

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.11.2016

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE N.AUTHINATHAN

Writ Petition No.21350 of 2016
W.M.P.No.18281 of 2016

1. The General Manager,
Union of India,
Southern Railway,
Park Town, Chennai 600 003.
2. The Divisional Railway Manager,
Southern Railway,
Tiruchirappalli Division, Trichy.
3. The Senior Divisional Personnel Officer,
Southern Railway,
Tiruchirappalli Division, Trichy.
4. The Senior Divisional Engineer (Co.ord.),
Southern Railway,
Tiruchirappalli Division, Trichy. Petitioners

Vs.

1. The Registrar
Central Administrative Tribunal
Chennai Bench, High Court Campus,
Chennai - 600 104.
2. Mr.Rajendran,
Sr.Permanent Way Supervisor,
Senior Section Engineer/Permanent Way/
Office/Thiruthuraipoondi,
Tiruchirappalli Division,
Southern Railway. Respondents

Writ Petition filed under Article 226 of the Constitution of India, for a writ of certiorari, to call for the entire records of the order, dated 27.04.2015, passed by the 1st respondent in O.A.No.268 of 2012 and quash the same as illegal.

For Petitioner : Mr.V.Radhakrishnan,
Senior Counsel
for Mr.V.Haribabu

ORDER

(Order of this Court was made by S.MANIKUMAR, J.)

Vide order, dated 27.04.2015, in O.A.No.268 of 2012, the Central Administrative Tribunal, Madras Bench, Chennai, while quashing the orders, dated 30.11.2011 and 22.12.2011, directed the petitioners to restore the 2nd respondent's basic pay at Rs.14,860/-, with Grade Pay of Rs.4,200/-, in the Pay Band of Rs.9,300-34,800, with Grade pay of Rs.4,200/-, w.e.f. 01.01.2012, within a period of three months, from the date of passing of the order. Being aggrieved by the abovesaid order, Railways have preferred the present writ petition.

2. Facts leading to the writ petition are that the 2nd respondent, Mr.M.Rajendran, was appointed as Gangman, in Scale of Pay of Rs.196-232, under Section Engineer, Permanent Way, Tiruthuraipoondi, with effect from 07.01.1976. Thereafter, he was promoted as Keyman and further promoted as Gangmate in Scale of Pay of Rs.260-400, in the year 1982. According to the petitioners, he was holding the substantive post of Gangmate in scale of Pay of RS.950-1500 (IVth Pay Commission. Thereafter, he was promoted as Permanent Way Mistry, a safety post, with medical classification of "AYE THREE" (A3), purely on "AD HOC BASIS", in Scale of Pay of Rs.1400-2300 (IVth PC)/ Rs.4500-7000 (Vth PC), with effect from 09.01.1989, from the post of Gangmate in sale of Pay of Rs.3050-4590 (Vth PC)/ Rs.5200-20200, plus Grade Pay of RS.1900/- (Vith PC).

3. Subsequently, as per the instructions contained in the Railway Board's Letter, dated 22.03.2007 (RBE No.86/2007), there was an introduction of a new category, viz., Senior Permanent Way Supervisor, in Scale of Rs.5000-80001/Rs.9300-34800, with Grade Pay of Rs.4200/-. The 2nd respondent was upgraded to hold the post of Senior Permanent Way Supervisor, with effect from 22/23.05.2008, on adhoc basis.

4. The writ petitioners have further contended that when the 2nd respondent was working as Senior Permanent Way Supervisor, on adhoc basis, he was referred to the Railway Medical Authorities for periodical Medical Examination and he was found 'medically unfit' in medical classification of 'AYE THREE' and found fit in medical classification of 'CEY ONE and below', not involving jobs with heavy machinery, heights, tracks and near water, with effect from 22.09.2011, vide Chief Medical Superintendent, Railway Hospital, Golden rock, Trichy's Medical Fitness Certificate No.F 1157/538687, dated 31.10.2011. Therefore, the 2nd respondent was medically unfit to perform the duties of Senior Permanent Way Supervisor.

5. The above circumstances warranted Railways to post the 2nd respondent to his substantive and parent post of Gangmate. Accordingly, the 2nd respondent was posted back/reverted to his substantive and parent post of Gangmate

in Pay band of Rs.5200-20200 with Grade Pay of Rs.1900 and posted back to work under the control of Section Engineer, Permanent Way, Tiruthuraipoondi (SE/PITTP), against a Supernumerary post, with effect from 22.09.2011, vide letter, dated 30.11.2011, without prejudice to the Office Order, for creation of a Supernumerary Post. Subsequently, an Office Order, dated 22.12.2011, was issued by the petitioners, advising all concerned that the 2nd respondent was treated as having been charged against the Supernumerary Post in the same designation of Gangmate with Pay of Rs.10990/- plus grade of Rs.1900/- in pay band of Rs.5200-20200, with effect from 22.09.2011 and that operation of the said Supernumerary Post in respect of the 2nd respondent, had been approved by the Competent Authority viz. Divisional Railway Manager, Tiruchchirappalli Division, 2nd petitioner herein.

6. Being aggrieved by the same, the 2nd respondent has filed O.A.No.268 of 2012, contending inter alia that reduction of his pay to Rs.10990, in pay band of Rs.5200-20200, on medical decategorisation, in spite of being continuously holding the post of Senior Permanent Way Supervisor, with pay of Rs.14,860/- in pay band of Rs.9300-34800/- with grade pay of Rs.4200/-, is arbitrary. He further submitted that as per Rule 1313 (b) of IREM, a Railway Servant holding a post, other than a tenure post in a substantive capacity or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfilment of the eligibility conditions, as prescribed in the relevant recruitment rules, to another post carrying duties and responsibilities of greater importance than those attached to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment, at the stage, at which such pay has accrued or rupees twenty-five only, whichever is more and the orders, impugned before the Tribunal, amounts to reversion, with consequential reduction in basic pay.

7. Before the Tribunal, the 2nd respondent has further contended that he was working as Senior Permanent Way Supervisor in the pay band of Rs.9300-34800, with grade pay of Rs.4200, from 22/23.05.2008, until the orders impugned before the Tribunal, reducing his pay to Rs.10990, in pay band of Rs.5200-20200, on medical decategorisation was issued, and in the light of Section 47 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, orders of reversion and reduction in pay, impugned before the Tribunal, are liable to be set aside.

8. The writ petitioners have filed their reply affidavit before the Tribunal and submitted that vide order, dated 22/23.05.2008, the 2nd respondent was promoted purely on adhoc basis, as Senior Permanent Way Supervisor. Though

periodically, adhoc promotion was extended, it was made clear that the adhoc promotion was subject to fulfilment of selection and would not confer on the adhoc promotee, any right to assignment of seniority in the Pay Band of the higher post, he was holding, on adhoc basis.

