

CENTRAL ADMINISTRATIVE TRIBUNAL

ERNAKULAM BENCH

ORIGINAL APPLICATION NO. 180/00269/2015

Tuesday, this the 13th day of November, 2018

CORAM

**HON'BLE MR.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER
HON'BLE MR.ASHISH KALIA, JUDICIAL MEMBER**

M.G.Prabhakara Panicker
39/180A, Pisharikovil Road, Eroor North,
Tripunithura, presently working as Sub Divisional Engineer (OMCR)
BSNL Mobile, Telephone Exchange Building
Panampilly Nagar, Kochi – 682 036 ... **Applicant**

[By Advocate Mr.George Varghese Perumpallikuttyil with Ms.Parvathi Nair]

V.

(By Advocate Mr.M.Saleem for R 1-3)

This application having been finally heard on 2.11.2018, the Tribunal on 13.11.2018 delivered the following in the open court.

ORDER

Per: MR.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER

Original Application No.180/00269/2015 is filed by Mr.M.G.Prabhakara Panicker who is working as Sub Divisional Engineer (OMCR), BSNL, Kochi. He is aggrieved by order F No.HR-III/3-20/Court Case/MGP Panicker/2011/5 dated 28.3.2012 (Annexure A-16) by which his case for out of turn promotion in the light of his physical disability was declined. The benefit he seeks is in line with the Rights of Persons with Disabilities Act, 2016. The relief sought for in the Original Application are as follows:

- “ i. Issue appropriate direction or order calling for the records leading to the decision contained in Annexure A16 and set aside the same;
- ii. Declare that the applicant is entitled to be promoted to the post of Sub Divisional Engineer in the year 1996, in terms of the Act, on his having completed the qualifying service of 3 years to his credit for promotion to such category;
- iii. Declare that the applicant is entitled to further promotion to Group A post in the year 2002, in terms of the Act, on his completion of qualifying service of further 6 years in SDE Cadre;
- iv. Issue a direction or order directing the 2nd respondent to issue order promoting the applicant to the post of Sub Divisional Engineer with effect from the year 1996 with all consequential relief;
- v. Issue a direction or order directing the 2nd respondent to issue order promoting the applicant to Group A post with effect from 2002, treating the applicant as deemed to have been in the cadre of SDE, the qualifying service and issue orders granting consequential reliefs; ”

2. The applicant had joined service as a Telegraph Assistant in 1983 and was promoted as Junior Telecom Officer in 1991. The post of Junior Telecom Officer is a Group 'C' post and is the feeder category for promotion to the cadre

of Sub Divisional Engineer (SDE for short). The method of recruitment for SDE is entirely by promotion. As per Sub Divisional Engineer (Telecom) Recruitment Rules, 2002, the method of recruitment is further clarified as 75% of the post by promotion on the basis of seniority cum fitness and the remaining 25% by Limited Departmental Competitive Examination.

3. Applicant had been officiating as SDE from June 1989, but was promoted to the cadre of SDE in the general category on regular basis from the forenoon of 12.3.2002 (Annexure A-3). His case primarily is that he was entitled to be promoted as SDE as per the provisions contained in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. As per Section 33 of the said Act, 3 % of the vacancies are to be reserved for persons with 50% permanent loco-motor disability. A true copy of the certificate issued by the General Hospital, Ernakulam to the applicant in this regard is marked as Annexure A-4.

4. On being denied the promotion, applicant approached this Tribunal through Original Application No.1551/1997. The said O.A was disposed of by order dated 8.12.1997 directing the department to consider the representation made by the applicant in line with relevant Rules. It may be recalled that as per document, copy of which is at Annexure A-5 in the said application which is a copy of O.M No.36025/03/97-Estt (Res.) dated 4.7.1997, reservation of roaster for the physically handicapped persons in Group "A" & "B" posts/services were issued. Further orders of Department of Personnel and Training, Government of India are available at Annexure A-6. As both these documents were available to

this Tribunal, the respondents were expected to take a decision duly in consonance with the same.

5. After the issuance of the orders of this Tribunal, further clarification was issued by the Department of Personnel and Training dated 16.1.1998 as a corrigendum of Annexure A5 order, clarifying that the policy of promotion for physically handicapped persons for promotion is applicable to all grades and services where the element of direct recruitment does not exceed 75% , a copy of which is available at Annexure A-7. This clarification is projected by the applicant as helpful in his case as there is no direct recruitment at all to the cadre of SDE.

