

(2015) 03 DEL CK 0170

In the Delhi High Court

Case No : Writ Petition (C) No. 3919 of 2014

Sambhavana

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 33(1), 36, 57(1)

Citation : (2015) 148 DRJ 497

Hon'ble Judges : G. Rohini, C.J.; Rajiv Sahai Endlaw, J.

Bench : Division Bench

Advocate : Pankaj Sinha and A. Gupta, for the Appellant; Arun Bhardwaj, CGSC, Advocates for the Respondent

Final Decision : Disposed off

Judgement

G. Rohini, C.J.—This petition by way of public interest litigation has been filed with the following prayers:

(i) To quash the Examination Notice No. 09/2014-CSP dated 31.05.2014 issued by Union Public Service Commission (UPSC) for conducting Civil Services Examination, 2014.

(ii) To direct the respondents to implement Section 33 of the Disabilities Act by equally bifurcating the vacancies among the three categories of persons with the disabilities.

(iii) To direct the respondents to implement the Executive Order/O.M. No. 16-110/2003-DD.III dated 26.2.2013 passed by the Department of Disability Affairs, Ministry of Social Justice and Empowerment with respect to uniform guidelines of scribes for persons with disabilities and the implementation of the compensatory time i.e. providing 20 minutes per hour to the visually impaired candidates.

2. The petitioner which is stated to be a registered society consisting of persons

with disabilities, claims to have been working in the larger interest of the persons with disabilities. The writ petition is filed contending inter alia that the reservation provided under the Notice dated 31.05.2014 for Civil Services Examination, 2014 for visually impaired candidates is not in conformity with the provisions of Section 33 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "Disabilities Act").

3. The brief facts are:

The respondent No. 2/UPSC which is authorized to conduct examination for appointment to civil services/posts for various departments/ministries, issued the Examination Notice No. 09/2014-CSP dated 31.05.2014 (hereinafter referred to as "the impugned Notice") proposing to conduct Preliminary Examination on 24.08.2014 for recruitment to about 23 services mentioned therein. Approximately 1291 vacancies were sought to be filled up by conducting the examination proposed under the impugned Notice. Out of the said vacancies, 26 vacancies were reserved for Physically Handicapped category, i.e., 12 vacancies for persons with Loco Motor disability or Cerebral Palsy (LDMP), 2 vacancies for person suffering from Blindness or Low Vision and 12 vacancies for persons suffering from hearing impairment.

4. It was specifically mentioned in the impugned Notice under the head "General Instructions- that blind candidates will be allowed the help of a scribe to write answers for them but they will be allowed only an extra time of 30 minutes at each paper @10 minutes per hour.

5. It is contended by the petitioner inter alia that the number of vacancies reserved for Visually Impaired category is not in conformity with the mandatory requirement of reservation of 1% vacancies available for persons suffering from blindness or low vision as provided by Section 33 of the Disabilities Act and that as per the Executive Order/O.M. No. 16-110/2003-DD.III dated 26.2.2013 issued by the respondent No. 1 Union of India, the compensatory time for persons who are making use of scribe/reader/lab assistant should not be less than 20 minutes per hour of examination.

6. Shri Pankaj Sinha, the learned counsel appearing for the petitioner points out that as per Section 33 of the Disabilities Act, 1995, not less than 3% reservation is provided for persons with disabilities, of which 1% shall be reserved for Visually Impaired Category. It is contended by him that the impugned Notice, whereunder only 26 vacancies out of 1291 vacancies are reserved for Physically Handicapped category, is not in accordance with Section 33 since 3% of 1291 works out to be 39 and thus, 39 vacancies are required to be reserved for physically handicapped. It is further contended that since Section 33 of the Disabilities Act mandates distribution of the vacancies reserved for physically handicapped candidates equally between the three categories of persons with disabilities, i.e., persons suffering from blindness or low vision, persons suffering from hearing impairment and persons suffering from locomotor disability or

cerebral palsy, the impugned Notice under which only 02 vacancies are reserved for the Visually Impaired candidates whereas for the Hearing Impaired candidates and Loco Motor disabled candidates, 12 vacancies each are reserved, is unsustainable under law.

