Delhi High Court
Babita Pathak & Others vs High Court Of Delhi & Others on 22 February, 2013
Author: Badar Durrez Ahmed

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.02.2013

+ WP (C) No. 997/2011

BABITA PATHAK & OTHERS ... Petitioners

versus

HIGH COURT OF DELHI & OTHERS ... Respondents

Advocates who appeared in this case:
For the Petitioners : Ms Nitya Ramakrishnan with Ms Nalini Tripathi, Ms Suhasini Sen and Mr Rahul Kripalani
For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

WITH

+ WP (C) No. 3251/2010

DEEPTI ... Petitioner

versus

HIGH COURT OF DELHI & OTHERS ... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr Neeraj Kumar
For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

JUDGMENT

BADAR DURREZ AHMED, J

1. These writ petitions concern the Delhi Judicial Service Examination 2010. The High Court of Delhi (Respondent No.1) had issued a notification dated 26.10.2009 with regard to the holding of the Delhi Judicial Service Examination in respect of 60 vacancies. 27 vacancies were for the General category, 14 vacancies were for the Scheduled Caste category, 14 were for the Scheduled Tribes category and 5 vacancies were reserved for the physically handicapped persons (blind / low vision). It may be pointed out at this stage itself that out of these five vacancies, which were reserved for physically handicapped persons, one vacancy was carried forward and advertised for the fifth time, one vacancy was carried forward and advertised for the third time, two vacancies were carried forward and advertised for the second time and one vacancy was advertised for the first time.

2. The main controversy is with regard to the manner in which the five vacancies for the physically handicapped persons are to be filled. The petitioners in these writ petitions are all persons belonging

to the General category. In the final result that was declared for the said DJS Examination 2010, the petitioner No.1 in WP(C) 997/2011, was placed at S.No.30 in the order of merit. Similarly, the petitioner No.2 in that writ petition was at S.No.31 and the petitioner No.3 was at S.No.34. The petitioner in WP(C) No.3251/2010, namely, Deepti, had, in fact, not even qualified in the preliminary examination and was at No.4 after the candidates who had made the cut-off for the main examination. However, by an interim order dated 31.05.2010 in CM No. 6484/2010 in WP(C) 3251/2010, the said Deepti was permitted to appear for the main examination, subject to the final outcome of the writ petition. Deepti has been placed at S.No.32 after the final merit list was taken out. The case of the petitioners is essentially that the seats reserved for the physically handicapped persons cannot be carried forward without a time-cap. According to them, Section 36 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995 (hereinafter referred to as 'the said Act') contemplates the carrying forward of a vacancy reserved for the physically handicapped person for only one year. Section 36 of the said Act reads as under:-

> "36. Vacancies not filled up to be carried forward.-- Wheres in any recruitment year any vacancy under Section 33, cannot be filled up due to non-availability of a suitable person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vancancy by appointment of a person, other than a person with disability:
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> > Provided that if the nature of vacancies in an establishment is such that a given category of person can not be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

3. It has been contended that the provision is mandatory, in the sense that it uses the word "shall" when it directs that if, even after carrying forward of a vacancy to the succeeding recruitment year, no suitable person with disability is available even by interchange among the three categories (blind or low vision; hearing impairment; locomotor disability or cerebral palsy), then the employer is mandated to fill up the vacancy by appointment of a person other than a person with disability. The emphasis is on the phrase "the employer shall fill up". According to the learned counsel for the petitioners, the use of the word "shall" clearly implies that a duty has been cast upon the employer to fill up the vacancy in such an eventuality by appointment of a person other than a person with disability. Since a duty has been cast on the employer, it implies that the persons belonging to the General category would have a right to be employed in such eventuality provided they are suitable and there are vacancies. In this backdrop, it has been contended that there were 27 General category vacancies, all of which have been filled by the first 27 candidates in order of merit. However, the 5 vacancies for the persons with disability remained unfilled. By virtue of Section 36 of the said Act, 4 out of these 5 vacancies were

carried forward from earlier recruitment years and, therefore, ought to have been released for being filled up by persons from the General category. If this were to be so, 4 vacancies would be available for being filled up by the General category. It was contended that the persons who were placed at ranks 28th and 29th of the merit list after the final examination and interview, had opted out of contention and, therefore, the petitioner Nos.1 & 2 in WP(C) 997/2011 and the petitioner in WP(C) 3251/2010 would have a right to be appointed against the said four vacancies as they would be the next three persons in order of merit having the ranks of 30, 31 and 32. Insofar as the petitioner No.3 in WP(C) 997/2011 is concerned, his case is different. He does not make the argument with regard to the vacancies for persons with disability inasmuch as, even if he were to take that argument, he would not qualify as he is not within the next four candidates after the selected candidate at S.No.27. This is so because his rank was 34. Consequently, his argument is based on an entirely different footing and that is that there were 14 Scheduled Tribe vacancies advertised, but only one could be filled because of non-availability of suitable candidates belonging to that category. The argument is that such a large number of seats go-a-begging because of the non-availability of the Scheduled Tribe candidates in Delhi and, therefore, such seats should be de-reserved and, if that were to happen, then the petitioner No.3 in WP(C) 997/2011 would be in the reckoning for appointment. We may observe at the outset that such an argument is very far-fetched and tenuous. The petitioner No.3 does not have any right to be appointed against an advertised Scheduled Tribe vacancy. It is only if a carry forward or a backlog vacancy is de-reserved after following the due process of law that such a seat would be available for being filled up by a General category candidate. Therefore, the case of the petitioner No.3 in WP(C) 997/2011 is clearly untenable.

