

**Central Administrative Tribunal
Ernakulam Bench**

O.A No.180/00128/2020

Tuesday, this the 2nd day of March, 2021

CORAM:

**Hon'ble Mr. P.Madhavan, Judicial Member
Hon'ble Mr.K.V.Eapen, Administrative Member**

Dr.Pradeep Sankar.S
Aged 33 years, S/o.Surendran P
Ulpala Nivas, TC 20/1866(1)
Kattanvila Lane, Thamalam
Poojappura P.O
Thiruvananthapuram – 695 012
Mob:-9809903390

- Applicant

(By Advocate: Mr.P.M.Pareeth)

Versus

1. Employees State Insurance Corporation
Panchadeep Bhavan, CIG Marg
New Delhi represented by its Director General
Pin Code – 110 001
2. Medical Superintendent
ESIC Hospital, Udyogamandal P.O
Ernakulam District – 683 501
3. Dr.Manju Rani, Manju Nivas
Vidyanagar 150, Mayyanad P.O
Kollam – 691 303
Now Residing at Chempakassery House
Karikkamuri Cross Road, Cochin – 682 011

- Respondents

(By Advocate: Mr.T.V.Ajayakumar for R 1 &2)

The application having been heard on 18th February, 2021, this Tribunal delivered the following order on 2.3.2021.

O R D E R

P.Madhavan, Judicial Member

This is an Original Application filed seeking the following reliefs:

- “i. *A direction or order calling for the records leading to Annexure A11 and quash the same to the extent it selects the 3rd respondent for the post of Ayurveda Physician in preference to the applicant.*
- ii. *A direction or order calling for the records leading to Annexure A9 and quash the same to the extent it, as per sl.No.8 in the Annexure-1 therein makes One leg affected (OL) category alone as suitable for the post of Ayurveda Physician as in violation of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 and the Rules therein.*
- iii. *A direction to the 2nd respondent to select the applicant for appointment to the post of Ayurveda Physician on contract in the place of the 3rd respondent and to grant appointment to him in view of his superior claim and entitlement than the 3rd respondent.*
- iv. *To grant cost.*
- v. *To grant such other reliefs this Hon'ble Court deems fit and proper in the facts and circumstances of the case.”*

2. The applicant's case is that the applicant is a physically handicapped person with 50% loco motor disability. He is a post graduate in Ayurvedic medicine and he is working under the first respondent at ESIC Hospital Udyogamandal on contract basis. The grievance of the applicant is that despite the reservation of the post under 2nd respondent for disabled candidates, the applicant was denied employment and the 3rd respondent was given appointment. The applicant has produced a copy of the certificate of Standing Disability Assessment Board dated 15.4.2017 issued to the

applicant as Annexure A-1. He has also produced copy of the certificate regarding his qualifications, certificate of registration, additional medical qualification certificates and photo copy of experience certificates etc issued to him as Annexure A-2 to Annexure A-6(e). The first respondent had earlier issued a notification for filling up of the post of Medical Officer Ayurveda on 30.12.2013 in various states as per Annexure A-7. But subsequently, they did not continue with the recruitment and it was cancelled. Subsequently, the applicant has participated in a walk-in-interview for the post of Ayurveda Physician held on 16.1.2019 and he was selected for appointment under un-reserved category. Copy of the order is produced as Annexure A-8.

3. At the time of filing of this O.A, the applicant was continuing as Ayurveda Physician under respondent no.2 and his contract appointment had expired on 19.02.2020. Now the second respondent had issued a notification for walk-in-interview of Doctors (Allopathic and Ayurveda) and Ayurveda Pharmacist on 29.1.2020. A copy of the notification is produced as Annexure A-9. The applicant had applied for the interview and participated in the interview on 12.2.2020. The result of the interview was published on the same date wherein the name of the applicant was not included. A copy of the result published by the respondents is produced as Annexure A-11. As per Annexure A-9 notification, it is clearly stated that preference will be given to PWD candidates. But the respondents did not comply with the above decision and selected the 3rd respondent who is an OBC candidate. According to the applicant, he is a disabled person with locomotor disability and he is entitled to 1% reservation against appointments made to establishments as defined under **section 2(k) of the Persons with Disabilities Act, 1995** (Repealed in 2016). The applicant in this case is also a person who belongs to

O.B.C category and there is no valid reason to give appointment to respondent no.3. The action of the respondents is malafide and arbitrary in nature. Hence he seeks to quash Annexure A-11 and for a direction to the second respondent to select the applicant for appointment. He also challenged the classification of disability for Ayurveda Physician as “OL” in Annexure -1 to Annexure A-9 notification.

