

Reserve Bank of India & Ors. Vs. A. K. Nair & Ors.

Civil Appeal No(S). 529 of 2023
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Full judgment text

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In view of the conclusions recorded by Hon'ble Mr. Justice Dipankar Datta (concurred to by Hon'ble Mr. Justice S.R. Bhat) the appeal is disposed of in terms of the following directions:

"We direct RBI to grant notional promotion to Mr. Nair on the post of Assistant Manager Grade - 'A', to be effective from the date of presentation of the writ petition before the High Court, i.e., 27th September, 2006 and actual promotion from 15th September, 2014, i.e., the last date for compliance of the order of the High Court.

This exercise must be completed within a period of 2 (two) months from date. The monetary benefits accruing to Mr. Nair with effect from 15th September, 2014 shall be computed and released by 4 (four) months from date.

Since Mr. Nair has a couple of years for his retirement on superannuation, it is needless to observe that in computing his retiral benefits due regard shall be given to his promotion, as directed above, with effect from 27th September, 2006. The appeals stand disposed of on the above terms. Parties shall bear their own costs."

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S. Ravindra Bhat, J.

1. I have had the benefit of reading the detailed and elaborate reasoning of my learned brother judge, Dipankar Datta, J. While I concur with the conclusions and relief granted to the appellant, I wish to record a few observations, by way of abundant caution, on the larger question of reservations in promotions for any class of citizens other than those covered by Article 16(4- A) of the Constitution.

I. HISTORY OF RESERVATIONS IN PROMOTIONS

2. The question of reservations in promotions has a chequered history. In General Manager, S. Rly. v. Rangachari¹, a constitution bench in a 3:2 decision held that reservations in promotions were permissible. They were not merely restricted to initial appointments, but also selected posts subsequently.² This was a decision rendered during the era when this court's understanding of Articles 15(4) and 16(4) was that such provisions were exceptions to the rule under Articles 15(1) and 16(1). However, this interpretation underwent a change³, as elucidated in State of Kerala v N.M. Thomas⁴, wherein K.K. Mathew, J. opined:

"If equality of opportunity guaranteed under Article 16 (1) means effective material equality, then Article 16 (4) is not an exception to Article 16 (1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even up to the point of making reservation".⁵ In Indra Sawhney v Union of India⁶, a nine-judge constitution bench, equipped with this interpretation, revisited the question of reservations in promotions. Question No. 7 was unambiguously cast:

"Whether Article 16 permits reservations being provided in the matter of promotions?" Eight out of nine justices considered the issue, and held that the view expressed in Rangachari (supra) was erroneous, and that reservations in promotions were impermissible under Article 16.

3. The observations made by different judges in their opinions are extracted below:

a. Per Kania, Venkatachalaiah and BP Jeevan Reddy, JJ:

"828. We see no justification to multiply 'the risk', which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career.

That would mean creation of a permanent separate category apart from the mainstream - a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured.

This in turn is bound to generate a feeling of despondence and 'heart-burning' among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-frogging and the deleterious effects of "leap-frogging" need no illustration at our hands.

At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their "birthmark", as one of the learned Judges of this Court has said in another connection.

They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III.

Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation.

831. We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion without compromising the efficiency of the administration.

The relaxation concerned in Thomas [(1976) 2 SCC 310, 380 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in Karamchari Sangh [(1981) 1 SCC 246, 289 : 1981 SCC (L&S) 50 : (1981) 2 SCR 185, 234] are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration.

We reiterate that while it may be permissible to prescribe a reasonably lesser qualifying marks or evaluation for the OBCs, SCs and STs - consistent with the efficiency of administration and the nature of duties attaching to the office concerned - in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove."

b. Pandian, J:

"240. In Mohan Kumar Singhania v. Union of India [1992 Supp (1) SCC 594 : 1992 SCC (L&S) 455 : (1992) 19 ATC 881] a three-Judge Bench of this Court to which I was a party has taken a view that once candidates even from reserved communities are allocated and appointed to a Service based on their ranks and performance and brought under the one and same stream of category, then they too have to be treated on par with all other selected candidates and there cannot be any question of preferential treatment at that stage on the ground that they belong to reserved community though they may be entitled for all other statutory benefits such as the relaxation of age, the reservation etc. Reservation referred to in that context is referable to the reservation at the initial stage or the entry point as could be gathered from that judgment."

c. Thommen, J:

"307. The initial appointments may be made at various levels or grades of the hierarchy in the service. There is no warrant in Article 16(4) to conclude from the expression 'reservation of appointments or posts' that reservation extends not merely to the initial appointment, but to every stage of promotion. Once appointed in a service, any further discrimination in matters relating to conditions of service, such as salary, increments, promotions, retirement benefits, etc. is constitutionally impermissible, it being the very negation of equality, fairness and justice.

309. In whichever post that a member of a backward class is appointed, reservation provisions are attracted at the stage of his initial appointment and not subsequently. Further promotions must be governed by common rules applicable to all employees of the respective grades.

Reasoning to the contrary in decisions, such as General Manager, S. Rly. v. Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] ; State of Punjab v. Hiralal [(1970) 3 SCC 567 : (1971) 3 SCR 267] ; Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India [(1981) 1 SCC 246, 289 : 1981 SCC (L&S) 50 : (1981) 2 SCR 185, 234] is not warranted by the language of the Constitution."

d. Kuldeep Singh, J

"376. The reservation permissible under Article 16(4) can only be "in favour of any backward class of citizens" and not for individuals. Article 16(1) guarantees a right to an individual citizen whereas Article 16(4) permits protective discrimination in favour of a class. It is, therefore, mandatory that the opportunity to compete for the reserve posts has to be given to a class and not to the individuals. When direct recruitment to a service is made the 'backward class' as a whole is given an opportunity to be considered for the reserve posts.

Every member of the said class has a right to compete. But that is not true of the process of promotion. The backward class as a collectivity is nowhere in the picture; only the individuals, who have already entered the service against reserve posts, are considered. In the higher echelons of State services - cadre strength being small - there may be very few or even a single 'backward class' candidate to be considered for promotion to the reserve post.

An individual citizen's right guaranteed under Article 16(1) can only be curtailed by providing reservations for a 'backward class' and not for backward individuals. The promotional posts are not offered to the backward class. Only the individuals are benefited. The object, context and the plain language of Article 16(4) make it clear that the job reservation can be done only in the direct recruitment and not when the higher posts are filled by way of promotion."

e. PB Sawant, J

"540. However, if it becomes necessary to answer the question, it will have to be held that the reservations both under Articles 16(1) and 16(4) should be confined only to initial appointments. Except in the decision in Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] there was no other occasion for this Court to deliberate upon this question. In that decision, the Constitution Bench by a majority of three took the view that the reservations under Article 16(4) would also extend to the promotions on the ground that Articles 16(1) and 16(2) are intended to give effect to Articles 14 and 15(1).

Hence Article 16(1) should be construed in a broad and general, and not pedantic and technical way. So construed, "matters relating to employment" cannot mean merely matters prior to the act of appointment nor can 'appointment to any office' mean merely the initial appointment but must also include all matters relating to the employment, that are either incidental to such employment or form part of its terms and conditions, and also include promotion to a selection post.

The Court further observed that: (SCR headnote p. 587) "Although Article 16(4), which in substance is an exception to Articles 16(1) and 16(2) and should, therefore, be strictly construed, the court cannot in construing it overlook the extreme solicitude shown by the Constitution for the advancement of socially and educationally backward classes of citizens.

The scope of Article 16(4), though not as extensive as that of Article 16(1) and (2), - and some of the matters relating to employment such as salary, increment, gratuity, pension and the age of superannuation, must fall outside its non-obstante clause, there can be no doubt that it must include appointments and posts in the services. To put a narrower construction on the word 'posts' would be to defeat the object and the underlying policy. Article 16(4), therefore, authorises the State to provide for the

reservation of appointments as well as selection posts."

543. It has been pointed out earlier that the reservations of the backward classes under Article 16(4) have to be made consistently with the maintenance of the efficiency of administration. It is foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors.

