Supreme Court of India
Rajeev Kumar Gupta & Ors vs Union Of India & Ors on 30 June, 2016
Bench: J. Chelameswar, Abhay Manohar Sapre

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL/APPELLATE JURISDICTION

WRIT PETITION (CIVIL) No.521 OF 2008

Rajeev Kumar Gupta & Others Petitioners

Versus

Union of India & Others Respondents

WITH

CIVIL APPEAL NO. 5389 OF 2016

(Arising out of SLP (Civil) No.244 of 2016)

J U D G M E N T

Chelameswar, J.

1. Leave granted in SLP (Civil) No.244 of 2016.

2. The petitioners are employed with Prasar Bharati Corporation of India (hereinafter, Prasar Bharati), a statutory corporation brought into existence by the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 (hereinafter the 1990 Act). The petitioners are persons with disability (hereinafter, PWD) as defined under Section 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter the 1995 Act). They filed this writ petition aggrieved by two office memoranda No.36035/16/91-Estt. (SCT) dated 18.02.1997 and No.36035/3/2004-Estt. (RES) dated 29.12.2005 (hereinafter impugned

memorandum I and II respectively) issued by the Department of Personnel and Training, Government of India. The petitioners grievance is that the impugned memoranda deprive them of the statutory benefit of reservation under the 1995 Act w.r.t. Group A and Group B posts in Prasar Bharati.

3. Posts in Prasar Bharati are classified into four groups A to D. Each group consists of a number of classes of posts and in each class there are a number of posts. Certain posts were identified by the Government of India vide notification No. 16-70/2004-DD.III dated 18.01.2007 (hereinafter, NOTIFICATION) as posts suitable for being filled up with PWD (hereinafter IDENTIFIED POSTS); an exercise in compliance with the mandate under Section 32 of the 1995 Act[1]. After such identification, the appropriate Government[2] is mandated under Section 33[3] to reserve not less than three per cent of IDENTIFIED POSTS in favour of PWD.

4. Under the regulations framed under the 1990 Act, various posts (falling in groups A to D) in Prasar Bharati are to be filled up by three different modes i.e. direct recruitment, promotion and some posts partly by direct recruitment and partly by promotion.

5. Memorandum II provides for reservation in favour of PWD to the extent of three per cent in all the IDENTIFIED POSTS in Prasar Bharati, when these are filled up by direct recruitment. However, it provides for three per cent reservation in IDENTIFIED POSTS falling in Groups C and D irrespective of the mode of recruitment i.e. whether by direct recruitment or by promotion. As a consequence, the statutory benefit of three per cent reservation in favour of PWD is denied insofar as IDENTIFIED POSTS in Groups A and B are concerned, since these posts, under relevant regulations of Prasar Bharati are to be filled up exclusively through direct recruitment.

6. The crux of the issue before us is legality of denial by the impugned memoranda of the statutory benefit of three per cent reservation in IDENTIFIED POSTS falling in Groups A and B. Such denial, the petitioners contend, violates the States obligation under Sections 32 and 33 of the 1995 Act and subverts of the object of the said Act enacted by Parliament inter alia to secure opportunities for full participation of PWD in matters of employment.

7. It is relevant to notice the history and background of the impugned memoranda. After enactment of the 1995 Act, impugned memorandum-I was issued purporting to extend the benefit of reservation to certain IDENTIFIED POSTS falling in Groups A and B, which under relevant regulations of Prasar Bharati are to be filled only through direct recruitment. This memorandum was followed by several others (examination of each of them is not necessary for our present purpose) leading to significant confusion regarding the intendment of the Government of India with respect to reservation to PWD candidates. The impugned memorandum II was issued to clarify governments understanding of the problem. The legality (correctness of the governments understanding of the law) of impugned memorandum-II is the issue for our consideration.

8. The petitioners argued,

(i) A large number of IDENTIFIED POSTS in Groups A and B are filled only through promotion. Because of the impugned memoranda, the benefit of reservation under Section 33 of the 1995 Act is denied w.r.t. those posts. Petitioners therefore lose out on a significant amount of opportunity at the upper end of the organizational hierarchy. It cannot be the respondents case that the petitioners are unfit by virtue of their disability to perform the functions of office in the IDENTIFIED POSTS. Such posts are already identified to be suitable to be filled up with PWD. Classification among the PWD on the basis of the mode of recruitment is discriminatory and the same has no nexus to the objects sought to be achieved either by the 1995 Act or the recruitment. Government of India has created an arbitrary and irrational distinction by excluding IDENTIFIED POSTS in Groups A and B from the benefit of three per cent reservation.

(ii) That the embargo on reservation in promotions laid down by this court in Indra Sawhney & Others v. Union of India & Others, 1992 Supp (3) SCC 215 (hereinafter, referred to as the Indra Sawhney case) is not applicable to PWD.

