

IN THE KARNATAKA STATE ADMINISTRATIVE TRIBUNAL AT
BANGALORE

DATED : THIS THE 20th DAY OF JULY, 2021.

P R E S E N T

THE HON'BLE Mr. JUSTICE BUDIHAL.R.B, ACTING CHAIRMAN.

&

THE HON'BLE Mr. N. SIVASAILAM, ADMINISTRATIVE MEMBER.

APPLICATION NUMBER : 1139 OF 2020.

BETWEEN :

Sri. Srinivasa.H, 48 years,
S/o. Late Hanumanthappa,
Working as Lecturer in Economics,
Government PU College for Girls,
Chitradurga-577 501.
R/o. Near Sri Hatti Maramma Temple,
Burujanahatty,
Chitradurga-577 501.

.. APPLICANT.

(By Sri. H. Kantharaja & Sri. Ravi.H.K, Advocates).

AND :

1. The State of Karnataka,
Represented by its Principal Secretary to
Government, Education Department,
(Pre-University Education), Vikasa Soudha,
Dr. B.R. Ambedkar Veedhi,
Bangalore-560 001.
2. The Director,
O/o. The Directorate of Pre-University Education,
18th Cross, Malleshwaram,
Bangalore-560 003.

3. The Deputy Director of
Public Instructions, Chitradurga District,
Chitradurga-577 501. .. RESPONDENTS.

(By Sri. V. Shiva Reddy, Government Pleader for Respondents).

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This Application is filed under Section 19 of the Administrative Tribunals Act, 1985 with a prayer to quash the impugned order bearing No. PaPooShiE/AaViA/ViNi3/PraBadthi/ 02/2-19-20 dated 16.1.2020 (Annexure-A18) passed by the second respondent, and, etc.,

This Application coming on for Preliminary Hearing/Hearing, having been reserved for Pronouncement of Orders, this day, the **Hon'ble Sri.N.SIVASAILAM, Administrative Member**, made the following :

ORDER

The applicant was appointed to the post of Lecturer in Economics by direct recruitment on 27-01-1997 under 2A category as at Annexure A1 in which the name of the applicant is at Sl. No68. The applicant has thereafter served at various places in the department of PU education as Economics lecturer. The applicant is suffering from Locomotor disability to the extent of 65% and the disability ID issued by the Government of India on 6-07-2019 is as at Annexure A2. The applicant also is getting physical disability allowance based on O.M. dated 3-08-1998 as at Annexure A4 and is also entitled to benefits under Section 80DD and Section 80U of

the IT Act as at Annexure A3 and also given exemption under professional tax as at Annexure A5.

The applicant contends that the Respondent State has provided reservation vide circular dated 27-11-2012 as at Annexure A6 for providing reservation to all the government institutions, commissions, courts and private aided institutions. The applicant contends that he is entitled to promotion on the basis of reservation quota for persons with disabilities as per the provisions of the disabilities Act and rules made there under.

The applicant contends that he has been requesting the government and the departmental authorities on several occasions to provide reservation in promotion to physically challenged and one such representation is dated 10-01-2017 as at Annexure A7 that has been presented to the Director, Disabled and Senior Citizens Empowerment department. The Director has stated in his letter dated 17-01-2017 that government has to take a decision in this regard as at Annexure A8. Another representation has been given to the respondents 1-2, Chief Secretary dated 18-01-2020 as at Annexures A9-12, for providing 3% reservation for persons

with disabilities as per the law laid down by the Hon'ble Supreme Court.

2. The applicant has placed reliance on the judgments of the Hon'ble Supreme Court in the case of Union of India vs National Federation of Blind & others reported in (2013) 10 SCC 772, Rajeev Kumar Gupta and others vs Union of India and others in (2016) 6 SCALE 417 and Siddaraju vs State of Karnataka & others in CA 1567/2017 dated 14-01-2020 as at Annexure A13-A15.

3. The applicant contends that the second respondent has prepared a seniority list dated 26-03-2011 and the said list is still in operation. In the said Seniority list the serial no of the applicant is at 6610 as at Annexure A17. The applicant contends that he is eligible for promotion as well as reservation for physically disabled persons. In spite of the fact that the applicant is eligible for promotion for the post of principal he is not considered in the O.M. dated 16-01-2020 as at Annexure A18 to fill the post of principal by promotion and aggrieved by the same the applicant has approached the Tribunal to set aside the impugned O.M. dated 16-01-2020 as at Annexure A18 and issue direction to the second respondent to provide 3% reservation to the persons with disabilities in

promotion and consider the case of the applicant for promotion to the post of Principal under the said quota.

4. The applicant has assailed the impugned order on many grounds that are briefly stated as follows;

that the applicant has not even been considered as eligible for promotion, the respondents have not provided reservation for physically handicapped which is mandatory under law and the aforesaid judgements of the Hon'ble Supreme Court, juniors to the applicant have been declared eligible for promotion and hence the applicant has sought the reliefs as prayed for in the application.

