

Case relating to Reservation:

Parties : K. Sathya Narayanan Versus The State of Tamil Nadu, Rep. by Secretary & Others

Court : High Court of Judicature at Madras

Case No : W.P. No.5097 of 2009

Judges: THE HONOURABLE MR. JUSTICE T.S. SIVAGNAM

Appearing Advocates : For the Petitioner: Hema Sampath Senior Counsel for M/s. R. Meenal, Advocate. For the Respondents: R1 – R3 - R. Lakshmi Narayanan G.A R2 -M/s. C.N.G. Niraimathi, Advocate.

Date of Judgment : 17-11-2011

Head Note :-

Constitution of India - Article 226 - Protection of Rights and Full Participation Act, 1995 -Tamil Nadu State Subordinate Service Rules - Rule 22 and Rule 22(aa) - To direct the respondents to appoint the petitioner as Assistant Medical Officer (Siddha) in the post reserved for him - petitioner is a physically challenged person, he secured a Bachelor's degree in Siddha Medicine and Surgery and obtained M.D. in Siddha Medicine and registered both his qualifications in the professional employment exchange - TNPSC notified for the posts of Assistant Medical Officer – petitioner contended that, notification came to the knowledge of him was 35% reservation for physically handicapped, was not made available for Group-A & Group-B posts in Tamil Nadu Government Service so he challenged against the proviso from Rule 22 and direct to give 3% reservation for physically disabled persons and he stated that, 77th turn alone was reserved for the petitioner - respondent submitted that, petitioner is not the only contender under the said category and there are three more physically handicapped Ortho candidates, in the ranking list so Commission examined the matter and stated that, the petitioner is not eligible to be selected –

Court held – In “Neelima Shangla’s, case they support for the petitioner and stated that, even though several successful candidates were not appointed and only one of them filed writ petition, challenging the selection, the Hon'ble Supreme Court held that the petitioner was entitled to be appointed against the post which was kept vacant pursuant to the Court's interim order and other successful candidates failed to question the selection, so they cannot be held to get a general order for appointing all of them” -finally petitioner is entitled to be selected and appointed in the post which was reserved for him pursuant to the interim direction issued in the earlier writ petition - writ petition allowed.

Cases Referred :-Neelima Shangla vs. State of Haryana and Others, (1986) 4 SCC 268.

Judgment :-

(Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of Writ of Certiorarified Mandamus to call for the records relating to Memorandum No.5922/OTD-A1/2002, dated 23.03.2009, of the second respondent, quash the same and direct the respondents to appoint the petitioner as Assistant Medical Officer (Siddha) 2003-04 in the post reserved for him and also grant him pay and full benefits from the date.)

1. The petitioner has sought for issuance of a writ of Certiorarified Mandamus, to quash the Memorandum dated 23.03.2009, issued by the Tamil Nadu Public Service Commission (TNPSC) and consequently direct the respondents to appoint the petitioner as Assistant Medical Officer (Siddha) in the post reserved for him and grant him all benefits.

2. The petitioner is a physically challenged person, suffering from 45% disability in his leg. The petitioner secured a Bachelor's degree in Siddha Medicine and Surgery (BSMS) during 1998 and subsequently, obtained an M.D. in Siddha Medicine during 2002. The petitioner had registered both his qualifications with the professional employment exchange. The TNPSC during March 2004, notified 47 posts of Assistant Medical Officer (Siddha). After the notification was issued by the TNPSC, it came to the knowledge of the petitioner that 35% reservation for physically handicapped, was not made available for Group-A & Group-B posts in Tamil Nadu Government Service. Since this was against the provisions of the Persons with Disabilities (Protection of Rights and Full Participation) Act, 1995. The petitioner filed two writ petitions before this Court being W.P.No.21078 of 2004 and W.P.No.21079 of 2004, challenging the proviso to Rule 22 of the Tamil Nadu State Subordinate Service Rules and for a direction to give 3% reservation for physically disabled persons and the other writ petition for direction upon the respondents, to consider the petitioner for the said post.

