

PRADIP KUMAR MAITY
v.
CHINMOY KUMAR BHUNIA & ORS.
(Civil Appeal No. 4820 of 2013)

JULY 01, 2013

[ALTAMAS KABIR, CJI, ANIL R. DAVE AND
VIKRAMAJIT SEN, JJ.]

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

**Section 38 -- Age relaxation vis-à-vis physically
handicapped - Appointment of physically handicapped
challenged as he had crossed the age prescribed - Held:
Expression "appropriate Government and local authority shall
formulate schemes for ensuring employment of persons with
disability" and "may provide for relaxation of upper age limit"
- Connotation of - Where the Legislature uses the words 'shall'
and 'may' in close proximity of each other, as in s. 38, word
'may' cannot be construed as mandatory -- Act postulates age
relaxation only as directory or expectant - Failure to mandate
age relaxation is a lacuna in the legislation - Since the
Government Order not providing age relaxation to physically
handicapped continues to hold the field, succour cannot be
extended to appellant who is indubitably suffering from a
disability - Government of West Bengal Memo No. 1736(21)
GA dated 1.11.1999 - Service law -- Age relaxation to
physically handicapped - Costs -- Proclamation adopted by
the Economic and Social Commission for Asian and Pacific
Region (ESCAP) - Legislation.**

**Section 2(t) - 'Person with disability' -- Held: Means a
person suffering from not less than forty per cent of any**

A *disability as certified by a medical authority -- On the coming into force of the Disabilities Act on 7.2.1996, the definition in s.2(t) shall apply notwithstanding any State legislation or Rules irreconcilable or repugnant thereto.*

B The appellant, a physically handicapped, suffering from 60% hearing disability, and respondent no. 1 were interviewed for the post of Group 'D' non-teaching staff. The appellant securing first place in the merit list was appointed. Respondent no. 1, who secured second position, challenged the appointment of the appellant on the ground that on the date of interview he had crossed the age prescribed. Though concurrent finding of the single Judge and the Division Bench of the High Court were against the appellant, he continued to hold the post even during the pendency of the instant appeal.

D Dismissing the appeal, the Court

E HELD: 1.1 Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, inter alia, ordains in Chapter VI, provisions relating to the employment of disabled persons through the device of reservation of posts, setting apart not less than three per cent (3%) seats in Government educational institutions and other educational institutions receiving aid from Government. Section 38 postulates that the appropriate Government and local authority shall formulate schemes for ensuring employment of persons with disabilities and such schemes may provide for the relaxation of upper age limits. Where the Legislature uses the words 'shall' and 'may' in close proximity of each other, as in s. 38, word 'may' cannot be construed as mandatory. [para 3] [122-E-F; 123-C-E]

H *Chinnamarkathian Vs. Ayyavoo* 1982 (2) SCR 146 = (1982) 1 SCC 159 - relied on.

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'Principles of Statutory Interpretation' by G.P. Singh - A
referred to.

*Proclamation adopted by the Economic and Social
Commission for Asian and Pacific Region (ESCAP) - B
referred to.*

**1.2 The Disabilities Act does not in terms provide for
age relaxation vis-a-vis persons suffering from
disabilities, though this ought to have been woven into
the fabric of the statute. The failure to mandate age
relaxation is a lacuna in the legislation since it fails to
comprehensively put in place affirmative action in favour
of the disabled sections with regard to employment in
even the non-reserved posts. The Disabilities Act should,
therefore, explicitly postulate compulsory relaxation of
age of candidates suffering from any of the statutorily
recognized disabilities. [para 3 and 8] [123-G-H; 126-A;
129-A-B] C
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**1.3 Section 2(t) defines a 'person with disability' to
mean a person suffering from not less than forty per cent
of any disability as certified by a medical authority.
Therefore, it cannot be accepted that this definition would
not enure to the benefit of the appellant for the reason
that the Rules/Government Orders extant in the State of
West Bengal speak to the contrary inasmuch as they
postulate complete disability. The Disabilities Act pays
obeisance to the Constitution The definition of deafness
or hearing impairment contained in the extant
Government Orders must immediately measure to the
definition contained in the Disabilities Act. On the coming
into force of the Disabilities Act on 7.2.1996, the definition
in s.2(t) shall apply notwithstanding any State legislation
or Rules irreconcilable or repugnant thereto. [para 4 and
9] [124-D-F; 130-D-F] E
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1.4 Age relaxation was available in the State of West H

