

Item- 8.	07-05-2024	MAT 1207 of 2023 CAN 2 of 2023
sg	Ct. 8	Union of India & Ors. Versus Tejen Mitra & Ors.

Mr. Soumak Bera, Adv.
...for the appellants
Mr. Partha Sarathi Bhattacharyya, Sr. Adv.
Mr. Kunal Ganguly, Adv.
Mr. Tirupati Mukherjee, Adv.
Mr. Kaustav Banerjee, Adv.
...for the respondents

1. The appeal is arising out of an order dated 23rd March, 2023 passed by the learned Single Judge in a writ petition filed by a number of employees challenging the order dated 5th January, 2011 passed by the Commandant, Railway Protection Special Force, 8th Battalion (hereinafter referred to the “Commandant”) by which the said authority regularized the period for unauthorized leave of the writ petition on no work no pay basis i.e. leave without pay.
2. We have heard the learned Counsel for the parties. The admitted position that emerged from the pleadings and the arguments of the parties is that the writ petitioners had been de-categorized and were declared medically unfit in terms of Manual 13.03 of the Indian Railway Establishment Manual, Volume 1, revised edition 1989 (hereinafter referred to as “Manual”). Even after the writ petitioners were de-categorized, the Commandant, 8th Battalion, by an order dated 29th September, 2003 temporarily posted the writ petitioner nos. 1 to 7 to the operational company at “A to E Coy”. This order was challenged by the writ petitioners as

they contended that such order is contrary to paragraph 13.03 of Manual and accordingly, challenged such action in the writ petition.

3. For better appreciation, the relevant portions of the said Manual is reproduced hereinbelow;

*"INDIAN RAILWAY ESTABLISHMENT MANUAL
VOLUME-1
(REVISED EDITION 1989)*

*Chapter XIII - Absorption of Medically Incapacitated
Staff in Alternative Employment*

ADVANCE CORRECTIN SLIP NO.77

*Substitute the following for the existing Chapter XIII
and paragraphs 1310-1315 therein:*

Chapter XIII

*Absorption of disabled /medically decategorised staff in
Alternative Employment.*

1301. A Railway servant who fails in a vision test or otherwise by virtue of disability acquired during service becomes physically incapable or performing the duties of the post which he occupies should not be dispensed with or reduced in rank but should be shifted to some other post with the same pay scale and service benefits.

1302. Classification of Railway Servants declared medically unfit:- Railway servants acquiring disability during service and declared medically unfit are divisible into two groups:

(i) Those completely disabled for further service in any post in the railway, i.e. those who cannot be declared fit even in the 'C' medical category; and

(ii) Those disabled/incapacitated for further service in the post they are holding but declared fit in a lower medical category and eligible for retention in

service in posts corresponding to this lower medical category.

1303. The railway servants both in group (i) and group (ii) of para 1302 above cease to perform the duties of the posts, they are holding from the date they are declared medically unfit for the present post. No officer has the authority to permit the Railway Servant concerned to perform the duties in the post beyond that date. If such a Railway Servant cannot be immediately adjudged against or absorbed in any suitable alternative post he may be kept on a special supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit pending location of suitable alternative employment for him with the same pay scale and service benefits, efforts to locate suitable alternative employment starting immediately.

The special supernumerary post so created will stand abolished on as the alternative employment is located.

(quoted from the judgment and order dated 1st February, 2008 in FMA 338 of 2005)".

4. Mr. Soumak Bera, learned Counsel appearing for the appellants has argued that said paragraph 13.03 does not call for a further medical re-examination by the authority concerned. However, in view of the interpretation of paragraph 13.03 of the Manual of the coordinate Bench which clearly held that a medically fit staff cannot be sent again for medical re-examination and he should be kept on a supernumerary post till a suitable placement could be found.
5. We are unable to accept the said submission.
6. A conjoined reading of the several provisions and more particularly paragraph 13.03 would show that no officer has

the authority to permit the Railway Servant, who has declared medically unfit, to perform the duties in the post beyond that date when he was declared medically unfit for the said post. If he cannot be immediately adjudged against or observed in any suitable alternative post, he may be kept on a special supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit pending location of suitable alternative employment for him with the same pay scale and service benefits, efforts to locate suitable alternative employment starting immediately. On such post being located, the special supernumerary post so created shall stand abolished. This clause came up for consideration before a coordinate Bench in the earlier proceeding that was disposed of on 1st February 2008 in FMA 338 of 2005 in which this aforesaid order was challenged.

7. The Hon'ble Division Bench by the aforesaid order after interpreting the provisions of paragraph 13.03 of the said Manual concluded that once a Member of a Force has been declared medically unfit and if he cannot immediately be adjusted or absorbed on any suitable alternative post, then he has to be kept on a supernumerary post in the grade in which he was working before being declared medically unfit. The Hon'ble Division Bench further concluded that Rule does not provide that once declared medically unfit, the instructions as contained in paragraph 13.03 can be bypassed and instead, the concerned de-categorized/alternative declared medically unfit staff can be once again sent for 're-medical

examination”.

