

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

OA 1105/2012
MA 950/2012

Reserved on: 16.03.2017
Pronounced on: 22.03.2017

**Hon'ble Mr. V. Ajay Kumar, Member (J)
Hon'ble Mr. P.K. Basu, Member (A)**

Smt. Bhupinder Kaur
Senior Social Security Assistant (Sr. S.S.A.)
Office of Regional Provident Fund Commissioner
Delhi (North)
28, Community Centre,
Wazirpur Industrial Area,
Delhi-110052 Applicant

(Through Shri O.P. Gehlaut, Advocate)

Versus

Central Provident Fund Commissioner
O/o EPFO, Ministry of Labour,
Through its Regional Provident Fund Commissioner
Delhi (North)
28, Community Centre,
Wazirpur Industrial Area,
Delhi-110052Respondent

(Through Shri Satpal Singh, Advocate)

ORDER

Mr. P.K. Basu, Member (A)

The applicant joined as Lower Division Clerk (LDC) on 5.01.1990. She was promoted as Upper Division Clerk (UDC) in 1993. On reconstitution of the service of Social Security Assistants (SSA) as per Recruitment Rules (RRs) of January

2004, all the UDCs in the department were appointed as SSA and the cadre of UDC was declared as a dying cadre and abolished except for those who opted out of this new Service or were found unfit for appointment thereto. The next promotional post for UDC (now SSA/ Senior SSA) is Section Supervisor (Head Clerk). According to RRs of 1992, for the post of Section Supervisor, 2/3rd of the posts are to be filled by promotion of UDCs (now SSA/ Senior SSA) with three years service on the basis of seniority subject to rejection of unfit candidates and 1/3rd by promotion on the basis of a departmental examination restricted to those who have rendered not less than three years service as UDC. The respondents held a Limited Departmental Examination (LDE) on 18th and 19th December 2007.

2. It is pointed out by the applicant that though it was contemplated in the RRs to hold departmental examinations regularly every year, the examination in 2007 was held after a long time. For this examination, the respondents did not give any break up of existing or future vacancies that they proposed to fill up on the basis of this single examination. The applicant took part in the examination and obtained 35 out of 100 marks in both Paper I and Paper II (Annexure A/2). The respondents had set a qualifying mark for this examination which was 40 out of 100 in case of 'general' candidates and 35 out of 100 for SC/ST candidates, minimum in each paper and 80 out of 200 for 'general' candidates and 70 out of 200 for SC/ST candidates as aggregate marks.

3. The applicant's candidature was rejected on the ground that she failed to obtain 40 minimum qualifying marks out of 100 in each paper and 80 marks out of 200 in aggregate. Aggrieved by this, the applicant has filed the instant OA seeking the following reliefs:

"(a) Declare respondent's action of non-promoting of the applicant as illegal and invalid.

(b) Direct the respondent's to promote/appoint the applicant against the vacancy reserved for physically handicapped person by relaxing the standard on a par with SC/ST candidates on the basis of examination held in 2007.

(c) Declare clubbing of past vacancies and promotion/appointment to vacancies occurring subsequent to examination year as illegal.

(d) Direct respondent's to hold departmental examination regularly as and when vacancies meant of this quota occur.

(e) Issue any other order/direction/instruction as may appear to be just and proper in the interest of justice in this case".

4. The applicant has filed a medical certificate for physically handicapped issued by Lok Nayak Jai Prakash Narain Hospital in which she has been categorized as 40% disabled.

5. The applicant had sought some information under RTI to which she received a reply dated 18.01.2012, which reads as follows:

“1. Copy of the recruitment rule for the post of Section Supervisor is enclosed (04 pages).

2. 32 regular promotions had been made in the cadre of Section Supervisor under Examination Quota on the basis of December, 2007 exam. However, as on date there are 12 Sr. SSAs has been promoted to the post of Section Supervisor under Exam Quota on ad hoc basis.

