

(2013) 12 DEL CK 0076

In the Delhi High Court

Case No : Writ Petition (C) 1546 of 2013

All India Institute of Medical Sciences

APPELLANT

Vs

Dillip Kumar Samal and Another

RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 39A, 41
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(a), 31, 32, 32(a), 33

Citation : (2013) 12 DEL CK 0076

Hon'ble Judges : V. Kameswar Rao, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Mukul Gupta, Ms. Anjali Chauhan and Mr. Rishab Kaushik, for AIIMS Mr. Vinay Kumar Garg, Amicus Curiae, for the Appellant; Yakesh Anand, Advocate, Ms. Sonam Anand, Murari Kumar, Nimit Mathur, Advocates for R-1 and Mr. Akshay Chandra, Advocate for R-3, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—Keeping in view the importance of the issues which arose for consideration in the writ petition we had appointed Mr. Vinay Kumar Garg, Advocate as the Amicus Curiae and at the outset we place on record our appreciation for the inputs given by learned Amicus which have helped us in seeing through the cobwebs; not to belittle the able arguments advanced by the learned Senior Counsel who appeared for the petitioner as also learned counsel who appeared for respondent No. 1. On May 10, 2012 the petitioner, All India Institute of Medical Sciences ("AIIMS" for short), invited applications for the posts of Sr. Residents/Sr. Demonstrators in different disciplines, to be filled up ad-hoc basis, for a tenure period as per Government of India Resider Scheme. The advertisement, inter-alia, reads as under:-

ALL INDIA INSTITUTE OF MEDICAL SCIENCES ANSARI NAGAR, NEW DELHI-110029.

F. No. 13-6/2011/Acad.I (SR-July-2012)

Dated 10.05.2012

Subject: Recruitment to the posts of Senior Residents/Senior Demonstrators on adhoc basis for the tenure period as per Govt. of India's Residency Scheme for the July Sessions" 2012 at the AIIMS, New Delhi.

The online applications are invited from Indian citizens, as per Govt. of India's Residency Scheme, for the following posts of Senior Residents/Demonstrators (including Backlog vacancies) on adhoc basis for the tenure period, which will become available till 31.12.2012.

Last date for applying to the post of Senior Residents/Demonstration online will be 30th May, 2012 (by 1700 hrs)

(UPPER AGE LIMIT (AS ON 30.06.2012)

(i) Senior Resident and Senior Demonstrators 33 years, relaxable for SC/ST candidate upto for SC/ST candidate upto a maximum period of five years, in the case of OBC candidates upto a maximum period of three years". In the case of Orthopedic Physical Handicapped (OPH) candidates upto maximum period of 5 years for General Category, 8 years for OBC category and 10 years for SC/ST category candidates.

(ii) 35 years for those who are appointed as Senior Residents after completing DM/M.Ch. Courses. The age limit is relaxable by 5 years for SC/ST candidates and 3 years for OBC candidates.

RESERVATION

A)

B) Orthopedic Physically Handicapped (3%)

For Indian National 3% reservations for orthopedic physically handicapped shall be provided on horizontal basis, in the seats available as per their rank in the merit.

2. As the advertisement dated May 10, 2012 would depict, separate number of vacancies available to be filled up from amongst the categories of different classes of candidates; namely Scheduled Castes, Scheduled Tribes, Other Backward Classes and unreserved were specified in the advertisement. The Clause pertaining to reservation prescribed that for Indian nationals, 3% reservation were to be made for Orthopedic Physically Handicapped ("OPH" for short) shall be provided on horizontal basis in the seats available, as per their rank in the merit. The criteria for OPH category was also provided as, in the first instance, candidates with disability of lower limbs between 50% to 70% were to be considered and in case candidates are not available in such category, then candidates with disability of lower limbs between 40% to 50% were to be considered.

3. Respondent No. 1 and 2 in the OBC category applied for vacancies in the discipline of ENT (Main). Whereas respondent No. 1 is not physically handicapped and thus sought appointment on the strength of the vertical reservation alone, respondent No. 2 being physically handicapped sought additional benefit of horizontal reservation.

4. The final result of the selection was published on July 03, 2012 wherein respondent No. 2 was selected against the vacancy of Sr. Residents ENT (Main) in the category of OBC (NCL) OPH, whereas respondent No. 1 was kept in the waiting list.

