

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CWP-20174-2023 (O&M)

Date of decision: 23.08.2024

Sukhmandar Singh

....Petitioner

Versus

Punjab State Power Corporation Limited and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMAN CHAUDHARY

Present : Mr. Pawan Kumar, Senior Advocate with
Ms. Vidushi Kumar and Ms. Parul Dhingra, Advocates
for the petitioner

Ms. Sukriti Gupta, Advocate for respondent No.1 and 2

Mr. Manipal Singh Atwal, DAG, Punjab

Mr. R. Kartikeya and Mr. R. Akanksha, Advocates
for the applicant in CM-9113-CWP-2024

AMAN CHAUDHARY, J.

1. The prayer in the present petition is for directing the respondents to consider the petitioner for promotion to the post of Chief Engineer (Electrical) in the 4% quota reserved for persons with disability as per Section 34 of the Rights of Persons with Disability Act, 2016 (hereinafter referred to as '2016 Act').

2. As is evident, the petitioner had acquired hearing disability which, on getting reverified under directions of the respondent-Corporation by AIIMS, Bathinda, was assessed as 54.275%. In the Departmental Promotion Committee meeting held on 29.07.2023, R1/1, he was considered and approved for promotion.

3. This Court, while issuing notice of motion on 14.09.2023, passed an interim direction not to promote anyone to the post in question under the category of physically handicapped, during the pendency of the present petition, which was

modified on 19.01.2024 to the extent that Corporation was free to make promotion to the post of Chief Engineer except that of Electrical in disabled category to which the petitioner belongs and that his promotion shall be made with effect from the date the others had been promoted, in pursuance of recommendation of the DPC held on 29.07.2023. Thereafter, as is reflected from the order dated 07.05.2024, the learned Advocate General, Punjab had submitted that the promotion of the petitioner considered in DPC to the post of Chief Engineer has not been given effect to due to clarification as sought by the Corporation being pending with the Government, which shall be finalized immediately on lifting of Model Code of Conduct and in the interregnum he shall be given officiating charge of the said post, already kept vacant for him, which this Court directed to be done forthwith.

4. The premise of the respondent-Corporation to not issue orders promoting the petitioner is that the clarification had been sought by it on 20.06.2023, on the following points, response thereto is awaited:

“1. Whether the officer already working in the department, if he becomes disabled during service (while performing duty), can he be promoted on the basis of reservation of disabled category or not? (Instructions should also be made available)

2. Whether the officers already working in the department, if they become disabled in the course of service (but not while on duty), can they be promoted on the basis of reservation of disabled category or not? (Instructions should also be made available, please)

3. Whether any disabled officer was appointed in the department on his own merit before 1997 (i.e. before reservation of disabled category in direct recruitment in class A and B) and

he had submitted disability certificate at the time of recruitment, in the light of Instructions-2019 (Para No.6 and 7), he should be promoted as Chief Eng./Elec. under reservation of disabled category or not?

4. Whether a disabled officer was appointed on his merit in the department prior to 1997 (i.e. before reservation of disabled category in direct recruitment in class A and B), but his disability is not identified for further promotion, then such officer can be promoted to the next post on the basis of reservation?

It is issued with the approval of the competent authority.”

5. In view of the above, it would be apt to also refer to a letter dated 17.04.2023 of Power Department, Annexure P-15, in particular to information sought at Sr.No.1 as relevant to the present case, which reads thus:

Sr. No.	Information sought	Response / Clarification
1.	If the employees who are already in service acquire a disability during their service (while doing their duty), then can they be given reservation in promotion or not? (please supply the relevant instructions)	In this regard, the instructions issued by the Government of India, Personnel and Training Department vide letter
2.	If the employees who are	

	already in service acquire a disability during their service (but not while doing their duty), then can they be given reservation in promotion or not? (please supply the relevant instructions)	no.36035/3/2009-Estt. (Rules) dated 10.06.2009, whether to be adopted or not are still pending consideration.
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6. The aforesaid Instructions dated 10.06.2009 issued by Government of India, Ministry of Personnel, Public Grievances & Pensions Department of Personnel & Training North Block, read thus:

“Subject: Benefit of reservation to persons with disability who acquire disability after entering into Govt. service.

