

GAHC010112622020



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**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : WP(C)/3299/2020**

DUL MALLA BUZAR BARUAH  
S/O. LT. BIDYA MALLA BUZAR BARUAH, VILL. AND P.O. CHANDKUCHI,  
P.S. NALBARI, PIN-781335, DIST. NALBARI, ASSAM.

VERSUS

THE STATE OF ASSAM AND 6 ORS.  
REP. BY THE COMM. AND SPL. SECRETARY TO THE GOVT. OF ASSAM,  
P.W.D. (ROADS) DEPTT., DISPUR, GUWAHATI-781006.

2:THE COMMISSIONER AND SPL. SECRETARY  
TO THE GOVT. OF ASSAM  
(BUILDING AND NATIONAL HIGHWAY)  
DISPUR  
GUWAHATI-781006  
ASSAM.

3:THE SECRETARY

PWD (R)  
DISPUR  
GUWAHATI-781006.

4:THE CHIEF ENGINEER

P.W.D. (NH) GUWAHATI  
ASSAM  
PIN-781003.

5:THE COMMISSIONER AND SECY.  
TO THE GOVT. OF ASSAM  
PERSONAL (B) DEPTT.

GOVT. OF ASSAM  
DISPUR  
GUWAHATI  
PIN-781006.

6:THE SECRETARY  
TO THE GOVT. OF ASSAM  
SOCIAL WELFARE DEPTT.  
DISPUR  
GUWAHATI-781006.

7:THE ASSAM PUBLIC SERVICE COMMISSION  
REP. BY ITS CHAIRMAN  
KHANAPARA  
GUWAHATI-781022

**Advocate for the Petitioner** : MS D BORGOHAIN, MS. M SARMAH,MR. P GOHAIN

**Advocate for the Respondent** : SC, P W D, SC, PERSONNEL DEPT.,SC, APSC,GA, ASSAM

Linked Case : WP(C)/3317/2020

MAHANTA GOGOI  
S/O. LT. INDRA NATH GOGOI  
R/O. KANAKLATA PATH  
BHARALUPAR  
LACHIT NAGAR  
GUWAHATI-781007.

VERSUS

THE STATE OF ASSAM AND 6 ORS.  
REP. BY THE COMM. AND SPL. SECY. TO THE GOVT. OF ASSAM  
P.W.D. (ROADS) DEPTT.  
DISPUR  
GUWAHATI-781006.

2:THE COMMISSIONER AND SPL. SECY.

PWD (BUILDING AND NATIONAL HIGHWAY) DEPTT.  
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ASSAM  
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7:THE ASSAM PUBLIC SERVICE COMMISSION

REP. BY ITS CHAIRMAN  
KHANAPARA  
GUWAHATI-781022.

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Advocate for : MS D BORGOHAIN  
Advocate for : SC  
P W D appearing for THE STATE OF ASSAM AND 6 ORS.

**BEFORE  
HONOURABLE MR. JUSTICE KARDAK ETE**

**JUDGMENT**

**Date : 05.11.2024**

Heard Ms. D. Borgohain, learned counsel for the petitioner. Also heard Mr. D. Nath, learned Senior Government Advocate for the State of Assam and Ms.

P.P. Das, learned counsel appearing for the APSC.

2. Having considered that the issue involved in both writ petitions is analogous, same were heard together and are being disposed of by this common judgment and order.

3. By filing these two writ petitions, the petitioners have prayed for a direction to the respondent authorities to modify the O.M. dated 17.01.2019 so as to provide reservation in promotion to the post of Assistant Engineer (Civil) under Public Works Department, Government of Assam. The petitioners have also prayed for a direction to consider the case of the petitioners for promotion to the post of Assistant Engineer (Civil) against the 4% quota reserved for Persons With Disabilities (hereinafter PwD in short) as provided under the Rights of Persons with Disabilities Act, 2016, (hereinafter referred to as the Disabilities Act, 2016 in short).

4. The brief facts of the case are that the petitioners were appointed as Junior Engineer (Civil) under the Assam Public Works Department, who are PwDs. In WP(C) 3299/2020, the petitioner was appointed as Junior Engineer (Civil) under Assam Public Works Department, NH under Rangia Division on 03.10.1996. The petitioner suffers from Locomotor disability since 2014 and after re-examination of his disability, the Disability Certificate has been issued being registration No. 5088 dated 15.11.2017 to that effect and he has been receiving disability allowance since 19.08.2017.

5. In WP(C) 3317/2020, the petitioner was appointed as Junior Engineer (Civil) under Assam Public Works Department, Building on 21.11.1990. He became physical disabled in the year, 2016, which has been diagnosed as Spastic Left Hemiparesis and is a Locomotor Disability as per the provision

contained in the rights of persons with Disabilities Act, 2016. The petitioner has been issued a Disability Certificate being Certificate No. 1399 dated 16.08.2016. In course of their services, the petitioners in the meantime have become eligible to be promoted to the cadre of Assistant Engineer (Civil) and by now, have been promoted on their own merit and positions in the Department.

6. It is contended by the petitioners that under the Disabilities Act of 2016, the petitioners are entitled to a preferential treatment of reservation under the 4% reservation in terms of the provisions of the Disabilities Act, 2016.

7. It is the contention of the petitioners that office memorandum dated 07.01.2019 issued by the Department of Personnel (B), Government of Assam, inter alia, provides that the benefit of reservation in promotion for persons with benchmark disabilities will be limited to the Grade-III and IV posts, where 4% of the posts shall be reserved for persons with benchmark disabilities. Since the benefit of reservation in promotion for persons with benchmark disabilities will be limited to the Grade-III and IV posts only, the petitioner would be disentitled to a reservation in promotion to the cadre of Assistant Engineer (Civil) in the PWRD as because the cadre of Assistant Engineer (Civil) is Grade-II.

8. It is contended that as per the provision contained in Section-34 of the Disabilities Act, 2016, every appropriate Government shall appoint in every Government establishment not less than 4% of the total number of vacancies in the cadre strength in each group of posts meant to be filled up with persons with benchmark disabilities of which 1% each shall be reserved for persons with benchmark disabilities. The petitioner claims for implementation of the benefit of the Disabilities Act, 2016 and also relying on the decision of the Hon'ble Supreme Court in the case of **Rajeev Kumar Gupta and others -Vs- The Union of**

**India and Others** reported in **(2016) 13 SCC 153**. The petitioners have submitted a representation before the respondent authorities praying for consideration of their cases for promotion to the post of Assistant Engineer (Civil) under the disabled quota as 30% of the vacancies in the post of Assistant Engineer (Civil) is to be filled up by promotion from the feeder grade of Junior Engineer in terms of the relevant Recruitment Rules.

9. It is contended that the Office Memorandum dated 17.01.2019 is contrary to the provision contained in Section-34 of the Disabilities Act, 2016, as well as the law laid down by the Hon'ble Supreme Court in the case of **Rajeev Kumar Gupta** (Supra) as the Hon'ble Supreme Court has held that once a post is identified as being capable of being filled up by a disabled person it must be reserved for the disabled irrespective of the mode of recruitment adopted by the State for filling up such post.

10. During the pendency of the writ petitions, vide dated 21.05.2022, the Department of Personnel (B), Govt. of Assam, has issued office memorandum with regard to the quantum of reservation, wherein, inter-alia provided that in case of direct recruitment 4% of the total number of posts to be filled up by direct recruitment, in the cadre strength in each group of posts i.e. Grade-I, Grade-II, Grade-III and Grade-IV shall be reserved for Persons with Benchmark Disabilities. Benefits of reservation in promotion for Persons with Benchmark Disabilities will also be available in the cadre strength in each group of post i.e. Grade-I, Grade-II, Grade-III and Grade-IV where 4% of the total number of posts shall be reserved for Persons with Benchmark Disabilities provided that the posts are identified and suitable for Persons with Benchmark Disabilities.

11. In view of the above Office Memorandum Dated 21.05.2022, concededly,

the prayer for modification of the Office Memorandum Dated 17.01.2019 issued by the Department of Personnel (B), Govt. of Assam has become redundant. Thus, no consideration and determination is required to be made in this proceedings.

12. Now, the only issue to be determined is as to whether the petitioners are entitled to be considered for promotion to the post of Assistant Engineer (Civil) in terms of the mandate of law as provided under the Disabilities Act, 2016.

12. Ms. D. Borgohain, learned counsel for the petitioner submits that the respondent authority in the Assam Public Works Department, Govt. of Assam has effected promotion to the post of Assistant Engineer (Civil) during the pendency of these writ petitions without providing benefits of reservation in promotion for Persons with Benchmark Disabilities which has deprived the petitioners.

13. She submits that vide notification dated 11.01.2021 as many as 83 Junior Engineers (Civil) have been promoted to the post of Assistant Engineers (Civil). Thereafter, vide notification dated 29.06.2022 another 43 persons have been promoted to the rank of Assistant Engineers (Civil) from the post of Junior Engineers, as per the recommendation of the Selection Board, wherein, the petitioner in 3317/2020 , namely, Mahanta Gogoi has also been promoted. Thereafter, vide notification dated 13.09.2022 further 106 numbers of Junior Engineers have been promoted to the rank of Assistant Engineers (Civil) wherein, the petitioner in WP(C) 3299/2020, namely, Shri Dul Malla Buzar Baruah has also been promoted. However, all this promotions have been effected without following the reservation policy as well as mandate of the law under Disabilities Act, 2016, rather the petitioners have been promoted on their

own merit, which is in total violation of the mandate of the law as well as the judgment of the Hon'ble Supreme Court. Therefore, she submits that the respondent authorities may be directed to consider the case of the petitioners for promotion with retrospective effect.

14. Ms. D. Buragohain, learned counsel for the petitioner, referring to the affidavit filed by the respondent authorities to the effect that a total number of 8 nos. of Junior Engineers have been promoted in the cadre of Assistant Engineer (Civil) out of which 2 nos. of vacancies have been filled up by promoting the person with disability quota as per the seniority and merit, and also to the effect that there is no backlog vacancies in PwD category, submits that the same are fallacious as in view of the provisions contained Section-34 (2) of the Disabilities Act, 2016, which provides that if the vacancies are not filled up due to non-availability of persons with benchmark disabilities and any other sufficient reason it shall be carried forward in the succeeding recruitment year and if in the succeeding year also no suitable persons are available then it may first be filled up by inter change among the five categories and only when there is no persons with disability available for the post in that year, the employer shall filled up the vacancies by appointing a person other than PwDs.

15. Ms. D. Boragohain, learned counsel for the petitioners, has placed reliance on the following judgments of the Hon'ble Supreme Court.

**I. Rajeev Kumar Gupta and Others Vs. Union of India** reported in **(2016) 13 SCC 153.**

**II. Siddaraju Vs. State of Karnataka & Ors.** reported in **(2020) 19 SCC 527.**



**III. State of Kerala and Ors. Vs. Leesamma Joseph, reported in (2021) 9 SCC 208.**

16. Mr. D. Nath, learned Senior Govt. Advocate, referring to the affidavit filed in terms of the order of this Court on 10.02.2023 submits that a total of 8 (eight) nos. of Junior Engineers (Civil) belonging to the PwD category have been promoted to the cadre of Assistant Engineers (Civil), out of which 2 (two) nos. of vacancies have been filled up by promoting PwD quota and the rest as per seniority-cum-merit. He further submits that there is no backlog vacancy in the category of PwD. However, after the Office Memorandum issued by the Personnel Department (B) dated 21.05.2022 came into force, the department is promoting Junior Engineers (Civil) to the rank of Assistant Engineers (Civil) while considering the 4% vacancies reserved for PwD category from the zone of consideration as per the said Office Memorandum.

17. Mr. D. Nath, learned Senior Govt. Advocate, submits that it is settled law that no employee has right to promotion but has only right to be considered for promotion. It is also equally settled that the employee has no right to be promoted with retrospective effect as the promotion will take effect from the date of DPC and not from the date of vacancy of the post. The petitioners have already been promoted vide orders dated 29.06.2022 and 13.09.2022. Therefore, there remains no live issue to be determined and as such writ petitions may be dismissed.

18. In support of his submissions, Mr. D. Nath, learned Senior Govt. Advocate, has relied on the judgment of the Hon'ble Supreme Court in the case of **Reserve Bank of India and Others, Vs. A.K. Nair and Others** reported in **2023 10 SCR 775** corresponding to **2023 SCC Online SC 801**, wherein the Hon'ble Supreme Court has observed and held which are reproduced herein under:-

“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 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”. 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 in fact seeded from this very judgment (supra). 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 (2021) 4 SCC 542. 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, (2006) 8 SCC 212.*

*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.*

*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 Rajeev 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 12 th September, 2014. GoI 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 GoI 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 cross- appeal, 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 15<sup>th</sup> 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."*

19. Due consideration has been extended to the submissions of the learned counsel for the parties.

20. As noted hereinabove, the only issue left to be determined is as to whether the petitioners are entitled to be promoted to the post of Assistant Engineer (Civil) in terms of the mandate of the law as provided under Disabilities Act, 2016, with retrospective effect.

21. It is seen that during the pendency of these writ petitions, an office memorandum dated 21.09.2022 has been issued by the Govt. of Assam, providing the reservation for the posts for persons with benchmark disabilities in direct recruitment as well as promotion by making available in the cadre strength in each group of posts i.e. Grade-I, Grade-II, Grade-III and Grade-IV, where, 4% of the total number of posts shall be reserved for persons with benchmark disabilities provided that the posts are identified and suitable for persons with benchmark disabilities. Therefore, challenge to the Office

memorandum dated dated 17.01.2019 has become redundant.

22. The petitioners were appointed in the year 1990 and 1996 and are admittedly eligible to be promoted to the post of Assistant Engineer (Civil) in terms of the Recruitment Rules. By now, they have been promoted in the rank of Assistant Engineer (Civil) vide notification dated 29.06.2022 and 13.09.2022.

23. Section 34 of the Disabilities Act, 2016 provides which are extracted as under:-

34. Reservation.—(1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent. Each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent for persons with benchmark disabilities under clauses (d) and (e), namely:—

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type

of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of the appropriate Government.

3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit.

24. Bare perusal of the above provisions, inter alia, provides that where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability. Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior

approval of the appropriate Government.

25. It is noticed that post the filing of the writ petitions, vide notification dated 11.01.2021 the first batch of promotion, from the post of Junior Engineer (Civil) to the post of Assistant Engineer (Civil) was effected wherein total 83 (eighty three) nos. of Junior Engineers (Civil), have been promoted to the posts of Assistant Engineer (Civil) in the department.

26. It is noticed that the number of vacancies in the cadre of Assistant Engineer (Civil) available for promotion quota are 111 (one hundred and eleven). As the percentage of reservation for disabled persons is 4% as per the Disabilities Act of 2016, there would 4 (four) numbers of posts.

27. On perusal of the gradation list dated 30.09.2020 and the list of promotees dated 11.01.2021, reflects that in order of seniority the last person to have been promoted from the gradation list is placed at serial No. 93. Further perusal of the notification dated 11.01.2021 shows that there are three PwDs who have been promoted, however, on their own merit and positions as their positions in the final gradation list being at serial Nos. 57, 64 and 86 respectively. Thus, it cannot be held that the 3 (three) PwDs who have been promoted have been made against the disabled quota.

28. The name of the petitioner in WP(C) 3317/2020 is reflected at serial No. 179 and petitioner in WP(C) 3299/2020 at serial no.305 of the Final gradation list of Junior Engineers. Concededly, as the service Rules provides that the numbers of Officers who would be considered for promotion is 4 (four) times the number of vacancies, I am of the view that the petitioners would have come within the zone of consideration for promotion had the provisions of law been applied.



29. The above referred three Officers with Benchmark Disabilities having been promoted in their own merits and seniority, the quota of 4% for PwDs remained unfilled. Thus, I am of the considered view that the petitioners being PwDs, below the officers with benchmark disability who have been promoted on their own merit and positions, ought to have been considered for promotion to the rank of Assistant Engineer (Civil).

30. Indisputably, the respondent authorities have not filled up the disability quota since the coming into force of the Disabilities Act, 2016 and in terms of the provision contained in Section 34 (2) which provides that wherein any recruitment year any vacancy cannot be filled up due to non availability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a PwD.

31. In this regard, I would refer to the case of **Rajeev Kumar Gupta** (Supra) wherein the Hon'ble Supreme Court has held that once a post is identified as being capable of being filled up by a disabled person it must be reserved for the disabled irrespective of the mode of recruitment adopted by the State for filling up such post.

32. On consideration of the materials and provisions of Disabilities Act, 2016

coupled with the judgments of the Hon'ble Supreme Court, I am of the considered view that the petitioners are entitled to be promoted to the post of Assistant Engineer (Civil) under the benchmark disabilities quota. The respondent authorities have failed to adhere to the mandate of law, which resultantly, appears to have deprived the petitioners of right to be considered for promotion. The respondent authorities have affected promotion of Junior Engineer (Civil) to the post of Assistant Engineer (Civil) in the department on three occasions in the year, 2021 and 2022. However, it appears that no consideration has been made under the benchmark disabilities depriving the right of the petitioners. Thus, in my view, the respondent authorities ought to have considered the case of the petitioners for promotion under 4% reservation as provided in the Disabilities Act, 2016.

33. In view of the discussions made hereinabove, I am of the considered view that the petitioners are entitled to be considered for promotion to the post of Assistant Engineer (Civil) in terms of the provisions of the Disabilities Act, 2016. Therefore, I deem it appropriate to direct the respondent authorities to consider the case of the petitioners.

34. Accordingly, it is directed that the respondent authorities shall consider the case of the petitioners for promotion to the post of Assistant Engineer (Civil) post the filing of present writ petitions particularly, with effect from the year 2021 as the authorities, at the relevant point of time, have promoted as many as 83 (eighty three) numbers of Junior Engineers (Civil) to the rank of Assistant Engineers (Civil) without adhering to the mandate of law.

35. Both the writ petitions stand allowed to the extent indicated hereinabove

and disposed of. No order as to cost(s).

**JUDGE**

**Comparing Assistant**