

T/15/23

**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH**

O.A. No.126/2004 with M.A.No.56/04

Thursday, this the 26th day of April, 2007.

CORAM:

**HON'BLE Dr. K.B.S. RAJAN, JUDICIAL MEMBER
HON'BLE MR. TARSEM LAL, ADMINISTRATIVE MEMBER**

Vinay Kumar, S/o Sh.Ved Bhaskar Ji,
R/O Qtr.No.T-17-E Railway Colony,
Barmer, Distt: Barmer (Rajasthan).
Presently working on the post of
Head Enquiry-Cum-Reservation Clerk
(H.E.R.C.), at North Western Railway,
Barmer, Distt: Barmer (Rajasthan).

Applicant

(By Advocate Shri S.K. Malik)

Vs.

1. Union of India, through the
General Manager,
North Western Railway,
Jaipur(Rajasthan).

Divisional Railway Manager,
North Western Railway,
Jodhpur Division, Jodhpur, (Rajasthan).

Divisional Personnel Officer,
North Western Railway,
Jodhpur Division, Jodhpur, (Rajasthan).

Respondents

(By Advocate Shri ~~Shri~~ Manoj Bhandari)

ORDER

HON'BLE Dr. K.B.S. RAJAN, JUDICIAL MEMBER

This order shall dispose of both M.A. No. 56/04 for condonation of delay
as well as the main O.A. No. 126/04.

2. M.A. 56/04 has been filed praying for condonation of delay in filing the
OA No. 126/04. Heard the counsel for the parties. In view of the fact that the
case is one of fixation of pay scale, which has recurring effect, limitation does
not apply in so far as fixation of pay is concerned, though, as far as recovery of
arrears of pay and allowances is concerned, limitation may apply, condonation in
respect of which has to be considered taking into account the cause of delay and

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the extent of objection from the other side over condonation. This view is based on the decision of the Apex Court in the case of M.R. Gupta vs Union of India (1995) 5 SCC 628, wherein the Apex Court has held as under:-

The appellants grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellants claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action.

3. As regards the so called delay in filing in the OA, since earlier, the applicant's pay as well as pay scale had been protected and it was only as on 20-04-2004 that a show cause notice was issued over reduction in the pay scale, there is absolutely no delay in this case. M.A., therefore, is rather redundant and is accordingly closed, with the finding that there is no delay in filling the OA.

4. Now the main matter. The issue is, what should be the pay scale and the post that should be afforded to a Railway employee who had been medically declassified. The applicant who had at the time of medical declassification been in the pay scale of Rs 5000 - 8000, has been fitted against a post carrying pay scale of Rs 4,500 - 7000 which later on was revised to Rs 5,000 - 8000 but again brought back to Rs 4,500 - 7000. The facts in detail, as per the OA are as under:

(a) Applicant, while working on the post of ASM in the pay scale of Rs.5000-8000 at Parlu was declared Medically de-categorised due to Eye Vision. Respondents vide A-3 letter dated 1.8.2000 directed to create one supernumerary post of ASM in the pay scale of Rs.5000-8000 and charged the pay of the applicant against that post. Thereafter the respondents vide A-4 letter dated 25.8.2000 directed the applicant to appear before the Committee on 29.8.2000 for an alternative post. Accordingly, applicant appeared before the Committee who recommended that the applicant is to be appointed on the post of Enquiry-cum-Reservation Clerk (ECRC) in the pay scale of Rs.4500-7000, subject to passing of requisite course. The applicant had no other alternative except to give his written consent under pressure for appointment on the post of Enquiry-cum-Reservation Clerk (ECRC) in the pay scale of Rs.4500-7000. Respondents directed the applicant for training at Zonal Training Centre Chandousi. After coming back from training, applicant came to know that he has been appointed on wrong post and pay scale whereas his other colleagues were given protection of pay which they were drawing on their earlier posts and accordingly he made representation before the respondents that his pay and post also be protected in view of A-6 Railway Board Circular P.S. No.11816/1999. According to the said circular, Para 1301 of the IREM Vol. 3, 1989 Edition has been amended wherein it has been provided that "Railway servant who falls in the Vision Test or otherwise by virtue of disability, acquired during service, becomes physically incapable of performing duties of the post which he is occupying, should not be dispensed with or reduced in rank but should be shifted to some other post on the same pay scale and service benefits." Keeping in view the said Circular, respondents vide their letter(A-7) dated 4.11.2003 protected the pay and post of the applicant and accordingly fixed the pay of the applicant in the pay scale of Rs.5000-8000 which he was drawing before he was Medically de-categorised on the post of ASM. Applicant was also allowed to work on the post of Head Enquiry-Cum-Reservation Clerk. However, no such order about working on the post of Head Enquiry-Cum-Reservation Clerk was passed by the respondents. Respondent No.3 vide A-8 letter dated 20.4.2004 issued Show Cause Notice to the applicant to reduce his pay scale from Rs.5000-8000 to 4500-7000. The applicant vide Annexure A-9 letter/representation replied to the respondents that, according to Railway Board's Circular he is entitled for protection of his pay and post whereas in other case no such action has been taken and by following the order of Railway Board his pay and post has been protected and as per law his right may kindly be protected. Without following the Railway Board Circular and the law on Medically de-categorised persons, respondents vide their Impugned Order dated 17.5.2004, in an arbitrary