9. The petitioners have further contended that the medical standard/medical classification, required for the post of Senior Permanent Way Supervisors, is "AYE THREE", being the safety category of laying and maintaining the railway permanent way track and when the 2nd respondent was found medically unfit for "AYE THREE" Medical Classification, but medically found fit in "CYE ONE" and below, he cannot be retained in the post of Senior Permanent Way Supervisor and hence, as per the extant instructions, the 2nd respondent was placed in a Supernumerary Post, with effect from 22.09.2011 and continued to be in the post, pending provision for an alternative appointment, suitable to his medical classification, "CEY ONE" and below.

10. Further case of the petitioners-Railways, before the Tribunal, is that the 2nd respondent is medical unfit to hold the post of Senior Permanent Way Supervisor and therefore, he was posted to his substantive post of Gangmate on 22.12.2011. They have also submitted that in terms of the provisions contained in The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the substantive pay and the grade pay of the substantive post of Gangmate held by the 2nd respondent was not reduced and therefore, his status as a regular Gangmate has been protected with pay protection. For the abovesaid reasons, they prayed for dismissal of the Original Application.

11. Adverting to the rival contentions, while quashing the orders impugned therein, the Central Administrative Tribunal, Madras Bench, at Paragraphs 9 and 10, held as follows:

"9. The applicant was promoted as Permanent Way Mistry on adhoc basis in the scale of pay of Rs.1400-2300 (IV PC)/Rs,4500-7000 (V PC) w.e.f. 09.01.1989 from the post of Gangmate in the scale of pay of Rs.3050-4590 (VPC). Consequent to the cadre restructuring, new post of Senior Permanent Way Supervisor in the scale of pay of Rs.5000-8000 was introduced and the applicant was reverted to his substantive post in the pay scale of Rs.3050-4590 w.e.f. 31.03.2008. However, the applicant was again promoted as Senior Permanent Way Supervisor in the scale of Rs.5000-8000 on adhoc basis w.e.f. 23.05.2008 and he was also allowed to continue with the adhoc promotion and after the implementation of VI Pay Commission, the pay scale of Senior Permanent Way Supervisor in the scale of Rs.5000-8000 was

replaced with the Pay Band of Rs.9300-34800 with Grade Pay of Rs.4200/- and the adhoc promotion of the applicant continued till the year 2011, when he was subjected to medical fitness test. Following the applicant's medical de-categorisation, he was reverted to the Pay Band Rs.5200- 20200 with a Grade Pay of Rs.1900 corresponding to his earlier post the applicant was holding in substantive capacity. It is not in dispute that the applicant was working in the higher post of Senior Permanent Way Supervisor on adhoc basis since 2008 until his medical de-categorization in the year 2011. Upon medical de-categorization, the respondents have chosen to revert him to substantive and parent post of Gangmate in the Pay Band Rs.5200-20200 with GP Rs.1900/- and retained in a Supernumerary post w.e.f. 22.09.2011. There is no justification for keeping an employee in higher post on adhoc basis for such long periods as that would run counter to the instructions issued by the Railway Board relied upon by the counsel for the applicant. The above decision of the respondents also runs counter to the provisions under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which reads as follows:-

"47. Non-discrimination in Government employment.- (1) No establishment shall dispense with, or reduce in rank., an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post he may be kept on supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

This Tribunal also had considered similar issue in various O.A.Nos.359 & 360 of 2012 and O.A.No.394 of 2011. As per Rule 1313 of IREM, a Railway servant holding a post in substantive, temporary or officiating capacity is eligible for pay protection.

10. In the light of the above position, we are of the view that the respondents are not justified in reverting the applicant to the Pay Band of Rs.5200-20200 with Grade Pay of Rs.1900, while

adjusting him in the supernumerary post upon medical decategorisation. Accordingly, the impugned orders, dated 30.11.2011 and 22.12.2011 are set aside and the respondents are directed to restore the applicant's basic pay at Rs.14,860/-, with Grade Pay of Rs.4,200/-, in the Pay Band of Rs.9,300-34,800, with Grade pay of Rs.4,200/-, w.e.f. 01.01.2012. This exercise shall be completed within a period of three months, from the date of receipt of a copy of this order. With the above direction, the OA is allowed. No order as to costs."

Being aggrieved by the same, Railways have preferred this instant writ petition.

12. Inviting the attention of this Court to Paragraph 510 of the Indian Railway Medical Manual, Volume I, 3rd Edn., Mr.V.Radhakrishnan, learned Senior Counsel for Railways submitted that the post of Permanent Way Mistry, falls in "AYE THREE" class and in the interest of public safety, the medical test to be satisfied, which according to medical classification, is "AYE THREE". He further submitted that though the 2nd respondent was promoted on 09.01.1989, as Permanent Way Mistry, on adhoc basis, from the post of Gangmate, Railway Medical authorities have conducted periodical medical examination.

13. He further submitted that as per the instructions contained in the Railway Board's letter, dated 22.03.2007, when a new category of post, Senior Permanent Way Supervisor in Scale of Rs.5000-80001/Rs.9300-34800, with Grade Pay of Rs.4200/-, was introduced, the 2nd respondent was upgraded to the post of Senior Permanent Way Supervisor, with effect from 22/23.05.2008, purely on adhoc basis. When he was working in the said capacity, on adhoc basis, he was referred to medical examination and found medically unfit, in medical classification "AYE-THREE", but medically fit in medical classification "CEY-ONE" and below, not involving jobs with heavy machinery, heights, tracks and near water, with effect from 22.09.2011, vide Chief Medical Superintendent, Railway Hospital, Golden rock, Trichy's Medical Fitness Certificate No.F 1157/538687, dated 31.10.2011 and therefore, considering the safety of passengers, he cannot be retained as Senior Permanent Way Supervisor and consequently, be downgraded to the substantive post of Gangmate in scale of Pay of RS.950-1500 (IVth Pay Commission) only, for which, medical classification "BEE-ONE".

14. According to the learned Senior Counsel appearing for the petitioners, as per Section 47 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the pay of the 2nd respondent was retained in the substantive post of Gangmate and his pay not reduced.

15. Referring to the judgment of the Hon'ble Supreme Court in Union of India v. Devendra Kumar Pant reported in 2009 (14) SCC 546, learned Senior Counsel appearing for the petitioners submitted that the Tribunal has failed to appreciate the ratio laid down by the Hon'ble Supreme Court in proper perspective, wherein, the Hon'ble Apex Court held that prescription of a minimum medical standard for promotion should be considered as such, and should not be viewed as denial of a promotional opportunity to a person with disability and that when denial is on the ground of non-fulfillment of a minimum required standard/qualification, Section 47(2) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, is not at all attracted.

16. According to the learned Senior Counsel appearing for the petitioners, the Tribunal has erred in directing adjustment of the 2nd respondent in a supernumerary post, by erroneous application of Section 47 of the abovesaid Act. He also contended that following the decision in Devendra Kumar Pant's case (cited supra), denial of promotion to one of the candidates to the post of loco poilet (goods), was sustained in O.A.No.2000 of 2014, dated 29.09.2014, by the Central Administrative Tribunal, Madras Bench, and that the same was confirmed by this Court.