A Bengal for the physically handicapped or disabled till 1999. However, the Memo No. 1736(21) G.A. dated 1.11.1999, inter alia, introduced benefits to Other Backward Classes, but withdrew or deprived it to disabled defence personnel and physically handicapped candidates. Keeping the ethos, expectations and endeavours of the Disabilities Act as well as the Beijing Declaration in mind as well as at heart, the deletion of age relaxation is facially a retrograde action. However, keeping extant legislation and executive fiats in perspective, since age relaxation is not available post 1.11.1999 to the physically handicapped in the State of West Bengal and since the Disabilities Act postulates age relaxation only as directory or expectant, the Government Order will continue to hold the field and, as such, succour cannot be extended to the appellant who is indubitably suffering from a disability. Keeping in view the fact that the appellant has not succeeded before the single Judge as well as the Division Bench of the High Court, as also before this Court, he shall be liable to pay costs to respondent No.1. [Para 6-9 and 11] [126-H; 127-E; 129-C-D; 131-B]

F *Saiyad Mohammad Bakar El-Edroos v. Abdulhabib Hasan Arab* 1998 (2) SCR 648 = (1998) 4 SCC 343 and *K.P. Sudhakaran v. State of Kerala* 2006 (2) Suppl. SCR 291 = (2006) 5 SCC 386 - referred to.

Case Law Reference:

	1982 (2) SCR 146	relied on	para 3
G	1998 (2) SCR 648	referred to	para 9
	2006 (2) Suppl. SCR 291	referred to	para 9

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From the Judgment and Order dated 05.09.2007 of the High Court at Calcutta in FMA No. 399 of 2006. A

A.K. Ganguli, Samapati Chatterjee, Soumen Kumar Dutta, Sarla Chandra for the Appellant.

Gaurav Jain, Abha Jain, Subir Sanyal, Kamal Mishra, Avijit Bhattacharjee, Sarbani Kar for the Respondents. B

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted. We have heard counsel for the parties in detail and hence proceed to deliver judgment. C

2. The dispute pertains to the employment of the Appellant and Respondent no.1 in the Group 'D' staff (non-teaching staff) of the Nazirbazar Harendranath High School, Nazirbazar, Medinipur, West Bengal (Respondent no.6). Pursuant to holding of the interviews, the Appellant was placed first in the merit list followed by the Respondent no.1 in second position. Respondent no.1, thereafter, challenged the appointment of the Appellant on the ground that he had crossed the permissible age prescribed for recruitment to this Group 'D' post even on the date when the interview was conducted and completed. However, the Appellant's contention is that he was entitled to relaxation in the maximum age as a consequence of his suffering from a hearing disability to the extent of sixty per cent (60%). The factum of his said affliction is not in dispute, although it has been faintly argued by Mr. Sanyal, learned counsel for Respondent no.1 that the applicable Rules and Regulations contemplate complete loss of audio powers for favourable treatment; and that the forty per cent (40%) disability, indubitably prescribed by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 [hereafter referred to as, 'Disabilities Act'] does not come to the succour of the Appellant. Despite the fact that the Appellant had not succeeded in the writ proceedings before the D
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A learned Single Judge and thereafter had also failed in his Appeal before the Division Bench of the Calcutta High Court, he appears to have been in the employment of Respondent no.6 throughout the duration of litigation and remained so on 01.10.2007 when the maintenance of status quo came to be ordered in the present proceedings. We may also underscore that concurrent findings are against the Appellant.

3. The Disabilities Act was passed by Parliament in the wake of the Proclamation that came to be adopted by the Economic and Social Commission for Asian and Pacific Region (ESCAP), the endeavour and expectation of which was the attainment of full participation and equality to persons with disabilities in the matter of protection of their rights, provision of medical care, education, training, employment and rehabilitation. Keeping in perspective that India was a signatory to the said Proclamation, necessitating its wholesome and holistic implementation, the Disabilities Act was introduced in the Lok Sabha on 26th August 1995 and came into force on 7th February 1996. The Disabilities Act, inter alia, ordains in Chapter VI, provisions relating to the employment of disabled persons through the device of reservation of posts, establishment of Special Employment Exchanges, the formulation of schemes for ensuring employment of persons with disabilities and the reservation and setting apart of not less than three per cent (3%) seats in Government educational institutions and other educational institutions receiving aid from Government etc. etc. The Disabilities Act also specifically stipulates that if in any recruitment year any vacancy cannot be filled up due to non-availability of persons with disabilities, i.e., (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy, such vacancy shall be carried forward. If in the succeeding year the vacancies in the three categories cannot yet again be filled up by an eligible candidate, the vacancy must first enure to the benefit of any of the other two categories; and only in the event that there are no candidates even therefrom, can the employer fill up such