When reservations are kept in promotion, the inevitable consequence is the phenomenon of juniors, however low in the seniority list, stealing a march over their seniors to the promotional post. When further reservations are kept at every promotional level, the juniors not only steal march over their seniors in the same grade but also over their superiors at more than one higher level.

This has been witnessed and is being witnessed frequently wherever reservations are kept in promotions. It is naive to expect that in such circumstances those who are superseded, (and they are many) can work with equanimity and with the same devotion to and interest in work as they did before. Men are not saints.

The inevitable result, in all fields of administration, of this phenomenon is the natural resentment, heartburning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration. When, further, the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined. This has admittedly a deleterious effect on the entire administration.

544. It is not only the efficiency of those who are thus superseded which deteriorates on account of such promotions, but those superseding have also no incentive to put in their best in work. Since they know that in any case they would be promoted in their reserved quota, they have no motivation to work hard. Being assured of the promotion from the beginning, their attitude towards their duties and their colleagues and superiors is also coloured by this complex. On that account also the efficiency of administration is jeopardised.

545. With respect, neither the majority nor the minority in the Constitution Bench has noticed this aspect of the reservations in promotions. The later decisions which followed Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] were also not called upon to and hence have not considered this vital aspect. The efficiency to which the majority has referred is with respect to the qualifications of those who would be promoted in the reserved quota."

f. Sahai, J

"622. But, inadequacy of representation is creative of jurisdiction only. It is not measure of backwardness. That is why less rigorous test or lesser marks and competition amongst the class of unequals at the point of entry has been approved both by this Court and American courts. But a student admitted to a medical or engineering college is further not granted relaxation in passing the examinations.

In fact this has been explained as a valid basis in American decisions furnishing justification for racial admissions on lower percentage. Rationale appears to be that everyone irrespective of the source of entry being subjected to same test neither efficiency is effected nor the equality is disturbed. After entry in service the class is one, that of employees. If the social scar of backwardness is carried even thereafter, the entire object of equalisation stands frustrated. No further classification amongst employees would be justified as is not done amongst students.

623. Constitutional, legal or moral basis for protective discrimination is redressing identifiable backward class for historical injustice. That is they are today, what they would not have been but for the victimisation. Remedying this and to balance the unfair advantage gained by others is the constitutional responsibility. But once the advantaged and disadvantaged, the so-called forward and backward, enter into the same stream then the past injustice stands removed.

And the length of service, the seniority in cadre of one group, to be specific the forward group, is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimisation.

624. Equality either as propagated by theorists or as applied by courts seeks to remove inequality by "parity of treatment under parity of condition" [(1976) 2 SCC 310, 380 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] . But once in "order to treat some persons equally, we must treat them differently" [57 L Ed 2d 750 :

438 US 265 (1978)] has been done and advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.

625. Constitutional sanction is to reserve for backward class of persons. That is class or group interest has been preferred over individual. But promotion from a class or group of employees is not promoting a group or class but an individual. It is one against other. No forward class versus backward class or majority against minority. It would, thus, be contrary to the Constitution. Brother Kuldip Singh, for good and sound reasons has rightly opined, that, Rangachari [(1962) 2 SCR 586 : AIR 1962 SC 36] cannot be held to be laying down good law."

627. Is it possible to reserve under Article 16(1)? Detailed reasons have been given earlier, against any reservation under cover of doctrine of reasonable classification. Eradication of poverty which "is not to be exalted or praised, but is an evil thing which must be fought and stamped out" [Jawaharlal Nehru, quoted from Dorothy, Norman (Ed.) Nehru] is one of the ideals set out in the Preamble of the Constitution as it postulates to achieve economic justice and exhorts the State under Article 38(2) to "minimise the inequality of income".

All the same, can the State for this purpose reserve posts for the economically backwards in service. Right to equal protection of laws or equality before law in 'benefits, and burdens' by operation of law, equally amongst equals and unequally amongst unequals is firmly rooted in the concept of equality developed by courts in this country and in America. But any reservation or affirmative action on economic criteria or wealth discrimination cannot be upheld under doctrine of reasonable classification.

Reservation for backward class seeks to achieve the social purpose of sharing in services which had been monopolised by few of the forward classes. To bridge the gap, thus created, the affirmative actions have been upheld as the social and educational difference between the two classes furnished reasonable basis for classification. Same cannot be said for rich and poor. Indigence cannot be a rational basis for classification for public employment."

4. It is thus discernible that in *Indra Sawhney* (supra), this court ruled that reservations under Article 16 for backward classes of citizens were limited only to initial appointments, and did not extend to promotions. The rationale for such a conclusion was that reservations in promotions would have a deleterious effect on the efficiency of services: firstly, they would stifle the spirit to work amongst the reserved candidates, and would amount to creation of a permanent separate category. Secondly, such reservations would generate a feeling of despondence and heartburn among general category candidates. Thirdly, reservations in promotions would violate the rule of equality.

5. To negate the declaration of the court in *Indra Sawhney* (supra), Parliament introduced an amendment to Article 16 of the Constitution, by inserting clause (4-A) by the 77th Constitutional Amendment Act of 1995. Clause (4-A) reads as follows:

"Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

Additionally, the Statement of Objects and Reasons for the 77th Constitutional Amendment Act, 1995, reads as follows:

"The Scheduled Castes and the Scheduled Tribes have been enjoying the facility of reservation in promotion since 1955. The Supreme Court in its judgment dated 16th November, 1992 in the case of *Indra Sawhney v. Union of India*, however, observed that reservation of appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion.

This ruling of the Supreme Court will adversely affect the interests of the Scheduled Castes and the Scheduled Tribes. Since their representation in services in the States have not reached the required level, it is necessary to continue the existing dispensation of providing reservation in promotion in the case of the Scheduled Castes and the Scheduled Tribes.

In view of the commitment of the Government to protect the interests of the Scheduled Castes and the Scheduled Tribes, the government has decided to continue the existing policy of reservation in promotion for the Scheduled Castes and the Scheduled Tribes. To carry out this it is necessary to amend Article 16 of the Constitution by inserting a new clause (4-A) in the said article to provide for reservation in promotion for the Scheduled Castes and the Scheduled Tribes."

Thus, reservations in promotions were extended to members of the Scheduled Castes and Scheduled Tribes alone.

II. HISTORY OF RESERVATIONS FOR PERSONS WITH DISABILITIES

6. In *Union of India v. National Federation of the Blind*⁷, this court had reiterated the distinction between 'vertical' reservations for backward classes of citizens as delineated in *Indra Sawhney* (supra) and 'horizontal' reservations for persons with disabilities under Section 338 of the erstwhile Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("1995 Act"), as follows:

"42. A perusal of *Indra Sawhney* [1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385 : AIR 1993 SC 477] would reveal that the ceiling of 50% reservation applies only to reservation in favour of Other Backward Classes under Article 16(4) of the Constitution of India whereas the reservation in favour of persons with disabilities is horizontal, which is under Article 16(1) of the Constitution.

In fact, this Court in the said pronouncement has used the example of 3% reservation in favour of persons with disabilities while dealing with the rule of 50% ceiling. Para 812 of the judgment clearly brings out that after selection and appointment of candidates under reservation for persons with disabilities they will be placed in the respective rosters of reserved category or open category respectively on the basis of the category to which they belong and, thus, the reservation for persons with disabilities per se has nothing to do with the ceiling of 50%. Para 812 is reproduced as follows : (SCC pp. 735-36)

"812. all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations-what is called interlocking reservations.

To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains-and should remain-the same."

This judgment did not discuss reservations in 'promotions', but confined its pronouncement to initial appointments only.

7. *Rajeev Kumar Gupta v. Union of India*⁹ authoritatively dealt with the question of reservations in promotions for persons with disabilities. The two judge bench decision, authored by Chelameshwar, J., differentiated the application of *Indra Sawhney* (supra) as follows:

"21. The principle laid down in *Indra Sawhney* [*Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] is applicable only when the State seeks to give preferential treatment in the matter of employment under the State to certain classes of citizens identified to be a backward class. Article 16(4) does not disable the State from providing differential treatment (reservations) to other classes of citizens under Article 16(1) [As per *Indra Sawhney* case, 1992 Supp (3) SCC 217, Article 16(4) is a subset of Article 16(1).] if they otherwise deserve such treatment.

