

BHARAT SANCHAR NIGAM LIMITED AND ANOTHER

v.

G. SARVOTHAMAN

(Civil Appeal No. 8947 of 2013)

OCTOBER 04, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995:

s. 59 – Chief Commissioner – Functions of – Explained – Complaint by respondent-physically handicapped (PH) person for not providing him reservation in promotion – Chief Commissioner directing to include Telecom Operating Assistants (TOA) cadre in the list of notified jobs and to prepare 100 point reservation register for PH persons and to consider claim of respondent – Held: Promotion in physically handicapped quota was limited to certain categories of posts as identified by High Powered Committee constituted for the purpose -- TOA was not identified for the purpose of reservation for physically handicapped persons – Chief Commissioner has no power to direct inclusion of one more category among the identified categories and to grant the benefit – He exceeded the powers conferred on him u/s 59 – Order of Chief Commissioner, as confirmed by High Court, is set aside – Service law – Reservation in promotion for physically handicapped persons.

The respondent was appointed as a Lower Division Clerk on compassionate ground in the Post Master General's Office in 1973. Later, on bifurcation of the PMT Department into Departments of Posts and Telecommunications, the respondent opted for

A Telecommunications Department. The respondent on his normal turns was promoted to higher posts and was ultimately promoted as Telecom Operating Assistant TOA Grade-III (Senior Section Supervisor), w.e.f. 01.07.1999. He then applied for promotion under the physically handicapped person's quota on the basis of OM No.36035/8/89-Estt.(SCT) dated 20.11.1989. The claim was declined by the appellant-BSNL. On the complaint filed by the respondent, the Chief Commissioner directed to include the TOA cadre in the list of identified jobs issued by Department of Telecommunications published in the Gazette notification No.178 dated 30.06.2001, to prepare a 100 point reservation register for PH persons, and to consider the claim of the respondent-complainant for promotion under reserved vacancies for the grade(s) as a PH person against reserved vacancies. The writ petition filed by BSNL was dismissed by the High Court ordering that the benefit of LSG cadre be given to the respondent from 01.03.1992.

E In the instant appeal filed by BSNL, the question for consideration before the Court was: "whether the Chief Commissioner has got the powers to order regularization of promotion and identification of eligible posts in a cadre, in the Department of erstwhile Telecommunications, while exercising powers under Section 59 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

Allowing the appeal, the Court

G HELD: 1.1. The Department of Personnel and Training by OM dated 20.11.1989 introduced reservation in favour of physically handicapped persons in posts filled by promotion (i) within Group 'D', (ii) from Group 'D' to Group 'C', and (iii) within Group 'C'. The promotion in the physically handicapped quota was limited to five

categories of posts as identified by the High Powered Committee, namely, JTO, JAO, Stenographers, JE (Civil) and JE (Electrical). TOA was not identified for the purpose of reservation for physically handicapped persons. The Chief Commissioner has no power to direct inclusion of one more category among the identified categories and to grant the benefit. [Para 6, 9-10 and 12] [568-G-H; 570-D-E, F, H; 571-A; 572-B-C]

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1.2. An employee who chose to join the new cadre of TOA cannot revert back for claiming any financial or promotion benefit in both the cadres simultaneously. TOA cadre was introduced in the circle office w.e.f. 09.09.1992 and the respondent had opted for TOA pattern with effect from the said date. Consequently, the respondent was working as TOA at the relevant time and, therefore, his claim for promotion to Grade-IV could not be allowed since the promotion to the Grade was based on seniority in the basic cadre and in fact there was no reservation even for SC/ST candidates for promotion to Grade-IV. [Para 7 and 10] [569-G; 571-B-C]

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1.3. The Chief Commissioner u/s 59 of the 1995 Act has got only the power to examine the matters relating to "deprivation of rights" of persons with disabilities. He can only examine whether the persons with disabilities have been deprived of any "rights" for which first it is to be examined whether the complainant has any "rights" under the laws. The Chief Commissioner cannot confer or create any right for the complainant before him. The respondent could not establish that the Department denied any right conferred on him. [Para 12] [571-G-H; 572-A-B]

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1.4. The Chief Commissioner as well as the High Court have failed to appreciate that the respondent was working in a cadre in which there was no reservation for promotion under physically handicapped quota. Further,

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A exclusion of TOA cadre from the promotional post of physically handicapped persons is due to a policy decision of the Government of India taken by the then Department of Telecommunications. In such
B s 59 of the 1995 Act to direct the inclusion of TOA cadre in the list of identified posts and then to order preparation of reservation register for physically handicapped persons and to consider the claim of the respondent for promotion under the reserved vacancies for the various
C Grades under TOA. The Chief Commissioner has exceeded the powers conferred on him u/s 59 of the Act of 1995. Consequently, the order of the Chief Commissioner, as confirmed by the High Court is set aside. [Para 11-13] [571-D-F; 572-E-F]

D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8947 of 2013.

