

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No.180/00031/2015

Monday this the 10th day of December, 2018

C O R A M :

HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER

HON'BLE Mr.ASHISH KALIA, JUDICIAL MEMBER

1. Brigit Telma Semondi, W/o Lionel Noronha,
Multi-Tasking Staff (Ministerial), Headquarters,
Southern Naval Command, Cochin – 682 004.
Residing at: “NEIL COTTAGE”, Peruveli Parambil,
Eroor South, Tripunithura P.O.,
Ernakulam District PIN : 682 301.
2. P.X.Elizabeth,
W/o P.D.Antony,
Multi-Tasking Staff (Ministerial), INS Garuda,
Southern Naval Command, Cochin-682 004.
Residing at: Peedikachira House,
Thannikkal Junction, Elamakkara P.O.,
Ernakulam District.

....Applicants

(By Advocate Mr.T.C.Govindaswamy)

v e r s u s

1. The Union of India,
represented by the Secretary to the
Government of India,
Ministry of Defence (Navy),
South Block,
New Delhi – 110 001.
2. The Chief of the Naval Staff,
Integrated Headquarters,
Ministry of Defence (Navy),
Directorate of Civilian Personnel,
D-II Wing, Sena Bhavan,
New Delhi – 110 011.

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3. The Flag Officer Commanding-in-Chief,
Headquarters Southern Naval Command,
Naval Base, Cochin – 682 004. ...Respondents

(By Advocate Mr.N.Anil Kumar, SCGSC)

This application having been heard on 28th November 2018, the Tribunal on 10th December, 2018 delivered the following :

ORDER

Per : HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER

O.A.No.180/31/2015 is filed by two applicants who are presently working as Multi Tasking Staff (MTS). The first applicant is physically handicapped with 75% disability and the second applicant with 60% disability. They are aggrieved by the failure on the part of the respondents to reserve 3% of the vacancies in the promotional post of Lower Division Clerk (LDC) for persons with disabilities and their consequent failure to consider the applicants for promotion. The reliefs sought in the O.A are as follows :

1. Declare that the non-feasance on the part of the respondents to reserve 3% of the vacancies in the cadre of Lower Division Clerk under the 3rd respondent for promotion of the persons with disability as provided for in Section 33 of the Act 1995 is arbitrary, discriminatory, contrary to law and unconstitutional.
2. Direct the respondents to reserve 3% of the vacancies in the cadre of Lower Division Clerks under the 3rd respondent for promotion of persons with disability and direct further to consider the applicants for such promotion with all consequential benefits with effect from the 1st day of April of the year in which the vacancy against the 3% quota above mentioned arose after 29.12.2005.
3. Award costs of and incidental to this application.
4. Pass such other orders or directions as deemed just fit and necessary in the facts and circumstances of the case.

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2. The two applicants who were appointed on 28.11.1997 and 19.2.1998 respectively, possessed required qualifications for promotion as LDC. According to rules relating to recruitment to the post of LDC promulgated in SRO.80 dated 13.12.2011, a copy of which is at Annexure A-1, the following is the various ratios for induction :

Promotion :

- (i) 85% by direct recruitment.
- (ii) 10% by promotion from amongst Group 'C' employees in the Grade Pay of Rs.1800 and who possess 12th class pass or equivalent qualification and have rendered three years regular service in the grade and pass the typing test as provided in Column 7.
- (iii) 5% by promotion of Group 'C' employees with three years regular service in posts with Grade Pay of Rs.1800/- on the basis of seniority-cum-fitness.

3. As is seen in the category for Group 'C' employees possessing three years regular service in posts with Grade Pay of Rs.1800/- 5% of the vacancies of LDC are to be made on the basis of 'seniority-cum-fitness'.

4. The applicants submit that Section 33 and Section 41 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 provide as follows :

“33. Reservation of Posts :

Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons for class of persons with disabilities of which one percent each shall be reserved for persons suffering from -

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- (i) blindness or low vision;
- (ii) hearing impairment;
- (iii) locomotor disability or cerebral palsy,
in the post 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, except any establishment from the provisions of this section."

"41. Incentives to employers to ensure five per cent of the work force is composed of persons with disabilities:

The appropriate Governments and the local authorities shall, within the limits of their economic capacity and development, provide incentives to employers both public and private sectors to ensure that the least five per cent, of their work force is composed of persons with disabilities".

