
(2008) 09 SHI CK 0004
In the High Court Of Himachal Pradesh

Yash Pal Gupta

APPELLANT

Vs

Comptroller and Auditor General of India and Others

RESPONDENT

Date of Decision : 03-09-2008

Acts Referred:

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

Citation : (2008) 3 ShimLC 528

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Deepak Gupta, J.—This writ petition is directed against the order of the learned Central Administrative Tribunal, dated 20th December, 2000 rejecting the claim of the petitioner that he should be promoted to the post of Audit Officer (Commercial) on the ground that there should be three per cent reservation in all categories of posts in view of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (herein-after referred to as the Act).

2. Brief facts necessary for the decision of the case are that the petitioner joined the office of the Accountant General, Himachal Pradesh, Shimla, as LDC in the year 1970. He was promoted as UDC in the year 1971. The petitioner is a orthopaedically handicapped, person suffering from Post Encephalitis Paraparesis. In the year 1981, his disability was assessed at 45%. On 17.1.1997 the disability of the petitioner was assessed at 50% in one lower limb with limp jerks and muscle wasting etc. by the department of Neurology, PGI, Chandigarh.

3. The petitioner qualified the Senior Auditor Incentive examination in the year 1989. He also cleared the SAS (Commercial) examination in the year 1989. The petitioner was promoted as Section Officer (Commercial) in April, 1990 and was further promoted as Assistant Audit Officer (Commercial) on February 22, 1994. The petitioner also qualified the Revenue Audit Examination for SAS

(Commercial) in December 1996. The petitioner is, therefore, entitled to be considered for the next post of Audit Officer and Senior Audit Officer. It is not disputed that the petitioner during the pendency of this petition has actually been promoted as Audit Officer.

4. The case of the petitioner is two fold. According to the petitioner, even before the enforcement of the Act, the Government had taken a decision to give benefits to physically handicapped persons. On 20th November, 1989, the Ministry of Personnel of the Government of India, issued an office memo introducing reservation in favour of physically handicapped persons in posts filled by promotion within group "C and D". On 18th February, 1997 after the promulgation of the Act another office memo was issued which provided that the reservation roster would be maintained in such a manner that the points No. 33, 67 and 100 in the roster will be reserved for the physically handicapped. This memo also provided that in cases where percentage of posts filled up by direct recruitment is 75% or more no reservation will be provided for any category including the physically handicapped. On 4th July, 1997 another memo was issued and the roster points earmarked for the physically handicapped were changed from 33, 67 and 100 to 1, 34 and 67. The Government of India issued another office memo on 16th January, 1998, relevant portion of which reads as follows:

(ii) The existing policy of reservation for SCs/STs, including for the physically handicapped in promotion in all Groups is applicable to all grades and services, where the element of direct recruitment does not exceed 75%.

Reference has been made by the petitioner to an office memo dated 25th November, 1986. This memo shows that the Ministry of Welfare constituted a Standing Committee for identification of jobs for the physically handicapped in the Central Government Services and Public Sector Undertakings. The Standing Committee after making indepth study of the various jobs done in Government Offices and Public Sector Undertakings and keeping in view the physical requirement and functional classification of disabilities, identified the jobs which could be filled in by the physically handicapped persons. It was also decided that in respect of these identified posts preference would be given to physically handicapped persons while making recruitment. Amongst the posts identified were the posts of Senior Audit Officer in group "A" and Audit Officer in group "B".

5. Shri Dalip Sharma, learned Counsel for the petitioner, has urged that in view of the identification of the posts by the Committee as far back as 1986 and the office memo dated 16.1.1998, the petitioner is entitled to claim that there should be reservation for the physically handicapped for the posts of Audit Officer and Senior Audit Officer. Shri Dalip Sharma has relied upon the provisions of the Act, the office memorandums detailed here-in-above and various judgments of the different Courts.