5. Aggrieved by the result, the respondent No. 1 approached the Central Administrative Tribunal vide O.A. No. 2330/2012 seeking quashing of the order of selection of respondent No. 2 to the post of Sr. Residents ENT (Main). It was pleaded by respondent No. 1-the original applicant before the Tribunal, that as per notification dated December 29, 2005 issued by the Ministry of Personnel, Public Grievances & Pensions, Dept. of Personnel & Training, Government of India, the horizontal reservation to the extent of 3% provided for OPH category can be applied only to the posts specified/indicated, and in the absence of such identification reservation for OPH category cannot be applied. In other words, it was the submission of the respondent No. 1 that for the application of horizontal reservation meant for OPH category, identification of posts prior to advertisement was necessary. It was also the case of the respondent No. 1 that respondent No. 2 has been wrongly appointed for the post of Senior Resident ENT as he was with 40% disability. It was also his case that respondent No. 2 was thus not suitable for the post.

6. Petitioner, AIIMS, in its reply before the Tribunal contended that 3% reservation provided for OPH category candidates cut across vertical reservation and persons selected against the quota for persons with disabilities, after adjusting the candidate selected on their own merit against the vacancies meant for unreserved categories, have to be placed in appropriate categories viz. SC/ST/OBC; depending upon the category to which they belong.

7. The impugned judgment dated January 21, 2013 passed by the Tribunal would depict that during arguments it was conceded that though no post is specifically reserved for OBC/OPH, but as per the safeguards conferred on persons belonging to OPH category, reservation for them can be applied horizontally in any of the reserved or unreserved vacancies; subject to the person belonging to OPH category and fulfilling the required condition under the notification issued. Though no such pleadings by either of the parties before the Tribunal are available on record, the impugned decision would reveal that it was urged before the Tribunal that since the cut off marks obtained by OBC candidate in the written test have been prescribed as 62.5% to be called for the interview and since the respondent No. 2 did not secure the said required percentage he could not be called for interview at all. It is this ground, which has found favour with the Tribunal in setting aside the appointment of respondent No. 2. The Tribunal

has thus allowed the Original Application filed by the respondent No. 1 with cost of in sum of Rs. 5,000/- on the ground that since in the notification advertising the posts, relaxed standard of suitability for persons belonging to OPH category have not been provided, respondent No. 2, who had not secured the required minimum percentage of marks in the written examination for candidates belonging to OBC category could not have been called for the interview. It is on the basis of these that the Tribunal has allowed the Original Application; quashing the selection of respondent No. 2 for the post of ENT (Main). The Tribunal has further directed the petitioner to declare respondent No. 1 as the candidate selected for the post of Senior Resident, ENT (Main) under OBC category.

8. It is the contention of the petitioner before us that Section 33 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "The Act") precedes Section 32 thereof and prior identification of posts u/s 32 is not necessary before reservation u/s 33 of the Act is made. It was the further submission that since reservation for OPH category are provided on horizontal basis by adopting floating reservation system, no post can be identified in advance. It was further contended that in case the tenure posts of Sr. Resident/Sr. Demonstrator are identified in advance for OPH categories, it would create practical difficulties in as much as in the event of unavailability of suitable candidates belonging to OPH category, of the discipline so identified, the same would result in the post of Sr. Resident going waste which would also be a national waste in view of the availability of limited posts in specialized categories in medical field. It was also contended that the candidates belonging to OPH categories, who qualify at the entrance examination are entitled to be adjusted in the respective category by application of reservation to the extent of 3%, irrespective of the marks/merit in the entrance examination.

9. Per contra it was submitted on behalf of respondent No. 1 that Section 32(a) of the Act makes it incumbent for the appropriate government to identify posts, which can be reserved for persons with disabilities. It was submitted that Section 33 of the Act provides for reservation to a minimum of 3% of the vacancies out of the total number of posts so identified. It was further submitted that appointment can only be made when posts, which are suitable for persons with disability, have been actually identified by the concerned government/authority and till such exercise is done, no appointment can be made.

10. During course of hearing, learned counsel for the respondent No. 1 relied upon a directive issued by the Ministry of Social Justice and Empowerment, Government of India, to contend that in the medical field reservation for OPH categories can be applied only in non-surgical posts. It was in view of this submission that vide order dated July 22, 2013 passed by this Court two issues arising in this case, one out of the pleadings and the other with reference to the compilation filed by the learned counsel for respondent No. 1 were framed, in the

following terms:-

a) Whether it would be mandatory in law to identify seats reserved for differently abled persons in medical specialties when applications are invited from eligible candidates?

b) Whether the directive issued by the Ministry of Social Justice of Empowerment, Government of India requiring reservation in the medical field only in non-surgical post is sustainable in law?

