



CENTRAL ADMINISTRATIVE TRIBUNAL
KOKATA BENCH, PATNA

O.A./350/00609/2017

With

17 other O.As.

Orders Reserved on : 10th May, 2018

Date of orders : 6th June , 2018

CORAM

HON'BLE MRs. BIDISHA BANERJEE, MEMBER (J)
HON'BLE DR. NANDITA CHATTERJEE, MEMBER (A)

[1] O.A./350/00609/2017

Amal Sarkar, son of Paran Sarkar, aged about 27 years, occupation nil, residing at Village Muria Kundu, Post Office – Alal, District – Malda, Pin Code – 732128.

.....Applicants
By Advocate : Mr. A.Chakraborty with Ms. P. Mondal

Versus

1. The Union of India, through General Manager, Eastern Railway, Fairlie Place Kolkata – 700 001.
2. The Chairman, Railway Recruitment Cell, C.R. Avenue, Kolkata – 700012.
3. The Chief Personnel Officer, Eastern Railway, Fairlie Place, Kolkata – 700 001.

..... Respondents.

By Advocates: Mr. A.K.Guha,

Mr. S. Banerjee

[2] O.A./350/00465/2017

Bijon Kumar Pal

Vs.

Union of India & Ors.

[3] OA/350/00946/2017

Suman Sarkar

Vs.

Union of India & Ors.

[4] OA/350/00947/2017

Jagadish Ghosh

Vs.

Union of India & Ors.

[5] OA/350/00948/2017

Debashish Biswas
Vs.
Union of India & Ors.

[6] OA/350/00949/2017
Pratima Mushar
Vs.
Union of India & Ors.

[7] OA/350/00950/2017
Ashok Kumar
Vs.
Union of India & Ors.

[8] OA/350/00954/2017
Amarjeet Kumar Shaw
Vs.
Union of India & Ors.

[9] OA/350/00955/2017
Chwramoni Mondal
Vs.
Union of India & Ors.

[10] OA/350/00956/2017
Biman Saha
Vs.
Union of India & Ors.

[11] OA/350/00958/2017
Bibekananda Biswas
Vs.
Union of India & Ors.

[12] OA/350/00959/2017
Gobinda Biswas
Vs.
Union of India & Ors.

[13] OA/350/00987/2017
Bapan Biswas
Vs.
Union of India & Ors.

[14] OA/350/01001/2017
Mobassar Hossain Khan

Vs.
Union of India & Ors.

[15] OA/350/001019/2017
Amal Kumar Mahato

Vs.
Union of India & Ors.

[16] OA/350/01020/2017
Abhijit Karmakar

Vs.
Union of India & Ors.
[17] OA/350/01021/2017
Biplab Pal

Vs.
Union of India & Ors.
[18] OA/350/00957/2017
Bikash Biswas

Vs.

Union of India & Ors.

ORDER

Per Bidisha Banjerjee, Member [J]:- The applicants are orthopedically handicapped candidates, who applied for appointment in Eastern Railway in posts carrying pay band Rs. 5200-20200, Grade Pay Rs. 1800/- against vacancies reserved for PWD [Person with Disabilities]. They had responded to Notification numbered IN-0112 issued by Eastern Railway.

2. These applications have been filed by such orthopedically handicapped candidates, to seek the following reliefs :

“8[i] An order do issue directing the respondents to grant appointment to the applicant following section 36 of the persons with Disability [equal opportunities, Protection of rights and full participation] Act, 1995 since he was declared fit for appointment by RRC.

[ii] An order do issue directing the respondent not to act on the

basis of the notification 01/2015 issued by RRC.”

Being identically circumstanced and since they seek identical reliefs, with the consent of the parties, the OAs filed by these applicants are taken up analogously for disposal by a common order.

3. The basis of the claim of applicants is as under :-

[i] Way back in 1977, the erstwhile Ministry of Social Welfare, Government of India, made reservation in favour of the following three categories of disabled persons in Group C and D posts, to the extent of 1 per cent each for the [i] Blind; [ii] Hearing and Speech Impairment; and [iii] persons suffering from locomotor disability.

In the year 1986, the Department of Personnel & Training [DOPT] directed all the departments to take into account both identified and unidentified posts for working out the total number of vacancies to be reserved for each of the disabled categories. Despite such executive order, various government departments and public sector undertakings chose not to give effect to the scheme of reservation which compelled the Federation of Blind and Orthopedic Organisation, a Society registered under Societies Act, to organize a nation wide agitation, As a result of which, an agreement was arrived at between the parties on 27.08.1987 to undertake a Special Recruitment Drive for clearing up the backlog of vacancies.

[ii] On 07.02.1996, the Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation] Act, 1995 hereinafter referred to as the “Act” or PWD Act, was brought into force making reservation of at least 3 percent posts in all government establishments to the extent of 1 per cent each, mandatorily, for the persons suffering from [i] blindness or low vision; [ii] hearing impairment; and [iii] locomotor disability or cerebral palsy. After such enactment, Union of India issued various orders for

ensuring proper implementation of the provisions of the Act for the persons with disabilities.

[iii] DOPT issued an OM dated 29.12.2005 for ensuring proper implementation of the provisions of the Act for the persons with disabilities.

[iv] Hon'ble High Court of Delhi , in W.P No.15828 of 2006, vide judgment and its order dated 12.12.2008 interpreted Section 33 of the Act supra, and directed the Union of India to modify its OM dated 29.12.2005 for it was inconsistent with the provisions of Section 33 of the Act and issued several other directions.

[v] When the order travelled to Hon'ble Apex Court in Civil Appeal No.9096 of 2013, before a Bench of Three Judges, Additional Solicitor General for Union of India would argue that the impugned judgement of the High Court was against the provisions of the Act, the finding of the High Court, that in terms of Section 33 of the Act, 3% reservation for the disabled persons had to be computed on the basis of total strength of the cadre, i.e. both identified as well as unidentified posts, was erroneous. The direction of the High Court to work out backlog vacancies for the disabled persons on the total cadre strength in different establishments within one month from the date of the order was impractical and not executable. According to Section 33 of the Act, reservation to the persons with disabilities in an establishment should be 3% of the vacancies arising in the posts which are identified for the persons with disabilities whereas the High Court, by the impugned judgment, disturbed the very basic system of the reservation of posts for the persons with disabilities. It was argued that the reservation for Group C and D posts was being calculated on the basis of the vacancies in identified as well as unidentified posts prior to the Act came into existence and in view of the provisions of Section 72 of the Act, continued in the same

way, however, reservation for Group A and B posts was being calculated on the basis of the vacancies for identified posts as per the provisions of the Act.