3. This Court by an interim order dated 12.08.2004, directed the respondents, to reserve one post for the petitioner. Accordingly in the TNPSC bulletin No.4, dated 16.02.2005, the post in the 77th turn was reserved. By order dated 11.03.2008, the writ petitions were disposed of and the Hon'ble First Bench of this Court held that Rule 22 of the said rules in so far as it excluded the applicability of reservation for physically disabled in Group A & Group B posts is ultra vires the Constitution of India as well as the provisions of the Persons with Disabilities (Equal opportunity, Protection of rights and Full Participation) Act, 1995. Further direction was issued to the respondents to consider the petitioner's case and appoint him, if found eligible. Initially this Court granted four weeks time to implement the order and by a subsequent order dated 30.04.2008, the time granted was extended by a further period of four weeks. Though the order ought to have been complied with on or before 28.05.2008, no action was taken by the TNPSC, till they passed the order dated 23.03.2009, stating that the request made by the petitioner cannot be considered, by applying the reservation for physically handicapped, the said turn is a

Scheduled caste turn, since the petitioner does not belong to a SC community, he cannot be considered. This order dated 23.03.2009, is impugned in this writ petition.

4. The learned Senior counsel appearing for the petitioner after bringing to the notice of this Court, the order passed by the Hon'ble Division Bench of this Court in W.P.Nos.21078 and 21079 of 2004, dated 11.03.2008, submitted that the order passed by the second respondent is without jurisdiction, arbitrary and it is contempt of the orders passed by this Court. It is further contended that the stand taken by the second respondent is erroneous, stating that the 76th turn was for Schedule Community candidate and since the petitioner was not a SC candidate, he could not be accommodated, whereas the 77th turn alone was reserved for the petitioner. It is further contended by the learned Senior counsel that after Rule 22 was struck down, the question of applying the 200 points roster did not arise when the petitioner's eligibility is under the 3% reservation for physically handicapped. Further, the learned Senior counsel pointed out that the TNPSC is not justified in taking the stand as taken in their counter affidavit, especially when no such stand was taken in the earlier round of litigation and it appears to be an attempt to make the direction issued by the Hon'ble Division Bench as unworkable. In support of her contention, the learned Senior counsel placed reliance on the decision of the Hon'ble Supreme Court in *Neelima Shangla vs. State of Haryana and Others*, (1986) 4 SCC 268.

5. The learned counsel appearing for the TNPSC, by relying upon the counter affidavit, submitted that the Commission issued notification, dated 04.03.2004 and invited applications from candidates for filling up 47 vacancies, which was increased to 58, at the time of selection, at the instance of the Government. The petitioner applied for the said post and he claimed concession under the physically handicapped - ortho category. It is admitted that the petitioner filed a writ petitions, to declare the proviso to Rule 22(aa) of the General Rules, excluding the applicability of reservation for physically disabled persons to the Executive post in Group A & Group B as ultra vires and to provide 3% reservation for physically handicapped in the post of Assistant Medical Officer (Siddha) and consider the case of the petitioner. It is further submitted that though an interim direction was issued, to keep one post vacant and 3% reservation for physically handicapped is made applicable, yet the petitioner cannot aspire since the relevant turn would be for SC Blind category as per the roster. The learned counsel further submits that the TNPSC Bulletin No.4, dated 16.02.2005, showed that the post in 77th turn was reserved for the petitioner, which was as per the interim direction issued by this Court and ultimately, the writ petition was disposed of on 11.03.2008, to consider the case of the petitioner against the post reserved for physically disabled, if he is otherwise found eligible. Therefore, it is contended that the Commission examined the matter and found that the petitioner is not eligible to be selected, since as per the Rules in vogue, the physically handicapped turn arisen between the 24th turn (second rotation) to 81st turn (second rotation), is 76th turn in the second rotation, which is a SC turn. Therefore, it is contended that the petitioner cannot be selected. Further, it

is submitted that the petitioner is not the only contender under the said category and there are three more physically handicapped Ortho candidates, in the ranking list above the writ petitioner.

6. Heard the learned Government Advocate appearing for the first and third respondents on the above submissions.

7. Heard the learned Senior counsel appearing for the petitioner and the learned counsel appearing for the TNPSC and perused the materials available on record.