11. The historical perspective leading to the promulgation of the Act are that initially, the Central as well as State Governments had launched welfare schemes to train, educate and provide useful employment to the persons with disabilities. The Central Government provided reservation to the extent of 3% vacancies in Group C and D posts for physically handicapped, including visually impaired persons. Vide order dated December 30, 1995, the Government of India constituted a Screening Committee to undertake identification of jobs for the handicapped in Group A and B posts also. The Committee headed by Sh. M.C. Narsihman Joint Secretary, Government of India as its Chairman, submitted its report published on October 31, 1986 identifying total 416 posts in Group A and B, found suitable for the persons with physically disabilities. The report was accepted by the Government of India vide O.M. dated November 25, 1986, conveying the policy decision of giving preference to the persons with disabilities in the matter of recruitment to the posts identified by the Committee.

12. After the 1975 declaration on the rights of disabled persons adopted by the UN General Assembly, a meeting to launch "Asian and Pacific Decades of Disabled Persons" was held in Beijing on 1st to 5th December 1992, wherein a proclamation to ensure "Full participation and equality of people with disabilities in the Asian and Pacific Regions" was adopted. India, being a signatory to the said proclamation, the Parliament enacted "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Act came into force with effect from January 01, 1996. 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-?-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. Chapter VI of the Act, in Section 32 provides for identification of posts which can be reserved for persons with disability and Section 33 provides for reservation for posts of not being less than 3% for the class of persons with disability. Section 36 provides that the vacancies not filled up are to be carried forward while Section 38 provides for schemes for ensuring employment of persons with disability. Section 32 and 33 of the Act, being relevant for the issues raised in the present writ petition need to be noted. They read as under:-

32. Identification of posts which can be reserved for persons with disabilities.- Appropriate Governments shall-

(a) identify posts, in the establishments, which can be reserved 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 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. It is the contention of the learned Counsel for respondent No. 1 that respondent No. 2 has been wrongly appointed for the post of Sr. Resident ENT (Main) because with 40% disability he was not suitable for the post. To buttress this submission, learned Counsel relied upon the list of posts identified by the Expert Committee to carry out the obligation u/s 32 of the Act, of identifying posts in establishments, which can be reserved for the persons with disability, to submit that for the post of "Sr. Resident" identified to be suitable for the persons with physical disability, surgical jobs have been completely excluded.

15. Vide Ministry of Social Justice & Empowerment, Government of India, notification No. 16-17/2004-DD.III dated January 18, 2007, which is the "appropriate government" defined u/s 2(a) of the Act, an Expert Committee was constituted to carry out the obligations u/s 32 of the Act, of identification of

posts in establishments, which can be reserved for the persons with disability. The Expert Committee has, in super session of earlier list of posts notified on May 31, 2001, issued a list of Group-A posts in various departments which can be reserved u/s 33 of the Act for persons with disability. At Sl. Nos. 598 to 608 of this list different posts under the heading "Physicians" have been identified to be suitable for persons with disabilities. At Sl. No. 604 is the post of "Sr. Resident" for which the physical requirements identified are as under:-

S-sitting, ST-standing, H-hearing, W-walking, RW-reading and writing and SE-seeing.

The working conditions are identified as;

the work is performed inside well lighted rooms. The workers works alone, no hazards are involved for non-surgical jobs. Bilateral hand activities should be adequate.

On this basis, the categories of persons with disabilities suitable for the jobs are identified as:

OL-one leg OA-one arm for non-surgical jobs.

Thus, for the post of "Sr. Resident" identified to be suitable for persons with disability, surgical jobs have been completely excluded.

On the other hand vide Sl. Nos. 204 to 229 of this very list, for "Lecturer", "Reader" and "Professor (Sciences)", in the field of ENT (Otolaryngology), the physical requirements for the posts identified suitable to be reserved for persons with disability, are noted as under:-

S-sitting, SE-seeing, ST-standing, MF-manipulations by fingers, KC-kneeling and crutching and C-communication.

The working conditions are identified as:-

the work is performed mostly inside, the workplace is well lighted. The persons with OH (Orthopedically Handicapped) to be assessed with aids and appliances. VH (Visually Handicapped) incumbent need to be provided with appropriate computer software.

On this basis, the category of disabled suitable for the jobs, identified is as: OL-one leg.