[vi] While on behalf of the Federation, it was argued that in terms of the provision of the Act, more particularly, Section 32 and 33 of the Act, it was obligatory on the part of the Government establishments to provide at least 3% reservation of posts in the total cadre strength and not in the identified vacancies and though the Act was passed in 1995 since then the provisions have not been strictly implemented, The Federation prayed for further time bound direction for implementation of the same.

[vii] Hon'ble Apex Court in the said matter observed as under [quoted verbatim with supplied emphasis for clarity] :

"9) In order to answer the rival contentions, it is desirable to quote the relevant provision of the Act. Sections 2(a), 2(i), 2(j) and 2(k) of the Act read as under:

"2(a) "appropriate Government" means,-

- (i) *in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924 (2 of 1924), the Central Government;*
- (ii) *in relation to a State Government or any establishment wholly or substantially financed by that Government or any local authority, other than a Cantonment Board, the State Government;*
- (iii) *in respect of the Central Co-ordination Committee and the Central Executive Committee, the Central Government;*
- (iv) *in respect of the State Co-ordination Committee and the State Executive Committee, the State Government;*

2(i) "Disability" means-

- (i) *blindness;*
- (ii) *low vision;*
- (iii) *leprosy-cured;*
- (iv) *hearing impairment;*
- (v) *locomotor disability;*
- (vi) *mental retardation;*
- (vii) *mental illness;*

2(j) "employer" means,-

- (i) in relation to a Government, the authority notified by the Head of the Department in this behalf or where no such authority is notified, the Head of the Department; and
- (ii) in relation to an establishment, the Chief Executive Officer of that establishment;

2(k) "establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government;"

10) Among the above definitions, we are more concerned with the definition of "establishment" under Section 2(k) of the Act, which is an exhaustive definition and covers (i) a corporation established by or under a Central, Provincial or State Act, or (ii) an authority or a body owned or controlled or aided by the Government or a local authority, or (iii) a Government company as defined in Section 617 of the Companies Act, 1956 and (iv) Departments of a Government.

11) Chapter VI of the Act deals with the employment of persons with disabilities. The relevant Sections of the said Chapter are as under:-

32. Identification of posts which can be reserved for persons with disabilities. - Appropriate Governments shall⁸ Page 9 (a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of Posts - Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy,

in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

36. Vacancies not filled up to be carried forward. - Where in any recruitment year any vacancy under section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the

succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

12) In exercise of the powers conferred by sub-sections (1) and (2) of Section 73 of the Act, the Central Government enacted the 9 Page 10 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996.

13) After enactment of the above Act, in order to consolidate the existing instructions in line with the provisions of the Act, on 29.12.2005, Government of India, Department of Personnel and Training, issued certain instructions by way of an Office Memorandum (OM), with regard to the reservation for the persons with disabilities (physically handicapped persons) in posts and services. The said Office Memorandum specifically states that it shall supersede all previous instructions issued on the subject so far. Respondent No. 1 herein has commended various clauses of the OM dated 29.12.2005. The relevant clauses of the same are extracted hereinbelow:

"2. QUANTUM OF RESERVATION

(i) Three percent of the vacancies, in case of direct recruitment to Group A, B, C and D posts shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability;

(ii) Three percent of the vacancies in case of promotion to Group D, and Group C posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities of which one per cent each shall be 10 Page 11 reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability.

3. EXEMPTION FROM RESERVATION: If any Department/Ministry considers it necessary to exempt any establishment partly or fully from the provisions of reservation for persons with disabilities of which one percent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor

disability or cerebral palsy in the posts identified for each disability, it may make a reference to the Ministry of Social Justice and Employment giving full justification for the proposal. The grant of exemption shall be considered by an Inter-Departmental Committee set up by the Ministry of Social Justice and Empowerment.

4. IDENTIFICATION OF JOBS/POSTS: The Ministry of Social Justice and Empowerment have identified the jobs/posts suitable to be held by persons with disabilities and the physical requirement for all such jobs/posts vide their notification no. 16-25/99.NII dated 31.5.2001. The jobs/posts given in Annexure II of the said notification as amended from time to time shall be used to give effect to 3 per cent reservation to the persons with disabilities. It may, however, be noted that:

- (a) The nomenclature used for any job/post shall mean and include nomenclature used for other comparable jobs/posts having identical functions.
- (b) The list of jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive. The concerned Ministries/Departments shall have the discretion to identify jobs/posts in addition to the jobs/posts already identified by the Ministry of Social Justice & Empowerment. However, no 11 Page 12 Ministry/Department/Establishment shall exclude any identified job/post from the purview of reservation at its own discretion.
- (c) If a job/post identified for persons with disabilities is shifted from one group or grade to another group or grade due to change in the pay-scale or otherwise, the job/post shall remain identified.

13. COMPUTATION OF RESERVATION: Reservation for persons with disabilities in case of Group C and Group D posts shall be computed on the basis of total number of vacancies occurring in all Group C or Group D posts, as the case may be, in the establishment, although the recruitment of the persons with disabilities would only be in the posts identified suitable for them. The number of vacancies to be reserved for the persons with disabilities in case of direct recruitment to Group C posts in an establishment shall be computed by taking into account the total number of vacancies arising in Group C posts for being filled by direct recruitment in a recruitment year both in the identified and non-identified posts under the establishment. The same procedure shall apply for Group D posts. Similarly, all vacancies in promotion quota shall be taken into account while computing reservation in promotion in Group C and Group D posts. Since reservation is limited to identified posts only and number of vacancies reserved is computed on the basis of total vacancies (in identified posts as well as unidentified posts), it is possible that number of persons appointed by reservation in an identified posts may exceed 3 percent.

14. Reservation for persons with disabilities in Group A posts shall be computed on the basis of vacancies occurring in direct recruitment quota in all the identified Group A posts in the establishment. The same method of computation applies for Group B posts.

15. EFFECTING RESERVATION - MAINTENANCE OF ROSTERS:

(a) all establishments shall maintain separate 100 point reservation roster registers in the format given in Annexure II for determining/effecting reservation for the disabled - one each for Group A posts filled by direct recruitment, Group B posts filled by direct recruitment, Group C posts filled by direct recruitment, Group C posts filled by promotion, Group D posts filled by direct recruitment and Group D posts filled by promotion.

(b) Each register shall have cycles of 100 points and each cycle of 100 points shall be divided into three blocks, comprising the following points :

1st Block - point No.1 to point No.33

2nd Block - point No.34 to point No.66

3rd Block - point No.67 to point No.100

(c) Points 1, 34, and 67 of the roster shall be earmarked reserved for persons with disabilities - one point for each of the three categories of disabilities. The head of the establishment shall decide the categories of disabilities for which the points 1, 34 and 67 will be reserved keeping in view all relevant facts.

