THE STATE OF KERALA & ORS.
v.
LEESAMMA JOSEPH

(Civil Appeal No. 59 of 2021)

JUNE 28, 2021

[SANJAY KISHAN KAUL* AND R. SUBHASH REDDY, JJ.]

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995: ss.32, 33, 47 – Reservation in promotion – Held: ss.32, 33 and 47 provides for equal opportunity for career progression, including promotion – Thus, it would be negation of the legislative mandate if promotion is denied to PwD and such reservation is confined only to the initial stage of induction in service – This would in fact result in stagnation of the disabled in a consequential frustration – The operation of reservation and the computation has to be made with reference to the total number of vacancies in the cadre strength and no distinction should be made between posts to be filled by direct recruitment and by promotion – Respondent having been given employment on compassionate grounds and not having entered service under the 1995 Act, was entitled to claim promotion under that Act.

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995: s.33 – Whether reservation under s.33 of the 1995 Act is dependent upon identification of posts as stipulated by s.32 – Held: It was never the intention of the legislature that the provisions of s.32 would be used as a tool to frustrate the benefits of reservation under s.33 – In fact, identification of posts for purposes of reservation had to take place immediately after the 1995 Act – A resistance to such reservation is obvious from the delaying tactics adopted by most of the government authorities in truly implementing the intent – What is required is identification of posts in every establishment until exempted under proviso to s.33 – No doubt the identification of the posts was a prerequisite to appointment, but then the appointment cannot be frustrated by refusing to comply with the prerequisite.

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995: s.32 – In absence of a provision in the Rules for reservation in promotion for PwD, whether promotion

* Author

can be denied to a PwD – No doubt, the mandate of s.32 of the 1995 Act enjoins the government to identify posts that can be filled up with persons with disability – Thus, even posts in promotional cadre have to be identified for PwD and such posts have to be reserved for PwD – The identification of such posts is no doubt a prerequisite for reservation in promotion for PwD – There cannot be methodology used to defeat the reservation in promotion – Once that post is identified, the logical conclusion would be that it would be reserved for PwD who have been promoted – The absence of rules to provide for reservation in promotion would not defeat the rights of PwD to a reservation in promotion as it flows from the legislation.

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995: Whether the Respondent can be promoted by giving benefit of reservation as she is a PwD, despite the fact that she was not appointed in the PwD quota – The 1995 Act does not make a distinction between a person who may have entered service on account of disability and a person who may have acquired disability after having entered the service – Similarly, the same position would be with the person who may have entered service on a claim of a compassionate appointment – The mode of entry in service cannot be a ground to make out a case of discriminatory promotion.

Dismissing the appeal, the Court Held:

1. Whether the 1995 Act mandates reservations in promotions for persons with disabilities?

1.1 Section 32, 33 and 47 provides for equal opportunity for career progression, including promotion. Thus, it would be negation of the legislative mandate if promotion is denied to PwD and such reservation is confined to the initial stage of induction in service. This would in fact result in stagnation of the disabled in a consequential frustration. [Para 14]

1.2 The operation of reservation and the computation has to be made with reference to the total number of vacancies in the cadre strength and no distinction should be made between posts to be filled by direct recruitment and by promotion. Reservation has to be computed with reference to total number of vacancies in the cadre strength and no distinction can be

made between the posts to be filled by direct recruitment and by promotion. Thus, total number of vacancies in the cadre strength would include the vacancies to be filled in by nomination as well as by promotion. [Paras 15, 17]

1.3 The two preliminaries for operationalising the said provision, i.e. there has to be rules providing for promotion from the feeder cadre to the provisional post as there cannot be promotions even for the PwD de hors the rules as a singular benefit. The requirement under Section 32 of the 1995 Act has also to be completed for identifying the posts in the promotional cadre. [Para 17]

2. Whether reservation under Section 33 of the 1995 Act is dependent upon identification of posts as stipulated by Section 32?