3. Rule position for the reservation in the cadre of Section Supervisor is enclosed. It is also informed that 03 posts in Seniority Quota and 01 post in Exam Quota had been fille dup against PH-category.

4. Same as Para 03.

5. Both the application submitted by your contains same questions. Therefore, another application addressed to CPFC is being returned to you”.

6. The respondents have taken the stand that reservation is available to physically handicapped candidates in addition to SC/ST candidates in direct recruitment quota and not promotion. It is further submitted that applicant has not provided any copy of any government rule/ instructions treating physically handicapped at par with SC/ST candidates in support of claiming relaxed standard for physically handicapped candidates in qualifying marks. Primarily, these are the two objections raised by the respondents in rejecting the applicant’s case.

7. The respondents further argued that the post of Section Supervisor (SS) was earlier a Group ‘C’ post and after implementation of the 6th CPC with effect from 01.09.2008, it is a Group ‘B’ post. It is argued that though the departmental examination was conducted in December, 2007, the results were declared in 2009 only. Since the results were declared post

01.09.2008, the promotions from the post of SSA to SS would be from Group 'C' to Group 'B' in which no reservation for physically handicapped candidates has been provided in OMs of Department of Personnel and Training (DoP&T). It was also argued that the qualifying marks (35 for SC/ST candidates etc.) was only for the purpose of qualifying and if a candidate obtained qualifying marks he does not get a right for appointment automatically.

8. In para 4.11 of OA the applicant has also stated that the respondents did not clarify whether the one post in physically handicapped category filled against examination quota was on the basis of relaxed standards or the candidate promoted against it was promoted on the basis of his own merit.

9. The respondents in their reply have stated that only one candidate namely Shri Purshottam, Sr. SSA was declared successful in the LDE under SC-PH quota vide part-I office order No.95 of 2008 dated 12.05.2008 and promoted to the post of Section Supervisor under exam quota in reserved category, i.e. SC category with effect from 03.11.2008. Shri Purshottam Kumar was promoted against the post reserved for SC candidates and incidentally the candidate was also a person with physical disability.

10. The applicant in his rejoinder has stated that Shri Purshottam was promoted on the basis of this examination against SC-PH quota, is false, in that he was promoted on this

own merit having stood first amongst SC's against 2 SC vacancies. This thus cannot be counted against PH quota.

11. The learned counsel for the applicant has filed copy of DoP&T OM dated 20.11.1989 on the subject of reservation for the physically handicapped in Groups 'C' and 'D' posts filled by promotion. The OM, *inter alia*, reads as follows:

"The matter has been examined and it has now been decided that when promotions are being made:

(i) Within Group 'D', (ii) From Group 'D' to Group 'C' and (iii) Within Group 'C' reservation will be provided for the three categories of the physically handicapped persons namely, the visually handicapped, the hearing handicapped and the orthopaedically handicapped. '

The applicability of the reservation, will, however, be limited to the promotions being made to those posts that are identified as being capable of being filled/held by the appropriate category of physically handicapped.

2. Each of the three categories of the physically handicapped persons will be allowed reservation at one percent each. Though the reservations will be effective only in those posts that are identified as being capable of being held by the appropriate category of the physically handicapped persons, the number of vacancies that will be reserved for the physically handicapped persons when promotions are being made to such identified posts will be computed by taking into account the total number of vacancies that arise for being filled by promotion in a recruitment year both in the non-identified as well as identified posts. If the appropriate category of the physically handicapped persons are not available in the feeder grade from which promotion is being made to the next higher grade of the identified post then an inter-se-exchange will be permitted subject to the condition that:

(i) The post of which promotion is to be made is one that can be held by the category of the

physically handicapped persons available in the feeder grade; and

(ii) The reservation so exchanged is carried forward in the next three recruitment years after which the reservation shall lapse. 3. Ministry of Finance etc. are requested to give immediate effect to those orders".