(d) All the vacancies in Group C posts falling in direct recruitment quota arising in the establishment shall be entered in the relevant roster register. If the post falling at point No.1 is not identified for the disabled or the head of the establishment considers it desirable not to fill up by a disabled person or it is not possible to fill up that post by the disabled for any other person, one of the vacancies falling at any of the points from 2 to 33 shall be treated as reserved for the disabled and filled as such. Likewise a vacancy falling at any of the points from 34 to 66 or from 67 to 100 shall be filled by the disabled. The purpose of keeping points 1, 34 and 67 as reserved is to fill up the first available suitable vacancy from 1 to 33, first available suitable 13
Page 14 vacancy from 34 to 66 and first available suitable vacancy from 67 to 100 persons with disabilities.

(e) There is a possibility that none of the vacancies from 1 to 33 is suitable for any category of the disabled. In that case two vacancies from 34 to 66 shall be filled as reserved for persons with disabilities. If the vacancies from 34 to 66 are also not suitable for any category, three vacancies shall be filled as reserved from the third block containing points from 67 to 100. This means that if no vacancy can be reserved in a particular block, it shall be carried into the next block.

(f) After all the 100 points of the roster are covered, a fresh cycle of 100 points shall start.

(g) If the number of vacancies in a year is such as to cover only one block or two, discretion as to which category of the disabled should be accommodated first shall vest in the head of the establishment, who shall decide on the basis of the nature of the post, the level of representation of the specific disabled category in the concerned grade/post etc.

(h) A separate roster shall be maintained for Group C posts filled by promotion and procedure as explained above shall be followed for giving reservation to persons with disabilities. Likewise two separate rosters shall be maintained for Group D posts, one for the posts filled by direct recruitment and another for posts filled by promotion.

(i) Reservation in Group A and Group B posts is determined on the basis of vacancies in the identified posts only. Separate rosters for Group A posts and Group B posts in the establishment shall be maintained. In the rosters maintained for Group A and Group B posts, all vacancies of direct recruitment arising in identified posts shall be entered and reservation shall be effected the same way as explained above.

16. INTER SE EXCHANGE AND CARRY FORWARD OF RESERVATION IN CASE OF DIRECT RECRUITMENT

(a) Reservation for each of the three categories of persons with disabilities shall be made separately. But if the nature of vacancies in an establishment is such that a person of a specific category of disability cannot be employed, the vacancies may be interchanged among the three categories with the approval of the Ministry of Social Justice and Empowerment and reservation may be determined and vacancies filled accordingly.

(b) If any vacancy reserved for any category of disability cannot be filled due to non-availability of a suitable person with that disability or, for any other sufficient reason, such vacancy shall not be filled and shall be carried forward as a 'backlog reserved vacancy' to the subsequent recruitment year.

(c) In the subsequent recruitment year the backlog reserved vacancy shall be treated as reserved for the category of disability for which it was kept reserved in the initial year of recruitment. However, if a suitable person with that disability is not available, it may be filled by interchange among the three categories of disabilities. In case no suitable person with disability is available for filling up the post in the subsequent year also, the employer may fill up the vacancy by appointment of a person other than a person with disability. If the vacancy is filled by a person with disability of the category for which it was reserved or by a person of other category of disability by inter se

exchange in the subsequent recruitment year, it will be treated to have been filled by reservation. But if the vacancy is filled by a person other than a person with disability in the subsequent recruitment year, reservation shall be carried forward for a further period upto two recruitment years whereafter the reservation shall lapse. In these two subsequent years, if situation so arises, the procedure for filling up the reserved vacancy shall be the same as followed in the first subsequent recruitment year.

19. HORIZONTALITY OF RESERVATION FOR PERSONS WITH DISABILITIES:

Reservation for backward classes of citizens (SCs, STs and OBCs) is called vertical reservation and the reservation for categories such as persons with disabilities and ex- servicemen is called horizontal reservation. Horizontal reservation cuts across vertical reservation (in what is called interlocking reservation) and person selected against the quota for persons with disabilities have to be placed in the appropriate category viz. SC/ST/OBC/General candidates depending upon the category to which they belong in the roster meant for reservation of SCs/STs/OBCs. To illustrate, if in a given year there are two vacancies reserved for the persons with disabilities and out of two persons with disabilities appointed, one belongs to a Scheduled Caste and the other to general category then the disabled SC candidate shall be adjusted against the SC point in the reservation roster and the general candidate against unreserved point in the relevant reservation roster. In case none of the vacancies falls on point reserved for the SCs, the disabled candidate belonging to SC shall be adjusted in future against the next available vacancy reserved for SCs.

20. Since the persons with disabilities have to be placed in the appropriate category viz. SC/ST/OBC/ General in the roster meant for reservation of SCs/STs/OBCs, the application form for the post should require the candidates applying under the quota reserved for persons with disabilities to indicate whether they belong to SC/ST/OBC or General category."

14) Clauses 21 and 22 of the said OM enable the Government for relaxation in age limit as well as standard of suitability.

15) After the OM dated 29.12.2005, based on the representations made by Respondent No. 1 herein, another OM 16 Page 17 dated 26.04.2006 came to be issued. The details and the directions contained in the said OM are as follows:

"Dated the 26th April, 2006

OFFICE MEMORANDUM

Sub: Reservation for the Persons with Disabilities

The undersigned is directed to say that the Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which came into existence on 01.01.1996 provides for reservation for persons with disability in the posts identified for three categories of disabilities namely (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy. Instructions have also been issued by this Department for providing reservation for such persons. In spite of the Act and the instructions of this Department, vacancies were not earmarked reserved or were not filled by reservation in some establishments.

2. The matter has been considered carefully and it has been decided that reservation for persons with disabilities should be implemented in right earnest and there should be no deviation from the scheme of reservation, particularly after the Act came into effect. In order to achieve this objective, all the establishments should prepare the reservation roster registers as provided in this Department's O.M. No. 36035/3/2004-Estt (Res) dated 29.12.2005 starting from the year 1996 and reservation for persons with disabilities be earmarked as per instructions contained in that OM. If some or all the vacancies so earmarked had not been filled by reservation and were filled by able bodied persons either for the reason that points of reservation had not been earmarked properly at the appropriate time or persons with disabilities did not become available, such unutilized reservation may be treated as having been carried forward to the first recruitment year occurring after issue of this O.M. and be filled as such. If it is not possible to fill up such reserved vacancies during the said recruitment year, reservation would be carried forward for further two years, whereafter it may be treated as lapsed.

