

Siddaraju vs The State Of Karnataka on 14 January, 2020

Author: R.F. Nariman

Bench: V. Ramasubramanian, Aniruddha Bose, Rohinton Fali Nariman

1

REPORTAB

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1567 OF 2017

SIDDARAJU

Appellant(s)

VERSUS

STATE OF KARNATAKA & ORS.

Respondent(s)

WITH

REVIEW PETITION (C) NO. 36 OF 2017

IN

CIVIL APPEAL NO. 5389 OF 2016

CIVIL APPEAL NO. 300 OF 2020

(Arising out of SLP (C) No. 11632 of 2017)

CIVIL APPEAL NO. 299 2020

(Arising out of SLP (C) No. 21197 of 2017)

CIVIL APPEAL NO. 310 2020

(Arising out of SLP (C) No. 4650 of 2019)

CIVIL APPEAL NO. 6092 OF 2019

CIVIL APPEAL NO. 6095 OF 2019

J U D G M E N T

R.F. Nariman, J.

1) This batch of cases before the Court has come to us on a reference made by a Division Bench of this Court dated 03.02.2017. The reference order reads as follows:

“Delay condoned. Leave granted.

Question which has arisen in this case is whether persons, governed under “The persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995”, can be given reservation in promotion. A view has been taken by this Court in *Rajiv Kumar Gupta & Others v. Union of India & Others* – (2016) 6 SCALE 417 in the affirmative.

Mr. Ranjit Kumar, learned Solicitor General, points out that the prohibition against reservation in promotion laid down by the majority in *Indra Sawhney & Others v. Union of India & Others* – (1992) Supp. 3 SCC 215 applies not only to Article 16(4) but also 16(1) of the Constitution of India and inference to the contrary is not justified.

Persons suffering from disability certainly require preferential treatment and such preferential treatment may also cover reservation in appointment but not reservation in promotion. Section 33 of the 1995 Act is required to be read and construed in that background.

We find merit in the contention that the matter needs to be considered by the larger Bench.

Accordingly, we direct the matter be placed before Hon’ble the Chief Justice for appropriate orders.

Union of India is at liberty to file its affidavit within one week from today.”

2) Parliament passed the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 being Act 1 of 1996. The statement of objects and reasons for the said Act states that a Conference held at Beijing, China, in December, 1992 had adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asia and the Pacific region India being a signatory to the said proclamation found it necessary to enact a suitable legislation to provide for the special care that is necessary to remove discrimination against persons with disabilities and to make special provision for the integration of such persons into the social mainstream.

3) Section 2(i) of the said Act defines “disability” as follows:-

“(i) “disability” means—

(i) blindness;

(ii) low vision;

(iii) leprosy-cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(viii) mental illness;" Section 2(t) defines "person with disability" as follows:-

"(t) "person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority;"

4) The Act then provides for Central and State Co-

ordination Committees and prevention and early detection of disabilities. We are directly concerned with Chapter VI of the Act which deals with identification and reservation of posts for the purpose of employment. These Sections state as follows:-

"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.

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."

5) In Union of India and Another vs. National Federation of the Blind and Others, (2013) 10 SCC 772, this Court went into the provisions of the aforesaid Act in some detail and, in particular, Sections 32 and 33. The Court considered Office Memorandum dated 29.12.2005 of the Government of India, which stated that the quantum of reservation would be as follows:-

“2. QUANTUM OF RESERVATION

(i) Three percent of the vacancies in case of direct recruitment to Group A, B, C and D posts shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and

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

(ii) Three percent of the vacancies in case of promotion to Group D, and Group C posts in which the element of direct recruitment, if any, does not exceed 75%, shall be reserved for persons with disabilities of which one per cent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the posts identified for each disability.

The Court then held as follows:

“39) It has also been submitted on behalf of the appellants herein that since reservation of persons with disabilities in Group C and D has been in force prior to the enactment and is being made against the total number of vacancies in the cadre strength according to the OM dated 29.12.2005 but the actual import of Section 33 is that it has to be computed against identified posts only. This argument is also completely misconceived in view of the plain language of the said Section, as deliberated above. Even for the sake of argument, if we accept that the computation of reservation in respect of Group C and D posts is against the total vacancies in the cadre strength because of the applicability of the scheme of reservation in Group C and D posts prior to enactment, Section 33 does not distinguish the manner of computation of reservation between Group A and B posts or Group C and D posts respectively.