There can be little doubt that it was never the intention of the legislature that the provisions of Section 32 would be used as a tool to frustrate the benefits of reservation under Section 33. In fact, identification of posts for purposes of reservation had to take place immediately after the 1995 Act. A resistance to such reservation is obvious from the delaying tactics adopted by most of the government authorities in truly implementing the intent. It thus shows that sometimes it is easier to bring a legislation into force but far more difficult to change the social mind set which would endeavour to find ways and means to defeat the intent of the Act enacted and Section 32 was a classic example of the same. What is required is identification of posts in every establishment until exempted under proviso to Section 33. No doubt the identification of the posts was a prerequisite to appointment, but then the appointment cannot be frustrated by refusing to comply with the prerequisite. [Para 19]

Government of India & Anr. v. Ravi Prakash Gupta & Anr. **(2010) 7 SCC 626 : [2010] 7 SCR 851;** *Union of India v. National Confederation for Development of Disabled & Anr.* **(2015) 13 SCC 643 – relied on.**

3. Whether in absence of a provision in the Rules for reservation in promotion for PwD, whether promotion can be denied to a PwD?

3.1 No doubt, the mandate of Section 32 of the 1995 Act enjoins the government to identify posts that can be filled up with persons with disability. Thus, even posts in promotional cadre have to be identified for PwD and such posts have to be reserved for PwD. The identification of such posts is no doubt a prerequisite for reservation in promotion for PwD. There cannot be methodology used to defeat the reservation in promotion. Once that post is identified, the logical conclusion would be that it would be reserved for PwD who have been promoted. The absence of rules to provide for reservation in promotion would not defeat the rights of PwD to a reservation in promotion as it flows from the legislation. [Para 20]

Rajeev Kumar Gupta and Others v. Union of India and Ors. **(2016) 13 SCC 153 : [2016] 3 SCR 407 – relied on.**

3.2 The only caveat to the aforesaid would be if the Government is of the view that the posts in the promotional cadre cannot be reserved for PwD category due to functional or other reasons and that should not be a ruse to defeat the reservation in promotion. Such a scenario will result in frustration and stagnation as others may get promoted even over the persons with disability more often than not, the disability comes in the way of meeting the requirements for promotion. In such a situation, the government should explore methods to address the issue of stagnation of PwD. [Para 21]

Vikash Kumar v. Union Public Service Commission **2021 (2) SCALE 468 – relied on.**

3.3 A reading of Section 20 with Section 2(y) shows that non-discrimination in employment is a mandate of the legislature. In the context of sub-section (2) of Section 20, where the expression used is "reasonable accommodation" as an aspect to be provided by the Government establishments, this expression has been defined in Section 2(y) to mandate necessary and appropriate modifications and adjustments to ensure that the PwD enjoy or exercise their rights equally with others. There is no reason why a clue cannot be taken from such a line of interpretation and reasoning to carry out the intent of the Legislation. Even under the 1995 Act, the rights of PwD, and how they would attain an equal opportunity has

been an ongoing exercise blocked by a greater impediment of a social mind set change and the 2016 Act is the result thereof. [Paras 24, 25]

4. Whether the Respondent can be promoted by giving benefit of reservation as she is a PwD, despite the fact that she was not appointed in the PwD quota?

4.1 The direction in the impugned order was for the respondent to be considered for the promotion based on disability at the time when the claim originally arose, but subject to her seniority with reference to other PwD candidates entitled to such reservation. She was also held entitled to the notional benefits of her promotion from the date she was so found entitled. The Ministry of Social Justice and Empowerment in the Department of Empowerment of Persons with Disabilities (Divyang), Government of India has undertaken a very comprehensive exercise of identifying posts which can be reserved for PwD and the list of such posts are available on the website. From that it appears that the post of UDC/Cashier would be amenable to reservation for PwD and thus there can be little doubt that the respondent has been capable of discharging functions of the promotional post and thus could not be denied the benefit of reservation (even if Rules do not provide for any reservation in promotion) as Section 32 of the 1995 Act is to facilitate but not to impede the legislative mandate. [Para 26]