7. It may at the outset be mentioned that the Miscellaneous Applications (CM No. 7898/2014 and 9583/2014) filed by the petitioner seeking stay of the Preliminary Examination proposed to be conducted on 24.08.2014 and to provide an extra time of 20 minutes per hour to the visually impaired candidates in the Preliminary Examination as well as the Main Examination, 2014, were disposed of by us by a detailed order dated 19.08.2014 declining to stay the Preliminary Examination in view of the stand taken by the UPSC in its counter affidavit that the figures shown in the impugned Notice were only a tentative indication and that the final number of vacancies may undergo change after getting firm number of vacancies from Cadre Controlling Authorities. However, the contention that the extra time allowed for each paper @ 10 minutes per hour is not in conformity with the Guidelines dated 26.02.2013 issued by the Ministry of Social Justice and Empowerment for conducting the Written Examinations for persons with disabilities was accepted and it was held that the respondents are bound to allow additional time of 20 minutes per hour to the Visually Impaired candidates in the Civil Service Examinations as provided in the Guidelines dated 26.02.2013.

8. Accordingly, the following directions were issued:

i. The Preliminary Examination in pursuance of the impugned notice dated 31.05.2014 may be conducted and the results be declared as per the schedule.

ii. However, none of the visually impaired candidates should be disqualified in Preliminary Examination on the ground that only 2 vacancies are reserved for the visually impaired candidates out of 26 vacancies reserved for physically handicapped category.

iii. Before the schedule for Main Examination is fixed, the respondents shall ensure proper assessment of number of vacancies reserved for visually impaired candidates in conformity with 1% reservation provided under Section 33 of the Disabilities Act, 1995 and notify the same.

iv. The visually impaired candidates shall be allowed additional time/compensatory time of 20 minutes per hour in both Preliminary and Main Examinations, apart from extending the help of scribe as provided under the guidelines dated 26.02.2013 issued by the Ministry of Social Justice and Empowerment.

9. The first respondent/Union of India was also directed to file an additional counter affidavit within two weeks furnishing the details of the vacancy particulars received from the Cadre Controlling Authorities of all the Services.

10. In pursuance of the above directions of this Court, an additional affidavit was filed by the Under Secretary to the Government of India, Ministry of Personnel,

Public Grievances and Pensions, Department of Personnel and Training dated 30.09.2014 stating that as per the latest information received from the Cadre Controlling Authorities by the DoPT and the Commission, altogether 1364 vacancies are available out of which 53 vacancies are reserved for Physically Handicapped category which include 21 for LDCP, 13 for Visually Impaired and 19 for Hearing Impaired sub-category.

11. The Union Public Service Commission also filed an affidavit furnishing the consolidated vacancy position in a tabular form which reiterates that out of total 1364 posts, 53 posts are reserved for physically handicapped earmarking 21 for LDCP, 13 for blind/low vision and 19 for hearing impaired. It is further stated by UPSC that out of 23 Services participating in CSE, 2014, Indian Police Service (150 vacancies) and Assistant Security Commissioner in Railways Protection Force (34 vacancies) are exempted from the purview of the Disabilities Act, 1995 and thus, no Physically Handicapped vacancy has been shown as reserved against these two Services.

12. As could be seen from the revised vacancy particulars furnished by the Union of India and the UPSC, the total number of vacancies available are 1364 out of which 53 vacancies as against the minimum 3% requirement of 41, are reserved for the Physically Handicapped in terms of Section 33 of the Disabilities Act. Out of the said 53 vacancies, 21 are reserved for LDCP, 13 for blind/low vision and 19 for hearing impaired.

13. In the light of the revised vacancies position noticed above, the grievance of the petitioner that 26 vacancies out of a total 1291 vacancies reserved for Physically Handicapped category is less than the mandatory requirement of 3%, does not survive. However, it is contended by Shri Pankaj Sinha, the learned counsel for the petitioner that even as per the revised vacancy position, there is no equal distribution among the three categories of persons with disability and only 13 vacancies are reserved for blind/low vision, whereas 21 and 19 are reserved for LDCP and hearing impaired respectively.

