

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE N.ATHINATHAN

W.P.No.17220 of 2014
M.P.No.1 of 2014

1. The Secretary,
Union of India,
Railway Board,
New Delhi.
2. The General Manager,
Southern Railways,
Chennai.
3. The Assistant Personnel Officer,
Southern Railways,
Chennai.

Petitioner

versus

1. The Registrar,
Central Administrative Tribunal,
Madras Bench, Chennai 600 104.
2. P.S.Haridasan
3. M.Loganathan

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, to call for the records of the 1st respondent in O.A.No.1554 of 2011, dated 06.09.2013 and quash the same.

For Petitioners : Mr.V.G.Suresh Kumar

For 2nd Respondent : Mr.R.Ramesh

For 3rd Respondent : Not Ready in Notice

ORDER

Challenge in this writ petition is to an order, made in O.A.No.1554 of 2011, dated 06.09.2013, by which, the Central Administrative Tribunal, Madras Bench, Chennai, has quashed the order, dated 29.08.2011 of the Assistant Personnel Officer, Southern Railways, Chennai, the 3rd writ petitioner herein and further directed the writ petitioners to post the 2nd respondent as CB Fitter Grade II, on par with Mr.M.Loganathan, the 3rd respondent herein, and to grant all consequential benefits, within a period of two months, from the date of the order in Original Application.

2. Facts leading to the writ petition are that the 2nd respondent was initially appointed as Khalasi on 29.10.1983. He was promoted as Khalasi Helper and thereafter, as Saw Mechanic in the scale Rs.950-1000, w.e.f. 1.4.1987, along with one Mr.Krishnan and Mr.M.Loganathan, the 3rd respondent herein. According to 2nd respondent, the said Mr.Krishnan was senior to him and the 3rd respondent herein was his junior. Vide order, dated 12.09.1988, the 2nd respondent was considered unfit for the original post of Saw Mechanic, but fit for an alternative job as Carpenter Grade III, in the same pay and grade. The seniority list of Carpentry Grade III was prepared on 10.10.1990, in which, seniority of the 2nd respondent was reckoned from 12.9.1988, instead of 1.4.1987. Therefore, he made a representation, dated 14.5.1992, against the change in the seniority position, to which, the writ petitioners replied that the seniority assigned was in order. Aggrieved by the same, the 2nd respondent filed O.A.No.1338 of 1993, which was dismissed on 02.04.1996. However, during the pendency of the said OA, he requested for fresh medical examination, to find his suitability, to the original post, Saw Mechanic.

3. The Medical Department, vide communication, dated 19.6.2004, found him fit for the post of Saw Mechanic. In the meanwhile, the post of Saw Mechanic was merged with Grade C.B. Fitter. In view of the merger and the subsequent medical fitness, the 2nd respondent has contended that he was eligible for the post of C.B. Fitter, with his original seniority, above the 3rd respondent. He made a representation, dated 24.5.2010, to post him, in the post of Highly Skilled Grade I, with seniority and other benefits. The said request was rejected by the Assistant Personnel Officer, Southern Railways, Chennai, 3rd petitioner herein, vide order, dated 29.8.2011, to the effect that benefits of the provisions of The Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation Act, 1995, would be given to those, who were rendered medically unfit from 7.2.1996 and not to those, who were found unfit, prior to that date.

4. Being aggrieved by the same, the 2nd respondent has preferred O.A.No.1554 of 2011, before the Central Administrative Tribunal, Madras Bench, to quash the order, dated 29.08.2011 and consequently, prayed for a direction to the writ petitioners to post him as CB Fitter Grade II and assign him seniority in the post of Saw Mechanic, merged as CB Fitter and on par with his junior, viz., 3rd respondent herein, and to grant him all consequential benefits. According to the 2nd respondent, as per the Railway Board's order, dated 7.1.1975, a medically unfit person, absorbed in alternative appointment, on being declared subsequently fit for the original category, is entitled to retain his original seniority in the post, he was medically found unfit, if he has preferred the appeal in time.

5. Before the Tribunal, the writ petitioners in their reply, have contended that the 2nd respondent has made a representation, dated 27.5.2004, after a lapse of 15 years to review his medical fitness for the post of Saw Mechanic. Inasmuch as the post of Saw Mechanic, in which, he was permanently declared unfit as on 25.05.1988, has been merged with CB Fitter, he was again referred to the medical authority, to ascertain, as to whether he was fit for CB Fitter or Carpenter. The 2nd respondent was certified fit on 19.6.2004 for service in Fitter, Saw Mechanic.

6. As regards the contention of the 2nd respondent that he would lose his seniority, in the post of Saw Mechanic, if an appeal is filed within the time limit on medical review, the writ petitioners have referred to para 522 of IRMM Vol.I, which deals with the time limit for appeal and belated appeal, with sufficient cause and contended that the representation of the 2nd respondent, after a lapse of 15 years, for reconsideration of his medical fitness to the former post, Saw Mechanic, would not fall under the purview of para 522 of IRMM Vol.I. Hence, the writ petitioners have contended that the plea of the 2nd respondent for change of category from Carpenter to Fitter, with original seniority, as Saw Mechanic, cannot be considered.

7. It was also their contention that based on the seniority, in the grade of Carpenter from the year 1988, the 2nd respondent was progressing in that grade and promoted to Carpenter Grade II, with effect from 2.2.2007, whereas, his junior, the 3rd respondent herein, was promoted as HSK II and HSK subsequently, and he has been progressing in the grade of Saw Mechanic. Therefore, the petitioners have contended that the 2nd respondent cannot claim seniority, pay, as well as grade, on par with that of 3rd respondent and prayed for dismissal of the original application.

8. The 2nd respondent has filed a rejoinder before the Tribunal and contended that para 522 of IRMM, relied on by the writ petitioners, is not applicable to him, since the delay is only on the part of the writ petitioners, in not reposting him, to his original post, as Saw Mechanic, inspite of being found fit for that category, as early as on 19.6.2004, on medical review. It was also his contention that he has not sought for seniority in the category of Carpenter Grade III, w.e.f. 12.9.1988, but has pleaded, only to assign proper seniority, on par with 3rd respondent, in the original post of Saw Mechanic, now merged with CB Fitter. After hearing the learned counsel appearing for the parties and Tribunal, vide order, dated 06.09.2013, quashed the rejection order, dated 29.8.2011 and consequently, directed the writ petitioners to post him as CB Fitter Grade II, on par with 3rd respondent, and grant him, all consequential benefits.

9. Being aggrieved by the same, instant writ petition has been filed, on the grounds, inter alia, that the Tribunal has failed to consider that the 2nd respondent was found unfit, for the duties of his original post, Saw Mechanic, but fit for an alternative sedentary job, with duties, not involving, going near the moving machinery, crossing tracks, fire and climbing heights, etc., and hence, he was designated as Carpenter, with effect from 12.09.1988.

10. The writ petitioners have further contended that the Tribunal has failed to take note of the Railway Board's Circular No.E(NG)I-76 SR6/37, dated 18.09.1976, wherein, it has been indicated that medically decategorised staff absorbed in alternative posts should be allowed seniority in the grade of absorption with reference to the length of service rendered in the equivalent or corresponding grade, irrespective of the rate of pay fixed in the grade of absorption.

11. Placing reliance on Para 522 of the IRMM Vol.I, the writ petitioners have submitted that an appeal has to be filed within one month time and therefore, the appeal filed by the 2nd respondent, after a lapse of 15 years for recommendation of his medical fitness, to his former post, cannot be come under the purview of the abovesaid Para. Even in the year 1993, when the 2nd respondent filed O.A.No.1338 of 1993, he sought for revision of seniority, only in the post of Carpenter and the Tribunal, vide order, dated 02.04.1996, rejected the said plea.

12. The writ petitioners have further submitted that the Tribunal has failed to take note that as per Para 1311 of IRMM, Vol.I, the 2nd respondent was informed that the change of category from Carpenter to Fitter, would be on bottom seniority, subject to Trade test and also whether, he was willing to accept

the same. Though the 2nd respondent acknowledged the receipt of the communication on 29.07.2004, he did not respond and not subjected to take any test.

13. The writ petitioners have further submitted that after a lapse of 15 years, the 2nd respondent has sought for restoration of seniority in the post of Saw Mechanic, which has been merged with CB Fitter. According to them, the 2nd respondent has already gained two promotions, in the channel of Carpenter and therefore, he cannot be restored to the post of Saw Mechanic, reckoned with his original seniority in the post of Saw Mechanic and subsequently, to post him as CB Fitter Grade II, on par with his junior.

14. The 2nd respondent has filed a counter affidavit, denying the contention that representation has been made, after 15 years. He was found fit on 19.06.2004 by the Medical Board, for the post of Saw Mechanic. Immediately thereafter, he made a representation to restore him to the post of Saw Mechanic with seniority in the said post. According to him, Para 1311 of IRMM Vol.I is not applicable to his case. He has also submitted that the Railway Board's Circular, dated 18.09.1976, is not applicable to his case. He submitted that there is no error in the order of the Tribunal, warranting interference.

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

15. On 01.04.1987, the 2nd respondent has been promoted as Saw Mechanic in the scale of pay of Rs.950-1000 and Mr.M.Loganathan, 3rd respondent herein, is his junior. Subsequently, vide order, dated 12.09.1988, the 2nd respondent has been considered unfit for the original post of Saw Mechanic, but fit for an alternative job as Carpenter Grade III, in the same pay and grade. He made a representation, dated 14.5.1992, requesting for re-fixation of his seniority, in the post of Carpenter, as 01.04.1987, instead of 12.09.1988. A reply has been given to the 2nd respondent, informing that the benefit of protection of seniority on medically de-categorised is applicable only to staff, subjected to periodical medical examination and not to other categories, which do not require medical examination, but given change of category, in terms of the Railway Board's letter, dated 18.09.1976. Challenge to the same in Original Application No.1338 of 1993 filed by the 2nd respondent, has been dismissed on 02.04.1996. Thereafter, after nearly 15 years, the 2nd respondent has sent a representation, dated 27.05.2004, to review his medical fitness.

16. Para 522 of Indian Railways Medical Manual, Vol.I, deals with the provision for reconsideration of adverse reports and the same is extracted hereunder:

"522. Provision for reconsideration of adverse reports:- The following provisions shall apply in regard to the reconsideration of adverse reports of Medical Examination.:-

(1) Candidates:- (i) Ordinarily, there is no right of appeal against the findings of an examining medical authority, but if the Government is satisfied, based on the evidence produced before it by the candidate concerned, of the possibility of error of judgement in the decision of the examining medical authority, it will be open to it, to allow re-examination. Such evidence, should be submitted within one month of the date of communication in which the decision of the first medical authority is communicated to the candidate. The appellate authority may entertain the appeal within a reasonable time after the expiry of said period, if it is satisfied that the appellant had sufficient cause for not preferring an appeal in time. Consultation and investigation charges will be recovered for appeal. (Ministry of Railway's letters No.91/H/5/1 dt.. 23/08/1991 and No.87/H/5/18 dt.. 26/10/1988)

(ii) If any medical certificate is produced by a candidate as evidence about the possibility of an error of judgement in the decision of the first medical authority, the certificate will not be taken into consideration unless it contains a note by the medical practitioner concerned, to the effect that it has been given in full knowledge of the fact that the candidate has already been rejected as unfit for service by the medical authority appointed by the Government in this behalf.

(2) Railway Employees:- (i) The Railway employee may himself, on receiving the notice of failure to pass the examination, lodge an appeal within seven days from the date of adverse report, for reconsideration by the Chief Medical Director. This appeal will be directed through the Divisional Officer /District Officer of the employing Branch or the department concerned and CMS/MS in charge of the Division, who will respectively attach a report of the examination.

(ii) A principal Divisional or District Officer of the branch or department concerned may submit a requisition for reconsideration by the Chief Medical Director of the case of a Railway employee concerning whom an adverse certificate has been issued by an examiner authorised to do so. The requisition will include a statement of any special circumstances that appear worthy of consideration, and will be sent

through the CMS/MS of the division who while forwarding it to the Chief Medical Director will attach a report of the examination.

(iii) On receipt of an appeal under para (i) above, or a requisition under para (ii) above, the Chief Medical Director will after perusal of the papers, either issue summary orders or arrange at his discretion of such further special examination of the Railway employee as the circumstances of the case may require. The decision of the C.M.D will be final.

(iv) A Railway employee who, having been examined by a competent medical authority, has been certified by the authority to be unfit to continue to discharge the duties formerly assigned to him, shall not be permitted to discharge such duties or the duties of any other class, competence for which has not been certified by the examiner; and the adverse certificate shall hold irrespective of the submission of an appeal under sub-para(i) above, or the submission of a requisition under sub-para (ii) above, until such time as under the instructions of the Chief Medical Director, the adverse certificate has been formally withdrawn or replaced."

17. Rules 312 and 313 of the Indian Railway Establishment Manual, Vol.I, deal with transfer on request and medically unfitted railway servants and the same are reproduced hereunder:

"312. TRANSFER ON REQUEST:- The seniority of railway servants transferred at their own request from one railway to another should be allotted below that of the existing confirmed, temporary and officiating railway servants in the relevant grade in the promotion group in the new establishment irrespective of the date of confirmation or length of officiating or temporary service of the transferred railway servants.

Note:- (i) This applies also to cases of transfer on request from one cadre/division to another cadre/division on the same railway. [Rly. Bd. No. E (NG) 1-85 SR 6/14 of 21-1-1986].

(ii) The expression "relevant grade" applies to grade where there is an element of direct recruitment. Transfers on request from Railway employees working in such grades may be accepted provided they fulfil the educational qualifications laid down for direct recruitment to the post. No such transfers should be allowed in the intermediates grades in which all the posts are filled entirely by promotion of staff from the lower grade(s) and there is no element of direct recruitment. (Railway Board's letter NO. E(NG) I/99/TR/15 dated 08.02.2000)

313. MEDICALLY UNFITTED RAILWAY SERVANTS :-

(a)(i) Medically decategorised staff may, as far as possible, be absorbed in such alternative posts which should broadly be in allied categories and where their background and experience in earlier posts could be utilized. For example, traffic running and operating ,staff need not necessarily be absorbed in the ticket checking cadre alone but they could also be absorbed in other commercial, station or yard categories.

(ii) The medically decategorised staff absorbed in alternative posts, whether in the same or other cadre, should be allowed seniority in the grade of absorption with reference to the length of service rendered in the equivalent or corresponding grade, irrespective of the rate of pay fixed in the grade of absorption under the extant rules. In the case of staff who are in grade higher than the grade of absorption at the time of medical de categorisation, total service in the equivalent and higher grade is to be taken into account.

Provided that if a medically decategorised employee happens to be absorbed in the cadre from which he was originally promoted, he will not be placed above his erstwhile seniors in the grade of absorption.

(iii) While absorbing the medically decategorised Running Staff in alternative posts, a percentage of basic pay representing the pay element in Running Allowance, as decided by the Government through administrative instructions from time to time, should be added to. the minimum as well as maximum of the scale of pay for purposes of identifying 'equivalent' posts and their seniority should then be fixed in the equivalent absorbing posts. [No. E(NG) II/77/RE-3-2 of 2-9-77 and E(NG)I-80-SR-6/83 of 5-3-1981].

(b) Railway servants whose services were terminated either because of the maximum limit of all leave including extraordinary leave having been exceeded or the medical authorities could not recommend the grant of extraordinary leave in the case of tuberculosis, pleurisy and leprosy patients and are re-employed in railway service after being declared fit to work by the medical authority should take their seniority below all permanent railway servants on the date of their re-employment provided they were permanent before medical unfitness or would have been confirmed in the meantime. Railway servants who were officiating or temporary at the time of medical unfitness or would not have been confirmed in the meantime should be placed below the officiating or

temporary employees as the case may be on the date of their re-employment.

(c) Seniority of medically unfitted staff mentioned in sub-para (a) above, on restoration to their original posts should be determined as under:-

(i) Railway servants who properly appeal within the time limit laid down for appeals or whose appeal is entertained in a reasonable period waiving the time limit and get declared fit, should not lose their seniority or their claim for consideration for promotion for which they were eligible in the original category in which they were employed.

(ii) Seniority of railway servants who prefer delayed appeals and are declared fit or who take treatment and consequently get declared fit, if they were formerly confirmed in the grades in which they were, would be affected to the extent of any persons who may have been confirmed before their re-absorption into the original category. If, however, they were only officiating in the original category, then their seniority should be below the staff confirmed till then, but need not be affected vis-a-vis their original juniors who happen to be till officiating.

(d) In the case of staff coming to a new unit on own request by accepting bottom seniority and then getting medically de-categorised, provision of sub-Para (a) (ii) above will be applicable only to the extent of service in the new unit. [No. E(NG)I-71 SR6/39 dated 31-5-1977].

(e) In the case of staff who are not required to undergo periodical Medical examination but who of their own accord request for change of category on grounds of health, and are recommended change of occupation by the medical authority, their change will be treated as transfer on own request and dealt with as per para 312. [No. E(NG)I-76 SE 6/37, dated 18-9-1976]."

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(emphasis supplied)

18. As per the Railway Board's letter, dated 30.06.1959, a medically unfit staff absorbed in an alternative appointment on being declared subsequently fit for the original category will reckon his seniority, on his absorption in that post:-

(a) If the employee is reposted as a result of his appeal preferred within the time-limit laid down for appeals - The original seniority will be retained.

(b) If the employee submitted delayed appeals or after medical treatment is declared fit for the category - His seniority if he was formerly confirmed in the grade would be below those who may have been confirmed before his re-absorption. If, however, he

was only officiating in the original category; then his seniority on restoration should be below the staff confirmed till then but need not be affected vis-a-vis his original juniors who happen to be still officiating. (R.B.'s No.E(NG)55SR6/15 of 30.06.1959, Sl.No.ER 3693/NR558). Refixation of pay will be made under Fundamental Rules.

(c) Pay of running staff on re-promotion/re-appointment to a running post (from a stationary post) should be fixed after excluding the element of running allowance (R.B.'s No.E(P&A) II 74/PP 12 of 9.1.75)."

19. Seniority of medically incapacitated staff in alternative posts, as per Railway Board's Circular No.E(NG) 63 SR 6-31, dated 26.08.1964, is extracted hereunder:

GOVERNMENT OF INDIA (BHARAT SARKAR)
MINISTRY OF RAILWAYS/RAIL MANTRALAYA
(RAILWAY BOARD)

No. E(NG) 63 SR 6-31

dated
26/08/1964

Subject :- Seniority of medically incapacitated staff in alternative posts.

Reference Board's letters Nos. E 55 SR 6/15/2 (NG) dated 22.10.1956 and E(NG) 65 SR 6-15 dated 14.03.1957. The Board have reviewed the present practice obtaining on different railways in regard to the absorption of medically decategorised staff in alternative categories whether in the same or other Department. They have decided hereafter the under mentioned procedure should be followed:-

(i) Medically decategorised staff, may as far as possible, be absorbed in such alternative posts which should broadly be in allied categories and where their background and experience in earlier posts could be utilised. For example Traffic running and Operating staff need not necessarily be absorbed in the Ticket Checking Cadre alone but they could also be absorbed in other Commercial, Station or Yard Categories.

(ii) The medically decategorised staff absorbed in alternative posts, whether in the same or other cadres, should be allowed seniority in grade of absorption with reference to the length of service rendered in the equivalent or corresponding grade, irrespective of the rate of pay fixed in the grade of absorption under the extant rules. In the case of staffs who are in grade higher than the grade of absorption at the time of medical decategorisation,

total service in the equivalent and higher grade is to be taken into account.

This is subject to the provision that if a medically decategorised employee happens to be absorbed in the cadre from which he was originally promoted he will not be placed above his erstwhile seniors in the grade of absorption.

2. The Board have also decided that the above procedure should be given prospective effect and seniority of medically decategorised staff absorbed in alternative categories during the period from 22.10.56 to the date of issue of this letter in accordance with the procedure outlined in their letters referred to in para 1 above should not be disturbed."

20. Railway Board's Circular No.E(NG)I-76 SR6/37, dated 18.09.1976, is extracted hereunder:

GOVERNMENT OF INDIA (BHARAT SARKAR)
MINISTRY OF RAILWAYS/RAIL MANTRALAYA
(RAILWAY BOARD)

No. E(NG)I-76 SR6/37 dated 18/09/1976

Subject :- Seniority of medically incapacitated staff in alternative posts.

Reference:- Board's letter No.E(NG)63 SR6-31, dated 26.08.1964

In Board's letter referred to above it had been indicated that medically decategorised staff absorbed in alternative posts should be allowed seniority in the grade of absorption with reference to the length of service rendered in the equivalent or corresponding grade, irrespective of rate of pay fixed in the grade of absorption and in the case of staff who are in grade higher than the grade of absorption at the time of medical decategorisation, total service in the equivalent and higher grade is to be taken into account.

2. A doubt has arisen whether these orders will apply in the case of staff who are not required to undergo periodical medical test but who of their own accord request for change of category on grounds of health and are recommended a change of occupation by the medical authorities.

3. The Board wish to clarify that their orders of 1964, referred to above will not apply to staff who

get their cases recommended for a change in category on medical grounds. They will be governed by the same rules as staff transfers at their own request.

4. These orders will come into force with immediate effect. Past cases need not be re-opened."

Copy of the Railway Board's Circular, dated 18.09.1976, has been addressed to all the General Managers of Indian Railways.

21. When the 2nd respondent was found medically unfit for the post of Saw Mechanic, vide letter, dated 12.09.1988, he was provided with an alternative employment as Carpenter. Thereafter, Railways have issued Circular No.E(NG)I/93/RE3/6, dated 29.04.1994, for the purpose of assigning seniority to medically decategorised staff, absorbed in alternative categories. The said circular, dated 29.04.1994, reads as follows:

GOVERNMENT OF INDIA (BHARAT SARKAR)
MINISTRY OF RAILWAYS/RAIL MANTRALAYA
(RAILWAY BOARD)

RBE No.36/1994

No. E(NG)I/93/RE3/6

dated
18/09/1976

Subject :- Assignment of seniority to
medically decategorised staff absorbed in
alternative categories.

Reference:- W. Rly.'s letter No. EU 1160/55/160/90
(PNM),
dated 01.11.1993 on the above subject.

The matter has been reviewed by the Board in the light of the points made in your Railway's letter referred to above and it is clarified that the medically decategorised employees on their absorption in an alternative post will be assigned seniority as per para 1314 {1310} of IREM 1989-Edition irrespective of the fact whether they were required to undergo P.M.E. or not and whether the decategorisation had resulted from the P.M.E. or otherwise.

2. The staff who get their cases recommended for change of category on medical grounds will continue to be allowed seniority as per para 312 of IREM 1989-Edition.

3. Necessary correction to the Master Circular No.25 is being issued separately for deleting para 2 thereof.

22. Earlier, the 2nd respondent was assigned seniority, as on 12.09.1988, in the post of Carpenter Grade II, from the date of entry as skilled Saw Mechanic, in Grade III. Hence, he made representations against the change in seniority position to 01.04.1987, which was rejected by the Chief Works Manager, Carriage and Wagon Works, Madras, on 01.07.1992. Against which, the 2nd respondent has filed O.A.No.1338 of 1993, before the Central Administrative Tribunal, Madras Bench. Defending the action, the Chief Works Manager, Carriage and Wagon Works, Madras, has submitted as follows:

"Accordingly as regards the fixation of seniority the rules applicable for cases other than those medically unfitted from posts where periodical medical examinations have been specified have to be observed. Stand of the official respondents that they had committed the error in fixing the seniority initially. The applicant had been conferred unmerited benefit by treating him erroneously on a par with medically decategorised staff who are submitted to periodical medical examination. It was explained by the learned counsel for the respondent that there are certain categories of staff who have to undergo periodical medical examinations in the interest of staff running of trains/administration. Such staff when medically decategorised and get fitted into categories requiring lesser medical standards are given benefit of their full seniority in the alternative post in which they get placed. Such a benefit is not allowable in the case of other staff who do not have to undergo periodical medical examination but are however fixed in alternative posts, when it is found that they do not meet the medical standards of the posts in which they had been functioning earlier. In these cases, the seniority in the new posts has to be reckoned only from the date of posting in these alternative posts. Reference was also invited to Board's letter No.E(NG)/176/SR VI/37, dated 18.09.1976, which is to the effect that seniority of staff who get their cases recommended by the medical authorities for a change in category on medical grounds but who are otherwise fit should be regulated by the rules as applicable to staff transferred in their own."

Accepting the stand of the respondent therein, O.A.No.1338 of 1993, has been dismissed on 02.04.1996.

23. The 2nd respondent, working as Carpenter, has made a representation, dated 27.05.2004, to review his medical fitness. He was found fit for service in Fitter, Saw Mechanic. However, by this time, the post of Saw Mechanic, did not exist and was

merged with CB Fitter. When the 2nd respondent made a representation, dated 27.05.2004 to the authorities, a reply, dated 28.07.2004, has been given to him, which reads as follows:

"You were initially promoted to the post of Technician Gr.III (Saw Mechanic) with effect from 01.04.1987. Consequent to your being declared as unsuitable to perform the duties of the post of Saw Mechanic, you were accorded change of category as Technician Gr.III (Carpenter) with effect from 12.09.1988. Since then you have been working as a carpenter. Your present request for change of category from Carpenter to CB Fitter will be treated as transfer on own request on bottom seniority. This change of category also involves necessary trade test. Please confirm acceptance of the above for further processing."

24. Thereafter, the 2nd respondent seemed to have made a representation to the Chief Workshop Manager, Carriage & Wagon Works, Chennai, stating that his junior, Mr.M.Loganathan, 3rd respondent herein, has been promoted as HSK-II and HSK-I and whereas, the 2nd respondent, who was found fit on 19.06.2004, should be considered to the post of Fitter trade of CB shop. Railway Board's Circular No.E(NG)I/2004/RE-3/9, dated 31.05.2005, reads as follows:

GOVERNMENT OF INDIA (BHARAT SARKAR)
MINISTRY OF RAILWAYS/RAIL MANTRALAYA
(RAILWAY BOARD)

RBE No.93/2005

No.E(NG)I/2004/RE-3/9

dated
31.05.2005

Subject :- The Persons with Disabilities
(Equal Opportunities, Protection of Rights and
Full Participation) Act, 1995- Absorption of
disabled/medically decategorised Staff in
alternative employment- Date of effect of the
revised scheme - Question regarding.

Chapter XII of Indian Railway Establishment Manual, Vol.I, 1989 incorporating the scheme for absorption in alternative employment of medically decategorised staff has been amended pursuant to Section

47(1) of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995, vide ACS No.77 issued under this Ministry's letter number E(NG)I- 96/RE3/9 (2) dt. 29-4-99 read with ACS Nos.122 and 148 issued under their letters No.E(NG)I/2000/RE-3/5dt. 31-7-2001 and E (NG)I/2001/RE-3/8 dt. 1-7- 2003, respectively.

2. The scheme so revised is being implemented in the Railways from the date of issue of the relevant instructions viz 29-4-99. Representations have been received to the effect that since the Act came into force with effect from the date on which it was notified in the Govt. of India Gazette viz 7-2-96, the benefit of revised scheme should be made available from 7-2-96. The matter has been considered carefully by this Ministry. It has now been decided that the scheme contained in this Ministry's letter of 29-4-99 as modified may be made effective from 7-2-96. Accordingly in respect of cases in which the disabled/medically decategorised employees on or after 7-2-96 and upto 28-4-99 were absorbed in alternative employment in accordance with the earlier scheme in grade(s) lower than the grade(s) held by them on regular basis at the time of disablement/medical decategorisation may be reviewed on representations received in this regard and decided at the level of the General Manager as per the revised scheme. In other type of cases wherein disabled/medically decategorised employees had opted to retire asking for appointment of eligible ward on compassionate ground, the question of review does not arise.

3. This issues with the concurrence of the Finance Directorate of the Ministry of Railways.

Please acknowledge receipt.

(J.S.Gusain)
Director Estt.(N)
Railway Board

25. A further representation, dated 24.05.2010, has been made, for which, a reply has been given by the Assistant Personnel Officer/M&E for Chief Personnel Officer, Southern Railway, Headquarters Office, Personnel Branch, Chennai, 3rd petitioner herein, which is impugned in O.A.No.1554 of 2011 and the same reads as follows:

"Your representation has been considered. The assignment of seniority in the category of Carpenter Gr.III with effect from 12.09.1988 is in order as per the relevant rules at that time. Based on the seniority assigned, you have also been considered for promotion as Carpenter - Gr.II with effect from 02/02/07.

Though Shri.M.Loganathan was promoted as HSK-II

and HSK-I subsequently being your junior as mentioned in your representation, he has been progressing in the Grade of Saw Mechanic whereas your seniority was assigned in the Grade of Carpentry. Hence, your claim for pay as well as grade on par with Shri.M.Loganathan cannot be agreed to.

Consequent on the passing of the "The Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act 1995", Board vide their letter E(NG)II/2004/RE/2-9, dated 31.05.2005, have clarified that the instructions contained in the Board's letter dated 29.04.1999 may be made effective from 07/02/1996. Accordingly, in respect of cases in which the disabled/medically decategorised employees on or after 7th February 1996 and upto 28th April 1999 were absorbed in alternative employment in accordance with the earlier scheme in grade lower than the grades held by them on regular basis at the time of disablement/medical decategorisation may be reviewed and decided at the level of the General Manager.

As your case was decided prior to 07/02/1996, your case cannot be reviewed under the "The Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act 1995".

26. Thus, from the above materials, it could be deduced that on medical unfitness in the year 1987, the 2nd respondent has been given alternative appointment to the post of Carpenter, Grade III, with seniority, as on 12.09.1988, from the date of joining, in the said post. When the 2nd respondent challenged the fixation of seniority in the post of Carpenter, Grade III, with effect from 12.09.1988, the same has been sustained by the Tribunal, vide order made in O.A.No.1338 of 1993, dated 02.04.1996. From the post of Carpenter, Grade III, the 2nd respondent has earned promotion as Carpenter, Grade II, with effect from 02.02.2007 and he continued in the channel from Carpenter, Grade III to Carpenter, Grade II.

27. The 2nd respondent submitted a representation, dated 27.05.2004, to review his medical fitness. This representation, at any rate, cannot be construed as an appeal, under Rule 313 of the Indian Railway Establishment Manual, Vol.I, for the reason that such an appeal has to be filed, within the time limit, laid down for appeals, ie., one month from the date of medical unfitness or whose appeal is entertained in a reasonable period waiving the time limit and declared fit. Only in those cases, the 2nd respondent would not lose his seniority, in the post, in which, he was medically found unfit to continue or his claim can be considered for promotion. The 2nd respondent has been absorbed in the cadre of Carpenter, Grade III, fixed at the

appropriate place, gained seniority and also further promotion as Carpenter, Grade II, in the year 2007.

28. Right of appeal provided in Paragraph 522 of IRMM, Vol.I, is against the finding of an examining medical authority, but if the Government is satisfied, based on the evidence provided before it, by the candidate concerned, of the possibility of error of judgment, in the decision of the examining medical authority, it will be open to it, to allow re-examination. Such evidence should be submitted, within one month, from the date of communication, in which, the decision of the first medical authority, is communicated to the candidate. The appellate authority may entertain an appeal, within a reasonable time, after the expiry of the said period, if it is satisfied that the candidate had sufficient cause for not preferring any appeal in time. Upon receipt of an appeal or a requisition, the Chief Medical Director, after perusal of the papers, would either issue summary orders or arrange at his discretion of such further special examination of the Railway employee as the circumstances of the case may require and his decision is final.

29. An appeal is a proceeding taken to rectify an erroneous decision of an inferior authority, to a superior authority. It is a removal of case from an inferior authority to a superior authority, for the purpose of re-examination of evidence, with reference to facts, procedure and law. Appellate jurisdiction is exercised, when the record of the inferior authority, is brought to the notice of the superior authority, who has jurisdiction to re-examine, affirm, reverse or modify the order of the inferior authority and also to issue directions to the inferior authority. Appeal is an application by the aggrieved person to a superior authority, in order to test, scrutinize and for correction of the decision of an inferior authority.

30. In the light of Paragraph 522 of the Indian Railway Medical Manual, Vol.I and the discussion, the representation, dated 27.05.2004, made by the 2nd respondent, cannot be considered as an appeal, against the decision of the first medical authority of the year 1987 and consequently, the 2nd respondent cannot be placed in the original post of Saw Mechanic, with seniority. Had there been an appeal within one month from the date on which, he was medically unfit in the year 1987 or some time later, with delay, against such an order, then there is scope to contend that the case of the 2nd respondent ought to have been considered, as per Para 522 of Indian Railway Medical Manual, Vol.I. But in the case on hand, after 16 years, a representation has been made to review his medical fitness, to the post of Saw Mechanic.

31. In the light of the manual and other guidelines

extracted, the writ petitioners are not bound to restore him, in the post of Saw Mechanic, with original seniority. There has been a change of category in the year 1988. The 2nd respondent has earned promotion in that category as Carpenter, Grade II. Therefore, when a representation, dated 27.05.2004, has been made, the Chief Works Manager, Carriage and Wagon Works, Perambur, Chennai-23, vide letter, dated 28.07.2004, has rightly replied that the request of the 2nd respondent for change of category from Carpenter to CB Fitter would be treated as transfer on own request on bottom seniority, which involves necessary trade test. When the Department has asked for confirmation, the 2nd respondent has insisted for restoration of seniority in the post of Saw Mechanic, on par with his junior, Mr.M.Loganathan, 3rd respondent herein, who earned his promotion as HSK-II and HSK-I respectively.

32. The 2nd respondent, who had been medically unfit and de-categorised in the year 1988 and worked as Carpenter, Grade III and earned his promotion as Carpenter, Grade II, in the year 2007, cannot be treated on par with a person, who had continued in the channel of promotion from Saw Mechanic to HSK-II and subsequently to HSK-I. If the contention of the 2nd respondent has to be accepted, then the period between 1988 to 2004, has to be construed as medically fit.

33. As stated supra, the representation, dated 27.05.2004, is not an appeal, against de-categorisation, made in the year 1988. But it is only a representation to consider his medical fitness to the post of Saw Mechanic, which came to be merged with the post of CB Fitter, Grade II. In the light of the above discussion, this Court is not inclined to accept the case of the 2nd respondent. On the contrary, this Court is of the view that the writ petitioners have made out a prima facie case, for interference with the order of the Tribunal.

34. In the result, the order of the Tribunal made in O.A.No.1554 of 2011, dated 06.09.2013, is set aside. Hence, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

s/d-
Assistant Registrar(CS-III)

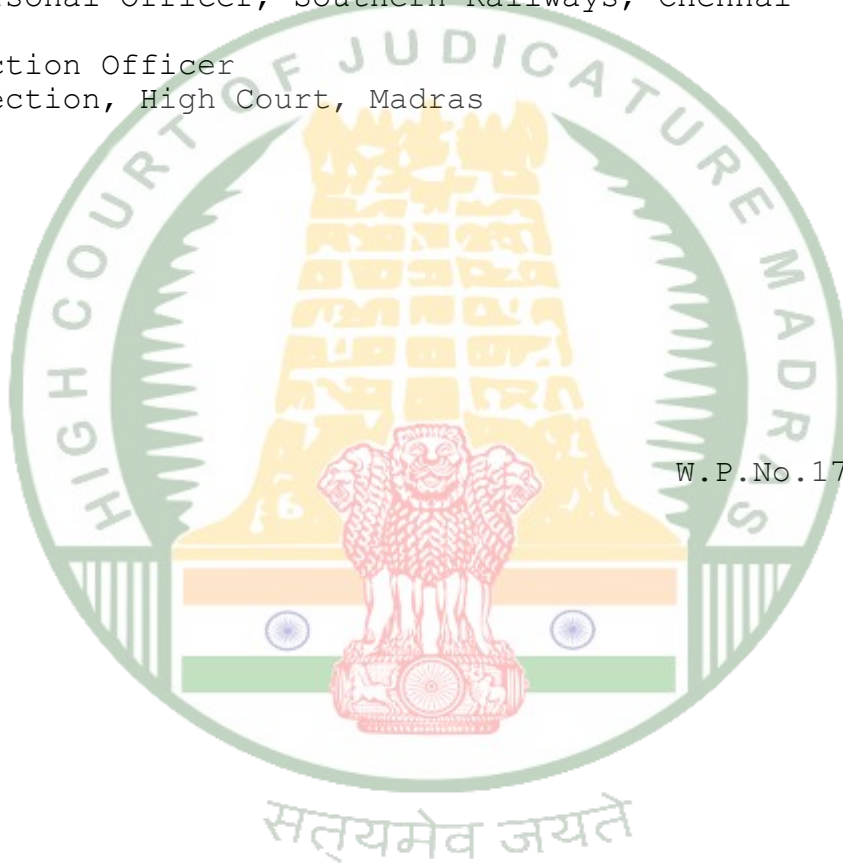
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Sub-Assistant Registrar

skm

To

1. The Registrar,
Central Administrative Tribunal,
Madras Bench, Chennai 600 104.
2. The Secretary, Railway Board, Union Of India, New Delhi.
3. The General Manager, Southern Railways, Chennai.
4. The Personal Officer, Southern Railways, Chennai
5. The Section Officer
V.R. Section, High Court, Madras



W.P.No.17220 of 2014

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