1. The undersigned is directed to say that various Ministries/Departments have been seeking clarification whether a person who acquires disability after entering into Govt. service shall get the benefit of reservation in services as provided in this Department’s OM No.36035/3/2009-Est.(Res.) dated 29.12.2005.

2. It is hereby clarified that the OM dated 29.12.2005 does not make any distinction between persons acquiring disability before or after entering into service. An employee who acquires disability after entering into service will be entitled to get the benefit of reservation as a person with disability as provided in the instructions contained in the above referred OM from the

date he produces a valid certificate of disability.

3. All Ministries/Departments etc. are requested to bring it to the notice of all establishments under their control.”

7. The Government of Punjab issued Instructions dated 03.10.2019 in terms of the 2016 Act, under which the petitioner is claiming his right of promotion under the 4% quota of disabled granted for Group A, B, C and D posts, he falling under type-2 i.e. category of deaf and hard of hearing, relevant of which read thus:

“Subject:- Instructions regarding four percent reservation under section 34 of the Rights of Persons with Disabilities Act, 2016.

1. In supersession of the Government of Punjab, Department of Social Security, Women and Child Development (Disability Cell), issued vide I.D. No. 9/23/2015-3DC/506 dated the 24th June, 2015 and No.1/1/2017-3DC/1543557/1, dated the 6th August, 2019, the following instructions are hereby issued for the management of reservation in direct recruitment and in promotion for the persons with disabilities as defined in clause (r) of section 2 readwith the Schedule appended to the Rights of Persons with Disabilities Act, 2016 (Central Act No.49 of 2016), in the Services in the Government of Punjab (i.e. in Group-‘A’, Group-‘B’, Group-‘C’ and Group-‘D’ Services, respectively), in the following manner, namely:-

Disability-wise percentage in services

Serial No.	Type of disability (See Schedule appended to the Rights of Persons with Disabilities Act, 2016)	Percentage
1	Blindness and Low-vision;	One percent
2	Deaf and Hard of hearing;	One percent
3	Locomotor disability (including Cerebral palsy, Leprosy cured, Dwarfism, Acid attack victims and Muscular dystrophy);	One percent
4	Intellectual disability (including Autism and Specific learning disability), and Mental illness; OR Multiple disabilities specified in Serial No. 1 to 4 above, including deaf-blindness.	One percent

NOTE-1: The reservation in Services specified under these instructions, shall be applicable in all modes of recruitments done in the State of Punjab including the Services filled under Contract Basis or by Out-sourcing.

Note-2:- "Service" for the purposes of these instructions', Service means a post or vacancy in Group-'A', Group- 'B', Group-'C' or Group-'D' Service, as the case may be, being filled up from amongst the persons with disabilities specified above.

Note-3:- "Percentage" for the purposes of these instructions, the percentage means the Service to be offered shall be in the running Roster of hundred vacancies arising in the cadre strength in Group-'A', Group- 'B', Group-'C' or Group-'D' Service, as the case may be."

8. Insofar as the reliance by the respondent-Corporation on the Memorandum of the Government of India dated 17.05.2022, Annexure R3/1, issued on the directions in **Siddaraju vs. State of Karnataka**¹, providing for promotion from group C to group B and from B to the lowest rung of Group A, is concerned, a reference can be made to order dated 15.07.2024, passed by Hon'ble the Supreme Court in Contempt Petition (Civil)-686-2020 in CA-1567-2017, which reads thus:

“Dr. Siddaraju

...Petitioner

Versus

**Mr. P. Ravikumar, Chief Secretary, ...Alleged Contemnors
State of Karnataka & Ors.**

OFFICE REPORT

“The Contempt Petition (c) No. 686/2020 was listed before the Hon'ble Court on 05.03.2024 alongwith other connected matter with office report dated 22.01.2024, when the Hon'ble Court was, inter alia, pleased to pass the following Order:-

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CONMT.PET.(C) No. 686/2020 in C.A. No.
1567/2017

The present petition is de-tagged from
CONMT.PET.(C) No. 678/2020.