He has also drawn our attention to DoP&T OM dated 16.01.1998 by which detailed procedure to be followed for reservation to the physically handicapped in case of promotion, in the light of OM dated 20.11.1989, has been provided. It is clearly mentioned in these instructions as follows:

"For providing reservation to the physically handicapped in promotion, which would be 3% of such posts, a separate register of 100-points will be maintained for a post identified to be manned by the physically handicapped, in which point Nos. 1, 34 and 67 in a cycle of 100 vacancies will be reserved for the physically handicapped."

The OM gives further detailed provisions as to how reservation for physically handicapped has to be implemented.

12. The contention of the learned counsel for the applicant is that this clearly establishes that even on promotion, Government instructions are to grant reservation in promotion to physically handicapped. The learned counsel for the applicant also placed before us OM dated 29.12.2005 again on the subject of reservation for the persons with disabilities and particularly to sub-para 7 which reads as follows:-

"7. ADJUSTMENT OF CANDIDATES SELECTED ON THEIR OWN MERIT: Persons with disabilities selected on their own merit without relaxed standards alongwith other candidates,

will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible candidates with disabilities which will thus comprise physically handicapped candidates who are lower in merit than the last candidate in merit list but otherwise found suitable for appointment, **if necessary, by relaxed standards.** It will apply in case of direct recruitment as well as promotion, wherever reservation for persons with disabilities is admissible".

13. Applicant further relied on the judgment of the Hon'ble Supreme Court in **Nagendra Chandra etc. etc. Vs. State of Jharkhand and Others**, 2008 (2) AISLJ (SC) 426, particularly to para 8 and 9, which read as follows:-

"8. In the case of National Fertilizers Ltd. & Ors. vs. Somvir Singh, (2006) 5 SCC 493, this Court was dealing with the case of recruitment under Rule 1.5 of Recruitment and Promotion Rules which required "direct recruitment by advertisement". The appointments were made without advertisement by a public sector undertaking which is State within the meaning of Article 12 of the Constitution. Those appointed filed a writ petition before the High Court for regularization of their services which was allowed and their services were regularized. Challenging the said order, when the matter was brought to this Court, the orders of regularization were quashed on the ground that the initial appointments were nullities in view of the fact that the same were in infraction of the Rules and violative of Articles 14 and 16 of the Constitution. The Court observed in paragraph 13 at page 497 thus:-

"..Admittedly, no advertisement was issued in a newspaper nor was the employment exchange notified as regards existence of vacancies. It is now trite law that "State" within the meaning of Article 12 of the Constitution is bound to comply with the constitutional requirements as adumbrated in Articles 14 and 16 thereof. When the Recruitment Rules are made, the employer would be bound to comply with the same. Any appointment in violation of such Rules would render them as nullities."

9. In view of the foregoing discussion, we have no option but to hold that if an appointment is made in infraction of the recruitment rules, the same would be violative of Articles 14 and 16 of the Constitution and being nullity would be liable to be cancelled. In the present case, as the vacancies were not advertised in the newspapers, the appointments made were not only in infraction of Rule 663(d) of the Bihar Police Manual but also violative of Articles 14 and 16 of the Constitution, which rendered the appointments of the appellants as illegal; as such the competent authority was quite justified in terminating their services and the High Court, by the impugned order, was quite justified in upholding the same”.

It is argued that since the promotions made by the respondents were violative of rules regarding reservation for physically disabled persons, it was a nullity in view of the fact that the same were violative of Articles 14 and 16 of the Constitution.

