

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 19.11.2024
Pronounced on: 17.12.2024

**WP(C) No.2530/2024
CM No.6854/2024**

SAJAD AHMAD MIR & ORS.PETITIONER(S)

Through: - Mr. Arif Sikandar Mir, Advocate.

Vs.

UT OF J&K & ORS.RESPONDENT(S)

Through:- Mr. Ilyas Nazir Laway, GA, with
Mr. Younis Hafiz, Assisting Counsel-for R1 to R3
Mr. T. M. Shamsi, DSGI, with
Ms. Rehana Qayoom, Adv-for R4.
Ms. Shagufta Maqbool, Adv-for R5.
None for R6 to R7.

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

Per Sanjeev Kumar 'J'

1) The petitioners claim to have participated in NEET-UG Examination 2024, the result whereof was declared on 26th July, 2024. On the declaration of the result of NEET UG 2024 examination by the National Testing Agency and receipt of merit list of the candidates belonging to the Union Territory of Jammu and Kashmir, the J&K Board of Professional Entrance Examinations [“the BOPEE”] vide Notification No.78-BOPEE of 2024 dated 18.08.2024, notified the schedule for online registration by the eligible candidates to register themselves and upload their

documents on the official website of the BOPEE for verification/updation of their category status. The petitioners claim that their Union Territory rank is 3739, 4140, 4397, 4323 and 4343 respectively.

2) The grievance of the petitioners is that on checking the online status of their application forms, it was found that their claim to be considered under the category of physically challenged persons stood rejected on the ground that their disability as indicated in the certificates uploaded was temporary and not permanent. It is further pleaded by the petitioners that with a view to have the redressal of their grievance, the petitioners approached the Chief Secretary of the Government of Union Territory and requested him to intervene in the matter. They also approached the State Commission for Persons with Disabilities, Union Territory of J&K but could evoke no response.

3) The grievance of the petitioners is that the Chief Secretary as well as the State Commission for Persons with Disabilities, J&K, instead of addressing their grievance, have left it to the BOPEE to determine the eligibility of the petitioners to seek consideration under the category of physically challenged persons. The BOPEE has already made its stance clear that the certificates

indicating temporary disablement will not be considered and the candidates possessing temporary disablement are not entitled to be considered under the category of physically challenged persons.

4) Having failed to seek any relief from the BOPEE, the petitioners are before us raising a singular issue as to whether or not a candidate with a temporary disablement is eligible to seek the benefit of reservation provided for the category of 'physically challenged persons'.

5) Mr. Arif Sikandar argues that the Rights of Persons with Disabilities Act, 2016 ["RoPWD Act"] does not make any distinction between temporary or permanent disablement nor such distinction is made in the J&K Reservation Act, 2004 and the rules framed thereunder. He argues that in the absence of any such distinction made in the statute, it is not open to the BOPEE to reject the disability certificates of the petitioners and declare them ineligible on the ground that the disability they suffer is temporary in nature.

6) Strong reliance is placed by Mr. Arif Sikandar on the judgment of Delhi High Court in the case of **Anmol Kumar Mishra (minor) vs. Union of India and others**, 2021 SCC OnLine Del 5148, wherein a learned Single

Judge of Delhi High Court has held that temporary disability is not a disqualification to avail the benefit of reservation envisaged under the RoPWD Act.

7) *Per contra*, Mr. T. M. Shamshi, DSGI, and Mr. Ilyas Nazir Laway, GA, would contend that the benefit of reservation in professional institutions provided under the J&K Reservation rules, 2005, is meant only for the persons with benchmark disability and not for the persons with temporary disability. Relying upon the Jammu and Kashmir Rights of Persons with Disabilities Rules, 2021 [“the Rules of 2021”] issued vide S.O 91 dated 15th March, 2021, Mr. Laway would argue that there is no scope to consider a person with a temporary disability for the benefit of reservation earmarked for the category of physically challenged persons. He places reliance upon a judgment of the Division of Delhi High Court in the case of

Bhavya Nain vs. High court of Delhi(WP(C) No.5948/2019 decided on 08.05.2020), wherein the Division Bench has affirmed that the benchmark disability must be permanent to take the benefit of reservation and that the temporary disablement is a disqualification for availing the benefit of reservation.

8) Having heard learned counsel for the parties and perused the material on record, it is seen that with a view

to giving effect to the United Nations Convention on the rights of persons with disabilities and for matters connected therewith, a comprehensive legislation known by the name of RoPWD Act was enacted in the year 1995, which was later on repealed and replaced by RoPWD Act, 2016. The legislation has been enacted to ensure full participation and equal opportunity to the people with disabilities. The relevant provisions of RoPWD Act, 2016, which are essential for adjudication of the issue on hand need to be noticed.