4.2 There is no dispute about the benchmark disability of the respondent. It would be discriminatory and violative of the mandate of the Constitution of India if the respondent is not considered for promotion in the PwD quota on this pretext. Once the respondent has been appointed, she is to be identically placed as others in the PwD cadre. The anomaly which would arise from the submission of the appellant-State is apparent - a person who came in through normal recruitment process but suffers disability after joining service would on a pari materia position be also not entitled to be considered to a vacancy in a promotional post reserved for a PwD. This is the consequence if the entry point is treated as determinative of the entitlement to avail of the benefits. Source of recruitment ought not to make any difference but

what is material is that the employee is a PwD at the time for consideration for promotion. The 1995 Act does not make a distinction between a person who may have entered service on account of disability and a person who may have acquired disability after having entered the service. Similarly, the same position would be with the person who may have entered service on a claim of a compassionate appointment. The mode of entry in service cannot be a ground to make out a case of discriminatory promotion. [Para 27]

Poonam Manchanda v. Union of India **(2019) SCC Online P&H 2710;** *Union of India v. Poonam Manchanda* **Civil Appeal No. 6092/2019;** *Kamla Chanyal v. State of Uttarakhand* **W.P. No. 126/2015 – judgment dated 29.11.2016;** *Uma Prasad v. Chief Executive Officer, EPFO: A case before the Chief Commissioner for Persons with Disabilities (Divyangjan) Govt. of India* **– referred to.**

5. The appellant-State has not implemented the judgment of this Court in Rajeev Kumar Gupta's and Siddaraju's cases. The State of Kerala is directed to implement these judgments and provide for reservation in promotion in all posts after identifying said posts. [Para 29]

Union of India v. National Federation of the Blind **(2013) 10 SCC 772 : [2013] 9 SCR 1023;** *National Confederation for Development of Disabled and Anr. v. Union of India and Ors.* **(2015) SCC OnLine Bom 5112;** *Indra Sawhney and Ors. v. Union of India and Ors. Siddaraju v. State of Karnataka & Ors.* **2020 3 SCALE 99 – referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 59 of 2021.

From the Judgment and Order dated 09.03.2020 of the High Court of Kerala at Ernakulam in O.P.(KAT) 286 of 2015.

Jishnu M.L., Ms. Priyanka Prakash, Ms. Beena Prakash, G. Prakash, Advs. for the Appellants.

Gaurav Agrawal, Adv. for the Respondent.

The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.

1. The international awakening to further the rights and equal opportunities to persons with special abilities (hereinafter referred to as 'PWD') propelled the adoption of the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region in the meeting of the member states of the Economic and Social Commission for Asia and the Pacific held in Beijing in December, 1992; to which India was a signatory. In furtherance of its international commitments, The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the 1995 Act") was enacted which came into force on 7th February, 1996. In 2007, India ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In pursuance to the debates in the Standing Committee of the Parliament, The Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as "the 2016 Act") replaced the 1995 Act.

2. The issue debated before us in the present proceedings is the right of promotion under the 1995 Act, as claimed by the respondent, in which she succeeded before the High Court of Kerala in terms of the impugned order dated 9th March, 2020. The respondent did not succeed in a claim before the Kerala Administrative Tribunal which dismissed her application by order dated 27th February, 2015 but the said judgment was set aside by the impugned order.

3. On 7th January, 2021, we had noted the submission of learned counsel for the appellants that the respondent was given employment on compassionate ground and thus the entry point was not of a person with disability under the 1995 Act. In view thereof, a submission was made that such a person cannot claim reservation in matters of promotion as it will affect the other general candidates. We were of the view that the issue required examination, but since the respondent had retired and it was only the issue of her financial benefits, we declined to interfere with the relief granted by the High Court vide the impugned order. Thus, no notice was required to be issued to the respondent. Leave was granted to examine the legal issue and we appointed Mr. Gaurav Agrawal as Amicus Curiae to assist the Court, since the respondent would be unrepresented before us.