5. The Respondent State has filed reply statement in which it is contended that the applicant is not entitled for the reliefs prayed for, the respondent State has provided for horizontal reservation for physically disabled persons only in Direct recruitment but not for promotion and hence there is no provision to provide reservation to the applicant for his promotion to the post of Principal on the basis of physical disability and hence there is no provision to provide reservation for promotion to the physically disabled person in the relevant rules. The respondent State has placed reliance on the judgment of the Hon'ble Rajasthan High Court in D.B.

Civil Special Appeal (W) No. 628/2010 in S.B. WP no. 8736/2008 dated 4-11-2015 as at Annexure R3, in the case of Arun Singhvi vs The New India Assurance Company Ltd has held that 'all the contentions regarding absence of reservation in promotions in the O.M. issued by the Government was specifically raised in the contempt petition before the Hon'ble Supreme Court and the said contention was negated after noticing provisions of Section 47(2) of the Act, it cannot be said that the absence of reservation in Group-A and Group-B post in the O.M. issued by the government is bad; the promotion policy of the respondent company clearly stipulates that the reservation would be provided to persons with disabilities on the instructions of the government from time to time and as admittedly the instructions presently do not provide for any reservation in Group-A posts, in which the cadre of Class-1 officer of respondent company falls, the appellant cannot claim any relief in this regard and it cannot be said that the judgment of the learned single judge requires any interference.

6. We have heard the learned counsels on both sides who have reiterated the contentions in the application and the reply statement respectively. We have also perused the

application, reply statement and the annexures attached to the application.

7. We refer to the 3-Member Bench Judgement of the Hon'ble Supreme Court in the case of Union of India and other vs National Federation of the Blind and others reported in (2013) 10 SCC 772 wherein in para 51 of the judgment, the Hon'ble Apex Court has held that,

'...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.....'

In para 54 of the judgment, it has been directed that,

*' (i) ******

(ii) We hereby direct the 'appropriate government' to compute the number of vacancies available in all the 'establishments' and further identify the posts for disabled persons with a period of three months from today and implement the same without default'.

8. In the case of Rajeev Kumar Gupta and others vs Union of India and others reported in (2016) 13 SCC 153, the Hon'ble Apex Court has held that,

*'14. We examine the applicability of the prohibition on reservation in promotions as propounded by **Indira Sawhney**. Prior to **Indira Sawhney**, reservation in promotions were permitted under law as interpreted by this Court in *General Manager, Southern Railway and another, vs **Rangachari*** reported in AIR 1962 SC 36. **Indira 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. **Indira 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 Constitutional Scheme.*

*21. The principle laid down in **Indira Sawhney** is applicable only when the State seeks to give preferential treatment in the matter of employment under 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 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 **Indira Sawhney** has clearly and normatively no application to the PWD.*

24....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 percent 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.....We 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’.

9. In the case of **Siddaraju** vs State of Karnataka and others in CA 1567/2017 dated January 14-15, 2020, the Full Bench of the Hon’ble Supreme Court has held placing reliance

on the judgement of the Hon'ble Apex Court in the case of National Federation of the Blind vs **Sanjay Kothari**, Secy, DoPT reported in (2015) 9 SCALE 611 has held in para 17 as follows,

*'17.....The High Court held that no action can be initiated in the contempt petition on the ground that reservation had not been provided in the matter of promotion. We may hasten to add that this is not a correct reading of the law laid down by this Court. National Federation of the Blind vs **Sanjay Kothari**, Secy, Deptt. Of Personnel and Training, (2015) 9 SCALE 611 was a judgment in a contempt petition in which the contention taken up by the petitioner was repelled by stating that para 51 of the 2013 judgment has held that the manner of identification of posts of all groups must be uniform and nothing beyond. After the declaration of the law in Rajeev Kumar Gupta & others v. Union of India & others – (2016) 13 SCC 153, it is now clear beyond doubt that the OM of 2005 cannot be given effect to when it is in the teeth of the 2016 judgment'.*

10. From the landmark judgments governing reservations for PWD in civil posts supra, the following points emerge which are detailed below.

1. *The reservations for PWD is horizontal reservation which has been clarified as under.*

'Reservation for backward classes of citizens (SCs, STs and OBCs) is called vertical reservation and the reservation for categories such as persons with disabilities and ex-servicemen is called horizontal reservation. Horizontal reservation, cuts across vertical reservation (in what is called interlocking reservation) and person selected against the quota for persons with disabilities have to be placed in the appropriate category viz. SC / ST / OBC / General candidate depending upon the category to which they belong in the roster meant for reservation of SC/ST/OBCs. To illustrate, if in a given year there are two vacancies reserved for the persons with disabilities and out of the two persons with disabilities appointed, one belongs to a Scheduled Caste and the other to the General Category then the disabled SC candidate shall be adjusted against the SC point in the reservation roster and the general candidate against the unreserved point in the relevant reservation roster. In case, none of the vacancies falls on point reserved for the SCs, the disabled candidate belonging to the SC shall be adjusted in future against the next available vacancy reserved for SCs.

2. *The computation of 3% reservation for PWD is based on the total number of vacancies in the cadre strength.*

3. Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once a post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up of the post.