Learned Additional Solicitor General appearing for
the Union of India will obtain instructions as to whether
the Office Memorandum restricting reservation in

¹ 2021 SCC OnLine SC 3501

promotion for persons with benchmark disabilities in the lowest rung/Junior Scale in Group 'A' posts, will be contrary to provisions of the Rights of Persons with Disabilities Act, 2016, and the judgments of this Court. Let an affidavit, in this regard, be filed by the Union of India within a period of three weeks from today.

The petitioner will be entitled to file reply/response within a period of two weeks after service of the said affidavit.

Re-list in the week commencing 15.04.2024.”

Contempt Petition No. 686/2020

It is submitted that Mr. S.N. Terdal, Advocate has on 18.04.2024 e-filed reply on behalf of respondent No. 5. Copy of the same is included in the contempt paperbooks.

It is further submitted that Ms. Rukhsana Choudhary, Advocate has on 01.07.2024 e-filed rejoinder affidavit to the counter affidavit filed on behalf of respondent No. 5. Copy of the same is included in the contempt paperbooks.

Service of notice is complete.

The contempt petition alongwith interlocutory Application above-mentioned is listed before the Hon'ble Court with this Office Report.

Dated this 15th day of July, 2024”.

9. The right of persons with disability for promotion has been interpreted in umpteen number of judgments, to which a beneficial reference can be made.

Hon'ble the Supreme Court in **Kunal Singh vs. Union of India**² observed and held thus:

“6. Short question that arises for consideration in this appeal is whether the appellant is entitled for the benefit of Section 47 of the Act.

7. From the facts, which are not in dispute. It is clear that the disability suffered by the appellant is covered by Section 2(i)(v) read with Section 2(o) of the Act. It is also not in dispute that this disability was acquired by the appellant during his service.

Under Section 2 "disability" and "person with disability" are separately defined and they are distinct. We may also notice some provisions in Chapter VI of the Act relating to employment. Section 32 deals with identification of posts which can be reserved for persons with disabilities. Section 33 speaks of reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability of which 1% each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment and (iii) locomotor disability or cerebral palsy. Section 38 requires the appropriate Governments and local authorities to formulate schemes for ensuring employment of persons with disabilities. Section 47 is included in Chapter VIII of the Act. Chapter VI deals with employment relating to persons with disabilities including identification of posts and reservation of vacancies for such persons. Under this chapter, reservation of vacancies for persons with disabilities is

² (2003) 4 SCC 524

made for initial appointments. Section 47 in Chapter VIII deals with an employee of an establishment who acquires a disability during his service.

8. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. To realise objective that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view a meeting called the 'Meet to Launch the Asian and Pacific Decades of Disabled Persons' was held in Beijing in the first week of December, 1992 by the Asian and Pacific countries to ensure 'full participation and equality of people with disabilities in the Asian and Pacific Regions'. This Meeting was held by the Economic and Social Commission for Asia and Pacific. A Proclamation was adopted in the said meeting. India was a signatory to the said Proclamation and they agreed to give effect to the same. Pursuant thereto this Act was enacted, which came into force on 1st January, 1996. The Act provides some sort of succor to the disabled persons.

9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of "disability" and

"person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The Section further provides 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; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal

opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.”

10. In **Siddaraju vs. State of Karnataka**³, it was observed that persons with disabilities are entitled for promotion in all Group of posts, under the reservation for the said category, the relevant paras whereof read thus:

“5. In **Union of India and Another v. National Federation of the Blind and Others**, (2013) 10 SCC 772, this Court went into the provisions of the aforesaid Act in some detail and, in particular, Sections 32 and 33. The Court considered Office Memorandum dated 29.12.2005 of the Government of India, which stated that the quantum of reservation would be as follows:-

"2. QUANTUM OF RESERVATION

(i) Three percent of the vacancies in case of direct recruitment to Group A, B, C and D posts shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability;

(ii) Three percent of the vacancies in case of promotion to

³ (2020) 19 SCC 572

Group D, and Group C posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability.

