

HIGH COURT OF CHHATTISGARH AT BILASPURWrit Petition (S) No.123 of 2013Order reserved on: 4-10-2021Order delivered on: 20-10-2021

Mahesh Kumar Pandey, S/o Late Chandra Shekhar Pandey, aged about 37 years, R/o Q.No.B/62, P.O. South Jhagrakhand Colliery, P.S. Jhagrakhand, District Korea (C.G.)

--- Petitioner

Versus

1. The Chairman, Coal India Limited, "Coal Bhawan", 10, Netaji Subhas Road, Kolkata – 700 001
 2. The General Manager (EE), S.E.C.L., Bilaspur (C.G.)
 3. Dy General Manager (P), S.E.C.L., Hasdeo Area, District Korea (C.G.)
- Respondents

For Petitioner: Mr. Sabyasachi Bhaduri, Advocate.

For Respondents: Mr. H.B. Agrawal, Senior Advocate with Mr. Pankaj Agrawal, Advocate.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Order

1. Invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner herein has filed this writ petition stating inter alia that he being the Junior Data Entry Operator (non-executive cadre) working in South Eastern Coalfields Limited (SECL), Hasdeo Area, District Korea, pursuant to the notification dated 8-3-2010, applied for the promotional post of Welfare / Personnel in E-1 (Executive 1) under physically handicapped quota (general), but his candidature for promotion on the said post was not considered against physically handicapped category and the same has been rejected, whereas, he being physically handicapped candidate is entitled to be considered in that category and he is entitled to be promoted on the

said post, therefore, appropriate writ / direction be issued to the respondents for consideration of his case on the promotional post of Welfare / Personnel in E-1 and subsequently, appointment order be directed to be issued in his favour.

2. Return has been filed by the respondents stating inter alia that the existing policy or guidelines of the Government of India does not provide for any reservation for physically handicapped person on departmental promotion from non-executive cadre to executive cadre and as such, the petitioner is not entitled for any relief and the writ petition is liable to be dismissed. It has been further stated in the return while replying to para 8.5 of the writ petition that notification dated 8-3-2010 for selection / promotion from non-executive cadre to executive cadre in various disciplines has been issued and the said notification was meant for promotion on selection of existing non-executive cadre employees from non-executive cadre to executive cadre, it was not a direct recruitment and therefore the petitioner is not entitled to be considered for promotion on the promotional post under physically handicapped quota by virtue of the provisions contained in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, 'the Act of 1995').
3. This Court by order dated 29-9-2021 directed the respondent SECL to file additional affidavit as to whether the petitioner's case for promotion on the post of Welfare / Personnel in E-1 was considered against the physically handicapped category or not and whether the post of Welfare / Personnel in E-1 was reserved for physically handicapped person.

4. It has been stated by the respondent SECL on affidavit filed pursuant to the order of this Court that there was no reservation for persons with disabilities as mentioned in the notification dated 8-3-2010 and therefore the petitioner's case was not considered for the post of Welfare / Personnel in E-1 against the physically handicapped category. Similarly, it has further been pleaded in the affidavit that in promotion from non-executive to executive cadre for the post of Welfare / Personnel in E-1 grade, there was no provision for such reservation. Copy of the notification dated 8-3-2010 has been filed with the affidavit.
5. Mr. Sabyasachi Bhaduri, learned counsel appearing for the petitioner, would submit that the petitioner's case for promotion on the post of Welfare / Personnel in E-1 has not been considered merely on the ground that reservation under Section 33 of the Act of 1995 is applicably only in direct recruitment and it would not apply for promotion which runs contrary to the decisions of the Supreme Court in the matters of Rajeev Kumar Gupta and others v. Union of India and others¹, State of Kerala and others v. Leesamma Joseph² and Siddaraju v. State of Karnataka and others³. He would further submit that merely because identification process as mandated under Section 32 of the Act of 1995 has not been undertaken and the post of Welfare / Personnel in E-1 grade has not been identified to be the post suitable for physically handicapped candidate, the petitioner cannot be deprived of the benefit of reservation under Section 33 of the Act of 1995 and he relied upon the decision of the Supreme Court in the matter of Government of India Through Secretary and another v. Ravi

1 (2016) 13 SCC 153

2 2021 SCC OnLine SC 435

3 2020 SCC OnLine SC 45

Prakash Gupta and another⁴ (paragraph 29) to buttress his submission. Therefore, it be directed that the petitioner's case be considered and he be appointed on the said post.

