BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MS.JUSTICE V.M.VELUMANI

W.P(MD)No.16349 of 2014
and
M.P(MD)No.1 of 2014
and
W.M.P(MD)Nos.12528 and 12529 of 2016

S.Annanda Padmavathi ...Petitioner

Vs.

1.The Chief Commissioner,
Central Excise,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 34.

2.The Commissioner of Central Excise,
Tirunelveli. ...Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned order dated 15.07.2014 in O.A.No.735 of 2011 on the file of the Central Administrative Tribunal, Madras Bench, Chennai and to quash and regularize the petitioner's service in the post of Inspector of Central Excise, with effect from 19.12.2002 with all other attending benefits.

For Petitioner : Mr.G.Prabhu Rajadurai
for Mr.J.Ashok
For Respondents : Mr.S.Gurumoorthy

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ORDER

(Order of the Court was made by M.SATHYANARAYANAN,J.)

The writ petitioner/applicant before the Central Administrative Tribunal, Madras Bench, Chennai, was promoted to the Grade of Inspector of Central Excise, vide proceedings, dated 21.05.2008, subject to her passing the physical test in the light of the new physical parameters for Physically Handicapped Officers are evolved in consultation with NIOH, Kolkatta and in terms of the instructions of the Central Board of Excise and Customs, dated 17.12.2008.

2. The petitioner, being one leg affected Physically Handicapped category, was called upon and instructions were given to the Commissioner of Central Excise to verify Height and Weight of the petitioner in terms of Recruitment Rules for the post of Inspector of Central Excise. The petitioner made a challenge to the said order by filing O.A.No.735 of 2011 before the Central Administrative Tribunal, Madras Bench, Chennai and the said Original Application and O.A.No.1046 of 2011 filed by one R.Venugopal were taken up for disposal together and vide common order dated 15.07.2014, both the Original Applications were disposed of, observing that it is not the function of the Court to lay down or modify physical standards fixed by technical bodies, like the NIOH in the instant case, for appointment to a post and the applicants were granted liberty to take up their case once again with the Central Board of Excise and Customs by submitting a comprehensive representation, with a further direction to dispose of the said representation within a stipulated time.

3. A perusal of the affidavit filed in support of this writ petition would read among other things that the petitioner was initially appointed as Upper Division Clerk by way of direct recruitment under Physically Handicapped category and was promoted to the post of Tax Assistant on *ad hoc* basis with effect from 05.08.2001 and pursuant to the cadre restructure that took place in the year 2002, the post of the petitioner was redesignated to Senior Tax Assistant and subsequently, got promotion as Tax Assistant with effect from 19.12.2002.

4. According to the petitioner, many of her juniors were promoted to the higher scale. The petitioner would further state that the Ministry of Social Justice and Empowerment in exercise of power under Section 32 of the Person with Disability (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995, [in short 'the Disability Act'], constituted an Expert Committee to identify/review the posts in Group A, B, C & D to be reserved for the person with Disabilities in the Ministries/Departments and Public Sector Undertakings and accordingly, the said Committee has given a report, based on which, a Gazette Notification in No.16-25/1999-NI, dated 31.05.2001 was published identifying the posts.

5. According to the petitioner, as per the above said Notification, the post of Inspector of Central Excise and Customs was identified for being held by a person with orthopedic disabilities with physical requirements and categories, as suitable for the said job.

6. The petitioner would further aver that in suppression/in violation of the above said Notification, the Department of Central Excise had formulated the Central Excise and Land Customs Department Inspector (Group-C Post) Recruitment Rules, 2002,

wherein they prescribed the physical test for the post of Inspector of Central Excise. The petitioner challenged the same by filing W.P.(MD)No.9993 of 2007 and pending the writ petition, the petitioner was notionally promoted to the post of Inspector of Central Excise against 3% reservation for Physically Handicapped candidates, subject to the condition that she should pass the physical test after the new physical parameters for Physically Handicapped officers are evolved in consultation with NIOH, Kolkatta, with effect from 19.12.2002 vide proceedings dated 21.05.2008. In the light of the said proceedings, the writ petition in W.P.(MD)No.9993 of 2007 was dismissed, by taking into consideration the notional promotion given to her to the grade of Inspector of Central Excise.

