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MAHESH GUPTA AND ORS.

v.

YASHWANT KUMAR AHIRWAR AND ORS.

AUGUST 30, 2007

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[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Service Law:

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Reservation—Post of Assistant teacher—8 posts for Scheduled Castes and 3 for handicapped persons—Appellants, handicapped persons belonging to general category, selected—Respondent belonging to reserved category and also handicapped, not selected—Respondent challenged selection of appellants—Selection of appellants set aside—On appeal, Held: Handicapped persons form a special class—Hence, further reservation based on caste, creed or religion could not be made—Appellants were selected against posts vacant under handicapped quota—Hence, their selection was wrongly set aside—Executive action must be fair and reasonable—Constitution of India, 1950—Articles 14, 16 and 39—Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995—Administrative law—Executive action—Social justice.

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The State of Madhya Pradesh issued a circular letter on 29.3.1993 which stated that the quota fixed for the blinds and other physically handicapped persons is not being fulfilled due to absence of knowledge about reservation and procedural complications and extending of the full benefit against the reserved posts in the government services as per the prescribed quota, for the handicapped persons could not be determined as a fair situation.

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Pursuant to or in furtherance of the said circular letter, the Commissioner issued an advertisement dated 26.5.1994. Appellants belonging to the general category and also handicapped persons were selected. Respondent No. 1, a handicapped person but also belonging to the reserved category candidate was not selected. He approached the Administrative Tribunal. The Administrative Tribunal opined that he had no right of appointment on the post of Assistant Teacher (Science) having not been selected by the Selection Committee stating that the heading of the advertisement dated 26.5.1994 is misleading that applications are also invited

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from the candidates belonging to the Scheduled Castes and Scheduled Tribes but in the body of the advertisement, 8 posts were reserved for the candidates belonging to the Scheduled Castes and 3 posts for handicapped persons without having any caste wise reservation.

On a writ petition, High Court set aside the order of Tribunal. High Court held that State Government is required to examine minutely and decide whether the posts could be filled from the general category when advertisement was for reserved category mentioned in the advertisement and whether these posts are to be filled from the members of scheduled tribes only or from the members of scheduled castes only or from the category of other backward castes or these posts were for all the categories and whether the reservation was in accordance with the reserved proportion. State would also examine whether at the relevant date any post of the handicapped candidate in general category was vacant. If no post was vacant then no person from general category could be appointed against these posts.

Even after the direction of the High Court, State was of the view that the Advertisement dated 26.5.1994 regarding special drive for recruitment of Scheduled Caste/Tribes and filling of the posts of handicapped persons, was issued in compliance of the instructions issued from time to time by the General Administration Department and the Circular Dated 29th of March, 1993, but in the language of the heading of the Advertisement, the words "and handicapped" should have been used along with Scheduled Caste/Tribes, which has not been done so and the selection procedure is without any fault and guiltless.

A contempt petition was filed at a later stage. In the contempt proceedings, the State took the stand that the advertisement was not proper and selection made against the quota for handicapped persons is liable to be cancelled. In terms of the said decision, the services of appellants were terminated. Appellants filed special leave to appeal against both the orders of High Court.

Allowing the appeal, the Court

HELD: 1.1. The State in terms of Article 16 of the Constitution of India may make two types of reservations - vertical and horizontal. Article 16(4) provides for vertical reservation; whereas Clause (1) of Article 16 provides for horizontal reservation. [Para 10] [587-D]

A 1.2. The State adopted a policy decision for filling up the reserved posts
for handicapped persons. A special drive was to be launched therefor. The
circular letter dated 29.03.1993 was issued only for the said purpose. A bare
perusal of the said circular letter would clearly show that the State had made
3% reservation for blinds and 2% for other physically handicapped persons.
B Such a reservation falling within Clause (1) of Article 16 of the Constitution
has nothing to do with the object and purport sought to be achieved by reason
of Clause (4) thereof. [Para 11] [587-D, E]