6. Mr. H.B. Agrawal, learned Senior Counsel appearing for the respondents, would submit that in the recruitment notice which has been issued on 8-3-2010 for selection / promotion on various posts including Welfare / Personnel in E-1, there is no provision for reservation so far as the Act of 1995 is concerned, as it is not direct recruitment and it is selection by way of promotion, therefore, the petitioner would not be entitled for reservation in the said appointment process. He would further submit that the post of Welfare / Personnel in E-1 grade has not been earmarked for persons with disabilities for appointment under Section 33 of the Act of 1995, therefore, the petitioner is not entitled for any relief in the writ petition and the writ petition is liable to be dismissed.
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
8. After hearing learned counsel for the parties, following two questions arise for consideration: -
 1. Whether the benefit of reservation as contemplated under Section 33 of the Act of 1995 would be applicable in promotion and the petitioner is entitled for the benefit of reservation in promotional post of Welfare / Personnel in E-1?

⁴ (2010) 7 SCC 626

2. Whether non-identification of post under Section 32 of the Act of 1995 would dis-entitle the petitioner for consideration and appointment on the post of Welfare / Personnel in E-1?

Answer to question No.1: -

9. At this stage, it would be appropriate to notice the provisions contained in Section 47 of the Act of 1995 which provides for non-discrimination in Government employments. It states as under: -

“47. Non-discrimination in Government employments.—(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 be 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.”

10. A careful reading of the above-stated provision would show that it provides for equal opportunity for career growth including promotion.

11. The Supreme Court in **Rajeev Kumar Gupta** (supra) has clearly held that once post is identified, it means that PWD (persons with disabilities) is fully capable of discharging functions associated with identified post and thereafter reservation under Section 33 of the Act of 1995 must necessarily follow and once the post is identified, it must

be reserved for PWD irrespective of the mode of recruitment adopted for filling up of the said post. It has been observed in paragraphs 24 and 25 of the report as under: -

“24. A combined reading of Sections 32 and 33 of the Act explicates a fine and designed balance between requirements of administration and the imperative to provide greater opportunities to PWD. Therefore, as detailed in the first part of our analysis, the identification exercise under Section 32 is crucial. Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once found to be so capable, reservation under Sections 33 to an extent of not less than three per cent must follow. 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.

25. In the light of the preceding analysis, we declare the impugned memoranda as illegal and inconsistent with the 1995 Act. We further direct the Government to extend three per cent reservation to PWD in all identified posts in Group A and Group B, irrespective of the mode of filling up of such posts. This writ petition is accordingly allowed.”

12. The principle of law laid down in Rajeev Kumar Gupta (supra) was followed firstly in Siddaraju (supra) (three Judge Bench) in which their Lordships of the Supreme Court have considered the question as to whether under the Act of 1995, persons with disabilities can be given reservation in promotion and answered the reference by holding that the judgment in Rajeev Kumar Gupta (supra) will bind the Union and the State Governments and must be strictly followed. It has been observed in paragraphs 15 and 16 of the report as under: -

“15. After hearing learned counsel appearing on behalf of all the parties including the learned Additional Solicitor General, we are of the view that the judgment of this Court cannot be faulted when it stated that *Indra Sawhney* dealt with a different problem and, therefore, cannot be followed.