6. The petitioner filed original application on the basis of the aforesaid claim,

which claim was rejected by the learned Tribunal. Hence, the present writ petition. It would be pertinent to mention that the petitioner had also filed a petition before the Chief Commissioner for persons with disabilities, which was also rejected.

7. It would be apposite to note that India is a signatory to the proclamation, on the full participation and equality of people with disabilities adopted at Beijing in December, 1992, in the meeting of the Economic and Social Commission for Asian and Pacific regions. Having signed the said proclamation, it was obligatory on the Union of India to enact a suitable legislation to give rights and equal opportunities to the persons suffering with disability. Therefore, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was introduced in Parliament on 26th August, 1995. This Act came into force on 7th February, 1996. The Act has been enacted with a very laudable purpose. Section 32 and 33 of the Act read as follows:

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 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 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 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.

8. A bare perusal of the aforesaid provisions shows that it was incumbent upon the Government to identify the posts in the establishments which can be reserved for persons with disabilities and it was also the mandate of the Act that the Government shall in every establishment make reservation of not less than 3% for persons or classes of persons with disabilities. Out of these 3%, 1% each was to be reserved for persons suffering from:

- (i) blindness or low vision;
- (ii) hearing impairment;
- (iii) locomotor disability or cerebral palsy.

Even before this Act had come into force, the Government of India had as far back as 1989 directed that 3% posts be reserved for physically handicapped but this reservation was restricted to class "C and D" posts only. Later on in the year 1997, after the promulgation of the Act, the Government decided that wherever the element of direct recruitment is 75% or more no reservation would be provided. This conversely means that wherever the recruitment by direct recruitment is less than 75% reservation must be provided. The State vide memo dated 16.1.1998 also made it clear that the existing policy of reservation is applicable to all grade and services where the element of direct recruitment does not exceed 75%. It is not disputed that for the posts of Auditor and Senior Auditor, there is no direct recruitment and all the posts are filled in by promotion only. Thus reservation would be applicable to the aforesaid posts. Therefore, the petitioner claims that the reservation is applicable to the post of Audit Officer and Senior Audit Officer and as per the instructions of the Government the first roster point was meant for physically handicapped and according to him he is entitled to be promoted against the first post which was filled up after the promulgation of the Act.

9. On the other hand, Shri Sandeep Sharma, learned Assistant Solicitor General of India, has contended that before reservation can be made, the posts are to be identified. He submits that the posts have not been identified. He further submits that the Office of the Accountant General falls under the Comptroller and Audit General of India and in terms of Article 148 (5) of the Constitution of India, the condition of service of persons in the Indian Audit and Accounts Department shall be such as may be prescribed by the Rules made by the President after consultation with the Comptroller and the Audit General of India. According to him, since no rules for reservation have been framed in consultation with the Comptroller and the Audit General of India and posts have not been identified, the petitioner is not entitled to any benefit.

10. As noted above, the aforesaid Act came into force on 7th February, 1996. The respondents are guilty of thwarting the mandate of the Act with impunity only on the ground that 13 years have elapsed since the Act was enforced but they have not identified the posts. Can the petitioner or other persons who are suffering from such disabilities be asked to wait till eternity for the Government to identify the posts. It is no solace to the person with disability to be informed that the Government has still not identified the posts. They have waited for many long years and they cannot be made to wait any longer.

11. In *Ankush Dass Sood v. State of H.P. and Ors.* CWP No. 192 of 2004, a division bench of this Court, of which one of us (Deepak Gupta, J.) was a member, had observed as follows:

However, the most well intentioned legislations, the finest judicial orders are all set at naught by the ingenuity and apathy of the bureaucratic system. Despite the Act in question being in force since 7th February, 1996, i.e. for more than a decade, the mandate of the Act has been observed more in breach than in compliance to the provisions thereof. The Act has been violated with impunity or entirely frivolous grounds. Though, ostensibly reservations have been made for persons suffering from disabilities in matters of employment and guidelines have been laid down with regard to the facilities to be provided to such persons, in actual fact the persons with disabilities have been given virtually nothing in this decade.