14. On the question of non-applicability of reservation for physically disabled persons in Group 'A' and Group 'B', the learned counsel for the applicant relied on the judgment in

Rajeev Kumar Gupta and Others Vs. Union of India and Others, 2016 (3) AISLJ (SC) 21, where the Hon'ble Supreme Court held as follows:-

“Persons with disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - Section 32 and 33 – SC/ST Reservation in posts filled by Group A and B) Government issued OM by which reservation was in Group C and D posts – Hence claim for other classes also – Supreme Court had decided for reservation only in higher post and not at initial stages – In posts identified for PWDs they are to be filled by promotion-The OM only mentions recruitment thus disentitles PWDs for many posts in A and B classes- Case law cited and discussed-77th amendment of Constitution excludes SC/ST from its cope, discussed all aspects and held the OMs are not legal and PWDs in all cases in the identified post must be given three percent reservation.”

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"24. A combined reading of Sections 32 and 33 of the 1995 Act explicates a fine and designed balance between requirements of administration and the imperative to provide greater opportunities to PWD. Therefore, as detailed in the first part of our analysis, the identification exercise under Section 32 is crucial. Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once found to be so capable, reservation under Section 33 to an extent of not less than three per cent must follow. Once the post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up of the said post.

25. In light of the preceding analysis, we declare the impugned memoranda as illegal and inconsistent with the 1995 Act. We further direct the Government to extend three percent reservation to PWD in all IDENTIFIED POSTS in Group A and Group B, irrespective of the mode of filling up of such posts. This writ petition is accordingly allowed".

It is, therefore, contended that in view of the judgment of the Hon'ble Supreme Court, reservation for physically handicapped will apply even for Group 'B' posts.

15. On the objection raised by the respondents that relaxation at par with SC/ST would not be available for persons with disabilities, the learned counsel for the applicant relied on the judgment of the Hon'ble Supreme Court in **A.I. Confederation of the Blind & Another Vs. U.O.I. & Another** – Writ Petition (Civil) No.115/1998 decided on 19.03.2002. We quote below this judgment:

"The prayer made in I.A. No. 4 is in relation to the reservation of the identified teaching posts in the

Faculties and Colleges of various Universities in terms of Sec. 33 of the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 for the visually handicapped persons.

2. The counter affidavit filed on behalf of the Chief Commissioner for Persons with Disabilities as set out in the following terms :

"... 3. It is humbly submitted that in pursuance of Sec. 32 of the Persons with Disabilities Act (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the appropriate Government (Government of India) has updated the list of identified posts. This list has been issued vide Extraordinary Gazette Notification No. 178 dated 30.6.2001. In this list, the posts of University/College/School Teacher for the blind and low-vision have been listed at Sl. Nos. 24-27 on page No. 592.

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6. The Chief Commissioner for Person with Disabilities has taken cognizance of the arrangements provided by the University Grants Commission for persons with disabilities by way of extending 5% relaxation in cut-off marks, appearing in the NET for Junior Research Fellowship and Lecturership. Thus, the arrangement extended by UGC is in consonance with the policy stand taken by Government of India insofar as relaxation in minimum standard is concerned. Relaxation in standards has been favoured only when the candidates belonging to reserved categories are not available on the basis of the general standard to fill all the vacancies reserved for them.

7. The relaxation extended to SC and ST candidates as per Maintenance of Standard 1998 of the Universities, provides for a 5% relaxation from 55% to 50% in the marks obtained at Master's Degree. Since reservation for the disabled is called horizontal reservation which cuts across all vertical categories such as SC, ST, OBC & General. Therefore, all such blind/low- vision persons who belonged to SC, ST vertical category would automatically enjoy the benefit of 5% relaxation at the minimum qualifying marks obtained at Master's Degree

level. Thus, only the blind and low-vision belonging to OBC and General categories are deprived of the relaxation of 5% marks at Masters' level.

8. The blind/low-vision and other visually disabled persons belonging to SC and ST category are in any case enjoying the benefit of 5% relaxation in marks obtained at the master's level for appearing in the NET examination conducted by the UGC. By extending the same relaxation to particularly blind/low-vision and in general all disabled at par with SC and ST disabled would bring parity amongst all persons with disabilities irrespective of their vertical categories."

