

HIGH COURT OF DELHI (D.B.)

UNION OF INDIA

V/S

PANKAJ KUMAR SRIVASTAVA & ANR

Date of Decision: 11 October 2013

Citation: 2013 LawSuit(Del) 4037

Hon'ble Judges: Pradeep Nandrajog, V Kameswar Rao

Case Type: Writ Petition (Civil)

Case No: 4902 of 2013**Acts Referred:**Persons With Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 Sec 32, Sec 33Civil Services Examination Rules, 1996 R 6, R 4Advocates: Saqib, C Harishankar, S Sunil, Naresh Kaushik, Aditi Gupta, S K Rungta, Prashant Singh, Pratiti Rungta, Smita Jain**CASES REFERRED :**RITESH R.SAH VS. DR.Y.LYAMUL & ORS, 1996 3 SCC 253R.K.SABBARWAL VS. STATE OF PUNJAB, 1995 2 SCC 745INDRA SAWHNEY VS. UNION OF INDIA, 1992 Supp3 SCC 217**Judgement Text:-**

Pradeep Nandrajog, J

[1] At a meeting convened in Beijing in December 19, 1992 by the Economic and Social Commission for Asian and Pacific Region to launch the Asian and Pacific Decade of Disabled Persons a proclamation was adopted on the Full Participation and Equality of People with Disabilities. Being a signatory to the said proclamation, discharging its obligation to enact a suitable legislation the Parliament of India accorded approval to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Bill, 1995 and with the presidential assent being accorded on January 01, 1996, with effect from February 07, 1996 the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 came into force. The various provisions of the Act spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; and we are concerned with the subject of employment of the differently abled persons.

[2] The present writ petition has been filed by the Union of India through the Secretary, Department of Personnel and Training (DOPT), Ministry of Personnel Public Grievances and Pension, assailing the order dated May 30, 2012 passed by the Central Administrative Tribunal, Principal Bench disposing of OA No.3943/2011 and three other connected Original Applications. The relief claimed in the said Original

Application and the connected Original Applications primarily pertained to issuance of directions to appoint the applicants thereof to the Indian Administrative Service or any other Civil Service based on their rank in the merit list prepared against reserved vacancies, for the persons suffering from blindness or low vision in respect of CSE 2008, by taking into account both the vacancies filled by CSE 2008 as well as backlog vacancies in terms of OM No.36035/3/2004-Estt. (Res.) dated December 29, 2005 and OM No.36035/8/2003-Estt. (Res.) dated April 26, 2006, keeping in view the decision rendered by the Supreme Court in SLP (Civil) No.14889/2009 as well as directions issued in OA No.2402/2009 pertaining to implementation of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 with all consequential benefits. The said Original Applications came to be decided by the order impugned, noting the main contentions of the applicants, as under:-

"That the Commission only recommended four persons to be selected, but it has not been mentioned that they have been selected, against reservation quota or against their own merit. That five candidates ought to have been selected on their own merits belonging to visually impaired category, and the applicant ought to have been selected against a reserved vacancy."

[3] The Tribunal has disregarded the contention of the writ petitioner that allowing the facility of scribe and extra time to attempt the exam was a relaxation and has held that in its view the said fact does not amount to availing a relaxed standard. The Original Application has been allowed directing as under:-

"The OA is allowed. The respondent No.1, UPSC, is directed to undertake the exercise in order to decide that in the CSE 2008 and other examinations how many candidates on the basis of their ranking deserve to be selected on their own merits, and they must be adjusted against unreserved vacancies on their own merits as provided in the Office Memorandum dated 29.12.2005, and thereafter rest of the candidates belonging to visually impaired category must be selected against reserved category, and if the applicants are to be selected against reserved category, then they must be given appointment. The respondents shall undertake this exercise within a period of three months from today. There shall be no order as to costs."

[4] Before advertng to the grounds raised in the writ petition, we would like to note the evolution of principle of selection on general merit which was, for the first time considered by the Supreme Court in the decision reported as Indra Sawhney Vs. Union of India, 1992 Supp3 SCC 217 wherein it was held in para 811 as under:-

"811.it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

[5] The principle stated in the observation quoted above, has further been noted with approval and reiterated in the decisions of the Supreme Court reported as R.K.Sabbarwal Vs. State of Punjab, 1995 2 SCC 745 Ritesh R.Sah Vs. Dr.Y.L.Yamul & Ors, 1996 3 SCC 253.

