

Case relating to Reservation:

Parties : Prof. I. Elangovan Versus The Government of Tamil Nadu, rep. by its Chief Secretary, Fort St.George, Chennai – 9 & Others

Court : High Court of Judicature at Madras

Case No : W.P.Nos.35808 of 2007 and 36777 of 2007 & M.P.Nos.1+1+2 of 2007

Judges: THE HONOURABLE CHIEF JUSTICE MR. A.P. SHAH & THE HONOURABLE MR. JUSTICE F.M. IBRAHIM KALIFULLA

Appearing Advocates : For the Petitioner : D.Hari Paranthaman, Advocate. For the Respondents: R2, V.T. Gopalan, Addl.Solicitor General assisted by Ms. C.N.G. Ezhilarasi, R1 & 3, Raja Kalifulla Government Pleader assisted by V.R. Thangavelu, G.A.

Date of Judgment : 27-03-2008

Head Note :-

PWD Act, 1995 – Sections 2(K), 32, 33 & 36 - Tamil Nadu State and Subordinate Service Rules - Constitution of India - Article 226 - writ of declaration – matter pertaining to reservation of posts for persons with disabilities – held, the provisions of Section 33 read with Section 2(k) of the Act would prevail over the Tamil Nadu State and Subordinate Service Rules and the government is duty bound to provide reservation of not less than 3% in every establishment for persons with disabilities in accordance with Section 33 of the Act - as per the charts showing the vacancy positions as per Section 33 read with Section 2(k) of the Act 80 vacancies are liable to be reserved for the post of Typist and 8 vacancies for the post of Steno-Typist for persons with disability under the Notifications - for the post of Typist and Steno-Typist the TNPSC has received in all 2151 applications and for the post of Junior Assistants, Bill Collectors, etc. falling under Grade-IV service, 524 applications have been received in disabled category - directed the TNPSC to fill up the 187 vacancies exclusively by appointing eligible disabled candidates - the writ petitions are disposed of.

Cases Referred: -

Perambaduru Murali Krishna and Others v. State of Andhra Pradesh and Others, 2005 1 PDD (CC) 231,

S.Jagannath v. Union of India, 1997 (2) SCC 87,

Maganbhai v. Union of India, AIR 1969 SC 783,

Ref. By President of India under Article 143(1), AIR 1960 SC 845

Comparative Citation:

2008 (3) MLJ 481

Judgment :-

(PRAYER: W.P.No.35808 of 2007:

Petition filed under Article 226 of the Constitution of India for the issuance of a writ of

declaration declaring that Clause 5(D) read with the Annexure to the impugned Notification/Advertisement No.135 dated 15.11.2007 issued by the 2 respondent insofar as not providing 3% of reservation of posts as provided under Section 33 of the PWD Act 1995 for the recruitment to the posts advertised and Clause 11 of the impugned Notification/Advertisement No.135 dated 15.11.2007 and Clause 12 of the General Instructions, etc. to candidates insofar as not granting any concession in the matter of Application Fee and laying down onerous conditions to avail Exam Fee Exemption to Persons With Disabilities are illegal and consequently to direct the 2nd respondent to reserve 3% posts for persons with disabilities as per Section 33 of the PWD Act, 1995 vertically and also not to collect Application and Examination Fee from the persons with disabilities, and award costs.

W.P.No.36777 of 2007:

Petition filed under Article 226 of the Constitution of India for the issuance of a writ of declaration declaring that Clause 4 of the impugned Notification/Advertisement No.142 dated 06.12.2007 issued by the 2nd respondent insofar as not providing 3% of reservation of posts as provided under Section 33 of the PWD Act, 1995 for the recruitment to the posts advertised and Clause 16(A) and 13 of the impugned Notification/Advertisement No.142 dated 06.12.2007 and Clause 12 of the General Instructions, etc to candidates insofar as not granting any concession in the matter of Application Fee and laying down onerous conditions to avail Exam Fee Exemption to persons with disabilities are illegal and consequently to direct the 2nd respondent to reserve 3% posts for persons with disabilities as per Section 33 of the PWD Act, 1995 vertically and also not to collect Application and Examination Fee from the persons with disabilities.