6. The Court then held as follows:

"39) It has also been submitted on behalf of the appellants herein that since reservation of persons with disabilities in Group C and D has been in force prior to the enactment and is being made against the total number of vacancies in the cadre strength according to the OM dated 29.12.2005 but the actual import of Section 33 is that it has to be computed against identified posts only. This argument is also completely misconceived in view of the plain language of the said Section, as deliberated above. Even for the sake of argument, if we accept that the computation of reservation in respect of Group C and D posts is against the total vacancies in the cadre strength because of the applicability of the scheme of reservation in Group C and D posts prior to enactment, Section 33 does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively. As such, one statutory provision cannot be interpreted and applied differently for the same

subject-matter.

40) Further, if we accept the interpretation contended by the appellants that computation of reservation has to be against the identified posts only, it would result into uncertainty of the application of the scheme of reservation because experience has shown that identification has never been uniform between the Centre and the States and even between the Departments of any Government. For example, while a post of middle school teacher has been notified as identified as suitable for the blind and low vision by the Central Government, it has not been identified as suitable for the blind and low vision in some States such as Gujarat and J&K, etc. This has led to a series of litigations which have been pending in various High Courts. In addition, Para 4 of the OM dated 29.12.2005 dealing with the issue of identification of jobs/posts in sub clause (b) states that list of the jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive which further makes the computation of reservation uncertain and arbitrary in the event of acceptance of the contention raised by the appellants.

42) A perusal of Indra Sawhney would reveal that the ceiling of 50% reservation applies only to reservation in favour of other Backward classes under Article 16(4) of the Constitution of India whereas the reservation in

favour of persons with disabilities is horizontal, which is under Article 16(1) of the Constitution. In fact, this Court in the said pronouncement has used the example of 3% reservation in favour of persons with disabilities while dealing with the rule of 50% ceiling. Para 812 of the judgment clearly brings out that after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%. Para 812 is reproduced as follows:-

"812.all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, the Scheduled Tribes and the other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under Clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically

handicapped persons; this would be a reservation relatable to Clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same....."

7. Having concluded thus, the Court then held:

"50) Employment is a key factor in the empowerment and inclusion of people with disabilities. It is an alarming reality that the disabled people are out of job not because their disability comes in the way of their functioning rather it is social and practical barriers that prevent them from joining the workforce. As a result, many disabled people live in poverty and in deplorable conditions. They are denied the right to make a useful contribution to their own lives and to the lives of their families and community.

51) The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for

disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today.

52) Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) consistent with the decision rendered by this Court.

53) Further, the reservation for persons with disabilities has nothing to do with the ceiling of 50% and hence, Indra Sawhney is not applicable with respect to the disabled persons."

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10. The next important judgment that needs to be adverted to in this behalf is the judgment in **National Federation of the Blind v. Sanjay Kothari, Secy. Deptt. of Personnel and Training**, 2015 (9) Scale 611, in para 10 of which para 51 of the earlier judgment was clarified as follows:-

"10. Para 51 of the order on which reliance has been

placed by Shri Rungta must be viewed in the context of the questions arising for answer before the Court i.e. the manner of computation of vacancies in case of Groups A, B, C and D posts. All that the Court in the aforesaid paragraph 51 has held is that the manner of such identification must be uniform in the case of all the groups viz. A, B, C and D. Nothing beyond the above should be read in paragraph 51 of the Courts' order as aforesaid."