4. It is also untenable for the reasons for which we feel that the case of the other petitioners has no merits. This would be clear from the discussion below.

5. Insofar as the other petitioners are concerned, the argument is that the carrying forward of vacancies reserved for persons with disabilities beyond one year is not permissible under Section 36 of the said Act. Ms Nitya Ramakrishnan, arguing for the petitioners 1 and 2 in WP(C) 997/2011, submitted that Section 33 of the said Act deals with reservation for disabled persons in recruitment. It would be instructive to set out that provision at this juncture itself. Section 33 of the said Act reads as under:-

> "33. Reservation of posts.--Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from--
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> (i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:

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

6. Section 36 provides that if, in any given recruitment year, the vacancies reserved for disabled persons cannot be filled up due to non- availability of a suitable person, the vacancy "shall" be carried forward to the next year and, if in the succeeding year also, no suitable candidate is found, the post could be filled by a person, other than a person with disability. Ms Nitya Ramakrishnan also referred to the DOPT O.M. dated 29.12.2005, in particular to paragraph 16 thereof, which reads as under:-

"16. INTER SE EXCHANGE AND CARRY FORWARD OF RESERVATION IN CASE OF DIRECT RECRUITMENT.

(a) Reservation for each of the three categories of persons with disabilities shall be made separately. But if the nature of vacancies in an establishment is such that a person of a specific category of disability cannot be employed, the vacancies may be interchanged among the three categories with the approval of the Ministry of Social Justice & Empowerment and reservation may be determined and vacancies filled accordingly.

(b) If any vacancy reserved for any category of disability cannot be filled due to non-availability of a suitable person with that disability or, for any other sufficient reason, such vacancy shall not be filled and shall be carried forward as a 'backlog reserved vacancy' to the subsequent recruitment year.

(c) In the subsequent recruitment year the 'backlog reserved vacancy' shall be treated as reserved for the category of disability for which it was kept reserved in the initial year of recruitment. However, if a suitable person with that disability is not available, it may be filled by interchange among the three categories of disabilities. In case no suitable person with disability is available for filling up the post in the subsequent year also, the employer may fill up the vacancy by appointment of a person other than a person with disability. If the vacancy is filled by a person with disability of the category for which it

> was reserved or by a person of other category of disability by inter se exchange in the subsequent recruitment year, it will be treated to have been filled by reservation. But if the vacancy is filled by a person other than a person with disability in the subsequent recruitment year, reservation shall be carried forward for a further period upto two recruitment years whereafter the reservation shall lapse. In these two subsequent years, if situation so arises, the procedure for filling up the reserved vacancy shall be the same as followed in the first subsequent recruitment year."

7. She contended that the said O.M. goes a step further and provides that if a suitable candidate is not found even in the subsequent recruitment year and, if the post is filled by a person other than a disabled person, the reservation may be carried forward for a further period of two years, following which it would lapse. Thus, according to her, the said O.M. makes the carrying forward beyond the second year, contingent upon the filling up of the reserved seat in the second year, by a person who is not disabled. It was argued that since in the present case, the respondents had not filled the seats with disabled persons, it could not have carried forward the seats for a period beyond what was contemplated by Section 36 of the said Act. In other words, beyond the year next to that of the first year, the vacancy was advertised as having been reserved for disabled persons. She submitted that carrying forward of posts or vacancies is not the rule in horizontal reservation as distinct from the cases of vertical reservation. She submitted that Section 36 of the said Act is by way of an exception to the said rule insofar as horizontal reservations are concerned. Relying upon the decision of the Supreme Court in M. Nagaraj and Others v. Union of India & Others: 2006 (8) SCC 212, she submitted that the carrying forward must be subjected to a time-cap, otherwise it would operate to the detriment of efficiency and good governance and that the extent of reservation must be purposive and context specific.

