

**Case relating to Reservation:**

**Parties :** Dr. M. Sheik Mohamed Mydeen & Others Versus State of Tamilnadu, rep. by its Secretary to Government & Another

**Court :** High Court of Judicature at Madras

**Case No :** W.P.Nos.14312 and 16610 of 2007 (T) (O.A.Nos.3513 and 2689 of 2003)

**Judges:** THE HONOURABLE MR. JUSTICE S. MANIKUMAR

**Appearing Advocates :** For the Petitioner: K. Sridhar, V. Raghavachari, Advocates. For the Respondents: R1 - Edwin Prabhakar, Additional Government Pleader, R2 – Bhaskar, TNPSC.

**Date of Judgment :** 05-04-2011

**Head Note :-**

Person with Disabilities (Equal Opportunities, Protection of rights and full participation) Act 1995, Act 1 of 1996 - Section 33 – petitioners have challenged the notification issued by the Tamilnadu Public Service Commission to fill up the post of Assistant Surgeon (General / Specialities) in Tamilnadu Medical services and quash note (iii) as illegal, incompetent, irregular and Unconstitutional and consequently prayed for a direction to the 1st respondent to provide for a minimum of 3% reservation for physically disabled – Court held - post of Assistant Surgeon (General) in Tamilnadu Medical Services, falling under Group 'B' has already been identified, then it is imperative on the part of the Government to identify the number of back log vacancies and fill up the same, by arranging special recruitment drive in accordance with the provisions of the Person with Disabilities (Equal Opportunities, Protection of rights and full participation) Act 1995 -directions of the Division Bench has to be implemented in letter and spirit - not inclined to quash the notification at this juncture – dismissed.

**Cases Referred:**

1. TMN Deepak Vs. State of Tamilnadu rep. by its Chief Secretary and 4 others, 2011 (2) CTC 353.
2. Prof.I.Elangovan Vs. Government of Tamilnadu, 2008(3) MLJ 481.

**Judgment :-**

(Prayer: This writ petition came to be numbered under Article 226 of the Constitution of India by way of transfer of Original Application in O.A.No.3513 of 2003 to call for the records in notification dated 11.06.2003 and set aside the impugned note denying application of 3% reservation for physically handicapped persons in paragraph 1(iii) of the notification issued by the Tamilnadu Public Service Commission for the post of Assistant Surgeon (General / Specialties in the Tamilnadu Medical Services dated 11.06.2003 and reserve 3% of posts under the physically handicapped category and consider the applicant in the above category.)

(Prayer: This writ petition came to be numbered under Article 226 of the Constitution of India by way of transfer of Original Application in O.A.No.2689 of 2003 to call for the records on the file of the 1st respondent in its notification nil dated 11.06.2003 in seeking to fill up the post of Assistant Surgeon (General / Specialties) in the Medical services and quash note (iii) as illegal incompetent, irregular and Unconstitutional and further direct the respondent No.1 to provide for a minimum of 3% reservation for physically disabled as per Sec. 33 of Act 1 of 1996.)

Common Order

1. In both the writ petitions the petitioners have challenged the notification dated 11.06.2003 issued by the Tamilnadu Public Service Commission to fill up the post of Assistant Surgeon (General / Specialities) in Tamilnadu Medical services and quash note (iii) as illegal, incompetent, irregular and Unconstitutional and consequently prayed for a direction to the 1st respondent to provide for a minimum of 3% reservation for physically disabled as per Sec. 33 of Act 1 of 1996.

2. According to the petitioners, though Section 33 of Person with Disabilities (Equal Opportunities, Protection of rights and full participation) Act 1995, Act 1 of 1996, provides that the Government should reserve 3% posts for physically handicapped persons in educational institutions and establishments, reservation has not been provided for filling up of the post of Assistant Surgeon (General / Specialities) and therefore it is contrary to the statute and in support of his contentions, he has also placed reliance on a decision of this Court in TMN Deepak Vs. State of Tamilnadu rep. by its Chief Secretary and 4 others, reported in 2011 (2) CTC 353, where a positive direction has been made directing 3% reservation in all Government and aided educational institutions.

