

(2009) 10 P&H CK 0043

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Amit Ganeriwala

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision: Oct. 8, 2009

Citation: (2010) 124 FLR 493 : (2009) 156 PLR 715

Hon'ble Judges: Ranjit Singh, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Ranjit Singh, J.

Despite having spelt out the responsibility of the State towards prevention of disabilities and the protection of rights of persons with disability, the mind set of the authorities apparently has not undergone a change towards persons with disabilities. Our country is a signatory to the proclamation on full participation and equality of people with disability and accordingly has legislated the Act known as the Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995 (hereinafter called "the Act"). Still the authorities would look for ways to circumvent the provisions of this Act rather than ensuring the implementation of the process of this forward looking enactment. The vehemence with which the prayer in the present Civil Writ Petition Nos. 2736 of 2009 (Amit Ganeriwala v. State of Haryana and Ors.) and 6060 of 2009 (Ramavtar v. State of Haryana and Ors.) has been opposed would show that the aim and objects of this Act perhaps are yet to sink in.

2. The issue involved in the present writ petition is about the right of the State to exempt certain posts of H.C.S Executive Branch from the purview of the Act and thereby to deny appointment to person with disability on the said post. This issue commonly arises in both the writ petitions and, therefore, both the petitions are being disposed of together through this common order.

3. The facts in Civil Writ Petition No. 2736 of 2009, would show that the petitioner in this case has passed LL.B in Ist Division from Kurukshetra University, Kurukshetra, on 24.11.2001. He is a physically handicapped person. The Haryana Public Service Commission (for short, "the Commission") has advertised 26 posts of H.C.S (Executive Branch), making reservation for various categories but has excluded the category of "physically handicapped persons" for appointment to the said posts. The petitioner would challenge this action and would draw support from the advertisement issued by Union Public Service Commission on 6.12.2008 where posts in Indian Administrative Services have specifically been reserved for physically disabled category. In contrast, the advertisement issued by the Commission has specifically mentioned that physically handicapped candidates are not eligible. The petitioner accordingly has filed this writ petition to challenge this advertisement on the ground that the same is illegal, arbitrary and discriminatory.

4. The petitioner in Civil Writ Petition No. 6060 of 2009 has 70% disability. He is presently working as Block Development and Panchayat Officer (HCS allied) since the year 2002. He applied for H.C.S (Executive) in response to advertisement and was selected for allied services. Subsequently on 12.1.2004, he was selected and appointed as District Food and Supplies Controller, which is again an allied service. He also has a grievance against the action of the State in not making any reservation in the 26 posts advertised for H.C.S (Executive Branch) on 3.1.2009. He has accordingly challenged this advertisement on the ground that it is illegal, arbitrary besides being discriminatory and also being violative of the provisions of the Act.

5. The common stand taken in the reply is that the Government has already issued instructions dated 20.2.1990 (Annexure R1/1) whereby Government has decided to provide 3% reservation to physically handicapped persons in Class I and Class II posts to be filled by direct recruitment. Reference is then made to the instructions issued on 14.10.1999 (Annexure R1/2) whereby it has been decided that the reservation in the services prescribed for physically handicapped person will not be applicable to the post of Haryana Civil Service (Executive Branch). To justify this, it is stated that the officers of Executive Branch are to be posted at District/Sub Divisional level and they have to face public, hear their problems and solve the same as early as possible. They are also required to work as Executive Magistrate and Collector Ist Grade and have also to handle law and order situation. It is also stated that they have to work as Joint Directors, Additional Directors, Directors, Under Secretaries, Deputy Secretaries, where they are to handle important policy matters. It is accordingly stated that it would not be in the interest of justice or in the public interest to provide reservation in the Haryana Civil Services (Executive Branch) to the physically handicapped persons. In short, the defence to exclude physically handicapped persons from appointment is on the basis of instructions issued by the Government on 14.10.1999 and in support justification as noted above is advanced.

6. Is this action of the respondents justified in law, especially in the light of provision made in the Act? The aim and object of the Act and the background in which this Act has been legislated has been noticed above. The Act is quite comprehensive and contain various provisions like constituting Central Coordinating Committee, the State Coordinating Committee, provision for prevention and early detection of disability, for providing free education to the children with disability and also about their employment. Section 32 of the Act makes a provision for identification of posts, which can be reserved for persons with disability. It entitles the appropriate Government to identify the posts in the establishment which can be reserved for the persons with disability. This can be reviewed periodically with the intervals not exceeding three years by taking into consideration the development in the technology. Then Section 33 of the Act regulates the reservation of the posts for the persons with disability. The Section makes it mandatory for every appropriate Government to appoint in every establishment such percentage of vacancies, not less than 3% for person or class of persons with disability, which has to be 1% each for persons suffering from blindness or low vision; hearing impairment; locomotor disability or cerebral palsy. The provisions of Section 33 are extracted for ready reference:

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.