C 2. Disability has drawn the attention of the worldwide community. India
is a signatory to various International Treaties and Conventions. The State,
therefore, took a policy decision to have horizontal reservation with a view to
fulfil its constitutional object as also its commitment to the international
community. A disabled is a disabled. The question of making any further
reservation on the basis of caste, creed or religion ordinarily may not arise.
D They constitute a special class. The advertisement, however, failed to mention
in regard to the reservation for handicapped persons at the outset, but the
vacant posts were required to be filled up for two categories of candidates;
one for Scheduled Castes and Scheduled Tribe candidates and other for
handicapped candidates. Handicapped candidates have not been further
classified as belonging to Scheduled Castes, Scheduled Tribes and general
category candidates. It is a travesty of justice that despite the State clarified
E its own position in its order dated 1.01.2004 and stated that the posts were
vacant under the handicapped quota but it completely turned turtle and took a
diagonally opposite stand when a contempt petition was filed. In its reply in
the said proceedings, reference was made to the aforementioned order dated
1.01.2004 but within a short time, viz., on 4.02.2004 it opined on a
F presumption that as the word "handicapped" was not mentioned in the heading
of advertisement they were meant only for Scheduled Caste and Scheduled
Tribe candidates. Rule of Executive Construction was given a complete go bye.
Reasonableness and fairness which is the hallmark of Article 14 of the
Constitution of India was completely lost sight of. The officers of the State
behaved strangely. It prevaricated its stand only because a contempt proceeding
G was initiated. If the State was eager to accommodate the writ petitioner, it
could have done so. It did not take any measure in that behalf. It chose to
terminate the services of some of the employees who had already been
appointed. Such a course could not have been taken either in law or in equity.
The State is expected to have a constitutional vision. It must give effect to the
constitutional mandate. Any act done by it should be considered to have been
H effected in the light of the provisions contained in Part IV of the Constitution

of India. The State in terms of the provisions contained in Part IV should have given effect to the principles embodied in Article 39 of the Constitution of India. Whereas a reasonable reservation within the meaning of Article 16 of the Constitution of India should not ordinarily exist, 50%, reservation for women or handicapped persons would not come within the purview thereof.

[Para 12] [587-F-H; 588-A-F]

Indra Sawhney v. Union of India, [1992] Supp 3 SCC 212, relied on.

3. Furthermore, when the decision was taken, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 had come into force. In terms of the 1995 Act, the States were obligated to make reservations for handicapped persons. The State completely lost sight of its commitment both under its own policy decision as also the statutory provision. [Para 13] [588-F-G]

4. It is directed that the persons whose services have been terminated should be continued in service and they should be paid back wages as also other service benefits. Respondent No. 1 could have been considered both as handicapped persons as also Scheduled Castes and Scheduled Tribes. If all the vacancies meant for Scheduled Castes, Scheduled Tribe had not been filled up, the State may consider appointing him. If he has already been appointed, the State may consider the desirability of creating a supernumerary post and continue his service therein. [Para 14] [588-G; 589-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3984 of 2007.

From the final Judgment and Order dated 1.5.2003 of the High Court of Judicature for Madhya Pradesh, Jabalpur, Bench at Gwalior in W.P. No. 40/2000.

WITH

Civil Appeal Nos. 3985 and 3986 of 2007.

Sushil Kumar Jain, H.D. Thanvi, Sarad Singhania, Puneet Jain, Christi Jain, Piyush Jain, Pratibha Jain, Raj Kumar Gupta, Mridula Ray Bhaardwaj and Vibha Datta Makhija for the Appellants.

B. Sunita Rao, Rajesh Srivastava and B.S. Bandhit for the Respondents.

The Judgment of the Court was delivered by

A **S.B. SINHA, J. 1.** Leave granted.

B 2. Interpretation of an advertisement in the light of a circular of the State of Madhya Pradesh as regards recruitment of handicapped persons to some posts is in question in these appeals which arise out of judgments and orders dated 1.5.2003 and 23.08.2004 passed by the High Court of Madhya Pradesh in Writ Petition No. 40 of 2000 and M.C.C. (Contempt) No. 222 of 2003.