3. It is also pointed out by the petitioners that on an earlier occasion, when the Tamilnadu Public Service Commission by their notification dated 03.03.1998 for the post of Assistant Surgeon (General) in Tamilnadu Medical Service, invited applications to fill up 250 vacancies for direct recruitment to the above said posts, 3% reservation was provided to the differently abled persons from among the communal categories, for whom a separate reservation is provided under rule 22 of Tamilnadu State and Subordinate Services and whereas, in the impugned notification dated 11.06.2003 inviting applications to fill up 504 vacancies of Assistant Surgeon (General / Specialities) in Tamilnadu Medical Services, the Tamilnadu Public Service Commission has not provided 3% reservation for differently abled persons.

4. According to the petitioners, the action of the Tamilnadu Public Service Commission is not in consonance with the object sought to be achieved under the Person with Disabilities (Equal Opportunities, Protection of rights and full participation) Act 1995, Act 1 of 1996. As there was a failure on the part of the respondents in implementing the mandate of the statute, the

petitioners have prayed to set aside the notification. It is also their further contention that the post of Assistant Surgeon (General / Specialities) in Tamilnadu Medical Service, has not been exempted by the Government under the above said Act and therefore, the notification is arbitrary and violative of Article 14, 16, 19(1) (g), 41 and 311 of the Constitution of India.

5. Placing reliance on a Division Bench decision of this Court stated supra, Mr.K.Sridhar, learned counsel for the writ petitioner in W.P.No.14312 of 2007 has submitted that even in the year 2000, the Government have issued orders in G.O.Ms.No.105 dated 20.06.2000 providing 3% reservation in the vacancies and that the respondents have failed to give an opportunity to differently abled persons, thus violating Article 14 of the Constitution of India.

6. According to him, had the respondents provided 3% reservation in the post of Assistant Surgeon (General / Specialities) in Tamilnadu Medical Services, as done in the earlier notification dated 03.03.1998, the petitioners would have had an opportunity to secure employment. As the notification is contrary to statutory provision and earlier the Government Orders, he has prayed to quash the same.

7. To sustain the notification, the Deputy Secretary, Tamilnadu Public Service Commission, Chennai, in his counter affidavit submitted that notifications are being issued calling for applications for direct recruitment based on statutory provisions read with orders issued by the Government of Tamilnadu (vide Rules 21 and 22 of the General Rules for the Tamilnadu State and Subordinate Services read with G.O.Ms.No.343, Health and Family Welfare, dated 06.07.1999).

8. According to him, Rule 22 provides reservation to differently abled persons, which is confined only to Group 'C' and 'D' and in so far as Executive posts are concerned, there was no provision for implementing reservation to differently abled persons, at the time of issuing the notification. He further contended that as per G.O.Ms.No.343, Health and Family Welfare, dated 06.07.1999, the post of Assistant Surgeon, besides, certain other posts, have been classified as 'Executive Posts' and annexed to G.O.No.34, Personnel and Administrative Reforms (R) dated 12.01.1983. It is his further submission that at that time, since the post of Assistant Surgeon was under Group-B category (posts carrying scales of pay the minimum of which is Rs.5500/- and above but below Rs.10,000/-) the 3% reservation for differently abled persons was not been provided.

9. He therefore, submitted that the Commission's notification dated 11.06.2003, inviting application from candidates for appointment against 504 vacancies in the post of Assistant Surgeon is based on the Government guidelines and proviso to Rule 22(aa) of the General Rules for the Tamilnadu State and Subordinate Services, issued under the proviso to Article 309 of the Constitution of India.

10. As regards the contention that the post of Assistant Surgeon in Tamilnadu Medical Services has not been exempted from the purview of Tamilnadu Public Service Commission, learned counsel for the Commission contented that the Government is empowered to exempt any post from applying the provisions of the Act having regard to the type of work, to be discharged by the holders of a particular post. In sum and substance, it is the contention of the Tamilnadu Public Service Commission that the notification is in accordance with the statutory provisions and therefore there is no violation of Constitutional provisions or the Act 1 of 1996.