7. Thus, it is the emphatic mandate of the statute, as can be seen from use of word "shall" in the Section, for the Government to make reservation for persons with disability. To balance the interest of the organization, a proviso has been added, as reproduced above. Thus, the appropriate Government is given an option to exempt any establishment from the provisions of this Section but this has to be by way of a notification, which may be subject to such conditions as may be specified in such notification. While doing so, the appropriate Government may have regard to the type of work carried on in any Department or establishment.

8. What would, thus, emerge from the reading of Section 33 of the Act is that it is a mandate of the statute and requirement of law that every appropriate Government

has to appoint in every establishment such percentage of vacancies, not less than 3% for person or class of persons with disability. If the appropriate Government is of the view not on account of any whims or fancies but having regard to the type of work carried by the Department or establishment, then it may exempt any such establishment from the purview of this mandate as is contained in Section 33. A very fine example can be found from the notification issued by the Central Government exempting all categories of posts of combatant personnels. Obviously a person with disability like blindness or low vision or hearing impairment or locomotor disability etc. can not be able to perform the combat duties and hence, the need to exempt appointment from the purview of reservation on such posts. Such exemption, however, can only be through a notification and may be subject to certain conditions.

9. Apparently, the respondents would fail on both the counts and have not been able to justify the requirements laid down in the Section. The respondents have attempted to justify exemption for reserving the post of H.C.S. (Executive Branch) on the ground of nature of duties required to be performed by said persons and have relied upon State Government instructions dated 10.10.1992 issued in this regard. Incidental question, thus, would arise whether the instructions issued in the year 1992 exempting H.C.S (Executive Branch) from the reservations of person with disability would be relevant for the purposes of the Act, which was legislated in the year 1995. Obviously, the authority while issuing instructions in the year 1992 was in no position to consider or appreciate the requirements of the Act legislated in the year 1995 and also the legal requirement of granting exemption by way of notification. Thus, the reliance by the respondents on instructions issued prior to coming into force of the Act would be of no avail to the respondents.

10. Even otherwise, the stand taken by the respondents to rely on some instructions to satisfy the requirement of the Act as contained in Section 33 of the Act can not be accepted. If any exemption is to be granted, then it has to be by way of a notification as is laid down in the Section. This requirement is also to be appreciated in the background that it is the mandate of the statute to make reservation for persons with disability. The proviso is only by way of an exception. The exception, thus, can not be allowed to operate in a manner to take away the mandate in the Section and has to strictly adhere to the requirement of the Section, which would not only be to issue notification but also to keep in view the type of work, which is to be carried by any Department or establishment, which is sought to be exempted from the purview of this mandate. The reasons which have been given by the respondents to exempt the posts would not sound justified. It is not understood as to how a person with handicap be not able to work at District or Sub Division level as stated. It is also not understood as to how such a person would not be able to hear or solve the problems. These reasons, as advanced by the respondents to justify exemption, can easily be countered by the fact that such reservation has been provided for appointment to Indian Administrative Services. If a person with disability can seek

appointment to the post meant for Indian Administrative Services and work at the District or Sub Division level and is capable of hearing the problems and solving them, then certainly such disability would not be a handicap for those persons who seek appointment to H.C.S (Executive Branch). This justification obviously is in ignorance of the provisions of the Act and appears to have been formed when this Act was not yet legislated.

11. In any case, even if exemption is to be granted, then it has to be by way of notification. The stand of the respondents to rely upon instructions, therefore, is not justified at all and can not be accepted. For this, I can seek support from the observations made by division Bench of this Court in the case of *Balwinder Singh v. State of Punjab and Ors.* 2004(2) R.S.J. 216 where it is observed that the State Government can only exempt any category through notification and since no notification was issued in this case, the instructions relied upon were held contrary to the mandate and not sustainable. Similar is the issue involved in the present writ petitions. The instructions issued after the Act having been in operation was held not sustainable in view of the mandate contained in Section 33 of the Act whereas in the present case, reliance is placed on the instructions which have been issued even prior to the enactment of the Act. Reference here also can be made to a Division Bench decision of Delhi High Court, copy of which has been annexed as Annexure P-6 with Civil Writ Petition No. 6060 of 2009. A perusal of this would clearly show that even Union of India has issued instructions for making reservation of posts with disability in the Indian Administrative Services.

12. The action of the respondents, therefore, in issuing this advertisement by making the persons with disability to be ineligible for H.C.S. (Executive Branch) can not be sustained. The same is set side. Direction, therefore, is issued to the respondents to make 3% reservation for persons with disability in terms of Section 33 of the Act.

13. Both the writ petitions are, therefore, allowed in the above terms.