14. However, it is sought to be contended by the learned counsel for the respondents that 3% out of 1364 total vacancies would come to 41 and that being so, 13 vacancies reserved for persons suffering from blindness/low vision satisfies the 1% vacancies out of total 41 reserved for persons with disability. Thus, it is contended that reservation provided for persons suffering from blindness/low vision is in conformity with the provisions of Section 33.

15. Refuting the said contention, the learned counsel for the petitioner submits that having reserved 53 vacancies out of a total 1364 for the persons with disability which is more than 3% provided under Section 33 of the Disabilities Act, the respondents are bound to divide the said 53 vacancies between the three categories equally.

16. While referring to the language of Section 33(1) of the Disabilities Act, the learned counsel for the petitioner submits that even where the reservation

exceeds 3%, the sub-division among the three categories, i.e., persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy, shall be equal, i.e., 1% each out of the actual number of vacancies reserved. Therefore, according to the learned counsel for the petitioner, the reservation of 21 vacancies for LDCP, 13 for blind/low vision and 19 for hearing impaired is not equal distribution and does not satisfy the requirement of 1% for each category. The learned counsel would contend that the respondents ought to have earmarked at least 17 vacancies for each category out of the total reserved vacancies of 53 so as to satisfy the requirement of Section 33 of the Disabilities Act in letter and spirit. Thus, it is contended that the action of the respondents in reserving only 13 vacancies for the persons suffering from blindness or low vision is arbitrary and illegal.

17. For proper appreciation of the rival contentions noticed above, it is necessary to refer to Section 33 of the Disabilities Act which 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 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."

18. As we could see, Section 33 of the Disabilities Act does not specify the percentage of vacancies to be appointed with persons with disability, but mandates that the same shall not be less than 3% of the vacancies available. The words "such percentage of vacancies not less than 3%- employed in Section 33 make it clear that the Legislature never intended to confine it only to 3%. Therefore, it is always open to appoint more than 3% of persons with disability. However, so far as inter se distribution is concerned, it is mandatory to reserve 1% each to the three categories mentioned therein i.e. persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy.

19. It may be added that having regard to the type of work to be carried on, some of the posts may not be suitable for appointment of persons with disability. Therefore, Section 32 of the Disabilities Act specifically provides for identification of posts which can be reserved for persons with disability. The Disabilities Act has also taken care of the situation where on account of non-availability of suitable

persons with disability, any vacancy under Section 33 remained vacant in a given year and Section 36 provides that any such vacancy which cannot be filled up shall be carried forward. For ready reference, Section 32 and Section 36 of the Disabilities Act are reproduced hereunder:

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

(a) identify posts, in the establishment, 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 in developments in technology."

"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."

20. The question whether the appointments from the reserved categories as provided under Section 33 can be made in the absence of identification of posts under Section 32 was considered by the Supreme Court in Govt. of India through Secretary and Another Vs. Ravi Prakash Gupta and Another, in detail and it was held:

"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....."

21. In this context, we may also refer to the following directions issued by the

Supreme Court in Union of India (UOI) and Another Vs. National Federation of the Blind and Others, 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 nonobedience 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."

22. It is a matter of record that in terms of Section 32 of the Disabilities Act, the Expert Committees constituted by the Ministry of Social Justice and Empowerment, Government of India have been submitting their reports from time to time after making an in-depth study of various jobs performed in Government offices, public sector undertakings and autonomous bodies. The latest report was submitted on 24.01.2012 identifying the posts suitable for persons with disability and the list of posts so identified has been notified by the Ministry of Social Justice and Empowerment vide Notification dated 29.07.2013. Thus, by the date of the Examination Notice dated 31.05.2014 issued by the UPSC for conducting Civil Service Examination, 2014, the suitable posts were already identified and notified as provided under Section 32 of the Act.

23. Though the learned counsel for the petitioner, during the course of the arguments, disputed the number of vacancies shown in the additional counter affidavits filed by the UPSC and Union of India and contended that it is necessary to inquire into the exact number of vacancies and has even gone to the extent of seeking a direction for inquiry into the backlog vacancies alleging that the respondents failed to assess the total number of vacancies from the year 1996 onwards, we decline to go into those issues in the absence of any specific pleading to that effect.

24. We would reiterate that the only surviving grievance of the petitioner in this petition is with regard to the unequal distribution of vacancies reserved for

persons with disability among the three categories specified in Section 33 of the Disabilities Act.