9. The respondents argued[4]

(i) that the mandate of Section 33 of the 1995 Act applies only when the identified posts are sought to be filled up by direct recruitment. Impugned memorandum-II only contains a policy decision of the Government of India by which reservation is granted to Group C and Group D posts even when they are sought to be filled up by the mode of promotion. Since the policy decision restricted the reservation in promotion to identified Group C and Group D posts, the petitioners have no right to demand reservation in promotion to identified Group A and Group B posts.

(ii) The respondents further argued that Indra Sawhney case clearly ruled that reservations be confined to recruitment at the initial level of recruitment into government service and not at the stage of promotions. Providing for reservation in higher level posts is constitutionally impermissible. The respondents, therefore, argued that in light of the law laid down in Indra Sawhney, it is constitutionally impermissible that petitioners to be given three per cent reservation in promotions for identified Group A and Group B posts.

10. Whether any post under the State is to be reserved for being filled up exclusively by some persons belonging to any constitutionally deserving class of persons or otherwise is a matter of policy choice of the State. Such a policy is either laid down by a statute or executive orders. Various factors are to be taken into consideration for framing any policy such as the nature of responsibilities which a particular post carries, the number of posts available in that class and the representation already existing in that class of posts for persons of the class to which reservation is sought to be provided and myriad other things.

11. But such factors ought to be germane to purposes sought to be achieved by the policy apart from being relevant in the context of the scheme of Articles 14 and 16 of the Constitution. The same principles of law apply even to the question, as to the mode of filling up of any post or class of posts.

12. The policy of the State w.r.t. the issue on hand is regulated by the 1995 Act. It authorises (under Section 32) the appropriate Government to identify the posts suitable to be filled up by PWD. The Government of India has exercised the power and identified the posts vide the NOTIFICATON. The NOTIFICATION includes some of the posts in Group A and Group B.[5]

13. For some of these IDENTIFIED POSTS in Group A and Group B, the mode of recruitment is only through promotions.[6] The purpose underlying the statutory exercise of identification under Section 32 of the 1995 Act would be negated if reservation is denied to those IDENTIFIED POSTS by stipulating that either all or some of such posts are to be filled up only through the mode of promotion. It is demonstrated before us that PWD as a class are disentitled to some of the IDENTIFIED POSTS in Groups A and Group B because of the impugned memoranda and the relevant regulations, under which the only mode of appointment to those IDENTIFIED POSTS is through promotion. Once posts are identified under Section 32, the purpose behind such identification cannot be frustrated by prescribing a mode of recruitment which results in denial of statutory reservation. It would be a device to defraud PWD of the statutory benefit under Section 33 of the 1995 Act.

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 General Manager, Southern Railway & Another v. Rangachari, AIR 1962 SC 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)[7]. The majority held[8] that reservations in promotion are not permitted under our constitutional scheme.

15. The respondent argued that the answer to Q.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 respondents submission. The Indra Sawhney ruling arose in the context of reservations in favour of backward classes of citizens falling within the sweep of Article 16(4).

17. Backward classes contemplated under Article 16(4) are the socially and educationally backward classes of citizens. In Devadasan[9], it was held by this Court that Article 16(4) is an exception to the principle contained in Article 16(1). However, Subba Rao, J., in his dissent opined that Article 16(4) is not an exception to Article 16(1) but an emphatic way of expressing the principle inherent in Article 16(1). This dissenting opinion later found approval in the majority decision in State of Kerala v. N.M. Thomas, (1976) 2 SCC 310. Finally, in Indra Sawhney, a 9-judge Bench by majority (speaking through Jeevan Reddy, J.) confirmed that Article 16(4) is not an exception to the Rule in Article 16(1) but it is an instance of (such) classification[10]

18. The principle is that the State shall not discriminate (which normally includes preference) on the basis of any one of the factors mentioned in Article 16(1). Though under the doctrine of reasonable classification, it has always been held that State can identify classes of people who have distinct characteristics or disadvantages and treat them separately under law. Having regard to the history, the social and demographic context of our nation, the Constitution framers thought it appropriate to enable the State under Article 16(4) to identify citizens for preferential treatment for the purpose of employment under the State.

19. This Court in Indra Sawhney was dealing with the action of the State in providing reservation in employment under the State to various classes of citizens, identified by the State to be backward classes. The process of such identification and the nature and extent of reservations that could be provided under Article 16(4) were the main issues before this Court. It is in this context, this Court held that reservation in the context of promotions to higher posts under the State are constitutionally impermissible.