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segregated or reserved vacancy by a general appointment. It is also noteworthy that the reservation of three per cent (3%) is a minimum requirement. So far as Government as well as aided educational institutions, also poverty alleviation schemes of appropriate Government and local authorities are concerned, the statute mandates a three per cent reservation for the benefit of persons with disabilities; failure to implement these provisions can be remedied by issuance of a writ of mandamus. The two sections, i.e., Sections 39 and 40 containing these stipulations are preceded by Section 38, which is germane to the conundrum at hand. It postulates that the appropriate Government and local authority shall formulate schemes for ensuring employment of persons with disabilities and such schemes may provide for the relaxation of upper age limits. Owing to the use of the word 'may' in the section, the question that immediately arises is whether even in the absence of an implemental scheme, can a superior Court issue an inviolable order with regard to the relaxation of upper age limits. *Chinnamarkathian Vs. Ayyavoo* (1982) 1 SCC 159 holds that whenever the word 'may' is employed in a statute it confers discretion to do something. It seems to us that in instances where the Legislature uses the words 'shall' and 'may' in close proximity of each other, as in Section 38, there is virtually no room to construe the word 'may' as mandatory. Indeed, the decisions in this context dwell predominantly on the scope of interpreting "shall" as merely obligatory, whereas the nodus in hand is the obverse. G.P. Singh in his treatise titled, the 'Principles of Statutory Interpretation' remains steadfast in the opinion that when both words are used in the same Section, 'shall' imposes an obligation or imperative whilst 'may' connotes directive or discretionary power. The Disabilities Act should, therefore, explicitly postulate compulsory relaxation of age of candidates suffering from any of the statutorily recognised disabilities. The absence of this feature has become conspicuous by the dispute in hand. We think that the failure to mandate age relaxation is a lacuna in the legislation since it fails to comprehensively put in place affirmative action in favour

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A of the disabled sections of our society with regard to employment in even the non-reserved posts. The critique that this would unfairly increase the percentage of reservation does not pass muster since so far as non-reserved posts are concerned, the appointment has to be solely according to merit.

B Age relaxation enables disabled persons, otherwise outside the orbit of employment to general posts, an additional opportunity of being considered for such post. It is dissimilar to the regime of a reserved post where only a person in the postulated group is eligible for appointment. One readily recalls the self-

C deprecation of the saint who realized the triviality of his lament for not possessing a pair of shoes on his encountering a person who had no feet. When a relaxation of age is extended to the disabled, the post remains to be nevertheless filled up by adherence to merit.

D 4. Before departing from this skeletal narration of the provisions of the Disabilities Act, suffice it to state that Section 2(t) defines a 'person with disability' to mean a person suffering from not less than forty per cent of any disability as certified by a medical authority. Therefore, we cannot accept the argument

E of Mr. Sanyal that this definition would not enure to the benefit of the Appellant for the reason that the Rules / Government Orders extant in the State of West Bengal speak to the contrary inasmuch as they postulate complete disability. On the coming

F into force of the Disabilities Act on 7th February 1996, the said definition in Section 2(t) thereof shall apply notwithstanding any State legislation or Rules irreconcilable or repugnant thereto. This proposition of law is too well settled to tolerate any explanation again; doing so would needlessly lead to prolixity. However, despite this legal posit, as will presently be seen,

G relief will still not be available to the Appellant.

H 5. Reverting to the position obtaining in the State of West Bengal at the relevant time, our attention has been drawn to the Government Order dated August 26, 1986 which reads as follows :

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"Sub: Recruitment of Assistant teacher, non-teaching staff and Headmaster/Headmistress of non-Government Secondary Schools - Upper-age limit for physically handicapped candidates. A

The undersigned is directed to say that in terms of this department Memo No.454-Edn.(S) dated 25.4.83 the upper-age limit for first entry into service of Assistant Teachers and non-teaching staff has been prescribed as 35 years. The age limit is relaxable upto 40 years for experienced and highly qualified candidates and for candidates belonging to Scheduled Caste and Scheduled Tribe, disabled defence personnel and physically handicapped candidates. But in terms of Finance Department Memo No.105-17-F dated 2.12.80 the upper-age limit for recruitment to State Government Service and posts whether recruited through the Public Service Commission or otherwise, has been prescribed as 45 years in the case of physically handicapped persons provided they are otherwise suitable. B C D

