

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE N. NAGARESH

FRIDAY, THE 5TH DAY OF MAY 2023 / 15TH VAISAKHA, 1945

WP(C) NO. 40580 OF 2022

PETITIONER:

KERALA PUBLIC SERVICE COMMISSION
PATTAM, THIRUVANANTHAPURAM REPRESENTED BY ITS
SECRETARY., PIN - 695004

BY ADV P.C.SASIDHARAN

RESPONDENTS:

- 1 STATE DISABILITY COMMISSIONER
OFFICE OF THE STATE COMMISSIONER FOR PERSONS
WITH DISABILITIES, ANJANEYA, TC 9/1023(1),
GROUND FLOOR, SASTHAMANGALAM,
THIRUVANANTHAPURAM, PIN - 695010
- 2 V, R. JAYASREE
HAREKRISHNA, DESAM.P.O, ALUVA,
ERNAKULAM, PIN - 683102
- 3 THE LAW SECRETARY
GOVERNMENT OF KERALA, LAW DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001

BY ADVS.

ADV. P.G. JAYASHANKAR
P.K.RESHMA (KALARICKAL) (K/875/2014)
S.RAJEEV (K/001711/2019) (K/001711/2019)
SAJANA V.H (K/1174/2021)
VINITHA S.T. (K/704/2021)
RUBY K. ROY (K/001015/2017)
K.VASUDEVAN (K/412/2012)
SMT. ANIMA M, GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 05.05.2023, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

CR

N. NAGARESH, J.

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W.P.(C) No.40580 of 2022
.....

Dated this the 5th day of May, 2023

J U D G M E N T

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Aggrieved by an Order passed by the State Commissioner for Persons with Disabilities, Kerala, the Kerala Public Services Commission has approached this Court invoking Article 226 of the Constitution of India.

2. The 2nd respondent, who is a person with disability (hearing impaired), applied for appointment to the post of Legal Assistant Grade-II in the Law Department, Government Secretariat, in response to a notification issued by the Kerala Public Service Commission. The petitioner's name was

included in the additional rank list as No.2 for the hearing impaired candidates. The 2nd respondent filed OP(RPWD) No.564/S3/2020 before the State Commissioner for Persons with Disabilities, Kerala alleging that the Kerala PSC is not heeding to judgments which directed to fill up backlog vacancies for the differently abled persons, in the matter of appointment to the posts of Legal Assistants.

3. Before the Commissioner, the Kerala PSC submitted that as per GO dated 03.03.2011 the post of Legal Assistant was identified as fit to be filled up by Persons with Low Vision and Persons with Locomotor Disability. Original Rank List published included only the said two categories. By GO dated 26.11.2018, the Government included the category of Hearing Impaired also as fit for appointment. Hence, the Kerala PSC issued addendum notification dated 04.12.2019 including candidates with hearing impairment also. The petitioner was Rank No.2 in the supplementary list. The candidate at Rank No.1 was given appointment as Legal Assistant. From the entire rank lists, 44 candidates were

appointed. As the next turn for Hearing Impaired did not reach, the petitioner was not appointed. The validity of the Rank List expired on 24.09.2020, before reaching the next turn.

4. The State Commissioner for Persons with Disabilities noted that the Hon'ble Apex Court has held in the judgment in ***Government of India, through Secretary and another v. Ravi Prakash Gupta and another*** [2010 KHC 4433] that reservation under Section 33 of the Act, 1995 is not dependent on identification of posts. This Court has followed the Apex Court's judgment in ***Kerala Public Service Commission and another v. E. Dineshan and another*** [2016 (2) KHC 910]. The State Commissioner noted that in the judgment in ***Dineshan's*** case, the High Court has held that supplementary list is operative even after the expiry of main list and for filling up backlog vacancies, the supplementary list can be acted upon even after the expiry of main list.

5. The Commissioner accordingly gave the following directions:

(1) The additional 2nd respondent-Law Secretary, Government of Kerala shall compute the backlog vacancies of Legal Assistant Gr.II of the hearing impaired category in his department during the period from 07.02.1996 to till the date of receipt of a copy of this order in his office and report one of such vacancies to the 1st respondent Secretary of the Kerala Public Service Commission for giving appointment to the petitioner as Legal Assistant Gr.II within 30 days from the above said date.

(2) If it is found that there is no regular vacancy for accommodating the petitioner as Legal Assistant Gr.II in the Law Department at present, she will be accommodated in a supernumerary post and be accommodated in the regular service as the junior most Legal Assistant Gr.II as and when a vacancy arises.

(3) The 1st respondent Secretary, Kerala Public Service Commission shall issue advise memo for the appointment of the petitioner in the post of Legal Assistant Gr.II in the Law Department, Government of Kerala treating that the Ext.P3 as a valid (additional / supplementary) rank list within 30 days from the date of getting communication from the 2nd respondent vide (1) or (2) as above.

