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Shiv Kumar Singh Yadav Vs. State of U.P. and Others

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Court : Allahabad

Decided On : May-25-2001

Reported in : 2001(3)AWC1972; [2001(90)FLR473]; (2001)2UPLBEC1855

Judge : S.R. Singh and ;D.R. Chaudhary, JJ.

Acts : Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-servicemen) Act, 1993 - Sections 2, 3(1) and 5; Uttar Pradesh Public Service (Reservation for Physically Handicapped, ; Dependants of Freedom Fighters and Ex-servicemen) (Amendment) Act, 1997; Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - Sections 2, 32 and 33; Constitution of India - Article 254 and 254(1); Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-servicemen) (Amendment) Act, 1999

Appeal No. : C.M.W.P. No. 51515 of 1999

Appellant : Shiv Kumar Singh Yadav

Respondent : State of U.P. and Others

Advocate for Def. : Kripa Shanker Singh, Adv. and ;Pushpendra Singh, S.C.

Advocate for Pet/Ap. : H.N. Singh and ;D.S. Yadav, Advs.

Disposition : Petition dismissed

Judgement :

S.R. Singh, J.

1. The question that begs consideration in this writ petition is whether the petitioner, who suffered impairment due to locomotor disability to the extent of 20%, is entitled as 'physically handicapped' candidate, to get the benefit of the U. P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) Act. 1993 as it stands amended by the U. P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) (Amendment) Act. 4 of 1997?

2. Background leading to the filing of the present petition draped in brevity is that the petitioner, to begin with, applied for appointment to the post of Asstt. Prosecuting Officer pursuant to the notification issued by the U. P. Public Services Commission vide the advertisement issued on 29.12.1997. The petitioner belongs to other backward class (O.B.C.) category and also suffers from physical impairment and as such, he claimed to be extended the benefit of reservation simultaneously on two counts, i.e., both as O.B.C. as well as of being physically handicapped candidate. In the written examination, the result of which was made public on 28.1.1999, the petitioner was declared to have romped home for interview and was accordingly issued call letter for interview slated for 15.3.1999. He appeared in the interview in response to the call letter and in the ultimate analysis, when the final result was published, his name found place in the final select list as O.B.C.-P.H. category candidate and though, he was displayed in the list of successful candidates in the category of O.B.C. plus physically handicapped but against his name, a proviso was scripted that his selection was provisional inasmuch as the certificate of O.B.C. was not in conformity with the prescribed proforma. In the course of interview, he was asked to submit requisite certificate which, it is alleged in the writ petition, was presented by the petitioner in time. In the counter-affidavit filed on behalf of the Commission, it has been averred that the petitioner could not succeed as O.B.C. candidate inasmuch as the last candidate selected under that category had secured more marks and before recommending the name of the selected candidates to the Government, it was noticed that the

petitioner was not eligible to get the benefit available to a physically handicapped candidate since his disability was only 20% while the minimum degree of disability according to the Government of India's notification, should be 40% in order to make one eligible for anyconcession or benefit as physically handicapped candidate. The candidature of the petitioner was rescinded by the Commission and he was communicated with accordingly. The cancellation of the candidature, according to the counter-affidavit was in accord with the terms and condition of para 17 of the advertisement wherein it was specifically mentioned that if it was found on any subsequent stage that a candidate was not eligible or that his application should have been rejected as not entertainable initially, his candidature would be rejected and if selected, the recommendation would be withheld.

3. I have heard Sri H. N. Singh for the petitioner, Sri Kripa Shanker Singh, standing counsel representing the State and Sri Pushpendra Singh, appearing for the Commission.

4. Section 3 (1) of the U. P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) Act, 1993 (In short the U. P. Act 4 of 19931 as it stood originally, is excerpted below.

'3. Reservation of vacancies in favour of physically handicapped, etc.-- (1) In public services and posts in connection with the affairs of the State there shall be reserved five per cent of vacancies at the stage of direct recruitment in favour of-

(i) physically handicapped,

(ii) dependants of freedom fighters, and

(iii) ex-servicemen.

Sub-section (1) of Section 3 of the U. P. Act 3 of 1993 as it stands substituted by the U. P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) (Amendment) Act. 1997 (In short the U. P. Act 6 of 1997) is quoted below.

'(1) There shall be reserved at the stage of direct recruitment.--

(i) in public services and post two per cent of vacancies for dependants of freedom fighters and one per cent of vacancies for ex-servicemen :

(ii) in such public services and posts as the State Government may, by notification, identify one per cent of vacancies each for the persons suffering from.-

(a) blindness or low vision ;

(b) hearing impairment ; and

(c) locomotor disability or cerebral palsy.'