[6] The said principle came to be incorporated in respect of reservations in favour of differently abled persons in Office Memorandum dated December 29, 2005 which consolidated instructions for the implementation of the scheme of reservation as contained in Section 33 of the Persons with Disabilities (Equal Opportunity) Act, 1995, the relevant extract from the said Office Memorandum states as under:-

"7. ADJUSTMENT OF CANDIDATES SELECTED ON THEIR OWN MERIT: Persons with disabilities selected on their own merit without relaxed standards along with other candidates, will not be adjusted against the reserved share of vacancies. The reserved vacancies will be filled up separately from amongst the eligible candidates with disabilities which will thus compromise

physically handicapped candidates who are lower in merit than the last candidate in merit list but otherwise found suitable. For appointment, if necessary, by relaxed standards. It will apply in case of direct recruitment as well as promotion, wherever reservation for persons with disabilities is admissible."

[7] The aforesaid clause of the consolidated instructions came to be further clarified vide Office Memorandum dated April 26, 2006, para 3 whereof reads as under:

"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 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 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 as holding a common examination."

[8] Before us the following broad contentions have been raised:-

i) The principle of general merit as evolved by the judicial pronouncements and incorporated in the OM dated December 29, 2005 is incapable of application in respect of PH Category as the medical standards are incapable of being relaxed for application of the said principle.

ii) The principle is unworkable in the scenario of reservation in favour of differently abled persons.

iii) The term relaxed standard has not been defined in case of persons with disability and no illustration of relaxed standards as given in respect of SC/ST have been provided in case of person with disability.

iv) A PWD candidate who would fail medical examination would not be adjusted against the unreserved vacancy and could not be counted on merits. If medical requirements are not relaxed it would not be possible to allocate service to the persons with disability.

v) If for the sake of arguments the interpretation of relaxed standard given by the Tribunal is accepted and applied the same would have serious ramifications not only with respect to CSE 2008 also to other CSE years and result in unsettling of many settled issues.

vi) A PH category candidate cannot be a general merit candidates because at least he has to avail one or the other relaxation in the medical parameters.

[9] Sh.Saqib, learned counsel for the petitioner urged that the CSE is conducted on the basis of the rules framed by the petitioner, the said rules have not been challenged and there being no mechanism provided in the said rules to work out the application of the principle of general merit, physically disabled persons can be appointed only against posts identified to be filled up by said class of persons.

[10] Sh.Naresh Kaushik, Advocate who appeared on behalf of the UPSC has chosen not to file a separate reply and sought to reiterate the contentions raised before the Tribunal. The principle contention urged by Sh.Naresh Kaushik, Advocate was to the effect that the UPSC was not in a position to make any recommendations based on the principles propounded by the applicants before the Tribunal in the absence of operational mechanism incorporated in the relevant Rule i.e. Rule 17 of the Rules. The said Rule 17 reads as under:-

"17. The minimum qualifying marks as specified under rule 15 and 16 may be relaxable at the discretion of the Commission in favour of physically handicapped candidates in order to fill the vacancies reserved for them:

Provided that where a physically handicapped candidate obtains the minimum qualifying marks in his own merit in the requisite number for General, or the Scheduled Caste or the Scheduled Tribe or other Backward Class category candidates, then, the extra physically handicapped candidates, i.e., more than the number of vacancies reserved for them shall be recommended by the Commission on the relaxed standards and consequential amendments in the rules will be notified in due course."

[11] Learned counsel placed emphasis on the last line of the said rule which states that consequential amendments in the rules will be notified in due course and would urge that it was for the Government to notify the relaxed standards by amending the Rules.

[12] The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was enacted by the Parliament in the backdrop of the proclamation on full participation and equality of people with disabilities in the Asian and Pacific Region which was adopted by the Economic and Social Commission for Asian and Pacific Region in the meeting held on 1st to 5th December, 1992 to launch the Asian and Pacific decade of disabled persons 1993-2002, India being a signatory to the above said proclamation. The Act was enacted with the statement of objects and reasons as follows:-

"i) To spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

ii) to create barrier free environment for persons with disabilities;

iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis non-disabled persons;

iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

vi) to make special provision of the integration of persons with disabilities into the social mainstream."

[13] Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which constitutes the nub of the Act on the subject of employment, reads as under:-

"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 of cerebral palsy, in the posts identified for each disability;

Provided that the appropriate Government may, having regard to the type of work carried or 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."

[14] Sadly and unfortunately, we note, that the implementation of the Act, which was enacted to achieve a salutary object, has not been kept in proper prospective by the bureaucratic set-up and there has been serious slackness on the part of the concerned departments in ensuring smooth flow of the benefits to the deserving category. So much so, the benefit of reservation of 3% to the differently abled categories could be made available only after the decision by the Supreme Court in the decision rendered in SLP (Civil) 14899/2009 Ravi Prakash Gupta Vs. Union of India decided on July 07, 2010. The relevant extract whereof reads as under:-

"17. 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."

