

Delhi High Court

Nishant. S. Diwan vs High Court Of Delhi Through ... on 25 March, 2014

Author: S.Ravindra Bhat

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 21.03.2014

Pronounced on: 25.03.2014

+ W.P.(C) 983/2014, C.M. NOS.1973/2014 & 1974/2014
NISHANT. S. DIWANPetitioner
Through: Sh. Jinendra Jain, Sh. Ajay Jain, Sh. B.N.
Gaur, Sh. R.P. Kaushal and Sh. Arun Jain,
Advocates.
Versus
HIGH COURT OF DELHI THROUGH REGISTRAR GENERAL AND
ANR.Respondents

Through: Sh. Rajiv Bansal and Sh. Anchit Sharma, Advocates, for Resp. No.1.

Ms. Sonal. K. Singh and Sh. Anurag Gohil, Advocates, for Resp. No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE R.V. EASWAR MR.
JUSTICE S. RAVINDRA BHAT %

1. In these proceedings under Article 226 of the Constitution, a direction is sought to the Delhi High Court Establishment, through its Registrar General (hereafter called "the High Court Establishment") to reserve 3% of the vacancies for the disabled persons, in the Delhi Higher Judicial Service (DHJS) Examination-2013 and consequently reserve 3% of the posts of the total cadre strength of that Service (hereafter referred to as "DHJS") and consider his case as well in the category of "disabled persons". Consequently, direction to the High Court Establishment to grant extra 30 minutes to the petitioner for W.P.(C) 983/2014 Page 1 attempting the DHJS Examination, in respect of the direct- recruitment quota is also sought.

2. The petitioner has been practicing as an advocate since 1998; he claims to be disabled in terms of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereafter referred to as the "Disabilities Act"). He suffers from what is termed as "FOLLOW UP CASE OF HYDROCEPHALUS WITH STUNT SURGERY WITH MYOSITIS OSSIFICANS HIP WITH ANKYLOSED HIP". This condition, the petitioner says, is described as "locomotor disability" under the Disabilities Act which entitles him to benefits under that law, especially Section 33. The petitioner contends that in terms of an old 1977 Central Government notification, reservations to the extent of 3% for persons with disabilities was provided for in Group-C and Group-D posts and in Central Public Service Undertakings. There was a continuous demand to extend that benefit to Group-A and Group-B posts eventually leading to litigation under Article 32 of the Constitution which culminated in the decision reported as National Federation of Blind v. Union Public Service Commission and Others AIR 1993 SC 1916. The Supreme Court, in its judgement, directed the

Central Government to consider the feasibility of extending the reservations to Group-A and Group-B posts. The petitioner relies upon Section 33 of the Disabilities Act to urge that with its enactment, every appropriate government is obliged to appoint in every establishment not less than 3% of the W.P.(C) 983/2014 Page 2 vacancies, of the posts from amongst persons or class of persons with disabilities such as blindness or blurred vision, hearing impairment or locomotor disabilities or cerebral palsy.

3. The petitioner then refers to various developments, including the judgment of a Single Judge in Ravi Kumar Arora v. Union of India (UOI) and Anr. reported as (111) 2004 DLT 126 which was eventually affirmed by the Supreme Court. The petitioner also refers to another Division Bench ruling in All India Confederation of the Blind v. Union of India (Ministry of Railways) (W.P.(C) 23132/2005) where a direction to the Central Government to fill-up backlog of reserved posts of disabled category of candidates, on the basis of total cadre strength and not on the basis of vacancies, was given. It is submitted that with the recent judgment of the Supreme Court, reported as Union of India (UOI) and Anr. v. National Federation of the Blind and Ors. 2013 (10) SCC 772, a wide nature of the rights, enuring to all citizens with disabilities and the corresponding obligation to fill-up at least 3% of the vacancies in respect of each service and post has been mandated.