11. Heard the learned counsel for the parties and perused the materials available on record.

12. Section 33 of Person with Disabilities (Equal Opportunities, Protection of rights and full participation) Act 1995, Act 1 of 1996, reads as follows:

"33. Reservation of Posts: Every appropriate shall appoint in every establishment such percentage of vacancies not less than three percent 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.

and 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 to 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."

13. Though a contention has been raised that in 1998, when the Tamilnadu Public Service Commission, issued notification dated 03.03.1998, to fill up 250 vacancies in the post of Assistant Surgeon (General) in Tamilnadu Medical Services and that the said selection was directed to be made by following the rule of reservation for appointments for the respective communities, which includes 30% reservation of vacancies for women and 3% for differently abled persons from among the communal categories and that there was a deviation in not providing special concession in the matter of reservation, in the impugned notification of the year 2003, the Government have not chosen to file any counter affidavit, despite the pendency of this writ petition for nearly 7 years.

14. Further from the counter affidavit filed by the Tamilnadu Public Service Commission, it is evident that the rule position which stood in the year 2003 regarding reservation to various communal categories and reservation to the differently abled persons, reads as follows;

"Rule 22(aa) of the General Rules for the Tamilnadu State and Subordinate Services in so far as

it relates to reservation for physically Handicapped persons reads as follows:

"(aa) Out of the total number of appointments reserved in the categories referred to in clause (a), in the case of appointment made by direct recruitment, one percent in each such category shall be separately reserved for the blind, deaf and orthopaedically handicapped candidates and the appointments shall be made in turn and in the order of rotation as specified in SCHEDULE III-A to this part:

Provided that the appointment of physically handicapped candidates, against the reserved turns shall be subject to availability of such candidates:

Provided further that if no qualified and suitable candidate is available from a particular category of handicapped, namely the blind, the deaf or the orthopaedically handicapped, the vacancy can be filled up by candidates belonging to any of the other two categories:

Provided also that if no qualified and suitable physically handicapped candidates belonging to Scheduled Caste or Scheduled Tribe or Most Backward Classes/Denotified Community is available for selection for appointment against the reserved turn, such turn shall be filled up by a candidate other than physically handicapped belonging to that category and if no such candidate is available in that category for selection for appointment against the reserved turn, such turn shall be carried forward as provided in clause (d):

Provided also that in the case of appointment of candidates belonging to Backward Classes (other than Most Backward Classes/Denotified Communities) or in the case of appointment of candidates on the basis of merit, if no qualified and suitable physically handicapped candidate is available for selection for appointment against the reserved turn, such turn shall be filled up by a candidate other than physically handicapped belonging to that category and if no such candidate is available in that category for selection for appointment against the reserved turn, such turn shall be allowed to lapse.

Provided also that in so far as the Executive Posts are concerned, the reservation for physically handicapped candidates shall be made applicable in respect of posts in 'C' and 'D' Groups only: "

15. Reading of the Government order G.O.Ms.No.343, Health and Family Welfare, dated 06.07.1999, shows that the post of Assistant Surgeon, has been classified as Executive posts and brought under the list of Executive post and annexed to G.O.No.34, Personnel and Administrative Reforms (R) dated 12.01.1983. At that time the scale of pay applicable to the Group – B post was Rs.5500/- and above, but below Rs.10000/- and as per the counter affidavit, the post of Assistant Surgeon, at that point of time, carried a minimum scale of pay of Rs.5500/-.

16. Though, the learned counsel for the petitioner has submitted that the Government have

issued orders in G.O.Ms.105 dated 20.06.2000 and directed reservation of 3% vacancies for differently abled persons, it is an admitted fact that only in G.O.Ms.No.53, dated 11.04.2005, the Government have approved a list of 117 posts identified under Group A & B category under the purview of Tamilnadu Public Service Commission and Teachers' Recruitment Board, as suitable for persons, with disabilities and further directed 3% vacancies to be filled up by direct recruitment, in the abovesaid posts.