4. The facts relating to the respondent are not really necessary to be recorded in detail, except to note that she was appointed in 1996 to the post of Typist/clerk in the Police Department on compassionate grounds, after her brother had passed away during service. She undisputedly suffered from Post Polio Residual Paralysis (L) Lower Limb and her permanent disability had been assessed at 55%. The respondent subsequently cleared all departmental tests for promotion, and was test qualified in December, 1998. She was given a category change to Lower Division clerk in July, 2001 without losing her seniority and later on promoted as Senior Clerk (equivalent to Upper Division Clerk) on 16th September, 2004, based on the seniority list of test qualified LDCs. She was thereafter promoted to the post of a Cashier on 5th May, 2015. The issue which had been raised by the respondent was that she was entitled to promotion as a Senior Clerk with effect from 1st July, 2002 with all consequential benefits and as a Cashier with effect from 20th May, 2012 with all consequential benefits and thereafter as Junior Superintendent with effect from the date of her entitlement. This plea was predicated on reservation in matters of promotion which she sought under the 1995 Act as she suffered from physical disability.

VIEW OF THE TRIBUNAL

5. The aspect of employment under the 1995 Act has been dealt with in Chapter VI. Section 32 mandates identification of posts which can be reserved for persons with disabilities (PwD) while Section 33 provides for reservation of posts. The provisions read as under:

"32. Identification of posts which can be reserved forpersons 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 update 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 of 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."

6. On a reading of Section 33, the Tribunal observed that it only provided for reservation of not less than 3% for persons or class of PwD but did not provide for reservation in promotion. Section 32 mandating identification of posts was noticed by the Tribunal and the government order issued thereunder limited the reservation only in matters of direct recruitment through the Public Service Commission. The Promotion was once again an aspect not provided for.

7. The Tribunal took into account the judgment of this Court in ***Union of India vs. National Federation of the Blind***[1] to opine that the issue dealt with thereunder was whether 3% reservation was to be applied in reference to vacancies in a particular post arising from time to time, or the cadre strength of that post. In that context, it was opined by this Court that reservation was to be applied with reference to vacancies. The absence of any observations regarding reservation in promotion was noticed. The judgment of the Bombay High Court in ***National Confederation for Development of Disabled and Anr. vs. Union of India and Ors.***[2] which directed benefit of reservation in matters of promotion was also examined; but it was opined that the rules of Recruitment in the State of Kerala, General Rules and other orders issued by the Government under Section 32 of the 1995 Act did not provide for any reservation in promotions. Thus, the application before the Tribunal was dismissed.

1 (2013) 10 SCC 722.
2 2015 SCC Online Bom 5112.

VIEW OF THE KERALA HIGH COURT

8. The High Court succinctly set forth a question of law as to whether persons having physical disability could be granted reservation in promotion. In this regard, the judgment of this Court delivered subsequently in ***Rajeev Kumar Gupta and Others vs. Union of India and Ors.***[3] was taken note of to the effect that reservation would be applicable even in promotion. Another Bench of this Court had referred the matter to a larger Bench in this behalf on the question of whether the dicta would go against the decision in ***Indra Sawhney and Ors. vs. Union of India and Ors.***[4] The matter was resolved in ***Siddaraju vs. State of Karnataka & Ors.***[5] wherein it was affirmed that such reservation was applicable in promotions and the ratio of ***Indra Sawhney's case (supra)*** was distinguished. The High Court thus set aside the order of the Tribunal and granted relief to the respondent.

CASE OF THE APPELLANTS

9. A threefold submission was made before us on behalf of the Appellant-State:

   a. In Siddaraju's case(supra) it was opined that Sections 32 and 33 of the 1995 Act mandated that 3-4 per cent of the posts identified by the government were to be reserved for appointment of persons suffering from physical disabilities. It was pleaded that this cannot be interpreted to mean that such a reservation would extend even to promotions.

   b. Though undoubtedly the respondent suffered from physical disability, she was not appointed through a recruitment process under the 1995 Act, but was appointed on compassionate grounds on the demise of her brother- a different channel of recruitment. It was thus submitted that she could not claim any right to reservation in promotion under the 1995 Act.

   c. The government had issued several orders providing 3-4 per cent reservation as per the 1995 Act in matters of appointment.

