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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Application No.167 of 2006
Cuttack, this the 26th day of June, 2007.

Somanath Mishra ... Applicant
Versus
Union of India & Others ... Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not?
2. Whether it be circulated to all the Benches of the CAT or not?

(N.D.RAGHAVAN)
VICE-CHAIRMAN

(B.B.MISHRA)
MEMBER(A)

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C O R A M:

THE HON'BLE MR. N.D.RAGHAVAN, VICE-CHAIRMAN
AND
THE HON'BLE MR.B.B.MISHRA, MEMBER (A)

Somanath Mishra, aged about 42 years, Son of late Gajendra Mishra of Kusunapur, Po-Chandol, Dist. Cuttack at present working as Section Engineer (Estimate) under Senior Divisional Engineer (Co.Ord.) East Coast Railway, Sambalpur.

..... Applicant.

By legal practitioner: Mr.s.k.Nayak-3, Advocate.

-Versus-

1. Union of India represented through General Manager, East Coast Railway, At-Railvihar, Chandrasekharapur, Bhubaneswar-23, Dist. Khurda.
2. The Chief Personnel Officer, East Coast Railway, At-Railvihar, Chandrasekharapur, Bhubaneswar, Dist. Khurda.
3. Chief Engineer, East Coast Railway, At-Railvihar, Chandrasekharapur, Bhubaneswar, Dist. Khurda.
4. Divisional Railway Manager, East Coast Railway, Sambalpur, At/Po-Modipara, Dist. Sambalpur.

... Respondents.

By legal practitioner: Mr. Ashok Mohanty, Sr. Counsel and Mr. O.N.Ghosh, Advocate.

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ORDER

MR.B.B.MISHRA, MEMBER(A):

Before answering the issues called in question by the Applicant, it is worthwhile to mention that initially the Applicant, having been found suitable in the open competitive examination conducted, was empanelled in the panel list published on 07.12.1990 by the RRB. But on medical examination, the Applicant was declared unfit for the above post but declared medically fit in C-I category for which he was provided alternative appointment of Senior Estimator in the scale of Rs.1400-1600, vide order under Annexure-1, dated 03.03.1994, and posted to Sambalpur Division of the Railways.

2. While the Applicant is/was performing his duties of Sr. Estimator, for formation of a Group B panel of AENs, against 70% vacancies, the Deputy Chief Personnel Officer (Gaz.) on behalf of Chief Personnel Officer, East Coast Railways, Chandrasekharpur, Bhubaneswar published a notification under Annexure-2 dated 08.07.2004 notifying the scheduled date as 25.07.2004 for holding examination for formation of the above panel. Along with the notification, a list of candidates eligible to

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appear for the examination was published and in the said list, the name of the Applicant finds placed at Sl.No. 61. The Applicant along with others having been spared vide letter under Annexure 3 &4, they appeared in the test conducted for above post. The Applicant along with four others qualified in the written test for which, vide letter under Annexure-5 dated 23.09.2004, the Divisional Personnel Officer, Sambalpur intimated the Sr. Divisional Engineer(Co-ordination)that D&A clearance and medical fitness certificates of the qualified persons are required to be sent to Deputy Chief Personnel Officer (Gaz.), Bhubaneswar, before 24.09.2004. Besides, instruction was issued to the Applicant along with four others to be ready to face the viva voce test. Vide letter under Annexure-6 dated 30.09.2004 the Divisional Railway Manager (Engg.)East Coast Railway, Sambalpur, intimated the Chief Engineer, East Coast Railway, Bhubaneswar, with a copy to the applicant that the applicant has been directed to appear in the viva voce test on 01.10.2004 (Friday). It is his case that though he appeared before the Chief Engineer, East Coast Railway, Bhubaneswar, for taking part in the viva voce test, he was not permitted to sit in the test on the ground that he has been declared medically unfit and excluding the name of the applicant,

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the authorities prepared a panel of 14 candidates for promotion to the post of Assistant Engineer Gr. B under Annexure-7 dated 14.10.2004.

3. Being aggrieved by such action, the Applicant submitted two representations dated 14.10.2005 and 25.10.2005 (Annexure-8 & 9) enclosing copy of the decisions of the Hon'ble Apex Court rendered in the case of Union of India v. Sanjay Kumar Jain (Civil Appeal No.5178/2004 decided on 11.08.2004) holding that promotion should not be denied to a person merely on the ground of his physical disability. The aforesaid representations of the Applicant was rejected and communicated to him under Annexure-11 dated 20.01.2006. On perusal of the said order of rejection, it is found that the representations of the Applicant was sent to the Railway Board who opined as under:

“(i) Sub Section (1) of Section 47 of the Persons with Disabilities (Equal Opportunities Protection and Rights and Full Participation) Act, 1995 prohibits Dispensing with the services of persons acquiring disability during service and provides for their adjustment in alternative posts with the same scale of pay if they are not suitable for holding the post so far held by the, while Sub Section (2) of

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the Act deals with non-discrimination in promotion merely on grounds of disability. A harmonious reading of these two sub sections together will show that a person who acquires disability during service and is not thereby fit to hold the post held by him cannot be considered for promotion to higher grade in the stream/hierarchy but is required to be shifted to an alternative post for which he is suitable from the point of view Medical standards prescribed for such alternative post. Such being the case, the question of such a person being covered by the protection given by sub section (2) of the Act, does not arise. Otherwise, the provisions of these two sub sections will be contradictory. Accordingly, a reasonable interpretation/understanding of these provisions will be to the effect that the protection regarding non-discrimination in promotion is intended to cover disabled persons working against posts which have been identified as capable of being held by persons with disability as per Section 33 of the Act and those employees who acquire disability during the service and get absorbed in such posts.

- (ii) Any other interpretation of sub section (1) & (2) is liable to render the

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provisions thereof contradictory. It is one the same that non-discriminatory provisions for promotion in the hierarchy of persons who are acquiring disability during service have been absorbed in alternative post including the posts identified for appointment of physically handicapped persons and those appointed against such posts initially itself from open market have been incorporated in para 189 -A of the Establishment Manual.

Thus, you have not been permitted to attend the viva voce test of Gr.B/engg. As you are medically unfit to hold the Gr.B/Engg.Post. This disposes of your representation dated 25.10.2005."

4. Being dissatisfied with the decisions communicated under Annexure-11, on 01.02.2006, he again preferred a representation to the Chief Personnel Officer, E.Co.Railways, Chandrasekharpur, Bhubaneswar. Thereafter the Applicant approached this Tribunal in the present Original Application filed under section 19 of the Administrative Tribunals Act, 1985 challenging the action of the Respondents in not allowing him to sit in the Viva-voce test on the ground of medically unfit, is illegal and arbitrary being also hit by Article 14 & 16 of the

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Constitution of India. Besides, it contravenes the law enunciated by the Hon'ble Apex Court to the extent that, one found otherwise fit for promotion cannot be deprived of the said benefits on the ground of visual disability. His further ground of challenge is that paragraph 189-A of the Establishment Manual clearly envisages that there shall not be any discrimination in the matter of promotion on the ground of physical disability which is also fortified by the Disabilities Act, 1995 and the law enunciated by the Hon'ble Apex Court. Even then, he has been deprived of the benefits of promotion although he was found suitable in the Written test conducted by the Respondents. On the above grounds, he has prayed for the following relief:

- “(a) The order dated 20.01.2006 vide Annexure-11 be quashed;
- (b) The Respondents be directed to empanel the name of applicant in the panel prepared for promotion to the post of AEN (Gr.B), ignoring his visual disability and not to debar him from promotion solely on the ground of visual disability;
- (c) Respondents may be directed to provide promotion to applicant to AEN (Gr.B) and pass such other order/orders as this Hon'ble Tribunal deem fit.”

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5. While factual aspects of the matter are not in dispute in the counter filed by the Respondents, they have contested the grievance of the Applicants stating that as per IREM Vol.I (1989) Edition), vide Advance correction slip No. 181 (Ministry of Railways Letter No. E (GP) 80/2/8 dated 31.10.1991) at para 206.2, employees selected for promotion to Gr. B service should be fit in all respects including physical fitness for the duties one is required to discharge in the promotional post. As the post in question comes under Safety category, as per Rules, passing of medical examination and medical fitness is a precondition for viva voce test. Candidates who were declared qualified in the written test and submitted their medical fitness certificate were allowed to sit in the viva voce test held on 01.10.2004. Since the Applicant on the date of viva voce test was found medically unfit, he was not permitted to sit in the said test. However, he was issued Memo and pass to go to Eye Clinic of Garden Reach Hospital at Kolkata on 05.10.2004 to have the eye test there. But, he failed to report there in spite of repeated instructions issued to him in that context. Since the Applicant failed to report and produce the medical fitness, he was called upon by the Respondent No.2 vide letter under Annexure-R/6, dated 29.06.2005 to explain as

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to why his candidature for the selection would not be cancelled. As the Applicant was on continuous leave, the aforesaid letter under Annexure-R/6 could not be served on him. Ultimately, the aforesaid letter was served on him on 20.09.2005. Thereafter, applicant attended the medical test at Garden Reach Kolkata and as reported under Annexure-R/7, on examination, he was found medically unfit.