8. The short issue which falls for consideration in this writ petition, is whether the petitioner should be accommodated and posted as Assistant Medical Officer (Siddha) in the 77th turn, which was reserved for the petitioner and published in Bulletin No.4 of the TNPSC, pursuant to the interim orders granted by this Court in the earlier writ petitions. The incidental question, which has to be considered is whether, the TNPSC was justified in not selecting the petitioner by stating that he is not found eligible, in spite of the direction issued by this Court in the earlier writ petitions.

9. It is an admitted fact that there was no reservation for physically handicapped persons for the said post, when the notification was issued by the TNPSC during March 2004. The petitioner filed two writ petitions in W.P.No.21078 of 2004, the petitioner sought for issuance of a writ of declaration, to declare that the proviso to Rule 22 of the Tamil Nadu State Subordinate Service Rules, insofar as it excludes applicability of reservation for physically disabled persons is ultra vires of the Constitution and contrary to the provisions of the Persons with Disabilities (Equal opportunity, Protection of rights and Full Participation) Act, 1995. In W.P.No.21079 of 2004, the petitioner sought for a direction upon the respondents to provide 3% reservation for physically disabled in the post of Assistant Medical Officer (Siddha) and consider the case of the petitioner as against the post reserved for physically disabled.

10. This Court, while entertaining the writ petition granted an interim direction in W.P.No.21079 of 2004, by order dated 12.08.2004, directed the respondents, to reserve one post of Assistant Medical Officer (Siddha) for the petitioner, pending disposal of the writ petition. During the pendency of those writ petitions, the Government issued G.O.Ms.No.53, dated 11.04.2005, by applying the Rule of reservation for physically handicapped persons, thereby including the Group A & Group B posts under the said category. The Hon'ble Division Bench after taking note of G.O.Ms.No.53, dated 11.04.2005, disposed of the writ petition, by order dated 11.03.2008. The operative portion of the order reads as follows: -10. The Act is very clear and identification of posts which can be reserved for persons with disabilities is mandatory. The disabled people cannot be excluded from an entire class of posts, that would be clearly arbitrary. The Government would have to consider the type of work for each post and then identify the category of disabled persons who can be appointed to these posts. Therefore, clearly the offending rule is contrary to the provisions of the Act as well as the right to equality

of disabled persons. In view of the above Government Order, which acknowledges that Rule 22 of the Tamil Nadu State and Subordinate Service Rules must be amended and which has also given directions for recruiting persons with disabilities even for Group 'A' and 'B' posts, there can be no impediment to the respondents in recruiting the petitioner for the post of Assistant Medical Officer (Siddha), if he is otherwise found eligible.

11. For all these reasons, Writ Petition No.21078 of 2004 is allowed, declaring the proviso to Rule 22 of Tamil Nadu State and Subordinate Service Rules insofar as it excludes the applicability of reservation for physically disabled to the Executive Posts in Group A and B Services as ultra vires of the Constitution of India and contrary to the statutory provisions of Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act 1/1996. Until the Government amends the Rules in consonance with G.O. Ms. No.53 dated 11.4.2005, the appointment to the various posts shall be governed by the provisions of the said Government Order.

12. Consequently, Writ Petition No.21079 of 2004 is disposed of, directing the respondents to consider the case of the petitioner as against the post reserved for physically disabled and appoint him as Assistant Medical Officer (Siddha), if he is otherwise found eligible. No costs. Consequently, W.P.M.P. Nos.25412 of 2004 and 31559 of 2005 are closed."

11. As noticed above, the prayer for declaration, to declare the proviso to Rule 22 of the Rules was allowed and the Hon'ble Division Bench held that until the Government amends the Rules in consonance with the G.O.Ms.No.53, the appointment to the various posts shall be governed by the said Government order. W.P.No.21079 of 2004, in which the petitioner sought for a direction, to provide 3% reservation for physically disabled in the post of Assistant Medical Officer (Siddha) and to consider his case against the post reserved, the Hon'ble Division Bench, directed the respondents to consider the case of the petitioner against the post reserved for physically disabled and appoint him as Assistant Medical Officer (Siddha), if he is otherwise found eligible. Therefore, the direction is a positive direction to appoint in the post reserved for physically disabled. It is not in dispute that pursuant to the interim direction issued in the writ petition, one post was reserved. This was shown as 77th turn in the Bulletin issued by the TNPSC, dated 16.02.2005. Admittedly, when the Bulletin was issued, G.O.Ms.No.53, was not in vogue. Hence, for all practical purposes, it has to be taken that one post was directed to be reserved for the writ petitioner.