4. The petitioner complains that the advertisement dated 30.12.2013 issued by the High Court Establishment, calling for applications and advertising 14 vacancies (4 set apart for SC/ST candidates and 10 for general candidates) is contrary to the express provisions of the Disabilities Act and the guidelines issued in that W.P.(C) 983/2014 Page 3 regard. Emphasizing Section 33, the petitioner argues that since he suffers from locomotor disability, the High Court Establishment was under a duty to set-apart the appropriate number of posts having regard to the total cadre strength of 224 posts in DHJS. It is argued that the omission to make appropriate reservation in the proposed or on-going recruitment process in fact amounts to discrimination because persons with disabilities can compete for almost similar, if not entirely identical posts, of Civil Judges and Magistrates, through a Central Government circular of 18-01-2007.

5. It is also urged that the Central Government itself has determined that the ITAT members would be subjected to the 3% reservation under the Disabilities Act in the same 18.01.2007 circular. These two categories, i.e. Civil Judges/Magistrates as well as the members of ITAT perform similar functions which are of judicial nature. In the circumstances, to exclude DHJS from the benefit of reservation is both arbitrary and discriminatory. Besides, the circular of 18.01.2007 relied upon by the High Court Establishment, there is no rationale to support this differential treatment nor does the tenor of the decision of the Court taken at that time, show that any differentiation or unequal treatment was intended.

6. The relevant provisions of the Disabilities Act are as follows:

"2(a) Appropriate Government" means,-

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(i) in relation to the Central Government or any establishment/wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924, the Central Government ;

(ii) in relation to a State Government or any establishment wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government;

(iii) in respect of the Central Co-ordination Committee and the Central Executive Committee, the Central Government;

(iv) in respect of the State Co-ordination Committee and the State Executive Committee, the State Government;

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2(i) "Disability" means -

- i. blindness;
- ii. low vision;
- iii. leprosy-cured;
- iv. hearing impairment;
- v. loco motor disability;
- vi. mental retardation;
- vii. mental illness;

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2(j) "employer" means, -

- i. In relation to a Government, the authority notified by the Head of the Department in this behalf or where no such authority is notified, the Head of the Department; and
- ii. in relation to an establishment, the Chief Executive Officer of that establishment;

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2(k) "establishment" means a corporation

established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government;

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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.

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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-

- i. blindness or low vision;
- ii. hearing impairment;
- iii. locomotor disability or cerebral palsy, in the posts identified for each disability:

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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.

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36. Vacancies not filled up to be carried forward - Where 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 vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

7. The High Court Establishment, in its reply and the arguments advanced on its behalf in Court does not deny the essential facts, such as publication of the advertisement calling for applications

from amongst the eligible candidates to fill-up the 14 vacancies or that 10 of them have been set apart for general candidates and 4 for SC/ST candidates. Learned counsel for the High Court Establishment W.P.(C) 983/2014 Page 7 however, argues that in terms of the Ministry of Social Justice and Empowerment notification dated 18.01.2007, only Civil Judges and Magistrates of the Delhi Judicial Service (DJS), covered by the Delhi Judicial Service Rules and comprising of the cadre of Civil Judges/Magistrates have been identified as posts who are subject to the coverage of the Disabilities Act. Pointed reference is made to Sr. No. 466 of the Central Government, Ministry of Social Justice and Empowerment description in this regard which is as follows:

SI No.	Designation	Physical Requirements	Categories of Disabled suitable for the jobs	Nature of preferred work	Working conditions/re marks
466	Judges/Magistrates Subordinate in Lower Judiciaries	S.SCT.C.R.W	OA.OL.BL.B.B V	Deal with Civil and Criminal cases by adopting established procedure both under Civil and Criminal Codes. Records evidence and pass necessary orders/judgments	The work is mostly performed inside. The work place is well lighted. The worker usually works alone.

8. Counsel for the respondent also refers to a previous Division Bench decision of this Court dated 23.08.2006 in W.P.(C) 9840/2006 where the following order was made:

"the Government of India, Ministry of Social Justice and Empowerment has issued a corrigendum vide Notification dated 25th July, 2006 notifying that in the Gazette of India (Extraordinary) Part I, Section 1, serial number 178 dated the 30th June, 2001 containing the Ministry of Social Justice and Empowerment notification number 16-25/99-I dated W.P.(C) 983/2014 Page 8 the 31st May, 2001, in the List of Jobs Identified for being held by persons with Orthopedic Disabilities or C.P. in Group A, relating to categories of Disabled suitable for jobs, for the letters and words "B.LV (mobility not to be restricted)", the letters "OA, OL, BL" shall be substituted. In view of this corrigendum, the persons with orthopaedic disability or C.P. having one arm (OA), one leg (OL), both legs (BL) affected as well as blind persons and persons with low vision (mobility not to be restricted) have been recommended for appointment as Judges/Magistrates in subordinate Judiciary. It is pertinent to state that this is a recommendation of the Expert Committee constituted to identify/review the posts persons with disabilities - in the Ministries/Departments, Public Sector Undertakings. The Government of NCT of Delhi shall forward the recommendations

of the Expert Committee as they stand amended by the corrigendum dated 25th July, 2006 to the Delhi High Court.

As and when such a communication is sent by the Government of NCT of Delhi to the Delhi High Court, the same would be processed by the Delhi High Court in accordance with law."

9. The respondent further states that consequential action pursuant to the above directions was taken pursuant to the recommendation of a five-Judge Committee made on 09.03.2007 in respect of the DJS, comprising of Civil Judges and Magistrates. The minutes of meeting recommended that:

".....3% of the vacancies shall be reserved for persons with disabilities as required under Section 33 of "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995". The Committee was of W.P.(C) 983/2014 Page 9 the view that since the obligation to reserve 3% vacancies arises from the provisions of Section 33 of the Act aforementioned, there is no provision in the Rules themselves. The reservation and appointment shall be regulated by the statutory notification, if any, issued by the Government of India. The Committee has in this regard taken note of Notification No.16-25/99-NI-I dated 31.05.2001 as amended vide Corrigendum No.39- 14/2006/DD-III dated 25.07.2006 issued by the Ministry of Social Justice and Empowerment, Government of India, New Delhi, identifying the posts of "Judges/Magistrates Subordinate in Lower Judiciaries" as the jobs identified for being held by persons with specified disabilities viz. Blind- Low Vision (mobility not to be restricted) OA - one Arm Affected (right or left) OL - one leg affected (right or left), BL (both legs affected but not arms).

The advertisement notice to be issued for future DJS Examinations shall accordingly make a suitable provision and invite applications from all such person as are eligible for appointment against such vacancies."

10. It is argued that in the absence of a specific determination under Section 32, the petitioner cannot claim a right to be considered as a disabled candidate nor seek that reservation should be given in the cadre of DHJS. Counsel for the respondent also urges that since the advertisement was issued, any interdiction by this Court at this stage, given the fact that the examination is scheduled for 06.04.2014, would upset the entire timeline and delay the recruitment process. It is argued that whilst there can be no quarrel to the applicability of the Disabilities Act, yet as to what category of posts requires to be covered by the enactment is a matter of W.P.(C) 983/2014 Page 10 discretion best left to the High Court by virtue of Section 32. In the present case, the exercise having been concluded on 09.03.2007 and since in that decision, the reservations in the cadre of DHJS were not recommended, it would be unfeasible to reserve any post for persons with disabilities as that would involve a great deal of administrative inconvenience.

11. The latest decision of the Supreme Court in National Federation of the Blind (supra) considered the obligations of employers, particularly those in the Central Government, State and the public

sector to comply with the provisions of the Disabilities Act. The Court traced the history of the enactment as well as the instructions issued from time to time by the Central Government to consolidate and update the instructions. These were the Office Memorandum dated 29.12.2005, 10.12.2008 etc. which were analysed. The Court rejected the submission on behalf of the Union of India (UOI) that the obligation to reserve the posts would arise only after their identification. It was held that, "to accept such a submission would amount to accepting the situation where the provisions of Section 33 of the aforesaid Act would be kept deferred indefinitely by bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected." The Court then held that logically in terms of Section 32, posts had to be identified for reservation for purposes of Section 33 but the exercise had to be undertaken simultaneously with the coming into force of W.P.(C) 983/2014 Page 11 the Act, to give meaning and effect to Section 33. The Court pertinently noticed its previous decision in Govt. of India through Secretary and Anr. v. Ravi Prakash Gupta and Anr. 2010 (7) SCC 626 that, "16. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in every establishment (emphasis added)."