Interestingly, for these posts, it is specifically provided that the nature of work performed would be "apart from teaching students, they also perform surgical operations, diagnosis of patients, prescribe medicines, post operative care, conduct research work and update medical and surgical specialty". Thus, the Expert Committee has clearly found the persons with disability to be capable of discharging all these functions including performing surgeries. The nature of work performed by a Sr. Resident, however, as noted by the Expert Committee, is less onerous and we find that the Expert Committee has not recorded any

reason for the complete exclusion of the persons with disability from the field of surgical procedures for the post of "Sr. Resident". If the persons with disability can be found suitable for performing surgeries under the head "Lecturers, Reader, Professor" there cannot be any reason for them to be not able to perform surgical procedures to the post of "Sr. Resident".

16. Though, the law as regards to judicial intervention with the findings of an Expert Committee, is settled that normally the Courts of law would be loathe to interfere with the findings/decisions by the Experts in a field, yet it is equally settled that judicial review, even in such matters, is not excluded altogether. The power of judicial review in such cases, would be available, in cases where the action is found to be contrary to constitutional/statutory provisions or is patently arbitrary or is vitiated due to mala-fide. (See the decisions reported as Union of India (UOI) Vs. Pushpa Rani and Others, , Dr. Basavaiah Vs. Dr. H.L. Ramesh and Others, and Sajeesh Babu K. Vs. N.K. Santhosh and Others, .

17. Undoubtedly, as the legislative history and the statements of objects and reasons of the Act, read with the preamble thereof, would depict that the Act is a beneficial/welfare legislation aimed to benefit persons with disabilities so as to integrate them with the mainstream of the society as ordained by Articles 39A and 41 of the Constitution of India. Thus, the language of the Act has to be read and interpreted with reference to the object sought to be achieved thereunder and the power conferred on any authority will have to be exercised in the light thereof and for fulfillment of the object and purpose of the Act. The power conferred upon the appropriate government u/s 32 of the Act, to identify the posts suitable for persons with disability, thus, will have to be construed purposively so as to achieve the constitutional goal. The appropriate Government thus, in exercise of its function u/s 32 of the Act, cannot exclude persons with disability from a post in any establishment unless it is found that but for the nature of the duties performed, it will in no event be suitable for any person with disability to perform the duties of the said post. In the present case, once it is found that the persons with disabilities can perform surgeries without any limitations, there is no reason why they have been excluded from the post of "Sr. Resident" to the extent of surgical procedures. To highlight the point of absurdity, we once again highlight that Lecturers, Readers and Professors, in the field of ENT who while discharging duties of teaching perform ENT related surgeries in front of students so as to impart practical training to students. Further, Lecturers, Readers and Professors perform regular surgeries even otherwise in the discharge of the duties since regular hospitals are attached to every medical college.

18. Additionally, as may be seen from the provisions of the Act, Section 31 obligates the State to provide amanuensis to blind students/students with low vision and Chapter VII mandates affirmative action by the appropriate governments; to provide aids and appliances to the persons with disabilities. The Supreme Court in the decisions reported as National Federation of Blind Vs.

Union Public Service Commission and Others, , Syed Bashir-ud-din Qadri Vs. Nazir Ahmed Shah and Others, and Amita Vs. Union of India (UOI) and Another, has issued directions to the State to give effect to these provisions so as to equip the persons with disabilities to meet the challenges of the posts.

19. Article 14 of the Constitution of India, though is couched in a mandatory language, forbids the State from denying any person equality and equal treatment. Article 16, guarantees equality of opportunity in the matter of public employment. Thus, the persons with disability cannot be excluded from consideration in the matters relating to employment to any office (post) under the State unless there exists reasons sustainable in law to uphold such exclusion. In the present case, the two conclusions by the Expert Committee for the post at Sl. Nos. 220 and 604 contradict each other on the issue of assessment of capability of persons with disability to perform surgical procedures. Hence, the list of jobs, vide notification dated January 18, 2007, to the extent it excludes "persons with disability" as a class from performing "surgical jobs" attached to the post of "Sr. Resident" is without any rationale and is contrary to the object sought to be achieved by the Act. Hence it is arbitrary and liable to be struck down. Law declared in the decision reported as Glanrock Estate (P) Ltd. Vs. The State of Tamil Nadu, would require it to be so done. We strike the offending and discriminatory Clause and declare that persons with physical disabilities cannot be excluded from performing surgical jobs to the post of Sr. Resident (ENT).