11. We now come to the Division Bench judgment of this Court reported as **Rajeev Kumar Gupta & Others v. Union of India & Others** - (2016) 13 SCC 153. In this judgment, the posts in Prasar Bharati were classified into four Groups-A to D. The precise question that arose before the Court is set out in para 5 thereof in which it is stated that the statutory benefit of 3 per cent reservation in favour of those who are disabled is denied insofar as identified posts in Groups A and B are concerned, since these posts are to be filled through direct recruitment. After noticing the arguments based on the nine-Judge bench in *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, this Court held:

"14. We now examine the applicability of the prohibition on reservation in promotions as propounded by *Indra Sawhney*. Prior to *Indra Sawhney*, reservation in promotions were permitted under law as interpreted by this Court in *Southern Railway v. Rangachari*, AIR 1962

Supreme Court 36. Indra Sawhney specifically overruled Rangachari to the extent that reservations in promotions were held in Rangachari to be permitted under Article 16(4) of the Constitution. Indra Sawhney specifically addressed the question whether reservations could be permitted in matters of promotion under Article 16(4). The majority held that reservations in promotion are not permitted under our constitutional scheme.

15. The respondent argued that the answer to Question 7 in Indra Sawhney squarely covers the situation on hand and the reasons outlined by the majority opinion in Indra Sawhney at para 828 must also apply to bar reservation in promotions to identified posts of Group A and Group B.

16. We do not agree with the respondent's submission. Indra Sawhney ruling arose in the context of reservations in favour of backward classes of citizens falling within the sweep of Article 16(4).

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21. The principle laid down in Indra Sawhney is applicable only when the State seeks to give preferential treatment in the matter of employment under the State to certain classes of citizens identified to be a backward class. Article 16(4) does not disable the State from providing differential treatment (reservations) to other classes of citizens under Article 16(1) if they otherwise deserve such treatment. However, for creating such

preferential treatment under law, consistent with the mandate of Article 16(1), the State cannot choose any one of the factors such as caste, religion, etc. mentioned in Article 16(1) as the basis. The basis for providing reservation for PWD is physical disability and not any of the criteria forbidden under Article 16(1). Therefore, the rule of no reservation in promotions as laid down in Indra Sawhney has clearly and normatively no application to PWD.

The Court then concluded:

24. A combined reading of Sections 32 and 33 of the 1995 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 Section 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 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 percent 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. 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.

13. 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 & Others v. Union of India & Others - (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.

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15. This matter arises out of the order of the Central Administrative Tribunal, Bangalore Bench, Bangalore dated 24.07.2015 in which the 2005 O.M has been followed without reference to any of the judgments of this Court. A writ petition from the aforesaid judgment was dismissed by the Karnataka

High Court on 23.03.2016, stating that the precise question of law that arises in this case was kept open. Accordingly, we set aside the judgment of the CAT and consequently that of the High Court. The case is to be governed by the three decisions of this Court outlined above, which judgments have to be followed by the Union of India and the States. It is not necessary to pass any further directions. The appeal is disposed of accordingly”

11. In **Poonam Manchanda vs. Union of India**⁴, the petitioner therein, who was physically handicapped, appointed as also promoted under the General category, requested reserved promotion to Group A post, which was denied due to Rules against disability reservations for the same, however the Division Bench of this Court allowed it, against which the SLP filed came to be dismissed on 14.01.2020, alongwith the case of **Siddharaju** (supra). The relevant paras thereof read thus:

“4. The petitioner filed the Original Application challenging the aforesaid order, which has been dismissed by the impugned order. The learned Tribunal considered the various office memorandums, particularly those issued after the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the 1995 Act') and concluded that various office memorandums and instructions issued since 1989 have provided for 3% reservation of the vacancies in case of promotion to Group C and Group D posts in which direct recruitment does not exceed 75%. There is no provision for any reservation in Group A and B posts in case

⁴ 2019 SCC OnLine P&H 2710

of promotion.

5. The judgement of the Tribunal cannot be upheld in the light of the subsequent decision of Hon'ble Supreme Court in Rajeev Kumar Gupta v. Union of India, (2016) 13 SCC 153 in which it has been held that once a post is identified as suitable for being filled by up by persons with disabilities, it must be reserved for persons with disabilities irrespective of the mode of recruitment adopted by the State for filling up of the said post, whether by direct recruitment or by promotion.

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8. The office memorandum denying the benefit of three per cent reservation in appointment to Group A and Group B posts were quashed.