11. From the above summarisation of the law laid down by the Hon'ble Apex Court judgements supra, the contention of the learned government pleader that there is no reservation to persons in Group B posts for PWD for promotion on the basis of physical disability is untenable in terms of the settled legal position aforestated.

12. It is fairly stated by the learned counsel for the applicant that the post of Principal is filled up exclusively through promotion and that no post are identified for PWD persons in the cadre. The learned government pleader therefore, stated that since no posts are identified for PWD persons in the Principal cadre, the question of providing reservation for persons with disabilities in the cadre even under promotion quota does not arise. In this regard we refer to the provisions of the Section 47 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1995 Act),

'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 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.

13. It is not the case of the Respondent State in the reply statement or at the hearing that any notification has been

issued under the proviso to the said section that promotion can be denied to a person merely on the ground of his disability.

14. The 1995 Act has been repealed by the Right of persons with Disabilities, Act, 2016 (2016Act). Section 20 of the 2016 Act is as follows,

'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'.

15. From the provisions of the 1995 Act and 2016 Act, it is clear that promotion cannot be denied to a person with disability on the ground of disability alone, in the absence of any notification to exempting the concerned establishment from the operation of the Section 47 of the 1995 Act or Section 20 of the 2016 Act. The second respondent has issued a Notification dated 16-01-2020, of a list of persons eligible to be considered for promotion that has excluded the applicant. The learned government pleader fairly has stated that there

are no other reasons other than physical disability on the basis of which the applicant has been excluded. There are no reasons stated in the reply statement as to why the applicant has not been considered in the list of persons eligible for promotion. Therefore, the non-consideration of the applicant for promotion merely on the ground of physical disability is impermissible in terms of the 1995 Act or the 2016 Act. Therefore, we are of the considered view that the applicant who has actually been recruited to service without the benefit of PWD reservation, cannot be discriminated on the ground of physical disability, the non-consideration of his claim to be included in the list of persons for promotion is bad in law and he has a right to be promoted to the cadre of Principal on such consideration, if he is otherwise eligible to be promoted and his physical disability shall not be factor in consideration of his claim and credentials for promotion.

16. We finally come to the issue of reservation of posts in the cadre of Principal for PWD persons.

'33. Identification of posts for reservation.-The appropriate Government shall—

(i) identify posts in the establishments which can be held by respective category of persons with

benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of section 34;

(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and

(iii) undertake periodic review of the identified posts at an interval not exceeding three years.

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.

17. It is submitted by the learned Government pleader that posts in the Cadre of Principal have been identified for persons with disabilities with regard to the vacancies. This exercise requires to be done in the periodic review exercise under Section 33 (iii) of the Act (supra) by the first respondent. It is settled law in terms of the judgment of the Hon'ble Supreme Court in **Rajeev Kumar Gupta**, that once a post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up the said post. It is not the case of the respondent State that review has been done in respect of the vacancies in the posts of principal in terms of the aforesaid provisions of the Act

(supra). Therefore, a direction shall be in order to the first respondent to consider reservation of posts in the cadre of principal which is being filled up only through promotion.

18. The applicant has prayed for quashing the impugned Memorandum dated 16-01-2020 as at Annexure A18. In the application, the applicant has not made out any grievance against the persons who have been shortlisted for promotion to the cadre of Principal. It is not at all the case of the applicant that they are not eligible for promotion in accordance with their seniority. No relief is claimed against the persons named in the Memorandum, no relief even against the persons who are junior to the applicant and they are also not parties to this application even in a representative capacity. Hence the challenge to the list perse is rejected. However, the applicant has made out a strong case for his inclusion in the said list with regard to his seniority and consideration for promotion, without any discrimination based on his disability status with regard to the provisions of the 2016 Act, which prohibits such discrimination.

19. In view of the discussions above, the application is partially allowed and we direct as follows,

1. The prayer for quashing the impugned Memorandum dated 16-01-2020 as at Annexure A18 is rejected.
2. However, the second respondent shall consider his inclusion in the Memorandum dated 16-01-2020 as at Annexure A18, if he is otherwise eligible with due regard to his seniority in the cadre and the applicant shall not be discriminated solely based on his disability status. Time for compliance is one month from the date of this order.
3. If the applicant is included in the aforesaid list of 16-01-2020, then he shall be considered for promotion, if any of his junior has been considered and promoted to the post of Principal and such consideration for promotion and promotion, shall not discriminate against him because of his physical disability status. The promotion shall take effect from the date when his junior was promoted but the financial benefits shall accrue prospectively only. Time for

compliance is three months from the date of this order.

4. The first respondent shall consider reservation of posts for PWD persons in the cadre of principal which is being filled up only through promotion. Time or compliance is three months from the date of this order in terms of the provisions of the Right of persons with Disabilities, Act, 2016. If such a reservation is made, the applicant shall be considered along with others eligible for consideration for promotion, based on horizontal reservation for PWD persons, if the applicant is not already promoted with regard to clauses 2 and 3 above, within three months thereafter.

HBM.