A.P. Shah, C.J.

These petitions raise identical question of law and are concerned with the interpretation of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the Act' for short) and other related provisions of the Act. Accordingly, these petitions are being disposed of by this common judgment.

2. The petitioner, who is a Professor and Head of English Department, Vellore College, and a Member of the Academic Council and a Syndicate Member of the Thiruvalluvar University, Vellore, has filed these petitions in public interest questioning the validity of the Notification/Advertisement No.135 dated 15.11.2007 and Notification/Advertisement No.142 dated 6.12.2007 issued by the second respondent-The Tamil Nadu Public Service Commission (TNPSC for short) principally on the ground that the TNPSC has not followed the rule of 3% reservation as provided under Section 33 of the Act for the recruitment to the posts advertised.

The further grievance of the petitioner is that no concession has been granted in the matter of application fee and also an onerous condition has been laid to avail exam fee exemption to persons with disabilities.

3. Notification/Advertisement No.135 dated 15.11.2007 has been issued by the TNPSC calling for applications to fill 3368 vacancies through direct recruitment for the post of Typist and 507 vacancies for the post of Steno-Typist in Group-IV service for the year 2006-07. Clause 5(d) of the said Notification/Advertisement states that rule of reservation for the persons with disabilities would apply for the recruitment. By Notification/Advertisement No. 142 dated 6.12.2007 the TNPSC has called for applications to fill 4103 vacancies through Special Recruitment Examination to be held on 17.12.2008 for the post of 75 Junior Assistants (Security), 256 Bill Collectors (Grade-I) and 3772 Junior Assistants (Non-Security) in Group-IV service. Clause 6(e) of the said Notification/Advertisement also provides that the rule of reservation for the persons with disabilities applies for this recruitment.

4. The petitioner contends that as per Section 33 of the Act, not less than 3% post shall be reserved for persons with disabilities. Therefore, 100 Typist posts and 15 Steno-Typist posts should be reserved in pursuance of Notification/Advertisement No.135 and similarly, 123 posts should be reserved for persons with disabilities in pursuance of Notification/Advertisement No.142. Notification/Advertisement No.135, however, provides reservation only for 32 posts of Typist and 4 posts of Steno-Typist for the persons with disabilities as follows: -

TYPIST-NUMBER OF RESERVED POSTS (32)

(as found in the Annexure)

Grand Total 13 + 10 + 9 = 32 (Shortfall 69)

STENO-TYPIST- NUMBER OF POSTS RESERVED (4)

(as found in the Annexure)

Grand Total 2 + 1 + 1 = 4 (Shortfall 11)

Similarly Notification/Advertisement No.142 provides reservation for only 32 posts for persons with disabilities as follows: -

NUMBER OF RESERVED POSTS (32)

Grand Total 15 + 8 + 9 = 32 (Shortfall 91)

5. The submission of the petitioner is that the impugned Notifications/Advertisements denying legitimate reservation to persons with disabilities are contrary to the statutory guarantee under Section 33 of the Act.

6. In the counter filed on behalf of the respondents, it is not disputed that the reservation at the rate of 3% is to be accorded to the handicapped persons. Even other wise, the respondents are bound to do so in view of their own rules as well as the provisions of the Act. It is, however, contended that as per Rule 22 of the Tamil Nadu State and Subordinate Service Rules, the rule

of reservation of appointments shall apply only department/unit wise. For administrative convenience and practical purposes, some of the departments have been divided into various units and insofar as 3% reservations for physically handicapped persons is concerned, where the vacancies furnished by the departments/units happen to be below 100 mark, no reservation in favour of physically handicapped persons is permissible. The vacancies in most of the departments/units do not even touch 10, as a result no reservation could be made for the category of persons with disabilities. It is further contended that the Government in G.O.Ms.No.241, P & AR (K) Department dated 29.10.2007 has prescribed a roster containing 200 turns for effecting all the reservation groups (both main reservation groups and internal reservation groups). If and when the wheel of 200 turns completes its full circle, all the reservation categories would stand accommodated.