17. Learned Senior Counsel appearing for the petitioners further submitted that the 2nd respondent has no right for continuation, in the post of Senior Permanent Way Supervisor and according to him, the only legal right, which he can seek for enforcement, is continuation in the substantive post of Gangmate, to which, he was correctly reverted.

18. Referring to Paragraph 522(2) of IRMM and inviting the attention of this Court to the Medical Unfitness Certificate, learned Senior Counsel for the petitioners submitted that when the report of the competent authority, declaring the 2nd respondent as medically unfit to perform his duties, as Senior Permanent Way Supervisor, was not challenged, the consequential order of reversion to the post of Gangmate, with pay, ought not to have been set aside by the Tribunal.

19. Taking this Court through the orders of promotion, learned Senior Counsel for the petitioners submitted that all the promotions made, were purely on adhoc basis, subject to the condition that the same would not confer any claim for seniority or retention and therefore, the 2nd respondent cannot claim any right for retention, in the post of Senior Permanent Way Supervisor or pay protection, as the case may be.

20. It is also his submission that when public safety is the essential requirement for both the posts of Permanent Way

Mistry and Senior Permanent Way Supervisor, the required medical classification "AYE THREE", for which, the 2nd respondent was found unfit and consequently, reversion made, ought to have been declared as invalid.

21. On the basis of the counter affidavit filed by the 2nd respondent, Mr.L.Chandra Kumar, learned counsel for the 2nd respondent submitted that the 2nd respondent was engaged as a gangman and promoted as Permanent Way Mistry, with effect from 09.01.1989. Consequent to the cadre restructuring, ordered vide letter, dated 22.03.2007, pay scale of Rs.5000-8000/- was extended to the Mistry cadre, and that the 2nd respondent was upgraded to the pay scale of Rs.5000-8000/- in pay band of Rs.9300-34800/- + Grade Pay of Rs.4,200/-, with effect from 22/23.05.2008, on adhoc basis, which subsisted till December, 2011.

22. Learned counsel for the 2nd respondent further submitted that the 2nd respondent was subjected to medical examination by the Medical Board, and though he was declared as unfit to continue as Senior Permanent Way Supervisor, without any notice, reverted to the pay band of Rs.5200-20200 with a grade pay of Rs.1900/- and the reduced his pay from Rs.14,860/- with a grade pay of Rs.4,200/- to Rs.10,990/-, with Rs.1,900/- (in Pay Band of Rs.5200-20200 + GP of Rs.1,900/-).

23. He further submitted that whenever promotions are ordered in Railways, it was only on adhoc basis and in the instant case, after re-structuring, the subsequent upgradation of the 2nd respondent, as Senior Permanent Way Supervisor, was also on adhoc basis. According to him, the 2nd respondent had been working on adhoc basis, in the promotional posts for nearly 22 years from 09.01.1989 and that the same is contrary to Paragraph 108 of the IREM.

24. Learned counsel further submitted that the 2nd respondent was promoted as Senior Permanent Way Supervisor, along with other similarly placed employees, on 22/23.05.2008, on adhoc basis and that he held the said post, until 29.11.2011, for a period of three years and six months. It is also his submission that in the light of Paragraph 108 of IREM, the petitioners ought not to have reverted the 2nd respondent to the post of Gangmate, and consequently, reduced the pay.

25. Referring to Section 47 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, learned counsel for the 2nd respondent submitted that when the Central Administrative Tribunal, Madras Bench, has properly applied the provisions of the said Act, to the facts of this case and directed adjustment of the 2nd respondent, in a supernumerary post, protecting his pay and other service benefits and therefore,

the contention of the writ petitioners, placing reliance on Devendra Kumar Pant's case (cited supra), has to be rejected. He further submitted that in Devendra Kumar Pant's case (cited supra), the respondent therein has failed to qualify the medical examination and thus, held as not entitled for promotion, whereas, in the instant case, the 2nd respondent has already been found fit in the medical examination and promoted, through on adhoc basis. According to him, the said judgment is inapposite to the facts of this case.

26. Learned counsel for the 2nd respondent further submitted that the stand of the writ petitioners that consequent to medical examination and the finding of the medial authority, viz., Chief Medical Superintendent, Railway Hospital, Golden Rock that, the 2nd respondent was found unfit in medical classification "AYE THREE" and therefore, cannot be allowed to continue to discharge his duties, as Senior Permanent Way Supervisor, which post involves public safety and therefore, the writ petitioners have to revert the 2nd respondent to his substantive post with pay protection, has to be rejected, for the reason that the very purpose of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, is to protect such of those persons, who acquired disability in service, with pay protection and service benefits.

27. It is also his contention that merely because, the 2nd respondent has failed to challenge the medical report and the findings of the Medical Authority that the 2nd respondent was unfit to hold the post of Senior Permanent Way Supervisor, that would not disentitle the 2nd respondent, from claiming pay protection with service benefits, in the said post, which he held for more than three years and six months.

28. Lastly, learned counsel for the 2nd respondent submitted that when the 2nd respondent has filed O.A.No.268 of 2012, before the Central Administrative Tribunal, Madras Bench, he was aged 56 years. After adjudication, the Tribunal disposed of the said O.A., on 27.04.2015. Today, he is aged about 60 years. It is also his contention that by virtue of the interim orders, the 2nd respondent was in the pay band of Rs.9300-34800, till the disposal of the Original Application. For the abovesaid reasons, he prayed to sustain the order of the Tribunal.

Heard the learned counsel appearing for the parties and perused the materials available on record.

29. Initially, the 2nd respondent was appointed as Gangman, in the Scale of Pay of Rs.196-232, under Section Engineer, Permanent Way, Tiruthuraipoondi, with effect from 07.01.1976. Thereafter, he was promoted as Keyman and further promoted as Gangmate in the Scale of Pay of Rs.260-400, in the year 1982. As per the IVth Pay Commission Reports, scale of pay was revised. The Divisional Railway Manager, Southern

Railway, Tiruchirappalli Division, Trichy, 2nd petitioner, vide order, dated 09.01.1989, has promoted the 2nd respondent, as Permanent Way Mistry, a safety post, with medical classification of "AYE THREE", along with 15 others.

30. As per the said order, dated 09.01.1989, promotion effected was on adhoc measure, against the vacancies, set apart to be filled by the candidates, who have passed 12th Standard with Maths and Science, as indicated in Note (7) of the Office Order, dated 03.01.1989. Promotions ordered are purely on adhoc measure, subject to replacement by eligible candidates recruited, and will not confer on the promotees any claim, for retention, seniority, confirmation, etc. Promotions ordered were also subject to the approval of the competent authority and would have the effect from the dates, the employees assume charge of the higher post.

31. At this juncture, this Court is of the view that there are no averments in the counter affidavit filed before the Tribunal or in the supporting affidavit to this writ petition that the 2nd respondent was not qualified to be promoted as Permanent Way Mistry. On the contra, it can be safely concluded that when the 2nd respondent was promoted to the posts of Permanent Way Mistry and Senior Permanent Way Supervisor, he was fully qualified, and satisfied the medical test classification, "AYE THREE".