3. It has been observed that some recruiting agencies declare in their advertisements that blind/partially blind candidates need not apply and that separate examinations would be conducted for visually handicapped candidates. Attention is invited to para 17 Page 18 7 of this Department's O.M. No. 36035/3/2004-Estt (Res) dated 29.12.2005 which provides that persons with disabilities selected on their own merit will not be adjusted against the reserved share of vacancies. It means that persons with disabilities who are selected on their own merit have to be adjusted against the unreserved vacancies and reservation has to be given in addition. If visually handicapped candidates or any other category of handicapped candidates are debarred from applying on the ground that a separate examination would be conducted for them, chances of handicapped candidates being selected on their own merit would be eliminated. Thus, debarring of any category of handicapped candidates in the above manner is against the provisions contained in

the aforesaid O.M. It is, therefore, requested that persons with disabilities should not be debarred from applying for the posts identified suitable for them and should be provided opportunity to compete for the unreserved vacancies as well by holding a common examination.

4. Contents of this O.M. may be brought to the notice of all concerned.

Sd/-

(K.G.Verma)

Deputy Secretary to the Govt. of India"

16) Another OM dated 10.12.2008, issued by the Department of Personnel and Training, was also brought to our notice whereunder a Special Recruitment Drive to fill up the backlog reserved vacancies for the persons with disabilities was initiated. The said OM mainly speaks about filling up of "backlog reserved vacancies". Relevant portion of the said OM is extracted hereinbelow:

"Dated the 10th December, 2008

OFFICE MEMORANDUM

Sub: Special Recruitment Drive to fill up the backlog reserved vacancies for Persons with Disabilities

The undersigned is directed to say that this Department's O.M. No. 36035/3/2004-Estt(Res) dated 29.12.2005 provides that if any vacancy reserved for any category of disability cannot be filled due to non-availability of a suitable person with that disability or for any other sufficient reason, such vacancy is not filled and is carried forward as a 'backlog reserved vacancy' to the subsequent recruitment year. In the subsequent recruitment year, the 'backlog reserved vacancy' is treated as reserved for the category of disability for which it was kept reserved in the initial year of recruitment and filled as such. However, if a suitable person with that disability is not available in the subsequent recruitment also, it may be filled by interchange among the three categories of disabilities, failing which by appointment of a person other than a person with disability. It may, thus, be seen that if a vacancy is earmarked reserved for any category of disability and a suitable person with that disability is not available to fill it up in the initial year of recruitment, it becomes a 'backlog reserved vacancy' for first subsequent recruitment year.

2. As per instructions existing prior to issue of O.M. dated 29.12.2005, if in any year, suitable physically handicapped candidates were not available to fill up a reserved vacancy, the vacancy was filled by an other category candidate and reservation was carried forward for a period of upto three recruitment years. In the event of non-availability of suitable persons with disabilities, the reserved vacancies were not kept unfilled. Thus there was no provision of

backlog reserved vacancies of persons with disabilities prior to 29.12.2005. Nevertheless, it is possible that some Ministries/Departments/ establishments might have kept some vacancies earmarked reserved for the persons with disability unfilled due to nonavailability of persons with disability. If there exist such vacancies, these will be treated as backlog reserved vacancies for the current recruitment year”

17) By issuing such directions, the Department of Personnel and Training directed all the Ministries/Departments to launch a 19 Page 20 Special Recruitment Drive and fixed target dates for fulfilling various stages.

18) & 19 xxx xxx xxx

20) India as a welfare State is committed to promote overall development of its citizens including those who are differently abled in order to enable them to lead a life of dignity, equality, freedom and justice as mandated by the Constitution of India. The roots of statutory provisions for ensuring equality and equalization of opportunities to the differently abled citizens in our country could be traced in Part III and Part IV of the Constitution. For the persons with disabilities, the changing world offers more new 20 Page 21 opportunities owing to technological advancement, however, the actual limitation surfaces only when they are not provided with equal opportunities. Therefore, bringing them in the society based on their capabilities is the need of the hour.

21) Although, the Disability Rights Movement in India commenced way back in 1977, of which Respondent No. 1 herein was an active participant, it acquired the requisite sanction only at the launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002, which gave a definite boost to the movement. The main need that emerged from the meet was for a comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995 viz., the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which empowers persons with disabilities and ensures protection of their rights. The Act, in addition to its other prospects, also seeks for better employment opportunities to persons with disabilities by way of reservation of posts and establishment of a Special Employment Exchange for them.

22) For the same, Section 32 of the Act stipulates for identification of posts which can be reserved for persons with disabilities. Section 33 provides for reservation of posts and Section 36 thereof provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, in any recruitment year such vacancy is to be carried forward in the succeeding recruitment year. The difference of

opinion between the appellants and the respondents arises on the point of interpretation of these sections.

23) xxx xxx xxx

24) Two aspects of the impugned judgment have been challenged before this Court:-

(a) The manner of computing 3% reservation for the persons with the disabilities as per Section 33 of the Act.

(b) Whether post based reservation must be adhered to or vacancy based reservation.

25) xxx xxx xxx

26) Primarily, we would like to clarify that there is a sea of difference in computing reservation on the basis of total cadre strength and on the basis of total vacancies (both inclusive of identified and unidentified) in the cadre strength. At the outset, a reference to the impugned OM dated 29.12.2005 would, in unequivocal terms, establish that the matter in dispute in the given case is whether the latter method of computation of reservation will uniformly apply to the posts in Group A, B, C and D 23 Page 24 or will it be applicable only to Group C and D. The question pertaining to computation of reservation on the basis of total cadre strength does not even arise in the given circumstance of the case. However, the High Court, in the impugned judgment, went on to uphold the view that the computation of reservation must be on the basis of total cadre strength which is clearly erroneous on the face of it. Inadvertently, the respondents herein have also adopted the same line of argument in their oral and written submissions. As a result, the point for consideration before this Court is whether the modus of computation of reservation on the basis of total number of vacancies (both inclusive of identified and unidentified) in the cadre strength will uniformly apply to Group A, B, C and D or will it be applicable only to Group C and D.

27) It is the stand of the Union of India that for vivid understanding of the reservation policy laid down under Section 33 of the Act, it is essential to read together Sections 32 and 33 of the Act. It was also submitted that a conjoint reading of the above referred sections, mandates only reservation of vacancies in the identified posts and not in all the posts or against the total 24 Page 25 number of vacancies in the cadre strength. However, it was also admitted that the computation of reservation is being done in respect of Group C and D posts on the basis of total number of vacancies (both inclusive of identified and unidentified) in the cadre strength since 1977. In fact, the abovesaid contention has been raised in Govt. of India through Secretary and Anr. vs. Ravi Prakash Gupta & Anr. (2010) 7 SCC 626 and, therefore, it is no longer res integra.