(4) The 2nd respondent shall issue posting order to the petitioner as Legal Assistant Gr.II in the Law Department in a vacancy as specified in (1) or (2) above within 30 days from the date of receipt of communication from the 1st respondent regarding the compliance 3rd above.

(5) The respondents 1 and 2 will file action taken report before the State Commissionerate for Persons with Disabilities as per Section 81 of the RPwD Act, 2016.

Aggrieved by the said Ext.P1 order of the State Commissioner for Persons with Disabilities, Kerala, the Kerala PSC has filed this writ petition.

6. The counsel for the petitioner argued that the 1st respondent-State Disability Commissioner has ignored the functions assigned and powers conferred on it under Section 80(b) of the Right of Persons with Disabilities Act, while issuing directions contained in Ext.P1 order. The power conferred on the 1st respondent is only to give advice to the appropriate authorities. The 1st respondent has therefore exceeded its jurisdiction.

7. The counsel further urged that the Disabilities Commissioner is neither a Court nor a Tribunal to adjudicate the issue. It is only a recommendatory body having no powers to issue directions. The directions given by the Commissioner are legally unsustainable as the Commissioner cannot revalidate or keep alive a ranked list which is already expired.

8. A decision of the Public Service Commission is not one which can be interfered with by a statutory body. The entire directions issued by the 1st respondent will cause far reaching consequences, contended the counsel for the petitioner.

9. The counsel for the 2nd respondent, on the other hand, argued that the petitioner-PSC has not seriously disputed the eligibility of the 2nd respondent for getting appointment in the light of the Rights of Persons with Disabilities Act. The petitioner is clinging on technicalities. Annexure-A5 would evidence that the petitioner had taken up the matter during the currency and validity of the PSC Rank List. Therefore, the petitioner cannot be heard to contend that the validity of the list expired and hence the 2nd respondent cannot be appointed from the expired list.

10. Ext.P1 order was passed on 30.06.2020 and the Law Secretary, who was the 2nd respondent in the OP (RPWD), did not take any steps to implement the order by appointing the 2nd respondent herein. The Rank List was

cancelled only on 24.09.2020. The petitioner belongs to a marginalised class, she being physically handicapped. Appointment due to the 2nd respondent cannot be denied on technical reason, which would defeat the very purpose of the Rights of Persons with Disabilities Act.

11. In view of the judgments of the Hon'ble Apex Court, the 2nd respondent has a right to get appointed against backlog vacancies which ought to have been reserved in favour of the persons with disabilities. Non-identification of posts cannot be a reason to defeat the rightful claim of the 2nd respondent, asserted the counsel for the 2nd respondent.

12. Relying on the judgment of the Apex Court in ***Rajneesh Kumar Pandey and others v. Union of India (UOI) and others*** (MANU/SC/0997/2021), the counsel for the 2nd respondent urged that the Commissioner has been appointed to ensure that the concerned authorities discharge their responsibilities in the spirit of the provisions of the Act, 2016. The Act even provides that when an authority does not accept a recommendation of the Commission, it shall convey

reasons for non-acceptance to the Commissioner within three months. Therefore, it cannot be said that the power of the Commissioner is only recommendatory in nature.

13. The counsel for the 2nd respondent further pointed out that a Division Bench of this Court has held in ***Kerala Public Service Commission and another v. E. Dineshan and others*** [2016 (3) KLT SN 21] that handicapped persons are entitled to get 3% of vacancies from 1996. In the judgment in ***Sunil Kumar B. and another v. Cochin University of Science and Technology and others*** [2020 (6) KLT 110], this Court has held that the authorities have a statutory duty to appoint Disabled even in the backlog vacancies. The legal position being so, Ext.P1 order of the 1st respondent is perfectly justified and in the facts of the case, this Court should not interfere with Ext.P1 order.

14. I have heard the learned Standing Counsel for the petitioner, the learned counsel for the 2nd respondent and the learned Government Pleader representing the 3rd respondent.

15. The name of the 2nd respondent was included in the additional rank list prepared by the PSC as Rank No.2, for appointment to the post of Legal Assistant Grade-II. The 2nd respondent suffers from Disability (Hearing Impaired). The 2nd respondent approached the 1st respondent-State Disability Commissioner contending that though there were specific judgments for filing up the backlog vacancies for the differently abled persons, the PSC is not following the law laid down.

16. The 1st respondent held that identification of the posts of Legal Assistant Grade-II has to be done from 07.02.1996 and 19.04.2017 under the Act, 1995 and the Act, 2016 respectively, that there are backlog vacancies for hearing impaired candidates and the 2nd respondent is entitled to appointment. The PSC was directed to issue advice memo and the Law Secretary was directed to compute backlog vacancies and report one such vacancy to PSC. It has been further directed that the 2nd respondent be accommodated in a supernumerary vacancy.