20. To remove the basis of the rule propounded in Indra Sawhney case, Parliament enacted the Constitution (Seventy-Seventh Amendment) Act, 1995. By inserting Article 16(4A), an exception is created in favour of citizens belonging to the Scheduled Castes and the Scheduled Tribes, from the rule laid down in Indra Sawhney.

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 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)[11] 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 the PWD.

22. The 1995 Act was enacted to fulfill Indias obligations under the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region. The objective behind the 1995 Act is to integrate PWD into the society and to ensure their economic progress.[12] The intent is to turn PWD into agents of their own destiny.[13] PWD are not and cannot be equated with backward classes contemplated under Article 16(4). May be, certain factors are common to both backward classes and PWD such as social attitudes and historical neglect etc.

23. It is disheartening to note that (admittedly) low numbers of PWD (much below three per cent) are in government employment long years after the 1995 Act. Barriers to their entry must, therefore, be scrutinized by rigorous standards within the legal framework of the 1995 Act.

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.

CIVIL APPEAL NO. 5389 OF 2016 (Arising out of SLP (C) No.244 of 2016) In view of our decision in Writ Petition (Civil) No.521 of 2008, this Civil Appeal is also disposed of, with no order as to costs.

..J.

(J. Chelameswar) ..J.

(Abhay Manohar Sapre) New Delhi;

June 30, 2016.

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[1] Section 32- Identification of posts which can be reserved for persons with disabilities.Appropriate Governments shall-

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology. The 1995 Act was enacted on 01.01.1996 pursuant to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region adopted in the meeting convened by the Economic and Social Commission for Asian and Pacific Region at Beijing in December 1992 to launch the Asian and Pacific Decade of Disabled Persons 1993-2002. The proclamation was to ensure opportunities for full participation and equality for people with disabilities, especially in the fields of rehabilitation, education and employment. As a signatory to this proclamation, India passed the 1995 Act.

[2] The term appropriate Government is defined under Section 2(a) of the 1995 Act.

[3] Section 33- Reservation of posts. Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy; in the posts identified for such disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section. The term establishment" as referred to in Section 33 is defined in Section 2(k) of the 1995 Act.

[4] All the respondents adopted the counter affidavit filed on 9.7. 2010 by respondents 4 to 8 [5] The following entries in the identification notification are indicative of this fact- entry nos. 285, 289, 291, 363, 366, 379, 535, 547, 555 and 72 in the Group A list and entry nos. 67, 70 and 120.

[6] The petitioner annexed replies obtained through RTI at pages 119-122 of the writ petition. A perusal of the annexed documents leaves no doubt that there are several identified posts for which the only possible mode of recruitment under the regulations of Prasar Bharati is promotion.

The recruitment mode of several posts such as senior engineering assistant (Group B post), Assistant engineer (Group B post), Station engineer (Group A post); Superintending engineer (Group A post) and Chief engineer (Group A post) is through 100% promotion. There are some other posts such Assistant station engineer (Group A post) for which recruitment is 50% by direct recruitment and 50% by promotions.

[7] See Question No. 7 framed in Honble B.P. Jeevan Reddy, J.s Judgment in Indra Sawhney case;

7. Whether clause (4) of Article 16 provides reservation only in the matter of initial appointments/direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well? [8] Para 828. We see no justification to multiply the risk, which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and heart-burning among open competition members. All this is bound to affect the efficiency of

administration. Putting the members of backward classes on a fast-track would necessarily result in leap-frogging and the deleterious effects of leap-frogging need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their birth-mark, as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation.

Para 829. It is true that Rangachari [(1962) 2 SCR 586: AIR 1962 SC 36] has been the law for more than 30 years and that attempts to re-open the issue were repelled in Karamchari Sangh [(1981) 1 SCC 246, 289: 1981 SCC (L&S) 50: (1981) 2 SCR 185, 234]. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in Rangachari [(1962) 2 SCR 586: AIR 1962 SC 36] to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from. However, taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of State in Article 12 such reservations shall continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of backward class of citizens in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so.

[9] T. Devadasan v. Union of India and Anr., AIR 1964 SC 179
[10] Indra Sawhneys case.

Para 741. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that Clause (4) of Article 16 is not exception to Clause (1)

of Article 16. It is an instance of classification implicit in and permitted by clause (1). It is a provision which must be read along with and in harmony with clause (1). Indeed, even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

A Constitution Bench of this Court in M. Nagaraj & Ors. v. Union of India & Ors. (2006) 8 SCC 212 reiterated the position in Indra Sawhney. See Para 112.

[11] As per the Indra Sawhney case, Article 16(4) is a subset of Article 16(1).

[12] See Para 3, 4 and 5 of the Proclamation of the Full Participation and Equality of the People with Disabilities in the Asia and Pacific Region.

[13] Id at Para 2.