From the judgment and Order dated 19.02.2007 of the High Court of Kerala at Ernakulam in W.P. (C) No. 30816 of
E 2003.

Rahul Kaushik, Bhuvneshwari P. Kaushik, Ashok Kumar Singh for the Appellants.

Nidhi for the Respondent.

F The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. Leave granted.

2. We are in this case concerned with the question whether the Chief Commissioner has got the powers to order
G regularization of promotion and identification of eligible posts in a cadre, in the Department of erstwhile Telecommunications, while exercising powers under Section 59 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act of 1995').

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3. The Respondent was appointed as a Lower Division Clerk on compassionate ground in relaxation of normal recruitment rules, including upper age limit and typing test, in the Post Master General's Office Trivandrum on 23.01.1973 in the PMT Department, which was later bifurcated into Departments of Posts and Telecommunications. The Respondent then opted for Telecommunications Department. Nomenclature of posts of Lower Division Clerk/Upper Division Clerk/Office Superintendent (LDC/UDC/OS in short) was changed as Telecom Operating Assistants in the Telecom Department. Telecom Office Assistant (TOA in short) Grade-I included LDC/UDC/OS, Grade-II included Section supervisors, Grade-III included Senior Section Supervisors, Grade-IV included Chief Section Supervisors. The above categorization was done w.e.f 09.09.1992. The Respondent was later promoted as ad hoc UDC w.e.f. 1977 and was promoted as UDC on regular basis w.e.f. 04.11.1982 on seniority-cum-fitness quota. Later he was placed as TOA Grade-II (Section Supervisor) w.e.f. 09.09.1992. The Respondent was again promoted as TOA Grade-III (Senior Section Supervisor), w.e.f. 01.07.1999.

4. The Respondent then applied for promotion under the physically handicapped person's quota after availing all facilities of restructured Cadre on the basis of the OM No.36035/8/89-Estt.(SCT) dated 20.11.1989, which was considered and rejected by BSNL on the ground that no relaxation/reservation in promotion was permissible under schemes for physically handicapped persons as in the case of Scheduled Caste/Scheduled Tribe (SC/ST in short) officials. Further, it was also noticed that the respondent's appointment was not under physically handicapped quota. The Respondent, aggrieved by the rejection order passed by the BSNL filed a complaint before the Commissioner, praying that he should be given promotion to the post of Lower Selection Grade (LSG in short) (Section Supervisors) retrospectively w.e.f. 20.11.1989 and to the upgraded clerical posts of TOA Grade-III (Senior

A Section Supervisors) and TOA Grade-IV (Chief Section Supervisors) w.e.f. 07.02.1996. The Chief Commissioner entertained the complaint and registered case No.1109/2001 under Section 59 of the Act of 1995. The Commissioner after hearing parties and examining various contentions passed the following order on 26.12.2002. The operative portion of the same reads as under:

C “The respondents are, therefore, directed to include the TOA cadre which is required to do clerical work and other such jobs in the list of identified jobs issued by Department of Telecommunications vide their letter No.1-8/2001/AO(SNG) dated 18.10.01 to be in conformity with the list of identified jobs published in the Gazette notification No.178 dated 30.06.2001 referred to above. Upon identification of the cadre for PH persons, the respondents are directed to prepare a 100 point reservation register for PH persons as required under the existing instructions of Department of Personnel & Training/ Department of Telecommunications and to consider the claim of the complainant for promotion under reserved vacancies for the grade(s) if he becomes eligible as a PH person against reserved vacancies.”

F 5. BSNL, aggrieved by the above-mentioned order approached the Kerala High Court by filing Writ Petition No.30816 of 2003 which was dismissed by a learned Single Judge vide order dated 19.02.2007, ordering that the benefit of LSG cadre be given to the respondent from 01.03.1992. Aggrieved by the same, this appeal has been preferred by special leave.

G 6. The Department of Personnel and Training vide its OM dated 20.11.1989 introduced reservation in favour of physically handicapped persons in posts filled by promotion in (i) within Group ‘D’ (ii) from Group ‘D’ to Group ‘C’ and (iii) within Group ‘C’. Reservation was provided for three categories of persons namely, visually handicapped, hearing handicapped and

orthopedically handicapped. The applicability of reservation was, however, limited to the promotion being made to those posts that were identified as being capable of being filled/held by these appropriate categories of handicapped persons. On 09.09.1992, a new cadre was created under restructuring scheme of erstwhile Department of Telecommunications. A choice was given to the employees working in the clerical stream to opt for the new cadre of TOA or to remain in the clerical cadre. The posts in the clerical cadre became redundant as the majority of the employees had chosen to join the new cadre due to the difference in pay scale advantageous to them. Names of cadre and pay scales are given below for ready reference:

	Name of The erst-while cadre	Pay scale (Rupees)	Name of cadre under TOA pattern w.e.f. 09.09.1992	Pay scale (Rupees)
1	LDC	950-1400	TOA-GR-1	975-1660
2	UDC	1200-1800	TOA GR-II [SS(O)]	1400-2300
3	LSG	1400-2300	TOA GR-III [Sr.SS(O)]	1600-2550
4	OS	1600-2600	TOA GR-IV (CSS)	1640-2900

7. An employee who chose to join the new cadre of TOA cannot revert back on his own choice for claiming any financial or promotion benefit in both the cadres simultaneously. The Respondent had opted for restructured cadre of TOA. Consequently, he was placed as TOA-Grade-II (Section Supervisor) w.e.f. 09.09.1992 when restructured scheme was implemented on 09.09.1992.