5. Quoting from the decision of the Hon'ble Supreme Court in **Union of India & Anr. v. National Federation of the Blind & Ors.** reported in **(2013) 10 SCC 772** it had been decreed that 3% of the vacancies are to be reserved for persons with disabilities. The said judgment directed the Government of India to modify its existing instructions. The same view was taken by the Hon'ble High Court of Judicature at Bombay after considering the decision in **Union of India & Anr. v. National Federation of the Blind & Ors.** and directed the Government to grant the benefit of reservation to persons with disabilities in the matter of promotion to posts in the Indian Administrative Service (IAS) by applying Office Memorandum dated 29th December 2005 and subsequent O.M consistent with the judgment of the Hon'ble Apex Court already referred to above.

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6. In the light of the judgment of the Hon'ble High Court of Judicature at Bombay at Annexure A-4 being upheld by the Hon'ble Apex Court in S.L.P. (CC) No.13344/2014 by order dated 12.9.2014 the issue relating to the 3% of vacancies in the entire cadre being reserved for persons with disabilities had attained finality. However, the respondents have failed to adhere to the directions contained in the O.Ms referred to. In terms of Section 33 read with Section 41 of the Disabilities Act, 1995 the respondents are bound to reserve 3% of the vacancies in the category of LDC for promotion of persons with disability. The applicants claim that they are the senior most eligible persons to be considered for promotion and yet it is being denied to them. The quoted judgments uphold the noble intent and principles behind the reservation for persons with disabilities. The Act itself was enacted for the purpose of bringing our less fortunate brethren into the mainstream. But the non-feasance on the part of the respondents is standing in the way of the applicants achieving the benefits which is theirs' by right.

7. The respondents have filed a detailed reply statement wherein it is maintained that 3% reservation for physically handicapped persons in Group 'C' is to be computed on the basis of total number of vacancies occurring in all Group 'C' posts. These include the selection under direct recruitment for 85% as well as for the 10% who are selected through competitive examination. The applicants did not apply under the 10% quota and did not appear for the competitive examination. The respondents state that their

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idea of extending reservation for physically handicapped persons is to select one person for every 33 point ie. 01 to 33, 34 to 66 and 67 to 100 as per roster who will be eligible to be promoted under the said quota. Neither of the applicants have reached the said points and they being at lower position in the seniority list of MTS, are not eligible to seek the 3% reservation quota.

8. The respondents maintain that there has been no violation of the principles enunciated under the Disabilities Act, 1995 and the applicants could not be considered for promotion in the normal course as the individuals do not come under the panel of eligible candidates as they do not possess requisite seniority. The relative position of the applicants in the draft seniority list of MTS is at Sl.Nos.338 and 361 respectively. Although no separate seniority for physically handicapped personnel is maintained, the relative position of the applicants in the physically handicapped list would be Sl.Nos.13 and 14 respectively and since candidates senior to the applicants have already been promoted, the applicants could not be considered for the same. It is maintained that 5% quota for promotion under 'fitness cum seniority' basis is being applied and the applicants will be considered when their turn comes.

9. In the second reply statement filed on behalf of the respondents it is stated that in Group 'C' posts utilizing 3% quota for physically handicapped, promotions depend on three factors :

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- (i) Availability of identified posts for promotion under physically handicapped quota.
- (ii) Availability of qualified candidates satisfying the prescribed eligibility criteria.
- (iii) Availability of candidates with requisite seniority to be included in the zone of consideration.

10. They aver that in the absence of identified posts and eligible candidates in a particular post, it is not feasible to exhaust the 3% quota for physically handicapped category.

11. Heard Shri.T.C.Govindaswamy, learned counsel for the applicants and Shri.N.Anilkumar, learned SCGSC for the respondents. All pleadings, documentary and oral, are examined.

12. It was with the noble intention of providing much needed means of livelihood to physically handicapped persons that the Disabilities Act, 1995 was promulgated. Putting the enshrined principles into practice, Section 33 of the Act made it mandatory that not less than 3% of the vacancies in every establishment is to be kept reserved for class of persons with disability. Due to tardy implementation of the provisions of the said legislation, the affected were compelled to approach judicial fora seeking redressal. The Hon'ble Apex Court in the Union of India & Anr. v. National Federation of the Blind & Ors. (supra) after careful consideration of the issues at hand decided as follows :

“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 29th December 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.”