17. Reading of the Division Bench judgment also shows that pursuant to the orders made by this Court in Prof.I.Elangovan Vs. Government of Tamilnadu, reported in 2008 (3) MLJ 481, the Government have issued orders in G.O.Ms.NO.87, dated 17.07.2008,

to select one differently abled person for every 33 vacancies. If, there is no vacancy earmarked for differently abled candidates, the cut off mark should not be published and only when vacancies for these categories arise, the cut off mark should be published.

18. Thus, it could be seen from the above that though, the Central Government have enacted Person with Disabilities (Equal Opportunities, Protection of rights and full participation) Act (1 of 1996), in the year 1995, with an avowed object of providing reservation to differently abled persons, so as to enable them to come to the main stream, the Tamilnadu State and Subordinate Service Rules or the Special rules framed, at the time of notification, there was no provision to provide for any reservation in Group A and B categories. The Government ought to have identified the posts in Group A and B and accordingly provided reservation of 3%, but, the said exercise seemed to have been done only in the year 2005, in G.O.Ms.No.53, dated 11.04.2005, where a list of 117 posts have been identified under Group A and B category was under the purview of Teachers' Recruitment Board and Tamilnadu Public Service Commission, suitable for the persons with disabilities. Therefore, in the year 2003, when the statutory rules either general / special for any particular service do not provide for reservation of 3% to differently abled persons, the action of the Tamilnadu Public Service Commission in not reserving 3% to the differently abled persons for selection to the post of Assistant Surgeons in Tamilnadu Medical Service of the year 2003, cannot be said to be arbitrary for the reason, that the Commission cannot be held responsible. After all they are only the recruiting agency and as requested by the employer, they would hold a competitive examination for any notified post and after selection, forward the list to the employer. Besides, quashing the notification at this juncture, after eight years, on the grounds that due reservation had not been provided to differently abled persons, would result in upsetting the selection and consequently, the orders of appointment, regularisation, etc. It is also to be noted that even after 2003 notification, the Tamilnadu Public Service Commission has invited applications from eligible candidates for filling up of the post of Assistant Surgeons in Tamilnadu Medical Services.

19. All that has to be considered by this Court is that whether the Government have taken

appropriate efforts to fill up the vacancies as per the statute. In this context, it is useful to refer paragraphs 12 to 17 of the judgment in TMN Deepak Vs. State of Tamilnadu rep. by its Chief Secretary and 4 others, reported in 2011 (2) CTC 353, where the Division Bench of this Court has considered the action taken by the Government in fulfilling the objectives of the statute.

20. At paragraph No.17, the Division Bench has further directed that the government should also explore the possibilities of arranging recruitment for differently abled persons in Government companies and public sector undertakings and regular recruitment drives could be conducted, where Government companies and public sector undertakings should be directed to participate. Further directions have been given that the Government should also explore the possibilities of organizing special recruitment drives for the differently abled in association with Corporate Sector on a regular basis at frequent intervals so that there is wider spectrum of the job opportunities are made available to such persons. Immediate steps shall be taken to clear the backlog vacancies and the Government should ensure that the rule of reservation of 3% shall be adhered to strictly in accordance with Section 33 of the Act and as stated in the report submitted by the State Commissioner for disabled to give full and effective implementation to the provisions of the Act.

21. In view of the directions granted by the Hon'ble Division Bench and with regard to the fact that the post of Assistant Surgeon (General) in Tamilnadu Medical Services, falling under Group 'B' has already been identified, then it is imperative on the part of the Government to identify the number of back log vacancies and fill up the same, by arranging special recruitment drive in accordance with the provisions of the Person with Disabilities (Equal Opportunities, Protection of rights and full participation) Act 1995. The directions of the Division Bench has to be implemented in letter and spirit. In view of the above, this Court, is not inclined to quash the notification dated 11.06.2003, at this juncture. Hence, both the writ petitions are dismissed. No Costs.