3. In view of the stand taken by the Government, nothing survives for consideration insofar as U.G.C. is concerned. The matter shall stand disposed of so far as University Grants Commission is concerned. I.A. 4 is disposed of accordingly.

4. W.P. No. 115/1998, so far as other aspects of the matter is concerned, and W.P. No. 116/1998, C.A. No. 6442/1998, C.A. No. 6443/1998 and W.P. No. 241/2001 are adjourned by two weeks".

On this issue, in addition to the above judgment, the learned counsel also relied on order dated 26.02.2009 in case No.174/1011/08-09 of the Court of the Chief Commissioner For Persons With Disabilities, which was on the representation of the applicant. We quote below the contents of this letter for easy reference:-

"The complainant is seeking relaxation in marks at par with SC/ST in the departmental exams, re-declaration of her results and benefit of reservation. The concerned authorities be informed that Hon'ble Supreme Court vide order dated 19.03.2002 in Writ Petition (Civil) No.115/1998 has endorsed the stand of the Chief Commissioner that relaxation of marks at par with SCs & STs would bring parity amongst all persons with disabilities irrespective of their vertical categories. Thereafter relaxations are being extended to persons with disabilities in admissions to various courses, recruitments for employment and promotions.

Accordingly, the complaint is eligible for benefit of relaxation in marks at par with SC/ST in the departmental examination. In case she avails such a benefit then she would only be eligible for promotion against the vacancies reserved for persons with disabilities only (and not against unreserved vacancies).

The respondent therefore be directed to re-examine the case of the complainant in light of the aforesaid clarification and submit their version. They also be asked to comment on her allegation that vacancies reserved for persons with disabilities are not being filled and to submit copies of reservation rosters for promotion for persons with disabilities for Group 'C' and 'D'."

16. The learned counsel for the applicant argued that not only did the Hon'ble Supreme Court dispose of W.P. No. 115/1998 (supra) based on the Chief Commissioner's affidavit that by extending the same relaxation to particularly blind/low-vision and in general all disabled at par with SC and ST disabled would bring parity amongst all persons with disabilities irrespective of their vertical categories, the court of Chief Commissioner also noting this fact that the Hon'ble Supreme Court has endorsed the stand of the Chief Commissioner, concluded that the applicant is eligible for the benefit of relaxation in marks at par with SC/ST in departmental examination. He, therefore, contended that the objection of the respondents that there is no provision for relaxation is negated by the above.

17. Reliance was further placed on the judgments of the Hon'ble Supreme Court in the following cases:

(i) **Rakhi Ray and Others Vs. High Court of Delhi and Others**, (2010) 2 SCC 637 – In this case, the Hon'ble Supreme Court held as follows:-

“....vacancies have to be filled up according to relevant statutory rules – Delhi High Court (on administrative side) could not therefore be directed to fill up from existing unexhausted select list the vacancies which arose subsequent to issue of advertisement – Delhi Higher Judicial Service Rules, 1970”.

(ii) **Government of Andhra Pradesh and Another Vs. G. Jaya Prasad Rao and Others**, (2008) 1 SCC (L&S) 74 – This case basically relates to validity of scheme in the police department on accelerated promotion for police personnel in recognition of their outstanding work in the field of anti-extremist operation. The learned counsel specifically referred to paragraphs 28 and 29 of the judgment which deal with non-joinder of parties and also that when the validity of the rules is challenged, it is not necessary to implead all persons who are likely to be affected as party. In our opinion, this judgment is not very relevant to the present case.

