

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(S) No.3872 of 2022

Maheep Manoj Tirkey, aged about 33 years, son of Late Luise Oraon,
Resident of Village-Pahar Kamdaria, P.O. Pahar Kamdaria, P.S.-Narkopi
(Bero), District-Ranchi. At present posted as Junior Clerk, Engineering
Department, under Sr. Den(Co-ord)/CKP, Chakardharpur, P.O. + P.S.-
Chakardharpur, District-Singhbhum West **..... Petitioner**

Versus

1. The Union of India represented through General Manager, South Eastern Railway, Office at Dumayrie Are, SE railway, North Colony, Garden Rich, P.O. & P.S. Garden Rich, Kolkata, West Bengal, 700043.
2. The General Manager, South Eastern Railway, office at Dumayrie Are, SE Railway, North Colony, Garden Rich, P.O & P.S. Garden Rich, Kolkata–West Bengal 700043.
3. The Divisional Railway Manager, S.E. Railway, Chakardharpur, PO. + P.S. Chakardharpur, District-Singhbhum West
4. The Senior Divisional (Personnel Officer, South Eastern Railway, Chakardharpur, P.O. + P.S. – Chakardharpur, District-Singhbhum West.
5. The Chief Personnel Officer, South Eastern Railway, office at Dumayrie Are, SE Railway, North Colony, Garden Rich, P.O. & P.S. Garden Rich, Kolkata, West Bengal 700043.
6. The Chief Medical Officer, South Eastern Railway, Office at Dumayrie Are, SE Railway, North Colony, Garden Rich, P.O. & P.S. Garden Rich, Kolkatta, West Bengal 700043.
7. The Divisional Railway Manager (Engineer) Chakardharpur, P.O. + P.S. Chakardharpur, District-Singhbhum West **.....Respondents**

CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD

HON'BLE MR. JUSTICE PRADEEP KUMAR SRIVASTAVA

For the Petitioner : Mr. Suraj Kumar, Advocate

Mr. S.B. Gupta, Advocate

For the Respondents: Mr. Sunil Kumar, Advocate

For U.O.I. : Ms. Leena Mukherjee, C.G.C.

.....

Order No.06/ Dated:05.02.2024

1. The writ petition is under Article 226 of the Constitution of India for quashing the order dated 18.07.2022 passed by learned Central Administrative Tribunal in Circuit Bench Ranchi, in O.A. No./051/00397/2022 by which the relief sought for by the applicant before the tribunal regarding the right to hold the post of Assistant Loco Pilot higher in Rank grade to post of junior clerk in the account section has been denied.
2. The brief facts of the case as per the hearing made in the writ petition needs to be refer herein which reads as here under.
3. Petitioner was initially appointed as trainee Loco Pilot on 09.05.2014. After successful completion of his training and regularization in service and in this regard under the signature of Sr. Divisional personnel Officer, S.E. Railway, Chakardharpur issued office order dated 09.05.2014 for temporary appointment of the petitioner on the post of trainee (Temporary) Assistant Loco Pilot (Electrical/Diesel).
4. After completion of Training period, petitioner's service was regularized and he was initially appointed on 13.09.2014 at STC/Kharagpur on the post of Assistant Loco Pilot on the pay scale of

7730/- (5200-20200) GP-1900, which is very much apparent from extract of particulars of service of the petitioner.