28) The question for determination raised in this case is whether the reservation provided for the disabled persons under Section 33 of the Act is dependent upon the identification of posts as stipulated by Section 32. In the aforementioned case, the Government of India sought to contend that since they have conducted the exercise of identification of posts in civil services in terms of Section 32 only in the year 2005, the reservation has to be computed and applied only with reference to the vacancies filled up from 2005 onwards and not from 1996 when the Act came into force. This Court, after examining the inter-dependence of Sections 32 and 33 viz., identification of posts and the scheme of reservation, rejected this contention and held as follows:-

"25.The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission made on behalf of the Union of India that identification of Grade 'A' and 'B' posts in the I.A.S. was undertaken after the year 2005 is not of much substance.

26. As has been pointed out by the High Court, neither Section 32 nor Section 33 of the aforesaid Act makes any distinction with regard to Groups A, B, C and D posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said Section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to our notice on behalf of the petitioners.

27. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in every establishment.

29. While it cannot be denied that unless posts are identified for

the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

31. We, therefore, see no reason to interfere with the judgment of the High Court impugned in the Special Leave Petition which is, accordingly, dismissed with costs. All interim orders are vacated. The petitioners are given eight weeks' time from today to give effect to the directions of the High Court."

The Hon'ble Apex Court gave its findings as infra -

29) In the light of the above pronouncement, it is clear that the scope of identification comes into picture only at the time of appointment of a person in the post identified for disabled persons and is not necessarily relevant at the time of computing 3% reservation under Section 33 of the Act. In succinct, it was held in Ravi Prakash Gupta (supra) that Section 32 of the Act is not a precondition for computation of reservation of 3% under Section 27 Page 28. 33 of the Act rather Section 32 is the following effect of Section 33.

30) Apart from the reasoning of this Court in Ravi Prakash Gupta (supra), even a reading of Section 33, at the outset, establishes vividly the intention of the legislature viz., reservation of 3% for differently abled persons should have to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts. There is no ambiguity in the language of Section 33 and from the construction of the said statutory provision only one meaning is possible.

Hon'ble Apex Court then vividly and succinctly clarified the

provision that Section 33 envisaged :

"31) A perusal of Section 33 of the Act reveals that this section has been divided into three parts. The first part is "every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability." It is evident from this part that it mandates every appropriate Government shall appoint a minimum of 3% vacancies in its establishments for persons with disabilities. In this light, the contention of the Union of India that 28 Page 29 reservation in terms of Section 33 has to be computed against identified posts only is not tenable by any method of interpretation of this part of the Section.

32) The second part of this section starts as follows: "...of which one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment & locomotor disability or cerebral palsy in the posts identified for each disability." From the above, it is clear that it deals with distribution of 3% posts in every establishment among 3 categories of disabilities. It starts from the word "of which". The word "of which" has to relate to appointing not less than 3% vacancies in an establishment and, in any way, it does not refer to the identified posts. In fact, the contention of the Union of India is sought to be justified by bringing the last portion of the second part of the section viz. "...identified posts" in this very first part which deals with the statutory obligation imposed upon the appropriate Government to "appoint not less than 3% vacancies for the persons or class of persons with disabilities." In our considered view, it is not plausible in the light of established rules of interpretation. The minimum level of representation of persons with disabilities has been provided in this very first part and the second part deals with the distribution of this 3% among the three categories of disabilities. Further, in the last portion of the second part the words used are "in the identified posts for each disability" and not "of identified posts". This can only mean that out of minimum 3% of vacancies of posts in the establishments 1% each has to be given to each of the 3 categories of disability viz., blind and low vision, hearing impaired and locomotor disabled or cerebral palsy separately and the number of appointments equivalent to the 1% for each disability out of total 3% has to be made against the vacancies in the identified posts. The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived.

33) The third part of the Section is the proviso which reads thus: "Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be 30 Page 31

specified in such notification, exempt any establishment from the provisions of this section." The proviso also justifies the above said interpretation that the computation of reservation has to be against the total number vacancies in the cadre strength and not against the identified posts. Had the legislature intended to mandate for computation of reservation against the identified posts only, there was no need for inserting the proviso to Section which empowers the appropriate Government to exempt any establishment either partly or fully from the purview of the Section subject to such conditions contained in the notification to be issued in the Official Gazette in this behalf. Certainly, the legislature did not intend to give such arbitrary power for exemption from reservation for persons with disabilities to be exercised by the appropriate Government when the computation is intended to be made against the identified posts.

34) In this regard, another provision of the said Act also supports this interpretation. Section 41 of the said Act mandates the appropriate Government to frame incentive schemes for employers with a view to ensure that 5% of their work force is composed of persons with disabilities. The said section is reproduced hereinbelow:

"41. Incentives to employers to ensure five percent of the work force is composed of persons with disabilities. – The appropriate Government and the local authorities shall, within limits to their economic capacity and development provide incentives to employees in public and private sectors to ensure that at least five per cent of their work force is composed of persons with disabilities."

Thus, on a conjoint reading of Sections 33 and 41, it is clear that while Section 33 provides for a minimum level of representation of 3% in the establishments of appropriate Government, the legislature intended to ensure 5% of representation in the entire work force both in public as well as private sector.

35) Moreover, the intention of the legislature while framing the Act can also be inferred from the Draft Rights of Persons with Disabilities Bill, 2012, which is pending in the Parliament for approval. In Chapter 6 of the Bill, viz., Special Provisions for Persons with Benchmark Disabilities, similar sections like Sections 32 & 33 in the Act have been incorporated under Sections 38 and 39 which are as under:-

"Section 38. Identification of Posts which can be 32 Page 33 Reserved for Persons with Benchmark Disabilities:

Appropriate Governments shall – (a) identify posts in establishments under them which can be reserved for persons with benchmark disability as mentioned in section 39; (b) at periodical intervals not exceeding three years, review and revise the list of identified posts, taking into consideration developments in technology.

Section 39. Reservation of Posts for Persons with Benchmark Disabilities:-

(1) Every appropriate Government shall reserve, in every establishment under them, not less than 5% of the vacancies meant to be filled by direct recruitment, for persons or class of persons with benchmark disability, of which 1% each shall be of all posts reserved for persons with following disabilities:-

- i) blindness & low vision (with reservation of 0.5% of the vacancies for each of the two disabilities).
- ii) hearing impairment & speech impairment.
- iii) locomotor disability including cerebral palsy, leprosy cured and muscular dystrophy.
- iv) autism, intellectual disability and mental illness
- v) multiple disabilities from among i to iv above including deaf blindness

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

(2) If sufficient number of qualified persons with benchmark disabilities are not available in a particular year, then the reservation may be carried forward for upto the next three recruitment years, and if in such succeeding recruitment years also a suitable person with benchmark disability is not available, then the post in the fourth year may be first filled by interchange among the categories of disabilities; and only when there is no person with any benchmark disability available for the post in that year, the vacancy may be filled by appointment a person, other than a person with benchmark disability." A perusal of Sections 38 and 39 of the Bill clarifies all the ambiguities raised in this appeal. The intention of the legislature is clearly to reserve in every establishment under the appropriate Government, not less than 3% of the vacancies for the persons or class of persons with disability, of which 1% each shall be reserved for persons suffering from blindness or low vision, hearing impairment and locomotor disability or cerebral palsy in the posts identified for each disability.