(emphasis supplied)

13. The Hon'ble Apex Court went on to prescribe the following modalities by which the decision will be implemented :

“(i) We hereby direct the appellant herein to issue an appropriate order modifying the OM dated 29.12.2005 and the subsequent O.Ms 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 non-obedience and Nodal Officer in department/public sector undertakings/Government companies, responsible for the proper strict implementation of reservation for person with disabilities, be departmentally proceeded against for the default.”

14. Following this order, the Hon'ble High Court of Judicature at Bombay through its judgment at Annexure A-4 directed the Government to give benefits of reservation to persons with disabilities in the matter of promotion to posts in the IAS by applying the Office Memorandum dated 29th December 2005 and the subsequent O.M dated 8th October 2013.

15. Hon'ble Apex Court in its seminal judgment in **Rajeev Kumar Gupta & Ors. v. Union of India & Ors. in Writ Petition (Civil) No.521 of 2008** stated as follows :

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.

16. This is followed by a clear direction as below :

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.

17. Thus what the respondents are called upon to do is to identify posts computing 3% reservation on total number of vacancies in the cadre strength and assign the same for appointment/promotion to physically handicapped persons. The reply of the respondents is inadequate from this point of view. They appear to be confused on the issue and by keeping one post reserved for every 33 roster point, they hope to fulfill the reservation quota. At the same time, they also mention the need for competition as a requirement for

promotion. But promotion on competition basis is relevant only for the first two categories of direct recruitment amounting to 85% and promotion quota of 10%. In the case of 5% quota 'seniority-cum-fitness' are the factors which are relevant and in this category there should be no difficulty in assigning physically handicapped persons.

18. The respondents are required to identify 3% of the vacancies in each cadre to be kept apart for physically handicapped persons and this they have not done. To argue that the applicants are at lower position in the seniority list and do not come under the zone of consideration is a specious argument and would not be relevant when we consider the reservation issue. It is stated that seniors to the applicants are occupying the promoted post. But there is no clarity whether they are persons with physical disabilities. Clearly no identification of posts have been made and no action in pursuance to the Hon'ble Apex Court order has been made by the department/s in the respondent organization. Interestingly no data relating to what percentage of the total vacancies have been utilized for physically handicapped persons has also been provided.

19. The provisions of the Disabilities Act, 1995 and the judgments cited are clear and unequivocal. The respondents are required to reserve 3% of the vacancies in the cadre of LDC under the 3rd respondent for promotion of persons with disability and take action accordingly. We would not comment

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on the eligibility of the particular applicants because we do not know how many persons above them in the seniority would qualify for the reservation quota as persons with disabilities. First and foremost it would be necessary for the respondent organization to identify the number of posts that arose after the issuance of the O.M on the subject on 29.12.2005. Then the eligible persons will have to be slotted against vacancies for various years as per their seniority among persons with disabilities. The entire process should be completed within 6 months from the date of receipt of a copy of this order. The O.A is disposed of with the above directions. No order as to costs.

(Dated this the 10th day of December 2018).

(ASHISH KALIA)
JUDICIAL MEMBER

(E.K.BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

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List of Annexures in O.A. No.180/00031/2015

1. **Annexure A1** – True copy of SRO.80 dated 13.12.2011 published in Gazette of India dated 24 December 2011 Part II Sec.4.
 2. **Annexure A2** – True copy of representation dated nil Sep 2012 submitted by the 2nd applicant.
 3. **Annexure A3** – True copy of letter bearing No.CP(NG)/2853/ARP dated 21 Sep 2012 issued from the office of the 2nd respondent.
 4. **Annexure A4** – True copy of the judgment dated 04 Dec 2013 in Public interest Litigation No.106/2010 rendered by the Hon'ble High Court of Judicature at Bombay.
 5. **Annexure A5** – True copy of the order dated 12.09.2014 in SLP(CC) No.13344/2014 rendered by the Hon'ble Apex Court as downloaded from the website of the Hon'ble Supreme Court of India.
 6. **Annexure R1** – Details of individuals promoted in PH category.
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