

Ajay Kumar Pandey vs State Of U.P. on 1 August, 2022

Author: Hemant Gupta

Bench: Vikram Nath, Hemant Gupta

REPORT

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4811 OF 2022
(ARISING OUT OF SLP (CIVIL) NO. 18854 OF 2019)

AJAY KUMAR PANDEY & ORS.

.....APPELLANT

VERSUS

STATE OF U.P. & ORS.

.....RESPONDENT

JUDGMENT

HEMANT GUPTA, J.

1. The challenge in the present appeal is to an order passed by the High Court of Judicature at Allahabad on 15.2.2019 whereby though the Government Order¹ dated 7.5.1999 was struck down, but selection to the post of Safai-Karmis made in pursuance of the advertisement dated 16.6.2008 was not interfered with.

2. The facts leading to the present appeal are that an advertisement was published on 16.6.2008 inviting applications for 1651 posts of safai- karmis in District Mau, out of which 346 posts were reserved for Scheduled Caste, 34 for Scheduled Tribe and 445 for Other Backward Class. It further stated that reservation would also be in respect of the Reason: advertised posts to women, disabled candidates, freedom fighters and 1 For short, the 'G.O.' ex-servicemen as per government decisions, though the number of such reserved posts has not been specified.

3. The appellants have mentioned in the writ petition filed, the record of which was called from the High Court, that there were 50 posts reserved for disabled candidates. However, such 50 posts were said to be on the basis of 3% of the total posts advertised and not as per the reservation policy of appointment of the disabled candidates in the State.

4. In respect of disabled candidates, the State Government had circulated a G.O. dated 07.05.1999 identifying the posts which can be manned by such suitable disabled candidates under Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. For the present appeal, relevant clauses of the G.O. pertaining to Group D posts are reproduced hereunder:

“3. In this regard, the government has identified the posts of Group ‘C’ and Group ‘D’ for the purpose of ensuring reservation in public services under Section 32 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and in the context of the Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and ex-military officials) (Amendment) Act, 1997 promulgated by the Department of Personnel. List of identified posts is enclosed herewith.

4. I am directed to state that appointment should be made to the identified posts under the posts reserved for these classes. In the event of non-filing of the vacancy due to non-availability of suitable candidates, it shall be carried over to the next recruitment.

2 For short, the ‘Act’

xx

xx

xx

GROUND ‘D’ IDENTIFICATION OF JOBS FOR PHYSICALLY HANDICAPPED

1. Daftry, Attendant SWSE OA OL PD
2. Peon, Office Boy SWSE OA OL PD
3. Dusting Man Farash SWSE OA OL D PD PB
4. Process Server SWSE OA D PD
5. Unskilled Office worker SWSE PD OA OL OA
6. Duplicating Machine Operator, S W S E D PD OL OA Cyclostyle Machine Operator
7. Sweeper Dry ST S W KC PD D SE F P PL
8. Sweeper Wet -do- -do-
9. Sweeper, Sewer -do- -do-

10. Sweeper Cleaner & Related -do- -do-

Workers, Ors.

11. Water Carrier -do- -do-

12. Dhobi ST S KC SE PD D PP L F

13. Stencillar SE S F B OA BL OL PD D

14. Stamper Hand SE S F B -do-

XX

XX

XX

APPENDIX A

PHYSICAL REQUIREMENTS

Code Function

F 1. Work performed by manipulating (with fingers) PP 2. Work performed by pulling and pushing L 3. Work performed by lifting KC 4. Work performed by knelling and crouching B 5. Work performed by bending S 6. Work performed by siting (on bench or chair) ST 7. Work performed by standing W 8. Work performed by walking SE 9. Work performed by seeing H 10. Work performed by hearing/speaking APPENDIX B
Code Function BL (i) Both legs affected but not arms BA (ii) Both arms affected

(a) impaired

(b) Weakness of grip BLA (iii) Both legs and both arms affected OL (iv) One leg affected (R &/or L)

(a) Impaired reach

(b) weakness of grip

(c) Ataxie BH (vi) Stiff back and hips (cannot sit or stoop) FT (vii) Limited exercise to tolerance – Early fatigue MW (viii) Muscular weakness and limited physical.

IC (ix) General in coordination of movement B (x) The blind PB (xi) Partially blind D (xii) The deaf PD (xiii) Partially deaf

5. A perusal of the above G.O. shows that the posts of Sweeper Dry, Sweeper Wet, Sweeper Sewer, Sweeper Cleaner & Related Workers could be filled up by the candidates who are deaf or partly deaf.