5. It is pertinent to mention that at the time of the Training period of the petitioner, he was also medically examined by the medical Board of the Medical Department of the S.E. Railway, Chakardharpur and as per the report dated 28.07.2014, petitioner was found medically fit with the noting that “ I consider him fit to be appointed in the category of Aye-one”.
6. It is stated that thereafter in the year 2017, petitioner was promoted to the post of Sr. Assistant Loco Pilot and with this regard on 25.7.2017, one office order was also issued under the signature of APO/CKP with the noting that petitioner is suitable for promotion to the post of Sr. A.L.P. in P.B. Rs. 5200-20200 with GP Rs. 2400/-.
7. That as the Rule/mandatory requirement of the Railway train driver, petitioner has to participate in medical examination after completion of four years of service and after medical examination of the petitioner at different medical department of the Railway, the medical board declared the petitioner as Malingerer and with the regard office order No. M/51/MB/1839 dated 27.06.2019 was issued from the office of Chief Medical Superintendent, Chakardharpur with the opinion that “Petitioner had undergone Lasik Surgery in his eye, which is not allowed in his designation and medical category”. It was also opined by the Medical Board that “Regarding his fitness he is declared fit in Cey-one and below in the non lucrative post as per extent rule”.

8. It is stated that on 14.12.2018, when petitioner was attending periodical medical examination, he was show caused by the respondent with the instruction to clarify the medical status of the petitioner as Doctors of periodical Medical Board has opined that petitioner had undergone Lasik Surgery earlier, but petitioner has confirmed himself medically fit.
9. The Show cause notice dated 14.12.2018 has duly been replied by the petitioner on 18.12.2018 denying any lasik Surgery of his eye as per his knowledge with the further request to re-medical examination of the petitioner.
10. After medically de-categorizing the petitioner, office of Sr. Divisional Personnel Officer, Chakardharpur issued office order dated 15.07.2019 regarding alternative post of the petitioner as well as similarly situated medically de-categorized persons and declared the petitioner fit for Jr. Clerk in Engineering Department in the scale of 5200-20200, GP Rs. 1900/- where petitioner name appears at serial no.6.
11. Subsequently on 18.07.2019, office of the Sr. Divisional Electrical Engineer (OP) Chakardharpur issued letter no. 2838 in favour of Sr. DPO/MPP-Cell/CKP regarding release of the petitioner due to Lasik detected case and directed to join the petitioner as Jr. Clerk in Engg Department.
12. In view of the letter no. 2838 dated 18.07.2019 issued from the office of the Sr. Divisional Electrical Engineer (OP) Chakardharpur, fresh posting order vide O.O. No.- Engg/R/Estt./22/19 dated 31.07.2019 issued by the Sr. Div Railway Manager(Engg) Chakardharpur) with regard to the

petitioner from the office of Sr. Div. Railway Manager (Engg.) Chakardharpur.

13. In view of the fresh order of posting of the petitioner, on 31.07.2019 itself petitioner joined in the office of Sr. Div. Engineer (Co-ord) S.E. Railway, Chakardharpur.
14. After joining as junior clerk in account section, petitioner medically examined his eyes before reputed hospitals for cross check and verification of his medical condition of eye, but surprisingly all the hospitals had opined that petitioner has never undergone Lasik Surgery.
15. In view of the difference of Medical report with regard to the Lasik surgery of the eye of the petitioner, fresh representation was filed by the petitioner before respondent authority for re-medical examination but respondents are sitting tight over the matter which is arbitrary and against the principle of natural justice.
16. Having no option left, petitioner approached before Hon'ble Central Administrative Tribunal, Circuit Bench, Ranchi by filing O.A./051/00397/2022, which was heard on 18.07.2022, and after hearing the parties, Hon'ble Tribunal has been pleased to dismiss the O.A. No. 051/00397/2022 on the ground of non-representation and also on the point of limitation.
17. It is evident from the factual aspect that the writ petitioner was appointed under the respondent as Assistant Loco Pilot to Senior Loco Pilot which has been denied due to the reason that the writ petitioner was found medically unfit and has been held not medically fit to hold that post of Senior Loco Pilot and hence, he has been given the post of junior clerk

