

(2013) 12 BOM CK 0033

In the Bombay High Court

Case No : Public Interest Litigation No. 106 of 2010

National Confederation for Development of Disabled and
Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-12-2013

Acts Referred:

Citation : (2013) 12 BOM CK 0033

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : Mahesh Jethmalani and Mr. Kamlesh Ghumre and Ms. Gunjan Mangla instructed by Mr. Rohit Mahadik, for the Appellant; Rajeev Chavan and Mr. H.V. Mehta for the UOI and Mr. G.W. Mattos, AGP for State, for the Respondent

Final Decision : Allowed

Judgement

1. By consent of parties, petition is taken up for final hearing. In this public interest petition, the petitioners-National Confederation for Development of Disabled have prayed for writ of mandamus to direct the respondents to appoint the disabled persons in terms of Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act) in Indian Administrative Services posts to be filled up either by promotion from the State Civil Services or by selection from persons who hold gazetted posts in connection with the affairs of a state but are not members of the State Civil Services, as per their entitlement retrospectively from 1996 and to comply with the said provisions hereafter.

2. This petition was filed on 8 December 2010.

3. In the affidavit-in-reply filed by Under Secretary in the Union Public Service Commission on 1 March 2011 and in the affidavit-in-reply dated 20 April 2012 filed by Under Secretary in the Department of Personnel and Training, Government of India, it was contended that provisions of Section 33 of PWD Act

provides for reservation for the persons with disabilities only in the matter of appointment to the vacancies in the establishment. It does not provide for reservation in the matter of promotion. It was further contended that such reservation is applicable for persons with disabilities in Group "C" and Group "D" as provided in the Office Memorandum dated 20 November 1989 and in the subsequent Office Memorandum dated 29 December 2005 it is provided that 3% of the vacancies in case of promotion to Group "C" and Group "D" posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities. It is, therefore, submitted that reservations for persons with disabilities were never available in Group "A" and Group "B" posts. It is further contended that the whole scheme of the cadre management of officers appointed by promotion to the promotion quota of an All India Service is quite different in nature from the scheme of things as are generally prevailing in the matter of promotion within the same service from a Group "B"/Group "A" post to a Group "A" posts.

4. In any view of the matter, nothing is brought to our notice indicating that posts in the Indian Administrative Services are excluded from reservation for persons with disabilities. In fact, in Govt. of India through Secretary and Another Vs. Ravi Prakash Gupta and Another, , the Supreme Court specifically dealt with the question of reservation in the matter of appointment to All India Service and held that reservation was applicable to posts in Groups "A", "B", "C" & "D". The Supreme Court confirmed the decision of the High Court and issued mandamus to the Central Government to offer the writ petitioner appointment to one of the reserved posts by issuing appropriate appointment order in the Indian Administrative Services.

5. In the said decision the Supreme Court also noted in paras 20 and 26 that neither Section 32 nor Section 33 of the PWD Act make any distinction with regard to Groups A, B, C and D posts. It was further noted that 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 out in any department or establishment. No such exemption was brought to the notice of the Supreme Court on behalf of the Government of India. Nor has any such exemption been brought to our notice.

6. In view of the above, we have to proceed on the basis that the reservation is available for Group A and Group B posts as well and the same would, therefore, include posts in the Indian Administrative Services.

7. Learned counsel for the Government of India, however, submits that the above decision would not necessarily mean that the posts to be filled by promotion are also available for reservation. Learned counsel submits that the case of Ravi Gupta (supra) was concerned with direct recruitment to the Indian Administrative Services and not with regard to promotion.

8. Learned counsel for the petitioners has, thereupon, invited our attention to the

recent judgment of three Judge Bench of the Supreme Court in Union of India v/ s. National Federation of the Blind & ors., dated 8 October 2013.

9. In the said decision, three Judge Bench of the Supreme Court has in terms held that Section 33 of the Act establishes vividly the intention of the legislature viz., reservation of 3% for differently abled persons has 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. The Supreme Court analyzed the provisions of Section 33 of the Act and arrived at the following conclusion:-

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 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)

10. In view of the aforesaid decision of the Supreme Court, it is clear that reservation has to be computed with reference to total number of vacancies in the cadre strength and, therefore, no distinction can be made between the posts to be filled in by direct recruitment and by promotion. Total number of vacancies in the cadre strength would include the vacancies to be filled in by nomination and vacancies to be filled in by promotion.

11. The Supreme Court has given following directions to the Government of India to ensure proper implementation of the reservation policy for the disabled and to protect their rights:-

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 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.

12. In view of the above directions, it is clear that the respondents will have to give benefits of reservation to persons with disabilities in the matter of promotion to posts in the Indian Administrative Services by applying the Office Memorandum dated 29 December 2005 and subsequent Office Memorandum consistent with the aforesaid judgment dated 8 October 2013 of the Supreme Court and accordingly give benefits of the reservation with effect from the date of issuance of the said Office Memorandum dated 29 December 2005. Writ petition is, accordingly allowed in the aforesaid terms.