36) Admittedly, the Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfill its objective. Besides, it is a settled rule of interpretation that if the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision. In the present case, the plain and unambiguous meaning of Section 33 is that every appropriate Government has to appoint a minimum of 3% vacancies in an establishment out of which 1% each shall be reserved for persons suffering from blindness and low vision,

persons suffering from hearing impairment and persons suffering from locomotor or cerebral palsy.

37) to 50 xxx xxx xxx

Hon'ble Apex Court held as follows :

51) Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) in consistent with the decision rendered by this Court.

52) Further, the reservation for persons with disabilities has nothing to do with the ceiling of 50% and hence, *Indra Sawhney (supra)* is not applicable with respect to the disabled persons.

53) We also reiterate that the decision in *R.K. Sabharwal (supra)* is not applicable to the reservation for the persons with disabilities because in the above said case, the point for consideration was with regard to the implementation of the scheme of reservation for SC, ST & OBC, which is vertical reservation, whereas reservation in favour of persons with disabilities is horizontal. Directions:

54) In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, it is necessary to issue the following directions:

(i) We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29.12.2005 and the subsequent OMs consistent with this Court's Order within three months from the date of passing of this judgment.

(ii) We hereby direct the "appropriate Government" to compute the number of vacancies available in all the "establishments" and further identify the posts for disabled persons within a period of three months from today and implement the same without default.

(iii) The appellant herein shall issue instructions to all the departments/public sector undertakings/Government companies declaring that the non observance of the scheme of reservation for persons with disabilities should be considered as an act of nonobedience and Nodal Officer in department/public sector undertakings/Government companies, responsible for the proper 47 Page 48 strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default."

[vii] The applicants have sought for consideration of their claim in the light of the enumerated decision. They have alleged that the respondents have deprived there in not reserving 3% of the vacancies [1% for OH], against the vacancies notified in 2012 have not computed backlog vacancies of 2010, and therefore, despite recurring qualifying marks, they languish without appointment.

4. In the aforesaid legal backdrop, let us consider the grievance of the present applicants, the facts of the present case and orders under challenge. We noted that pursuant to such directions, it was incumbent upon the authorities to take up the following exercise :

- [1] Compute the total number of vacancies and total strength of each cadre in their establishment ;
- [2] Reserve 3% of the same for persons with disabilities, 1% for each category of disability, Visually Handicapped [VH], Hearing Handicapped [HH], and Orthopedically Handicapped [OH];
- [3] Identify posts suitable for reservation for each of such category;
- [4] Notify such vacancies earmarked for disabled along with other vacancies in non identified posts;
- [5] Fill up the vacancies by way of a recruitment drive;
- [6] Carry forward the unfilled vacancies including that of disabled category etc. to next recruitment year.
- [7] If suitable qualified candidate of one disabled category was not available for appointment in the earlier drive;
- [8] In the next recruitment year, to permit interchange between

other categories or else to fill it up in normal course.

5. For the purpose of comprehending the intention of the respondents, a speaking order dated 17.04.2018 would be useful to quote, to find out whether the respondents acted in the right earnest. It would run thus [emphasis supplied to clarity] :-

"A Notification dated 16.08.2012 being EN No.0112 was issued for recruitment of persons in Pay Band -1, Rs. 5200-20200/- with GP Rs. 1800/- for some specified categories including Persons with Disabilities [PWD] with number of posts to be filled up in Eastern Railway with community-wise and PWD-wise distribution, scale of pay, medical classification etc. In the notification, it was clearly mentioned the number vacancy of OH=13, VH=07 & HH = 12.

The applicant, Sri Amal Sarkar [UR-OH], Roll No.-131109718, applied against OH quota in the said EN No.0112 and came out successful in written test, document verification [DV] and subsequently in Medical Test and ranked 51 in the list of OH quota as per merit position. There was vacancy of 13 posts of OH quota and the applicant was not amongst the topmost candidates to be considered for the said 13 posts.

In the course of recruitment process of EN No.0112, latter a Corrigendum dated 13.09.2013 was issued for inclusion/revision in ST and PWD[VH&HH] categories in EN No.0112 dated 16.08.2012. It was clearly notified that shortfall of vacancies of PWD in VH=97 and HH=101 Nos against EN No.0110 dated 14.12.2010 were included in the notified vacancies of Employment Notice No.0112 dated 16.08.2012.

The carry forward of backlog vacancy of PWD quota in EN No.0110 in subsequent recruitment process of EN No.0112 clearly indicates that the provision of Section 33 and Section 36 of Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation] Act, 1995 has been followed correctly. On completion of recruitment against EN No.0112 there was no vacancy in OH quota.

In the meantime, Hon'ble Supreme Court vide order dated 08.10.2013 [Civil Appeal No. 9096/2013] directed the appropriate Government to issue appropriate order for modifying the OM dated 29.12.2005 in the matter of computation 3% reservation on total number of vacancies in the cadre strength for the persons with disabilities within three months from the order and to implement the same without default. Further, in terms of unambiguous and

unequivocal commitment on behalf of Union of India before the Hon'ble Supreme Court in Contempt Petition No.499/2014 [arising out of Civil Appeal No. 9096/2013], Ministry of Personnel, P.G. and Pension, Deptt. of Personnel and Training, New Delhi vide OM dated 22/25.05.2015 directed for launching of Special Recruitment Drive for filling up of unfilled vacancies of Persons with Disabilities.

Accordingly, Centralized Special Drive [SRD] vide Notification No.CEN No.01/2015 was initiated for filling up of unfilled vacancies of Persons with Disabilities wherein backlog vacancies under VH & HH quota against EN No.0112 was merged. In the said Centralized Notification of SRD, total vacancies of RRC/E.Rly/Kolkata for Eastern Railway was 116 Nos. against OH=0, VH=47 and HH=69.

It is well within the knowledge of you that once Hon'ble Supreme Court had made specific direction for filling up unfilled vacancies of posts for Persons with Disabilities with a time bound manner, there is no scope to deviate from the same.

In view of the above, your representation dated 07.03.2017 does not deserve any consideration otherwise in contravention to Hon'ble Supreme Court's direction.

This is for your information."