in the account section. It would be evident from the factual aspect that the writ petitioner initially was appointed as Assistant Loco Pilot which was based upon his medical fitness at the time when he was in that service to function as Assistant Loco Pilot. Subsequent to the passage of time when the advertisement notice was issued by the respondent concern for fulfilling the post of Senior Loco Pilot to be filled from among suitable serving service candidates, in which the writ petitioner has also participated. However, he has been declared to be qualified so far as the skill performance is concerned but he has been found to be medically unfit due to some defect in the eye. Therefore, the respondents have taken decision on the ground of such medical unfitness holding the writ petitioner not eligible to holding the post of Assistant Loco Pilot and hence, he has been given the post of Junior Clerk in the Accounts Department. The writ petitioner being aggrieved with action of the respondent has raised a grievance that there cannot be any discrimination on the ground of medical unfitness.

18. It has been contented before the authority concerned that even if the writ petitioner has been declared to be medically unfit for the post of Senior Loco Pilot then he is entitled to be posted at the same pay scale to the other post so as not to cause detriment to him. The respondents when gave no notice to such request the writ petitioner having no option but to move before the learned Tribunal for redressal of his grievance so that he being posted at the same pay scale equivalent to the post of Senior Loco Pilot on the ground that once he has been appointed as assistant loco pilot and at that time he was found to be medically fit in all respect and if

subsequent thereto, in course of discharging his duty he has been found to be medically unfit the same will be said to be crept up in discharge of the official duty.

19. The learned Tribunal has called upon the Respondents and the ground has been taken that the relief has been sought for is barred by limitation, since, such application was filed after delay of three years which is beyond the period of one year as per the mandate of the Administrative Tribunal Act, 1985 as contained under Section 21 thereon.

20. The second ground has been taken that while posting the petitioner as junior clerk opportunity was given by showing the show cause notice but he has given a vague reply. Learned tribunal while accepting the plea taken by the respondent has denied to pass positive direction in favour of the writ petitioner thereby, the writ petitioner being aggrieved with the said order of the learned tribunal is before this Court by involving the jurisdiction conferred under Article 226 of the Constitution of India.

21. Mr. Suraj Kumar, Advocate, learned counsel appearing for the petitioner has taken the following grounds.

- (i) So far as issue of limitation is concerned it has also been taken as a ground to negate the relief sought for by the petitioner, there was no office note to that effect perhaps reason being that during the relevant period the Covid 19 was prevalent due and to that reason the lockdown was inflicted since 25.03.2020. The contention has been made that the requirement to file delay condonation application is only, if any defect is pointed out by the office but there is no such note given by the office note and

the learned tribunal without taking into consideration the aforesaid aspect of the matter has accepted that plea of the respondent and has taken the same as a ground for dismissal of the original application.

- (ii) The learned tribunal has accepted the plea of the respondent that before the passing an order of posting as Junior Clerk in account Section show cause notice was given and the reply has not been found to concrete rather it was found to be vague. The contention has been made that there was no requirement to issue show cause notice, rather the issue ought to have been taken into consideration by the learned tribunal that if the medical unfitness has crept up upon the physique of the writ petitioner, the same ought to have been considered to have crept up in discharge of the official duty and if any unfitness has occurred in discharge of the official duty, for the same, petitioner should not have been put at a detrimental situation.
- (iii) The learned counsel by strengthening such argument has taken the aid of the provision of the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (herein after referred as Act, 1995) which was replaced by the Rights of Person with Disabilities Act, 2016 (herein after referred as Act, 2016). It has been contended by making reference of Section 47 of the Act 1995 which provides the provision not to discriminate or deny the chance of promotion on the ground of medical unfitness subject to condition that if

the concerned establishment has come out with notification exempting the establishment from the purview of Section 47 of the Act, `1957 .The Para materia provision is that under the Act, 2016 as under Section 20 thereof.

22. The learned counsel for the petitioner has submitted that when the statutory command is not to discriminate or put the concerned employee in a detrimental condition due to medical unfitness then denying the equivalent post to that of the Senior Loco Pilot by the respondent concerned herein is absolutely illegal and arbitrarily exercised and is not in consonance of the statutory command, either in view of Section 47 of the Act 1995 or Section 20 of the 2016. Therefore the order passed by the learned tribunal is not sustainable in law.