7. Mr.Hari Paranthaman, learned counsel appearing for the petitioner contended that in view of definition of 'establishment' contained in clause (a) of Section 2 read with Section 33 of the Act, the respondents are duty bound to appoint in every establishment such percentage of vacancies not less than 3%, and the State rule providing for reservation on unit basis is wholly inconsistent with the provisions of the Act. He submitted that the Act has been enacted by the Parliament in exercise of Article 253 of the Constitution to give effect to the International Convention relating to People with Disabilities and the provisions of the Act would prevail over the State rules. On the other hand, learned Additional Solicitor General and learned Government Pleader appearing for the TNPSC and State respectively submitted that the Rules framed by the State Government providing reservations to the persons with disabilities in the services of the State fall within the competence of State Legislature. The Rules essentially are traceable to Entry 41 of List II and, therefore the question of there being any repugnancy between the Rules framed by the State Government and the provisions of the Act does not arise. Learned counsel submitted that the legislative competence of the State cannot be doubted, and that the reservations have been rightly determined on the basis of the State Rules.

8. With a view to realize the objective that people with disabilities have same right, hopes and aspirations as every one else, and they are to be provided with equal opportunities and rather better incentives for their rehabilitation in the society, a meeting was held in Beijing on 1st to 5th December, 1992 called the "Meet to Launch the Asian and Pacific Decade of Disabled Persons". A proclamation was adopted by the Asian and Pacific countries to ensure 'full participation and equality of people with disabilities in the Asian and Pacific regions'. India was a signatory to the said proclamation and with a view to implement the same, The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was enacted, which came into force on 1st January, 1996.

9. The Statement of Objects and Reasons to this Act, which was appended to the Bill, before it was enacted, reads as under: -

" The meeting to launch the Asian and Pacific Decade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, held at Beijing on 1st to 5th December, 1992 adopted the proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. India is a signatory of the said proclamation and it is necessary to enact a suitable legislation to provide for the following: -

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provisions of medical care, education, training employment and rehabilitation of persons with disabilities;

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-à-vis, non-disabled persons;

(iv) to counteract any situation of abuse and exploitation of persons with disabilities;

(v) to lay down a strategies for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

(vi) Accordingly, it is proposed to provide inter alia for the constitution of Co-ordination Committees and Executive Committees at the Central and State Levels to carry out the various functions assigned to them. Within the limits of their economic capacity and development the appropriate Governments and the local authorities will have to undertake various rehabilitation services, etc. The Bill also provides for education, employment and vocation training, reservation in identified posts, research and manpower development, and establishment of homes for persons with severe disabilities, etc. For effective implementation of the provisions of the Bill, appointment of the Chief Commissioner for persons with disabilities at the Central level and Commissioners for persons with disabilities at the State level clothed with powers to monitor the funds disbursed by the Central and State Governments and also to take steps to safeguard the rights of the persons with disabilities is also envisaged."

10. Easily, employment rights of persons with disabilities covered by Chapter-VI of the Act containing Sections 32 to 41 (except Section 39 which relates to education) comprise the most empowering provisions of the Act as they yield the most tangible and substantial rights to persons with disabilities. Section 32 of the Act provides for identification of posts, Section 33 of the Act provides for reservation of posts and Section 36 thereof provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, the vacancy is to be carried forward in the succeeding recruitment year. The relevant provisions of the aforesaid sections read as under: -

Section 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.

Section 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 shall be reserved for persons suffering from

- (i) blindness or low vision,
- (ii) hearing impairment and
- (iii) locomotor disability or cerebral palsy, in the posts identified for each disability.

Provided that the appropriate Government may, having regard to the typed 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.

Section 36: Vacancies not filled up to be carried forward: - Where in any recruitment year any vacancy under Section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled up by interchange among the three categories and only when there is no person with disability available for the post in the year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

11. It is apparent from reading of the aforesaid provisions, that the appropriate Government is statutorily enjoined to appoint in every establishment such percentage of vacancies not less than 3% for persons with disabilities, of which 1% each shall be reserved for three categories mentioned in Section 33 of the Act. The term 'establishment' has been defined in Section 2(k) of the Act to mean '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.'. Therefore, each department of the Government has to be treated as an 'establishment', and the Government is bound to reserve not less than 3% vacancies in an establishment in posts identified in accordance with Section 32 of the Act. There is no dispute that the present recruitment is in respect of Group 'C' and 'D' services and all the posts can be reserved for persons with disability.