8. She also submitted that where a power is given to do a certain thing in a certain way, that thing must be done in that way or not at all and that other methods of performance are forbidden. She placed reliance for this proposition on the Supreme Court decision in Hukam Chand Shyam Lal v. Union of India & Others: 1976 (2) SCC 128. In this context, she submitted that the said Act provides for a reservation based on a percentage of the vacancies and it also provides for carrying forward of such vacancies. But, the carry forward permitted by the said Act must be done in the manner specified in the said Act and, in particular, under Section 36 thereof or not at all. According, to her, Section 36 of the said Act does not confer any power on the employer to carry forward the posts beyond the first year and on the contrary, the said provision envisages that the posts so reserved shall be filled in the second year itself either by a physically handicapped person of a different category and, if no such suitable person is available, then by any other person. She submitted that even the O.M. dated 29.12.2005 imposed a time-cap on the carrying forward of reservations for persons with disabilities. She submitted that if the provisions of Section 36 of the

said Act and of the O.M. dated 29.12.2005 are read together, the following position would emerge:-

> i) In the first year of reservation of a vacancy for persons with disabilities, if a suitable candidate is not found, the vacancy shall be carried forward to the next recruitment year;
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> ii) a) In the succeeding year, the vacancy may be filled by a person with another category of disability, in which case, the reservation would be satisfied; or
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> b) It may be filled by a person without disability, in which case, the reserved vacancy would carry over to the next year;
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> iii) The said Act did not contemplate any carry over beyond the year next to that of the initial reservation;
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> iv) The said O.M. dated 29.12.2005 permitted the carry forward beyond the year next to that of the initial reservation, if, and only if, the vacancy had been filled by a person without disability;
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> v) Therefore, no reservation for persons with disability is permitted for a vacancy that has remained unfilled for two successive years;
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> vi) It was contended that whether the words used are "may" or "shall", the intention is that the vacancy should not remain unfilled beyond the first year that it is advertised as reserved for the physically handicapped. There cannot be any arbitrary refusal to fill the post in the second year.

9. In view of the aforesaid submissions, the learned counsel further submitted that the two posts reserved initially for the physically handicapped in the years 2006 and 2008 respectively could not be carried forwarded as reserved vacancies beyond 2008 and 2009 respectively as they were not filled by the General candidates in the meantime. This is so because, according to the learned counsel, neither Section 36 of the said Act nor the said O.M. dated 29.12.2005 permits the carry-forward beyond the second year. It was also contended that the respondent No.1 is forcing the carry over quota for the physically handicapped to lapse and that the interest of the physically disabled persons can be better protected by appointing persons from the General category, so that the reservation can be carried over from year to year and kept alive in terms of the O.M. dated 29.12.2005. It was further contended that the two vacancies reserved in the year 2009 for persons with disabilities must also be filled in 2010 by those in the General category because, first of all, both Section 36 of the said Act and the said O.M. dated 29.12.2005 contemplate such an appointment;

secondly, the interests of administration of justice require this to be done; thirdly, the term "shall" in Section 36 of the said Act as well as the term "may" in the said O.M. can only be interpreted in consonance with the established ratio of cases that there must be a good and sufficient reason for not complying with the requirements of administration and that the State cannot be whimsical in denying appointment to successful candidates. Reliance was placed on the Supreme Court decision in Shankarsan Dash v. Union of India: 1991 (3) SCC 47 and Vice-Chancellor, University of Allahabad and Ors. v. Dr Anand Prakash Mishra and Ors.: 1997 (10) SCC 264. Consequently, Ms Ramakrishnan submitted that a mandamus would lie to direct that the posts advertised for the fifth and third time be treated as general vacancies and be filled as such. She also submitted that the mandamus would also lie in filling up the two vacancies reserved in 2009 for physically handicapped persons in 2010 in the interest of fair administration and justice. For, such a course would not take away anything from the entitlements of physically handicapped, but would ensure that there is a valid carry over of seats for 2011 and 2012.

10. The learned counsel appearing on behalf of the other petitioner adopted the arguments of Ms Nitya Ramakrishnan. The learned counsel also submitted that a literal and strict interpretation has to be given to Section 36 of the said Act. This is so because the concept of carry forward, according to the learned counsel, is not applicable in case of horizontal reservation. Reliance was placed for this proposition on the Supreme Court decision in Jitendra Kumar Singh and Another v. State of Uttar Pradesh & Others: 2010 (3) SCC 119. Consequently, it was urged that Section 36 was an exception to this rule and, therefore, required to be construed strictly. As such, it was contended that the word "shall" appearing in Section 36 ought to be read as "shall" and not as "may" and, therefore, the vacancies reserved for physically disabled persons could not be carried forward beyond the second year, meaning thereby that 4 vacancies would be available for being filled up by the candidates of General category which would include the petitioners.

11. Mr Datar, appearing on behalf of the High Court of Delhi, submitted that the said Act being a beneficial / welfare legislation enacted to benefit the persons with disabilities had been enacted with the object and purpose of giving effect to the proclamation on the full participation and equality of the persons with disabilities as also to ensure equal opportunities and protection of the rights of full participation of such persons. That being the case, it was submitted that the said Act ought to be given a liberal, purposive and constructive interpretation in favour of the persons with disabilities. For this proposition, he placed reliance on Bata India Ltd v. Union of India and Others: 180 (2011) DLT 351 (DB); National Federation of the Blind v. Union of India & Others: 156 (2009) DLT 446 (DB), Kunal Singh v. Union of India and Another: 2003 (4) SCC 524 and GNCTD and Others v. All India Confederation of the Blind: 128 (2006) DLT 695 (DB).