9. It is no doubt true that in Special Leave to Appeal (C) No(s). 24994/2016 Siddaraju v. State Of Karnataka And Ors the question whether persons, governed under "The persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995" can be given reservation in promotion has been referred to a larger bench and the matter is pending consideration before a three judge bench of Hon'ble Supreme Court. However, there is no final determination of the issue so far.

10. Pending the said decision there is no reason why the petitioners should be denied the benefit of the decision of Hon'ble Supreme Court in Rajeev Kumar Gupta's case.

11. Consequently, these petitions are allowed. The order of the

Tribunal is quashed. The respondents are directed to consider the case of the petitioners for promotion being persons with disability under the three per cent reservation provided for persons with disability.”

12. In **State of Kerala vs. Leesamma Joseph**⁵, it was observed and held that, “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.”

13. A controversy similar to the present matter was adjudicated upon in

⁵ (2021) 9 SCC 208

Reserve Bank of India vs. A.K. Nair⁶, wherein it has been held that:

“33. Appearing in support of the appeal presented by the RBI, Mr. Jaideep Gupta, learned senior counsel, contended that the High Court erred in making the directions it did. According to him, the circulars issued by the RBI restricted promotion of physically handicapped persons only to Group 'C' posts and within Group 'D' posts, and did not permit reservation in promotion in Group 'A' posts. That apart, OM dated 29th December, 2005 relied on by Mr. Nair did not extend any benefit of the nature claimed by Mr. Nair despite its modification by OM dated 3rd December, 2013. Thus, from whichever angle one looks at the circulars, resolving Mr. Nair's grievance by considering him fit for promotion from the date of issuance of OM dated 29th December, 2005, as directed by the High Court, was not called for. He also contended that after the GoI issued OM dated 17th May, 2022, the RBI has also issued the circular dated 8th December, 2022, whereby requisite vacancies in Group 'A' posts have also been reserved for promotion of persons with disabilities. This circular dated 8th December, 2022 contemplates promotion of persons with disabilities upon qualifying in a departmental examination.

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37. Ms. Madhavi Divan, learned Additional Solicitor General appearing for the GoI, placed OM dated 17th May, 2022 and contended that pursuant to orders of this Court made from time

⁶ 2023 SCC OnLine SC 801

to time and in particular after the order dated 28th September, 2021 (supra), instructions have been issued to make available reservation in promotion for persons with disabilities from posts in Group 'B' to the lowest rung in Group 'A', however, with the rider that reservation in promotion shall be applicable in the cadres in which the element of direct recruitment, if any, does not exceed 75%. She further submitted that since there was no specific post identified for promotional appointment in Group 'A' when Mr. Nair participated in the process and also that the shortfall in marks could be condoned only in respect of SC/ST candidates, coupled with the fact that Mr. Nair elected to stay away from the recent promotional process, the directions made in the impugned judgment and order that paragraph 14 of OM dated 29th December, 2005, since modified by OM dated 8th December, 2013, should be applied with retrospective effect, do not call for being sustained. Accordingly, she too joined Mr. Gupta in urging that the appeal of the GoI be disposed of granting liberty to Mr. Nair to participate in the fresh process, whenever conducted.

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47. We have noticed that in the appeals, the RBI and the GoI have each raised 3 (three) questions of law which they claim are substantial questions. In essence, the questions are common but obviously differently worded and not in the same sequence. To put the matter in the proper perspective, the appellants essentially have sought for answers in the negative to the

following questions:

(i) Whether the modification made by paragraph 5 of the Office Memorandum dated 3rd December, 2013 to paragraph 14 of the Office Memorandum dated 29th December, 2005 is to be applied retrospectively with effect from 29th December, 2005?

(ii) Whether the High Court was justified in holding that the RBI has to apply reservation in promotion for persons with disabilities in respect of Group 'A' and Group 'B' posts? And

(iii) Whether the High Court is justified in holding that the decision in National Confederation of Development of Disabled (supra) is applicable to the present case?