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

Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] has clearly and normatively no application to PWD.

24. A combined reading of Sections 32 and 33 of the 1995 Act explicates a fine and designed balance between requirements of administration and the imperative to provide greater opportunities to PWD. Therefore, as detailed in the first part of our analysis, the identification exercise under Section 32 is crucial.

Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once found to be so capable, reservation under Section 33 to an extent of not less than three per cent must follow. Once the post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up of the said post."

8. A reference was then made to a larger bench to resolve the issue with respect to interpretation of reservations in promotions as settled by Indra Sawhney (supra) and Rajeev Kumar Gupta (supra). Thus, in Siddharaju v. State of Karnataka¹⁰, a three-judge bench decision rendered by Nariman, J. held:

"12. After hearing the learned counsel appearing on behalf of all the parties including the learned Additional Solicitor General, we are of the view that the judgment of this Court cannot be faulted when it stated that Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 215 : 1992 SCC (L&S) Supp 482] dealt with a different problem and, therefore, cannot be followed."

9. Thereafter, in State of Kerala v. Leesamma Joseph¹¹, a two-judge bench judgment authored by Kaul, J. held in unequivocal terms that reservations in promotions could not be denied to persons with disabilities:

"18. On examination of the aforesaid plea we find that there is merit in what the learned Amicus Curiae contends and we are of the view that really this issue is no more res integra in view of the judgments of this Court in Union of India v. Ravi Prakash Gupta [Union of India v. Ravi Prakash Gupta, (2010) 7 SCC 626 : (2010) 2 SCC (L&S) 448] and Union of India v. National Federation of the Blind [Union of India v. National Federation of the Blind, (2013) 10 SCC 772 : (2014) 2 SCC (L&S) 257] opining that reservation has to be computed with reference to the total number of vacancies in the cadre strength and no distinction can be made between the posts to be filled by direct recruitment and by promotion.

Thus, total number of vacancies in the cadre strength would include the vacancies to be filled in by nomination as well as by promotion. In fact, this was the view adopted by the Bombay High Court discussed aforesaid in National Confederation for Development of Disabled v. Union of India [National Confederation for Development of Disabled v. Union of India, 2015 SCC OnLine Bom 5112] with the challenge raised to the same in a SLP being rejected in Union of India v. National Confederation for Development of Disabled [Union of India v. National Confederation for Development of Disabled, (2015) 13 SCC 643 : (2016) 1 SCC (L&S) 276] .

We may note the observations in Rajeev Kumar Gupta v. Union of India [Rajeev Kumar Gupta v. Union of India, (2016) 13 SCC 153 : (2017) 2 SCC (L&S) 605] in para 24 to the effect : (Rajeev Kumar Gupta case [Rajeev Kumar Gupta v. Union of India, (2016) 13 SCC 153 : (2017) 2 SCC (L&S) 605] , SCC p. 162)

"24. Once the post is identified, it must be reserved for PwD irrespective of the mode of recruitment adopted by the State for filling up of the said post." (emphasis supplied) and a direction was issued to the Government to extend 3% reservation to PwD in all identified posts in Group A and Group B "irrespective of the mode of filling up of such posts".

II. Whether reservation under Section 33 of the 1995 Act is dependent upon identification of posts as stipulated by Section 32?

21. On a plea of the learned Amicus Curiae, which we unhesitatingly accept, there can be little doubt that it was never the intention of the legislature that the provisions of Section 32 would be used as a tool to frustrate the benefits of reservation under Section 33. In fact, identification of posts for purposes of reservation had to take place immediately after the 1995 Act. A resistance to such reservation is obvious from the delaying tactics adopted by most of the Government authorities in truly implementing the intent.

It thus shows that sometimes it is easier to bring a legislation into force but far more difficult to change the social mindset which would endeavour to find ways and means to defeat the intent of the Act enacted and Section 32 was a classic example of the same. In Union of India v. Ravi Prakash Gupta [Union of India v. Ravi Prakash Gupta, (2010) 7 SCC 626 : (2010) 2 SCC (L&S) 448] also, this Court mandated the identification of posts for purposes of reservation.

Thus, what is required is identification of posts in every establishment until exempted under proviso to Section 33. No doubt the identification of the posts was a prerequisite to appointment, but then the appointment cannot be frustrated by refusing to comply with the prerequisite. This view was affirmed by a larger Bench of three Judges in *Union of India v. National Federation of the Blind* [Union of India v. National Federation of the Blind, (2013) 10 SCC 772 : (2014) 2 SCC (L&S) 257]."

III. ANALYSIS

10. At the outset, it is imperative to observe that the 1995 Act did not contain a provision for reservations in 'promotions' for persons with disabilities appointees, unlike its successor enactment, the Rights of Persons with Disabilities Act, 2016 ("2016 Act"),¹² which enabled the State to do the same. Section 33 of the 1995 Act only provided for 3% reservation for posts identified under Section 32, with 1% each for persons suffering from (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy.

There is no mention of this extending to promotions. In the absence of such statutory power, its inclusion in the extant provisions by this court is not beyond doubt. It cannot be said that the manner in which such reservations have been granted in promotions - even if horizontally - as a matter of right, is not contrary to the express prohibition of the same by the nine judges in *Indra Sawhney* (supra). I therefore hold serious reservation in its interpretation otherwise.

11. While *Indra Sawhney* (supra) no doubt pertained to vertical reservations for backward classes of citizens, this understanding of horizontal reservations infact seeded from this very judgment.¹³ It cannot be said that its operative portion on reservations in promotions is inapplicable to other classes of citizens on that front alone. Such an exercise of distinguishing its application misses the crux of its reasoning - that while provision of reservations in initial appointments furthers the mandate of substantive equality, its application to promotions militates against the same mandate.

It was not the intention of Article 16 of the Constitution to compromise on administrative inefficiency by culling the spirit of competition-after all, positions gained by promotions taper higher up. To ear-mark a certain portion to one class of citizens, and not others, who may have also gained initial appointments on the strength of such horizontality (such as women, retired / ex-servicemen, etc.) is not constitutionally protected - the only exception to reservations in promotions is SC / ST appointees, as provided under Article 16(4A).

12. Additionally, horizontal reservations, unlike their vertical counterparts, are not rigid, but have a fluidity to them, as observed in this court's pronouncement in *Saurav Yadav v. State of Uttar Pradesh*.¹⁴ A candidate eligible for horizontal reservation is not confined to their vertical category.

Migrations are permissible to allow the best candidates to emerge from this interlocking framework of reservations. However, such a mechanism is unworkable in promotions, where vertical and horizontal qualifiers are absent (barring those for SC/ST candidates). The (then) 3% reservation set aside for persons with disabilities candidates no longer remains horizontal, but is implemented vertically. While the 2016 Act enables the State to work out this mechanism, such is conspicuously absent in the 1995 Act.

13. This also leads to differential treatment of candidates belonging to the same backward class as recognized by Article 16(4) of the Constitution. An OBC candidate who is also a person with disabilities, will be given preference over a non-persons with disabilities OBC candidate in promotions, which is impermissible.

Additionally, on a reading of *T. Devadasan* and *N.M. Thomas* (supra), it is relevant to note that while reservations for backward classes are to be carried forward, the 2016 Act permits carrying forward of horizontal reservations for persons with disabilities candidates for a maximum period of two years. However, the amendment to the Constitution recognizes that 'carry forward' vacancies can exceed the 50% limit in promotional vacancies. This amendment [inserting Article 16(4-B)] was upheld by this court in *M. Nagaraj v Union of India*.¹⁵

14. The laudable intent behind a provision such as Section 33 of the 1995 Act, and Section 34 of the 2016 Act, is undeniable. That persons with disabilities need to be accommodated, in public service, is a given. At the same time, this reasonable accommodation ought not to open gates for demands by those benefitting other kinds of horizontal reservation, for reservation in promotional vacancies in public services.