12. In Bata India Limited (supra), a Division Bench of this court, had, in turn, referred to various decisions of the Supreme Court to arrive at the conclusion that a beneficial legislation is to be interpreted in favour of the beneficiaries when it is possible to take two views of a provision. The first decision referred to in Bata India Ltd (supra) was that of Bharat Singh v. Management of New Delhi Tuberculosis Centre, New Delhi and Others: 1986 (2) SCC 614, wherein the Supreme Court held as under:-

> "... Now, it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the Court to give such a construction to a statute as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of have-nots and the underdog and which would lead to injustice should always be avoided. ..."

13. Similarly, in S.M. Nilajkar & Others v. Telecom District Manager, Karnataka: 2003 (4) SCC 27, another decision referred to in Bata India Limited (supra), the Supreme Court observed as under:-

> "12 ...It is well settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two views of a provision..."

14. A word of caution, however, was sounded in Usha Breco Mazdoor Sangh v. Management of Usha Breco Limited and Another: 2008 (5) SCC 554, which has also been noted in Bata India Limited (supra). In Usha Breco (supra), the Supreme Court observed as under:-

> "26. It may not be a correct approach for a superior court to proceed on the premise that an Act is a beneficient legislation in favour of the management or the workmen. The provisions of the statute must be construed having regard to the tenor of the terms used by Parliament. The court must construe the statutory provision with a view to uphold the object and purport of Parliament. It is only in a case where there exists a grey area and the court feels difficulty in interpreting or in construing and applying the statute, the doctrine of beneficient construction can be taken recourse to. Even in cases where such a principle is resorted to, the same would not mean that the statute should be interpreted in a manner which would take it beyond the object and purport thereof."

15. In similar vein is the decision of the Supreme Court in Edukanti Kistamma (Dead) Through LRs & Others v. S. Venkatareddy (Dead) Through LRs & Others: 2010 (1) SCC 756.

16. In National Federation of Blind (supra), a Division Bench of this court held as under:-

> "16. The Disabilities Act was enacted for protection of the rights of the disabled in various spheres like education, training, employment and to remove any discrimination against them in the sharing of development benefits vis-a-vis non-disabled persons. In the light of the legislative aim it is necessary to give purposive interpretation to Section 33 with a view to achieve the legislative intendment of attaining equalization of opportunities for persons with disabilities. ..."

17. In Kunal Singh (supra), the Supreme Court held as under:-

> "9. ... In construing a provision of a 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."

18. In GNCTD v. All India Confederation of the Blind (supra), a Division Bench of this court observed, with reference to the said Act, that it was a welfare legislation and, therefore, if two views were possible, the interpretation which was in favour of the handicapped persons, ought to be adopted. From the above decisions, which have been relied upon by Mr Datar, it becomes clear that social welfare legislations ought to be given a beneficial and purposive construction which advances the object of the legislation. Of course, such an interpretation would only be possible where the provision is open to more than one meaning and is in keeping with the legislative intent.

19. It was also contended by Mr Datar that the said Act, which includes the said Section 36, is a piece of legislation which is aimed at the amelioration of persons with disabilities. The said Act does not contemplate or intend to create or grant any rights in favour of persons, other than those with disabilities. It was contended that Section 36 of the said Act restricts the natural tendency of an employer to de-reserve the seats reserved for different categories of disabled persons and by filling them up with persons who are not disabled. Section 36, according to Mr Datar, does not create any right in favour of the persons belonging to the General category, such as the

petitioners in these writ petitions. It was submitted by him that the action of the respondents in carrying forward the vacancies reserved for persons with disabilities was designed to give full effect to the mandate of the said Act as provided in Section 33 thereof so as to ensure 3% representation of persons with disabilities in the Delhi Judicial Service. The object being to provide equal opportunities of participation to the persons with disabilities in the Delhi Judicial Service. In this backdrop, it was submitted that the action of carrying forward the vacancies reserved for persons with disabilities, is not an arbitrary act, but is a conscious decision to further the objective of the said Act. At the same time, Mr Datar submitted that it is not the case of the respondent No.1 that vacancies reserved for persons with disabilities be carried forward for an indefinite period of time. He submitted that the decision would have to be taken at an appropriate point of time with regard to the carrying forward of such vacancies, but that decision would have to be taken prior to the notification of the vacancies and cannot be altered once the vacancies have been notified and the examination process is underway.

20. It was also submitted by Mr Datar that the use of the word "shall" in Section 36 of the said Act should be read as "may" keeping in view the context in which it is used as also the object of the legislation. As regards the O.M. dated 29.12.2005 issued by the DOPT, Government of India, Mr Datar submitted that the same was not applicable in the present case inasmuch as the respondent No.1 has not adopted the said O.M. However, he submits that if one were to go through the said O.M. dated 29.12.2005, it would be clear that the Government of India also has interpreted Section 36 in such a way that the word "shall" ought to be construed as "may" and is not mandatory.