23. Per Contra, Mr. Sunil Kumar, Central Government Counsel has defended the order passed by the learned tribunal. It has been contended that so far as legal issues as have been raised by the petitioner before this Court is concerned, the same is not fit to be accepted due to the reason that the aforesaid legal issues have never been raised before the learned tribunal.

24. The learned Central government Counsel based upon the aforesaid ground has submitted that the reasons which have been taken for dismissal of the claim of the writ petitioner therefore, cannot be said to suffer from an error.

25. Heard the learned counsel for the parties and gone across by the finding recorded by the learned Tribunal in the impugned order. This Court before entering into merit, legal legality and propriety in the

impugned order deem it fit proper to first answer the objection which has been raised on behalf of the learned Central Government Counsel who has raised the issue that the issue of law as available either under the Act 1995 or the Act 2016 is not fit to be considered at this stage as the same was not agitated before the learned Tribunal. This Court is of the view based upon the legal position that the said contention would have been said to be acceptable if the same is related with the factual aspect but it is pure legal question and hence, as per the law laid down by the Hon'ble Apex Court in the case of *Tarini Kamal Pandit v. Prafulla Kumar Chatterjee*, reported in **(1979) 3 SCC 280 at paragraph 14** held that the legal question can be raised at any stage of the proceeding. Relevant paragraph is quoted below which reads as under:-

14. Before we conclude we will shortly refer to the question of law raised by Mr L.N. Sinha on behalf of the defendant. He submitted that as the title in the property vested in the defendant by confirmation of the court sale and later by a registered conveyance, the plaintiffs cannot seek relief on the unregistered agreement Ext. 4 as conveying any title to them. This point was not taken in any of the courts below but learned counsel submitted that because it is a pure question of law not involving any investigation of facts and as it goes to the root of the matter the court may permit the point to be taken. In support of his contention that a pure question of law in the circumstances can be taken for the first time in this Court he relied on the decisions of this Court in *Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari* [1950 SCC 766], *Raja Sri Sailendra Narayan Bhanja Deo v. State of Orissa* [AIR 1956 SC 346] , *Seth Badri Prasad v. Seth Nagarmal* [AIR 1959 SC 559], *State of Uttar Pradesh v. Anand Swarup* [(1974) 1 SCC 42] and *T.G. Appanda Mudaliar v. State of Madras* [(1976) 4 SCC 821] . As the point raised is a pure question of law not involving any investigation of the facts, we permitted the learned counsel to raise the question.

26. The Hon'ble Apex Court has laid down the proposition in the aforesaid judgments that the legal issues can be raised at any stage of the

proceeding which is based upon the principles that when the legal issues are being taken the same cannot cause any prejudice to the parties even though which has not been raised before the Court of first instance i.e. herein the tribunal.

27. This Court considering the aforesaid legal proposition is of the view that the argument which has been advanced on behalf of the learned Government Counsel not to accept the legal issues regarding the applicability either Section 47 of the Act 1995 or Section 20 of Act 2016 is hereby, according to our considered view is having no substance and as such the same is hereby rejected.

28. This Court now deems it fit and proper to refer the very object and intent of either the Act 1995 or 2016 as the same has been enacted to give effect to the proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. The Act, 1995 defines according to Section 2(t) person with disability that those having not less than forty per cent of any disability as certified by the medical authority. The Government of India taking into consideration the import to give effect to the proclamation on the participation with equality of the people with disabilities in the Asian and Pacific Region has come out with a legislation as the persons with disabilities (equal opportunities, protection of right and full participation) Act 1995.

29. The aforesaid act contains the provision as under Section 72 thereof. The Section 72 provides that the Act 1995 has got overriding effect over and above all the statutory legislation.