12. The Court in National Federation of the Blind (supra) then went on to endorse the view that the extent of dependence - of reservation, upon the identification exercise would be for "making appointments and not for the purpose of making reservations". The judgment went on to hold as follows:

"30. Apart from the reasoning of this Court in Ravi Prakash Gupta (supra), even a reading of Section 33, at the outset, establishes vividly the intention of the legislature viz., reservation of 3% for differently abled persons should have to be computed on the basis of total vacancies in the strength of a cadre and not just on the basis of the vacancies available in the identified posts. There is no ambiguity in the language of Section 33 and from the W.P.(C) 983/2014 Page 12 construction of the said statutory provision only one meaning is possible.

31. A perusal of Section 33 of the Act reveals that this section has been divided into three parts. The first part is "every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability." It is evident from this part that it mandates every appropriate Government shall appoint a minimum of 3% vacancies in its establishments for persons with disabilities. In this light, the contention of the Union of India that reservation in terms of Section 33 has to be computed against identified posts only is not tenable by any method of interpretation of this part of the Section.

32. The second part of this section starts as follows:

"...of which one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment & locomotor disability or cerebral palsy in the posts identified for each disability." From the above, it is clear that it deals with distribution of 3% posts in every establishment among 3 categories of disabilities. It starts from the word "of which". The word "of which" has to relate to appointing not less than 3% vacancies in an establishment and, in any way, it does not refer to the identified posts. In fact, the contention of the Union of India is sought to be justified by bringing the last portion of the second part of the section viz. "...identified posts" in this very first part which deals with the statutory obligation imposed upon the appropriate Government to "appoint not less than 3% vacancies for the persons or class of persons with disabilities." In our considered view, it is not plausible in the light of established rules of interpretation. The minimum level of representation of persons with disabilities has been provided in this very first part and the second part W.P.(C) 983/2014 Page 13 deals with the distribution of this 3% among the three categories of disabilities. Further, in the last portion of the second part the words used are "in the identified posts for each disability" and not "of identified posts". This can only mean that out of minimum 3% of vacancies of posts in the establishments 1% each has to be given to each of the 3 categories of disability viz., blind and low vision, hearing impaired and locomotor disabled or cerebral palsy separately and the number of appointments equivalent to the 1% for each disability out of total 3% has to be made against the vacancies in the identified posts. The attempt to read identified posts in the first part itself and also to read the same to have any relation with the computation of reservation is completely misconceived.

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36. Admittedly, the Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfill its objective. Besides, it is a settled rule of interpretation that if the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision. In the present case, the plain and unambiguous meaning of Section 33 is that every appropriate Government has to appoint a minimum of 3% vacancies in an establishment out of which 1% each shall be reserved for persons suffering from blindness and low vision, persons suffering from hearing impairment and persons suffering from locomotor or cerebral palsy.

37. To illustrate, if there are 100 vacancies of 100 posts in an establishment, the concerned establishment will have to reserve a minimum of 3% for persons with disabilities out of which at least 1% has to be reserved separately for each of the following disabilities: persons suffering from blindness or low vision, persons suffering from hearing W.P.(C) 983/2014 Page 14 impairment and the persons suffering from locomotor disability or cerebral palsy. Appointment of 1 blind person against 1 vacancy reserved for him/her will be made against a vacancy in an identified post for instance, the post of peon, which is identified for him in group D. Similarly, one hearing impaired will be appointed against one reserved vacancy for that category in the post of store attendant in group D post. Likewise, one person suffering from locomotor disability or cerebral palsy will be appointed against the post of "Farash" group D post identified for that category of disability. It was argued on behalf of Union of India with reference to the post of driver that since the said post is not suitable to be manned by a person suffering from blindness, the above interpretation of the Section

would be against the administrative exigencies. Such an argument is wholly misconceived. A given post may not be identified as suitable for one category of disability, the same could be identified as suitable for another category or categories of disability entitled to the benefit of reservation. In fact, the second part of the Section has clarified this situation by providing that the number of vacancies equivalent to 1% for each of the aforementioned three categories will be filled up by the respective category by using vacancies in identified posts for each of them for the purposes of appointment.