18. Learned counsel for the respondents has also raised the question of limitation. It is stated that the applicant is challenging promotion as a result of LDE held in 2007, whereas she has filed this OA only on 31.03.2012. The applicant has filed MA 950/2012 for condonation of delay. In this MA she states that she had represented to the department in February, 2008. Thereafter, she filed a representation before the Chief

Commissioner for Persons with Disabilities, who passed orders on 26.02.2009. Thereafter, the applicant filed an application under RTI on 11.01.2012 and from the reply dated 18.01.2012, she, for the first time, could know how many persons were promoted on the basis of above examination and how many of them were from physically handicapped category. Therefore, it is prayed that delay may be condoned on the ground that the applicant was suffering from severe crippling disease. Though there has been indeed delay, we allow this MA purely on humanitarian grounds keeping in view the applicant's condition.

19. We have heard the learned counsel for the parties, gone through the pleadings available on record and perused the judgments cited.

20. The applicant appeared for the examination and received the minimum qualifying marks meant for SC/ST candidates. The respondents gave following three reasons for not considering her case for promotion as SS:

(i) There is no provision of granting reservation to physically handicapped in promotion;

(ii) The applicant has failed to produce any rules/instructions in accordance with which physically handicapped candidates will be treated at par with SC/ST candidates on relaxed standards; and

(iii) SS post having been declared Group 'B' with effect from 01.09.2008 and examination results having been declared in 2009, the applicant is not eligible for getting benefit of reservation for physically handicapped as this reservation does not apply to Group 'A' and Group 'B' posts.

21. The learned counsel for the applicant has been successful in demonstrating before us the following:

(i) That indeed there are Government instructions to grant reservation to physically handicapped candidates in case of promotion also;

(ii) That respondents themselves have held that physically handicapped will get the benefit of being treated at par with SC/ST for relaxation. In this regard, they have drawn our attention to order dated 26.02.2009 of the Court of the Chief Commissioner For Persons With Disabilities (supra) as well as judgment of the Hon'ble Supreme Court in A.I. Confederation of the Blind (supra);

(iii) Reservation for disabled is to be granted even to Group 'A' and Group 'B' in accordance with the judgment of the Hon'ble Supreme Court in Rajeev Kumar Gupta (supra).

22. Regarding filling up one post under examination quota against physically handicapped category, it would be clear from the respondents reply and statement in the rejoinder that this post was meant for SC category in which Shri Purshottam had stood first and thus came on his own merit but since he was also a physically handicapped candidate, the respondents treated this as filling up a physically handicapped vacancy, which is clearly wrong. Thus, undoubtedly, one PH vacancy existed in exam quota.

23. It is well settled that seniority and promotions, which are once settled, cannot be unsettled after a delay of several years:

- (i) **Rabindra Nath Bose & ors. Vs. Union of India & ors.**, (1970) S.C.R. (2) 697
- (ii) **Malcom Lawrence Cecil D' Souza Vs. Union of India & ors.**, AIR 1975 SC 1269
- (iii) **M.B. Hiregoudar Vs. State of Karnataka and others**, AIR 1992 SC 410
- (iv) **Bimlesh Tanwar Vs. State of Haryana and others**, JT 2003 (2) SC 610

By relying on judgment in Rakhi Ray and Others (supra), the procedure adopted by the respondents of holding a one time LDE by clubbing the vacancies is in violation of rules. However, to undertake an exercise from 1996 onwards is impracticable as LDE cannot be held now for past vacancies.

24. In view of above discussion, we dispose of this OA with a direction to respondents to grant the benefit of relaxed standard at par with SC/ST to the physically handicapped candidates (including the applicant) for 2007 results and reconsider the promotion of physically handicapped candidates to the post of SS within a period of 90 days from the receipt of a certified copy of this order. The physically handicapped candidate who obtained the highest marks if need be by relaxed standards, should be offered the appointment. The candidate so appointed will be given notional benefit of seniority and pay fixation from the date of appointment of others in the 2007 LDE batch. It is made clear that in case there is no vacancy available in SS posts then a supernumerary post would be created by the respondents to appoint the physically handicapped candidate so selected. No costs.

(P.K. Basu)
Member (A)

(V. Ajay Kumar)
Member (J)

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