21. Mr Datar referred, inter alia, to the following decisions in order to persuade us to read the word "shall" as "may":-

> 1) Sainik Motors, Jodhpur and Others v. State of Rajasthan: AIR 1961 SC 1480;
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> 2) Rubber House v. Excellsior Needle Industries Pvt. Ltd.: AIR 1989 SC 1160 (1);

22. In Sainik Motors (supra), the Supreme Court observed as under:-

> "12. It is, however, contended that though the section creates an option, the Rules and the notification make the payment compulsory, and attention is drawn to the word "shall" used both in Rules 8 and 8-A and the notification whereas the words in the two provisos to Section 4 are "may accept". The word 'shall' is ordinarily mandatory, but it is sometimes not so interpreted if the context or the intention otherwise demands. In In re Lord Thurlow Ex Parte Official Receiver [(1895) 1 QB 724] Lord Esher, M.R. observed at p. 729 that "the word

'shall' is not always obligatory. It may be directory", and Lopes, L.J. at p. 731 added:

"It is clear that the word 'shall' is not always used in a mandatory sense. There is abundance of authority to the contrary in cases where it has been held to be directory only."

It was thus that the word "shall" was held to be directory only, in that case, by Coutts Trotter, C.J., in Manikkam Pattar v. Nanchappa Chettiar, 1928 Mad WN 441, by Russel, J., in Rustom v. H. Kennedy, ILR 26 Bom 396; Rustom Jamshed Irani, In re, 3 Bom LR 653, by Venkatasubba Rao, J., in Jethaji Peraji Firm v. Krishnayya, ILR 52 Mad 648 at p. 656: (AIR 1930 Mad 278 at p. 280), and by the Judicial Committee in Burjore and Bhavani Pershad v. Mt. Bhagana, 11 Ind App 7 (PC)."

23. In Rubber House (supra), the Supreme Court held as follows:-

"31. The word "shall" in its ordinary import is obligatory. Nevertheless, the word "shall" need not be given that connotation in each and every case and the provisions can be interpreted as directory instead of mandatory depending upon the purpose which the legislature intended to achieve as disclosed by the object, design, purpose and scope of the statute. While interpreting the concerned provisions, regard must be had to the context, subject-matter and object of the statute in question."

24. We may also refer to another decision of the Supreme Court which has been noticed in Rubber House (supra). That decision is in the case of Raza Buland Sugar Co. Ltd v. Municipal Board, Rampur: AIR 1965 SC 895, wherein the Supreme Court observed as under:-

"27. ... The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it uses the word "shall" -- as in the present case --is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the

> provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

25. Apart from the above decisions, we may also notice one more decision of the Supreme Court in the case of Pesara Pushpamala Reddy v. G. Veera Swamy & Others: 2011 (4) SCC 306, wherein the Supreme Court has quoted from the Justice G.P. Singh's Principles of Statutory Interpretation, which explains that the use of the word "shall" raises a presumption that a particular provision is imperative, but the said presumption may be rebutted by other considerations such as the object and scope of the enactment and the consequences flowing from such a construction. The Supreme Court observations were as under:-

> "28. As has been explained by Justice G.P. Singh in Principles of Statutory Interpretation, 12th Edn., 2010 at pp. 406-07:
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> "The use of word 'shall' raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction."

26. It is, therefore, clear that the use of the word "shall" is by no means conclusive that the provision in which it is used is mandatory. It may even be directory and that would depend on the facts of each case. It would also depend on the object of the statute, the purpose for which the provision has been made, its nature and the intention of the legislature in making that provision. There are other factors, such as the inconvenience or injustice to persons which would result from reading the provision in one way or the other and the relationship of that particular provision with the other provisions dealing with a similar subject. All these considerations would be necessary for the purposes of examining whether the presumption that the word "shall" is imperative can be rebutted or not so as to read it as being merely directory or not.

27. It was also contended by Mr Datar that the petitions were not, in any event, maintainable and ought not to be allowed by this court since the petitioners, being well aware of the terms and conditions as set out in the notification dated 26.10.2009, whereby the vacancies and the process of examination was notified for the Delhi Judicial Service Examination 2010, participated in the process without protest or demur and have only challenged the same upon being declared unsuccessful. It would be relevant to point out that while the petitioners in WP(C) 997/2011 have approached this court only after the declaration of the final result, the petitioner (Deepti) in WP(C) 3251/2010 had approached this court earlier, but after the declaration of the result of the preliminary examination. As pointed out earlier, she had not made the cut-off. The cut-off was at 128 marks in the preliminary examination, whereas she had secured 127.5 marks and was 4 positions below the last person, who had qualified in the preliminary examination. From this, it is clear that all the petitioners have approached this court by way of these writ petitions after having

participated, at least in the preliminary examination without any protest or demur.

28. Mr Datar placed reliance on the Supreme Court decision in the case of Rakhi Ray and Others v. The High Court of Delhi and Others: 2010 (2) SCC 637 as also on a decision of the Full Bench of this court in Sanjeet Singh v. High Court of Delhi & Another, decided on 12.12.2011 in WP(C) 1435/2011.