As such, one statutory provision cannot be interpreted and applied differently for the same subject-matter.

40) Further, if we accept the interpretation contended by the appellants that computation of reservation has to be against the identified posts only, it would result into uncertainty of the application of the scheme of reservation because experience has shown that identification has never been uniform between the Centre and the States and even between the Departments of any Government. For example, while a post of middle school teacher has been notified as identified as

suitable for the blind and low vision by the Central Government, it has not been identified as suitable for the blind and low vision in some States such as Gujarat and J&K, etc. This has led to a series of litigations which have been pending in various High Courts. In addition, Para 4 of the OM dated 29.12.2005 dealing with the issue of identification of jobs/posts in sub clause (b) states that list of the jobs/posts notified by the Ministry of Social Justice & Empowerment is not exhaustive which further makes the computation of reservation uncertain and arbitrary in the event of acceptance of the contention raised by the appellants.

42) A perusal of Indra Sawhney 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:-

“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 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 inter-locking 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 S.C. category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) 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.....” Having concluded thus, the Court then held:

“50) 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.

51) The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today.

52) Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., “computing 3% reservation on total number of vacancies in the cadre strength” which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) consistent with the decision rendered by this Court.

53) Further, the reservation for persons with disabilities has nothing to do with the ceiling of 50% and hence, Indra Sawhney is not applicable with respect to the disabled persons.”

6) Certain directions were then made in the end of the judgment to ensure proper implementation of the reservation policy for the disabled and to protect their rights.

7) We may mention that, pursuant to this Court’s judgment, the Union of India issued Office Memorandum dated 03.12.2013 in which it made only one change in the Office Memorandum dated 29.12.2015 as follows:-

“5. Keeping in view the directions of the Hon’ble Supreme Court, Para 14 of the OM dated 29.12.2005 is modified to the following extent:

“Reservation for persons with disabilities in Group ‘A’ or Group ‘B’ posts shall be computed on the basis of total number of vacancies occurring in direct recruitment quota in all the Group ‘A’ posts or Group ‘B’ posts respectively, in the cadre.” Contempt petitions were filed stating that the directions contained in this judgment have not been carried out, which is not the subject-matter before us. These petitions have been ordered to be listed after the decision in these cases.

8) The next important judgment that needs to be adverted to in this behalf is the judgment in National Federation of the Blind vs. Sanjay Kothari, Secy. Deptt. of Personnel and Training, 2015 (9) Scale 611, in para 10 of which para 51 of the earlier judgment was clarified as follows:-

“10. Para 51 of the order on which reliance has been placed by Shri Rungta must be viewed in the context of the questions arising for answer before the Court i.e. the manner of computation of vacancies in case of Groups A, B, C and D posts. All that

the Court in the aforesaid paragraph 51 has held is that the manner of such identification must be uniform in the case of all the groups viz. A, B, C and D. Nothing beyond the above should be read in paragraph 51 of the Courts' order as aforesaid."

9) We now come to the Division Bench judgment of this Court reported as *Rajeev Kumar Gupta & Others v. Union of India & Others* – (2016) 13 SCC 153. In this judgment, the posts in *Prasar Bharati* were classified into four Groups—A to D. The precise question that arose before the Court is set out in para 5 thereof in which it is stated that the statutory benefit of 3 per cent reservation in favour of those who are disabled is denied insofar as identified posts in Groups A and B are concerned, since these posts are to be filled through direct recruitment. After noticing the arguments based on the nine-Judge bench in *Indra Sawhney vs. Union of India*, 1992 Supp (3) SCC 217, this Court held:

"14. We now examine the applicability of the prohibition on reservation in promotions as propounded by *Indra Sawhney*. Prior to *Indra Sawhney*, reservation in promotions were permitted under law as interpreted by this Court in *Southern Railway v. Rangachari*, AIR 1962 SC 36. *Indra Sawhney* specifically overruled *Rangachari* to the extent that reservations in promotions were held in *Rangachari* to be permitted under Article 16(4) of the Constitution. *Indra Sawhney* specifically addressed the question whether reservations could be permitted in matters of promotion under Article 16(4). The majority held that reservations in promotion are not permitted under our constitutional scheme.