32. From the averments, it could be further deduced that when the 2nd respondent continued in the post of Permanent Way Mistry, a safety post, he was reverted to the post of Gangmate, for a short period and subsequently, as per the instructions contained in the Railway Board's Letter, dated 22.03.2007 (RBE No.86/2007), when a new category, viz., Senior Permanent Way Supervisor in Scale of Rs.5000-80001/Rs.9300-34800, with Grade Pay of Rs.4200/-, was introduced, vide order, dated 22/23.05.2008, the 2nd respondent has been promoted to the post of Senior Permanent Way Supervisor, on adhoc basis, in the abovesaid scale. Order, dated 22/23.05.2008, is subject to the condition that the 2nd respondent and others, would be officiating for a period of four months, pending finalization of selection and adhoc promotion would not confer any right to assignment of seniority in the scale of Rs.5000-8000/-.

33. From 22/23.05.2008 onwards, the 2nd respondent has been continuously working as Senior Permanent Way Supervisor, on adhoc basis. The expression "ad hoc" in Blacks Law Dictionary, means, something which is formed for a particular purpose. In Oxford Dictionary, the word "ad hoc" means, for a particular purpose; specially. In P.Ramanatha Aiyers Law Lexicon (2nd Edition), the word "ad hoc" is defined as for a particular purpose, made, established, acting or concerned with a particular and or purpose. In Chamber's Dictionary, "ad hoc" means, "for special purpose".

34. The expression "fortuitous" in Strouds Judicial Dictionary, is accident or fortuitous casualty. In Blacks Law dictionary, the expression, "fortuitous", means occurring by chance, a fortuitous event may be highly unfortunate. In Oxford Dictionary, the word, "fortuitous" means happening by accident or chance rather than design. The expression, "stop-gap", in the same dictionary, means a temporary way of dealing with a problem or satisfying a need. In P.Ramanatha Aiyers Law Lexicon (2nd Edition) the word, "fortuitous" event is given as an event which happens by a cause which we cannot resist; one which is unforeseen and caused by superior force, which it is impossible to resist; a term synonymous with Act of God.

35. Though, initially the appointment of the 2nd respondent, in the post of Permanent Way Mistry, a safety post, with medical classification "AYE THREE", is stated to be on adhoc basis, subject to replacement of eligible candidates for recruitment, absolutely there are no materials, in the typed set of papers, filed by Railways, as to whether, there was any recruitment to the post of Permanent Way Mistry, from 1989 onwards.

36. On the contra, reading of the Office Order, 09.01.1989 of the 2nd petitioner, shows that promotion has been ordered, against the vacancies, set apart to be filled by candidates, who have passed 12th Standard with Maths and Science, as indicated in Note (7) of the Office Order, dated 03.01.1989. From the above, it could be further deduced that though there were regular vacancies in the post of Permanent Way Mistries, the 2nd respondent and 15 others have been promoted as Permanent Way Mistries, on adhoc basis and continued in the said capacity, till they were subsequently reverted to the post of Gangmate/Track Supervisors.

37. Material on record discloses that consequent to the introduction of a new category, viz., Senior Permanent Way Supervisor, in the Scale of Rs.5000-80001/Rs.9300-34800, with Grade Pay of Rs.4200/-, the 2nd respondent, along with 13 others, working as Gangmates/Track Supervisors, have been promoted as Senior Permanent Way Supervisor, with effect from 22/23.05.2008, on adhoc basis.

38. Here again, the writ petitioners have stated that promotions ordered were on adhoc measure, and that the promotees would be officiating for a period of four months, pending finalization of selection and that the said promotion would not confer them any right of assignment of seniority, in the scale of Rs.5,000-8,000/-. Though the petitioners have stated that the promotion was pending finalization of selection, they have not furnished any details, as to the selection to the post of Senior Permanent Way Supervisor, undertaken by the Railways for appointment. Thus, when there is no material, supporting the averments made in the counter

affidavit filed before the Central Administrative Tribunal or in the supporting affidavit filed in this writ petition that there was a selection process, undertaken by the Railways, still the writ petitioners have contended that the 2nd respondent and 13 others, have been promoted to the post of Senior Permanent Way Supervisor, in the scale of Rs.5,000-8,000/-, on adhoc basis. No where in the counter affidavit, existence of regular vacancies has been denied.

39. Promotion ordered on 22/23.05.2008, has been periodically extended, excepting for a short break, ie., between 31.03.2008 to 22.05.2008, when the 2nd respondent and six others have been reverted, as Gangmates and once again restored to the post of Senior Permanent Way Supervisor, in the scale of Rs.5,000-8000/-, which according to the petitioners, is purely on adhoc measure.

40. Considering the definition of the words, "ad hoc", "stop-gap" and "fortuitous" and on the facts and circumstances of this case, we are of the considered view that instead of promoting the 2nd respondent and others, to the existing regular and sanctioned vacancies, on temporary or permanent basis, Railways have promoted and kept them on adhoc basis for several years. Approach of Railways in ordering promotion, is not correct.

41. From the material on record, it could be deduced that when the writ petitioners were in need of the services of the 2nd respondent and others, in the post of Permanent Way Mistry, unfortunately without issuing appropriate orders, regularising their services, Railways have continued their services, only on adhoc basis, for nearly nineteen years and thereafter, reverted them as gangmates and once again, promoted them as Senior Permanent Way Supervisor, on adhoc basis, on 22/23.05.2008.

42. In Rudra Kumar Sain v. Union of India reported in 2000 (8) SCC 25, at Paragraph 19, the Hon'ble Supreme Court, after considering the meaning of the words, "ad hoc", "stop gap" and "fortuitous", held as follows:

"19. The meaning to be assigned to these terms while interpreting provisions of a Service Rule will depend on the provisions of that Rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter-se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a

particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as ad hoc or stop-gap. If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as fortuitous in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a stop-gap arrangement and appointment in the post as ad hoc appointment. It is not possible to lay down any straight-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stop-gap) can be made."

43. At Paragraph 20 of the reported judgment, the Hon'ble Supreme Court, held that,

"20. In the Service Jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such appointment cannot be held to be stop-gap or fortuitous or purely ad hoc."

44. The 2nd respondent and others were promoted as Permanent Way Mistries on 09.01.1989 and continued till 2008, for nearly nineteen years, as Permanent Way Mistries, when they were promoted as Senior Permanent Way Supervisors and continued in the latter post till 30.11.2011. Thus, for nearly 22 years, in both the posts, they were kept on adhoc promotion. At this juncture, it is also relevant to extract Paragraph 108 of the IREM, which states that,

"Cases of staff promoted on a regular basis should be reviewed after completion of one year's continuous officiating service, even if a permanent vacancy does not exist, with a view to determining their suitability for retention in the grade. The review should be completed early and a decision to retain the employee in the officiating post or revert him, taken and implemented within a period of 18 months of officiating service. Having followed this procedure, there should be no question of denying the benefits of confirmation to an employee on completion of two years officiating service in a clear permanent vacancy for the reason that he is unfit for confirmation."