Clause (i) of sub-section (1) of Section 3 was substituted by the U. P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) Act. 1999 (In short the U. P. Act 29 of 1999) as under ;

'(i) in public services and posts two per cent of vacancies for dependants of freedom fighters :

(i-a) in public services and posts other than group 'A' posts or group 'B' posts, on and from May 21. 1999 two per cent of vacancies, and on and from the date on which the U. P. Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen) (Amendment) Act. 1999 is published in the Gazette five per cent of vacancies, for Ex-Servicemen.'

5. It may, however, be observed that the provisions of the U. P. Act 29 of 1999 shall have no application to the present case inasmuch as the cases in which the selection process had been initiated before the commencement of the U. P. Act 29 of 1999 have been saved from the amending provisions and such cases require to be dealt with in accordance with the provisions of the Act as itstood before its amendment by the U. P. Act 29 of 1999 in view of subsection (1-A) of Section 5 of the Act. The process of selection in the present case was initiated before the commencement of the U. P. Act 29 of 1999 and therefore, the Act 4 of 1993, as it stood amended by the U. P. Act 6 of 1997, will apply to the present case. A perusal of the Section 3 (1) of the Act, as it stands amended by the U. P. Act 6 of

1997, would indicate that a person suffering from - (a) blindness or low vision ; (b) hearing impairment : and (c) locomotor disability or cerebral palsy, is called 'physically handicapped' and is entitled to get benefit of the Act. The present is a case of 'locomotor disability' which has been defined in Section 2 (ddd) inserted in the Principal Act by U. P. Act 6 of 1997 as under :

'(ddd) 'locomotor disability' means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy.'

6. The Act by itself does not lay down that the persons suffering from locomotor disability or any other disability would be entitled to get the benefit of the Act only if the disability is to the extent of 40%. The petitioner in the instant case, suffered from locomotor disability to the extent of 20% and according to the medical certificate, copy of which has been annexed as Annexure-S.A. I, the disability is such as 'will lead to substantial restriction of the movement of limbs'. From this reckoning, the petitioner is entitled to get the benefit of the Act. The learned standing counsel, however, submits that the petitioner is not entitled to be given the benefit of the Act, in view of the Government of India. Ministry of Welfare's notification dated 6th August, 1986 issued on the subject of 'uniform definitions of physically handicapped' in which it has been provided that each category of handicapped persons including locomotor handicaps, has been divided in four groups, viz., mild, moderate, severe and profound/totaland it has been envisaged therein that various concessions/benefits would in future be available only to moderate, severe and pro found/total groups and not to the mild group. The minimum degree of disability, it is provided in the notification, should be 40% in order to be eligible for any concession/benefits as a physically handicapped person. The notification aforestated was issued, after considering the reports submitted by the three committees set up by Government of India. Ministry of Welfare under the Chairmanship of Director General of Health Services ; one each in the area of visual handicaps, speech and hearing disorders and for mental handicaps and 'with the concurrence of the State Governments/Union Territories, and the concerned Ministries/ Departments'. Reliance has also been placed upon a notification dated 30.9.2000 issued by the State Government adopting the

standard of disability as fixed by the Central Government vide notification aforestated.

7. We have bestowed our anxious thoughts to the questions involved in the case. A person suffering from locomotor disability and cerebral palsy comes within the purview of the 'physically handicapped' within the meaning of Section 2 (e) of the Act. The locomotor disability as nailed down in clause (ddd) of Section 2 means disability of the bones, joints or muscles 'leading to substantial restriction on the movement of the limbs or any form of cerebral palsy'. The medical evidence In the instant case, clearly evinces that 20% locomotor disability of the petitioner 'will lead to substantial restriction on the movement of limbs'. In view of the medical evidence, therefore, the petitioner satisfies the test of being a 'physically handicapped' person within the meaning of the Act. The Government Order No. 464/65-2-2000-178/2000 dated September 30, 2000 issued by the Government of Uttar Pradesh read with notification No. 4-2/83-H.W. III Government of India, Ministry of Welfare dated 6th August, 1986, have no application inasmuchas the G.O. dated September 30, 2000 has been made applicable only in relation to benefits under the projects concerning the six 'Niyamawalian' (Rules) enumerated therein. None of the six 'Niyamawalian' cover the case of reservation at the stage of direct recruitment in public service and posts as provided in Section 3 (1) of the U. P. Act 4 of 1993. In the absence of any amendment in the Act, the Government order aforestated cannot exclude the petitioner from taking benefit of the Act No. 4 of 1993 merely because the locomotor disability he is suffering from, is only to the extent of 20% and not 40% as per standard of disability prescribed under the Government orders referred to above.