12. Indisputably, the Tamil Nadu State and Subordinate Service Rules, which provide for

reservation in the State and Subordinate Services in favour of the persons with disabilities, is a piece of legislation traceable to Entry 41 List II. Its legislative competency cannot be doubted. It is essentially a legislation in respect of State services. It contemplates that the rule of reservation shall apply separately to each departmental unit.

13. The question that falls for consideration is whether the provisions of the Act shall prevail over the Tamil Nadu State and Subordinate Service Rules insofar as providing reservation in favour of persons with disabilities in the services of the State.

14. Undoubtedly, the Act has been enacted in order to give effect and implement the proclamation adopted at Beijing on 1st to 5th December, 1992 for providing full participation and equality of people with disabilities in the Asian and Pacific regions. Article 253 of the Constitution confers power upon Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Under Article 253, in implementing a treaty, agreement or convention with any other country or countries (Entry 14 List I) or any other decision made at any international conference, association or other body (Entry 13 List I), the limitations imposed by Articles 245 and 246(3) are removed and the total field of legislation is open to the Union Parliament. The importance attached to the treaties and international obligations is further emphasized by Article 51, which makes it a directive of State Policy to foster respect for international law and treaty obligations in dealings of organized people with one another. Therefore, the competency of the legislature of any State and exclusive power to make laws for the whole of the State or any part thereof with respect to any of the matters enumerated in List I in the 7th Schedule, referred to as the State list in the Constitution, itself is subject to the power of Parliament to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made in any international convention, association or other body.

15. Mr. H.M.Seervai, in his classic book 'Constitution Law of India' (4th Edition (Volume

I) page 306) states that Article 253 of the Constitution appears to have been enacted in order to avoid the difficulties faced by Canada in implementing the international agreement or convention. In *A.G. for Canada v. A.G. for Ontario*, 1937 AC 326, the Privy Council struck down as ultra vires three labour Acts passed by the Dominion Parliament, which gave effect to the draft convention adopted by the International Labour Organisation in accordance with the treaty of Versailles and ratified by Canada. The Privy Council held that the Dominion could not merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the Constitution which gave it birth, and as the impugned laws related to 'property and civil rights in the province' a subject of exclusive provincial legislative power under Section 92 (13)

of B.N.A. Act, they were void. In other words, a power to implement a treaty did not include a power to legislate on a subject of exclusive provincial legislation. To prevent such a position arising in India, Article 253 enables Parliament to implement a treaty by law even if the subject matter of the law is a subject of exclusive State legislation.

16. In *Ref. By President of India under Article 143(1)*, AIR 1960 SC 845, the Supreme Court explained the scope of Article 253 as follows: -

" The effect of Article 253 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power thereby power is conferred upon the Parliament which it may not otherwise possess."

17. In *Maganbhai v. Union of India*, AIR 1969 SC 783, Shah, J., in his concurring judgment observed: -

" Article 253 occurs in Chapter I of Part XI of the Constitution which deals with legislative relations, Distribution of Legislative Powers. By Article 245 of the territorial operation of legislative power of the Parliament and the State Legislatures is delimited, and Article 246 distributes legislative power subject-wise between the Parliament and the State Legislatures. Articles 247, 249, 250, 252 and 253 enact some of the exceptions to the rule contained in Art.246. The effect of Art.253 is that if a treaty, agreement or convention with a foreign state deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power: thereby power is conferred upon the Parliament which it may not otherwise possess."