29. In Rakhi Ray (supra), the Supreme Court, inter alia, held as under:-

> "9. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated from and such a deviation is permissible only after adopting policy decision based on some rationale", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, is not permissible in law. (Vide Union of India v. Ishwar Singh Khatri & Ors. (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Assn. v. State of Gujarat Ors. (1994) Supp 2 SCC 591; State of Bihar & Ors. v. The Secretariat Assistant Successful Examinees Union 1986 & Ors: AIR 1994 SC 736; Prem Singh & Ors. v. Haryana SEB & Ors.: (1996) 4 SCC 319; and Ashok Kumar & Ors. v. Chairman, Banking Service Recruitment Board & Ors: AIR 1996 SC 976."
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> xxxx xxxx xxxx xxxx xxxx "13. In Mukul Saikia v. State of Assam [(2009) 1 SCC 386 : (2009) 1 SCC (L&S) 186 : AIR 2009 SC 747] this Court dealt with a similar issue and held that "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised." The select list "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The "currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies" and said course is impermissible in law."
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> "14. In view of above, the law can be summarised to the effect that any appointment made beyond the number of vacancies advertised is without jurisdiction, being violative of Articles 14 and 16(1) of the Constitution of India, thus, a nullity, inexecutable and unenforceable in law. In case the vacancies notified stand filled up, the process of selection comes to an end. Waiting list, etc. cannot be used as a reservoir, to fill up the vacancy which comes into existence after the issuance of

> notification/advertisement. The unexhausted select list / waiting list becomes meaningless and cannot be pressed in service any more."
>
> 15. In the instant case, as 13 vacancies of the general category had been advertised and filled up, the selection process so far as the general category candidates is concerned, stood exhausted and the unexhausted select list is meant only to be consigned to record room."

30. In Sanjeet Singh (supra), a Full Bench of this court analysed the matter in a different way as would be clear from the following observations:-

> "13. A word needs to be spoken here by us on the subject of appointing candidates in excess of the vacancies notified. Where the process of selection envisages a screening test followed by a final test, all Service Rules provide that the final selection would be from amongst five times the number of vacancies to be filled up. For example, if 5 vacancies are filled up the short listing has to be of 25 candidates. These 25 candidates who take the final exam would then be evaluated and merit position settled as per marks obtained. The one who gets the highest marks would be at serial No.1 and the one next would be at serial No.2 and so on. If finally appointment is given to 8 candidates, this would violate the Service Rule which would require shortlisted candidates to be 40 in number (8 x 5 = 40) who would be eligible to take the final exam. Who knows, whether or not the next 15 candidates who found themselves at Sl.No.26 to Sl.No.40 of the shortlist may have got marks more than the candidates who were at merit position 6 to 8 as per the merit list prepared by subjecting only 25 shortlisted candidates to the final examination. This is the reason why it is impermissible to fill up posts in excess of the number notified. ..."

It may be pertinent to point out that the special leave petition against the said decision in Sanjeet Singh (supra) was dismissed by the Supreme Court by its order dated 10.02.2012 passed in SLP (C) No.3727/2012.

31. It is in this context that Mr Datar submitted that the filling up of vacancies over and above those advertised was not permissible. He also submitted that, in any event, even if this court were to hold that the respondent No.1 had calculated the vacancies incorrectly and / or wrongly carried forward the backlog vacancies, the said vacancies would not automatically be de-reserved and thus go in favour of the General category.

32. Finally, it was submitted by Mr Datar that the petitioners, merely because their names appear in the list in order of merit, do not acquire any indefeasible right of appointment.

33. In rejoinder, Ms Nitya Ramakrishnan submitted that there is an urgency to appoint judicial officers and that filling up of judicial posts is an imperative which has been recognized through decades and, therefore, merely because the respondent No.1 did not force to fill up the carry forward vacancies, is not an answer to the imperative requirements of Section 36 of the said Act. She also

submitted that the decisions in Rakhi Ray (supra) and Sanjeet Singh (supra) are not applicable to the facts of the present petitions, inasmuch as both Rakhi Ray (supra) and Sanjeet Singh (supra) refer to situations where a past list is sought to be adjusted against the future vacancies which were not in existence at the time of the advertisement. She submitted that here the question is with regard to a wrongful classification within the notified / advertised vacancies and the failure to fill them up, which is an altogether different matter. Therefore, according to her, the said decisions would not come in the way of the petitioners. This is so because the present case relates only to vacancies existing and advertised from the start and not to vacancies arising or declared later on. She also submitted that Section 36 of the said Act, as also the said O.M. dated 29.12.2005, contemplate the possibility from the start that the carry over physically handicapped vacancies shall be filled up by General category candidates if no suitable disabled candidate is found. Therefore, according to her, there is no element of surprise or unfairness in that process and on the contrary, where there is wrongful apportionment of the quota within the notified vacancies, a direction can certainly be given to appoint those who have wrongly been left out from the reckoning.

