

Madras High Court

Tamil Nadu Association For The ... vs The Principal Secretary on 9 January, 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.01.2013

CORAM

THE HONOURABLE MR.JUSTICE D.HARI PARANTHAMAN

W.P.Nos.6677 and 11139 of 2012

Tamil Nadu Association for the Rights of
All Types of Differently Abled and Care givers
(TARATDAC),
Rep. by its State Secretary,
S.Namburajan,
Registered No.292/2010,
No.69, V.G.P. Road,
Saidapet, Chennai 600 015.

... Petitioner
in W.P.No6677 of 2012

D.Ganesan

... Petitioner
in W.P.No.11139 of 2012

Vs.

- 1.The Principal Secretary,
Tamil Nadu Electricity Board,
NPKR Ramasamy Maligai,
No.144, Anna Salai,
Chennai 600 002.
- 2.The Assistant Director,
Professional and Executive Employment Office,
Chennai 600 004.
- 3.The Secretary to the Government,
Differently Abled Welfare Department,
Fort St. George,
Chennai 600 009.
- 4.The State Commissioner of Disabled,
Govt. Peripheral Hospital Campus,
Jawaharlal Nehru Road, K.K Nagar,
Chennai 600 078.

... Respondents

both writ petitions PRAYER IN W.P.No.6677 OF 2012: Writ Petition filed under Article 226 of Constitution of India praying to issue Writ of certiorarified mandamus to call for the records pertaining to the notification dated 17.02.2012 issued on behalf of the respondents 1 and 2 and quash the same and consequently direct them to issue a fresh notification by incorporating the statutory 3% reservation for the disabled persons as per the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, in the recruitment of Assistant Engineers in Tamil Nadu Electricity Board.

PRAYER IN W.P.No.11139 OF 2012: Writ Petition filed under Article 226 of Constitution of India praying to issue Writ of mandamus to direct the second respondent to sponsor the petitioner's name under priority category under E.C.E. in the recruitment of Assistant Engineers in Tamil Nadu Electricity Board as per the notification dated 17.02.2012 and consequently direct the first respondent to call the petitioner for interview to the said post.

In both writ petitions For Petitioner : Mr.M.Christopher For R1 : Ms.R.Varalakshmi, TNEB For R2 to R4 : Mr.R.Karthikeyan COMMON O R D E R The petitioner in W.P.No.11139 of 2012, after completion of B.E. in Electronics and Communication Engineering, enrolled his name in the Professional and Executive Employment Office as a person with disability, as he suffers 50% loco motor disability in his right leg. He belongs to BC (others) Community.

2. The first respondent issued proceedings dated 04.01.2012 for recruitment of 450 candidates for the post of Assistant Engineer (Electrical), 100 candidates for the post of Assistant Engineer (Mechanical), 50 candidates for the post of Assistant Engineer (Civil) through employment exchange.

3. However, there was no mentioning about 3% reservation made for physically challenged persons as provided under Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short "Disabilities Act").

4. Based on the request made by the first respondent in his proceedings dated 04.01.2012, the second respondent / the Assistant Director, Professional and Executive Employment Office, Chennai, issued the notification dated 17.02.2012 prescribing tentative cut-off dates of seniority dates and a tentative nomination list relating to various category.

5. In the said notification, it is stated that the physically handicapped registrants are not eligible for the said post.

6. According to the petitioner, if the first respondent provided 3% reservation for disabled persons as mandated under the Disabilities Act, he could have been called for the interview and he could have been selected under 3% quota.

7. The petitioner filed the writ petition in W.P.No.11139 of 2012 seeking a direction to the second respondent to sponsor his name under priority category, in the recruitment of Assistant Engineers in Tamil Nadu Electricity Board, as per the notification dated 17.02.2012 and consequently to direct

the first respondent to call the petitioner for interview to the said post.

8. The Tamil Nadu Association for the Rights of All Types of Differently Abled and Care givers (TARATDAC) filed another writ petition in W.P.No.6677 of 2012 seeking to quash the notification dated 17.02.2012 issued by the second respondent and consequently to direct the respondents 1 and 2 to issue a fresh notification by incorporating the statutory 3% reservation for the disabled persons as per the Disabilities Act in the recruitment of Assistant Engineers in Tamil Nadu Electricity Board.

9. Counter affidavit is filed by the first respondent.

10. Heard both sides.

11. The Disabilities Act, 1995, 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.

11(i). As per Section 2(t), person with disability means a person suffering from not less than forty per cent of any disability as certified by a medical authority.