As stated at the outset, I concur with the relief proposed to the appellant, and accordingly agree with the directions contained in Datta, J.'s judgment.

1 General Manager, S. Rly. v. Rangachari, (1962) 2 SCR 586.

2 Id., para 27.

3 The dissenting opinion of Subba Rao, J. in T. Devadasan v. Union of India, (1964) 4 SCR 680 was affirmed in State of Kerala v N.M. Thomas, (1976) 2 SCC 310.

4 State of Kerala v N.M. Thomas, (1976) 2 SCC 310.

5 Ibid., para 78.

6 Indra Sawhney v Union of India, 1992 Supp (3) SCC 217.

7 Union of India v. National Federation of the Blind, (2013) 10 SCC 772. See also generally - the relationship between Section 32 and 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, elucidated in Govt. of India v. Ravi Prakash Gupta, (2010) 7 SCC 626.

8 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:

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.

9 Rajeev Kumar Gupta v. Union of India, (2016) 13 SCC 153

10 Siddaraju v. State of Karnataka, (2020) 19 SCC 572.

11 State of Kerala v. Leesamma Joseph, (2021) 9 SCC 208.

12 "34. Reservation. - [***] Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time".

13 See, para 812 of Indra Sawhney (supra).

14 Saurav Yadav v State of Uttar Pradesh, (2021) 4 SCC 542.

15 M. Nagaraj v Union of India, (2006) 8 SCC 212.

Reserve Bank of India & Ors. Vs. A.K. Nair & Ors.

[Civil Appeal No. 529/2023]

Union of India & Ors. Vs. A.K. Nair & Ors.

[Civil Appeal No. 530/2023]

Dipankar Datta, J.

The Challenge:

1. Reserve Bank of India (hereafter 'RBI', for short) and the Union of India (hereafter 'Govt' for short) are in appeal, by special leave, mounting challenge to the judgment and order dated 16th June, 2014 passed by the High Court of Judicature at Bombay on Writ Petition No.2753 of 2006 presented before it by the common first respondent (hereafter 'Mr. Nair', for short).

Facts:

2. The facts leading to these appeals reflect the grim struggle of Mr. Nair, a person having 'Post-Polio Paralysis of Limbs' with 50% disability to secure promotion to the post of Assistant Manager in the RBI by

claiming benefit envisaged by the Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995 (hereafter 'the PwD Act, 1995') as well as various office memoranda issued from time to time by the Department of Personnel and Training (hereafter 'DoPT', for short) of the Ministry of Personnel, Public Grievances and Pensions, GoI, and circulars issued by the RBI.

3. Mr. Nair, joined the services of the RBI, on 27th September, 1990 as Coin/Note Examiner, Grade-II/Clerk on a vacancy reserved for a person with disability. In due course of time, Mr. Nair participated in the All India Merit Test for the Panel Year 2003, conducted sometime between 26th April and 3rd July, 2004 by the RBI, for securing his promotion to a Class-I post.

The standards fixed for qualifying in the examination were the same for general candidates as well as persons with disabilities. Apart from fulfilling other conditions, Mr. Nair was required to obtain 95 (ninety-five) marks to qualify for promotion. Results were declared on 19th October, 2004. Having obtained 92 (ninety-two) marks, he fell short of the qualifying marks by only 3 (three) marks.

Notwithstanding fulfillment of other eligibility criteria for promotion, Mr. Nair was not considered for promotion owing to such shortfall. Since circulars issued by the GoI contemplated condonation of short fall to the extent of 5 (five) marks for SC/ST candidates, Mr. Nair submitted a representation dated 18th December, 2004 seeking grant of benefit of relaxation as available to him "on par with SC/ST category candidates" and also requested to include his name in the panel of selected candidates. By a reply dated 25th May, 2005, the RBI informed Mr. Nair that there is no provision for extending grace marks to persons with disabilities in promotional examinations.

Immediately on the next day, Mr. Nair submitted a further representation and while inviting attention to circular dated 5th July, 2000 (extending reservation to physically handicapped persons in promotions up to S.O. Grade 'A' in the general side where not much of moving from the seat is involved) and the Master Circular dated 19th October, 2004 (hereafter 'Master Circular', for short) on the subject of 'Reservation in Recruitment and Promotions in Bank' for persons with disabilities, both issued by the RBI, sought remedial action. This was followed by a spate of representations which, however, proved abortive.

4. The pursuit to have the shortfall in marks condoned not having been favourably considered by the RBI, thereby resulting in his nonpromotion to the post of Assistant Manager Grade - I, drove Mr. Nair to knock the doors of the High Court by instituting a writ petition seeking, inter alia, the following relief: -

"a) This Hon'ble Court be pleased to call for the records of the case and after perusing the same be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ order or direction, directing Respondents to provide relaxation of conditions and/or providing grace marks to the candidate with disabilities for the purpose of placing the disabled candidates in the zone of consideration in All India Merit Test for the Panel Year 2003 in the Respondents' establishment and further be pleased to direct the Respondents to place the Petitioner in the panel of selected candidates for promotion in All India Merit Test for the Panel Year 2003 conducted by the Respondents in the year 2004 and be pleased to direct the Respondents to consider the candidature of the Petitioner for promotion to Grade A in the Physically Handicapped Employees category.

b) The Respondents be ordered to implement the 3% Reservation in promotion for the persons with disability in toto to all the posts identified by the Respondents under Circular Nos.49 and 18 dated 05.07.2000 and 19.10.2004 respectively."

5. The writ petition was contested by the RBI by filing a counter affidavit dated 8th February, 2008. Referring to Office Memorandum (hereafter 'OM', for short) dated 29th December, 2005 on the subject of "Reservation for the Persons with Disabilities" which consolidated all existing instructions in line with the PwD Act, 1995 and clarified certain issues including procedural matters, it was contended that for persons with disabilities 3 (three) per cent of vacancies in case of direct recruitment to Groups 'A', 'B', 'C' and 'D' have to be reserved; and (three) per cent of the vacancies in case of promotions, only to identified Groups 'C' and 'D' posts in which the element of direct recruitment, if any, does not exceed 75 (seventy-five) per cent, have to be reserved.

Further, it was contended by referring to a clarification provided by the GoI, contained in OM dated 25th October, 2002, that "(T)here is no reservation for the persons with disabilities when promotions are made to Group 'A' and Group 'B' posts". Insofar as circular dated 5th July, 2000 of the RBI is concerned, it was pleaded that instructions contained therein were withheld and not given effect. Finally, reference was made

to paragraph 22 of the OM dated 29th December, 2005 providing as follows:

"If sufficient number of persons with disabilities are not available on the basis of the general standard to fill all the vacancies reserved for them, candidates belonging to this category may be selected on relaxed standard to fill up the remaining vacancies reserved for them provided they are not found unfit for such post or posts. Thus, to the extent the number of vacancies reserved for persons with disabilities cannot be filled on the basis of general standards, candidates belonging to this category may be taken by relaxing the standards to make up the deficiency in the reserved quota subject to the fitness of these candidates for appointment to the post/posts in question."

6. The Division Bench of the High Court was referred to its coordinate Bench decision in *National Confederation for Development of Disabled & Anr. vs. Union of India & Ors.*¹, where the prayer was for issuing a mandamus to the respondents to appoint disabled persons in terms of section 33 of the PwD Act, 1995 in Indian Administrative Service posts by promotion from the State Civil Services or by selection from persons who hold gazetted posts in connection with the affairs of the State but are not members of the State Civil services, as per their entitlements, retrospectively from 1996 and to comply with the said provisions hereafter.

The decision in *Govt. of India & Anr. vs. Ravi Prakash Gupta & Anr.*² was also referred, where this Court dealt with the question of reservation in the matter of appointment to All India Service and while confirming the decision under challenge held that reservation was applicable to posts in Groups 'A', 'B', 'C' and 'D'.