6. However, as per communication dated 24.3.1998 (Annexure A-8), 2nd respondent declined the applicant's claim on the ground that Government has yet to issue any specific order providing reservation to Group 'B' post through promotion. The applicant thereupon challenged Annexure A-8 by filing O.A No.800/1998 before this Tribunal. The applicant also made use of Annexure A-7 O.M which according to him clinches the whole issue. The Annexures at Annexure A-5, A-6 & A-7 Office Memorandums, according to the applicant, have direct relevance in allowing his claim as he had more than the qualifying service of 3 years to his credit for promotion. He ought to have been promoted as SDE once the Act came into force and further upon completion of qualifying service of six years from that point, he would have been entitled to be promoted to Group 'A' i.e; in 2002. He made a representation before the first respondent on 11.1.2001, copy of which is available at Annexure A-9. As this was not

responded to, he approached the Hon'ble High Court of Kerala by filing Writ Petition C No. 28538/2004 seeking a direction to the 1st respondent to consider and dispose of Annexure A9 representation in the light of Annexures A5,A6 and A7 O.Ms. The Hon'ble High Court ordered that the said representation should be dealt with within 2 months. A further representation was filed by the applicant seeking the same benefits vide Annexure A-10.

7. However, the respondents issued communication No.ST.III/3-25(R)/2005 dated 12.5.2005 rejecting Annexure A-9 representation on the ground that the applicant is not qualified as per Recruitment Rules as on 7.2.1996 and cannot be considered for promotion to TES Group 'B', copy of the order is at Annexure A-11. Applicant submits that the decision arrived at through Annexure A-11 is arbitrary and illegal and does not take into account the facts and circumstances associated with his claim. As could be seen from Annexure A-1, the method of recruitment for the post of SDE had been changed and the test qualification is not a pre-qualification for such promotion. In the light of this development, the contention that the applicant as on 7.2.1996 was not qualified for promotion to Group 'B' is erroneous.

8. The applicant lays stress on Section 32 (b) and 33 of the Act of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. It is seen that in terms of Section 32(b) of the Act, the 4th respondent had reviewed all posts on the basis of an expert committee report. As per Annexure A-12 document which is an O.M dated 25.11.1986, even before the introduction of the Act, Group A and Group B posts were identified

for engaging physically handicapped persons. It was expected that once the post is identified under Section 32 of the Act, then by operation of Section 33, 3% of such posts are available for appointment of physically handicapped persons. Facts being so, the rejection of the case of the applicant on the ground that he was not qualified as on 7.2.1996 was unjustified and arbitrary.

9. Being aggrieved by Annexure A-11, applicant filed Writ Petition © No.19415/05 before the Hon'ble High Court of Kerala. However, the Hon'ble High Court dismissed the Writ Petition accepting the contentions of the respondents that there was no enabling provision or Rule providing for reservation in the matter of appointment by promotion. The judgment of the Hon'ble High Court is at Annexure A-14. This was challenged in Writ Appeal No.1756/06. The Hon'ble High Court allowed the Writ Appeal and set aside the orders of the Single Judge. The 2nd respondent was directed to reconsider the matter. It was further directed that if the applicant is found eligible for retrospective promotion, the same needs to be given only on a notional basis and the monetary benefits would flow only prospectively, a copy of the judgment is at Annexure A15.

10. Respondents issued Annexure A-16 order on 28.3.2012, yet again rejecting the claim of the applicant, stating that the applicant is not eligible for the benefit of reservation under the relevant Act. Applicant filed CCC 263/12 which came to be closed by the Hon'ble High Court. However, the Hon'ble High Court left the applicant the liberty to challenge the proceedings before the relevant Forum. This is the background in which O.A 269/2015 has been filed.

11. As grounds, applicant calls to his assistance Annexure A-1 Recruitment Rules, which lays down that the method of recruitment is solely on the basis of promotion and as there is no element of direct recruitment, there is no ambiguity in the matter. Again by virtue of Annexure A-5 to A-7 O.Ms, the posts of categories "A" and "B" in the respondent organisation have come to be identified as eligible for accommodating persons with disabilities. Further as per Annexure A-18, which is a judgment of the Hon'ble Supreme Court, it has been made clear that it is the obligation of the State as well as that of the Authorities under the Act to implement the same in letter and spirit. The Departmental Office Memorandums of the Government of India have clearly extended the benefit to Group A and B posts and hence there is no ambiguity in this either.

12. Respondents have filed reply statement wherein the claim made by the applicant has been denied. It is stated that the cadre of JTO was a Group C cadre but that was made Group B from the year 1996. It is averred that there is no classification as Group C, B and A, and it is only as Non-Executives and Executives. The cadres of JTO and above are Executive cadres in BSNL. It is admitted that the post of SDE is to be filled up by promotion entirely. It is further averred that the O.Ms at Annexure A-5, A-6 and A-7 do not help the applicant's claim.