12. Therefore, in my view, the expression 'reserved' used by the Hon'ble Division Bench in paragraph 12, shall be interpreted to the post reserved in the bulletin of the TNPSC, dated 16.02.2005, which was pursuant to the interim direction. The Hon'ble Division Bench while disposing of the writ petitions in its final order, did not modify or vary the interim order. Therefore, the interim order deems to have merged with the final order and when there is a

positive direction to appoint the petitioner, the TNPSC is not justified in denying the plea that dehorse the judgment, they applied the Rule of reservation for physically handicapped as per G.O.Ms.No.53, and while considering the turn, namely the 76th turn it falls for a SC candidate and therefore, they cannot appoint the petitioner, is a hyper technical and arbitrary plea, which cannot be allowed to be raised by the TNPSC at this distance of time.

13. There is a further justification to take such a view, since after the disposal of the writ petitions by the Hon'ble First Bench at the instance of the respondents, the matter was placed before the Hon'ble Division Bench for "being mentioned" on 01.04.2008. The Hon'ble Division Bench after taking note of the submissions on either side, directed the respondents to implement the order dated 11.03.2003, within a period of four weeks. Subsequently, once again on 30.04.2008, the matter was placed for "being mentioned" and the Hon'ble Division Bench granted four weeks further time to implement the order.

14. Therefore, it is evidently clear that the objection now raised in the counter affidavit was never raised before the Hon'ble Division Bench and raised for the first time in the order impugned in this writ petition. It is a clear case where, the TNPSC is attempting to make the order of the Hon'ble Division Bench as unworkable and such approach is not appreciable. Admittedly, no other candidate has approached this Court, claiming that he/she should be selected for the said post under the physically disabled category. In such circumstances, the decision of the Hon'ble Supreme Court in Neelima Shangla, referred supra, would support of the case of the petitioner. In the said judgment, the Hon'ble Supreme Court while considering the question that though several successful candidates were not appointed and only one of them filed writ petition, challenging the selection, the Hon'ble Supreme Court held that the petitioner therein having been found entitled to be appointed against the post kept vacant pursuant to the Court's interim order and other successful candidates though similarly situated, failed to question the selection, they cannot be held to get a general order for appointing all of them. The Hon'ble Supreme Court while disposing of the said writ petition observed as follows: -4. As a result of our finding a few more candidates would also be entitled to be included in the Select List and ordinarily we would have directed their inclusion in the list. But having regard to the fact that most of the others have not chosen to question the selection and the circumstance that two years have elapsed we do not propose to make any such general order as that would completely upset the subsequent selection and create confusion and multiplicity of problems. The cases of any other candidate who may have already filed a writ petition in this Court or the High Court will be disposed of in the light of this judgment

15. In the light of the above facts, this Court is fully convinced that the petitioner is entitled to be selected and appointed in the post which was reserved for him pursuant to the interim direction issued in the earlier writ petition and as directed by the Hon'ble Division Bench and if

such interpretation is not given, then it would amount to undoing the order passed by the Hon'ble Division Bench, which this Court shall not and will not permit to be done.

16. In the result, the writ petition is allowed, the impugned order is set aside and the respondents are directed to appoint the petitioner as Assistant Medical Officer (Siddha) in the post reserved for him pursuant to the interim order in W.P.M.P.No.25412 of 2004 in W.P.No.21079 of 2004, dated 12.08.2004 and as per the direction contained in paragraph 12 of the common final order of the Hon'ble First Bench of this Court in W.P.Nos.21078 & 21079 of 2004, dated 11.03.2008, within a period of four weeks from the date of receipt of a copy of this order. However, it is made clear that the petitioner shall not be entitled for any monetary benefits for the earlier period, prior to his taking charge, but the earlier period shall be taken into consideration for the purpose of computing the total length of service of the petitioner. No costs. Consequently, connected miscellaneous petition is closed.