45. In the case on hand, it could be seen that from 22/23.05.2008, the 2nd respondent had been continuously working as Senior Permanent Way Supervisor, for nearly three years and six months, until he was found medically unfit to continue in the said post and the petitioners have stated that he did not satisfy the medical classification test, "AYE THREE", for the post of Senior Permanent Way Supervisor, a safety post.

46. Though the writ petitioners have not enclosed the instructions contained in Railway Board's Letter, dated 22.03.2007, by which, a new category, viz., Senior Permanent Way Supervisor, is introduced, we deem it fit to extract the same,

RBE No.45/2007

Board's letter No.PC-III/2004/CRC/1(Pt.1 dated 22.03.2007 (RBNo.45/2007)

Sub: Introduction of the category of Senior Permanent Way Supervisor.

The issue of effecting rationalized planning for staff engaged in track maintenance on the Indian Railways and related matters such as the level of skill/technical know how expected from such staff and changes in the existing AVCs/methods of their recruitment in the light of mechanization of track maintenance/technological improvements have been under consideration of the Ministry of Railways for quite some time. The review had become additionally justified especially after progressive implementation of the Corporate Safety Plan (2003-2013) of Indian Railways, prepared in pursuance of the recommendations of Railway Safety Review Committee (RSRC -1998).

2. After undertaking a comprehensive exercise involving detailed deliberations on the different aspects of the issue and after duly consulting the recognized federations, Ministry of Railways have decided with the approval of President to Phase out the existing category of Track Supervisor (erstwhile P.W. Mistries/Supervisors Permanent Way) in scale Rs.4500-7000 (+Rs.100/- S.A. applicable to those appointed prior to 1.11.03) and introduce the category of Sr. Permanent Way Supervisor in scale Rs.5000-8000, subject to the following terms and conditions:-

Date of effect	(1)	These orders are effective from the date of issue of these instructions and would be applicable to the sanctioned cadre strength of the Track Supervisors (erstwhile P.W.Mistries/Supervisors Permanent Way) on the above date. The sanctioned cadre strength of the new category of Sr.P.Way Supervisors would be fixed by the individual Railways after providing matching savings as provided in these orders. However, the total number of sanctioned posts in the new category should not exceed the present sanctioned strength of Track Supervisors (erstwhile P.W.Mistries/Supervisors Permanent Way).
Applicability	(2)	These orders will be applicable to regular cadres (excluding surplus & supernumerary posts) of the open line establishments and will not be applicable to ex-cadre & work charged posts.
Procedure for fitment of existing staff in the new category	(3)	As a one time exception, existing regular incumbents of the posts of Track Supervisor (erstwhile P.W.Mistries/Supervisors Permanent Way) would be absorbed in the category of Sr.P.Way Supervisor through promotion through modified selection procedure which will be based only on scrutiny of service records and confidential reports without holding any written or viva-voce tests. The selection Board would consider the claims/suitability of eligible staff one by one in order of their seniority. The Track Supervisors (erstwhile P.W.Mistries/Supervisors Permanent Way) who do not get absorbed (promoted) as Sr.P.W. Supervisor shall continue to hold post/scale of Track Supervisor as personal to them. To this extent, the newly created posts of Sr.P.W.Supervisor will be operated as the posts of Track Supervisors (erstwhile P.W.Mistries/Supervisors Permanent Way) till the existing incumbents vacate the same by way of promotion, retirement etc. On vacation of these posts, the same shall automatically be operated as the posts of Sr.P.Way. Supervisors.

	(3.1))	For the above purpose the condition regarding minimum residency period prescribed by the Railway Board for promotion within Group C Safety categories on the Railways will have to be fulfilled. Those Track Supervisors (erstwhile P.W.Mistries/Supervisors Permanent Way) who do not have the prescribed minimum service would not be absorbed (through promotion) in the new category till they acquire such service.
	(3.2))	Such selections through direct recruitment by Railway Recruitment Boards where notification(s) has/have not been issued by RRBs shall henceforth be abandoned. Ongoing selections etc. for filling up the posts of Track Supervisors (erstwhile P.W.Mistries/Supervisors Permanent Way) against LDCE/seniority-cum-suitability quota, which have not been finalized till the date of issue of these orders should also be cancelled/abandoned.
Refusal of promotion.	(4)	Such of the staff as had refused promotion before issue of these orders and stand debarred for promotion may be considered for promotion, in relaxation of the extant provisions as a one time exception, if they indicate in writing that they are willing to be considered for absorption/promotion against the newly created superior category as on the date of effect.
	(5)	Extant instructions for D&A/Vigilance clearance will be applicable for effecting promotion under these orders with reference to the date of effect as mentioned above.
Pay Fixation	(6)	The staff placed in the new category will draw pay of the superior category from the date of effect as mentioned at (1) above. On absorption/promotion as Sr.P.Way Supervisor, pay of the staff would be fixed under Rule 1313 (FR 22) (I) (a) (1) R-II (erstwhile FR 22C) with the usual option for pay fixation as per extant rules.

	(6.1)	Employees who are otherwise eligible but retire/resign in between the period from the date of issue of these orders to the date of actual implementation of these orders will be entitled to the fixation benefits and arrears under these orders from the date of issue of these orders.
Provision of Reservation	(7)	Extant policy with regard to reservation of SC/ST will be followed.
Duties & responsibilities and training of those absorbed in the new category	(8)	The staff so absorbed/promoted against newly created posts would be under obligation to shoulder existing duties of Supervisors P.Way as well as the additional/new duties as entrusted to them by the Railway Administration keeping in view the changing needs/methods of track maintenance/ technological improvements/ mechanized track maintenance and to undergo necessary training in this regard. Detailed instructions in this regard would be issued by this Ministry (Civil Engineering Directorate) separately.
Eligibility norms or future appointment to the category	(9)	Instructions regarding eligibility qualifications/norms for future promotion and direct recruitment to the newly created category would be separately issued by the Establishment directorate.
Chain of command in the revised set up	(10)	There would be no change in the existing chain of command. The Sr.P.Way Supervisors would work under Junior Engineers Gr.II as per the existing practice relating to Supervisors P.Way and would seek further promotion to JE Gr.II. However, on such promotion as JE Gr.II, staff would be eligible for benefit of pay fixation under Rule 1313 FR22(I) (a) (i) R-II.

WEB COPY

Matching saving	(11)	The entire exercise would be self financing and expenditure neutral. Financial implications would be worked out taking into account the mid points of the scales of pay of the respective posts (mean of the minimum and maximum of the scales), number of posts in the existing and revised set up. After working out the financial implications, the matching savings should be effected by surrender of existing posts of Track Supervisors and other additional live posts to the extent required, which may be identified by the Civil Engineering Department of the Railways.
-----------------	------	---

3. The exercise as above has been undertaken keeping in view the compelling factors relating to the category of Track Supervisors/Pmt.Way Supervisors and therefore it would not be cited as a reason or precedent for change of staffing norms of any other categories.

4. This issues in consultation with the Civil Engineering & Establishment Directorates and with concurrence of the Finance Directorate of this Ministry.