18. In *S.Jagannath v. Union of India*, 1997 (2) SCC 87, a two-Judge Bench of the Supreme Court held that the Environment (Protection) Act, 1986, being a Central Legislation, has overriding effect. The Environment (Protection) Act, 1986 has been enacted under Entry 13 List I of Schedule VII of the Constitution of India. The preamble to the Act clearly states that it was enacted to implement the decisions taken at the United Nations' Conference on the Human Environment held at Stockholm in June 1972. Parliament has enacted the Act under Entry 13 of List I Schedule VII read with Article 253 of the Constitution of India. The CRZ Notification having been issued under the Act shall have overriding effect and shall prevail over the law made by the legislatures of the States. These observations were made while adverting to the question as to whether the provisions of the State legislations including that of the State of Tamil Nadu regulating the coastal aquaculture industries set up in the coastal areas were required to be in

conformity and in consonance with CRZ Notification issued by the Government of India under Section 3(3) of the Environment (Protection) Act, 1986. The Supreme Court held that the CRZ Notification shall have overriding effect and shall prevail upon the State Legislations.

19. In *Perambaduru Murali Krishna and Others v. State of Andhra Pradesh and Others*, 2005 1 PDD (CC) 231, a Division Bench of the Andhra Pradesh High Court was concerned with the State Rule which did not provide for 1:1:1 reservation for visually handicapped, hearing handicapped and orthopaedically handicapped candidates, though 3% reservation was provided under the Rules. The Division Bench held that the provisions of Section 33 of the Act would prevail over the A.P. State and Subordinate Service Rules insofar as providing 1:1:1 reservation in favour of the persons with disabilities in the services of the State. The following observations of the Division Bench are pertinent: - (Paras. 30 & 37)

“30. The heart of the Indian Federal Constitution is distribution of legislative powers between the Union Parliament on one hand and Provincial Legislatures on the other hand. Laws of both actual and potential have been separated into certain classes and those classes respectively are assigned either to the Central or to the Provincial authority. As has been observed, Article 253 of the Constitution of India makes an exception to that general rule and but for the exception so made, the Parliament could not legislate as to those classes of subjects, which have been assigned exclusively to the Provincial legislation.

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37. The division of powers jurisprudence is replete with instances where the subjects in one aspect and for one purpose fall within the Union List, may in another aspect and for another purpose fall within the State List. Under such situation, there may be both a valid federal law and valid provincial law directed to the same persons concerning the same things, but require from them different courses of conduct and thus having certain different effect. In case of two enactments called for inconsistent behaviour from the same people, they are in conflict or in collusion and both cannot be obeyed. In these circumstances, the doctrine of dominion paramountcy would be applicable and the federal law is to prevail and the provincial one becomes inoperative and need not be observed. The provincial law remains under suspension so long as there is a federal law inconsistent with the provincial law. Thus, it is a principle of our Constitution that in the event of collusion between the federal law and provincial law, each valid, the federal features of the former law are considered in the last analysis more important than the provincial features of law. The doctrine of ‘dominion paramountcy’ is inbuilt into Article 253 of the Constitution of India. It would be legitimate to presume that our founding fathers were actually aware of the complexities and accordingly, incorporated Article 253 in Part XI of the Constitution. In the light of this Article, it is evident that the situation similar to the one arising in Canada by virtue of 1937 decision afore mentioned may not arise.”

20. We have therefore no hesitation to hold that the provisions of Section 33 read with Section

2(k) of the Act would prevail over the Tamil Nadu State and Subordinate Service Rules and the respondents are duty bound to provide reservation of not less than 3% in every establishment i.e., department for persons with disabilities in accordance with Section 33 of the Act.

21. On behalf of the TNPSC, the charts showing the vacancy positions, as per Section 33 read with Section 2(k) of the Act, are filed on record. As per the charts 80 vacancies are liable to be reserved for the post of Typist and 8 vacancies for the post of Steno-Typist for persons with disability under Notification/Advertisement No.135. As regards, Notification No.142, 99 vacancies are liable to be filled up from among the persons with disabilities. We are informed that for the post of Typist and Steno-Typist, the TNPSC has received in all 2151 applications and for the post of Junior Assistants, Bill Collectors, etc. falling under Grade-IV service, 524 applications have been received in disabled category. Accordingly, we direct the TNPSC to fill up the said 187 vacancies exclusively by appointing eligible disabled candidates. The writ petitions are disposed of accordingly. No costs. Consequently, connected miscellaneous petitions are closed.