30. The effect of Section 72 has been considered for the first time by the Hon'ble Apex Court in the case of *Kunal Singh Versus Union of India & Anr.* reported in (2003) 4 SCC 524 wherein the Hon'ble Apex Court while dealing with the implication of Section 47 has come out by laying down the law that Section 47 is mandatory and since the Section 72 confers the Act 1995 as overriding effect upon all the legislation, hence, has laid down the proposition that Section 47 is to be given due adherence by not carving out any discrimination amongst on the ground of medical unfitness. Relevant paragraph are quoted hereunder:-

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.

10. The argument of the learned counsel for the respondent on the basis of the definition given in Section 2(f) of the Act that benefit of Section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee, who has acquired “disability” within the meaning of Section 2(i) of the Act and not a person with disability.

11. We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pension Rules. The Act is a special legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of *generalia specialibus non derogant* would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act. Further, Section 72 of the Act also supports the case of the appellant, which reads:

“72. Act to be in addition to and not in derogation of any other law.—

The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefit of persons with disabilities.”

12. Merely because under Rule 38 of the CCS (Pension) Rules, 1972, the appellant got invalidity pension is no ground to deny the protection mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provisions of Section 47 of the Act.

31. The Hon’ble Apex Court has recently considered the judgment rendered by the Hon’ble Apex Court in the Case of *Ravinder Kumar Dhariwal and Anr. Versus Union of India and Ors.* reported in (2023) 2 SCC 209 wherein, all the previous judgment including the judgment

rendered by the Hon'ble Apex Court in the case of *Kunal Singh versus Union of India & Anr. (Supra)* and the principle has been laid down in different judgments regarding the Article 14 of the Constitution of India has reconsidered the implication of Section 47 of the Act, 1995 para materia provision under the Act 2016 as under Section 20 thereof.

32. The Hon'ble Apex Court in the aforesaid case was dealing with the issue of initiation of departmental proceeding on the ground of medical unfitness and by considering under paragraph 135 the import of the Section 20 of the Act 2016 or the successive amounts to supersession of Section 47 of the old Act 1995 has been pleased to hold the department against the proceeding against the appellant as discriminatory and the same was set aside. Relevant been para 135 of the said judgment which needs to be referred as:-

135. Having regard to the complex nature of mental health disorders, any residual control that persons with mental disabilities have over their conduct merely diminishes the extent to which the disability contributed to the conduct, it does not eliminate it as a factor. The appellant has been undergoing treatment for mental health disorders for a long time, since 2009. He has been diagnosed with 40 to 70% of permanent disability by a government hospital. While all CRPF personnel may be subject to disciplinary proceedings on charges of misconduct, the appellant is more vulnerable to engage in behaviour that can be classified as misconduct because of his mental disability. He is at a disproportionate disadvantage of being subjected to such proceedings in comparison to his able-bodied counterparts. The concept of indirect discrimination has been recognised by this Court in *Nitisha v. Union of India* [*Nitisha v. Union of India*, (2021) 15 SCC 125 : 2021 SCC OnLine SC 261] , which is closely tied with the conception of substantive equality that pervades the international and Indian disability-rights regime. Thus, the disciplinary proceeding against the appellant is discriminatory and must be set aside.

33. The Hon'ble Apex with the said Judgment has come out with the following conclusion which starts from para 146 for ready reference. Para 146 is being referred herein.

146. In view of the discussion above, we summarise our findings below.

147. The validity of the disciplinary proceedings shall be determined against the provisions of the RPwD Act, 2016 instead of the PwD Act, 1995 for the following reasons:

147.1. The respondent holds a privilege under the 2002 Notification to not comply with the principles of non-discrimination and reasonable accommodation provided under Section 47 of the PwD Act. However, for a privilege to accrue in terms of Section 6 of the GCA, mere expectation or hope is not sufficient. Rather, the privilege-holder must have done an act to avail of the right. The privilege provided by the 2002 Notification would accrue only when one of the punishments provided under Section 47 has been imposed. However, in the instant case, the disciplinary proceedings were challenged even before the punishment stage could be reached. Therefore, the privilege available to the respondent under the 2002 Notification was not accrued in terms of Section 6 of the GCA.