13. The respondents averred that the object in issuing the Annexure A-7 O.M was to ensure the availability of reservation for the physically handicapped in

promotion where the element of direct recruitment exists and where the same does not exceed 75% and cannot be extended to a post which is entirely promotion-driven. The applicability of the O.Ms at Annexures A-5 to A-7 is further contested on the ground that no orders have been issued enabling reservation in promotion to Group A & B. The quoted O.Ms only direct calculation of reservation of posts in the cadres of A & B on the basis of total number of vacancies in direct recruitment quota. This means that the reservation for the persons with disabilities is by way of horizontal reservation and not vertical reservation. The respondents call to their assistance the judgment of the Hon'ble High Court – Kerala reported in 2015 (4) KHC 257(DB) wherein it was ordered that:

“Even if the post is identified as in the case of OP(CAT) No.156 of 2015, limiting the benefit only for the purpose of 'direct recruitment' does not appear to be arbitrary or illegal. If the contention of the petitioner that the same is to be thrown open also for promotion, is to be accepted, the object of the statute is likely to be defected. This is for the obvious reason that, the petitioner by virtue of his appointment already obtained in the establishment is likely to be promoted in the normal channel; subject to satisfaction of the requirements with reference to his seniority, qualification and experience, if any. If the post which has already been identified with reference to section 32, is left open to be accommodated by persons like the petitioner by promotion, then a deserving person with disability as envisaged under the statute, still waiting in the queue to get appointment, will lose the chance to get appointed. This cannot but be an injustice to be resulted and is totally alien to the scheme of the statute. This court finds that the reservation envisaged under section 32 of the Act can only be in respect of the direct recruitment, so as to compel the employer to identify and reserve the requisite extent of posts to be accommodated by persons with disabilities as specified. It can never be applied in the case of promotion as contended by the petitioner. The wordings of the statute never give any such impression that it is to be applied also in the case of promotion. No such observation has been made by the Apex Court, to the effect that it has to be given with reference to promotion as well.”

14. Heard Mr.George Varghese Perumpallikuttyil, learned counsel for the applicant and Mr.Reghunathan representing Mr.M.Salim, learned counsel for the respondents and perused the documents.

15. The case of the applicant is based on his rights as a disabled person to get the benefit of reservation in promotion to Group A & B posts from the date the Act came into force. He had worked as a Junior Telecom Officer since 1991 and had completed 3 years qualifying service when the Act came into force in 1996. Thus he can be declared as eligible as per the eligibility criteria. The applicant submits that as per Annexure A-7 O.M, he is eligible for promotion whereas the respondents contest this stating that the O.M in question allows promotion where direct recruitment does not exceed 75% and by implication excludes any grade where there is no element of direct recruitment. The view of the respondents is that since there is no direct recruitment component in the path to become a SDE, they cannot seek the benefit of the said clause. We are not inclined to go by this argument as a simple reading of the said O.M does not preclude posts which are meant entirely for promotion.

16. The other point is a controversial aspect and the claim of the applicant is hotly contested by the respondents. This relates to the question whether reservation in promotion is extendable to Group A & B Posts. The modification brought out by way of Annexure A-5 is to the effect that point nos.1,3,4 and 67 in cycle of 100 vacancies in the 100 point roaster is to be earmarked for reservation for physically handicapped. Further, as per Annexure A-8, which is an order issued in compliance with the judgment of this Tribunal, it is stated

that “rules and instructions so far made is applicable only to identified Group A & B Posts filled through direct recruitment.” As already discussed, no such exclusion of promoted personnel is warranted. Annexure A-12 is a report of a Committee which took up the basis of identifying the posts for physically handicapped and included also Group A & B. Further to this, the Ministry of Social Justice and Empowerment, the administering Ministry of the Disabilities Act as per document at Annexure A-13 has identified the Divisional Engineer and Assistant Engineer under Telecom as belonging to Group A & B categories. This can only be taken to mean that Groups A & B are also categories which the authorities have earmarked for accommodating persons with disabilities and the Telecom sector is specifically included in the same. Based on the above, the contention of the respondents that the reservation for disabled persons is possible only in directly recruited posts and does not include Group A & B posts are non-acceptable arguments.

