

OPEN COURT

CENTRAL ADMINISTRATIVE TRIBUNAL  
ALLAHABAD BENCH  
ALLAHABAD

Dated: This the 16<sup>th</sup> day of JANUARY 2006.

Original Application No. 1046 of 1997.

Hon'ble Mr. K.B.S. Rajan, Member (J)  
Hon'ble Mr. A.K. Singh, Member (A)

Rama Nand, S/o late C.D. Prasad,  
R/o 610-C, Dairy Railway Colony, Gorakhpur.  
At present posted as Chief Design Assistant,  
N.E. Railway,  
GORAKHPUR.

.....Applicant

By Adv: Sri A. Srivastava

V E R S U S

1. Union of India through Chairman,  
Railway Board, Rail Bhawan,  
NEW DELHI.
2. General Manager, N.E. Rly.,  
GORAKHPUR.
3. Chief Engineer, N.E. Rly., Gorakhpur.
4. Chief Personnel Officer, N.E. Rly.,  
GORAKHPUR.

.....Respondents

By Adv: Sri Lalji Sinha

O R D E R

By K.B.S. Rajan, JM

The applicant is aggrieved by the order dated 4/10-7-1997 whereby the respondents have refused to allow the applicant to face viva voce after he became successful in the written exam for the post of A.E.N. on the ground that he has not been medically found fit to the post of A.E.N. and as per the Railway Board circular dated 31-10-1991 read with the judgment dated 3-11-1996 of the Hyderabad Bench of the Tribunal in OA 1143/93, when an

individual is medically unfit, he should not be promoted even on ad hoc basis.

2. The facts of the case being admitted, the same obviates debates. The applicant was initially appointed as D'Man, promoted to the post of Senior Design Assistant and was further promoted to the post of Chief Design Assistant. The next higher post is Assistant Engineer Group B, and provision exists for Limited Departmental Competitive Examination to fill up 20% of the vacancies and the applicant was successful in the written examination. When he subjected himself to medical exam, he was declared unfit (in respect of vision) for any Group B post in the open line or use of trolley or for train work, but was held fit for other services in Group B post. Thus on account of the above medical opinion he was not called for interview. On his making representation, he was again subjected to a medical exam and this time the authorities clearly spelt out that the applicant was fit in Class II Group for other work/non-trolley. The then Chief Engineer earlier held that the applicant could well be considered for non trolley posts, subject to qualifying in the viva. However, the subsequent incumbent to the post of Chief Engineer, no agreeing with the same had referred the matter to the Railway Board which had passed the impugned order.

3. Respondents have contested the O.A. Their contention is that since the Railway Board circular is specific, there is no question of the applicant being considered for any promotion to the post of AEN. Again, they heavily relied upon the Hyderabad Bench judgment, wherein the contention of the respondents that the posts of AEN being interchangeable, the order dated 31-10-1991 of the Railway Board was upheld.

4. Rejoinder, supplementary counter etc., have been exchanged.

5. Arguments were heard. The counsel for the applicant contended that order dated 31-10-1991 is not questioned by him; however, when the applicant has been medically found fit to hold other Group B posts there should be no embargo for permitting the applicant to face viva voce. He has relied upon the judgment of the Apex court in the case of Union of India vs. Sanjay Kumar Jain (2004) 6 SCC 708 wherein the very order dated 31-10-1991 and Rule 531(1) of the Manual were referred to and the Apex Court declined to interfere with the judgment of the Tribunal as upheld by the High Court invoking the provisions of the Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. He has also relied upon a case (one Shri K.C. Verma) where the individual has been appointed in 'other works' in Group B, while he was medically

unfit to hold the post on open line or use of trolley.

6. On the other hand the counsel for the respondents highlighted the judgment of the Hyderabad Bench and contended that since it also deals with interchangeability of the posts of open line/use of trolley with other posts and hence, there is no question of the applicant being sent for *viva voce* as in the event of his being appointed in the other non-trolley post, he cannot be transferred to the open line. As regards precedent, the counsel for respondents submitted that the said individual (K.C. Verma) was not promoted but was appointed under the handicapped quota as a direct recruit.

7. First a look at the order dated 31-10-1991.

The same reads as under:-

"Copy of Rly., Board's letter No. E(GP)80/2/8 dated 31.10.1991 addressed to the GMs, All Indian Railways and others.

Sub: Appointment of Group 'B' post-Medical Examination - relaxation in prescribed standard.

Ref: This office letter of even No. dated 16.12.1983.

The Board have been according approval to the adhoc promotion of Group 'C' employees empanelled for Group 'B' posts who do not pass prescribed medical examination, in few cases recommended by the GMs, in terms of the instructions/procedure contained in their letter referred to above. The matter has been reconsidered in the light of the need to maintain a high standard of efficiency and fitness of the officers at gazetted levels. In suppression of the instructions contained in their letter dated 16.12.1983, the Board have decided that the Group 'C' employees qualifying in the selection for promotion to Group 'B' post but not passing the prescribed medical standard should not be promoted to Group 'B' even on adhoc basis. Accordingly,

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the proposals for such adhoc promotions need not be sent to this office henceforth.

It has also been decided that the names of the candidates who do not pass the prescribed medical standard should not be included in the panel. Accordingly, only those who qualify in the medical examination of prescribed standard should be called for viva-voce."

8. The applicant has not challenged the above. He contends that he does not want to hold the post of AEN on the open line or where use of trolley is involved, whereas, his right is to be considered for 'other group 'B' posts' for which he is medically found fit.

9. Next is the judgment of the Hyderabad Bench. Relevant extract of the said judgment is reproduced below:-

"As the applicant failed to qualify in the appropriate medical category, for promotion to the post of A.E.E. he was not called for viva-voce even though he passed in the written selection test.

.....A.E.E. he should be promoted as A.E.E. in the post which does not require medical standard category 'A'.

.....As he is liable to be transferred to the other inter-changeable category if he fails in appropriate medical category it will not be possible to post him in that post requiring higher medical standards.

...There is force in the submission of the respondents. When the post of A.E.E. is an inter-changeable one the applicant cannot pick and choose a post in which he should be continued indefinitely without transferring him from that post. In our opinion the posts of A.E.E. which do not require the medical standard category 'A'."

10. In this case the applicant wanted that he should first be subjected to viva voce and in case he is medically unfit he should be considered for other equivalent posts. Thus, he challenged the very order dated 31-10-1991 and the Tribunal

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rejected the same, though, it had certainly touched about the interchangeability of the posts in Asst. Engineer. Whether the applicant in that case was found fit or not for other works/non trolley has not been made clear in the judgment. Hence, facts in the case of the said judgment could well be distinguished from the case in hand.

11. As regards the decision of the Apex Court in *Union of India v. Sanjay Kumar Jain, (2004) 6 SCC 708*, relevant extract is reproduced below:-

"3. Factual position in a nutshell is as follows:

The respondent while working in Group C post of the Railways applied for promotion to Group B post. He qualified in the written test and was directed to undergo medical examination as per para 531(b) of the Indian Railway Establishment Manual (in short "the Establishment Manual"). In terms of the Railway Board's circular dated 31-10-1991, passing of the medical test is a requirement before the candidate is called for viva voce test. The respondent was found to be medically unfit as he was visually handicapped. His case is one of external squint with advanced petriritis (sic) pigments on both the eyes. This is a disease which affects the eyesight progressively. He was considered unfit as he may become visually handicapped in future. The respondent was, therefore, not called for viva voce test. He filed OA No. 439 of 2001 before CAT challenging the order dated 20-9-2000 whereby it was indicated that he was not to be called for viva voce test as he had been declared medically unfit. CAT after hearing the parties came to hold that while considering the case of the respondent (applicant before it) the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short "the Act") were not kept in view. CAT took note of the fact that a new paragraph 189-A was introduced in the Establishment Manual which clearly laid down that there shall not be discrimination in the matter of promotion merely on the ground of physical disability. The application was accordingly allowed by CAT.

4. The Union of India questioned the correctness of CAT's order by filing a writ petition which was dismissed by the impugned

judgment. The High Court took note of sub-section (2) of Section 47 of the Act to hold that CAT's order is perfectly in order.

7. Since the controversy revolves around Section 47 of the Act, it would be appropriate to quote the provision which reads as follows:

"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."

8. The Act has been enacted, as the preamble of the Act indicates, to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. In a meeting to launch the Asian and Pacific Decade of the Disabled Persons, 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, which was held at Beijing from 1-12-1992 to 5-12-1992, a proclamation was adopted on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. Our country is a signatory to the said Proclamation. The Proclamation was on the following lines:

"To give full effect to the Proclamation it was felt necessary to enact a legislation to provide for the following matters:

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

(ii) to create barrier-free environment for persons with disabilities;

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-à-vis non-disabled persons;

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(iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

(v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

(vi) to make special provision for the integration of persons with disabilities into the social mainstream."

9. Sub-section (1) of Section 47 in clear terms provides that there cannot be any discrimination in government employments 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 that he was considered to be visually handicapped. Much stress was laid by Mr. Krishnamani on the proviso 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 Government to specify by notification any establishment which may be exempted from the provisions 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 a 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 proviso to sub-section (2) thereof does not operate in the absence of the notification.