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56. Having held thus and in the changed circumstances, we are tasked to decide two other questions, viz.:

(a) whether the RBI by failing to consider Mr. Nair for promotion, a right guaranteed by Article 16 of the Constitution, on application of relaxed standards committed an illegality?

and

(b) provided the answer to the aforesaid question is in the affirmative, to what extent relief can legitimately be extended to Mr. Nair?

57. Our answers to the aforesaid questions should be prefaced by a brief reference to the supreme law of the land. The resolve

in the Preamble to the Constitution and the provisions in Part IV thereof, are considered relevant. Our preambular promise is to secure 'social justice' to all. The Directive Principles of State Policy, though not enforceable, are declared in Article 37 to be "fundamental in the governance of the country" and the State has a duty to apply these principles in making laws. The immediately next article commands the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice ~ social, economic and political ~ shall inform all the institutions of the national life and endeavor to eliminate inequalities in status, facilities and opportunities. Article 41 requires the State, within the limits of its economic capacity and development, to make effective provision for securing the right to work, inter alia, in cases of disablement. In the society we live in, which is indeed class-ridden, 'social justice' should mean justice to the weaker and poorer section of the society, particularly when the people of the nation have resolved in the Preamble to secure 'equality of status and opportunity'. The underlying idea is that securing justice to the weaker and the poorer section could make them equal with the rest of the society. In a case where the weaker section is involved in a combat with the stronger section and the scales are even, to rise to the challenge for securing 'social justice', the Courts of law ought to lean in favour of the former so that justice is ensured. If persons with disabilities are denied the rights and privileges conferred by law of equal

opportunities, protection of rights and full participation, inter alia, in the field of public employment, the disservice to such persons would inevitably be grave causing erosion of constitutional idealism and respect for human rights apart from extreme mental agony and pain of the deprived. Where such situations emerge, the courts should not remain mute and dumb. No court, far less this Court, should condone the breaches and violations by employers/establishments arising out of treading of the illegal path by them.

58. It is noted that the version of the RBI before the High Court was that there is no provision for reservation in promotional posts in Grade - 'A' for persons with disabilities; hence, benefit of promotion on a reserved vacancy could not be granted to Mr. Nair. This was indeed the ostensible reason for which the relaxed standards of assessment available for SC/ST candidates was not extended to persons with disabilities, a fortiori, to Mr. Nair. In other words, Mr. Nair's claim for promotion on a reserved vacancy for persons with disabilities, upon application of relaxed standards, could not have been considered in the absence of any identified Group 'A' post. That the appropriate Government must make available reservation in the matter of appointment of persons with disabilities in identified posts of Group 'A' and Group 'B' had been conclusively and authoritatively decided by this Court in Ravi Prakash Gupta (supra) and National Federation of the Blind (supra) by the time the impugned judgment and order was rendered. That being the

position, no valid contention could have been advanced that reservation for persons with disabilities is not available for appointment on Group - 'A' posts. What remained was whether reservation for persons with disabilities is available for promotional appointment on Group - 'A' posts. That issue has also been given a quietus by Rajiv Kumar Gupta (supra), Siddaraju (supra) and Leesamma Joseph (supra). The two big impediments in the path of Mr. Nair, thus, stand removed by reason of a pragmatic and reasonable interpretation of the PwD Act, 1995 by this Court.

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69. We direct RBI to grant notional promotion to Mr. Nair on the post of Assistant Manager Grade - 'A', to be effective from the date of presentation of the writ petition before the High Court, i.e., 27th September, 2006 and actual promotion from 15th September, 2014, i.e., the last date for compliance of the order of the High Court. This exercise must be completed within a period of 2 (two) months from date. The monetary benefits accruing to Mr. Nair with effect from 15th September, 2014 shall be computed and released by 4 (four) months from date.”

14. The premise of not giving effect to the approval granted by the DPC for promoting the petitioner being the lack of clarity in the Instructions viz. entitlement to benefit to the one who acquired disability after appointment as also qua the post in question, is misconceived, in wake of the unequivocal elucidation of law, that the employee is disabled at the time of consideration for promotion is all that matters, source of recruitment notwithstanding and enforceable with regard to

Group A and B posts, which came about in **AK Nair** (supra) wherein the OM dated 17.05.2022 of Government of India had been dealt with. The dictum has binding nature under Article 141 of the Constitution, on not only the Government but Courts across board.