17. The learned counsel for the applicant has brought to our attention the judgment of the Hon'ble Supreme Court in W.P(c) No.521/2008 dealing with the very same question. The Hon'ble Supreme Court has stated thus:

“13. For some of these IDENTIFIED POSTS in Group A and Group B, the mode of recruitment is only through promotions.[6] The purpose underlying the statutory exercise of identification under Section 32 of the 1995 Act would be negated if reservation is denied to those IDENTIFIED POSTS by stipulating that either all or some of such posts are to be filled up only through the mode of promotion. It is demonstrated before us that PWD as a class are disentitled to some of the IDENTIFIED POSTS in Groups A and Group B because of the impugned memoranda and the relevant regulations, under which the only mode of appointment to those IDENTIFIED POSTS is through promotion. Once posts are identified under Section 32, the purpose behind such identification cannot be frustrated by prescribing a mode of recruitment which results in denial of statutory reservation. It would be a device to defraud PWD of the statutory benefit

under [Section 33](#) of the 1995 Act.”

18. The Hon'ble Supreme Court goes on to conclude that:

“ 22. The 1995 Act was enacted to fulfill India’s obligations under the ‘Proclamation on the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region’. The objective behind the 1995 Act is to integrate PWD into the society and to ensure their economic progress.[12] The intent is to turn PWD into ‘agents of their own destiny’.[13] PWD are not and cannot be equated with backward classes contemplated under [Article 16\(4\)](#). May be, certain factors are common to both backward classes and PWD such as social attitudes and historical neglect etc.

23. It is disheartening to note that (admittedly) low numbers of PWD (much below three per cent) are in government employment long years after the 1995 Act. Barriers to their entry must, therefore, be scrutinized by rigorous standards within the legal framework of the 1995 Act.

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. ”

19. In due appreciation to the facts of this case and also based on the above referred judgment of the Hon'ble Supreme Court in the related matter, we are of the view that the Original Application has merit on its side and it succeeds. The prayer is allowed with modification that while promotions as sought for are to be granted, it shall be on notional basis and there shall be no retrospective effect thereof. In other words, while promotion as SDE is to be granted to him with

effect from 1996, the benefits of promotion would accrue from the date he came to actually occupy the position i.e, from 12.3.2002 onwards. Similarly he is to be promoted further on completion of 6 years in SDE. The orders in this regard are to be issued within 60 days of receipt of a copy of this order.

20. The Original Application is allowed as above. No costs.

(ASHISH KALIA)
JUDICIAL MEMBER

(E.K.BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

SV

List of Annexures

Annexure A1 - A true copy of the Telecommunications Engineering Service (Group B posts) Recruitment rules 1996 as published in Gazette of India Extra ordinary No.229 dated 23.7.1996

Annexure A2 - A true copy of notification No.20-24/2001-Pers II dated 28.2.2002 issued by the 3rd respondent

Annexure A3 - A true copy of order No.ST/EK-203/8/XXI/149 dated 2.4.2002

Annexure A4 - A true copy of Certificate No.261 dated 5.2.1997 issued by the General Hospital, Ernakulam to the applicant

Annexure A5 - A true copy of OM No.36025/3/97-Estt.(Res) dated 4.7.1997

Annexure A6 - A true copy of OM No.36035/7/95-Estt.(SCT) dated 18.2.1997 issued by the Government of India, Department of Personnel and Training

Annexure A7 - A true copy of OM No.36035/7/95-Estt (SCT) dated 16.1.1998 issued by the Government of India, Department of Personnel & Training

Annexure A8 - A true copy of communication No.ST-III/I-S/Genl. Dated 24.3.1998 issued by the 2nd respondent

Annexure A9 - A true copy of representation dated 11.1.2001 submitted by the applicant before the 1st respondent

Annexure A10 - A true copy of representation submitted by the applicant to the 2nd respondent

Annexure A11 - A true copy of communication No.ST.III/3-25®/2005 dated 12.5.2005 issued by the 2nd respondent

Annexure A12 - A true copy of Office Memorandum No.36034/4/86-Estt.(SCT) dated 25.11.1986

Annexure A13 - A true copy of OM No.16-25/99-NI-I of the Ministry of Social Justice dated 31.5.2001

Annexure A14 - A true copy of Judgment in W.P.© No.19415/05 of the Hon'ble High Court of Kerala

Annexure A15 - A true copy of judgment in W.A No.1756/06 of the Hon'ble High Court

Annexure A16 - A true copy of order F.No.HR-III/3-20/Court Case/MGP Panicker/2011/5 dated 28.3.2012

Annexure A17 - A true copy of judgment dated 24.11.2014 in CCC 485/14 of the Hon'ble High Court of Kerala

Annexure A18 - A true copy of judgment dated 8.10.2013 of the Hon'ble Supreme Court of India in C.A 9096/13

Annexure R2(a) - True copy of the OM dated 8.7.2003

Annexure R2(b) - True copy of the OM dated 29.12.2005

Annexure R2© - True copy of the OM dated 6.1.2015

.....