C 3. The State took recourse to a special drive for filling up the vacant posts in the reserved category candidates, viz., Scheduled Castes, Scheduled Tribes and Backward Classes. In a circular letter issued on 29.03.1993, it was stated:

“SUBJECT: SPECIAL DRIVE FOR FILLING UP RESERVED POSTS FOR HANDICAPPED PERSONS

D The State Government has reserved 3% posts (1% for blinds and 2% for other physically handicapped persons) for disabled persons. By the Notification of the State Government vide No. 50-2532-1(3)/80 dated 12th of February, 1991, exemption for 10 years in the prescribed age limit has been granted to the candidates belonging to blind, dumb, deaf and disabled persons eligible for services for the posts of the categories of 3rd and 4th grades, to be filled in the services of the State Government through Employment Exchanges (copy enclosed).
E In the orders of the Finance Department No. L-17-1-87-B-7-4 dated 4th of June, 1987 in paragraph 2, exemption has also been granted from the ban imposed for appointment in the government services, prescribed only for handicapped persons against the reserved posts.

F It has been brought to the knowledge of the State Government that this quota for the handicapped persons is not being fulfilled due to absence of knowledge about reservation and procedural complications. Extending the full benefit against the reserved posts in the government services as per the prescribed quota for the handicapped persons, cannot be determined as a fair situation.”

G It was *inter alia* directed:

H “In this connection, it is worth mentioning that for the successful conduct of the aforesaid campaign and for the implementation of the said policy of the State Government, call for the names from the Employment Exchanges, for the vacancies at District level, the District

Collector, and for the vacancies at Divisional level, the Divisional Commissioner, and for the vacancies at Heads of the Department, the concerning Heads of Department have been authorized. These authorization shall be limited only up to the posts of 3rd and 4th grades. So far as the question about 2nd Grade is concerned, this authority shall vest with the State Government, but the procedure regarding examination, interview etc., could be conducted at the level of the Head of the Department.”

4. Pursuant to or in furtherance of the said circular letter, the Commissioner, Chambal Division, Morena issued an advertisement, the heading whereof is as under:

“SPECIAL RECRUITMENT DRIVE FOR FILLING UP THE VACANT RESERVED POSTS OF SCHEDULED CASTE AND SCHEDULED TRIBE.”

However, while providing for the details of the posts, it was categorically laid down:

Name of Post (s)	Vacant Posts SC ST Handi- capped	Minimum Qualifications	Pay- Scale
1. Higher Grade Teachers = English - 14 and Sanskrit - 8	- 20 02	Graduate in relevant subject passed in 2nd Div. & Trained (B.Ed. B.T.C.)	1400-2640
2. Industries Craft Teacher	- 17 02	Hr. Sec. Exam (Intermediate) & Diploma in concerning craft by an Institute recognized by the Government	1400-2640
3. Assistant Teacher (Science)	- 08 03	Hr. Sec. Exam (Intermediate) Science with the Subjects, Physics, Chemistry, Biology	1200-2040
4. Artists -cum-	- 01 -	Graduate Degree in Arts from J.J. School	1400-2340

A			of Arts and one year experience in commercial photography	
B	5. Dietician	01 - -	M.Sc. (Home Science) or B.Sc. (Home Science) - 2nd Division & essentiality of Food craft subject	1400-2340
C	6. II Gr. Clerk	- 01 -	1. Hr. Secy. or High School passed 2. Hindi Typing passed from M.P. Board	950-1530
D	7. Steno-Typist	- 05 -	1 & 2 ==ditto== 3. Knowledge in Hindi Stenography	950-1530 + 75
E	8. Stenographer	- 05 -	1 & 2 as above + 3. Dictation in Hindi Stenography with the speed of 60 words per minute as prescribed by Govt.	
F	9. Tracer	- 01 -	1. Hr. Secy./High Sch. with I.T.I. passed 2. Drawing Diploma or Civil Engineering Diploma	950-1530
G	10. Assistant Cartographer	- 02 -	Passed Hr. Secy. Exam. and Degree/ Diploma in the Craft or Certificate of Draftman in Civil Engineer from I.T.I. or Surveyor Trade Certificate	Pay as prescribed by Govt.
H	Total :	01 60 07		