11(ii). Section 2(i) of the Disabilities Act defines disability, which is extracted hereunder:

(i) "disability" means ----

(i) blindness;

(ii) low vision;

(iii) leprosy cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness;

11(iii). In this case, the petitioner in W.P.No.11139 of 2012 suffers locomotor disability of 50% as certified by the Competent Authority and the same is not in dispute. Hence, he is a person with disability under Section 2(t) of the Disabilities Act.

11(iv). Section 32 of the Disabilities Act provides identification of posts, in the establishment that is covered under the Disabilities Act, that can be reserved for persons with disabilities.

11(v). Section 33 of the Disabilities Act provides that every appropriate Government shall provide not less than 3% for persons with disability in the matter of employment in the establishment covered by the Disabilities Act.

11(vi). For better appreciation of the case in hand, Sections 32, 33 and 2(k) of the Disabilities Act are extracted hereunder:

32. Identification of posts which can be reserved for persons with disabilities.- Appropriate Governments shall -

(a) Identify posts, in the establishments, 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.

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:

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.

2(k) "establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government;

11(vii). It is apparent from reading of the aforesaid provisions of Sections 32 and 33 that reservation of posts in the establishment covered under the Disabilities Act is mandatory. The statute uses the word "shall".

12. The first respondent-TNEB, in exercise of the powers conferred under Section 79(c) and (k) of the Electricity (Supply) Act, 1948 (Central Act 54 of 1948) made service regulations. Clause 89(e) of the Regulations provides 3% of vacancies for physically handicapped persons. Section 89(e) is extracted hereunder:

"89 (e) Whenever recruitment is made for appointment to any Class or Category of a service to which the principle of reservation of appointments applies 3 per cent of the Vacancies/Seats shall be reserved for physically handicapped.

The reservation of 3 per cent for physically handicapped persons ordered above shall be made as noted below:-

(a) Out of the quota of 18 per cent reserved for Scheduled Castes/Scheduled Tribes, 3 out of every 100 vacancies/Seats shall be reserved for physically handicapped persons belonging to Scheduled Castes/Scheduled Tribes.

(b) Out of the quota of 50 per cent reserved for Backward Classes, 3 out of every 100 vacancies/seats shall be reserved for physically handicapped persons belonging to Backward Class.

(c) Out of the quota of 32 per cent intended for open competition, 3 out of every 100 vacancies/seats shall be reserved for physically handicapped persons in general.

(f) The list of candidates selected for appointment to various categories of posts by direct recruitment/internal selection shall be valid for a period of one year from the date of approval of the list by the competent authority and shall lapse at the end of the year.

Provided that the Chairman and the Board shall be competent to extend the validity of the lists of candidates for appointment by direct recruitment/internal selection for a period of three months and six months respectively, whenever preparation of a fresh list of candidates is not possible and delayed due to Court Orders or on administrative grounds."

13. The aforesaid Clause was made long before the Disabilities Act was enacted. However, Section 89(e) was amended subsequently by way of B.P. No.259, dated 03.12.1993, making 3% reservation for physically handicapped persons to Class III and IV posts only. That is, Class I and II posts excluded from the purview of reservation provided to the disabled persons. This B.P. was based on G.O.Ms.No.2093, Social Welfare Department, dated 30.10.1987, excluding reservation of Class I and II posts in Government to the physically handicapped persons.

14. In my view, Section 33 of the Disabilities Act will prevail over B.P.No.259, since the Disabilities Act was enacted pursuant to the Constitutional mandate of Article 253 of the Constitution of India. I am fortified in my aforesaid conclusions in view of the Judgment of a Division Bench of this Court in Prof. I.Elangovan, Vellore v. Government of Tamil Nadu ((2008) 3 MLJ 481), wherein it has clearly laid down that the provisions of Section 33 read with Section 2(k) of the Disabilities Act would prevail over the Tamil Nadu State and Subordinate Service Rules and the State Government is duty bound to provide reservation of not less than 3% in every establishment. In that case, the submission made by the State that the reservation provided under the Tamil Nadu State and Subordinate Service Rules would prevail over the Disabilities Act was rejected.