47. Railway Board's Letter, dated 14.06.2007 (RBE No.86/2007), referred to in the writ petition, is extracted hereunder:

RBE No. 86/2007

Bd's letter No. PC-III/2004/CRC/1[Pt.1] dated 14-6-2007 (RBE No. 86/2007)

Sub: Introduction of the category of Sr. Permanent Way Supervisor

.....

Orders for introduction of the category of Sr. Permanent Way Supervisor in scale Rs.5000-8000 have been issued vide Board's letter of even number dated 22-3-2007. AIRF has brought to the attention of Railway Board that para 2 of Board's aforesaid letter with regard to the eligibility of Track Supervisors [erstwhile P.Way Mistries / Supervisors P. Way] appointed as such after 01-11-2003 for absorption in the category of Sr. Permanent Way Supervisor scale Rs.5000-8000, is possibly being misconstrued and that clarification may be issued.

The matter has been examined and it is clarified that existing regular incumbents of the post of Track Supervisors [erstwhile P. Way Mistries / Supervisors P. Way] in scale Rs. 4500-7000 [+ Rs.100

S.A.] appointed prior to 01-11-2003 and those without special allowance appointed after 01-11-2003 are eligible for absorption in the category of Sr. Permanent Way Supervisor scale Rs.5000-8000, subject to fulfillment of various terms and conditions stipulated in Board's letter dated 22-3-2007.

48. Railway Board's Letter, dated 22.03.2007, extracted supra, makes it clear that the total number of sanctioned posts in the new category, viz., Senior Permanent Way Supervisor in Scale of Rs.5000-8000/Rs.9300-34800, with Grade Pay of Rs.4200/-, should not exceed the sanctioned strength of Track Supervisors (erstwhile Permanent Way Mistries/Supervisors Permanent Way). As per the abovesaid circular, as a one time exception, the existing regular incumbents of the posts of Track Supervisor (erstwhile Permanent Way Mistries/Supervisors Permanent Way) should be absorbed in the category of Senior Permanent Way Supervisor, through promotion through a modified selection procedure which will be based only on scrutiny of service records and confidential reports, without holding any written or viva-voce tests. The selection Board would consider the claims/suitability of eligible staff, one by one, in order of their seniority. The Track Supervisors (erstwhile P.W.Mistries/Supervisors Permanent Way) who do not get absorbed (promoted) as Senior Permanent Way Supervisor shall continue to hold post/scale of Track Supervisor as personal to them. To that extent, the newly created posts of Senior Permanent Way Supervisor, would be operated as the posts of Track Supervisors (erstwhile Permanent Way Mistries/Supervisors Permanent Way), till the existing incumbents vacate the same by way of promotion, retirement etc. On vacation of these posts, the same shall automatically be operated, as the posts of Senior Permanent Way Supervisors.

49. Though the writ petitioners/Railways have contended that pending selection, the second respondent and others have been given adhoc promotion, as observed earlier, there are no materials to substantiate, as to whether, Railways had taken any recruitment process. As per the procedure for fitment of existing staff in the new category, directed to be followed by the Railway Board's Letter, dated 22.03.2007, selection through direct recruitment by Railway Recruitment Boards, where notification has not been issued by Railway Recruitment Boards shall henceforth be abandoned. The ongoing selections for filling up the posts of Track Supervisors (erstwhile Permanent Way Mistries/Supervisors Permanent Way), against LDCE/seniority-cum-suitability quota, which have not been finalized, till the date of issue of the orders, should also be cancelled/abandoned.

50. As per the Circular, the staff placed in the new category, viz., Senior Permanent Way Supervisor, would draw pay of the superior category from the date of effect, as

mentioned in Column No.1 of the letter, dated 22.03.2007. On absorption/promotion as Senior Permanent Way Supervisor, pay of the staff should be fixed under Rule 1313 (FR 22) (I) (a) (1) R-II (erstwhile FR 22C), with the usual option for pay fixation as per extant rules.

51. Perusal of the order of promotion, dated 22/23.05.2008, shows that the 2nd respondent and 13 others have been promoted as Senior Permanent Way Supervisor, in the scale of pay of Rs.5,000-8,000/-. Though the Board's letter, dated 22.03.2007, clearly stated that the cadre strength of the new category, viz., Senior Permanent Way Supervisors, would be fixed by the individual Railways, after providing matching savings, as provided in the orders and also stated that the total number of sanctioned posts in the new category should not exceed the present sanctioned strength of Track Supervisors (erstwhile Permanent Way Mistries/ Supervisors Permanent Way), instead of issuing orders for regular promotion or absorption, as Senior Permanent Way Supervisor, the Railways have adopted a different procedure in promoting the 2nd respondent and others, on adhoc basis, pending finalization of selection, for which, there are no materials.

52. Though in the same order, dated 22/23.05.2008, Railways have stated that the 2nd respondent and 13 others, promoted as Senior Permanent Way Supervisor, are not eligible to exercise option for fixation of pay in the scale of Rs.5000-8000, being adhoc promotion, the Divisional Personal Officer/TPJ has stated that the Gangmates/Track Supervisor, in the scale of Rs.3050-4590 are promoted as Senior Permanent Way Supervisor in the scale of Rs.5000-8000. Indisputably, the 2nd respondent and others have been fixed a higher scale of pay, under Rule 1313 (FR 22) (I) (a) (1) R-II (erstwhile FR 22C).

53. As per Column No.8 of the Railway Board's Letter, in respect of duties & responsibilities and training of those absorbed in the new category, the staff so absorbed/promoted against the newly created posts would be under obligation to shoulder existing duties of the Supervisors (Permanent Way), as well as the additional/new duties as entrusted to them by the Railway Administration, keeping in view the changing needs/methods of track maintenance/technological improvements/mechanized track maintenance and to undergo necessary training in this regard.

54. The Railways have termed the promotion, as adhoc, pending finalization of selection. In the light of the Board's letter No.PC-III/2004/CRC/1(Pt.1), dated 22.03.2007 (RBNo.45/2007) and the subsequent Board's letter Bd's letter No.PC-III/2004/CRC/1[Pt.1] dated 14-6-2007 (RBE No. 86/2007), promotion of the 2nd respondent, should be treated, either as absorption or promotion to the post of Senior Permanent Way Supervisor, with effect from the date of promotion.

55. The next question to be considered, is whether, the judgment of Devendra Kumar Pant's case (cited supra), is applicable to the facts of the case on hand. Before advertng to the abovesaid issue, it is relevant to consider Section 47 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the said Section is extracted hereunder:

"47. (1) No establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service.

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits.

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability: Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

56. In 2008, the 2nd respondent was promoted as Senior Permanent Way Supervisor and found fit for AYE THREE category. He had been holding the post for three years and six months. However, vide letter, dated 01.11.2011, the Medical Superintendent, Southern Railways, Divisional Office, Medical Branch, Golden Rock, has stated that the 2nd respondent was found unfit for AYE THREE category and fit in CEY ONE and below, not involving jobs with heavy machinery, heights, tracks and near water. The said letter is extracted hereunder:

"The above named employee who was placed on sick list at RH/GOC from 31.03.2011 has been examined by Medical Board held at RH/GOC on 22.09.2011 and found him Unfit for Aye Three category, fit in Cey one and below not involving jobs with heavy machinery, heights, tracks, heights and near water w.e.f. 22.09.2011.