6. They have further maintained that Indian Railway Department of Civil Engineering, Assistant Engineer (Class II) Recruitment Rules clearly envisage that Educational and other qualifications laid down in the rules for the concerned Engineering Services (IRSE) conducted by the UPSC will be the criteria or eligibility for promotion. By placing copy of the Notification issued by the UPSC, under Annexure-R/9, it has been averred by the Respondents that there is no difference of the norms followed by the UPSC and the Railways and the UPSC has also specifically made known through the advertisement that appointment of the physically handicapped candidates to the service/posts is subject to medical fitness. Their stand is that in Paragraph 532 vision test is required to be taken before effecting promotion to the post in question; because in paragraph 530 of the Indian

Railway Medical Manual Vol. I it has clearly been provided that while filling up of posts including the post of AEN in Civil Engineering Department of the Railways, the medical test is a must. Since the Rules of the Railways clearly provide that before effecting promotion, one has to be medically fit, the Disability Act, 1995 based on which the applicant seeks relief has no role to play. They have, therefore, prayed for dismissal of this OA.

7. Applicant in his rejoinder, while refuting the stand taken by the Respondents in their counter, has stated that after introduction of Section 47 (1) and 47(2) of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1985, the Rules quoted by the Railways are no more available and the Applicant has got a right to be considered for the post in question. It has been stated by him that the Railways/authorities were totally unkind to him; because the Respondents in utilizing the power of relaxation, granted promotion to Shri Prabhakar Rao, who is now working as AEN (G) in Waltair Division, whereas the Applicant has been denied such promotion.

8. After giving a patient hearing in the matter, we have thoroughly examined the materials placed on record with the aid and assistance of Learned Counsel for

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the Parties through their rival submissions. We have also gone through the decisions relied on by them. After going through the decisions of the Hon'ble Apex Court made in the case of **Union of India v. Sanjay Kumar Jain**, 2005 (1) AISLJ, 40, it is needless for us to record the rival submissions of the parties in detail; because this was a case in which Sanjay Kumar Jain 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; as in terms of Railway Board's circular dated 31.10.1991 passing of medical test is a requirement before the candidate is being called for viva voce test. On medical examination Jain was found medically unfit as he was visually handicapped for which he was not called to appear in the viva voce test. Being aggrieved by such action of the Respondents, he approached the CAT, Principal Bench, New Delhi in OA No.439 of 2001. The Principal Bench of the CAT, after hearing the parties held that while considering the case of Jain, the provisions of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 were not kept in view. The Principal Bench while reaching such conclusion took note of the fact that a

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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 disabilities. The application was accordingly allowed by the PB directing the Railways to allow the Applicant to take part in the viva voce test.

9. The Union of India/Railways questioned the correctness of the aforesaid order of the PB, CAT, New Delhi before the Hon'ble High Court. The Hon'ble High Court by taking note of sub section (2) of Section 47 of the Act held that there is nothing wrong in the order which was the subject matter of review before them. The issues were not allowed to be settled then and there; because the Railways carried the matter to the Hon'ble Apex Court in Civil Appeal No. 5173 of 2004. The Hon'ble Apex Court after examining the Rules of the Railways prescribed the medical test vis-à-vis various provisions made in the Disabilities Act, 1994, in order dated 11.08.2004 dismissed the civil Appeal No. 5173 of 2004 holding that there is no infirmity in the order of the Tribunal affirmed by High Court.

10. We find that the issues raised therein are exactly the issues involved in the case on hand. Therefore, in all fitness of thing, it is necessary to quote the relevant portion of the observations of the Hon'ble Apex Court

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made in the case of Sanjay Kumar Jain (supra) which run thus:

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

"Sections 47: Non-discrimination in Government employments-

(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." (emphasis is ours)

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8. 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 of as 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 applicant. 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.

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9. 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."

(emphasis is ours)

In observing so, at the conclusion it has been ordered as under:

"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 of 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."

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11. Also in the present case, no material has been produced by the Respondents showing the exclusion of the post or department from the provision of Section 47 of the Disabilities Act, 1995. In absence of this, we have no hesitation to hold that debarring the Applicant to appear in the Viva-voce test on the ground of his visual handicap is against the specific Act, 1995, referred to above.

12. In view of the discussions made above, the order under Annexure-11 dated 20.0.2006 is hereby quashed by directing the Respondents to take the viva voce test of the Applicant as per Rules within a period of 30 days from the date of receipt of a copy of this order and based on the place and position of the Applicant in the said test, further action, as had been taken in regard to others, should be taken in the matter within a period of 30 days from the date of conducting the viva voce test of the Applicant.

13. With the aforesaid observations and directions, this OA stands allowed by leaving the parties to bear their own costs.


(N.D. RAGHAVAN)
VICE-CHAIRMAN


(B.B. MISHRA)
MEMBER(A)