3 (2016) 13 SCC 153.
4 1992 Supp (3) SCC 217.
5 2020 3 SCALE 99.

SUBMISSIONS OF THE AMICUS CURIAE

10. Mr. Gaurav Agrawal, learned Amicus Curiae, took us through the conspectus of the legal pronouncements dealing with the aspect of reservation in promotion under the 1995 Act, and the consequences of the repeal of that Act on the enactment of 2016 Act. In this behalf, we may note that the State Government, on perusal of the written note of arguments of the learned Amicus Curiae, sought to draw our attention to the factum of filing of MA No. 2171/2020 for clarification of the judgment in ***Siddaraju's case*** (supra) and pleaded for the result of the application to be awaited. However, on the other hand, the learned Amicus Curiae submitted that he had examined the record of that case and the issue involved therein is not concerned with the issue arising in the present case. We may note Section 34 of the 2016 Act which reads as under:

34. Reservation.–(1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent. each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark disabilities under clauses (d) and (e), namely:-

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five 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 five categories with the prior approval of the appropriate Government.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit."

11. The material aspect is the proviso inserted stipulating that reservations in promotions shall be in accordance with such instructions as are issued by the appropriate government from time to time. M.A. No. 2171/2020 has been filed for clarification in view of the proviso, seeking the view of the Court as to how that would operate and from which date. The earstwhile Section 33 of the 1995 Act did not have such a provision. The reason why this clarification was not relevant was noted by us on 24th March, 2021. It was explained that since the present case was admittedly governed by the provisions of 1995 Act; and the main issue arising for consideration is whether the respondent having been given employment on compassionate grounds and not having entered service under the 1995 Act, was entitled to claim promotion under that Act. The plea of the State was that since the rules of the appellant-State did not provide for any reservation in promotion to people who are governed by the 1995 Act, the same was not permissible.

12. Mr. Gaurav Agrawal, learned Amicus Curiae, submitted an exhaustive written note setting forth the judicial pronouncements and set out four issues which would arise for consideration. We now proceed to discuss each of the four aspects hereinafter:

I. Whether the 1995 Act mandates reservations in promotions for persons with disabilities?

13. A broad aspect sought to be submitted before us is that Sections 32 and 33 of the 1995 Act had to be interpreted in juxtaposition and consonance with Section 47 of that Act which reads as under:

"47. Non-discrimination in Government employment. —

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall he denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

14. The legislative mandate has to be understood in the aforesaid context as it provides for equal opportunity for career progression, including promotion. Thus, it would be negation of the legislative mandate if promotion is denied to PwD and such reservation is confined to the initial stage of induction in service. This would in fact result in stagnation of the disabled in a consequential frustration.[6]

6 This was held in Viklang Sang Haryana vs, State of Haryana, 2011 SCC OnLine P&H 4266 as the State of Haryana did not provide for reservation in promotion to PwD in Class III and IV posts.

15. The operation of reservation and the computation has to be made with reference to the total number of vacancies in the cadre strength and no distinction should be made between posts to be filled by direct recruitment and by promotion.

16. The last aspect submitted in this behalf is that the reservation could be granted to PwD if: (i) the Rules provide for promotion from the feeder cadre to the promotional posts; and (ii) posts are identified in the promotional cadre, which are capable of being filled up with Persons with Disability.[7]