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

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13. With the enactment of the Disabilities Act, every establishment was placed under an obligation to effectuate its provisions, including its mandate to reserve and fill at least 3% of the vacancies which arose. This obligation is, given the nature of the mandate under Section 33, non-derogable by its character. The decision in Ravi Prakash Gupta, (supra) held this to be so, in as many terms:

"15..... neither Section 32 nor Section 33 of the aforesaid Act makes any distinction with regard to Groups A, B, C and D posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section 33 does empower the appropriate Government to exempt any establishment from the provisions of the said section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to our notice on behalf of the petitioners.

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

17. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the W.P.(C) 983/2014 Page 16 Act, as submitted by the learned ASG, but the extent of such dependence would

be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise."

14. The enunciation of law by the Supreme Court is categorical about the imperative nature of the Disabilities Act's provisions vis-À - vis reservation of posts in various establishments. This Court therefore, is bound to decide the issue before it within the framework of the declaration of law in Ravi Prakash Gupta, (supra) and National Federation of the Blind (supra) both pronouncements of three judge Benches of the Supreme Court.

15. Precedential compulsion apart, there is another circumstance which the Court has to consider. The respondents main argument- supplementary to the lack of identification of the post of District Judge, is that the matter was put to the Committee of Judges which took note of the 18-01-2007 circular of the Central Government and W.P.(C) 983/2014 Page 17 decided that reservations in the DJS (as opposed to the DHJS) cadre and posts were to be ensured. A careful look at that document, i.e the minutes of meeting of 09-03-2007 shows that the Committee considered the proposal in the background of whether to provide for reservations in DJS. This is evident from the following observations in its minutes:

"The reservation and appointment shall be regulated by the statutory notification, if any, issued by the Government of India. The Committee has in this regard taken note of Notification No.16-25/99-NI-I dated 31.05.2001 as amended vide Corrigendum No.39-14/2006/DD-III dated 25.07.2006 issued by the Ministry of Social Justice and Empowerment, Government of India, New Delhi, identifying the posts of "Judges/Magistrates Subordinate in Lower Judiciaries" as the jobs identified for being held by persons with specified disabilities..."

However, the Committee did not positively rule-out reservations in DHJS. The operative direction was premised on the need to take a decision on the recruitment for DJS vacancies.

16. The second reason why this Court feels compelled to reject the respondent's argument is that as between DJS officers (who are Judges) and DHJS officers (who are also Judges certainly not less so) there is and can be no difference for the purposes of reservation under the Disabilities Act. The mere use of the word ("Magistrates") in Sl. No 466 in the circular of the Central Government was not meant to limit the benefit of reservation under the Act to only the Civil Judges/ W.P.(C) 983/2014 Page 18 Magistrates cadre or posts. Both categories of holders of posts' workload is fairly described as "Deal with Civil and Criminal cases by adopting established procedure both under Civil and

Criminal Codes. Records evidence and pass necessary orders/judgments." Likewise, the notification (of the Central Government) goes on to mention in the last column, i.e "working conditions/remarks" that work is performed inside and the working conditions are well lighted. These descriptions apply equally to those in the Delhi Higher Judicial Service, who also exercise appellate jurisdiction over the decisions of DJS officers. Furthermore, the circular of the Central Government also describes Income Tax Appellate Tribunal members' posts as those which are subject to reservations under the Disabilities Act. The decision of the Committee (of this Court) dated 09-03-2007 surely was not intended to result in such discrimination.

17. The Supreme Court had perspicuously held that the doctrine of classification, which can be legitimately used to examine complaints of discrimination and violation of Article 14, itself cannot produce inequality, through under-classification or undue emphasis as the basis of drawing distinction when none exist. This aspect was emphasized in Roop Chand Adlakha and Ors. v. Delhi Development Authority and Ors., AIR 1989 SC 307:

"7.....The process of classification is in itself productive of inequality and in that sense antithetical of equality. The process would be constitutionally valid if it recognises a pre-existing inequality and acts in aid of amelioration of the effects of W.P.(C) 983/2014 Page 19 such pre-existent inequality..... The process cannot merely blow-up or magnify in-substantial or microscopic differences on merely meretricious or plausible. The over-emphasis on the doctrine of classification or any anxious and sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the article of its precious content and end in re-placing doctrine of equality by the doctrine of the classification....."