(2) In view of the position stated above, the Government have after careful consideration, decided that the upper-age limit for first entry into service of Assistant teachers and non-teaching staff of Non-Government Secondary Schools will be **45 years in the case of physically handicapped persons provided they are otherwise suitable and possess the qualifications and capacity to perform duties and responsibilities attached to the posts concerned.** E F

(3) Grant of the above concessions shall be subject to the following conditions: G

(i) The "physically handicapped" as illustrated in item (ii) below should be proved by a medical certificate from Competent Medical Officer as defined in Rule 14 of West Bengal Service Rules Part-I. H

A (ii) For the purpose of the concessions the term 'Physically handicapped' will include three categories viz., the blind, the deaf and dumb and the orthopaedically handicapped as indicated below:

B (a) The blind - The blind are those who suffer from the following conditions -

(i) Total absence of sight.

C (ii) Visual acuity not exceeded 3/60 or 10/200 (Smellen) in the better eye with correcting lense.

D (b) The deaf and dumb - The deaf are those in whom the sense of hearing is fully non-functional for the ordinary purpose of life. The dumb are those persons suffering from aplasia (complete loss of speech-sense of hearing normal) or whose speech is not clear and/ or normal.

E (c) The orthopaedically handicapped are those who have physically defects or deformities which cause adequate interference with the normal functioning of bones, muscles and joints.

F This order shall be deemed to have come into force with effect from 25.4.83, i.e., the date of issue of order No.454-Edn.(S) dated 25.4.83."

[Emphasis supplied]

G 6. This Government Order was partially modified by letter dated July 29, 1990 conveying to all concerned the following :

H "In supersession of this Department G.O. No.454 Edn.(S) dated 25.04.83 the undersigned is directed to say that after careful consideration, the Government have decided that the upper age limit for first entry into service of Assistant

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Teacher and non teaching staff in Non Govt. Secondary Schools shall be 35 years. The age limit is relaxable upto 40 years for candidates belonging to Scheduled Caste and Scheduled Tribe, Disabled defence personnel and physically handicapped candidates.

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As will be palpably clear, age relaxation was available for the physically handicapped or disabled till 1999 although the relaxation stood reduced from 45 years to 40 years of age.

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7. Mr. Sanyal, learned counsel for the Respondent no.1 has emphasized the point that age relaxation was specifically dealt with in both the above Government Orders, and since the age relaxation for the defence personnel and physically handicapped or disabled has notably been deleted from subsequent Government Orders it is facially clear that this advantage was not found by the State of West Bengal to be expedient any longer. It is for this purpose that reliance was placed on behalf of Respondent no.1 to Memo No.1736(21) G.A. dated 1st November 1999 which, inter alia, introduced benefits to Other Backward Classes whilst withdrawing or depriving it to disabled defence personnel and physically handicapped candidates :

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"GUIDELINE FOR RECRUITMENT OF NON-TEACHING STAFF (LIBRARIAN, CLERK, GROUP D STAFF) OF NON GOVT. AIDED SECONDARY SCHOOLS, HIGHER SECONDARY SCHOOLS, GOVT. SPONSORED SCHOOLS, D.A. GETTING SCHOOLS AND ALL TYPES OF AIDED MADRASAHs INCLUDING SENIOR MADRASAHs AND NEWLY SET UP EDUCATIONAL INSTITUTION AT SECONDARY LEVEL IN WEST BENGAL

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4.d) No person shall be selected for appointment unless

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A he/she is a citizen of India and 18 years of age or above. The maximum age limit for appointment in Aided Institution is 37 years and as relaxable in case of S.C./S.T./O.B.C. candidates as per existing Government orders.

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This Memorandum states that it is in supersession of all previous orders of that Department in respect of procedure for recruitment of non-teaching staff of any Institution. Predicated on this Memorandum it is contended against the Appellant that age relaxation provided in the 1990 Government Order stood withdrawn; that this position has been reiterated in Government Order dated 21st January 2003 which states that non-teaching posts must be filled up only on the basis of the guidelines for recruitment as contained in Memo No.1736(21) G.A. dated 01st November 1999 issued by the Directorate of Education, West Bengal :

"In the circumstances, the undersigned is directed by the order of the Governor to say that henceforth all appointments in teaching and non-teaching posts available as vacant either due to retirement/death/resignation of an existing employee or due to creation of posts in the aforesaid institutions on first recognition or upgradation or otherwise should be filled up only as follows :

F (a) In case of whole-time teaching post, through the School Service Commission of the concerned region; and

G (b) In case of a non-teaching post, on the basis of the guidelines for recruitment as contained in Memo No.1736(21) G.A. dt. 01.11.99 issued by the Director of School Education, West Bengal.

H This cancels the earlier Govt. orders in Memo No.117-SE(S) dt. 24.02.1995 and Memo No.511-SE(S) dt.29.03.2000.

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This will take immediate effect."

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8. We have already underscored that the Disabilities Act does not in terms provide for age relaxation vis-a-vis persons suffering from disabilities and that this ought to have been woven into the fabric of the statute. Had this been so done, it would have been mandatorily incumbent on every State to fall in line with and implement the Central legislation especially so far as extending the maximum age eligibility criterion for the disabled. Having said so, and keeping the ethos, expectations and endeavours of the Disabilities Act as well as the Beijing Declaration in mind as well as at heart, it seems to us that the deletion of age relaxation is facially a retrograde action. However, keeping extant legislation and executive fiats in perspective, since age relaxation is not available post 1st November 1999 to the physically handicapped in the State of West Bengal, regrettably, succour cannot be extended to the Appellant who is indubitably suffering from a disability. Relief for the disadvantaged in our society should be holistic and should be implemented with vigour. Although the issue is not focal before us, we also think that it is most unfortunate that the exercise to identify and earmark posts suitable for being filled up by total reservation for the disabled to the extent of a minimum of three per cent has not been completed thereby reducing the statutory promise to a mere hallucination. We hasten to reiterate that the present case does not fall in the genre of reservation but of relaxation of age.

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9. Since the legal regime applicable to amelioration of the persons suffering from disabilities has been argued before us, we need to dwell upon it briefly. Briefly, because this aspect of the law is so well entrenched in our jurisprudence that only a succinct reiteration is justified. The Constitution of India is the grund norm, demanding meticulous allegiance from all other laws. Statutes, central/parliamentary or of State legislatures, must mandatorily comply with our Constitution. We must hasten to emphasise that statutes must also conform with the discipline

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A of the three lists contained in the Seventh Schedule of the
Constitution. Most statutes postulate the promulgation of Rules,
through delegated legislation, which, if they are not ultra vires
the Statute inasmuch as they are operational within the
parameters of their parent pandects, require adherence.
B Executive Orders or Administrative Instructions cease to have
legal efficacy the moment they are contrary to their superiors,
i.e., the Constitution, a Statute, or any delegated legislation in
the form of Rules or Regulations. This is also referred to as
"dominion paramountcy" by some Courts. There is a plethora
C of precedents on this proposition, as also on the tiers of
subservience, including the adumbration in the case of *Saiyad
Mohammad Bakar El-Edroos v. Abdulhabib Hasan Arab*
(1998) 4 SCC 343 and *K.P. Sudhakaran v. State of Kerala*
(2006) 5 SCC 386. The Disabilities Act pays obeisance to the
D Constitution and had it concerned itself with improving the lot
of the disabled by also providing for compulsory relaxation of
age stipulations for employment having regard to disability, all
other contrary forms of law-making by State Legislatures or
State Governments would have fallen foul of it, and consequently
E would have ceased to command legal authority. Thus, the
definition of deafness or hearing impairment contained in the
extant Government Orders must immediately measure to the
definition contained in the Disabilities Act. But since the
Disabilities Act postulates age relaxation only as directory or
F expectant, the Government Order will continue to hold the field.

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10. Mr. Ganguly, learned senior counsel appearing for the
Appellant has not contended that the Government Orders
mentioned above are ultra vires the Disabilities Act or that they
are devoid of being functional. This is also the dialectic favoured
G by the Division Bench of the Calcutta High Court in the
impugned judgment, which we affirm.

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11. In this analysis we cannot but conclude that the
Appellant has failed to disclose any Legislation or Rules or
Orders that would facilitate, support or legitimise his claim for

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being conferred with the advantage of age relaxation, which is presently available only to SC/ST/OBC candidates. It is for these reasons that regretfully we are unable to locate any merit in the present appeal. Interim orders are accordingly recalled and the appeal is dismissed. Keeping in view the fact that the Appellant has not succeeded before the Single Bench as well as the Division Bench, as also before us, he shall be liable to pay costs to Respondent No.1.

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Appeal dismissed.