25. As expressed above, the language of Section 33 of the Disabilities Act is indicative of the legislative intent of appointment of minimum 3% of vacancies with persons with disability and equal distribution of the same in the three categories specified therein. It is also clear from the language of Section 33 that the Government if so desires, is entitled to appoint persons with disability in excess of 3% of the vacancies.

26. Once it is clear that the appointment of persons with disability to vacancies in excess of 3% is of the own volition of the Government as the employer and not under statutory compulsion, the only consequence that should follow, according to us, is that it should be left open to the Government to choose anyone of the three categories of persons with disability for the vacancies exceeding 3%, having regard to the type of the work required to be carried on in the particular establishment. Compelling the Government to distribute equally even the excess vacancies among the 3 categories does not appear to be the object of the Disabilities Act which is aimed at providing equal opportunities, protection of rights and full participation of persons with disabilities and to remove any discrimination against them in the sharing of development benefits vis-a-vis non-disabled persons. The Disabilities Act, as we could see, is not enacted to do away with the discrimination, if any, amongst the different categories of disability. In the absence of any specific provision, either express or by necessary implication, that all categories of disability should be provided equal opportunities in the matter of employment, we are unable to hold that the vacancies in excess of 3% shall also be distributed among the 3 categories specified in Section 33 equally. It may be pointed out that the proviso to Section 36 also permits interchange among the three categories with the prior approval of the appropriate Government. Therefore, the Government cannot be restrained from preferring the persons from one category of disability for appointment in the vacancies exceeding 3% if such persons are found suitable for appointment against the said vacancies. Of course, if the Government as employer, without any reason discriminates between persons of the three categories beyond 3%, a challenge thereto would be maintainable. Therefore, in our opinion, there is nothing in Section 33 or in any other provision of the Act under which the respondents can be compelled to fill up the vacancies in excess of 3% also equally with the persons with disability of the three categories.

27. So far as the case on hand is concerned, it is not disputed before us that the 3% vacancies are equally distributed among the three categories of persons with disability. With regard to the vacancies exceeding 3%, there is nothing on record from which the reason for unequal allocation of vacancies in excess of 3% amongst the three categories can be ascertained. The Cadre Controlling Authorities which have notified and categorized the vacancies are not before this Court. Perhaps the said Cadre Controlling Authorities have found persons of

other two categories suitable for the excess vacancies and have not found persons with visibility impairment suitable therefor. There is also a possibility that the excess vacancies sought to be filled up with the persons belonging to the other two categories are the carried forward vacancies of the previous recruitment year within the meaning of Section 36.

28. For the aforesaid reasons, the prayer with regard to equal bifurcation of the vacancies notified under the impugned Examination Notice dated 31.05.2014 among the 3 categories of persons with disabilities cannot be granted. However, we deem it appropriate to issue the following directions:-

(a) the respondent no.2 UPSC shall find out from the respective Cadre Controlling Authorities the reason for allocating the vacancies in excess of 3% unequally between the three categories aforesaid.

(b) if the Cadre Controlling Authorities are unable to give any valid reason (which shall be determined in the light of our observations hereinabove), the vacancies in excess of 3% shall also be equally distributed between the persons with disability of all three categories and the appointments in pursuance to the Employment Notice impugned in the petition shall be made accordingly.

29. As far as the other relief claimed by the petitioner, i.e. issuance of a direction to the respondents to comply with the Office Order dated 26th February, 2013 supra is concerned, we had in our order dated 19th August, 2014 held that the guidelines contained therein were issued as per the directions of the Chief Commissioner for Persons with Disabilities who is an Authority appointed under Section 57(1) of the Act and cannot be treated as mere executive instructions and the said guidelines having been issued for effective implementation of the provisions of the Disabilities Act, have statutory force and are bound to be implemented by all Departments and Authorities. No arguments whatsoever were addressed on the said aspect by the learned counsel for the respondents during the hearing of the writ petition and therefore, we hold with respect to the said prayer that the respondent no.2 - UPSC shall abide by the said guidelines for all times to come unless the same are varied in accordance with law.

30. The petition is disposed of accordingly with the aforesaid directions.

31. No order as to costs.