6. The applicants have strenuously argued and averred as under :-

[i] that the provisions of Persons with Disabilities Act have been flagrantly violated by the respondents inasmuch as in 2012 recruitment year, 3% of available DR vacancies have not been reserved for the handicapped [VH,OH & HH]in terms of the Persons with Disabilities Act.

They have depicted the figures in the form of a chart as reproduced below :

	Total	UR	SC	ST	OBC	PWD			Remarks
						OH	VH	HH	
16.08.12	4179	1990	716	419	1054	13	7	12	Initial Notification
16.07.14	5847	2227	787	1450	1185	13	104	113	Vacancy changed without any change of the OH status.

According to the applicants, the reservation figures ought to have been the following :-

1.	Notified Vacancies	Enhanced Vacancies	Increased no of Vacancies	% increase
Yr 2012	4179	5847	1668	39.91%

[ii]. As per Section 33 of the Act, minimum 3% of vacancies ought to be reserved for PWD candidates, which turns out of the following :

"PWD candidates out of 5847 (enhanced no. of vacancies)		
	Rounded off	
(A) OH - 1%	58.47	58
VH - 1%	58.47	58
HH - 1%	58.47	58
Total - 3%	175.41	174

Table A

PWD candidates out of 4179 (original no. as notified in E.N.No.0112)		
	Rounded off	
(B) OH - 1%	41.79	41
VH - 1%	41.79	41
HH - 1%	41.79	41
Total-3%	125.37	123

Table -B

As per calculation in table (A)

PWD vacancies for Yr 2012 should have increased from 32 (13+7+12) to 175.41 i.e. 3% of 5847. That means another 143.41 (175.41-32) vacancies should have been added.

As per calculation in table (B)

PWD vacancies for Yr 2012 should have increased from 32 (13+7+12) to 125.37 i.e. 3% of 4179. That means another 93.37 (125.37-32) vacancies should have been added in the E.N.No.0112 dt. 16.08.2012.

In both the cases we should not include the carried over vacancies of 198 (VH - 97+HH-101) for the Yr 2010 as section 36 clearly states that

- Any recruitment year (herein Yr. 2010) any vacancy u/s 33 cannot be filled up due to non-availability of a suitable person with disability or for any other sufficient reason, such vacancy should be carried forward in the succeeding recruitment yr (i.e. Yr2012) and
- if in the succeeding yr (i.e. Yr 2012) also suitable person with disability is not available, it may first be filled by interchange among the 3 categories i.e. OH, VH & HH and
- Only when there is no person with disability available for the post in that Yr (herein Yr 2012), the employer shall fill up the vacancy by appointment of a person, other than a person with disability.

Hence from the above it is clear that the carried over vacancies of 2010 numbering to 198 should not be mixed up with the fresh vacancies of 2012 which should be kept separate.

[iii] "Empanelled PWD candidates 114 Question-what is the segregation/breakup in
between OH, VH & HH out of 114

Unfilled vacancies 116 (230-114)

Notified PWD vacancies out of 4179 vacancies

as per E.No.0112 dt. 168.2012 230 → 97(VH+101(HH) of 2010+32 of 2012

Add 39.91% enhancement increase 91.79

Total 321.79

Rounded off 322

Petitioner was ranked 31st in the merit position of the selection, which according to the above calculation, he easily qualify.

[iv] Carry forward of backlog vacancies of PWD quota were not allowed

to be inter-changed between the 3 categories of VH, HH and OH. The

figures depicted being as follows :

Year		vacancies			Sub Total
2010	Carried over vacancies to 2012 from 2010	OH-Nil,	VH -97	HH-101	198
2012	Notified vacancies vide E. Notice No.0112 dt. 16.08.2012	OH-13	VH-7	HH-12	32
Grand Total		13	104	113	230

[v] "As per Section 36 of the Act – vacancies were 198 which were carried over to 2012 should have been filled up first by inter-se-change amongst OH, VH and HH."

"In both the cases we should not include the carried over vacancies of 198 [VH-97+HH-101] for the year 2010 as Section 36 clearly states that –

[a] Any recruitment year [herein yr. 2010] any vacancy u/s 33 cannot be filled up due to non-availability of a suitability of a suitable person with disability or for any other sufficient reason, such vacancy should be carried forward in the succeeding recruitment yr. [i.e. yr 2012] and

[b] If in the succeeding yr. [i.e. yr. 2012] also suitable person with disability is not available, it may first be filled by interchange among the 3 categories, i.e. OH, VH & HH and

[c] Only when there is no person with disability available for the post in that Yr [herein Yr. 2012], the employer shall fill up the vacancy by appointment of a person, other than a person with disability. Hence from the above it is clear that the carried over vacancies of 2010 numbering to 198 should not be mixed up with the fresh vacancies of 2012 which should be kept separate.

3 Empanelled PWD 114 Question-what is the segregation/breakup in between OH, VH & HH out of 114.

Unfilled vacancies 116 [230-114]

Notified PWD vacancies out of 4179 vacancies as per E. No.0112 dt.

16.8.2012 -230 -97(VH) of 2010 + 32 of 2012.

Add 39.91% enhancement increase	-	91.79
Total	-	321.79
Rounded Off	-	322

Petitioner was ranked 21st in the merit position of the selection, which according to the above calculation, he easily qualify."

[vi] If appropriate number of vacancies [3% of total] were earmarked for PWD candidates for the recruitment year 2012 and backlog vacancies of recruitment year 2010 [198] was allowed switching over to other categories, the applicants would be adjusted against that.

The applicants have further argued that having not allowed the backlog vacancies [198] of 2010 petitioners to be included in 2012 for switching over of quota or interchange of disability category between VH, OH, HH, in case sufficiently qualified candidate of a particular category was not available even in 2012, the respondents were guilty of blatant violation of provisions of Persons with Disability Act as envisaged in Section 32, 33 etc. as enumerated supra.

7. In course of hearing, respondents were directed to clarify the following positions :-

- [i] Why 3% PWD Quota [1% OH, 1% VH & 1% HH] were not reserved for Notification No. 0112 in terms of Section 33 of P.D. Act.
- [ii] and why switching over of quota between OH, VH and HH was not permitted when sufficient number of candidates of any one category was not available.

8. In response, the respondents have submitted as under:

..“It is to mention wherewith that in EN No. 0112, there were total 4179 nos. notified vacancies, out of 4179 notified vacancies, PWD vacancies were only 32 [OH-13, VH-7 and HH-12] whereas the 3% of 4179 should be 125 instead of 32. Hence, the shortfall comes [125-32]=93 nos. The 3% reservation of PWD vacancies is as per DOPT’s Office Memorandum No. 36033/3/2004-Estt[Res] dated 29.12.2005.”