147.2. Section 47 of the PwD Act is not the sole source of the right of equality and non-discrimination held by persons with disability. The principle of non-discrimination guides the entire statute whose meaning and content find illumination in Article 5 of the CRPD. An interpretation that furthers international law or gives effect to international law must be preferred. Therefore, even though the PwD Act does not have an express provision laying down the principle of equality vis-à-vis disabled persons, it will have to be read into the statute.

147.3. The 2002 Notification is not saved by Section 102 of the RPwD Act since Section 20 of the RPwD Act is not corresponding to Section 47 of the PwD Act.

148. The disciplinary proceedings are discriminatory and violative of the provisions of the RPwD for the following reasons:

148.1. A person with a disability is entitled to protection under the RPwD Act as long as the disability was one of the factors for the discriminatory act.

148.2. The mental disability of a person need not be the sole cause of the misconduct that led to the initiation of the disciplinary proceeding. Any residual control that persons with mental disabilities have over their conduct merely diminishes the extent to which the disability contributed to the conduct. The mental disability impairs the ability of persons to comply with workplace standards in comparison to their able-bodied counterparts. Such persons suffer a disproportionate disadvantage due to the impairment and are more likely to be subjected to disciplinary proceedings. Thus, the initiation of disciplinary proceedings against persons with mental disabilities is a facet of indirect discrimination.

34. The issue of discrimination on the ground of medical unfitness has been dealt with at under para 147.2.
35. It requires to refer herein that in the facts of the present case the order of promotion of the other identically placed public servant was passed after enforcement of Act 2016 , i.e. on 26.08.2017 while the Act 2016 was enforced on 27.12.2016 and hence the provision of Act,2016 will be effective in the present case .
36. The same is on the principle that once the Act has been replaced by way of repealment as under Section 6 of the General clauses Act, there cannot be any decision on the basis of the repealed Act, however, the right if created in favour of the party/parties in pursuant to the repealed Act will be said in view of the Section 6 of the general Clauses Act i.e. on the principle that once the right has been created the same cannot be taken away merely due to the repealment of the old Act, rather, it will be construed to the creation of right said to be created in pursuance to the Action or the decision taken by virtue of the substituted act.
37. This Court is now proceeding to analyze the factual aspect of the present case.
38. It is admitted case, herein, of the respondent that the writ petitioner was found to be medically unfit, since, there is some defect in his eyes. Therefore, the petitioner is not found to be fit to hold the post of loco pilot which has got the nature of duty of driving the train.
39. We are not questioning the said decision taking into consideration the nature of duty which it to performed by a public servant who is to hold the post of the Loco Pilot either junior or senior. Since, the perfectness of the

eyes is the mandatory condition for such public servant to discharge duty of the Loco Pilot either junior or senior but the issues which is to be decided herein as to whether if the writ petitioner is found to be medically unfit then can be put into detrimental situation by way of discrimination on the ground of medical unfitness.

Therefore, facts is to be looked into with the purport of Section 47 of the Act 1995 and the substituted provision as under Act 2016 i.e. under Section 20 of the Act, 2016. Relevant provision of the Act, 1995 and Act 2016 are quoted below:-

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

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

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

Provided further that if it is not possible to adjust the employee against any post, he may be kept on 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."

THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

20. Non-discrimination in employment. — (1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:

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, exempt any establishment from the provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

(3) No promotion shall be denied to a person merely on the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall 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.

(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.