5. We are concerned with the posts of Assistant Teacher (Science). Appellants herein belonged to the general category. They, however, suffer from disability. They are handicapped persons. Respondent No. 1 Yashwant Kumar Ahirwar, a handicapped person but also belonging to the reserved category candidate was not selected. He approached the Administrative Tribunal. The Administrative Tribunal by a judgment and order dated 27.11.1999 opined that he had no right of appointment on the post of Assistant Teacher (Science) having not been selected by the Selection Committee stating:

"4. On perusal of the advertisement published in the Rojgar Nirman dt. 26th May, 1994 (Ann. P.8), it appears that the respondent had advertised 8 posts for the reserved category for scheduled castes and 8 posts for the handicapped persons. The respondents showed the reserved category separately in the body of the advertisement, though the heading of such advertisement is misleading that applications are also invited from the candidates belonging to the category of S.C. & S.T. but the body of the advertisement leaves no room for doubt that 8 posts were got reserved for the candidates belonging to the Scheduled Castes and 3 posts for handicapped persons without having any caste wise reservation. The respondent made it clear in their return that there was also special drive to fill the vacancies belonging to the handicapped persons pursuant to the circular issued by the State Government on 29th March, 1993 (Ann.J-1). There was clear direction therein that such vacancies should be filled by the end of 30th June, 1993..."

6. On a writ petition having been filed by him, the High Court, however, by reason of the impugned judgment while setting aside the order of the Tribunal, directed:

"...Therefore, in the said facts of the case it will be appropriate that the State Government should examine minutely and decide whether the posts could be filled from the general category when advertisement was for reserved category mentioned in the advertisement. The State Government shall also examine whether these posts are to be filled from the members of scheduled tribes only or from the members of scheduled castes only or from the category of other backward castes or these posts were for all the categories mentioned above. State Government should also consider whether the reservation was in accordance with the reserved proportion shown in the Annexure-R/1 filed by the State. Annexure R/1 is issued by the State Government

- A on 29th March, 1993. State shall also examine whether at the relevant date any post of the handicapped candidate in general category was vacant. If no post was vacant then no person from general category could be appointed against these posts. State shall determine that the category advertised had been properly filled. The entire exercise be conducted within a period of three months from the date of communication of the order..."
- B

7. The stand of the State before the Tribunal as also the High Court had been that the posts reserved for the handicapped persons were open to all. Even after the direction of the High Court, the State was of the view:

- C "1 The filling of the three posts of Assistant Teachers (Science) as mentioned in the Advertisement, could be carried out from the handicapped candidates of any category.

- D 2 The Advertisement published by the Commissioner, Chambal Division, regarding special drive for recruitment of Scheduled Caste/Tribes and filling of the posts of handicapped persons, was issued in compliance of the instructions issued from time to time by the General Administration Department and the Circular vide No. F.9-2/93/1/Res.Cell, Bhopal Dated 29th of March, 1993, but in the language of the heading of the Advertisement, the words " and handicapped" should have been used along with Scheduled Caste/Tribes, which has not been done so.
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- F 3 At that time in the quota for the handicapped persons, 3 posts of Assistant Teacher (Science) were vacant, for filling of the same, proposals were forwarded by the Joint Director, Education, Gwalior Division, vide its letter No. Estt.3/DRA/Gwalior/268 dated 1st of March, 1994, to the Commissioner, Chambal Division.

- G Resultantly, simply in the language of the heading of the Advertisement, because of not mentioning of the word "Handicapped" at the relevant time, the selection committee has fully complied with the directions/instructions issued by the Government, and the selection procedure is without any fault and guiltless."

8. A contempt petition was filed at a later stage. In the contempt proceedings, the State took a volte face. It *inter alia* took the stand that the advertisement was not proper and directed:

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"9. Resultantly, the advertisement issued by the Commissioner, Chambal Division and published on 26th of May, 1994 in Rojagar Samachar, was not proper advertisement relating to vacant posts for the category of handicapped persons. Therefore, on the basis of this advertisement, selection made against the quota for handicapped persons, being not proper, is liable to be cancelled. Because the handicapped teachers are presently in service selected on the basis of this selection, their services will have to be terminated, and, therefore, the competent officer shall issue a show-cause notice to them, an opportunity for being heard, should be extended to them."