2(r) "person with benchmark disability" means a person with not less than forty percent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;

2(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;

9) From reading of the definitions reproduced above, it is quite evident that a person with not less than 40% of the specified disability, where specified disability has not been defined in measurable terms, would be a person with benchmark disability and the term "*person with benchmark disability*" would also include a person with disability where specified disability has been defined in measurable terms as certified by the certifying authority.

10) With a view to understand the definition of ‘*person with benchmark disability*’ we need to advert to the definition of ‘*person with disability*’ as defined in Section 2(s), which means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others. The definition of ‘*specified disability*’ given in Section 2(zc) reads as under:

“(zc) “*specified disability*” means the disabilities as specified in the Schedule.”

11) The Schedule appended with the Act of 2016 divides the specified disability into;

- (1) physical disability;
- (2) intellectual disability;
- (3) mental behavior;
- (4) disability caused due to chronic neurological and blood disorders; and
- (5) multiple disabilities including deaf blindness etc. etc.

12) Section 32 of the Act makes a provision for reservation of the persons with benchmark disabilities in higher education. For facility of reference, Section 32 is also set out below:

“32. Reservation in higher educational institutions.—(1) All Government institutions of higher education and other higher education institutions

receiving aid from the Government shall reserve not less than five per cent seats for persons with benchmark disabilities.

(2) The persons with benchmark disabilities shall be given an upper age relaxation of five years for admission in institutions of higher education.”

13) The source of reservation in the higher educational institutions, which would obviously include the higher professional and technical institutions, is Section 32 of the Act. So far as the admissions to MBBS courses are concerned, the Medical Council of India Regulations make the provision for reservation in admissions by incorporating the provisions of RoPWD Act, 2016. It is, thus, beyond any pale of discussion that the benefit of reservation for admission to MBBS courses is also regulated by RoPWD Act, 2016 read with the J&K Reservation Rules, 2005. At this stage we would like to advert to the J&K Reservation Rules, 2005, which, in terms of Rule 13, makes provision for horizontal reservation in favour of physically challenged persons in professional institutions. The term used in the Reservation Rules, 2005, is ‘physically challenged person’ which is a new name given to the category of ‘persons with disabilities’ as defined under RoPWD Act, 2016.

14) From the discussion so far, we have reached at a conclusion that the benefit of reservation for admissions

in professional institutions is available only to the persons with benchmark disability and the persons with benchmark disability could be as under:

- (i) a person with not less than 40% of the disability specified in the schedule; where the specified disability has not been defined in measurable terms;
- (ii) a person with a long-term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society on par with others; provided where the specified disability has been defined in measurable terms as certified by the certifying authority.

15) It is, thus, evident that the Act of 2016, *prima facie*, does not make any distinction between a temporary or permanent disability. However, when we compare Section 2(r) with Section 2(s), we find that reference to 'person with benchmark disability' to mean a person with not less than 40% of specified disability, is to the disability which is of permanent character and has not otherwise been defined in measurable terms. The person with long term

physical, mental, intellectual or sensory impairment too can fall in the definition of 'person with benchmark disability' provided such specified disability has been defined in measurable terms as certified by the certifying authority.

16) The Rules of 2021 issued vide S.O 91 of 2021, *inter alia*, prescribe the procedure for obtaining certificate of disability. Rule 26 is relevant for our purpose and is, therefore, reproduced hereunder:

26. Issue of certificate of disability.—(1) On receipt of an application under rule 24, the medical authority or any other notified competent authority shall, verify the information as provided by the applicant and shall assess the disability in terms of the relevant guidelines issued by the Central Government and after satisfying itself that the applicant is a person with disability, issue a certificate of disability in favour of the applicant in Form-II, III & IV as the case may be.

(2) The medical authority shall issue the certificate of disability within a month from the date of receipt of the application.

(3) The medical authority shall, after due examination,—

(i) issue a permanent certificate of disability in cases where there are no chances of variation of disability overtime in the degree of disability ; or

(ii) issue a certificate of disability indicating the period of validity, in cases where there is any chance of variation overtime in the degree of disabilities.

(4) If an applicant is found ineligible for issue of certificate of disability, the medical authority shall convey the reasons to the applicant in writing under Form-V within a period of one month from the date of receipt of the application.

17) Reading of Rule 26 would show that the Medical Authority shall, after due examination of the application filed by the candidate, issue a certificate of permanent disability in cases where there are no chances of variation

of disability overtime in the degree of disability or shall issue a certificate of disability indicating the period of validity in cases where there is any chance of variation overtime in the degree of disability. This only indicates that there could be disabilities having no chances of their variation overtime in the degree of disability and there are some disabilities which have chances of variation overtime in the degree of disability. In the latter certificates, the Medical Authority would indicate the period of validity.