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While dealing with Sections 32 and 33 of the Act, this Court in respect of class "1 and 2" posts, which would be equivalent to class "A" and "B" had observed as follows:

With regard to the class 1 and 2 posts, the State has only identified a few posts of Engineers, Doctors, Welfare Officers, Lecturers, etc. for certain disabled categories. According to the State a meeting under the Chairmanship of the Chief Secretary was held on 22.1.2007 to constitute a committee in the Personnel Department to identify more categories of posts for being including reservation in the Act. This is the bureaucratic system working at its best. If you want to avoid the mandate of the Act, appoint a committee. If you want to delay giving benefits to the disabled, appoint a committee. 11 years have elapsed since the Act was enacted and the bureaucratic system wants to delay the matter further by just appointing committees. Are the petitioners and other disabled persons to be told to wait till eternity while the administrative committees move at a snail's pace to identify the posts. The need of the disabled is today and now. They cannot be asked to wait till tomorrow. The Act makes no distinction between various categories of posts including the posts falling in the administrative services. The Apex Court in a number of cases has held that disabled persons cannot be denied their right to serve in these posts. This Court cannot lose sight of the fact that now reservation under the Act is provided even in the All India Civil Services Examination conducted by the UPSC. Therefore, the State is bound to make similar reservation in the Administrative Services of the State.

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12. In National Federation of Blind Vs. Union Public Service Commission and Others, , the apex Court held as follows:

13. ...After going through the list of posts identified as suitable for visually handicapped (blind and partially blind) it is obvious that there are number of posts which are required to be filled through the civil services examination and other competitive examinations conducted by the Commission. Group "A" and "B" posts in the category of Administrative Officers (Secretarial-Senior) and Administrative Officer (Secretarial-Junior) are necessarily to be filled as a result

of civil services examination by the Union Public Service Commission. If some of the posts in the Indian Administrative Service and other Allied Services, as identified by the committee, can be filled from amongst the visually handicapped persons then we see no reason why they should not be permitted to sit and write the civil services examination.

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13. The Bombay High Court in *Ashok M. Shrimali and Ors. v. State Bank of India and Ors.* 2001 BC.R. 132, had directed the Union of India to carry out the identification of posts u/s 32 of the Act and reserve the posts in favour of persons physically challenged, as contained in Section 33 of the Act, within a period of six months. This judgment was passed on 16.6.1999. More than 9 years have elapsed but according to the Union of India it still has not identified the posts.

A single Judge of the Delhi High Court in a very erudite judgment in *Ravi Kumar Arora Vs. Union of India (UOI) and Another*, had held as follows:

2. It is no answer to the persons with disability to be told that the Government is still not equipped and ready with the identified posts. They have waited enough and as Gabrielle Mistral said, "Right now is the time, his bones are being formed, his blood is being made and his senses are being developed... to him, we cannot answer "tomorrow". His name is "today".

Thereafter, the Court also held that the State could not negate the provisions of the Act by deleting or not identifying the posts. The Court thereafter directed that the petitioner be appointed to the Indian Postal Service or equivalent service.

14. A division bench of the Delhi High Court in a judgment delivered in *Union of India v. Jagmohan Singh* decided on 7th December, 2007 was dealing with a similar contention though that case admittedly related to class "C and D" posts. However] it would be appropriate to refer to certain observations of the division bench:

It is to be noted that the petitioner do not deny that a person suffering from physical disability is entitled to promotion to this very post in normal course. We fail to understand as to how when such physically (handicapped person gets promotion to the posts of COS in the normal course would be able to discharge the function of that post satisfactorily but would not be able to do so if he is promoted to this post under the reservation quoted. Ironically, this was the argument of learned Counsel for the petitioner before the Tribunal that in the normal course, despite being handicap, the respondent herein was eligible to be considered in the selection for promotion to Group C post of COS subject to his qualification in the selection. If selection by promotion to such a post under normal channel is available to a person like the respondent and his handicappedness, in that eventuality, does not come in way of discharging his duties, the reason for not providing reservation on this ground is contradictory in

terms and cannot be sustained. Such a justification for denying reservation is totally irrational and arbitrary. It, rather, depicts closed and narrow minded approach of the petitioner, which is unsustainable in view of the discussion above.