40. The aforesaid provision as has been quoted and referred hereinabove is having one exception either under Section 47 of Act 1995 or the para materia provision as under Section 20 of the Act 2016, i.e. the establishment has been conferred with the power to come out with the notification of exempting such establishment from the purview of Section 47 of the old Act 1995 at the time when it was invoked and the similar provision is there as under Section 20 of the Act 2016.
41. It is admitted case of the respondents that there is no notification exempting the establishment herein from the purview of Section 47 of the Act of 1995 as the Act was prevalent during the relevant time and under proviso to Section 20 of the Act 2016.
42. When there is no notification of exempting the establishment herein then the question is that why the statutory provision under Section 20 of the Act 2016 will not be given adherence by the functionary of the Central Government which is within the act of Parliament but even then the Central Government has flouted the said statutory provision with reasons best known to the respondents authorities.
43. The implication of Section 47 or 20 has well been dealt by Hon'ble Apex Court in the Case of *Kunal singh (Supra)* and also in the case of *Ravinder Kumar Dhariwal (Supra)* then the provision of the said Act

ought to have been duly adhered to keeping the fact into consideration that the Act either of 1995 or 2016 having adjudicated over all the legislation so as to achieve the object and intent of the purpose of which the statute has been enacted. Although these points were not agitated before the learned Tribunal but since we have come to the conclusion that the same being the legal position, hence, this is the bounded duty of this Court to consider the said statutory provisions and accordingly, the same is being considered herein.

44. The learned Tribunal has passed order on two reasons i.e. first on the issue of limitation and second on merit.

45. So far as issue of limitation is concerned we have already referred hereinabove that there is no office note pointing out any limitation and hence, the learned Tribunal ought to have taken into consideration the aforesaid fact by calling upon the office to give a note if such ground has been agitated on behalf of the respondents so as to come to the conclusion that whether the Tribunal was approached after lapse of one year as mandated under Section 21 (Administrative Tribunal Act, 1985) or since the report would have been there then the petitioner would have opportunity to invoke the Jurisdiction of the learned Tribunal by filing an application for condonation of delay as per the Sub Section 3 of Section 21 of the Administrative Tribunal Act, 1985.

46. This Court therefore, is of the view that while accepting the ground on limitation of three years the learned Tribunal has committed gross error even though there is no office note so that the applicant would have

provided an opportunity to invoke the Jurisdiction as conferred under Section 21(3) of the Act, 1985.

47. The second ground that show cause notice was issued to the petitioner but the reply has been said to be vague by the respondents which has been accepted by the learned Tribunal, however, we are not making any comment upon the nature of response given by the petitioner rather we are considering the issue as per the implication of Section 47 of the Act, 1995 or Section 20 of the Act 2016 which are quoted above. The aforesaid provisions mandates that there cannot be any discrimination on the ground of medical unfitness.

48. The only consideration has to be given that if such medical unfitness has been crept up in course of discharge of the official duties can he be denied the benefit of higher post subsequently. The aforesaid principle is applicable for the reason that if a candidate is being inducted in the service but he has been found to be medically unfit then in such situation eventually there is no question of applicability of Section 47 of the old Act, 1995 or Section 20 of the new Act 2016 but where the person concerned has been inducted in the service on the ground of being medically fit by the doctors and subsequently in course of discharge of duty if any medical disability has crept up the same will be said to be crept up in course of the official discharge of duty. The case herein is the same. Since, there is no objection on the part of the respondents to the fact that when the petitioner was medically fit when inducted in service to discharge his duty as Assistant Loco Pilot but when he has been examined medically at the time when he was to be promoted as Senior Loco Pilot then he was found to be

medically unfit due to some defect in his eyes. The writ petitioner when has been inducted in service as Junior Assistant Loco Pilot and subsequently if any medical ailment has come, said to be in nature of the unfitness the same according to our considered view construed to be occurred in discharge of the official duty and in that view of the matter the provision of Section 47 of the Act 1995 or Section 20 of the Act 2016 as per its applicability will apply.