17. On examination of the aforesaid plea we find that that there is merit in what the learned Amicus Curiae contends and we are of the view that really this issue is no more res integra in view of the judgment of this Court in ***Government of India & Anr. vs. Ravi Prakash Gupta & Anr.***[8] and ***Union of India vs. National Federation of the Blind (supra)*** opining that reservation has to be computed with reference to total number of vacancies in the cadre strength and no distinction can be made between the posts to be filled by direct recruitment and by promotion. Thus, total number of vacancies in the cadre strength would include the vacancies to be filled in by nomination as well as by promotion. In fact, this was the view adopted by the Bombay High Court discussed aforesaid in ***National Confederation for Development of Disabled and Anr. vs. Union of India and Ors. (supra)*** with the challenge raised to the same in a SLP being rejected in ***Union of India vs. National Confederation for Development of Disabled & Anr.***[9]. We may note the observations in ***Rajeev Kumar Gupta and Others vs. Union of India and Others (supra)*** in paragraph 24 to the effect: "Once the post is identified, it must be reserved for PwD irrespective of the mode of recruitment adopted by the State for filling up of the said post" and a direction was issued to the Government to extend 3% reservation to PwD in all identified posts in Group A and Group B "irrespective of the mode of filling up of such posts".

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7 This is how the Bombay High Court in Ravindra v. Union of India, 2020 SCC OnLine Bom 771 has interpreted the judgments of this Hon'ble Court in Rajeev Kumar Gupta (supra) and Siddaraju (supra).

8 (2010) 7 SCC 626.

9 (2015) 13 SCC 643.

Learned Amicus Curiae has rightly pointed out the two preliminaries for operationalising the said provision, i.e. there has to be rules providing for promotion from the feeder cadre to the provisional post as there cannot be promotions even for the PwD de hors the rules as a singular benefit. The requirement under Section 32 of the 1995 Act has also to be completed for identifying the posts in the promotional cadre.

18. In our view, the aforesaid should put at rest the controversy insofar as the mandate of 1995 Act qua promotion is concerned.

II. Whether reservation under Section 33 of the 1995 Act is dependent upon identification of posts as stipulated by Section 32?

19. On a plea of the learned Amicus Curiae, which we unhesitatingly accept, there can be little doubt that it was never the intention of the legislature that the provisions of Section 32 would be used as a tool to frustrate the benefits of reservation under Section 33. In fact, identification of posts for purposes of reservation had to take place immediately after the 1995 Act. A resistance to such reservation is obvious from the delaying tactics adopted by most of the government authorities in truly implementing the intent. It thus shows that sometimes it is easier to bring a legislation into force but far more difficult to change the social mind set which would endeavour to find ways and means to defeat the intent of the Act enacted and Section 32 was a classic example of the same. In ***Government of India & Anr. vs. Ravi Prakash Gupta & Anr.*** ***(supra)*** also, this Court mandated the identification of posts for purposes of reservation. Thus, what is required is identification of posts in every establishment until exempted under proviso to Section 33. No doubt the identification of the posts was a prerequisite to appointment, but then the appointment cannot be frustrated by refusing to comply with the prerequisite. This view was affirmed by a larger Bench of three Judges in ***Union of India vs. National Federation of Blind*** ***(supra).***

III. Whether in absence of a provision in the Rules for reservation in promotion for PwD, whether promotion can be denied to a PwD?

20. The aforesaid issue was raised by learned Amicus Curiae in the context of the plea of the appellant State that the State does not provide for any reservation in promotion for PwD. Thus, a person with disability would be considered for promotion along with other persons working in the feeder cadre. We have no doubt that the mandate of Section 32 of the 1995 Act enjoins the government to identify posts that can be filled up with persons with disability. Thus, even posts in promotional cadre have to be identified for PwD and such posts have to be reserved for PwD. The identification of such posts is no doubt a prerequisite for reservation in promotion for PwD. There cannot be methodology used to defeat the reservation in promotion. Once that post is identified, the logical conclusion would be that it would be reserved for PwD who have been promoted. The absence of rules to provide for reservation in promotion would not defeat the rights of PwD to a reservation in promotion as it flows from the legislation and in our view, this is the basis of the mandate of this Court in Rajeev Kumar Gupta's and Siddaraju's cases (supra).