15. There being no distinction between disabled before appointment or thereafter was conveyed by the Government of India, as far as back in 2009, however, this also, for reasons best known, is pending adoption with the Corporation, but on the other hand, the OM dated 17.05.2022, is heavily being relied upon in para 3 of the written statement to oppose the claim of the petitioner, by which a benefit of promotion is limited to the lowest rung of Group A posts, by a misplaced interpretation of the judgment of Hon'ble the Supreme Court, which without doubt has to be followed in letter and spirit. The Instructions are to be issued in aid of the judgment and cannot run counter to it. Even otherwise, it would not be binding on the Courts, that are to effectuate the implementation thereof. As is now rather apparent, the Instructions that are restrictive in nature are sought to be pressed into service.

16. The resistance offered by the Corporation that paras 6 and 7 of the Instructions of 2019 require clarity, is mislaid in light of para 1 thereof, wherein State of Punjab itself has decided to grant 4% reservation under Section 34 of 2016 Act regarding Group A, B, C and D services. However, para 6 relates to appointment of a person with disability not being debarred from competing against unreserved service, while 7, to a situation where such person, if appointed on merit, would not be entitled to claim promotion against reserved service.

17. The right of promotion of the petitioner is sought to be eclipsed, on the anvil of an alleged ambiguity in the Instructions *ibid*, which if indeed had truly existed, the respondent-Corporation would not have even granted promotions to

similarly situated, such as Bhupinder Khosla, who was promoted on 04.12.2020, P-36, likewise was Arvinder Pal Singh, vide order dated 31.12.2021, P-16, in remarks whereof it was mentioned that the same had been made against the reserved quota post meant for PH&SC category and Satwinder Singh Sehmbi, vide order dated 29.05.2019, P-17, at serial No.14, which, as per Note 8 in the order was clarified to have been made against the reserved quota post meant for PH category officer. Even in PWD (B & R), Harinder Singh Dhillon, who though was in General category, was promoted in the physically handicapped category vide order dated 01.11.2022, by granting the benefit of disability. It is also not a case that the post in question had been taken out of the purview of the 2016 Act. The salubrious objective behind enactment thereof, cannot be permitted to be defeated under the garb of awaiting instructions, as administrative *ipse dixit* cannot infiltrate on to an arena which stands covered by judicial orders, as was held in **Anil Ratan Sarkar vs. State of West Bengal**⁷.

18. The case of the petitioner is covered on all fours by the exposition of law as referred to hereinbefore and the Instructions *ibid*, whilst also at par with that of the abovementioned employees, there being a positive approval as well of the DPC held as far back as on 29.07.2023, still the respondent-Corporation is dragging its feet. At one stage, even the shelter of Model Code of Conduct, being in operation was taken, which though cannot come in the way of implementation of Court orders and as such it was stated by the learned Advocate General that officiating charge will be given to him, but instead of honouring the same, additional charge was granted on a post in the office of the CMD, depicting the adamant attitude.

19. Notably, much water has flowed in terms of the interim orders passed

⁷ (2001) 5 SCC 327

in this case from time to time, but the Corporation has stuck to its guns nevertheless, the more than evident undercurrent is to stall or delay the promotion of the petitioner, the reasons put forth therefor are not plausible in view of the accentuating facts of the case at hand and the time being of essence herein.

20. On a conspectus evaluation of the matter, the petition deserves to be and is hereby allowed. The respondents are directed to promote the petitioner from the date that of others, who were promoted based on the recommendations of the DPC dated 29.07.2023. He shall be entitled to all the consequential benefits arising therefrom. The petitioner being on the cusp of retirement, the needful be done within a month.

21. Pending applications also stand disposed of.

(AMAN CHAUDHARY)
JUDGE

23.08.2024
Hemant/ashok

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes