

**Central Administrative Tribunal
Principal Bench**

OA No. 313 of 2004

New Delhi, this the 29th day of September, 2005

**Hon'ble Mr. V.K. Majotra, Vice Chairman (A)
Hon'ble Mr. Shanker Raju, Member (J)**

Het Ram Singh
S/o Late Sh. Sukhi Ram,
R/o C/o Sh. Ramesh Chand Sagar,
House No. 224-A, Near Arya Samaj Mandir,
Railway Harthela Colony,
Moradabad.

..Applicant

(By Advocate:- Shri G.D. Bhandari)

-versus-

Union of India through:

1. The General Manager,
Northern Railway,
Baroda House,
New Delhi.
2. The Divl. Railway Manager,
Northern Railway,
Moradabad.

...Respondents

(By Advocate:- Shri R.L. Dhawan)

1. To be referred to the Reporters or not? YES / ~~NO~~
2. To be circulated to other Benches or not? YES / ~~NO~~

yes
yes

S. Raju
(Shanker Raju)
Member(J)

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ORDER (ORAL)

By Mr. Shanker Raju, Member (J):

By virtue of this O.A., applicant assails respondents order dated 6.6.2003 whereby the request of the applicant to treat him as physically handicapped as blind has been turned down and he has been denied appointment as Clerk in group-C post in the selection held in 1998.

2. Applicant, who is a handicapped person with disability upto 40% on account of atrophy measuring 6/18 in the artificial eye acquired in an accident, is a trained Steno-typist and a graduate. Respondents invited application from physically handicapped through sponsorship of employment exchange for filling

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up 12 posts in group -C in the year 1998. A list of 180 candidates was issued who were called for written test. Applicant, who qualified it and appeared in the viva voce, a panel of two persons was declared which did not include his name. Applicant represented to the respondents for his non-appointment and selection. He furnished a certificate issued by a Chief Medical Officer, Civil Hospital, Rampur dated 12.3.1991 whereby it is clarified that a right eye has been totally lost and vision in the left eye is 6/18 with 40% disability which is categorized as moderate disability. However, the claim of the applicant was rejected on the ground that he does not fall within the scope and ambit of blind as per Railway Board's letter dated 15.11.1978 as for this visual acuity should not exceed 6/60 or 20/200 (Snellen) in the better eye.

3. Learned counsel of applicant Shri G.D. Bhandari contended that there has been a change in the definition of persons with disability as per DOP&T OM dated 4.6.1998 where categories of handicap in blind are further divided into four categories and the category of having 40% and above disability is nomenclature as moderate. By referring to Section 33 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, blindness includes low vision as well. In the above backdrop, it is stated that respondents' stand to adhere to the definition of blind as per their letter dated 15.11.1978 is not in consonance with the definition of handicap. Moreover, blind as per the Disability Act *ibid* which shall prevail over their Board's letter and having failed to adopt the aforesaid definition, is not per se legal.

4. Learned counsel would also contend that by alleged hostile discrimination with one Kalyan Singh, who was also treated with 40% blindness, has been treated as blind and was accorded appointment as Clerk on 10.12.2002, as applicant being similarly circumstanced, denial of equal treatment violates Article 14 of the Constitution of India.

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5. Learned counsel would also contend that once 40% disability being moderate indicates low vision, rejection of the case of the applicant when he has qualified in the written test and viva voce is not justifiable.

6. On the other hand, learned counsel for the respondents vehemently opposed the contentions and stated that the Original Application is barred by limitation as representation preferred by the applicant on 15.4.1998 against his non-appointment, limitation as per Section 21 of the A.T. Act expired on 15.10.1999. The inter office communication dated 6.6.2003 does not give any fresh cause of action to the applicant to prefer the present O.A., which is barred by delay and laches.

7. On merits, it is contended that applicant was not found within the definition of blind as per Board's instructions. Accordingly, Kalyan Singh, who has been certified to be fit as his visual acuity was within the permissible limit, his appointment cannot be found fault with.

8. We have carefully considered the rival contentions of the parties and perused the material on record.

9. Disability Act of 1995 has been enacted to safeguard the rights of persons with disability and to enable them to enjoy equal opportunities and allow them to participate in the main stream of national life. This had been the result of an International Meeting held in China in December, 1992 a proclamation signed on behalf of our country in the Socio Economic Commission in India and Pacific being bound by the provisions of this Act. The object of this Act is described in sub-section (1) of Section 47 of the Act which prohibits discrimination in providing government employment on the ground of disability. The Apex Court in *Union of India vs. Sanjay Kumar Jain*, 2005(1)ATJ (SC) 180, held the provisions of the said Act as mandatory and to be read in the IREM and declared that the rights of a blind person to be protected with the following observations:

“Sub-Section (1) of Section 47 in clear terms provides that there cannot be any discrimination in government employment and no establishment shall dispense with or reduce in rank an employee whatsoever during his service. Sub section (2) is relevant for our purpose. It, in crystal clear terms, provides that no promotion shall be denied to a person merely on the ground of his disability. Obviously, in the instant case, the respondent was not considered for promotion on the ground as he was considered to be visually handicapped. Much stress was laid by Mr. Krishnamani on the provision to sub Section (2) of Section 47. The same is not in any way helpful to further the case of the appellant. In fact, it only permits the appropriate Governments to specify by notification any establishment which may be exempted from the provision of Section 47. It does not give unbridled power to exclude any establishment from the purview of Section 47. The exclusion can be only done under certain specified circumstances. They are:

- (i) Issuance of notification,
- (ii) Prescription of requisite conditions in the notification.

10. The notification can be issued when the appropriate Government having regard to the type of work carried on in any establishment thinks it appropriate to exempt such establishment from the provisions of Section 47. The provision to sub Section (2) thereof does not operate in the absence of the notification.

11. The normal function of a provision is to except (sick)(accept) something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins vs. Treasurer of Survey, 1880(5)QBD 170* (referred to in *Shah Bhojraj Kuverji Olil Mills and Ginning Factory vs. Subhash Chandra Yograj Sinha* (AIR 1961 SC 1596) and *Calcutta Tramways Co. Ltd. vs. Corporation of Calcutta* (AIR 1965 (SC) 1728); when one finds provision to a Section the natural presumption is that, but for the provision, the enacting part of the section would have included the subject matter of the provision. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted

as stating a general rule. "If the language of the enacting part of the statute does not contain the provision which are said to occur in it you cannot derive these provisions by implication from a proviso". Said Lord Watson in *West Derby Union vs. Metropolitan Life Assurance Co.* (1897 AC 647) (HL). Normally a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision and to which it has been enacted as a proviso and to no other. (See. A.N. Sehgal and Ors. vs. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), *Tribhovandas Haribhai Tamboli vs. Gurajat Revenue Tribunal and Ors.* (AIR 1991 SC 1538) and *Kerala State Housing Board and Ors. vs. Ramapriya Hotels (P) Ltd. and Ors.* (1994(5) SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant"(Coke upon Littleton 18th Edition, 146)

If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails...But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole"(Per. Lord Wrenbury in *Forbes v. Git* (1922) 1 A.C. 256].

12. A statutory provision, "is something engrafted on a preceding enactment"(R.V. Taunton, St. James, 9B & C 836).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances"(per Lord Esher in *Re Barker*, 25 Q.B.D. 285).

13. A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the provision (see *Jennings vs. Kelly* [1940] A.C. 206).

14. The above position was noted in *Ali M.K. & Ors. vs. State of Kerala & Ors.* (2003(4) SCALE 197).

15. Though several documents were referred to contend that the intention of the employer was to exclude certain establishment, a bare perusal thereof shows that they have no relevance and do not in any

way fulfill the requirements of the provision to sub Section (2) of Section 47. It goes without saying that if a notification in this regard is issued by the appropriate Government the same shall be operative in respect of the establishment which is specifically exempted. This is not the position so far as the present case is concerned. Therefore, on the facts of the case the order of the Tribunal as affirmed by the High Court by the impugned judgment suffers from no infirmity to warrant our interference. The appeal fails and is accordingly dismissed with no order as to costs."

10. In *Kunal Singh vs. Union of India & Anr.*, 2003(1) (SC) SLJ 300, it has been laid down that the provisions of Section 47 of the Act shall override any other provision and in this course, following observations have been made:

"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 'persons 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 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. They very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". This 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 social beneficial enactment that too dealing with disabled person 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 respondents on the basis of definition given in Section 2 (t) 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 invalidly pension as per Rules 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 benefits of persons with disabilities."

12. Merely because under Rule 38 of 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 person 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."

11. If one has regard to the above what is discerned as a ratio is that either in direct recruitment or in promotion quota for physically handicapped cannot be given go bye and it is to be implemented scrupulously. Any other provision, which is in conflict with the Disability Act has to give way and shall be overridden by it.

12. Having the above background, in so far as Railway Board's letter dated 15.11.1978 which defines a blind as total absence of sight and visual acuity not exceeding 6/60 or 20/200, the definition has undergone a change under the Disability Act where the DOP&T OM dated 4.6.1998 laid down as under:

"Change in definition of "Persons with Disabilities for reservation in Central Government posts/services.