7. It is the case of the petitioner that since the post of Inspector of Central Excise has been identified for accommodating the Physically Handicapped persons, the prescription/question of undergoing the physical test as per Central Excise and Land Customs Department Inspector (Group-C Post) Recruitment Rules, 2002, is not at all warranted and it is also in violation of the Government Notification in No.16-25/1999-NI, dated 31.05.2001, issued by the Ministry of Social Justice and Empowerment.

8. The petitioner had also filed a writ petition in W.P(MD) No.740 of 2009 challenging the fixation of the physical standards and it was dismissed for non-prosecution on 18.01.2010 and though it is stated in the affidavit that the petitioner is taking steps to restore the said writ petition, it is yet to be done.

9. It is also averred by the petitioner that the first respondent, vide proceedings dated 08.02.2011, insisted the petitioner to undergo the physical standards test in the light of the instructions, vide Letter F.No.A120/34/SSC/2/2003 Ad.IIIB, dated 17.12.2008 and as a consequence, the second respondent was directed to do the said test. Meanwhile, she filed an original application in O.A.No.735 of 2011 challenging the proceedings dated 08.02.2011.

10. The respondents had filed a counter/reply statement in the Original Application, stating among other things that the petitioner was promoted on provisional basis pending framing of physical parameters by the NIOH, Kolkatta for Physically Handicapped candidates and a Department Promotion Committee was conducted and as a consequence, she was given such a promotion vide order dated 21.05.2008 against 3% quota meant for them subject to passing of physical test after introducing new physical parameters for the Physically Handicapped officers evolved in consultation with NIOH, Kolkatta. Subsequently, the Central Board of Excise and Customs, vide letter dated 17.12.2008 contemplated certain physical standards for the Physically Handicapped persons for promotion to the grade of Inspectors and it was put to

challenge by the petitioner in W.P.(MD)No.740 of 2009 and it came to be dismissed for non-prosecution. The respondents would further aver that as per the letter dated 17.12.2008, the candidates recruited/promoted under the Physically Handicapped category are allowed to join provisionally, subject to their passing the physical test at a later stage, after the new physical parameters for this category are evolved in consultation with NIOH, Kolkatta and it was also examined in consultation with the said expert body and thereafter, the revised instructions have been issued vide Notification No.16/70/2004-DD.III, dated 15.03.2007.

11. The physical parameters were also prescribed in the letter dated 17.12.2008 and as per the same, for the post of Inspector, the following physical parameters are required:

Physical Standards : Height, Chest, Weight.
Physical Test : Walking, Cycling.

12. The Board had decided that the physical standards regarding height, chest and weight prescribed in the Recruitment Rules do not clash with the parameters mentioned in the Notification of Ministry of Social Justice and Empowerment, which can be retained. However, the relaxation can be given in respect of the physical test of walking and cycling in respect of OL (One Leg affected) and OAL (One Arm & One Leg affected) categories and OA (One Arm affected), OL (One Leg affected) and OAL (One Arm & One Leg affected) categories respectively.

13. In the light of the said letter dated 17.12.2008, the petitioner was given promotion on provisional basis as to her satisfying the physical standards and admittedly, she has not satisfied the physical standards of height and since the promotion was given provisionally, the second respondent was directed to verify the same and it was the subject matter of challenge in the said Original Application.

14. The Tribunal, on consideration of entire materials placed before it and taking into consideration the judgment of the Honourable Supreme Court in *Union of India v. Devendra Kumar Pant and others* reported in *2009 (14) Supreme Court Cases 546*, found that it is not the function of the Court to lay down or modify physical standards fixed by technical bodies like the NIOH for appointment to a post and granted liberty to the applicants therein to take up the case with the Board by submitting a comprehensive representation for revision of the physical standards.