In The State of Gujarat & Anr v Shri Ambica Mills Ltd., Ahmedabad & Anr. [(1974) 4 SCC 656], again, the Supreme Court dwelt on the same aspect, in the following words:

"54. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase "similarly situated" mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under- inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-

inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of W.P.(C) 983/2014 Page 20 classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification."

In one of the earlier cases, the Court had emphasized that when some distinction is sought to be the basis of differentiation for the purpose of classification, under Article 14, "the classification, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis.." (Ref. *Dhirendra Kumar Mandal v The Superintendent and Remembrancer of Legal Affairs to the Govt. of West Bengal and Anr.* AIR 1954 SC 424).

18. In the present case, there is no material to suggest that DHJS officers perform duties and functions which are radically different from those in DJS. Indeed, their positions answer to the description of "Judges" of "Subordinate courts" (the latter being the expression used by the Constitution itself). Other posts whose holders discharge judicial functions such as members of ITAT too have been accorded the benefit of disability reservations under the Act.

19. In these circumstances, this Court holds that the non-inclusion of DHJS cadre posts for the purposes of reservation under the Disabilities Act, cannot be upheld; it amounts to discrimination.

20. Now, as to the question of relief. During the hearing, the Petitioner had contended that in terms of the existing guidelines he W.P.(C) 983/2014 Page 21 should be given relaxation in the time to be taken for writing the examination by way of extension of half an hour. As far as age relaxation is concerned, the advertisement does not specify any maximum age limit. That question does not accordingly arise.

21. The decision in *National Federation of the Blind* (supra) states that reservation under the Disabilities Act is to be vacancy-based - on a textual reading of Section 33. If one were to literally apply that authority to the facts of this case, it would not be possible to earmark any post under the 3% quota since the total number of advertised posts is only 14. Keeping in mind the circumstance that for the period 2007 onwards when the disabilities reservation was introduced in Judicial Services in Delhi for the first time, and also taking notice of the fact that this Court is called upon to decide the issue in the context of the direct recruitment quota for the DHJS which is 25% of the entire cadre strength of 224 posts or such other number as is determined, having regard to the increased number of posts, the most feasible approach under the circumstances would be to determine the total number of posts that are to be filled in this quota before actually taking steps to fill them. This Court is also mindful of the circumstance that the advertisement in this case was issued on 30.12.2013. The petitioner approached this Court on 03.02.2014. One of the alternatives that this Court could adopt would be to direct the consideration of the petitioner's case, based upon his claim as a disabled candidate and, therefore, entitled to be considered as against the 3% quota. Although this course is attractive, at the same time, the Court cannot be W.P.(C) 983/2014 Page 22

oblivious of the circumstance that other eligible and possibly equal, if not more meritorious candidates, are unaware of their right to be considered against this quota. Directing the petitioner's case alone to be processed on the basis of the documents and materials presented by him to back-up the claim of disability would in such a case result in keeping out those candidates. In these circumstances, this Court is of the opinion that the most appropriate method of proceeding with this exercise is to direct the respondents to earmark one of the advertised posts for disabled candidates in terms of the 3% quota under the Disabilities Act and not fill it up in the present recruitment process. Once the recruitment process is completed and the appointments are made, depending upon the further number of vacancies which may exist at the stage of declaration of results, the respondents should carry-out a review of the balance number of vacancies that can be appropriately earmarked for those with disabilities, club them with the post directed to be kept apart and proceed with the next recruitment process, clearly indicating the total number of vacancies earmarked under the 3% quota. In the event the respondents are not in a position to advertise all the vacancies, it shall endeavour to at least carry-out a special recruitment procedure in respect of only the earmarked vacancies falling to the share of those entitled to be considered under the 3% quota under the Disabilities Act, within one year of the date of declaration of results in the current recruitment process. A direction is accordingly issued to the respondents to carry-out the exercise and complete the special recruitment drive after following the steps indicated above.

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22. The Writ Petition is entitled to succeed to the above extent indicated above. It is accordingly allowed along with pending applications with no order as to costs.

Order dasti.

S. RAVINDRA BHAT (JUDGE) R.V. EASWAR (JUDGE) MARCH 25, 2014 W.P.(C) 983/2014 Page 24