20. It was the contention of the respondent No. 1 who was the applicant before the Tribunal as also before this Court that the reservation to the extent of 3% provided for OPH category can be applied only to the posts specified/indicated, and in the absence of such identification reservation for OPH category cannot be made. It is thus the contention, that for application of 3% reservation meant for OPH category, identification of posts prior to advertisement of vacancies is necessary. On facts, with reference to the advertisement, contents whereof we have already noted hereinabove, it was urged that no post whatsoever was identified as reserved in the OPH category.

21. The issue as to the identification of posts u/s 32 of the Act and the extent of dependence of such identification for the purpose of making of reservation, came up for consideration before the Supreme Court in the decision reported as Govt. of India through Secretary and Another Vs. Ravi Prakash Gupta and Another, . After noting the scheme of the Act and the objects and reasons thereof, the Court held that no appointment can be made unless the posts as required u/s 32 of the Act are identified for the purposes of Section 33 thereof. It was held that such dependence would be, for the purpose of making appointment, and not for the purpose of making reservation. Para 29 of the judgment reads as under:-

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 u/s 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 u/s 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

22. The issue was once again taken up by a three Judge Bench of the Supreme Court in a recent decision reported as Union of India (UOI) and Another Vs. National Federation of the Blind and Others, As per para 28 of the judgment the Court identified the question for determination as "whether the reservation provided for the disabled person u/s 33 of the Act, is dependent upon the identification of posts as stipulated by Section 32". After referring to the relevant observation in the decision in Ravi Prakash Gupta's case (supra), the Court concluded that prior identification of posts is not a sine-qua-non for computation of 3% reservation for the persons with disability. The observations by the Court relevant for the present purposes, are extracted as under:

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 u/s 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% u/s 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.

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 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 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.

23. Pertaining to the contention urged on behalf of respondent No. 1 that since the post of Sr. Resident ENT (Main) had not been prescribed in the advertisement as the post identified for reservation in favour of persons with disability, and thus no appointment by way of reservation can be made on such post as also the argument that the advertisement dated May 10, 2012 would show that vacancies in different disciplines have been advertised separately with application of vertical reservation thereto and that since it is a position admitted by the petitioner that candidates for these posts have applied for each of the disciplines separately and separate exam for each discipline has been held, with further submission that each discipline in the grade of "Sr. Resident" would constitute a separate and distinct "post" within the meaning of Section 32 of the Act and therefore, reservation to the extent of 3% cannot be computed for the post of Sr. Resident as a whole than on different discipline, for the post of Sr. Resident, we only have to say that the plain language used in the statute, which undoubtedly, is a beneficial legislation, given its fullest meaning, would depict that as against the word "post" used in Section 32, Section 33 prescribes reservations not less than 3% "of the vacancies" but in the "post" identified for each disability. The expressions "post" and "vacancies" have been explained by the Constitution Bench of the Supreme Court in the decision reported as R.K. Sabharwal and others Vs. State of Punjab and others, in the following terms: (SCC p.751)

The expressions "posts" and "vacancies" often used in the executive instructions providing for reservations, are rather problematic. The word "post" means an appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a "post" in existence to enable the "vacancy" to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservation has to be worked out in relation to the number of posts which form the cadre-strength. The concept of "vacancy" has no relevance in operating the percentage of reservation.

24. A "post" may have different disciplines independent of each other prescribing different qualifications. In the decision reported as J.S. Yadav Vs. State of U.P. and Another, it has been held that there is no prohibition in law to have two or more separate grades in a cadre. Thus, merely because a post such as "Sr. Resident" has different disciplines without scope of any interchangeability amongst the disciplines, it would not mean that for the purposes of effecting reservation, such different disciplines, would be constituted as separate "posts" constituting separate cadres. It may be that some of these disciplines are identified by the appropriate government as "The posts" u/s 32 of the Act, suitable for persons with disability whereas others may not, yet reservation envisaged u/s 33 of the Act, will be applied to the post of "Sr. Resident only on the "disciplines" so identified.

25. Thus, we allow the writ petition and quash the impugned order dated January 21, 2013 and while dismissing OA No. 2330/2012 filed by respondent No. 1 we would direct the appropriate Government to take cognizance of our observations in the writ petition and take suitable remedial measure to modify the notification No. 16-17/2004-DD.III dated January 18, 2007, for which we direct the Registry of this Court to send a certified copy of the decision to the Secretary, Ministry of Social Justice & Empowerment, Government of India. There shall be no order as to costs.