15. The respondent argued that the answer to Que-

tion 7 in *Indra Sawhney* squarely covers the situation on hand and the reasons outlined by the majority opinion in *Indra Sawhney* at para 828 must also apply to bar reservation in promotions to identified posts of Group A and Group B.

16. We do not agree with the respondent's submission. *Indra Sawhney* ruling arose in the context of reservations in favour of backward classes of citizens falling within the sweep of Article 16(4).

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21. The principle laid down in *Indra Sawhney* is applicable only when the State seeks to give preferential treatment in the matter of employment under 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) if they otherwise deserve such treatment. However, for creating such preferential treatment under law, consistent with the mandate of Article 16(1), the State cannot choose any one of the factors such as caste, religion, etc. mentioned in Article 16(1) as the basis. The basis for providing reservation for PWD is physical disability and not any of the criteria forbidden under Article 16(1). Therefore, the rule of no

reservation in promotions as laid down in Indra Sawhney has clearly and normatively no application to PWD.

The Court then concluded:

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

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

10) After hearing 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 dealt with a different problem and, therefore, cannot be followed.

11) We may also note that review petitions were filed and have since been dismissed against both the 2013 and 2016 judgments. Consequently, the reference stands answered by stating that the 2013 judgment as clarified in National Federation of the Blind vs. Sanjay Kothari, Secy. Deptt. of Personnel and Training, 2015 (9) Scale 611 and the judgment in Rajeev Kumar Gupta & Others v. Union of India & Others – (2016) 13 SCC 153 case will bind the Union and the State Governments and must be strictly followed notwithstanding the Office Memorandum dated 29.12.2005, in particular.

Since the reference has been disposed of by us today, contempt petitions be listed for hearing.

Civil Appeal No. 1567 OF 2017:

12) Application for impleadment in C.A. 1567/2017 is allowed.

13) This matter arises out of the order of the Central Administrative Tribunal, Bangalore Bench, Bangalore dated 24.07.2015 in which the 2005 O.M has been followed without reference to any of the judgments of this Court. A writ petition from the aforesaid judgment was dismissed by the Karnataka High Court on 23.03.2016,

stating that the precise question of law that arises in this case was kept open.

Accordingly, we set aside the judgment of the CAT and consequently that of the High Court. The case is to be governed by the three decisions of this Court outlined above, which judgments have to be followed by the Union of India and the States. It is not necessary to pass any further directions. The appeal is disposed of accordingly.

Review Petition (C) No. 36 OF 2017 in Civil Appeal No. 5389 of 2016:

14) Delay is condoned.

15) This matter stands dismissed in view of today judgment.

SLP (C) No. 11632 of 2017:

16) Leave granted.

17) The impugned judgment of the High Court dat

22.06.2016 in this appeal, after referring to the judgment of this Court in National Federation of the Blind vs. Sanjay Kothari, Secy. Deptt. of Personnel and Training, 2015 (9) Scale 611 arrived at the following conclusion:

“8. The contention of the learned Attorney General was that except for sub-section 2 of Section 47, there was no other provision under the Disabilities Act dealing with the promotions and, therefore, on the strength of sub-section 2 of Section 47 of the Disabilities Act, it cannot be contended that the Act provides for reservation in the matter of promotion. In paragraphs 9 and 10 of the judgment and order dated 1st September, 2015, the Apex Court has dealt with issue of reservation in promotion. In paragraph 10 of the judgment and order dated 1st September, 2015, the Apex Court has explained paragraph 51 of the earlier judgment and order dated 8 th October, 2013 by observing that what is observed in paragraph 51 is about the manner of computation of vacancies in case of all the Groups viz. A, B, C and D posts. That is the reason why the Apex Court declined to initiate any action for contempt on the basis of allegations that there is no provision made for the reservation of persons with disabilities in promotion. In terms the Apex Court observed that what is held in paragraph 51 of the judgment and order dated 8th October, 2013 cannot be construed to mean that there is a direction issued to provide for the reservation for the persons with disabilities even in the promotional posts.