18) Viewed in the aforesaid background, it is difficult for us to say that to avail the benefit of reservation for admission in professional institutions under the category of physically challenged persons, a candidate must have benchmark disability which is only of permanent in nature. A long-term disability, which may not have chances of variation in near future, could also be considered to be a disability suffered by a person seeking benefit of reservation.

19) We are in agreement with learned counsel for the petitioners that the Act does not make any distinction between a permanent or temporary disablement. However, we, on the analysis of different provisions reproduced hereinabove, have found that the purpose and object of providing reservation to the physically challenged persons

for admission in professional institutions is to provide such persons equal chances of participation in society with others. A disability temporary duration which has the chances of variation in degree in immediate future may not come within the definition of a person with benchmark disability. As we have noticed above, if we read Section 2(r) and 2(s) along with other provisions of the Act of 2016, the intent and object of providing reservation centers round permanent disability. This benefit is given to an individual who has to carry the weight of disablement through his entire life and the one who would be deprived of equal chances of participation in society. The purpose and object of providing reservation, concessions and other facilities to the persons with disabilities would not be achieved if the benefit is given to the persons afflicted with temporary disablements which are likely to dissipate or reduce in degree with passage of time or with appropriate treatment. A person with temporary disablement also does not carry a stigma as is carried by a person suffering with permanent disability. If the benefit of reservation is held available even to the persons with temporary affliction of disability, not only the purpose and object of legislation would be defeated but also the benefit would be availed by the persons with such temporary afflictions at the cost of

those who have suffered and are suffering permanent disablement with stigma in their life. It is because of this reason, the concept of benchmark disability is coined for the purpose of granting the benefit of reservation only to the persons with permanent and long term disabilities. We are alive to a situation where the disability with forty percent or more is certified to be one which has the chances of variation in future. In such situation it would be appropriate to treat even such disablement as permanent disablement provided the Medical Authority certifies that the disablement suffered by the candidate is a long-term disablement. However, in the absence of any guidelines on the issue, it would be difficult for us to say as to how long would be a 'long-term disablement'. We can only say that if the disability suffered by a person which meets the benchmark requirement of 40% is likely to subsist for more than ten years, it must be taken as long-term disablement and cannot be termed as temporary disablement so as to exclude such persons from the benefit of reservation.

20) Having said that, we would now like to examine the certificates of disability placed on record by the petitioners. As per the disability certificate of petitioner No.1, he suffers from visual impairment. As per the said

certificate, he suffers from 40% temporary disablement in relation to his both eyes. The certificate has been recommended for two years to remain valid till 5th November, 2025. The disablement suffered by petitioner No.1, therefore, cannot be said to be long-term so as to bring the petitioner No.1 within the definition of 'persons with benchmark disability'. Petitioner No.2, as per the certificate placed on record by her, suffers low vision (both eyes) having been diagnosed as a case of Amblyopia. As per the said certificate, petitioner No.2 suffers from 40% temporary disablement in relation to her both eyes. The certificate has been recommended for two years to remain valid till 28th July, 2026. The disablement suffered by petitioner No.2, therefore, cannot be said to be long-term so as to bring the petitioner No.2 within the definition of 'persons with benchmark disability'. Petitioner No.3, according to the certificate placed on record, suffers from mental illness and suffers from 50% temporary disability in relation to his brain. The certificate has been recommended for five years to remain valid till 25th August, 2028. The disablement suffered by petitioner No.3, therefore, cannot be said to be long-term so as to bring him within the definition of 'persons with benchmark disability'. As per the certificate placed on

record by petitioner No.4, she suffers from Locomotor disability. As per the certificate, she is suffering from 60% temporary disability in relation to her lower limb. The said certificate has been recommended for 9 years and 11 months to remain valid till 18.10.2030. The disablement suffered by petitioner No.4, therefore, cannot be said to be long-term so as to bring the petitioner No.4 within the definition of 'persons with benchmark disability'. The certificate placed on record by petitioner No.5 reveals that she suffers from Locomotor disability. As per the said certificate, respondent No.5 suffers from 52% temporary disability in relation to her left lower limb. The said has been recommended for three years to remain valid till 09.01.2026. The disablement suffered by petitioner No.5, therefore, cannot be said to be long-term so as to bring the petitioner No.5 within the definition of 'persons with benchmark disability'.

21) In view of the above discussion, none of the petitioners can be said to be the persons with benchmark disability, in that, they neither suffer from permanent disablement nor their disability certified by the Medical Authority is a long-term disability so as to qualify the petitioners to be the persons with benchmark disability.

22) For the foregoing reasons, we find no merit in this petition and the same is, accordingly, dismissed.

(RAJESH SEKHRI)
JUDGE

(SANJEEV KUMAR)
JUDGE

Srinagar,
17.12.2024
"Bhat Altaf-Secy"

Whether the order is reportable: Yes