Necessary certificate of recommendation for alternative employment, dated 01.11.2011, Physical fitness certificate No.F157/538687, dated 31.10.2011/01.11.2011 and discharge medical certificate No.06/981006, dated 01.11.2011, issued in his favour are enclosed."

57. In Devendra Kumar Pant's case (cited supra), the respondent therein was selected for the next higher post of

Chief Research Assistant and he was promoted to the said post on condition that promotion would be effective from the date of submission of fit certificate in B-1 medical category. He challenged the revised medical standards that was introduced by office order, dated 19.7.1990, for Research Assistants and also relied on Section 47(2) of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. After considering the rival submissions and the facts and circumstances of the case, the Hon'ble Supreme Court, at Paragraphs 15 to 18, held as follows:

"15. Sub-section (2) of section 47 deals with non-discrimination in promotion and provides that no promotion shall be denied to a person merely on the ground of his disability. This would mean that a person who is otherwise eligible for promotion shall not be denied promotion merely or only on the ground that he suffers from a disability. Thus section 47 (2) bars disability per se being made a disqualification for promotion. To give an example, a person working as a Lower Division Clerk (LDC) suffering from the disability of low vision, cannot be denied promotion to the post of Upper Division Clerk (UDC) merely because of his disability. This is because the efficiency with which he functioned as a LDC will be the same while functioning as a UDC also and the disability as such will not affect his functioning in a higher post. But the position is different if the disability would affect the discharge of functions or performance in a higher post or if the disability would pose a threat to the safety of the co-employees, members of the public or the employee himself, or to the assets and equipments of the employer. If promotion is denied on the ground that it will affect the safety, security and performance, then it is not denial of promotion merely on the ground of his disability, but is denial of promotion by reason of the disability plus something more, that is adverse effect of the disability upon the employee's performance of the higher duties or functions attached to the promotional post. It is significant that section 47(2) does not provide that even if the disability comes in the way of performance of higher duties and functions associated with the promotional post, promotion shall not be denied. Section 47(2) bars promotion being denied to a person on the ground of disability, only if the disability does not affect his capacity to discharge the higher functions of a promotional post. Where the employer stipulates minimum standards for promotion keeping in view safety, security and efficiency, and if the employee is unable to meet the higher minimum standards on account of any disability or failure to

posses the minimum standards, then section 47(2) will not be attracted, nor can it be pressed into service for seeking promotion. In other words where the disability is likely to affect the maintenance of safety and security norms, or efficiency, then the stipulation of standards for maintaining such safety, security and efficiency will not be considered as denying a person with disability, promotion, merely on the ground of his disability.

16. When invoking or applying the provisions of the Act, it is necessary to keep in view that the intention of the Act is to give a helping hand to persons with disability so that they can lead a self-reliant life with dignity and freedom. But the intention of the Act is not to jeopardize the safety and security of the public, co-employees, or the employee himself or the safety and security of the equipments or assets of the employer nor to accept reduced standards of safety and efficiency merely because the employee suffers from a disability. In this case, office order No.4/1990 makes it clear that the minimum medical standards have been fixed taking into account the requirements in the medical manual with reference to interest of public safety, interest of the employee himself and fellow employees and in the interest of the administration. If any employee or group of employees are of the view that a particular minimum medical standard prescribed does not serve the interest of public safety, interest of the employee and fellow employees or the interest of administration, but has been introduced only with the intention of keeping a person with disability from securing the promotional post, it is always open to him or them to give a representation to the employer to review/revise the minimum medical standards. On such representation the employer will refer the issue to a committee of experts to take appropriate decision, if that was not already done. But once a decision regarding medical standards has been taken by the management bonafide and in the usual course of business on the report/recommendation of an expert committee, the same cannot be found fault with on the ground that it affects the right of a person with disability for promotion.

17. As noticed above, in this case the higher medical standard of B1 was prescribed not only for the post of Chief Research Assistant but for Senior Research Assistants and Junior Research Assistants. As the respondent with a B2 medical category clearance, had already been appointed as Senior Research Assistant, he cannot be reduced from that rank merely on the ground that under the revised guidelines, the post requires a B1 medical standard

clearance. But when the issue of promotion comes up, the requirement of B1 medical standard cannot be dispensed with. It should be remembered that for Chief Research Assistant, the minimum medical standard was B1 even before the revision of standards whereby the medical standard for even Senior Research Assistant was revised from B2 to B1. The said standard having been fixed in the interest of the public safety, as also interest of the employee concerned, co-employees and administration, the respondent cannot, by relying upon section 47(2) of the Act, avoid subjecting himself to medical examination for ascertainment of B1 medical category fitness.

18. Prescription of a minimum medical standard for promotion should be considered as such, and should not be viewed as denial of a promotional opportunity to a person with disability. We may illustrate. When an advertisement for the post of a police inspector prescribes a minimum height or a minimum chest measurements or a minimum physical stamina, a person who lacks the same and therefore denied appointment, cannot contend that he is discriminated on the ground of physical disability. Firstly being short or very thin or lacking stamina is not a physical disability but a physical characteristic. Therefore in such a situation the question of applicability of the Act does not arise at all. If a person not having a colour perception is denied appointment to the post of a driver, he cannot complain that he is discriminated on the ground of his disability. Same would be the position where the colour perception is a required minimum standard for a particular post. A person not possessing it is not being denied appointment or promotion on the ground of disability. The denial is on the ground of non- fulfillment of a minimum required standard/qualification. Viewed accordingly, it will be seen that section 47(2) is not attracted at all."

58. It is not the case of the writ petitioners that when the 2nd respondent was promoted as Senior Permanent Way Supervisor, in 2008, he was not medically fit. We have already recorded that adhoc promotion given to the 2nd respondent, in the post of Senior Permanent Way Supervisor, in 2008, has to be construed as absorption/regular promotion. In Devendra Kumar Pant's case (cited supra), there is a condition precedent for promotion. He did not satisfy the condition and hence, was not promoted. The said judgment cannot be applied to the present case. But in the case on hand, after promotion, the 2nd respondent has acquired a disability.

59. In *K.Ganesan v. M.D., Metropolitan Transport Corporation Chennai Ltd.*, reported in 2008 (5) MLJ 787, a Division Bench of this Court considered the scope of Section 47 of the Act. It was a case, where re-employment was rejected. At Paragraph 10, a Hon'ble Division Bench, extracted a portion of the judgment in *G.Muthu v. Mgmt. of T.N. State Transport Corporation (Madurai) Ltd.*, reported in 2006 (4) MLJ 1669 (Mad.), wherein the arguments and its decision made in the latter case has been extracted. For the purpose of this writ petition, this Court deems it fit to extract the relevant Paragraphs 8(iii) to 8(viii), which are as follows:

"(iii) When the language under Section 47 of the Act is plain and unambiguous, there is no need to give different interpretation.

(iv) When Section 33 of the Act contains similar provisos like under Section 47, Section 47 cannot be said to be having isolated provisos.

(v) Section 56(4) of the said Act deals with persons with severe disability which cannot be compared with mere disability as found in the other provisions of the Act. Hence, if the Parliament intend to give different meaning to disability as found in Section 47, it would have stated so. Further, if the Parliament intended to give elaborate meaning to Section 47, the said provision would not contain the words "who acquires disability" but it would have defined the illness.

(vi) Section 47(i) of the Act merely says "who acquires "a" disability during the service" not who acquires "any" disability. If liberal interpretation is given, every person in the Corporation will try to take advantage of it, since he/she will be getting the same scale of pay without any or much work.

(vii) If wider interpretation is given, there will be a long queue claiming disability. Further, liberal interpretation to Section 47 will cause havoc among the employees and there will be demotivation among the employees.

(viii) Paying capacity of the Corporation has to be taken into consideration while deciding the case in favour of the disabled persons."

60. Even in the case of disablement, prior to the coming into force of the Act, the Hon'ble Supreme Court in *Narendra Kumar Chandla v. State of Haryana* reported in AIR 1995 SC 519 : (1994) 4 SCC 460, protected the last drawn scale of pay. It is useful to extract the views of the Hon'ble Supreme Court, reiterated in *K.Ganesan's* case,

"Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the post

he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since, he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For Clerk, typing generally is not a must. Therefore, the State Electricity Board should relax his passing of the typing test and appoint him as an LDC. Since, on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs.1,400-2,300, his last drawn pay and scale of pay have to be protected. He will also be entitled to arrears of salary."

61. Upon considering the relevant provisions of the Disabilities Act, 1995, including Sections 2(i), 33 and 47, a Hon'ble Division Bench in G.Muthu's case (cited supra), observed as follows:

"19. Having regard to the special features contained in the said Section 47, providing for such a special benefit to an existing employee in an establishment when he acquires a 'disability' as held by us earlier, the application and implementation of the said provision will have to be ensured independent of various other benefits provided under the various other provisions falling under Chapters IV to VII of the Act which are meant for persons 'with disability'. Having regard to the said distinctive features contained in Section 47 of the Act, as compared to the other provisions, we are of the considered opinion that the context in which the benefit has been conferred under Section 47 stands apart from the context of all other provisions where various other benefits have been conferred. In other words, we are of the firm view that the opening set of expressions contained in the definition clause, namely Section 2, which denotes "unless the context otherwise requires" squarely gets attracted to Section 47 and therefore the definition of 'disability' as defined under Section 2(i) cannot be blindly applied to the term 'disability' which has been used in Section 47 of the Act. In other words, the term 'disability' used in Section 47 can draw support not only in respect of the defined 'disabilities' as contained in Section 2(i) of the Act but will also encompass such other 'disabilities' which would disable a person from performing the work which he held immediately prior to acquisition of such 'disability' and thereby entitle him to avail the benefits conferred under the said provision for

having acquired such a 'disability'. (emphasis supplied)

23. Therefore, as argued by the learned counsel for the appellant, while the provisions contained in Chapters IV to VII of the Act deals with "persons with disability" Section 47 alone deals with "an employee who acquires a disability during his service." The said provision clearly says that no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service which means that the person who is employed in an establishment when he acquires a disability, his services cannot be dispensed with or there should be any reduction in rank. Further, the proviso to the said Section clearly states that if he is not suitable for the post he could be shifted to some other post with the same scale of pay and benefits. If it is not possible, he could be kept on a supernumerary post until a post is available or he attains the age of superannuation whichever is earlier. The said provision further states that no promotion shall be denied to any person merely on the ground of his disability. Thus, if we apply Section 47 of the said Act, the order of discharge passed by the respondent dated 26.3.2002 has no leg to stand.

31. After analysing the entire provisions of the Act and also various decisions cited above, we feel that the Courts cannot shut its eyes if a person knocks at its door claiming relief under the Act. In a welfare State like India, benefits of benevolent legislation cannot be denied on the ground of mere hyper-technicalities. When the law makers have conferred certain privileges on a class of persons, like in this case to a disabled person, the duty is cast upon the judiciary to oversee that the authorities or the persons to whom such a power is conferred, enforce the same in letter and spirit for which such enactment has been made. In the present case on hand, the appellant has been discharged on the ground of 'colour blindness' without providing alternative job as per Section 47 of the Act, which is unjustified and unreasonable. Hence, the order of the respondent dated 26.3.2002 discharging the appellant on medical grounds has no leg to stand. The appellant is entitled to the protection under Section 47 of the Act. He should have been given a suitable alternative employment with pay protection, instead of discharging him from service on the ground of 'colour blindness'. Viewed from any angle, the order of the learned single Judge dismissing the writ petition on the mere ground of laches without considering the claim of the appellant on merits is liable to be set aside."

Hon'ble Apex Court in Kunal Singh v. Union of India reported in AIR 2003 SC 1623 : (2003) 4 SCC 524 : 2003-II-LLJ 735, reiterated in K.Ganesan's case (cited supra), as follows:

"9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of "disability" and 'person with disability'. It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of the section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service." The section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of a social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service."

63. Section 47(1) of the abovesaid Act, applies to the case on hand and in which event, on medical examination, in the year 2011, after three years, from the date of promotion,

if the 2nd respondent had acquired disability, not capable of holding the post, then he could be shifted to some other post with the same pay scale and service benefits or if it is not possible to adjust him, against any post, he should be kept in supernumerary post, until a suitable post is available or he attains the age of superannuation, whichever is earlier. Therefore, the petitioners ought to have kept the 2nd respondent in a supernumerary post, with the same pay scale and service benefits. In the light of Section 47(1) of the abovesaid Act, the 2nd respondent cannot be reverted to the post of gangmate.

64. No doubt, the post of Permanent Way Mistry involves public safety. But as per the provisions under Section 47(1) of the Act, the petitioners need not retain the 2nd respondent in the same post, but ought to have given the same benefits and scale, by shifting him, to some other post with the same pay scale and service benefits or kept in a supernumerary post. In that context of the matter, there is no need to challenge the medical certificate issued by the Medical Superintendent, Railway Hospital, Golden Rock.

65. For the reasons, stated supra, there is no infirmity in the impugned order of the Central Administrative Tribunal, Madras Bench, which set aside the reversion order, warranting interference and the same is sustained. The petitioners are directed to restore the pay and other benefits of the 2nd respondent, from the date of reversion order and pay the arrears of salary, revised pension and other terminal benefits, within a period of four weeks, from the date of receipt of a copy of this order.

66. In the result, the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

skm

To

The Registrar,
Central Administrative Tribunal,
Chennai - 104.

+1cc to Mr.L.Chandrakumar, Advocate, S.R.No.62772

+1cc to Mr.V.Haribabu, Advocate, S.R.No.62526

W.P.No.21350 of 2016

LRS (CO)

<https://hcservices.ecourts.gov.in/hcservices/>
CA(05/12/2016)