9. In terms of the said decision, a show cause notice was issued upon the appellants herein as to why their services shall not be terminated. The services of the appellants were terminated. Appellants filed a Special Leave Petition against the original order dated 1.05.2003. However, it is now accepted that services of some of the appellants have been terminated.

10. The State in terms of Article 16 of the Constitution of India may make two types of reservations - vertical and horizontal. Article 16(4) provides for vertical reservation; whereas Clause (1) of Article 16 provides for horizontal reservation.

11. The State adopted a policy decision for filling up the reserved posts for handicapped persons. A special drive was to be launched therefor. The circular letter was issued only for the said purpose. A bare perusal of the said circular letter dated 29.03.1993 would clearly show that the State had made 3% reservation for blinds and 2% for other physically handicapped persons. Such a reservation falling within Clause (1) of Article 16 of the Constitution has nothing to do with the object and purport sought to be achieved by reason of Clause (4) thereof.

12. Disability has drawn the attention of the worldwide community. India is a signatory to various International Treaties and Conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfil its constitutional object as also its commitment to the international community. A disabled is a disabled. The question of making any further reservation on the basis of caste, creed or religion ordinarily may not arise. They constitute a special class. The advertisement, however, failed to mention in regard to the reservation for handicapped persons at the outset, but, as noticed hereinbefore, the vacant posts were required to be filled up for two categories of candidates; one for Scheduled Castes and Scheduled Tribe

- A candidates and other for handicapped candidates. Handicapped candidates have not been further classified as belonging to Scheduled Castes, Scheduled Tribes and general category candidates. It is a travesty of justice that despite the State clarified its own position in its order dated 1.01.2004 and stated that the posts were vacant under the handicapped quota but it completely turned
- B turtle and took a diagonally opposite stand when a contempt petition was filed. In its reply in the said proceedings, reference was made to the aforementioned order dated 1.01.2004 but within a short time, viz., on 4.02.2004 it opined on a presumption that as the word "handicapped" was not mentioned in the heading of advertisement they were meant only for Scheduled Caste and Scheduled Tribe candidates. Rule of Executive Construction was given
- C a complete go bye. Reasonableness and fairness which is the hallmark of Article 14 of the Constitution of India was completely lost sight of. The officers of the State behaved strangely. It prevaricated its stand only because a contempt proceeding was initiated. If the State was eager to accommodate the writ petitioner - respondent, it could have done so. It did not take any measure in that behalf. It chose to terminate the services of some of the
- D employees who had already been appointed. Such a course could not have been taken either in law or in equity. The State is expected to have a constitutional vision. It must give effect to the constitutional mandate. Any act done by it should be considered to have been effected in the light of the provisions contained in Part IV of the Constitution of India. The State in terms
- E of the provisions contained in Part IV should have given effect to the principles embodied in Article 39 of the Constitution of India. Whereas a reasonable reservation within the meaning of Article 16 of the Constitution of India should not ordinarily exist, 50%, as has been held by this Court in *Indra Sawhney v. Union of India*, [1992], Supp 3 SCC 212 : AIR (1993) SC 477, reservation for women or handicapped persons would not come within the
- F purview thereof.

13. Furthermore, when the decision was taken, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the 1995 Act") had come into force. In terms of the 1995
- G Act, the States were obligated to make reservations for handicapped persons. The State completely lost sight of its commitment both under its own policy decision as also the statutory provision.

14. For the reasons aforementioned, we not only set aside the judgment of the High Court but also direct that the persons whose services have been
- H terminated in terms of 4.02.2004 should be continued in service. We furthermore

direct that they should be paid back wages as also other service benefits. Respondent No. 1 could have been considered both as handicapped persons as also Scheduled Castes and Scheduled Tribes. If all the vacancies meant for Scheduled Castes, Scheduled Tribe had not been filled up, the State may consider appointing him. If he has already been appointed, the State may consider the desirability of creating a supernumerary post and continue his service therein.

15. The appeals are allowed with costs. Counsel's fee assessed at Rs. 25,000/- in each case.

D.G.

Appeal allowed.