15. Mr.G.Prabhu Rajadurai, learned Counsel for the petitioner has invited the attention of this Court to the typed set of documents filed in support of this writ petition and would submit that the petitioner is functioning as the Inspector of Central Excise right from 21.05.2008 and that the Annual Performance

Assessment Report from 01.04.2014 to 31.03.2015 would also disclose that she has been rated as 'Excellent' by all the officers and therefore, height and weight of the petitioner need not be verified.

16. It is the further submission of the learned Counsel for the petitioner that this Court can also take into consideration the benevolent object of the Disability Act and also come to the rescue of the petitioner for the reason that despite the physical incapacity, she is performing excellently and admirably well and earned prices from her superior officers and in any event, instead of placing her in the field post, she may be suitably accommodated in a desk job as she continues to perform properly and efficiently.

17. It is the further submission of the learned Counsel for the petitioner that the letter dated 17.12.2008 and the Recruitment Rules, 2002 as well as the letter dated 17.12.2008 are not in consonance with the Gazette Notification issued by the Ministry of Social Welfare and Empowerment and the opinion given by the expert body, viz., NIOH, Kolkatta has not been taken into consideration in a proper perspective and therefore, the respondents, in any event, ought to have benevolently interpreted paragraph 7 of the Recruitment Rules, 2002, for the post of Inspector as per the Notification dated 29.12.2005 by granting relaxation and for the reasons best known to them, the respondents did not do it so far.

18. Lastly, it is submitted by the learned Counsel for the petitioner that since the Disability Act is a benevolent legislation, it should be interpreted liberally and in fact, the Chief Commissioner, Customs, Central Excise and Service Tax, Lucknow, vide proceedings, dated 13.01.2010 had accommodated the persons without lower limbs as Inspectors and since the petitioner is not having one leg and in the light of the confidential report of her assessment which was graded as 'Excellent', there cannot be any difficulty for the respondents in accommodating her as Inspector of Central Excise and give her further promotion, but on the contrary, steps are being taken to revert her to the post of Senior Tax Assistant and therefore, the impugned orders warrant interference.

19. The learned Counsel for the petitioner, in support of his submissions, has placed reliance on the following decisions:

(i) *Union of India v. Devendra Kumar Pant and others* reported in *2009 (14) Supreme Court Cases 546;*

(ii) *S.K.M.Haider v. Union of India and others* reported in *(2011) 4 Supreme Court Cases 700;*

(iii) *Yogesh Dutt v. Union of India and others* reported in *2011 4 ADJ 778 (Allahabad);*

(iv) *Union of India v. Pankaj Kumar Srivastava and another* reported in *2013 Supreme (Delhi) 1346;*

20. Per contra, Mr.S.Gurumoorthy, learned Standing Counsel appearing for the respondents has drawn the attention of this Court to the reply statement filed by them in the Original Application as well as the counter affidavit filed in this writ petition and would submit that admittedly, the petitioner was promoted provisionally to the post of Inspector of Central Excise, subject to her passing of the physical test after the evaluation of new physical standards for the Physically Handicapped officers in consultation with NIOH, Kolkatta, and the said consultation was also done and thereafter, the Central Board of Excise and Customs, had issued a letter dated 17.12.2008 to all Cadre Control Authorities under the CBSE in respect of appointment/promotion of the persons with Disabilities to the post of Inspector (Central Excise), Inspector (Preventive Officers) and Inspector (Examiner) and in the light of the parameters, a decision has been taken to retain the physical standards, namely, height, chest and weight. Insofar as the physical test, namely, walking and cycling, is concerned, a fair decision has been taken to grant exemption in respect of the persons falling under the Physically Handicapped categories and it cannot be faulted with.

21. It is the further submission of the learned Standing Counsel for the respondents that admittedly, later on, the Central Board of Excise and Customs had issued the proceedings dated 17.12.2008 and that has not been put to challenge by the petitioner and the impugned communication, dated 08.02.2011, which is the subject matter of challenge in the Original Application in O.A.No.735 of 2011, is only a consequential order, directing the second respondent to conduct the physical standard test for the petitioner and in the absence of challenge to the letter dated 17.12.2008, the Original Application as well as the present writ petition are not maintainable.

22. It is also contended by the learned Counsel for the respondents that the prescription for qualification/promotion is within the realm of prerogative of the appointing authority and it cannot be lightly interfered with and in fact, the Tribunal has also placed reliance upon the decision of the Honourable Supreme Court in *Union of India v. Devendra Kumar Pant and others* reported in *2009 (14) Supreme Court Cases 546* and rightly arrived at a decision to reject the prayer of the petitioner, however, granted liberty to the petitioner to take up the issue with the Board by submitting a comprehensive representation and the petitioner has submitted the same and it was rejected by the first respondent vide proceedings dated 29.08.2006 and in the same proceedings, she has been reverted to the post of Senior Tax Assistant and the said order dated 29.08.2006 has also been given effect to, in the form of the proceedings of the second respondent, dated 09.09.2016,

permitting the petitioner to challenge the said orders before the Central Administrative Tribunal, Madras Bench, Chennai and therefore, prays for dismissal of this writ petition.

23. In response to the said submission, the learned Counsel for the petitioner would submit that the petitioner is likely to approach the Tribunal to challenge the said orders and in the interregnum, the order of reversion may not be given effect to, as she is working in that post for nearly 8 years and her juniors got further promotion.

24. This Court paid it's best attention to the rival submissions and perused the materials available on record.

25. The petitioner was provisionally promoted to the post of Inspector of Central Excise, vide office order dated 21.05.2008, subject to her passing the physical test after evaluation of new physical parameters for the Physically Handicapped officers in consultation with NIOH, Kolkatta.

26. Therefore, the petitioner is very well aware that her promotion to the said post is provisional. Thereafter, the Central Board of Excise and Customs in consultation with NIOH, Kolkatta, had evolved the instructions and it was also communicated to all the Cadre Control Authorities under the CBEC, vide letter dated 17.12.2008 and it is relevant to extract the following clauses:

> "(a) Three categories of persons with disabilities, namely, one-leg affected (OL), one-arm affected (OA) and partially hearing handicapped (HH) persons are be considered suitable for appointment/promotion of persons with disabilities.
>
> (b) Candidates recruited/promoted under the physically handicapped category are allowed to join provisionally, subject to their passing the physical test at a later stage, after the new physical parameters for this category are evolved in consultation with NIOH, Kolkatta."

27. The said letter also reads that the matter was reviewed by the Central Board, in a comprehensive manner, with a view to align the instructions with the latest Notification dated 15.03.2007 issued by the Ministry of Social Justice and Empowerment and instructions of DOPT issued from time to time and also examined in consultation with NIOH, Kolkatta, based on which, the revised instructions were issued and it is also relevant to extract the physical parameters hereunder:

> "Physical Parameters:
>
> 4. The physical standards/physical tests prescribed in the RRs cannot be applied to the persons with disability in toto. The physical standards/physical

tests stipulated in the RRs would need to be modified in the context of the 'physical requirements' prescribed in Notifications dated 31.05.2001 and 15.03.2007 issued by the Ministry of SJ & E. The basic criteria is that a person with disability should fulfil the 'physical requirements' indicated in the Notifications and should belong to one of the categories identified as suitable for the Job. The RRs for the post of Inspectors currently prescribe the following physical parameters:

<u>Physical Standards</u> : Height, Chest, Weight.
<u>Physical Test</u> : Walking, Cycling.

5. After careful consideration, the Board decided that the physical standards regarding height, chest and weight prescribed in the RRs do not clash with the parameters mentioned in the Notification of Ministry of SJ & E. Hence, the same shall be retained. However, the following relaxation shall be given in case of the physical tests:

a) The test of 'walking' shall not be insisted in case of OL and OAL categories.

b) The test of 'cycling' shall not be insisted in case of OA, OL and OAL categories."

Thus, the first respondent has deliberated the said issue exhaustively and in consultation with NIOH, Kolkatta, thought fit to issue the instructions dated 17.12.2008.

28. It is also pertinent to point out at this juncture that the petitioner was provisionally promoted to the post of Inspector of Central Excise on 21.05.2008 and the office order issued makes it clear that it is subject to her passing the physical test after evolvement of parameters in consultation with NIOH, Kolkatta and the letter of the first respondent, dated 17.12.2008, also indicates that the candidates recruited/promoted under the Physically Handicapped category are allowed to join provisionally, subject to their passing the physical test at a later stage, after the new physical parameters for this category are evolved in consultation with NIOH, Kolkatta. Therefore, the petitioner is very well aware and put on notice as to the said requirement.

29. The first respondent has arrived at a fair decision to retain the physical standards, namely, height, chest and weight, however, thought fit to modify in respect of physical tests, namely, walking and cycling in respect of the persons with certain disabilities which include OL category (one-leg affected).

30. Admittedly, though the said letter dated 17.12.2008 was put to challenge in W.P(MD)No.740 of 2009, before this Court, it was dismissed for non-prosecution on 18.01.2010 and so far, no

steps have been taken to restore the said writ petition and therefore, the said order has become final.

31. It is the primordial submission of the learned Counsel for the petitioner that since the Disability Act is in the nature of benevolent legislation, it should be given a liberal interpretation and therefore, this Court shall prevail upon the respondents to grant relaxation to accommodate the petitioner in the post of Inspector of Central Excise and in support of his submissions, the learned Counsel for the petitioner cited the aforesaid decisions.

32. In *Union of India v. Devendra Kumar Pant and others* reported in *2009 (14) Supreme Court Cases 546*, which was also cited before the Central Administrative Tribunal and referred to by the Tribunal in the impugned order, the Honourable Supreme Court held that where an employer stipulates minimum standards for promotion keeping in view the safety, security and efficiency, and if the employee is unable to meet the higher minimum standards on account of any disability or failure to possess minimum standards, then Section 47(2) will not be attracted, nor can it be pressed into service for seeking promotion and it has been further observed that once a decision regarding medical standards has been taken by the management bona fide 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.

33. In the considered opinion of this Court, the said judgment is actually coming on aid to the respondents for, the said exercise has been done by the first respondent precisely and thereafter only, the instructions regarding the physical standards test has been prescribed vide letter dated 17.12.2008.

34. In *S.K.M.Haider v. Union of India and others* reported in *(2011) 4 Supreme Court Cases 700*, for the post of Ticket Collector, certain requirements have been prescribed and the Honourable Supreme Court found that the said job may not require vision tests and a perusal of the said judgment would disclose that it came to be rendered on the facts of the case.

35. In the case on hand, the post of Inspector of Central Excise involves field duty also and taking into consideration the interest of the Revenue and other facts and circumstances of the case only, the first respondent thought fit to issue the instructions dated 17.12.2008 prescribing the physical standards and it cannot be faulted with.

36. In *Yogesh Dutt v. Union of India and others* reported in *2011 4 ADJ 778 (Allahabad)*, the concerned candidate applied for the post of Probationary Officer under OBC category and he was an

one-eye blind and the Honourable Supreme Court, on the facts of the case, found that there was no column in the application form nor was he required to give details of the events in his life in which he may have suffered any injuries or loss of limbs or parts of body which resulted in his handicap and also observed that there was absolutely nothing which he cannot do, which a person with two healthy eyes can do and therefore, decided the case in favour of the petitioner therein.

37. In the case on hand, as already pointed out, the post of Inspector of Central Excise also involved field duty and therefore, such a prescription with regard to the physical standards, has been prescribed in the letter dated 17.12.2008, which has not been put to challenge at all.

38. In *Union of India v. Pankaj Kumar Srivastava and another* reported in *2013 Supreme (Delhi) 1346*, with regard to the non-fulfilment of the medical standard prescribed for the general candidates by the Physically Handicapped candidates as per the Civil Services Examination Rules and the Union of India has not issued any consequential amendments contemplated by Rule 17 and in the absence of an operational provision as contemplated by Rule 17, it is not feasible for the UPSC to make such recommendations and on the basis of the said finding, directed the Union of India to do the needful. The said judgment did not have any application to the facts on hand.

39. In *Union of India v. Pushpa Rani* reported in *(2008) 9 Supreme Court Cases 242*, the judicial review in respect of matters relating to creation/abolition of posts, formation/restructuring of cadres, sources/mode of recruitment, prescription of qualifications, selection criteria, evaluation of service records are matters which fall in employer's domain. It is relevant to extract hereunder paragraph 37 of the above said decision:

> "37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct

recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open to the Court to make comparative evaluation of the merit of the candidates. The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."

40. The Honourable Supreme Court in the above cited decision held that the Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer and that the Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open to the Court to make comparative evaluation of the merit of the candidates.

41. In the light of the said legal position and also in the absence of challenge to the letter dated 17.12.2008, the points urged by the learned Counsel for the petitioner, lack merit and substance.

42. The petitioner was also made aware of the fact that the promotion to the post of Inspector of Central Excise is subject to her passing the physical standards and therefore, she cannot make a complaint in respect of the prescription of the physical standards.

43. The learned Counsel for the petitioner has relied upon certain documents in the typed set of papers to show that the performance of the petitioner was 'Excellent'. It is to be pointed out that the additional typed set of documents is not supported by any affidavit.

44. Be that as it may, in the light of the policy decision taken by the first respondent, which has not been put to challenge, this Court is not in a position to grant any relief to the petitioner.

45. The petitioner was reverted to the post of Senior Tax Assistant vide office order in Order No.89/2016, dated 29.08.2016 and the second respondent has passed the consequential order in Order No.51/2016, dated 09.09.2016, posting her to the said post in the office of the Customs and Central Excise, Tirunelveli. Thus, the order of reversion has been given effect to also. Now, the remedy open to the petitioner, if any, is to approach the Central Administrative Tribunal to make a challenge to those orders.

46. In the light of the above facts and circumstances of the case, coupled with the reasons assigned above, this Court is of

the view that the writ petition deserves dismissal and accordingly, this writ petition is dismissed, subject to the liberty granted to the petitioner to approach the Central Administrative Tribunal, Madras Bench, Chennai, challenging the order of reversion. It is also made clear that the observations/findings are given in the light of the facts placed before this Court and as and when a challenge is made to the order of reversion, the Central Administrative Tribunal, Madras Bench, Chennai, may consider and decide the issue on it's own merit without being influenced by any of the observations/findings made in this writ petition. No costs. Consequently, the connected M.P (MD)No.1 of 2014 and W.M.P(MD)Nos.12528 and 12529 of 2016 are also dismissed.

Sd/-
Assistant Registrar(Records)

/True Copy/

Sub Assistant Registrar(CS)
Madurai Bench of Madras High Court,
Madurai-23.

To
1.The Chief Commissioner, Central Excise,
26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai - 34.

2.The Commissioner of Central Excise,
Tirunelveli.

Copy to : The Central Administrative Tribunal,
Madras Bench, Chennai.

+1cc to M/s.J.Ashok, Advocate in SR.53031
+1cc to M/s.S.Gurumoorthy, Advocate in SR.53101

W.P(MD)No.16349 of 2014
and
M.P(MD)No.1 of 2014
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