11. The normal function of a proviso is to except 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 v. Treasurer of Surrey*(1880) 5 QBD 170 (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograv Sinha* AIR 1961 SC 1596 and *Calcutta Tramways Co. Ltd. v. Corpn. of Calcutta* AIR 1965 SC), when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. 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 provisions which are said to occur in it you cannot derive these provisions by implication from a proviso" said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Co.* 1897 AC 647 Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. [See *A.N. Sehgal v. Raje Ram Sheoran* 1992 Supp (1) SCC 304, *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal* (1991) 3 SCC 442 and *Kerala State Housing Board v. Ramapriya Hotels (P) Ltd.* (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 Edn., p. 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 AC 256)

12. A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St. James (1829) 9 B&C 831, ER p. 311).

"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 *Barker, Re* (1890) 25 QBD 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 proviso (see *Jennings v. Kelly* 1940 AC 206).

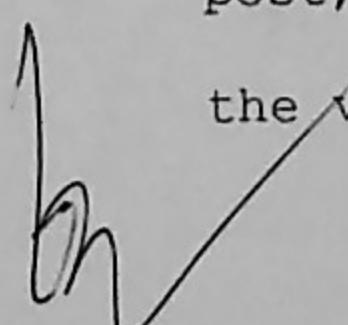
14. The above position was noted in *Ali M.K. v. State of Kerala* (2003) 11 SCC 632.

15. Though several documents were referred to contend that the intention of the employer was to exclude certain establishments, a bare

perusal thereof shows that they have no relevance and do not in any way fulfill the requirements of the proviso 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. That 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.

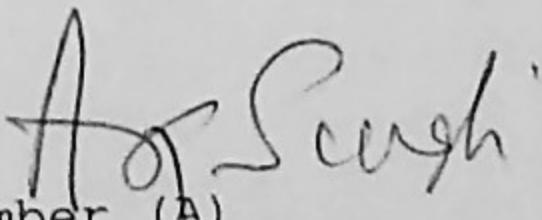
12. The above judgment is on a different footing. It relates to the extent of concession available to the physically disabled and in respect of a specific Act. The applicant has not claimed any such relief on the basis of the provisions of the Disabilities Act. Of course, in that case, the Tribunal has allowed the OA on the ground after the CAT took note of the fact that a new paragraph 189-A was introduced in the Establishment Manual which clearly laid down that there shall not be discrimination in the matter of promotion merely on the ground of physical disability. In the instant case what the asserts is that when the medical authorities have certified that the applicant is fit to hold any group B posts other than the On Trolley or open line posts, he should have been permitted to partake in the viva voce and in case of his being found suitable, he should have been accommodated against such 'other posts' where the medical standard is not that rigid and for holding which post the medical authorities have certified that the applicant is fit.

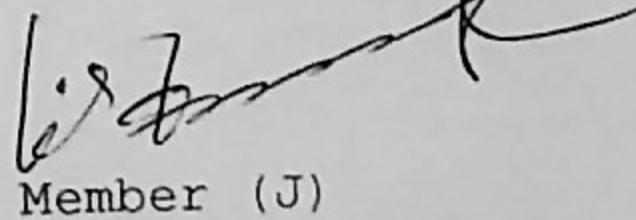
13. The medical authorities have conducted the fitness test and once they come to the conclusion that the applicant is fit to hold the other Group B posts it should be seen whether the applicant could be posted to any of the post of Asst. Engineer which does not involve his going to open line or use of trolley. Here exactly is the objection by the respondents that the posts of AEN being interchangeable, as held by the Hyderabad Bench, the applicant cannot be considered for the post of AEN which does not involve use of trolley. If so, the respondents cannot engage anyone who is visually incapacitated from holding the post of AEN, whereas, admittedly the said Verma was appointed to hold the post of AEN though he is visually handicapped. The learned counsel for the respondents has tried to justify the appointment of the said Shri K.C. Verma on contending that it was a direct recruitment. This does not appeal to logic. For, the said K.C. Verma admittedly could not be transferred to open line post of AEN. And in that event the contention that the posts are interchangeable and hence the applicant cannot be posted to the other group B post is not tenable. If a person could be appointed as a direct recruit to hold the post with some visual handicap, equally one could also be promoted to the post, subject, however, his proving his mettle in the viva voce.

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14. In view of the above, the OA succeeds. The respondents are directed to conduct viva voce and if the applicant is found suitable, he is entitled to promotion as AEN and he should be adjusted in any of the AEN posts (it is stated that there are more than 30 posts out of a total of 78 posts, which do not involve open line or use of trolley). Needless to mention that he may not be eligible to compete for higher promotion, which would essentially involve the higher medical standard. In case the applicant is so promoted, his promotion shall be only on notional basis from the date others had been promoted and the annual increment would be available notionally for fixation of pay in the higher pay scale and the applicant would be entitled to actual pay as and when he assumes higher responsibility. His seniority shall be protected.

15. The respondents shall undertake the above drill of calling the applicant for viva voce etc, within a period of five months from the date of communication of this order. No cost.

  
Member (A)

  
Member (J)

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