8. It was then submitted by the learned standing counsel that even if the Government order aforestated is ignored, the petitioner would still not be entitled to be selected under the quota reserved for physically handicapped persons under the U. P. Act 4 of 1993 in view of the provisions contained in Central Act known as 'The Persons with Disabilities (Equal Opportunities. Protection of Rights and Full Participation) Act, 1995. In the Central Act, the expression 'person with disability' has been defined to mean 'person suffering from not less than forty per cent of any disability as certified by a medical authority'. The word 'disability' according to

Section 2(i) of the Central Act means :

(i) blindness :

(ii) xx xx

(iii) xx xx

(iv) xx xx

(v) Locomotor disability ;

(vi) xx xx

(vii) xx xx

The word 'locomotor disability according to Section 2(o) of the Central Act, means disability of the bones. Joints or muscles leading to substantial restriction of the movement of limbs or any form of cerebral palsy.

9. Section 32 of the aforesaid Central Act provides that appropriate Government shall :

(a) identify posts, in the establishments, which can be reserved for the persons with disability :

(b) at periodical intervals notexceeding three years, reviewthe list of posts identified andup-date the list taking intoconsideration thedevelopments in technology.

Section 33 of the Central Act provides that 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 percent 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.

10. Section 3 (1) of the State Act No. 3 of 1994 as it stands amended by the U. P. Act No. 6 of 1997 envisages that there shall be reserved at the stage of direct recruitment, in such public services and posts as State Government may, by notification identify, one percentage of vacancy each for the person suffering from (a) blindness or low vision, (b) hearing impairment ; and (c) locornotor disability of cerebral palsy. Locomotor disability as defined in Section 2 (ddd) of the State Act and Section 2(o) of the Central Act, means disability of bones. Joints, or muscles leading to substantial restriction of the movement of limbs or any form of cerebral palsy. But unlike the provisions contained in Section 2(e) of the Central Act, the State Act by itself does not define 'person with disability' to mean a person suffering from not less than 40% of any disability as certified by medical authority. Rather, the State Act has used the term 'physicallyhandicapped' to mean a person who suffers from blindness or low vision ; hearing impairment and locomotor disability or cerebral palsy irrespective of whether such disability is 40/' or less than 40%. Thus, there is a conflict between the term 'physically handicapped' as used in the State Act and expression 'person with disability' as defined in the Central Act. Both the Acts are covered by Entry No. 23 of List III. The question is as to whether the Central Act will have precedence over the State Act. Article 254(1) of the Constitution envisages that 'if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.' It is thus evident that in the event of conflict between the law made by the Legislature of a State and law made by the Parliament, the latter will prevail subject, of course, to the provisions of clause (2) of Article 254 of the Constitution. Clause (2) of Article 254 gives predominance, in the event of any repugnancy to the law made by the Legislature of the State in

respect to one of the matters enumerated in the Concurrent List provided that law so made by the Legislature of the State 'has been reserved for the consideration of the President and has received his assent'. The State Act in the instant case does not appear to have been reserved for the consideration of President. Question of the same being assented by the President does not arise. The Act was assented to by the Governor on December 29, 1993. In such view of the matter, clause (2) of Article 254 of the Constitution is not attracted for application and,therefore, as provided under Article 254(1), the law made by the Parliament will prevail to the extent of repugnancy. The petitioner is not entitled to be treated as a physically handicapped candidate for the purposes of the Act in view of the fact that his disability is less than 40%.

11. The argument of Sri H. N. Singh that the State enactment is covered by Entry No. 41 which provides for legislation in respect of -State Public Services ; State Public Service Commission' cannot be countenanced for in substance the enactment is intended to provide social security by providing reservation in public services and posts in favour of physically handicapped and other persons referred to therein. If the doctrine of pith and substance is applied, there can be no manner of doubt that both the enactments-Central and State are covered by Entry No. 23 of List III of VIIth schedule, it is no doubt true that once an enactment is covered by any of the entries of List II. 'no central law whether made with reference to an entry in List-I or in reference to entry in List-III can affect the validity of such State enactment.'(State of Rajasthan and others v. Vatan Medical and General Stores and others, JT 2001 (4) SC 193). But as discussed above, both the enactments are covered by Entry 23 of List III and, therefore. Article 254 will come into play.

12. As a result of foregoing discussions, the petition fails and is dismissed with cost to be borne by respective parties.

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