Attention of the Division Bench was also invited to the decision in *Union of India vs. National Federation of the Blind*³, where this Court was of the view that "the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner, viz. computing 3% reservation on total number of vacancies in the cadre strength, which is the intention of the legislature". The Division Bench read the decision as laying down the law that reservation has to be computed with reference to total number of vacancies in the cadre strength and, therefore, no distinction can be made between the posts to be filled in by direct recruitment and by promotion.

It was, accordingly, held that the "total number of vacancies in the cadre strength would include the vacancies to be filled in by nomination and vacancies to be filled in by promotion". Certain directions were issued by this Court in paragraph 55, which led to issuance of a further OM dated 3rd December, 2013 by the DoPT modifying paragraph 6 of OM dated 29th December, 2005.

7. On consideration of the said decision and the modification so made by the OM dated 3rd December, 2013, the High Court in *National Confederation for Development of Disabled* (supra) was of the view that the respondents would have to give benefits of reservation to persons with disabilities in the matter of promotion to posts in the Indian Administrative Service by applying OM dated 29th December, 2005 and the subsequent office memorandum consistent with the aforesaid decision of this Court, with effect from the date of issuance of OM dated 29th December, 2005.

8. Significantly, the decision in *National Confederation for Development of Disabled* (supra) was the subject matter of challenge at the instance of the GoI in a special leave petition, which was dismissed on 12th September, 2014. A review petition was thereafter filed by the GoI, which was also dismissed by an order dated 5th December, 2014, on merits. Another special leave petition that was carried by the GoI to this Court from the order dismissing the review petition stood dismissed on 27th February, 2015. Thus, insofar as the GoI is concerned, the judgment and order dated 4th December, 2013 in *National Confederation for Development of Disabled* (supra) attained finality.

9. Upon consideration of the pleadings of the parties, the PwD Act, 1995, OM dated 29th December, 2005 and OM dated 3rd December, 2013 issued by the DoPT as well as the decisions that were referred to it, the High Court in the impugned judgment and order held as follows: -

"9. In view of the above discussion, we have no hesitation in holding that modification made by para 5 of the OM dated 3 December 2013 to para 14 of the OM dated 29 December 2005 will apply with effect from 29 December 2005 and therefore the respondent-Reserve Bank of India shall apply reservation for persons with disabilities on the basis of total number of vacancies appearing in direct recruitment quota as well as in promotion quota in Group 'A' and Group 'B' posts respectively with effect from 29 December 2005.

10. If on the basis of above direction, any vacancy is required to be filled in the cadre of Asst. Manager and/or other equivalent posts in Group 'A' or Group 'B' on or after 29 December 2005, the Reserve Bank of

India shall apply reservation policy with effect from 29 December 2005 and if as a consequence therefore the petitioner's case is required to be considered for such promotion, respondents-Reserve Bank of India shall consider the petitioner's case for promotion.

11. It is clarified that this direction is only in the context of controversy about applicability of reservation policy to promotion and if there are other requirements under the relevant rules, this Court may not be treated to have expressed any opinion on the question of the petitioner satisfying such requirements.

12. The direction given herein above shall be carried out within a period of three months from today."

10. It appears that while allowing the writ petition of Mr. Nair, the Division Bench of the High Court followed the earlier view expressed by its coordinate Bench.

11. Mr. Nair had applied for a review⁴ of the judgment and order dated 16th June, 2014 on the ground that the High Court had erred in not clarifying the position on grace marks and in not addressing his claim of qualification/seniority from the date of eligibility. When the same was taken up for consideration on 31st October, 2014, the High Court was informed of issuance of notice by this Court on the petition for special leave to appeal filed by the RBI. In view thereof, without examining the merits of the review petition, the same was disposed of by the High Court with liberty to Mr. Nair to seek revival after disposal of the proceedings before this Court.

Broad Overview of The Law:

12. Much water has flown under the bridge since the impugned judgment dated 16th June, 2014 was rendered by the High Court. On the legislative front, the Parliament enacted the Rights of Persons with Disabilities Act, 2016 (hereinafter referred to as 'the PwD Act, 2016') repealing the PwD Act, 1995. On the judicial side, pronouncements in *Rajiv Kumar Gupta and Ors. vs. Union of India and Ors.*⁵, *Siddharaju vs. State of Karnataka and ors.*⁶, and *State of Kerala and Ors. vs. Leesamma Joseph*⁷ have seen the light of the day.

The executive, in its turn, has complied with the directions contained in an order dated 28th September, 2021 of this Court⁸ arising out of *Siddharaju (supra)* resulting in issuance of OM dated 17th May, 2022 by the DoPT. These are undoubtedly developments subsequent to the impugned judgment; but since they could have a bearing on the merits of Mr. Nair's claim that he has unjustly been deprived of promotion to the post of Assistant Manager, the same cannot be kept out of our consideration.

Indeed, after OM dated 17th May, 2022 was issued, the RBI has also issued a circular dated December 8, 2022 conveying its decision to reserve 16 (sixteen) vacancies for persons with disabilities out of 600 (six hundred) vacancies on the post of Assistant Manager Grade - 'A', to be filled up by a departmental examination scheduled on 10th December, 2022.

13. The law relating to grant of equal opportunities, protection of rights, and full participation of persons with disabilities was codified by the PwD Act, 1995. Chapter VI of the PwD Act, 1995, titled 'EMPLOYMENT', containing sections 32 to 41, inter alia, mandated identification of posts which could be reserved for persons with disabilities for appointment, the extent of reservation and the procedure to be followed in the matter of recruitment.

Significantly, Chapter VI did not contain any express provision mandating an 'employer' or an 'establishment' as defined in clauses (j) and (k) of section 2, respectively, to reserve any percentage of posts for promotion to persons with disabilities serving in the feeder cadre. However, Chapter VIII titled 'NON-DISCRIMINATION' in sub-section (2) of section 47 ordained that no promotion shall be denied to a person merely on the ground of his disability.

Sections 44 to 47, under Chapter VIII, envisaged that persons with disabilities should not face any discrimination in any of the fields specified therein, with section 47 particularly dealing with non-discrimination in Government employment. It is true that sub-section (2) of section 47 does not contain any mandate requiring the employer or establishment to make reservation in promotional posts; on the contrary, it is a command to the employer or establishment that merely because an employee is suffering from a disability, as defined in section 2(i) of the PwD Act, 1995, he is not to be denied promotion.

14. However, it is noticed that even before the PwD Act, 1995 was enacted, OM dated 20th November, 1989 had been issued by the DoPT whereby, reservations promotions (i) within Group 'D', (ii) from Group 'D' to Group 'C' and (iii) within Group 'C' to the three categories of 'physically handicapped persons', viz. the

visually handicapped, the hearing handicapped and the orthopedically handicapped, were permissible.

It was, however, clarified that each of the three categories of physically handicapped persons would be allowed reservation at 1 (one) per cent each and that applicability of the reservation would be limited to promotions being made to those posts that are identified as being capable of being filled/held by the appropriate category of physically handicapped.

15. During the period intervening the advent of the PwD Act, 1995 and issuance of OM dated 29th December, 2005, the DoPT went on to issue Office Memoranda dated 18th February, 1997, 16th January, 1998 and 25th October, 2022. We need not consider the said office memoranda in any great detail except referring to the common thread running through them, i.e., the DoPT sought to carve out the benefit of reservation in promotion for persons with disabilities even though whether there was an explicit legislative mandate to that effect was indeed a grey area for some.

Notwithstanding the same, having regard to the objects that the PwD Act, 1995 intended to achieve by providing equal opportunity, protection of rights and full participation to the persons with disabilities and viewed in the light of difficulties and inconveniences faced by them, the initiative of the DoPT to provide for reservation in promotion for them on at least Group 'C' and Group 'D' posts was indeed a step in the right direction.

16. Be that as it may, mere absence of an express mandate in Chapter VI of the PwD Act, 1995 requiring reservation in promotion for persons with disabilities could not have been construed as not obliging the appropriate Government not to keep reserved vacancies on promotional posts for those answering clauses (i) to (iii) of section 33. Though the language used in section 33 could admit of a little bit of confusion, the crucial words there are "shall appoint in every establishment".

