purpose is to be achieved, the benefit of reservation should be extended to the physically handicapped at the earliest point of time".

With the above directions as also the observations, the writ petition stands disposed of. The parties shall bear their respective costs.

Sd/-

K. VINOD CHANDRAN, JUDGE SB // True Copy // P.A To Judge.