34. Having considered the arguments of the counsel for the parties at length, we feel that the provisions of the said Act and, particularly Sections 33 and 36 thereof have to be read together. Section 33 makes it mandatory for the appropriate Government to appoint in every establishment, such percentage of vacancies, not less than 3%, for persons or class of persons with disability of which 1% each is to 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 each disability. From this, it is clear that a minimum percentage of vacancies has to be set apart for persons with disabilities. That minimum is 3% of the vacancies and the said 3% being distributed as 1% each for each of the three categories mentioned above. It is abundantly clear that this reservation is only a floor. It provides the minimum and not the upper limit. While it is the intent and purport of the legislature that there could be more than 3% of the vacancies reserved for persons with disability, a minimum of 3% has been made by virtue of Section 33 of the said Act. This makes it clear that if there were reservation of the posts in excess of 3%, the same could not ipso facto be the subject matter of challenge. On the contrary, if the reservation was less than 3%, it could be challenged as being violative of Section 33 of the said Act. The intent and purport behind the said provision is to bring the persons with disabilities into mainstream activities and to enable them to contribute to society in general. The persons with disabilities are not to be discarded from the society at large. They are useful and productive members of society despite their disabilities and the purpose behind the Act is to give them an equal opportunity to contribute to society so that they are fully able to participate in national life. It is clear that the Act is meant for the benefit of the disabled. Chapter VI of the Act specifically deals with the employment and Sections 33 and 36 fall within that Chapter.

35. With this understanding of the provisions of Section 33 of the said Act, the intendment behind Section 36 can be easily discerned. Section 36, on a plain reading, may suggest that the word "shall", when it is used in the expression-"employer shall fill up the vacancy by appointment of a person, other than a person with disability"-is mandatory and is in imperative terms. But, as we have seen from the various decisions which we have referred to above, wherever the word "shall" is used in a provision, it does not necessarily mean that it is mandatory. It may even mean that it is directory. That has to be determined by looking at the context and by looking at the purpose behind the

legislation as also the provisions and the intention of the legislature. When we read Section 36, keeping in mind the salutary provisions of Section 33, it would become clear that there is a possibility to read the said provision as, if, even in the second year, the carried forward vacancies are not filled up by persons with disability or even by interchange amongst the three categories of disabilities, then, it would be open to the employer to fill up the vacancies by appointment of persons other than persons with disability. It does not mean that the employer has to fill up the vacancy by appointment of a person other than a person with disability. We agree with the learned counsel for the respondent No.1 that the said Act has been enacted for the benefit of the persons with disabilities and not to prescribe rights of the persons without disabilities. Section 36 does not grant any right in favour of a person who does not have a disability.

36. There is another way to look at the provisions of Sections 33 and 36. Under Section 33, the prescription is for reserving not less than 3% of the vacancies for persons with disabilities. This means that more than 3% of the vacancies can be reserved for persons with disabilities in any particular recruitment year without bothering about the carry forward rule prescribed in Section 36. Even if the respondent No.1 were to reserve the 5 seats, which it did, by simply stating that it was in accord with Section 33 of the said Act, being roughly 8.33% of the 60 vacancies, it would not be in violation of Section 33 of the said Act. When such reservation could not be challenged directly, how can it be challenged indirectly through the route of Section 36, which only prescribes a mode of how to deal with the unfilled vacancies ? It only enables the employer to fill up a carry forward vacancy, if no suitable person with disability is available in the succeeding year, by appointing a person other than a person with disability. It does not create any right in favour of a person who does not have a disability.

37. We shall also examine the question from the angle as suggested in Sanjeet Singh (supra). The syllabus for the competitive examination for recruitment to the Delhi Judicial Service is provided in the appendix to the Delhi Judicial Service Rules, 1970. Rule 15 of the said Rules stipulates that the syllabus for the examination and fee payable shall be as detailed in the Appendix to the said Rules. As per the syllabus contained in the said Appendix, the Delhi Judicial Service Examination is to be held in two successive stages: (i) The Delhi Judicial Service Preliminary Examination (Objective type with 25% negative marking) for selection for the main examination) and (ii) Delhi Judicial Service Main Examination (Written) for selection of candidates for calling for viva-voce. The syllabus further stipulates as under:-

"xxxx xxxx xxxx xxxx xxxx The Preliminary Examination will be a screening test and will consist of one paper of multiple objective type questions carrying maximum of 200 marks. In the preliminary examination questions on general knowledge and aptitude of the candidate, candidate's power of expression, flair in English, knowledge of objective type legal problems and their solutions covering Constitution of India, Code of Civil Procedure, Code of Criminal Procedure, Indian Penal Code, Contract Act, Partnership Act, Principles governing Arbitration Law, Evidence Act, Specific Relief Act and Limitation Act will be included.

Minimum qualifying marks in the preliminary examination shall be 60% for general and 55% for reserved categories i.e. Scheduled Castes, Scheduled Tribes and Physically Handicapped (Blind /

Low Vision) (mobility not to be restricted) / Orthopaedically. However, the number of candidates to be admitted to the main examination (written) will not be more than ten times the total number of vacancies of each category advertised.