9. In view of the clarification issued by the Apex Court under the order dated st 1 September, 2015 in Contempt Petition (Civil) No. 499 of 2014, now the directions

contained in paragraph 13 of the judgment and order dated 4th December, 2013 cannot be implemented insofar as the same deal with giving benefit of reservation to the persons with disabilities in the matter of promotion to the posts in the Indian Administrative Service by applying the Office Memorandum dated 29th December, 2005.” Consequently, the High Court held that no action can be initiated in the contempt petition on the ground that reservation had not been provided in the matter of promotion. We may hasten to add that this is not a correct reading of the law laid down by this Court. National Federation of the Blind vs. Sanjay Kothari, Secy. Deptt. of Personnel and Training, 2015 (9) Scale 611 was a judgment in a contempt petition in which the contention taken up by the petitioner was repelled by stating that para 51 of the 2013 judgment has held that the manner of identification of posts of all groups must be uniform and nothing beyond. After the declaration of the law in Rajeew Kumar Gupta & Others v.

Union of India & Others – (2016) 13 SCC 153 it is now clear beyond doubt that the O.M. of 2005 cannot be given effect to when it is in the teeth of the 2016 judgment. On the basis of this judgment, the impugned judgment is set aside and the contempt petition is restored to the file. The petition be disposed of on merits. The appeal is disposed of accordingly.

SLP (C) No. 21197 of 2017:

18) Leave granted.

19) In view of our judgment today, the appeal is dismissed.

SLP (C) No. 4650 of 2019:

20) Leave granted.

21) Having heard learned senior counsel for the appellant

at some length, we may note that paragraph 4(C) of the counter affidavit states as follows:

“(C) That Chhattisgarh State Power Holding Company Ltd. has appointed a committee for identification of the post upon which reservation in promotion will be applicable. The said Committee in its meeting held on 10.01.2017 decided that the post of Executive Engineer, Mechanical and Electrical in transmission, distribution and generation companies where the Executive Engineer has to visit sites and perform various acts personally, it is not advisable to keep such post under reservation. However, reservation will be applicable in promotion to the post of Executive Engineer, Computer Science, Information & Technology and Civil Engineering. The said decision of the company has not been challenged till date and thus binding on all the employees as per the provisions of Rights of Persons with

Disabilities Act, 2016. On this ground also the Special Leave Petition filed by the Petitioner is not maintainable.”

22) It is clear that the Internal Committee of respondent No. 2 has applied its mind to the post of Executive Engineer, Mechanical and Electrical, and has opined that in the said post, reservation for the physically disabled will not be possible for the reason given therein.

23) Learned senior counsel appearing on behalf of the appellant has pointed out that as per the Gazette Notification dated 31.05.2001, it is an Expert Committee that has to identify, keeping in view the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and Section 32 in particular, suitable posts for persons with disabilities, and this has not been done in the present case. Since this point has not been argued in any of the cross appeals, we reserve liberty to the appellant to challenge the Internal Committee’s findings on grounds available to them in law. Apart from this, the impugned judgment does not call for interference. The appeal is disposed of accordingly.

24) Needless to add if such a challenge succeeds, the three judgments pointed out by us in the Judgment in the lead matter, i.e., Civil Appeal No. 1567 of 2017 will have to be applied and followed.

Civil Appeal No. 6092 of 2019:

25) The appeal is dismissed in accordance with today’s judgment. Interim order dated 08.07.2019 stands vacated.

It has been contended before us that there are only 2 Group ‘A’ posts available/identified as a result of which the reservation will have to be worked in accordance with the roster system. We may only clarify that we have not, in any manner, indicated as to how such system should be worked.

Civil Appeal No. 6095 of 2019:

26) The appeal is dismissed in view of today’s judgment.

..... J.

(ROHINTON FALI NARIMAN) J.

(ANIRUDDHA BOSE) J.

(V. RAMASUBRAMANIAN) New Delhi;

January 14-15, 2020.