4. The respondents have filed a detailed reply statement stating that the Original Application is not at all maintainable either in law or on facts. The applicant has claimed to be a physically handicapped person with 50% loco motor disability. He has worked on contract basis in the ESIC Hospital, Udyogamandal. The applicant has challenged the appointment of respondent no.3 as Ayurveda Physician in preference to the applicant. As per Serial No.8 of Annexure-1 in Annexure A-9 notification, only One Leg disabled (OL) category is found suitable for the post of Ayurveda Physician and there is no violation of any of the provisions of the Act. The applicant is not entitled to get the benefit as he is both leg disabled. The applicant was earlier appointed in the un-reserved category on contract basis. The said period of appointment got expired on 19.2.2020. A total of 51 candidates had attended the interview and one Dr. Manju Rani, i.e, respondent no.3 who possessed the required and desired qualification/experience and belonging to O.B.C category was selected since she obtained the highest mark. She was granted a relaxation only with respect to the age for reserved category. In fact, there was no reservation offered to the PWD candidates in the said selection. There is no violation of any rules or law in the selection. The result of the interview was published with name and marks of the selected candidate. The post of Ayurveda Physician was not reserved for PWD candidates and the 3rd respondent was selected considering her overall performance and total marks obtained in the interview. The

earlier notification Annexure A-7 was cancelled and it was for regular post and not for contract employment. As per the earlier notification, two posts were reserved for PWD candidates on an all India basis and there was no mention to the fact that vacancy at Udyogamandal is for PWD category.

5. After filing the reply, the applicant has filed a rejoinder stating that as per the notification, Annexure A-9, it is stated that '**preference will be given to PWD (Persons with Disability) candidates as per rules as shown in Annexure A1.**' As per Annexure-1 to Annexure A-9 notification, Only One leg affected (OL) person alone can apply. It is contended that loco motor disabled category cannot be again sub divided into one leg affected or one arm affected. The applicant mainly relies on a judgment of the the Kerala Administrative Tribunal wherein it was categorically stated that such a division is in violation of the relevant provisions of **Persons with Disabilities Act, 1995.** The applicant submits that the action of the respondents is discriminatory and is liable to be set aside.

6. We have heard both sides and we have also perused the pleadings and Annexures produced by the applicant as well as the respondents.

7. The main contention raised by the counsel for the applicant is that the applicant is a disabled person having loco motor disability and as per the notification produced as Annexure A-9, candidates with disability has to be given preference over others. The respondents in this case has not considered the disability of the applicant and selected respondent no.3. He challenged the appointment of respondent no.3. The counsel also contends that Annexure -1 attached to Annexure A-9 notification shows that only One Leg disabled can apply

for the post of Ayurveda Physician. The respondents had classified loco motor disability again and this is discriminatory to the persons who are disabled with loco motor disability and hence the attached Annexure -1 to Annexure A-9 notification, wherein one leg affected category alone is suitable for the post of Ayurveda Physician, is liable to be set aside as it is against the Act itself.

8. We have carefully gone through the pleadings and it appears that there is some merit in the contentions put forward by the respondents in this case. If we go through Annexure A-9, it can be seen that no post is specially reserved for PWD candidates. But **it is clearly mentioned below the notification Annexure A-9 that preference will be given to PWD (persons with disability as per rules as shown in Annexure -1 attached to the notification)** . On a perusal of the disability certificate produced by the applicant in this case as Annexure A-1, it can be seen that the applicant is disabled (both lower limbs) and his disability is 50%. So he is not a one leg disabled person and according to the respondents, he cannot be considered for the post of Ayurveda Physician as per the notification in this case. If we go through Annexure -1 categories of disabled persons suitable for the job of Ayurveda Physician on contract basis, it shows that only one leg disabled person can apply for the post of Ayurveda Physician. Here, the applicant is both leg disabled and he will not come under the criteria fixed under Annexure -1 to Annexure A-9 notification for filling up the post of Ayurveda Physician. According to the respondents, it is because of that the applicant was not selected. The applicant knows that as per the notification, only one leg disabled person can apply for the post of Ayurveda Physician. But the counsel for the applicant would contend that as per Section 2 of the P.W.D Act, the Loco motor disability is defined as disability of bones, joints or muscles leading to substantial restriction of the

movement of the limbs or any form of cerebral palsy.