21. The only caveat to the aforesaid would be if the Government is of the view that the posts in the promotional cadre cannot be reserved for PwD category due to functional or other reasons and that should not be a ruse to defeat the reservation in promotion. We are conscious of the fact that such a scenario will result in frustration and stagnation as others may get promoted even over the persons with disability as submitted by the learned Amicus Curiae, more often than not, the disability comes in the way of meeting the requirements for promotion. In such a situation, we would require the government to explore methods to address the issue of stagnation of PwD.

22. In the aforesaid eventuality, learned Amicus Curiae has suggested some solutions, i.e., (a) to provide promotional avenues in other departments/establishments (where posts are identified for PwD at a higher level) or (b) grant of higher pay in the same post. This is stated to be an obligation flowing from Section 47 of the 1995 Act.

23. In the recent judgment of this Court in ***Vikash Kumar vs. Union Public Service Commission***[10] while dealing with the latter 2016 Act, an expansive interpretation has been given to Section 20 read with Section 2(y). The said provisions read as under:

10 2021 (2) SCALE 468.

"20. Non-discrimination in employment.-

(1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, exempt any establishment from the provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

(3) No promotion shall be denied to a person merely on the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities."

"2. Definitions-

(y) "reasonable accommodation" means necessary and appropriate modification and adjustments, without imposing a disproportionate or undue burden in a particular case, to ensure to persons with disabilities the enjoyment or exercise of rights equally with others;"

24. A reading of the aforesaid provisions shows that non-discrimination in employment is a mandate of the legislature. In the context of sub-section (2) of Section 20, where the expression used is "reasonable accommodation" as an aspect to be provided by the

Government establishments, this expression has been defined in Section 2(y) to mandate necessary and appropriate modifications and adjustments to ensure that the PwD enjoy or exercise their rights equally with others.

25. We see no reason why a clue cannot be taken from such a line of interpretation and reasoning to carry out the intent of the Legislation. Even under the 1995 Act, the rights of PwD, and how they would attain an equal opportunity has been an ongoing exercise blocked by a greater impediment of a social mind set change and the 2016 Act is the result thereof.

IV. Whether the Respondent can be promoted by giving benefit of reservation as she is a PwD, despite the fact that she was not appointed in the PwD quota?

26. If we may say so, this was the most crucial issue which persuaded us to grant leave in the SLP. The direction in the impugned order was for the respondent to be considered for the promotion based on disability at the time when the claim originally arose, but subject to her seniority with reference to other PwD candidates entitled to such reservation. She was also held entitled to the notional benefits of her promotion from the date she was so found entitled. In the factual context, it has been pointed out by learned Amicus Curiae that the respondent had claimed a promotion to the post of UDC with effect from 1st July, 2002 and further to the post of Cashier with effect from 20th May, 2012. The endeavour of the Amicus Curiae was to obtain necessary information from the appellant-State and to seek their response. In this behalf, it has been pointed out that The Ministry of Social Justice and Empowerment in the Department of Empowerment of Persons with Disabilities (Divyang), Government of India has undertaken a very comprehensive exercise of identifying posts which can be reserved for PwD and the list of such posts are available on the website. From that it appears that the post of UDC/ Cashier would be amenable to reservation for PwD and thus there can be little doubt that the respondent has been capable of discharging functions of the promotional post and thus could not be denied the benefit of reservation (even if Rules do not provide for any reservation in promotion) as repeatedly observed by us that Section 32 of the 1995 Act is to facilitate but not to impede the legislative mandate.

27. Now coming to the question of the respondent not being initially appointed in the quota for PwD in the feeder cadre, we note that there is no dispute about the benchmark disability of the respondent. It would be discriminatory and violative of the mandate of the Constitution of India if the respondent is not considered for promotion in the PwD quota on this pretext. Once the respondent has been appointed, she is to be identically placed as others in the PwD cadre. The anomaly which would arise from the submission of the appellant-State is apparent - a person who came in through normal recruitment process but suffers disability after joining service would on a pari materia position be also not entitled to be considered to a vacancy in a promotional post reserved for a PwD. This is the consequence if the entry point is treated as determinative of the entitlement to avail of the benefits. Source of recruitment ought not to make any difference but what is material is that the employee is a PwD at the time for consideration for promotion. The 1995 Act does not make a distinction between a person who may have entered service on account of disability and a person who may have acquired disability after having entered the service. Similarly, the same position would be with the person who may have entered service on a claim of a compassionate appointment. The mode of entry in service cannot be a ground to make out a case of discriminatory promotion.