15. After the Disabilities Act was enacted, the Government issued G.O.Ms.No.53, Social Welfare and Nutritious Meal Programme (SW.4) Department, dated 11.04.2005, identifying various posts for providing reservation under the Act. This was pursuant to the mandate of Section 32 of the Disabilities Act. However, the Government of Tamil Nadu has failed to apply its mind in the case of first respondent Board. As per Section 32 of the Disabilities Act, it is the duty of the appropriate Government to identify the posts in every establishment covered under the Act. While, the G.O.Ms.No.53, dated 11.04.2005 identified the posts that come under the purview of TRB and TNPSC, the Government failed to identify the posts, that come under the first respondent Board.

16. Assistant Engineer (Electrical) in PWD Department is one of the 117 posts identified for reservation in Government Service, as per G.O.Ms.No.53 referred to above.

17. It is stated in Para 15 of the counter affidavit filed in W.P.No.6677 of 2012 that physically handicapped persons were selected to the post of Assistant Engineer based on merits. Para 15 of the counter is extracted hereunder:

"15. I respectfully submit that, in fact, in the selection to the post of Assistant Engineers, 6 physically handicapped candidates were selected on merit and they have been referred to Director of Medical and Rural Health Service for constitution of Medical Board and to assess their suitability or otherwise for appointment to the post of Assistant Engineer."

18. From the above, it is clear that the first respondent board itself has appointed 6 physically handicapped persons. Therefore, it is not their case that physically handicapped persons cannot hold the post of Assistant Engineer due to disability.

19. Hence, by reading G.O.Ms.No.53, dated 11.04.2005 along with counter affidavit, I am of the view that the Assistant Engineers of the first respondent Board, that are Class II posts, shall be provided reservation as mandated under Section 33 of the Disabilities Act.

20. In fact, the Board has now issued a proceeding in No.119, dated 29.11.2012, providing 3% reservation of vacancies for differently abled persons in respect of direct recruitment posts for employees in Class I and II Service with effect from 29.11.2012. Relevant portion of the said proceeding is extracted hereunder:

"TANGEDCO hereby also directs that 3% reservation of vacancies for differently abled persons shall be made applicable in respect of direct recruitment posts for employees in Class I and II Service with effect from 29.11.2012.

Necessary amendment to Regulation 89(bb) and 89(e) of TNEB Service Regulation will be issued separately."

21. At this juncture, it is relevant to take note of the Apex Court Judgment in Government of India v. Ravi Prakash Gupta and another ((2010) 7 SCC 626), wherein it has been categorically held that reservation under Section 33 shall come into operation immediately without waiting for identifying

the posts. Paragraphs 25 and 26 thereof are extracted herunder:

"25. Although, the Delhi High Court has dealt with the aforesaid questions, we wish to add a few observations of our own in regard to the objects which the legislature intended to achieve by enacting the aforesaid Act. The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission made on behalf of the Union of India that identification of Grade `A' and `B' posts in the I.A.S. was undertaken after the year 2005 is not of much substance.

26. As has been pointed out by the High Court, neither Section 32 nor Section 33 of the aforesaid Act makes any distinction with regard to Grade `A', `B', `C' and `D' posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said Section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to our notice on behalf of the petitioners."

22. In view of the aforesaid discussions, I am of the view that W.P.No.11139 of 2012 filed by one D.Ganesan shall succeed. In respect of W.P.No.6677 of 2012 filed by the Association, no order is necessary, as the first respondent Board itself issued proceeding No.119, dated 29.11.2012, providing 3% reservation for differently abled persons.

23. While ordering notice of motion, this Court, in M.P.No.1 of 2012 in W.P.No.11139 of 2012, dated 25.04.2012, directed the first respondent to keep one post of Assistant Engineer (Electrical) vacant, pending further orders. Later on, the writ petition was admitted on 09.10.2012 and the interim direction is continued.

24. In these circumstances, the first respondent is directed to call the petitioner in W.P.No.11139 of 2012 for interview to the post of Assistant Engineer (Electrical) and select him in the said post, that was kept vacant by way of interim direction granted by this Court, if he is otherwise eligible. No Costs. Consequently, connected miscellaneous petitions are closed.

09.01.2013 rkm Index: Yes/No Internet: Yes/No D.HARI PARANTHAMAN, J.

Rkm To

1.The Principal Secretary, Tamil Nadu Electricity Board, NPKR Ramasamy Maligai, No.144, Anna Salai, Chennai 600 002.

2.The Assistant Director, Professional and Executive Employment Office, Chennai 600 004.

3.The Secretary to the Government, Differently Abled Welfare Department, Fort St. George, Chennai 600 009.

4.The State Commissioner of Disabled, Govt. Peripheral Hospital Campus, Jawaharlal Nehru Road, K.K Nagar, Chennai 600 078.

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