9. Here, the respondents had sub classified loco motor disability and made one leg disability as eligible and denied the opportunity to the applicant for applying for the post. According to the counsel appearing for the applicant, this is discriminatory to the loco motor disabled persons as a whole. He mainly relies upon the decision of the Kerala Administrative Tribunal in O.A No.16/2011 in support of his case. In that case, the selection was for the post of Higher Secondary School Teacher (Chemistry) Junior in the Kerala Higher Secondary Education Department. The Kerala Public Service Commission completed the selection process and published the rank list. The applicant therein was included in the supplementary list. She was shown as physically handicapped, but she was not considered for inclusion in the supplementary list for physically handicapped persons. She has produced a certificate showing 40% physical disability. Her disability was 'Erb's palsy right with residual paralysis'. So she is suffering from loco motor disability of orthopedic upper extremities. But as per the Kerala Government's G.O dated 13.10.2009, issued under Section 32 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, states that persons suffering from loco motor disability of lower extremities are eligible for the post of Higher Secondary School Teacher. After hearing the case, the Kerala Administrative Tribunal decided in favour of the applicant and held that loco motor disabled category cannot be sub divided as disability of upper and lower extremities and it is hostile discrimination. On a perusal of the above order, it can be seen that the Kerala Administrative Tribunal has considered the Government order issued in that case and held that the disability of upper extremity and lower extremity were not satisfactorily explained by the Government and it is a discrimination and hence the

Tribunal directed the respondents to reconsider the claim of the applicant for appointment.

10. In this case, the category of disabled person suitable for the post of Ayurveda Physician is clearly stated in Annexure-1 attached to Annexure A-9 notification. The classification having a direct nexus with the object to be achieved by an enactment cannot be considered as discriminatory. In this case the object of enactment is to give employment to various categories of disabled persons. As per Section 33 of 'The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 2016' the Government has prescribed various categories of disabled persons suitable for the job as Senior Resident for Casualty Department can have One Leg disability or One Arm disability; Senior Resident for Orthopaedics Department was considered as not suitable for PWD candidates and Senior Resident for OBG department was also considered as not suitable for disabled persons; the Senior Resident in Pathology can have One Leg disabled or one Arm affected etc.. Going through the above classification, it can be seen that these classifications were made on the basis of work to be performed in various posts. An Ayurveda Physician is a person who has to physically examine persons coming to the hospital and accordingly the maximum disability that can be considered is One Leg disability. **The classifications made in Annexure-1(of Annexure A-9) have a direct nexus with the object to be achieved by the Act and Rules framed by the Parliament and it cannot be considered as discriminatory.** The burden of showing that a classification is arbitrary and discriminatory is upon the person who impeaches the law. The allegation of discrimination must be specific and unambiguous and must give particulars. The applicant in this case has not produced any further evidence to show that the

classification made by the respondents is arbitrary in nature and discriminatory against the disabled persons as a whole. As per Section 33 of the new act 2016 (The Rights of Persons with Disabilities Act, 2016) which came into force in 2017, the identification of posts for reservation (u/s 34) has to be done by appropriate governments.

“ Section 33 Identification of posts for reservation

The appropriate Government shall -

- (i) identify posts in the establishments which can be held by respective category of persons with benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of section 34;
- (ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and
- (iii) undertake periodic review of the identified posts at an interval not exceeding three years. “

This shows that the appropriate government has to identify posts for persons with bench mark disability depending on the physical requirements of the job and select which category of disabled person is suitable for the job without adversely affecting the job requirements. For this purposes functional classification of each category of disabled person is usually shown as:-

- (1) OH - Orthopedically handicapped
- (2) MW - Muscular weakness
- (3) B.L - Both leg disabled
- (4) OL - one leg disabled
- (5) BLA - Both leg and Arms disabled
- (6) VH - Visually handicapped
- (7) LV - Low vision
- (8) B – Blind
- (9) HH – Hearing handicapped
- (10) PD - Partially deaf

(11) FD – Fully deaf

11. Here, we find that the above classification is a functional classification and there is no classification within a class of disabled person. This is done for purpose of taking suitable disabled person for a particular job. As per Annexure 9, the post of Ayurvedic Physician has to come under functional classification – OL, i.e, OL(One Leg disabled) person can perform the duties without compromising the minimum requirements of the post. We have to note that all locomotive disabled persons are not entitled to get reservation. Only those persons with Bench mark disability (40% and above) alone are eligible for reservation. Physical disabilities are defined in schedule attached to the act 2016 –

“Locomotor disability means “a person's inability to execute distinctive activities associated with movement of self and objects resulting from affliction of musculoskeletal or nervous system or both), including -

(a) “leprosy cured person” means a person who has been cured of leprosy but is suffering from -

(i) loss of sensation in hands or feet as well as loss of sensation and paresis in the eye and eye-lid but with no manifest deformity;

(ii) manifest deformity and paresis but having sufficient mobility in their hands and feet to enable them to engage in normal economic activity;

(iii) extreme physical deformity as well as advanced age which prevents him/her from undertaking any gainful occupation, and the expression “leprosy cured” shall be construed accordingly;

(b) “cerebral palsy” means a Group of non-progressive neurological condition affecting body movements and muscle co-ordination, caused by damage to one or more specific areas of the brain, usually occurring before, during or shortly after birth;

(c) “dwarfism” means a medical or genetic condition resulting in an adult height of 4 feet 10 inches (147 centimeters) or less;

(d) “muscular dystrophy” means a group of hereditary genetic muscle disease that weakens the muscles that move the human body and persons with multiple dystrophy have incorrect and missing information in their genes, which prevents them from making the proteins they need for healthy muscles. It is characterised by progressive skeletal muscle weakness, defects in muscle proteins, and the death of muscle cells and tissue;

(e) "acid attack victims" means a person disfigured due to violent assaults by throwing of acid or similar corrosive substance.