8. In terms of the aforesaid judgment, the service of the writ petitioners was regularized but the period during which they did not perform the duty which was treated as unauthorized leave with no work no pay. In view of the fact that a coordinate Bench has interpreted paragraph 13.03 of the said Manual to the effect that the writ petitioners cannot be asked for re-examination for a medical Board, hence, there was no requirement for the writ petitioners to appear before the said Board. The impugned order to treat the writ petitioners for unauthorized absence in view of refusal to appear before the Medical Board cannot be countenanced.
9. The learned Single Judge also relied upon the aforesaid judgment of the Hon’ble Division Bench to hold that the order of the Commandant for “re-medical examination” being contrary to the rules preventing the writ petitioners to join their duties without medical re-examination was not permissible in view of the judgment of the coordinate Bench.
10. The observations made by the earlier Division Bench relevant to the issue are reproduced hereinbelow:

“20. We do appreciate the stand taken by Mr. Chittaranjan Bag but in the instant case, we are inclined to take the view in line with Paragraph 1303 to the effect that once a Member of a Force under a Para Military service has been declared medically unfit and if he cannot immediately be adjusted or absorbed on any suitable alternative post, then he has to be kept on a supernumerary post in the Grade in which he was working before being declared medically unfit. The Rule does not provide that once declared medically unfit, the instructions as contained in Paragraph 1303 can be

bypassed and instead, the concerned decategorised/already declared medically unfit Staff can be once again sent for "re-medical examination" and that too, to such a far-away place under the Northern Railways.

21. We are inclined to take this view considering the fact that in so far as the Appellant Nos. 2 and 3 are concerned, the Respondents apparently acted in terms of Paragraph 1303 by passing an Order of absorption of those Appellants on the posts of Junior Clerks on 16.1.2004. It does not stand to reason therefore nor does this Court comprehend as to how and under what logic, the Commanding Officer had passed an Order one day prior thereto on 15.1.2004 in respect of all the Appellants including the Appellant Nos. 2 and 3 directing them to report to the Chief Medical Superintendent, Northern Railways for "re- medical examination".

22. Interpreting and after having read the provisions of Paragraph 1303 quoted above, we are of the view that once a Railway Servant is declared medically unfit, he has to be given a suitable alternative employment but before that status is conferred, the person concerned has to be kept on a supernumerary post but he cannot be subjected to a "re-examination". He can be ordered to be examined in accordance with law by the concerned authorities of only those departments in which such a medically declared unfit person is absorbed in an alternative status in terms of Paragraph 1303 of the Railway Establishment Code quoted above.

23. For the foregoing reasons, we find substance in the submissions made on behalf of the Appellants and are therefore, not inclined to accept the submissions of Mr. Chittaranjan Bag, learned Counsel for the Respondents.

24. We, therefore, set aside the impugned Order and we allow the Appeal and as a consequence, the Writ Petition is also allowed. The Order of the learned Single Judge passed on 23.2.2004 is set aside. The respondents

will now proceed to act in terms of Paragraph 1303 and in the same manner as they had done in the case of the Appellant Nos. 2 and 3. After absorption, if the Appellants are required for a medical check up, then they shall obey such an Order and subject themselves to such medical check up strictly in accordance with law after considering the observations made hereinabove.

25. After the aforementioned. Order was dictated, the learned Counsel for the Appellants submitted that for a certain period of time and till the Order of the Division Bench was passed on 31.8.2005, the Appellants were not allowed to join. We do not wish to pass any Order on this aspect save and except to observe that since we have directed the Respondents to act in accordance with Paragraph 1303, they will do so and they will take all such steps as are necessary to be taken in accordance with law if the Appellants file an Application for regularization of the period during which they were not allowed to join.”

11. Mr. Bera, however, submits that in paragraph 24 of the said judgment, a direction was given upon the appellants herein to act in terms of paragraph 13.03 and after absorption the writ petitioners if required for a medical check-up then they shall obey such order. The said observation does not assist the appellants in view of clear interpretation of paragraph 13.03 in the earlier paragraph.

12. In view of the law settled by the Hon'ble Division Bench with regard to interpretation of paragraph 13.03 of the Manual that they cannot be subjected to re-examination the absence of the writ petitioners on the score that they should not be allowed to resume duty without such re-examination cannot be treated to be willful or unauthorized. Failure to obey an order which is illegal and contrary to rules cannot

visit the writ petitioners with civil consequences.

13. In view thereof, we do not find any reason to interfere with the judgment passed by the learned Single Judge. The appeal and the connected application are accordingly disposed.

14. Vakalatnama filed in Court on behalf of the substituted respondents in favour of Mr. Tirupati Mukherjee, learned Advocate is accepted and the same is taken on record.

15. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Soumen Sen, J.)

(Uday Kumar, J.)