The marks obtained in the preliminary examination by the candidates who are declared qualified for admission to the Main Examination (Written) will not be counted for determining their final order or merit.

xxxx xxxx xxxx xxxx xxxx"
(Underlining added)

38. From the above, it is clear that the number of candidates to be admitted to the Main Examination (Written) cannot be more than 10 times the total number of vacancies of "each category advertised". Insofar as the present case is concerned, the position of vacancies advertised was as under:-

Category	No. of posts	Remarks
Physically Handicapped (Blind / Low Vision)	05	01 vacancy carried forward and advertised for the fifth time 01 vacancy carried forward and advertised for the third time. 02 vacancy carried forward and advertised for the second time. 01 vacancy being advertised for the first time.

39. Ten times the number of General candidates were to be called for the Main Examination and that prescribed the cut-off marks. It is also clear that if the last point of cut-off included several persons, then all of them would have to be called for the Main Examination and it is only in that way that the number of persons called for the Main Examination could exceed 10 times the number of vacancies. In the present case, the number of persons which ought to have been called for interview using the multiplier of 10 based on the number of vacancies advertised would be as under:-

Category	Number of posts	Multiplied by 10	Actual Number of candidates called for the Main Examination

PH	5	50	Gen-6, SC-3

40. The number of persons called for the Main Examination belonging to the General Category was 274 which was 4 in excess of the permissible 270 (using the multiplier of 10). This was because several persons had obtained the same last cut-off mark. As regards the SC and ST candidates, the numbers called for the main examination were far below the numbers that could have been called using the multiplier of 10 because there were not enough candidates in those categories. The same is the position with the category of physically handicapped candidates. The present petitioners all belong to the General category. All the petitioners, except Deepti had made the cut-off and were included in the said figure of 274 persons. Insofar as Deepti is concerned, she was placed at Rank No.278 and had not made the cut-off, but by virtue of an interim order of this court, she was permitted to take the main examination.

41. If the contentions of the petitioners are to be accepted, it would lead to grave injustice. This is so because they want a diversion of four vacancies reserved for the physically handicapped candidates to the General category which would mean that the vacancies for the General candidates would increase from 27 to 31. This, in turn, would entail that the cut-off marks would have been lower inasmuch as 31 x 10 = 310 candidates belonging to the General category would have had to be called for the Main Examination. By not doing so at the initial stage, 36 candidates in the list (excluding Deepti) would have had an opportunity to participate in the Main Examination, but have been denied that chance. It is quite possible that those 36 candidates could well have appeared in the Main (Written) Examination and the viva-voce and might even have been selected. A case in point is that of Deepti herself who did not make the initial cut-off and was ranked 4th after the cut-off, but she participated, with the aid of an interim order of this court, in the Main (Written) Examination and did reasonably well so as to be ranked 32nd in the final order of merit, just 5 positions away from the last successful candidate. Therefore, following the Full Bench decision in Sanjeet Singh (supra), we cannot permit the diversion of vacancies reserved for the physically handicapped candidates to the General category as that would amount to grave injustice to the persons who could have been in the reckoning as a larger number of persons would have been entitled to be called for the Main (Written) Examination.

42. Furthermore, the petitioners cannot be permitted to challenge the very advertisement / notification specifying the number of vacancies in each category under which they had participated without any demur. They have only challenged the said notification / advertisement after they were

found to be unsuccessful. The petitioners in WP(C) 997/2011 were unsuccessful after the interview stage and they have filed the writ petition only thereafter. On the other hand, the petitioner (Deepti) in WP(C) 3251/2010 did not make the cut-off after the Preliminary Examination and she filed the writ petition at that stage. All the petitioners have, therefore, approached this court only after participating in the examination process at one stage or the other. They, therefore, cannot, for this reason also, challenge the same.

43. The learned counsel for the petitioner had sought to bring about a distinction between the decisions of Rakhi Ray (supra) and Sanjeet Singh (supra) and the present case. She had contended that while those decisions referred to a situation where the appointments were sought to be beyond the advertised vacancies, the present case relates only to the vacancies existing and advertised from the start and not to vacancies arising or declared later on. We do not agree with this submission. This is so because what had been advertised were 27 General category vacancies. The suggestion of the petitioners is that 4 positions, which were hitherto reserved for the Physically Handicapped category, ought to be diverted to the General category. This would essentially mean that the number of positions for the General category would be 31 as against the advertised 27 vacancies. This by itself would mean that the appointments to such 31 positions, if made, would be beyond the advertised vacancies.

44. As regards the point that there was a wrongful apportionment of the quota within the notified vacancies, we are of the view that if this was the case, the petitioners ought to have challenged the notification / advertisement at the outset. They did not do so. They participated in the process and only on being unsuccessful, at different stages, they have filed these petitions.

45. For all these reasons, the petitions have no merit. They are dismissed. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J V.K. JAIN, J February 22, 2013 dutt