Attention of the Ministry of Agriculture, etc., is invited to the instructions contained in this Department's Office Memorandum No.39016/6/77/-Estt. (SCT) dated 04.11.1977, No.39016/24/80-Estt. (C) dated 01.12.1980 and No.39016/24/ 'C' and 'D' posts// services for the physically handicapped persons has been made to the extent indicated below:-

	<u>Category of the Handicapped</u>	<u>%age of reservation</u>
(1)	The Blind	1%
(2)	The Deaf	1%
(3)	The Orthopaedically Handicapped	1%

2. Each category of disability has been divided into four groups as under:-

(a)	Mild	- less than 40%;
(b)	Moderate	- 40% and above;
(c)	Severe	- 75% and above;
(d)	Profound/total	- 100%

3. According to the instructions contained in the Ministry of Welfare's Notification No4/2/83-HW-III dated 06.08.1986, various concessions/benefits, including employment under the Central Government, are available only to those falling under the categories mentioned at (b), (c) and (d) in the preceding paragraph. The minimum degree or disability has also been prescribed as 40% in order for a person to be eligible for any concessions/benefits.

4. Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation)

Act, 1995, provides that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability, of which one per cent each shall be reserved for persons suffering from :-

- i) Blindness or low vision,
- ii) Hearing impairment,
- iii) Locomotor disability or cerebral palsy,

in the posts identified for each disability.

5. With the enactment of this law, it has become necessary to change the definition of Persons with Disability so that the same is in line with Section 33 of the above mentioned Act.

6. The matter has been examined and it has been decided that henceforth the categories of persons with disabilities for the purpose of getting the benefit of 3% reservation in posts/services under the Central Government would be as indicated in Section 33 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. These categories of persons are as under:-

- i) Blindness or low vision,
- ii) Hearing impairment,
- iii) Locomotor disability or cerebral palsy,

(All cases of Orthopaedically handicapped persons would be covered under the category of locomotor disability or cerebral palsy).

7. Accordingly, in partial modification of this Department's Office Memorandum o.39016/6/77-Estt. (SCT) dated 04.11.1977, No.39016/24/80-Estt. (C) dated 01.12.1980 and No.39016/24/80-Estt.(C) dated 30.12.1980, it has now been decided that the benefit of three per cent reservation in posts/services under the Central Government, wherever admissible, would be available for the above-mentioned three categories of persons with disabilities at the rate of one per cent reservation for each category."

13. In the above light, applicant who was moderately disabled in vision being blind from one eye and the other having very low vision of 6/18, which has now gone upto 6/60 comes within the definition of a blind with low vision. As such, by not incorporating the definition of blind, as defined in the DOP&T OM dated 4.6.1998, under the Disability Act, more particularly when the selection had taken

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place after the notification, in case of conflict in definition of blind between the Railway Board's letter and the Disability Act, latter shall prevail and in that event having 40% disability and low vision, applicant was within the definition of blind and non-consideration of his case is not sustainable in law.

14. Another ground, which is relevant, is that whereas similarly circumstanced Kalyan Singh, who had 40% disability certified, had been considered for appointment and ultimately was appointed as Clerk in 2002, exclusion of his name from the select list when he is covered as 40% disabled on moderate disability with low vision as of Kalyan Singh and having qualified in the written and viva voce, and non-appointment is illegal, as we do not find any intelligible differentia in the action of respondents, which has any reasonable nexus with the object sought to be achieved. Rather the object sought to be achieved was to accord appointment to handicapped found suitable. This invidious discrimination cannot stand scrutiny of law and is violative of Article 14 of the Constitution of India.

15. As regards limitation, though applicant has not filed any application for condonation of delay, yet he has challenged an inter-departmental communication between the General Manager and DRM dated 6.6.2003 wherein on representation of applicant comments have been sought by GM from DRM and this would have culminated into a communication of the reasons as the representation made by applicant in 1998 was still to be considered, we find that Kalyan Singh was promoted only on 10.12.2002, the right to be appointed and left over by an illegal action of the respondents violates the Fundamental Rights of the applicant for consideration. As such, an action which is null and void is a recurring cause of action and on a hyper technical plea a meritorious claim cannot be thrown as sometime equity though as a matter of right cannot be claimed, prevails over law, once a letter has been issued in 2003, we do not find any delay

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and latches in the present O.A. Accordingly the objection of limitation taken by the respondents is overruled.

16. Moreover, we find that doctrine of legitimate expectation may not be an enforceable right itself, yet it is a test to check arbitrariness and in the present case rejection of the claim, per se, is illegal. There was a legitimate expectation of applicant having regard to the definition of visually handicapped under the Disability Act, 1995. We fortify our conclusion on a decision of the Apex Court in *State of West Bengal vs. Niranjan Singha*, 2002(2)SCC 326.

17. Moreover, in the matter of limitation, this technical plea should be avoided by the Government when the substantive rights are in question as held by the Apex Court in *Madras Port Trust Vs. Himanshu International*, 1979(4) SCC 176.

18. In the result, for the foregoing reasons, Original Application stands partly allowed. Impugned order is set aside. Respondents are directed to consider the applicant for appointment on Group – C post against the handicapped quota in vision category and in that event he would be entitled to all consequential benefits. No costs.

S. Rajm
(Shanker Raju)
Member (J)

/San/

V.K. Majotra
(V.K. Majotra)
Vice Chairman (A)

29-9-05