The respondents have thus emphatically admitted the fact of having reserved posts for disabled much less than the required minimum of 3%.

Further, they have clarified the reasons behind conducting recruitment under CEN 1/15 –SRD- PWD which is reproduced hereunder:

Dt. 16/08/12	Notification vide No. 0112 was published wherein, vacancy position of PWD candidates is as under:			
	NOTIFIED VACANCY	Carry forwarded From E.N. No.	Total	FILLED
	OH = 13	Nil	13	13
	VH = 07	97	104	57
	HH = 12	101	133	44
	Total = 32	198	230	114
Dt. 25.05.15	Office Memorandum was issued by Ministry of Personnel, P.G. & Pensions Department of Personnel & Training. In contempt petition No. 499/2014 in Civil Appeal No. 9096/2013, wherein target was sent with calendar.			

9. From the clarification supra, the following admitted position emerged :

- [i] Inarguably and indubitably, 3% of total 4179 Direct Recruitment vacancies of 2012 recruitment year were not reserved for the disabled. Instead of reserving 3% of 4179 which comes to 125, the respondents admittedly reserved only 32 which was far less than the required minimum of 3%. Deliberate violation of the

Act and 3% arbitrary deprivation of 93 PWD (disabled) candidate of their right to employment is apparent.

[ii] Further, 198 backlog reserved vacancies of 2010 notification were subsequently, vide corrigendum dated 13.09.2013, included in 2012 notification i.e. to the subsequent recruitment year. Out of such 198+32 [notified in 2012], 114 vacancies were filled up. Rest 116 vacancies could not be filled up (as per chart supra) due to non-availability of suitable candidates of a particular disabled category [OH], yet interchange between three categories of disability VH, HH and OH was not permitted. Violation of mandatory provision of the Act and Deprivation of disabled person is yet again palpable.

[iii] If such interchange was permitted in 2012 itself the present applicants, who belong to OH category, under 2012 notification could have been adjusted against such 116 vacancies. They were therefore arbitrarily and unreasonably and illegally deprived of appointment.

[v] Instead of permitting such interchange what the respondents resorted to in purported compliance of the DOPT OM was that in 2015 vide notification numbered "CEN-01/2015" they advertised 49 VH AND 69 HH of backlog vacancies of 2010 and 2012, totalling 116, in the disabled category. Violation of extant provisions of Section 33 & 36 of Persons with Disabilities Act is thus clearly and evidently established.

10. We noted that in 2012, the available disabled candidates of OH category was sufficiently higher than that of HH and VH. The OH were deprived since backlog vacancies of 2010 and beyond were not calculated properly and included in the notification of 2012. Sufficiently higher number of such OH candidates who

had cleared the written test, were suitable for appointment. They were deprived due to erroneous computation of vacancies of 2010 and 2012 and carry forward of 2010 vacancies to 2015 notification without permitting interchange of categories in 2012 itself, as already enumerated supra.

11. Upon a bare perusal of 2012 notification, we noticed and much to our utter surprise, that the respondents in the manner they categorized each vacancy as suitable for disabled, have not maintained any general standard or followed any general principle or rule. They have acted rather waywardly. For ^{eq. P} hearing while including 4, 2 and 4 posts under OH, VH AND HH categories respectively for Helper-II/Khalasi, out of available 539 [way below 3% of total] and 2, 0, 2 for OH, VH or HH respectively for Store Khalasi, Peon, Sweeper, Safaiwala of Mechanical Department, they completely excluded posts such as Helper-II/Khalasi of S&T Department as well as Safaiwala, waiting room bearer, Peon, Parcel Porter, Station Peon of Commercial Department, from being brought under the purview of PWD Act, which classification appears to be without any justification rhyme or reason. Again they have, out of available 1983 vacancies, reserved only 5 – (2 OH, 2 VH and 1 HH) vacancies for Trackman/Khalasi/Valve man of Engineering Department, which jobs are sufficiently onerous, whereas excluded Cook, Peon, Helper of Engineering and operating department and, Safaiwala of Medical Department from the purview of PWD Act, and thus reserved only 32 posts out of available 4179 [computed earlier] for reservation. To us, such acts and ^{actions} achieves of the respondents is a glaring example of administrative highhandedness, arbitrariness and discrimination, and amounts to deprivation of hapless disabled in deliberate and conscious violation of provisions of PWD Act rendering

themselves liable to be prosecuted for such deliberate and non observation of the scheme of reservation.

12. In 2015, the respondents have perpetuated the same error by not computing the total strength of each cadre, reserving 3% thereof, identifying posts for disabled and notifying them accordingly. The respondents have simply initiated a special recruitment drive for fresh disabled candidates depriving the orthopedically disabled (OH category) candidates of 2012 notification by denying them appointment.

13. In aforesaid backdrop, we feel there is sufficient force in the arguments advanced on behalf of the present applicants. However, since 2015 notification has been floated already and is under way not yet concluded and normal vacancies (other than disabled quota vacancies) of 2012 notification has been exhausted, it would be iniquitous to scrap the selection altogether. Under such circumstances and in the backdrop elucidated supra, and in terms of the cited decision and the PWD Act we direct the respondent authorities to undertake the following exercise :

1. [i] Compute total cadre strength in all its establishments for the purpose of compliance of Section 33 of the Act.
- [ii] Reserved 3% of the same for persons or class of persons with disabilities under the following categories :
 - (i) Blindness or low vision or visually handicapped or VH
 - (ii) Hearing impaired (hearing handicapped or HH)
 - (iii) Loco motor disability (orthopedically handicapped or OH) or cerebral palsy, in obedience to Section 33 of the Act

[iii] identify the posts suitable for disabled persons, in compliance of Section 32 of the Act and para 54 of the judgment supra DOPT OM dated 29.12.05 within three months, for the next recruitment drive.

2. In compliance of Section 39 of the Act, (i) Grant suitable switching over or interchange between three categories of disabilities (VH, OH OR HH) against 116 unfilled disability quota vacancies of 2012 notification out of available 230 vacancies [198 of 2010 and 32 of 2012] of disability quota.

[iii] And, thereafter publish the merit list of disability quota candidates of 2012 notification within two months while including all such disabled candidates of 2012 notification who qualified in terms of minimum merit but have been arbitrarily left out and deprived.

3. Only upon completion of the aforesaid exercise, to proceed with the subsequent notification of 2015 and for the purpose, the respondents may issue corrigendum to exclude equal number of vacancies of disability quota from the purview of 2015 notification which have to be filled up in terms of para 2 above.

14. Let appropriate orders be issued within three months from the date of communication of this order. No costs.

[Dr. Nandita Chatterjee]
Member (Admn.)

[Bidisha Banerjee]
Member (Judicial)

mps/-