15. We have given a careful consideration to the provisions of the Act as well as the various rulings cited before us. We are clearly of the view that the State which has enacted a very laudable legislation like the "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" cannot thwart the provisions of the Act by not complying with the mandate of law. The Government, in our view, cannot after 13 years of the promulgation of the Act take up a stand that it has still not identified the posts. If we accept this stand, the whole purpose of enacting the legislation will be frustrated. All the promises held out to the disabled will be mere illusions and mirages. The disabled need concrete benefits, not hollow promises.

16. It is important to note that as far back as 1986 a specially constituted Standing Committee had identified various posts which could be held by the disabled and these posts includes the posts of Senior Audit Officer and Audit Officer, with which we are concerned. It is also not disputed that in normal course, the petitioner despite being disabled is entitled to promotion to these posts. His disability does not come in his way when normal promotion is concerned. We have been informed that the petitioner already stands promoted. This itself shows that this is not a post which cannot be held by a disabled person. If the petitioner can discharge his duties on normal promotion why cannot he discharge the same duties if he is given accelerated promotion on the basis of reservation.

17. The purpose of identifying posts u/s 32 of the Act is to ensure that all posts which can be reserved for persons with disability are identified. The Government must show why a particular post cannot be identified for persons with disability. True it is, that while identifying the posts, it can further be clarified that a particular post is only reserved for persons with certain types of disabilities. However, there may be certain posts which cannot be held by the disabled at all or which can be manned only by a particular category of disabled persons.

18. Once a post can be manned by a disabled person then there is, in our view, no need to specifically identify the posts. In the present case, the petitioner, despite his disability is entitled to be promoted to the post of Audit Officer. Therefore, this post can be deemed to be identified for the purpose of Section 32.

19. The argument of Shri Sandeep Sharma that in the absence of any rule framed under Article 148(5) of the Constitution of India, no reservation can be made in favour of the disabled is an argument of desperation. There are positive directions and it is the mandate of the "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" that reservation be made for the disabled. The State, which would include the Comptroller and Auditor General of India is bound to identify the posts and also

make reservations. If it fails to identify the posts or frame rules in accordance with the mandate of the Act, it cannot take benefit of its own inaction.

20. Keeping in view the aforesaid discussion, we are of the considered view that the provisions of the "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" are applicable to the posts of Audit Officer and Senior Audit Officer. We are further of the view that after the Government issued office memo on 16th January, 1998 extending the benefits of the Act to all grades and services, where element of direct recruitment does not exceed 75%, the Government is bound to make reservation on the aforesaid basis. The order of the learned Tribunal rejecting the original application of the petitioner is against law and is accordingly set-aside. The petitioner had filed the original application before the learned Tribunal in the year 1999. Before that he had been making a large number of representations in this regard.

21. In view of the above direction, we allow the writ petition, set-aside the order of the learned Tribunal and further direct that the respondents shall consider 3% of the posts in the cadre of Audit Officer and Senior Audit Officer to be reserved for physically handicapped persons. The respondents are further directed to consider the petitioner for promotion against such reserved posts in accordance with the roster points mentioned in office memo dated 16th January, 1998, on the first vacancy occurring after 16th January, 1998. In case the petitioner is found suitable in other respects, he shall be offered appointment from the back date with all consequential benefits. Petition is allowed in the aforesaid terms. The petitioner is held entitled to costs of Rs. 10,000/-.