49. This Court in view of the discussion made herein above, both on facts & law and coming back to the order passed by the learned Tribunal is of the view that so far as the reasons taken by accepting the plea of the respondents that the case is barred by limitation of three years. The said according to our considered view is based upon the reason as aforesaid is not proper and held to be not sustainable.

50. So far the issue of show cause is concerned and the vagueness of not concrete reply, this Court is not appreciating in view of the legal situation as per the discussion made hereinabove. The consequence would be as per the discussion made hereinabove that whether the interference is to be shown on the order passed by the learned Tribunal.

51. We are concerned with the power conferred under Article 226 of the Constitution of India which is to be exercised by exercising the power of judicial review as per the law laid down by the Constitution Bench of the Hon'ble Apex Court in the case of *L. ChandraKumar Versus Union of India* reported in (1997) 3 SCC 261. The power of judicial review stipulates that the review can be shown by the court having the power to exercise the power of judicial review in all respect so as to give the justice

to the party concerned otherwise the same will amount to travesty of justice.

52. This Court taking into consideration the aforesaid issue legal issue as also by making reference of the order passed by the Constitution Bench of the Hon'ble Apex Court in ***L. Chandra Kumar (Supra)*** wherein at paragraph-99 it has been observed that the power of judicial review has been conferred to the High Court to be exercised under Article 226. The concept of judicial review is not only on the basis of the perversity but also on the ground of jurisdiction. Paragraph-99 of the said judgment reads as under:

“99. In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the “exclusion of jurisdiction” clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated.”

53. The law is well settled so far as the power which is to be exercised under the power of judicial review, as per the judgment rendered by the Hon'ble Apex Court in the case of ***West Bengal Central School Service Commission & Ors. Vrs. Abdul Halim & Ors.***, reported in ***(2019) 18 SCC 39***, wherein, at paragraph-30 it has been held as under:-

“30. In exercise of its power of judicial review, the Court is to see whether the decision impugned is vitiated by an apparent error of law. The test to determine whether a decision is vitiated by error apparent on the face of the record is whether the error is self-evident on the face

of the record or whether the error requires examination or argument to establish it. If an error has to be established by a process of reasoning, on points where there may reasonably be two opinions, it cannot be said to be an error on the face of the record, as held by this Court in Satyanarayan vs. Mallikarjuna reported in AIR 1960 SC 137. If the provision of a statutory rule is reasonably capable of two or more constructions and one construction has been adopted, the decision would not be open to interference by the writ Court. It is only an obvious misinterpretation of a relevant statutory provision, or ignorance or disregard thereof, or a decision founded on reasons which are clearly wrong in law, which can be corrected by the writ Court by issuance of writ of Certiorari."

54. Likewise, the Hon'ble Apex Court in the case of ***T.C. Basappa Versus T. Nagappa***, reported in ***(1955) 1 SCR 250***, wherein, it has been held as under:-

"10.....An error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, e. g. when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision....."

55. It is evident from the aforesaid judgment that the power of judicial review is to be exercised if the error apparent on the face of such order.
56. This court considering the aforesaid provision is of the view that it is a fit case where the power of judicial review is to be exercised by showing interference with the impugned order passed by the learned Trial Court. Accordingly, the order passed by the learned trial court is hereby quashed and set aside.
57. In the result, the instant writ petition stands allowed. In consequence thereof, the respondents are hereby directed to take appropriate decision by placing the writ petitioner at the pay matrix of the equivalent post of the Senior Loco Pilot from the due date i.e. the date when he has been held to be not eligible on the ground of medical unfitness.

- 58.** The respondents are directed to issue the appropriate order within a period of three months from the date of receipt of copy of the order along with all consequential benefits.
- 59.** Pending interlocutory application, if any, stands dismissed.

(Sujit Narayan Prasad, J.)

(Pradeep Kumar Srivastava, J.)

Rajnish/A.F.R.