Paraphrased, it implies that while the appropriate Government is making appointment in every establishment, it ought to reserve a minimum of 3 (three) per cent vacancies for persons or class of persons with disability, of which 1 (one) per cent each shall be reserved for those persons with disabilities of the nature mentioned in the clauses therein, i.e., (i) blindness or low vision, (ii) hearing impairment, and (iii) locomotor disability or cerebral palsy, and that appointments shall be made on the posts identified for each such disability as in the said clauses.

The proviso which permits exemption is not relevant in the present case; hence, its effect is not considered. It is, therefore, the statutory duty enjoined by section 33 that there must be appointment of persons with disabilities in every establishment which ought not to be less than 3 (three) per cent but a minimum of 1 (one) percent of vacancies, available on identified posts for each disability, has to be reserved. The confusion, to our mind, might have stemmed from the narrow interpretation of the word "appoint", without realizing that "promotion" is also included within "appointment".

The term "appointment" is quite broad and includes appointment by 'direct recruitment' as well as appointment by way of 'promotion'. Prior to Rajiv Kumar Gupta (supra), there was no authoritative pronouncement on the aspect of reservation in promotion. The interpretation of section 33 of the PwD Act, 1995 made by Rajiv Kumar Gupta (supra) finds its resonance in Siddaraju (supra).

17. We have noticed that the PwD Act, 2016 expressly makes available benefits of reservation to promotional posts for persons with disabilities in that the first proviso to section 34 ordains that reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time.

Law within the meaning of Article 141 of the Constitution of India having been declared by Siddaraju (supra) and the Gol having implemented the order of this Court dated 28th September, 2021 noted above and issued OM dated 17th May, 2022, the same constitutes "instructions" as contemplated by the first proviso to section 34 of the PwD Act, 2016. Such instructions contemplate reservation in promotion to posts in Group - 'A' in the lowest grade.

18. When the provisions of the PwD Act, 1995 and the PwD Act, 2016 in relation to reservation in promotion for persons with disabilities are contrasted, it is clear as crystal that what was implicit in the former has been made explicit by the latter.

19. This is the broad overview of the position of law, as it stands today, in regard to reservation in promotion for persons with disabilities.

Arguments on Behalf of The RBI:

20. Appearing in support of the appeal presented by the RBI, Mr. Jaideep Gupta, learned senior counsel, contended that the High Court erred in making the directions it did. According to him, the circulars issued by the RBI restricted promotion of physically handicapped persons only to Group 'C' posts and within Group 'D' posts, and did not permit reservation in promotion in Group 'A' posts.

That apart, OM dated 29th December, 2005 relied on by Mr. Nair did not extend any benefit of the nature claimed by Mr. Nair despite its modification by OM dated 3rd December, 2013. Thus, from whichever angle one looks at the circulars, resolving Mr. Nair's grievance by considering him fit for promotion from the date of issuance of OM dated 29th December, 2005, as directed by the High Court, was not called for.

He also contended that after the GoI issued OM dated 17th May, 2022, the RBI has also issued the circular dated 8th December, 2022, whereby requisite vacancies in Group 'A' posts have also been reserved for promotion of persons with disabilities. This circular dated 8th December, 2022 contemplates promotion of persons with disabilities upon qualifying in a departmental examination.

21. Though Mr. Gupta did not dispute that benefit of condonation of shortfall in marks was available for SC/ST candidates, he submitted that the concession could not have been extended to persons with disabilities like Mr. Nair in the absence of any policy decision for reserving vacancies in Group - 'A' posts for persons like him; hence, Mr. Nair could not have claimed any benefit flowing therefrom.

22. Referring to an "Additional Affidavit" dated 19th January, 2023 filed on behalf of the RBI, Mr. Gupta contended that vide circular dated 21st September, 2022, a departmental examination for promotion of Class III employees to the post of Assistant Manager Grade 'A' was scheduled on 10th December, 2022 and willingness therefor was invited by 30th September, 2022; however, Mr. Nair chose not to participate in such examination.

Mr. Nair, it was contended, having not offered his candidature, the RBI was disabled to assess his performance for promotion. Mr. Gupta, thus, urged that Mr. Nair having let go the opportunity, cannot be heard to complain; however, if Mr. Nair wishes to participate in the promotional exercise, when conducted next, the RBI shall consider his candidature in terms of the extant provisions.

23. Mr. Gupta, thus, prayed that the appeal of the RBI could be disposed of recording his aforesaid statement.

Arguments on Behalf of The GoI :

24. Ms. Madhavi Divan, learned Additional Solicitor General appearing for the GoI, placed OM dated 17th May, 2022 and contended that pursuant to orders of this Court made from time to time and in particular after the order dated 28th September, 2021 (supra), instructions have been issued to make available reservation in promotion for persons with disabilities from posts in Group 'B' to the lowest rung in Group 'A', however, with the rider that reservation in promotion shall be applicable in the cadres in which the element of direct recruitment, if any, does not exceed 75%.

She further submitted that since there was no specific post identified for promotional appointment in Group 'A' when Mr. Nair participated in the process and also that the shortfall in marks could be condoned only in respect of SC/ST candidates, coupled with the fact that Mr. Nair elected to stay away from the recent promotional process, the directions made in the impugned judgment and order that paragraph 14 of OM dated 29th December, 2005, since modified by OM dated 8th December, 2013, should be applied with retrospective effect, do not call for being sustained. Accordingly, she too joined Mr. Gupta in urging that the appeal of the GoI be disposed of granting liberty to Mr. Nair to participate in the fresh process, whenever conducted.

25. In the midst of her argument, Ms. Divan was on the verge of expressing certain reservations about the law expounded by this Court in Siddharaju (supra). However, the decision having become final and the DoPT also having acted in terms thereof, we did not consider it appropriate to permit her advance any further argument in that regard.

Arguments on Behalf of Mr. Nair:

26. Representing Mr. Nair, learned counsel Mr. K. Mohan invited our attention to the various circulars/office memoranda issued from time to time and the relevant decisions of this Court as well as the High Court in

matters relating to reservation of certain vacancies on promotional posts for persons with disabilities. Relying thereon, he contended that Mr. Nair has been given a raw deal.

27. OM dated 18th February, 1997 and corrigendum dated 16th January, 1998 were placed by Mr. Mohan. According to him, a conjoint reading thereof would leave none in doubt that the existing policy of reservation for SCs/STs, including for the "physically handicapped" in promotion in all groups is applicable to all grades and services where the extent of direct recruitment does not exceed 75 (seventy-five) per cent; and that the "existing policy of reservation" would obviously include the provision for grace marks for SCs/STs.

28. Referring to the counter affidavit of Mr. Nair filed in connection with these appeals, Mr. Mohan invited our attention to a communication dated 18th October, 2006 issued by the Banking Division, Department of Economic Affairs, Ministry of Finance, Gol addressed to, inter alia, the Chief General Manager, RBI on the subject of "Concession and relaxation to persons with disabilities at par with SCs/STs irrespective of their vertical categories".

It was shown that on a reference received from the Commissioner of Disabilities on the subject, it had been decided to extend concession in examination fee and relaxation in minimum percentage of marks to persons with disabilities at par with SCs/STs with the nationalized banks.

An order of this Court dated 19th March, 2002 in A.I. Confederation of the Blind vs. Union of India & Anr.⁹ was also referred endorsing the stand of the Gol to bring parity amongst all the persons with disabilities irrespective of their vertical categories. A request was, accordingly, made to the addressees including the RBI to note the instructions for appropriate action.

29. Heavily relying thereon, Mr. Mohan argued that the refusal of the RBI to treat persons with disabilities at par with SC/ST category of candidates and to award grace marks as are made available to the latter, despite the existence of the circular dated 5th July, 2000, the Master Circular and the communication dated 18th October, 2006, amounts not only to deprivation of the rights of "Equal Opportunity, Protection and Full Participation" guaranteed by the provisions of the PwD Act, 1995 but also to invidious discrimination hit by Article 14 of the Constitution.