A 8. The Department of Telecommunications formed a High
Power Committee for identification of posts in group 'C' from
'D' for the purpose of 9% reservation for physically
handicapped persons. The Committee identified 5 cadres,
B namely, JTO, JAO, Stenographers, JE (Civil) and JE
(Electrical), which was circulated for compliance vide letter
No.226-07/96-STN dated 12.05.1997. The Respondent in the
meanwhile was promoted as TOA Grade-III (Senior Supervisor)
w.e.f. 01.07.1999. He later applied for promotion under the
physically handicapped quota after availing of all the facilities
C of restructured cadre. In fact, he claimed promotion to the post
of LSG (SS) with retrospective effect w.e.f.20.11.1989 and to
the upgraded clerical post of TOA Grade-III (Sr. SS) and TOA
Grade-IV (CSS) w.e.f. 07.02.1996, which was rejected by the
Department.

D 9. We notice that the promotion in the physically
handicapped quota was limited to certain categories of posts
as identified by the High Powered Committee constituted for
the purpose of identification of the cadre. The High Power
E Committee was constituted by the erstwhile Telecommunication
Department for identifying the post to which physically
handicapped persons could be promoted under the physically
handicapped reservation quota. The High Power Committee
had identified five cadres for promotion and they were JTO,
F JAO, Stenographers, JE (Civil) and JE (Electrical). The
operative portion of the Circular dated 1.5.1997 reads as
follows:

G "Now, it has been decided to have a reservation of 1.5%
each for partially hearing impaired which can be improved with
hearing aid and for locomotive disability effecting one leg or
limb only in the vacancies in the cadre of JTO, JAO, JE (Civil),
JE (Electrical) and Stenographers for direct recruitment quota
as well as department quota."

H 10. We notice that the cadre of clerks was not identified

for the purpose of promotion under the physically handicapped reservations. Since the respondent was a TOA, he could not be considered for physically handicapped quota in Sr. TOA cadre. TOA cadre was introduced in the circle office w.e.f. 09.09.1992 and the Respondent had opted for TOA pattern with effect from the said date and it was with his own consent. Consequently, the respondent was working as TOA at the relevant time which was not identified for the purpose of reservation for physically handicapped persons and hence his claim for promotion to Grade-IV could not be allowed since the promotion to the Grade was based on seniority in the basic cadre and in fact there was no reservation even for SC/ST candidates for promotion to Grade-IV.

11. We are of the view that the Chief Commissioner as well as the High Court have failed to appreciate that the respondent was working in a cadre in which there was no reservation for promotion under physically handicapped quota. Further exclusion of TOA cadre from the promotional post of physically handicapped persons is due to a policy decision of the Government of India taken by the then Department of Telecommunications. In such circumstances, the Chief Commissioner has no power under Section 59 of the Act of 1995 to direct the inclusion of TOA cadre in the list of identified posts and then to order preparation of reservation register for physically handicapped persons and to consider the claim of the respondent for promotion under the reserved vacancies for the various Grades under TOA.

12. The Chief Commissioner under Section 59 of the Act of 1995 has got only the power to examine the matters relating to "deprivation of rights" of persons with disabilities. The Commissioner can only examine whether the persons with disabilities have been deprived of any "rights" for which the Commissioner has to first examine whether the complainant has any "rights" under the laws. The Commissioner cannot

- A confer or create any right for the Appellants. The respondent could not establish that any right has been conferred on him and such right has been denied to him by the Department. The Respondent wanted conferment of a right which was extended only to specific five categories of posts on the basis of the report of a High Power Committee. The Chief Commissioner has no power to direct inclusion of one more category among the identified categories and to grant the benefit. Under Section 59(b) the Chief Commissioner has got the power to look into the complaints with respect to the matters relating to non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made or issued by the appropriate Government and the local authorities for the welfare and protection of rights or persons with disabilities. It is not the case of the respondent that the Department has failed to implement either any laws, rules or regulations. The Respondent prayed for positive direction, claiming certain rights, which had not been conferred on him either by any law, regulations or orders. Consequently, the directions given by the Chief Commissioner for the inclusion of TOA cadre among the identified categories cannot be sustained and the Commissioner while passing such order has exceeded the powers conferred on him under Section 59 of the Act of 1995.

F 13. We, for the reasons mentioned above, allow this appeal and set aside the order of the Chief Commissioner, as confirmed by the High Court. There shall be no order as to costs.

R.P.

Appeal allowed.