The posts of Daftry, Attendant, Peon, Office Boy, Dusting Man Farash, Process Server etc. were identified to be filled up by the candidates with locomotor disability.

6. The appellants, being persons with locomotor disability, submitted their application forms with locomotor disability certificates to the effect, that Mr. Ajay Kumar Pandey had 50% Loco Motor Disability. Chandra Bali Ram had Loco Motor Disability of PPRP left upper limb 60%. Ram Bhawan Singh had Muscular Dystrophy of PPRP Right upper limb 70%.

7. It is the case of the appellants that they participated in the cycle test and also appeared for interview but were not appointed, which led them to file writ petition before the High Court in the year 2018. The High Court held that under the Act, there are other forms of disabilities in addition to the hearing impairment. Thus, all categories of disabled persons were found entitled to avail reservation up to 3 percent, of which one percent each is available for disabled candidates suffering from (i) blindness or low vision, (ii) hearing impairment, and (iii) loco- motor disability or cerebral palsy. Hence, the High Court found the G.O. to be ultra-vires to the Constitution and held as under:

“Section 32 only allows the State Government to identify posts in each establishment which can be reserved for persons with disabilities. The post of Sweeper in the establishment of District Panchayat Raj Officer is undoubtedly the post which has been identified for applying reservation in favour of disabled persons. The purpose of Section 32 stands fulfilled with the said identification. Therefore, reservation as per law is applicable on the said post of Sweeper to the disabled persons.

The disabled persons as per the definition of disability under Section 2 (i) of the Disabilities Act, 1995 includes inter-alia other forms of disability in addition to hearing impairment. Thus, in view of Section 33 of the Disabilities Act, 1995 read with Section 3 of the U.P. Reservation Act of 1993, all categories of disabled persons are entitle to avail reservation upto 3 percent of which 1 percent each is available to persons suffering from (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy.

xx xx xx Thus, the respondents cannot even make any intelligible distinction between the different categories of disabled persons in the matter of providing reservation when the Acts provide for reservation in favour of all categories of disabled persons .

In view of the aforesaid facts and circumstances, we are of the opinion that the Government Order No. 4161/63-1-99-18(24)/97 dated 07.05.1999 insofar as it provides reservation to persons with disabilities in the category of hearing impairment alone is illegal and ultra-vires to Article 14 and 16 of the Constitution of India as well as Section 3 of the U.P. Reservation Act of 1993 and Sections 32 and 33 of the Disabilities Act, 1995. The reservation would be applicable to each category of disabled persons in accordance with the provisions of U.P. Reservation Act of 1993 read with Disabilities Act, 1995.” (Emphasis Supplied)

8. The learned counsel for the appellants contended that once the G.O. dated 7.5.1999 has been struck down, as a consequence thereof, the appellants were entitled to be appointed in the category of persons suffering from locomotor disability.

9. On the other hand, Ms. Ruchira Goel, learned counsel for the State submitted that the G.O. itself has been wrongly struck down by the High Court. It was contended that the High Court has completely misread the G.O. dated 7.5.1999 as the posts have been reserved keeping in view the requirement of the posts to be filled up by the candidate seeking appointment. It was pointed out that for the posts of Sweeper (Dry, Wet, Cleaner & Related Workers) etc., reservation has been provided to deaf and partially deaf candidates, whereas for the persons with locomotor disability, reservation for the posts of Daftry, Attendant, Peon, Office Boy etc. has been provided. Therefore, striking down of the G.O. dated 7.5.1999 was not tenable. Ms. Goel relies upon the principles of Order XLI Rule 33 of the Code of Civil Procedure, 1908 to contend that the ultimate order of the High Court can be maintained on other grounds than what weighed with the High Court while dismissing the writ petition.

10. It was also contended that vide G.O. dated 8.12.2010, it has been decided that in future, no recruitment to any Class-IV posts (except the lowest cadre of technical post) would be made and the arrangements would have to be made by way of outsourcing only. Therefore, the High Court was correct in law in not disturbing the selection process, as on the date of the order, there could not be any appointment to the Class- IV posts.

11. The G.O. in question dated 7.5.1999 has to be examined in view of Sections 32 and 33 of the Act. Such provisions read thus:

“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;

3 For short, the ‘Code’

(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.”

12. We have heard learned counsel for the parties and are of the opinion that the High Court has completely misread Sections 32 and 33 of the Act.