12. We find that locomotive disability has various shades and take in leprosy cured person, loss of sensation in hands or feet physical deformity, cerebral palsy, dwarfism, muscular dystrophy and acid attack victims who were disfigured. So functional classification of the disability is essential to find whether a particular disabled person will meet the physical requirement in a job. So we find that the argument that locomotor disabled persons are classified again into separate categories is not correct. The applicant is a both leg disabled person and he will not come under the functional classification fixed for that post.

13. **We do not find any discrimination which goes against the object of the Act. The facts and circumstances in the decision of the Kerala Administrative Tribunal in O.A No.16/2011 is not similar to this case and the same ratio cannot be applied to the classification given in Annexure -1 to Annexure A-9 notification. The above case is relating to the post of Higher Secondary School Teacher and it is not similar to this case.**

14. **In view of the above circumstances, we hold that the classification made by the respondents have a direct nexus with the object to be achieved by the Act the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 2016 and it is not discriminatory as claimed by the applicant.**

15. In view of the above discussion, we find that there is no merit in the case

advanced by the applicant. He is not eligible to be appointed as Ayurveda Physician as per Annexure A-9 notification and the applicant has also failed to show that the classification in Annexure-1 to Annexure A-9 is discriminatory against the loco-motor disabled person. Hence the Original Application is liable to be dismissed.

Ordered Accordingly. No costs.

(K.V.Eapen)
Administrative Member

(P.Madhavan)
Judicial Member

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List of Annexures

Annexure A1 - A true photo copy of the Standing Disability Assessment Board Certificate dated 15.4.2017 in respect of the applicant issued by the Medical Board of the Taluk Head Quarters Hospital Chirayinkezhu, Thiruvananthapuram.

Annexure A2 - A true photo copy of the degree of Bachelor of Ayurvedic Medicine and Surgery (BAMS) dated 23.4.2011 in respect of the applicant

Annexure A3 - A true photo copy of the certificate of registration of BAMS dated 13.3.2017 with registration No.11495

Annexure A4 - A true photo copy of the Degree of MD -Ayurveda (Panjakarma) dated 25.3.2015

Annexure A5 - A true photo copy of the certificate of Registration of Additional Medical qualification (MD-Ayurveda) dated 03.02.2015

Annexure A6 - A true photo copy of the certificate of experience dated 30.6.2014 issued by Indu Ayurveda Dispensary

Annexure A6(a) A true photo copy of the Certificate of experience dated 23.12.2016 issued by Navajeevan Ayurveda and Sidha Clinic

Annexure A6(c) A true photo copy of the Certificate of experience dated 17.04.2018 issued by DMO, Indian System of Medicine Thiruvananthapuram

Annexure A6(d) A true photo copy of the Certificate of experience dated 17.11.2019 issued by Ramachandra's Panakkal Ayurveda

Annexure A6(e) A true photo copy of the Certificate of experience dated 11.02.2020 issued by the 2nd respondent

Annexure A7 - A true photocopy of the notification dated 30.12.2013 issued by the joint Director (Recruitment) of the first respondent

Annexure A7(a) A true photocopy of the notice dated 18.9.2017 issued by the Deputy Director (Recruitment) of the first respondent

Annexure A8 - A true photo copy of the results dated 22.01.2019 of the interview

Annexure A8(a) A true photo copy of the appointment order dated 29.1.2019 issued by the 2nd respondent

Annexure A9- A true photo copy of the notification No.543A/12/16/1/2019-Rectt dated 29.01.2020 issued by the 2nd respondent

Annexure A 10 A true photo copy of the application for the post (on contract basis) of Ayurveda Physician

Annexure A11 A true photo copy of the results No.543A/12/16/1/2019-Rectt of the walk-in-interview dated 12.02.2020

Annexure A12 A true photocopy of the certificate issued by the Tahsildar Thiruvananthapuram showing that the applicant is an OBC belonging to Nadar community.

Annexure A13 A true photo copy of the order dated 22.5.2012 in O.A.16/2011 issued by the Hon'ble Kerala Administrative Tribunal

Annexure A14 A true photo copy of the judgment dated 20.3.2012 in O.P(KAT) No.2045/2012 of the division bench of the Hon'ble High Court of Kerala

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