[15] The short point for consideration which therefore arises in the present writ petition pertains to the entitlement of the applicants before the Tribunal, for being considered against the vacancies, which become available on application of the principle of general merit. There cannot be two opinions about the applicability of the said principle in the light of the Office Memorandum dated December 29, 2005 and April 26, 2006 issued by the petitioner itself. The same is the situation reflected in the mandate under Rule 17 of the CSE Rules 2008 noted above. Thus it is not possible for the petitioner to contend before us that there is an error in the order of the Tribunal in issuing directions to consider the entitlement of the applicants on the basis of said principle. We affirm the view taken by the Tribunal with regard to its observation that grant of the facility of scribe and extra time of 30 minutes in the examination to the visually impaired candidates does not amount to relaxation of standards in their favour.

[16] The non-fulfilment of the medical standard prescribed for the general candidates by the physically handicapped candidates as per the CSE Rules has not been debated before the Tribunal and there is no finding in respect thereof. However, as pointed out by Sh.Naresh Kaushik, learned counsel for the UPSC, the petitioner i.e. the Union of India has not issued the consequential amendments contemplated by Rule 17 for

reasons best known. (Shear lethargy of the executive). The omission on the part of the executive i.e. DOPT which is the Nodal Department to issue Office Memorandum/Executive Instructions on matters pertaining to the Central Service has created a situation wherein the benefit is sought to be given on the one hand through the issuance of Office Memorandum(s) dated December 29, 2005 and April 26, 2006, and stands taken away by the other hand as a result of the inaction to issue the consequential amendment contemplated by Rule 17 of the CSE Rules, 2008.

[17] We are constrained to observe that the petitioner has been remiss in this regard and has itself caused a situation, whereby the entitlements which ought to have been available to the differently abled persons as early as on February 07, 1996 (the date of the commencement of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) are being denied to them till today. The situation points out to a grim scenario which is the creation of the petitioner itself. It is pointed out at the cost of repetition that the realization of the rights in favour of the differently abled persons has to pass through similar obstacles which had to be removed by the Courts of law through the judgment in Ravi Prakash Gupta's case. Be that as it may, the benefit of omission on the part of the petitioner cannot be allowed to go in the favour of the petitioner for the purpose of assailing the impugned order of the Tribunal. Instead, the petitioner ought to have taken necessary steps to issue consequential amendments to fully operationalise the Rules by incorporating the principle of general merit for the purpose of making available the advantage to the differently abled persons resulting from their success in the exam on the basis of general merit. In the absence of an operational provision as contemplated by Rule 17, it is not feasible for the UPSC to make recommendations on the basis of the said principle, since the UPSC has to conduct the examination and make its recommendations on the basis of rules notified by the petitioner itself. However, the petitioner would be obliged to devise a mechanism to give effect to the law. We reiterate. The petitioner cannot raise any grievance which emanates as a result of inaction by the petitioner itself.

[18] Under the circumstances, we do not find any error in the impugned order passed by the Tribunal, and we affirm the same. But, in the light of the fact that the consequential amendment in Rule 17 has not been issued by the petitioner we direct that the needful be done by the petitioner expeditiously and in any event not later than within four months from the date of this decision. We also direct the petitioner to apply its mind with regard to the fulfilment of the medical standards by the differently abled persons and issue appropriate guidelines in this regard, since Sh.S.K.Rungta, learned senior counsel appearing for the party impleaded had pointed out that the physical standards to be fulfilled by the differently abled persons have to be laid down separately and the medical standard for the general candidates cannot be made applicable to them.

[19] Since the matter pertains to a very important issue concerning differently abled persons who have struggled to avail equal opportunities in the matter of employment, we are constrained to direct the Secretary DOPT to personally oversee the exercise with required seriousness and urgency to ensure that the persons of the differently abled category are not unduly deprived the benefits which have been made available to them under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

[20] On the subject of whether the applicants before the Tribunal who were allowed a scribe and were provided 30 minutes extra time to write the paper were granted the benefit of a relaxed standard, we find that the CSE Rules provide as to what would constitute the relaxed standards and they are:- (i) Additional number of attempts allowed to certain reserved categories including persons suffering with disabilities in terms of Rule 4 of Civil Service Examination Rules; (ii) Relaxation in upper age limit in terms of Rule 6 of Civil Service Examination Rules; and (iii) Relaxation of minimum qualifying marks for persons with disabilities as prescribed in Rules 15 & 16 for persons with disabilities. Thus, the Rule itself envisages that allowing a scribe and providing extra time for writing the answers would not be amounting to availing a relaxed standard. This being so, the very foundation of the challenge has no peg to anchor itself on to.

[21] No costs.