13. Sections 32 and 33 came up for consideration before this Court in a judgment reported as Government of India through Secretary & Anr. v. Ravi Prakash Gupta & Anr. 4 wherein it has been held as under:

“29. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spelt out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in

4 (2010) 7 SCC 626 the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.” (Emphasis Supplied)

14. The said judgment was considered by this Court in Union of India & Anr. v. National Federation of the Blind & Ors. 5 wherein it was held as under:

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

and persons suffering from locomotor disability or cerebral palsy.

38. To illustrate, if there are 100 vacancies of 100 posts in an establishment, the establishment concerned will have to reserve a minimum of 3% for persons with disabilities out of which at least 1% has to be reserved separately for each of the following disabilities : persons suffering from blindness or low vision, persons suffering from hearing impairment and the persons suffering from locomotor disability or cerebral palsy.

Appointment of 1 blind person against 1 vacancy reserved for him/her will be made against a vacancy in an identified post for instance, the post of peon, which is identified for him in Group D. Similarly, one hearing impaired will be appointed against one reserved vacancy for that category in the post of Store Attendant in Group D post. Likewise, one person suffering from locomotor disability or cerebral palsy will be appointed against the post of “Farash”, Group D post identified for that category of disability. It was argued on behalf of the Union of India with reference to the post of driver that since the said post is not suitable to be manned by a person suffering from blindness, the 5 (2013) 10 SCC 772 above interpretation of the section would be against the administrative exigencies. Such an argument is wholly misconceived. A given post may not be identified as suitable for one category of disability, the same could be identified as suitable for another category or categories of disability entitled to the benefit of reservation. In fact, the second part of the section has clarified this situation by providing that the number of vacancies equivalent to 1% for each of the aforementioned three categories will be filled up by the respective category by using vacancies in identified posts for each of them for the purposes of appointment.” (Emphasis Supplied)

15. A reading of the impugned judgment of the High Court shows that 3% posts in each cadre de hors the identification of the posts are to be reserved for persons with disability, with blindness or low vision, hearing impairment and locomotor disability. We find that such view of the High Court is not the correct enunciation of law. The 3% reservation is to be in an establishment and not in all cadres of an establishment irrespective of the nature of job.

16. A reading of the G.O. dated 7.5.1999 shows that posts have been identified to be filled up from physically handicapped category in category C and D posts. Such identification of the posts in an establishment is in terms of Section 32(a) of the Act. Although, such list is to be reviewed every three years taking into consideration the development in technology, however the said exercise appears to have not been undertaken. But the identification of posts in terms of Section 32 of the Act has been carried out in the G.O. dated 7.5.1999. After such identification, the question of appointment in each establishment arises where the vacancies not less than 3% are to be reserved for the candidates with blindness or low vision, hearing impairment and locomotor disability. Such reservation of posts under Section 33 of the Act is not for all categories of posts irrespective of nature of work to be carried out. The 3% reservation has to be provided in an establishment and not in every cadre. The State Government has taken a conscious decision to reserve certain posts for hearing impaired candidates and not for the candidates with locomotor disability.

17. We find that the G.O. dated 07.05.1999 could not be set aside in exercise of the power of judicial review on the basis of cursory glance of the G.O. dated 07.05.1999. The identification of the posts which can be filled up by candidates suffering from disabilities is the responsibility of the appropriate Government under Section 32 of the Act, which is the State Government in the present case. Once such exercise has been carried out, the appropriate Government in terms of Section 33 of the Act shall reserve 1% each for the visual disability, hearing impairment and locomotor disability. The identification of the posts and the category of the disabled candidates who could be appointed against the posts reserved is the power conferred on the appropriate Government. Such exercise and the reservation of posts could not have been interfered with without holding such reservation to be totally arbitrary, irrational or against the objectives sought to be achieved and on judicially recognised principles.

18. We find that the order of the High Court striking the G.O. as a whole is on the basis of surmises and conjectures, thus the said order cannot be sustained in law. Since the posts of Safai-Karmis are not identified to be filled up from amongst the candidates having locomotor disability, the appellant could not be appointed against such category of post, even though they have appeared for cycling test or for interview. The appellants were not eligible for the appointment against such posts in terms of the advertisement. The G.O. dated 07.05.1999 is part of the advertisement and therefore, the appellants cannot claim appointment against the post reserved for disabled candidates only for the reason that they are locomotor disabled candidates when such post was not reserved for the Safai-Karmis.

19. Consequently, the order of the High Court striking aside the G.O. dated 7.5.1999 is set aside. Thus, we do not find any merit in the present appeal. The appeal is disposed of accordingly.

.....J. (HEMANT GUPTA)J. (VIKRAM NATH)
NEW DELHI;

AUGUST 01, 2022.