SOME VIEWS OF THE HIGH COURT

28. Mr. Gaurav Agrawal, learned Amicus Curiae through the note also pointed out different views of the High Court –

a. ***Poonam Manchanda vs. Union of India***[11] **-**

The Punjab and Haryana High Court while dealing with the case of the petitioner having 70% disability noticed that she had been appointed as Assistant Accounts Officer in 1999 and promoted as Accounts Officer in 2007. On both occasions she did not claim reservation but was considered in general category. The next post was that of Senior Accounts Officer and she claimed promotion on roster No. 1 earmarked for PwD. The Rules did not provide for reservation for PwD in promotion to Group A

11 2019 SCCOnline P&H 2710.

and Group B posts. The High Court granted relief relying upon Rajeev Kumar Gupta's case (supra) and directed that the petitioner be considered for promotion under 3% reservation provided for PwD.

b. ***Union of India vs. Poonam Manchanda***[12] **-**

An appeal was filed before this Court was dealt with along with a batch of matters of which judgment was delivered in ***Siddaraju's case (supra).***

c. ***Kamla Chanyal vs. State of Uttarakhand***[13] **-**

The Uttarakhand High Court once again relying upon the judgment in ***Rajeev Kumar Gupta's case (supra)*** quashed an OM to the extent that it ruled out reservation for PwD in Group A and B posts and directed the Government to consider the issue relating to the availability of benefit of reservation to the petitioner therein in the capacity as PwD. We may note that as per the solution of learned Amicus Curiae, the Chief Commissioner for Persons with Disabilities [Divyangjan], Government of India receives a number of complaints regarding non-grant of promotion to PwD in Group A and B posts by denying them benefit of reservation in promotion. In ***B. Uma Prasad vs. Chief Executive Officer, EPFO***[14], the Chief Commissioner noticed that the complainant was not being given reservation in promotion to Group B post and recommended that the respondent may give promotion to persons with benchmark disabilities in all posts, including Group A and Group B posts.

CONCLUSION

29. We are of the view that the course of action followed by the High Court in the impugned order is salutary and does not call for any interference. We have also answered various questions which have arisen in the present proceedings assisted by learned AmicusCuriae. In fact, what seems to emerge is that the appellant-State has not implemented the judgment of this Court in ***Rajeev Kumar Gupta's and Siddaraju's cases(supra).*** Thus, we consider it appropriate to

12 Civil Appeal No. 6092/2019.
13 W.P. No. 126/2015 - judgment dated 29.11.2016
14 A case before the Chief Commissioner for Persons with Disabilities (Divyangjan), Govt. of India

issue directions to the State of Kerala to implement these judgments and provide for reservation in promotion in all posts after identifying said posts. This exercise should be completed within a period of three months. We are making it time bound so that the mandate of the Act is not again frustrated by making Section 32 as an excuse for not having identified the post.

30. We may also note that the 2016 Act has now taken care of how to deal with the aspect of reservation in promotion. The view aforesaid was required to be propounded as a large number of cases may still arise in the context of the 1995 Act.

31. The appeal is accordingly dismissed in terms aforesaid.

32. We record our appreciation for the able assistance rendered by Mr. Gaurav Agrawal, learned *Amicus Curiae* and note that while submitting his synopsis he was furnished assistance in turn by Mr. S.K. Rungta, learned Senior Counsel and Mr. Archit Verma, Legal Consultant in the office of Chief Commissioner for Persons with Disabilities.

Headnotes prepared by: Devika Gujral

Result of the case:
Appeal dismissed.