16. We may also note that review petitions were filed and have since been dismissed against both the 2013 and

2016 judgments. Consequently, the reference stands answered by stating that the 2013 judgment as clarified in *National Federation of the Blind v. Sanjay Kothari, Secy. Deptt. of Personnel and Training*, (2015) 9 Scale 611 and the judgment in *Rajeev Kumar Gupta v. Union of India* – (2016) 13 SCC 153 case will bind the Union and the State Governments and must be strictly followed notwithstanding the Office Memorandum dated 29.12.2005, in particular. Since the reference has been disposed of by us today, contempt petitions be listed for hearing.”

13. Thereafter, in Leesamma Joseph's case (supra), again the Supreme Court formulated the question whether the Act of 1995 mandates reservation in promotion for persons with disabilities and answered the issue as under: -

“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.

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.”

14. Finally, the Supreme Court in Leesamma Joseph's case (supra) relying upon its earlier judgments in the matters of Union of India and others v. National Confederation for Development of Disabled and another⁵ and Rajeev Kumar Gupta (supra) observed as under: -

“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 v. Ravi Prakash Gupta* and *Union of India v. 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

5 (2015) 13 SCC 643

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 v. Union of India* (supra) with the challenge raised to the same in a SLP being rejected in *Union of India v. National Confederation for Development of Disabled*. We may note the observations in *Rajeev Kumar Gupta v. Union of India* (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”.

18. 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.

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

32. 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.”

15. As such, reservation is applicable in promotions also as provided under Section 33 of the Act of 1995.

Answer to question No.2: -

16. In **Ravi Prakash Gupta's** case (supra), their Lordships of the Supreme Court have categorically held that the legislature never intended the

provisions of Section 32 of the Act of 1995 to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein and observed as under: -

“27. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in every establishment (emphasis added).”

Their Lordships further held that unless posts are identified for the purposes of Section 33 of the Act of 1995, no appointments from the reserved categories can be made, and to that extent, the provisions of Section 33 are dependent on Section 32 of the Act and observed as under: -

“29. 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. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and

posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.”

17. In Leesamma Joseph's case (supra), their Lordships of the Supreme Court have formulated a specific question in this regard, as to whether reservation under Section 33 of the Act of 1995 is dependent upon identification of post as stipulated by Section 32, and answered the issue in paragraph 20 as under: -

“20. 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 v. Ravi Prakash Gupta* (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 v. National Federation of Blind* (supra).”

18. Their Lordships of the Supreme Court have clearly held that reservation under Section 33 of the Act of 1995 is not dependent upon identification of posts as stipulated by Section 32 of the Act, but identification of posts in every establishment until exempted under the proviso to Section 33 of the Act of 1995, is required.

19. Reverting to the facts of the present case in the light of the above-stated legal position, it is quite vivid that the only reason for not considering the petitioner's case against physically handicapped quota for the promotional post of Welfare / Personnel in E-1 is, Section 33 of the Act of 1995, which mandates reservation to persons with disabilities, is not applicable to promotions. The said finding is absolutely incorrect and runs contrary to the judgments rendered by the Supreme Court in this regard in Rajeev Kumar Gupta (supra), Siddaraju (supra) and Leesamma Joseph's case (supra) in which their Lordships of the Supreme Court have clearly held that reservation contemplated under Section 33 of the Act of 1995 is applicable to promotions also and accordingly, the act of the respondent SECL in holding that reservation under Section 33 of the Act is not applicable to promotions, is illegal and arbitrary.

20. Accordingly, the writ petition is allowed. The respondent SECL is directed to provide reservation in promotions after undertaking the process of identification of post(s) under Section 32 of the Act of 1995 as per the judgments of their Lordships of the Supreme Court noticed herein-above in Rajeev Kumar Gupta (supra), Siddaraju (supra) and Leesamma Joseph's case (supra), and thereafter to consider the case of the petitioner. The above-stated exercise be done within a period of three months from the date of receipt of a copy of this order. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge