

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.01.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR. JUSTICE N.AUTHINATHAN

Writ Petition Nos.4166 of 2015
W.P.Nos.4955, 21294 and 28779 of 2016
and Connected Miscellaneous Petitions

W.P.No.4166 of 2015:

1. The General Manager,
Union of India,
Southern Railway,
Chennai 600 003.
2. The Divisional Railway Manager,
Chennai Division,
Southern Railway,
Chennai 600 003.
3. The Senior Divisional Personnel Officer,
Chennai Division,
Southern Railway, NGO Annexe,
Park Town, Chennai 600 003. ... Petitioners

v.

1. The Registrar,
Central Administrative Tribunal,
Chennai Bench,
High Court Campus,
Chennai 600 104.
2. c.Gunasekaran ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari, to call for the records of the 1st respondent Tribunal relating to its order, dated 25.04.2014, passed in O.A.No.394 of 2011 and quash the same.

For petitioners : Mr.A.V.Radhakrishnan,
Senior Counsel
for Mr.Siddharth Bahety

For 2nd respondent : Mr.L.Chandrakumar

W.P.No.4955 of 2016:

1. The General Manager,
Union of India,
Southern Railway,
Park Town, Chennai.

2. The Divisional Railway Manager,
Madurai Division,
Southern Railway,
Madurai.

3. The Senior Divisional Personnel Officer,
Madurai Division,
Southern Railway,
Madurai.

... Petitioners

v.

1. P.Swaminathan

2. The Registrar,
Central Administrative Tribunal,
Chennai.

... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari, to call for the records of the 2nd respondent in O.A.No.632 of 2014, dated 31.08.2015 and quash the same.

For petitioners : Mr.A.V.Radhakrishnan,
Senior Counsel
for Mr.Siddharth Bahety

For 1st respondent : Mr.L.Chandrakumar

W.P.No.21294 of 2016:

K.Mohan

... Petitioner

v.

1. The General Manager,
Union of India,
Southern Railway,
Park Town, Chennai.
2. The Divisional Railway Manager,
Chennai Division,
Southern Railway,
Chennai 600 003.
3. The Senior Divisional Personnel Officer,
Chennai Division,
Southern Railway,
Chennai.
4. The Registrar,
Central Administrative Tribunal,
Chennai.

... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified Mandamus, to call for the records of the 4th respondent made in O.A.No.27 of 2012, dated 27.08.2015, quash the same and consequently, direct the respondents to extend all the consequential service benefits, viz., promotion and fixation of pay etc., with reference to Painter Technicians, Grade-III appointed after 05.12.1995.

For petitioner : Mr.L.Chandrakumar

For 2nd respondent : Mr.A.V.Radhakrishnan,
Senior Counsel
for V.G.Suresh Kumar

W.P.No.28779 of 2016:

1. The General Manager,
Union of India,
Southern Railway,
Chennai 600 003.
2. The Divisional Railway Manager,
Madurai Division,
Southern Railway,
Madurai.

3. The Senior Divisional Operations Manager,
Southern Railway,
Madurai Division, Madurai.

4. The Senior Divisional Personnel Officer,
Southern Railway,
Madurai Division, Madurai.

... Petitioners

v.

1. The Registrar,
Central Administrative Tribunal,
Chennai Bench, High Court Campus,
Chennai 600 104.

2. M.Arumugam

... Respondents

For petitioners : Mr.A.V.Radhakrishnan,
Senior Counsel
for Mr.Siddharth Bahety

For 2nd respondent : Mr.L.Chandrakumar

COMMON ORDER

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

In W.P.No.4166 of 2015, the 2nd respondent/applicant joined as Assistant Station Master in Chennai Division of Southern Railway in the year 1978 and subsequently, promoted as Station Master, Grade-I in the scale of pay of Rs.6500-10500. In the year 2001, as he was found to be medically incapacitated to continue in the said post and there were no identical suitable alternative post, he continued in the same post in supernumerary capacity, till the year 2009. Later, vide memorandum, dated 14.12.2009, he was absorbed as cash witness, in the same scale. However, the 2nd respondent/applicant was not extended the benefit of upgradation and the consequential VIth Pay Commission, while he was working in the same post in supernumerary capacity. Aggrieved by the said order, the 2nd respondent/applicant has O.A.No.394 of 2011, before the Central Administrative Tribunal (Madurai Bench), which allowed the application, taking note of the provision, Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

2. In W.P.No.4955 of 2016, while the 1st respondent/applicant was working as Loco Pilot Shunting Grade II in the scale of pay of Rs.5200-20200, was subjected to

medical examination and declared as medically incapacitated to discharge the duties of Loco Pilot. He was kept under sick list and in the mean while, he was upgraded to the Scale of Pay of Rs.9300-34800, with Grade Pay of Rs.4200/- with a condition that the promotion was subject to his medical fitness. In the periodical medical examination, he was declared fit only for CEE One and below with hearing aid, instead of Aye One and vide letter, dated 07.12.2011, the Senior Divisional Personnel Officer, Madurai Division, Southern Railway, Madurai, has fixed his pay, without taking into consideration the promotion earned by him. Thereafter, he was posted as Junior Clerk, in the Pay Band of Rs.5200-20200, with Grade Pay of Rs.2400/-. Aggrieved by the said order, the 2nd respondent/applicant O.A.No.632 of 2014, before the Central Administrative Tribunal (Madurai Bench), which allowed the application, taking note of the provision, Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

3. In W.P.No.28779 of 2016, while the 2nd respondent/applicant was working in the promoted post of Goods Guard in the scale of pay of Rs.4500-7000, as one time measure, he was subjected to medical examination. He was declared as medically unfit for AYE TWO medical category and declared fit only for CEY One and Below, which makes him medically incapacitated to hold the post of Goods Guard. By order, dated 08.06.2010, the appellants stated that the 2nd respondent/applicant was kept under sick list, while promotions were ordered. Till the date of superannuation, ie., 31.07.2010, he was continued in the same post in supernumerary capacity. However, the petitioners have issued Pension Order, dated 01.08.2010, without considering the pay drawn in Goods Guard post, which he was holding, when he was medically decategorized. Representations, dated 10.08.2010 and 14.09.2011 did not give the desired results. Aggrieved by the order, dated 08.06.2010, the 2nd respondent/applicant has filed O.A.No.388 of 2012, before the Central Administrative Tribunal (Madras Bench), which allowed the application, taking note of the provision, Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

4. In W.P.No.21294 of 2016, while the petitioner was working in the promoted post of Points Man 'A' in the scale of pay of Rs.3050-4590, he was subjected to medical re-examination. In the year 2002, he was declared as medically incapacitated to hold the post of Points Man 'A' and declared fit in CEE One and Below with glasses. As there were no suitable alternative post, he continued in the same post in supernumerary capacity, till the year 2009. Later, vide office order, dated 24.07.2009, he was posted as Painter Technician, Grade III. Though

representations were made by the petitioner to fix his seniority, commensurate with regard to his date of entry as 05.12.1995, the date on which, he was promoted substantively as Points Man 'A' in the grade of Rs.3050-4590 (Equivalent to Rs.5200-20200 with grade pay of Rs.1900), the 2nd respondent/applicant was not extended the benefit of VIth Pay Commission, while he was working in the same post in supernumerary capacity and also in the alternative appointment as Technician Grade III Painter. Aggrieved by the order, dated 24.07.2009, the 2nd respondent/applicant has filed O.A.No.27 of 2012, before the Central Administrative Tribunal (Madras Bench), which dismissed the application, stating that while assigning seniority in the alternate cadre, the petitioner can only be compared with the employees in that category at the time of absorption and not with the employees who entered the category of Painter Technician Grade III in the year 1995.

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

6. Before advertng to the abovesaid issues, 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."

7. 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 and held as follows:

"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.

8. It is also worthwhile to extract the decision of the 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, 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."

9. In *Bhagwan Dass and another v. Punjab State Electricity Board* reported in (2008)1 SCC (L&S) 242 the appellant therein like the applicant under compelling circumstances sought retirement from service. The respondents accepted the same and paid terminal benefits without considering the entitlement of the applicant to benefits under Section 47 of the Disabilities Act. The Hon'ble Apex Court accepted the case of the appellant for retirement as not voluntarily given by him and held that, "in view of the provisions of Section 47 of the Act, the appellant must be deemed to be in service and he would be entitled to all service benefits including annual increments and promotions, etc. till the date of his retirement."

10. In *Union of India v. Devendra Kumar Pant* reported in 2009 (14) SCC 546, 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 possess 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."

11. Chapter II, Section-B of Railway Establishment Manual, Volume-I, deals with promotion of Group 'C' Staff. Para.213A of Chapter II, Section-B deals with promotion of persons with disability. Para.213A mandates that, there shall be no discrimination in the matter of promotion merely on ground of physical disability. This will apply to the categories of staff who have been recruited from the open market against the vacancies reserved for recruitment of physically handicapped and the staff who acquire disability during service and are absorbed in suitable alternative employment as per provisions contained in Chapter XIII. Such staff will be considered for promotion in their turn on their eligibility and suitability along with others in the selection/suitability/trade test, for promotion to higher grade post. In the instant case, individuals had been given promotion, on certain conditions. In the light of the instructions, which governed in the matter of promotion in the railways, we hold that the physical disability could be no ground to deny promotion.

12. Para 1310 of IREM, dealing with fixation of seniority of disabled/medically decategorized staff absorbed in

alternative employment, reads as follows:

"1310. Fixation of seniority of disabled/medically decategorized staff absorbed in alternative employment:

The disabled/medically decategorised staff absorbed in alternative posts should be allowed seniority in the grade of absorption with reference to the length of service rendered on non-fortuitous basis in the equivalent or corresponding grade before being declared medically unfit.

This is subject to the proviso that if a disabled/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."

13. Southern Railway should not dispense with the services of the individuals nor reduce their rank, as it is not in dispute that they had acquired the disability during their service and they are entitled to some other posts with the same pay scale and service benefits. Further, if it is not possible to adjust in any post, they should be kept on supernumerary post until a suitable post is available or they attain the age of superannuation, whichever is earlier, and their promotion shall not be denied merely on the ground of disability, as per Section 47 of the Disabilities Act. In view of the law laid down by the Hon'ble Apex Court, we are of the view that the respondents herein are entitled to his pay and allowances, including increments etc., from the date he has been declared medically unfit, till the date of his superannuation.

14. The 1st respondent in W.P.No.4166 of 2014, was medically incapacitated to continue in the post of Station Master Grade I and as there is no identical suitable alternative post; he was continued in the same post as supernumerary capacity. However, he was not given the benefits of financial upgradation and consequential pay fixation. In view of the decision in Bhagwan Dass's case (cited supra) and Section 47 of the abovesaid Act, the 1st respondent is entitled to all service benefits including annual increments and promotions, etc. till the date of his retirement.

15. In respect of W.P.No.4955 of 2016, the 1st respondent was subjected to medical examination and though he was kept under sick list, his post was upgraded with a condition that the promotion was subject to his medical fitness. However, in the periodical medical examination, he was declared unfit and he was posted as Junior Clerk on the lower scale of pay. As stated supra, no promotion can be denied on the ground of disability and also, the 1st respondent cannot be placed at the lower

level.

16. In respect of W.P.No.21294 of 2016, the petitioner, who was given alternative employment as Painter Technician, Grade III, as he was declared as medically unfit for the post of Pointsman 'A', has sought for fixation of seniority from the date on which he was promoted substantively as Pointsman 'A'. As per Para 1310 of the Establishment Manual (IREM), the disabled/medically decategorised staff observed in the alternative posts, should be allowed seniority in the grade of absorption with reference to the length of service rendered on non-fortuitous basis in the equivalent or corresponding grade before being declared medically unfit. Seniority has to be fixed with reference to the length of service rendered on non-fortuitous basis in the equivalent or corresponding grade before being medically unfit. In this connection, date of absorption is also an important factor to be taken into consideration. Hence, seniority has to be fixed from the date of his immediate juniors.

17. The 1st respondent in W.P.No.28779 of 2016, was medically incapacitated to continue in the post of Goods Guard and as there is no identical suitable alternative post, he was continued in the same post as supernumerary capacity. His promotion and pay fixation on par with his juniors were denied. In view of the above decisions, the 1st respondent is entitled to all service benefits including annual increments and promotions, etc. till the date of his retirement. Further, pension order has to be revised.

In view of the above, W.P.No.21294 of 2016 is allowed and the other writ petitions, viz., W.P.Nos.4166 of 2015 and W.P.Nos.4955 and 28779 of 2016 are dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

skm

To

The Registrar,
Central Administrative Tribunal,
Chennai Bench,
High Court Campus,
Chennai 600 104.

2. The General Manager,
Union of India,
Southern Railway,
Chennai 600 003.
3. The Divisional Railway Manager,
Chennai Division,
Southern Railway,
Chennai 600 003.
4. The Senior Divisional Personnel Officer,
Chennai Division,
Southern Railway, NGO Annexe,
Park Town, Chennai 600 003.

+2cc to Mr.Siddharth Bahety, Advocate SR.No.4133,4134

+1cc to Mr.V.G.Suresh Kumar, Advocate SR.No.3745

+2cc to Mr.L.Chandrakumar, Advocate SR.No.3862,3863

Writ Petition Nos.4166 of 2015
W.P.Nos.4955, 21294 and 28779 of 2016
and Connected Miscellaneous Petitions

MP (CO)
GMY (24/05/2019)