17. Though the petitioner-Public Service Commission has raised various legal and factual grounds in the writ petition to impugn Ext.P1 order, the prime argument raised is regarding the powers and functions of the 1st respondent-State Disability Commissioner and the incompetence of the 1st respondent to pass an order in the nature of Ext.P1.

18. The 1st respondent-State Disability Commissioner is appointed under the Rights of Persons with Disabilities Act, 2016. The Act, 2016 is intended to provide full participation and equality of the people with disabilities. The Act gives rights and entitlements to persons with disability and provides for education, skill development, employment, social security, health, rehabilitation and recreation, etc. The Act also contemplates appointment of State Disability Commission by State Governments.

19. Section 80 of the Act, 2016 lays down functions of State Commissions. Section 80 reads as follows:

80. Functions of State Commissioner - The State Commissioner shall —

- (a) identify, *suo motu* or otherwise, provision of any law or policy, programme and procedures, which are in consistent with this Act, and recommend necessary corrective steps;
- (b) inquire, *suo motu* or otherwise deprivation of rights of persons with disabilities and safeguards available to them in respect of matters for which the State Government is the appropriate Government and take up the matter with appropriate authorities for corrective action;
- (c) review the safeguards provided by or under this Act or any other law for the time being in force for the protection of rights of persons with disabilities and recommend measures for their effective implementation;
- (d) review the factors that inhibit the enjoyment of rights of persons with disabilities and recommend appropriate remedial measures;
- (e) undertake and promote research in the field of the rights of persons with disabilities;
- (f) promote awareness of the rights of persons with disabilities and the safeguards available for their protection;
- (g) monitor implementation of the provisions of this Act and schemes, programmes meant for persons with disabilities;
- (h) monitor utilisation of funds disbursed by the State Government for the benefits of persons with disabilities; and
- (i) perform such other functions as the State Government may assign.

20. Section 81 provides that whenever the State Commissioner makes a recommendation to an authority in pursuance of Section 80(b), that authority shall take necessary action on it, and inform the State Commissioner of the action taken within three months from the date of receipt

of recommendation. The State Commission has been given certain powers under Section 82 to summon and enforce the attendance of witnesses, to require discovery and production of documents, to requisition public records from any court or office, to receive evidence on affidavits and to issue Commissions for examination of witnesses. A reading of Sections 80 to 83 would show that the State Disability Commissioner has power only to advise and make recommendations to appropriate authorities. In Ext.P1, the 1st respondent-Disability Commissioner has exceeded its jurisdiction and has given mandatory directions to effect appointment of the 2nd respondent as Legal Assistant Grade-II in the Law Department. Ext.P1 therefore is not legally sustainable.

21. There is a further reason which makes Ext.P1 illegal. By Ext.P1, the 1st respondent has directed to give appointment to the 2nd respondent as Legal Assistant in Public Services. After the enactment of the Administrative Tribunals Act, 1985, all service matters pertaining to

appointment to Central Government and State Government services are to be adjudicated by the Administrative Tribunals constituted under the Act. Section 4 of the Administrative Tribunals Act, 1985 contemplates establishment of Administrative Tribunals for the States also.

22. Section 15 of the Act, 1985 provides that the Administrative Tribunal for a State shall exercise all the jurisdictions, powers and authority in relation to recruitment and matters concerning recruitment to any civil service of the State or to any Civil Post under the State. Section 28 states that no court except the Supreme Court or any interstate Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force shall have or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters. The 1st respondent-State Disability Commissioner therefore cannot make an adjudication on a service matter and direct appointment of a person to civil

services of the Central Government or the State Government.

23. For the afore reasons, Ext.P1 order dated 30.06.2022 passed by the Court of the State Commissioner for Persons with Disabilities, Kerala in OP(RPWD) No.564/S3/2020 is legally unsustainable. Ext.P1 order is therefore quashed.

The writ petition is allowed as above.

Sd/-

N. NAGARESH, JUDGE

aks/04.05.2023

APPENDIX OF WP (C) 40580/2022

PETITIONER'S EXHIBITS

Exhibit P1 THE TRUE COPY OF THE ORDER/JUDGMENT
DATED 30/6/2022 IN OP (RPWD)
NO.564/S3/2020 PASSED BY THE 1ST
RESPONDENT

RESPONDENT'S EXTS:

R2 (A) COPY OF OA NO.1423/2022 PENDING BEFORE THE
KERALA ADMINISTRATIVE TRIBUNAL, ADDITIONAL BENCH AT
ERNAKULAM ALONG WITH ITS ANNEXURES.