30. Inviting our pointed attention to the decision in Leesamma Joseph (supra), Mr. Mohan contended that this Court declined to interfere with the order of the Kerala High Court under challenge which reversed the decision of the Kerala Administrative Tribunal and upheld not only the respondent's claim for promotion, though the initial entry of the respondent was on compassionate ground and not on a post reserved for persons with disabilities, but did not disturb the financial benefits received by the respondent.

He also contended that this Court even after not interfering with the impugned order examined the issue as to whether persons with disabilities could claim a right of promotion under the PwD Act, 1995, as such issue were likely to arise in other matters of similar nature, and answered it in the affirmative.

31. Mr. Mohan also invited our attention to an order dated 20th February, 2020 recorded on these appeals. Such order noticed the submission advanced by him on behalf of Mr. Nair that "the rights in favour of disabled persons flow directly from the provisions of the Act and the source of right is not the O.M. but the provisions of the Act themselves; and as such the O.M. in any case can not limit the applicability of the protection under the provisions of the Act". Mr. Mohan reiterated such submission before us and submitted that the directions given by the High Court in the impugned judgment and order do not call for any interference.

Proceedings before This Court:

32. Having heard the parties on 19th January, 2023, we had granted special leave to appeal and reserved judgment. In course of hearing, Mr. Gupta had sought for leave to file a "Further Affidavit", which we orally permitted. Such an affidavit having been tendered on 30th January, 2023, we permitted Mr. Mohan to look into its contents and on a prayer made on behalf of Mr. Nair, we even permitted filing of a reply by an order dated 31st January, 2023. Pursuant thereto, a "Common Affidavit-in-Reply" dated 7th February, 2023 has been filed by Mr. Nair and taken on record.

Additional Affidavits of The RBI:

33. We have read the additional affidavits filed by the RBI and Mr. Nair after judgment on these appeals was reserved. The points that the RBI urged in the counter affidavit filed before the High Court have been

reiterated, which we have noticed above.

That apart, perusal of paragraphs 3-7 of the 'Additional Affidavit' dated 19th January, 2023 and 10-13 of the 'Further Affidavit' dated 30th January, 2023 of the RBI reveal reference to issuance of instructions on 'Reservation in promotion' under section 34 of the PwD Act, 2016 by the Gol in pursuance of the directions contained in the order dated 28th September, 2021 (supra) and further that the RBI has adopted the same for itself vide its circular dated 08th December, 2022; that considering the above instructions, in relation to the examinations conducted for Panel Year 2022 vide circular dated 8th December, 2022, 16 (sixteen) vacancies were reserved for persons with disabilities and though the last date for expression of willingness to participate in the same was 30th September, 2022, Mr. Nair did not participate; and also that the qualification for Asst. Manager Grade 'A' post has undergone changes and the Memorandum of Settlement (MoS) between the RBI and the Employee's Association has been implemented vide revised qualification criteria w.e.f. 2013.

Questions of Law Raised by The Appellants:

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

- (i) Whether the modification made by paragraph 5 of the Office Memorandum dated 3rd December, 2013 to paragraph 14 of the Office Memorandum dated 29th December, 2005 is to be applied retrospectively with effect from 29th December, 2005?
- (ii) Whether the High Court was justified in holding that the RBI has to apply reservation in promotion for persons with disabilities in respect of Group 'A' and Group 'B' posts? And
- (iii) Whether the High Court is justified in holding that the decision in National Confederation of Development of Disabled (supra) is applicable to the present case?

Analysis and Decision:

35. Regard being had to the narrative of facts leading to presentation of these appeals, the rival contentions advanced at the Bar on behalf of the parties and in the light of exposition of law by this Court in the decisions referred to above in regard to rights of persons with disabilities in employment under the appropriate Government or in an establishment qua matters of promotion, we are of the considered opinion that the aforesaid 3 (three) questions have been rendered purely academic. We may briefly give our reasons therefor.

36. The decision in Rajeev Kumar Gupta (supra) considered the legality of the impugned Office Memoranda dated 18th February, 1997 and 29th December, 2005, issued by the DoPT, denying to employees of Prasar Bharati, having disabilities, of the statutory benefit of 3 (three) per cent reservation in identified posts falling in Groups 'A' and 'B'.

Contention raised by the respondents based on the Constitution Bench decision in Indra Sawhney vs. Union of India¹⁰, that there cannot be reservation in promotions to identified posts of Groups 'A' and 'B', was overruled by observing that such ruling arose in the context of reservations in favour of backward classes of citizens falling within the sweep of Article 16(4) of the Constitution. Ultimately, it was held in paragraphs 24 and 25 as follows:

"24. A combined reading of Sections 32 and 33 of the 1995 Act explicates a fine and designed balance between requirements of administration and the imperative to provide greater opportunities to PWD. Therefore, as detailed in the first part of our analysis, the identification exercise under Section 32 is crucial. Once a post is identified, it means that a PWD is fully capable of discharging the functions associated with the identified post. Once found to be so capable, reservation under Section 33 to an extent of not less than three per cent must follow. Once the post is identified, it must be reserved for PWD irrespective of the mode of recruitment adopted by the State for filling up of the said post.

25. In the light of the preceding analysis, we declare the impugned memoranda as illegal and inconsistent with the 1995 Act. We further direct the Government to extend three per cent reservation to PWD in all identified posts in Group A and Group B, irrespective of the mode of filling up of such posts. This writ petition is accordingly allowed."

37. The view expressed in *Rajeev Kumar Gupta* (supra) was doubted by a coordinate Bench of this Court. Opining that preferential treatment to persons with disabilities could cover reservation in appointment but not reservation in promotion, the said Bench in its order dated 3rd February, 2017 was of the view that the contention needs to be considered by a larger Bench.

38. *Siddaraju* (supra) is the larger Bench decision which has held that the decision in *Rajeev Kumar Gupta* (supra) cannot be faulted when it stated that *Indra Sawhney* (supra) dealt with a different problem and cannot be followed.

39. *Leesamma Joseph* (supra), which is the latest in the line of decisions on the same point, has reached similar conclusion albeit premised on a different reasoning.

40. There is, therefore, no dearth of authority for the proposition that the PwD Act, 1995 not only mandated reservation in appointment but also contemplated reservation in promotion. 41. Incidentally, we have also assigned our own reason as to why any perception and understanding of section 33 of the PwD Act, 1995 not contemplating reservation in promotion is erroneous and fallacious.

42. Bearing in mind what has been laid down by this Court in the cited decisions and the view taken by us (supra), our specific answers to the 3 (three) questions urged by the appellants are these. OM dated 29th December, 2005 having been set aside in *Rajeev Kumar Gupta* (supra), the first question does not survive consideration as to whether modification of paragraph 14 of the same, brought about by OM dated 8th December, 2013, would apply retrospectively.

Furthermore, *Rajeev Kumar Gupta* (supra) having directed the GoI to extend 3 (three) per cent reservation to the persons with disabilities in all identified posts in Group 'A' and Group 'B', irrespective of the mode of filling up of such posts (emphasis ours), and the larger Bench in *Siddaraju* (supra) having given its stamp of approval to such decision, the second question also stands squarely answered against the appellants.

Finally, the question as to whether the High Court was right in relying upon *National Confederation of Development of Disabled* (supra) is no longer *res integra* having regard to the multiple decisions of this Court on the point affirming the position that reservation in employment contemplated in section 33 of the PwD Act, 1995 covers all posts identified for each of the 3 (three) kinds of disability mentioned therein and is not restricted to Group 'C' and Group 'D' posts. We share the view taken therein.

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

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

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

44. Our answers to the aforesaid questions should be prefaced by a brief reference to the supreme law of the land. The resolve in the Preamble to the Constitution and the provisions in Part IV thereof, are considered relevant. Our preambular promise is to secure 'social justice' to all. The Directive Principles of State Policy, though not enforceable, are declared in Article 37 to be "fundamental in the governance of the country" and the State has a duty to apply these principles in making laws.

The immediately next article commands the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice ~ social, economic and political ~ shall inform all the institutions of the national life and endeavor to eliminate inequalities in status, facilities and opportunities. Article 41 requires the State, within the limits of its economic capacity and development, to make effective provision for securing the right to work, inter alia, in cases of disablement.

In the society we live in, which is indeed classridden, 'social justice' should mean justice to the weaker and poorer section of the society, particularly when the people of the nation have resolved in the Preamble to secure 'equality of status and opportunity'. The underlying idea is that securing justice to the weaker and the poorer section could make them equal with the rest of the society.

In a case where the weaker section is involved in a combat with the stronger section and the scales are even, to rise to the challenge for securing 'social justice', the Courts of law ought to lean in favour of the former so that justice is ensured. If persons with disabilities are denied the rights and privileges conferred

by law of equal opportunities, protection of rights and full participation, inter alia, in the field of public employment, the disservice to such persons would inevitably be grave causing erosion of constitutional idealism and respect for human rights apart from extreme mental agony and pain of the deprived.

Where such situations emerge, the courts should not remain mute and dumb. No court, far less this Court, should condone the breaches and violations by employers/establishments arising out of treading of the illegal path by them.

45. It is noted that the version of the RBI before the High Court was that there is no provision for reservation in promotional posts in Grade - 'A' for persons with disabilities; hence, benefit of promotion on a reserved vacancy could not be granted to Mr. Nair. This was indeed the ostensible reason for which the relaxed standards of assessment available for SC/ST candidates was not extended to persons with disabilities, a fortiori, to Mr. Nair. In other words, Mr. Nair's claim for promotion on a reserved vacancy for persons with disabilities, upon application of relaxed standards, could not have been considered in the absence of any identified Group 'A' post.

That the appropriate Government must make available reservation in the matter of appointment of persons with disabilities in identified posts of Group 'A' and Group 'B' had been conclusively and authoritatively decided by this Court in Ravi Prakash Gupta (supra) and National Federation of the Blind (supra) by the time the impugned judgment and order was rendered. That being the position, no valid contention could have been advanced that reservation for persons with disabilities is not available for appointment on Group - 'A' posts.

What remained was whether reservation for persons with disabilities is available for promotional appointment on Group - 'A' posts. That issue has also been given a quietus by Rajiv Kumar Gupta (supra), Siddaraju (supra) and Leesamma Joseph (supra). The two big impediments in the path of Mr. Nair, thus, stand removed by reason of a pragmatic and reasonable interpretation of the PwD Act, 1995 by this Court.

46. It cannot, however, be gainsaid that when Mr. Nair had participated in the Panel Year 2003 examination, no decision had been rendered by this Court that reservation in promotion is permissible in respect of Group 'A' posts. It is equally true that this Court while interpreting sections 32 and 33 of the PwD Act, 1995 did not declare the law laid down by it to have prospective application. It is a principle, well-settled in law, that the interpretation of a provision of law relates back to the date of the law itself.

This is essentially for the reason that the duty of the Court is not to legislate but to interpret the law. However, such principle is subject to the exception that this Court may, in a given case, declare that its interpretation would have effect prospectively. That is not the express intention of this Court in any of the decisions referred to above. This being the position in law, we have no doubt that Mr. Nair did have a statutorily conferred right all through to claim that reservation in promotional appointment in Group 'A' posts is ingrained in the PwD Act, 1995.

47. Thus held, the remaining impediment is with regard to condonation of shortfall of marks at par with the relaxed standards applicable to SC/ST candidates. We now proceed to examine whether the RBI was justified in not condoning the shortfall of 3 (three) marks pertaining to the 2003 examination taken by Mr. Nair to enable him secure promotion.

48. We have noted from the communication dated 18th October, 2006 issued by the Banking Division, Department of Economic Affairs, Ministry of Finance, GoI that the same surfaced as a followup step to comply with this Court's order dated 19th March, 2002 in A.I. Confederation of the Blind (supra).

Even otherwise, to reach out to persons with disabilities and grant them the facilities and benefits that the PwD Act, 1995 envisaged, it was rather harsh to apply standards which are applicable to general candidates to Mr. Nair while he competed with such general candidates for securing his promotion. RBI, as a model employer, ought to have taken an informed decision in this regard commensurate with the aspirations of persons with disabilities.

49. We did not hear any serious argument from Mr. Gupta or Ms. Divan, and rightly so, that persons with disabilities are not entitled to be judged by the same relaxed standards that are applied to assess candidature of SC/ST candidates.

50. In such circumstances, the omission or failure of the RBI in condoning the shortfall in marks coupled with the neglect to identify a Group 'A' post suitable for reservation to accommodate Mr. Nair on promotion

appears to us to be indefensible.

51. Question (a) is answered accordingly.

52. In considering question (b), concededly there was no authoritative pronouncement of this Court interpreting the PwD Act, 1995, making available reservation in promotional appointments for persons with disabilities in Group 'A' posts, when Mr. Nair took the examination for promotion to the post of Assistant Manager, Grade - I in 2004. The first time it came to be so declared was when the decision in Rajeew Kumar Gupta (*supra*) was pronounced. Should the RBI, in the circumstances, be directed to relax the standard of assessment and grant promotion to Mr. Nair with retrospective effect?

53. The answer to this question would necessitate looking back at the operative directions contained in the order under challenge. What the High Court said has been quoted above. It is noteworthy that the High Court did not mandatorily direct grant of promotion to Mr. Nair. The High Court's judgment, unintendedly, was confined to application of reservation policy.

The High Court did not declare that Mr. Nair should also be entitled to condonation of shortfall in marks with reference to the Panel Examination 2003. Insofar as other qualifying requirements under the relevant rules are concerned, the High Court clarified that it may not be understood to have expressed any opinion on the question of Mr. Nair satisfying such requirements. Given such contours of the order, it was open to the RBI to consider Mr. Nair for promotion and pass appropriate order either granting or denying him promotion in accordance with the prevailing exposition of law.

Instead of complying with the order, the RBI carried the judgment and order to this Court on 12th September, 2014. Gol also followed suit. It was Mr. Nair who rushed to the High Court with a review petition within the period of limitation, whereupon his rights have been kept open noticing pendency of the petition for special leave of the RBI. Given such a situation, it seems that the RBI has on its own invited the uncomfortable position in which it finds itself now.

The decisions of this Court rendered during the pendency of these appeals have to be considered and applied, notwithstanding the fact that the same were not available when the High Court decided Mr. Nair's writ petition finally. RBI might not have faced this conundrum had the order of the High Court been complied with on time.

54. In any event, should the RBI and Gol be worse off for approaching this Court, given the fact that after his participation in the 2003 examination Mr. Nair has elected to stay away from further examinations on the pretext of pendency of proceedings before the High Court as well as this Court, and suffer the impact of the decisions of this Court post the impugned judgment and order? Or, should the appeals be dismissed leaving it open to the RBI to comply with the order of the High Court?

In our view, dismissal without any observation has the potential of generating further unnecessary litigation. At the same time, though Mr. Nair did not file any crossappeal, he had applied for review and has been conferred the liberty to revive the review petition after disposal of proceedings by this Court.

55. Having regard to the materials on record before us and for answering question (b), it is considered appropriate to invoke Article 142 of the Constitution "for doing complete justice" in the cause.

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

57. Since Mr. Nair has a couple of years for his retirement on superannuation, it is needless to observe that in computing his retiral benefits due regard shall be given to his promotion, as directed above, with effect from 27th September, 2006.

58. The appeals stand disposed of on the above terms. Parties shall bear their own costs.

1 PIL 106 of 2010

2 (2010) 7 SCC 626

3 (2013) 10 SCC 772

4 RP No. 55 of 2014

5 (2016) 13 SCC 153

6 (2020) 19 SCC 572

7 (2021) 9 SCC 208

8 M.A. 2171/2020 in Civil Appeal No.1567/2017

9 W.P.(C) No.115/1998

10 1992 Supp (3) SCC 217

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