manner reduced the pay and pay scale of the applicant from Rs.5000-8000 to Rs.4500-7000 and also the post of the applicant has been reduced.

5. Respondents have contested the OA and their version is as under:

(a) The applicant himself had accepted the offer of absorption on the post of ECRC in the grade of Rs.4500-7000 vide his letter dated 6.9.2000 and therefore, he cannot be permitted to challenge the order after a delay of more than 4 years. The original application is therefore, not only time barred but the applicant is guilty of acquiescence and cannot be granted any relief in the extraordinary jurisdiction. The applicant did not challenge his absorption on the post of ECRC grade of Rs.4500-7000 and therefore, the question of challenge before this Hon'ble Tribunal after a delay of more than 4 years when he had already been absorbed as ECRC grade and he having been accepted the same, cannot be permitted to approbate and reprobate. The applicant's pay was erroneously fixed by time vide Annexure A-7 because he was absorbed as ECRC grade 4500-7000 as per his consent. Thereby, his pay protection was required to be made in this grade only. On the contrary his pay was wrongly fixed in grade 5000-8000 vide Annexure A-7. The entire absorption procedure made by the respondents is already under challenge in the case of **Safuddin vs. Union of India and others**, in O.A. No.298/2003 which is pending consideration before the Hon'ble Court. Therefore, until and unless the said case is decided the applicant cannot be granted any relief. He never represented against this order neither he challenged this order in Court therefore, this has attained finality so at this belated stage he should not be permitted to agitate the matter grade which is correct this pay was revised vide Annexure A-1 in accordance with his present grade is correct.

6. Arguments were heard and documents perused, The rules are very clear. Vide Chapter XIII of the I.R.E.M. a railway servant who falls in a vision test or otherwise by virtue of disability acquired during service becomes medically incapable of performing the duties of the post which he occupies should not be dispensed with or reduced in rank, but should be shifted to some other post with the same pay scale and service benefits. (Annexure A-6 of the OA refers). The respondents are fully right when they had passed the order dated 04-11-2003 (Annexure A-7) and placed the applicant in the pay scale of Rs 5000 - 8000,

which was the scale in which the applicant was placed before medical de-categorization. Error committed by them is only in the issue of the show cause notice vide Annexure A-8. Rejection of Annexure A-9 representation of the applicant by order dated 17-06-2004 is equally illegal. For, the applicant is right when he contended that the Rules provide for protection of pay and allowances. He relies upon the decision of the Apex Court in the case of Narendra Kumar Chandia v. State of Haryana, (1994) 4 SCC 460, wherein, the Apex Court has held as under:-

7. Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the posts he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For a Clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the respondent Board to relax his passing of typing test and to appoint him as an LDC. Admittedly on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs 1400-2300. Necessarily, therefore, his last drawn pay has to be protected. Since he has been rehabilitated in the post of LDC we direct the respondent to appoint him to the post of LDC protecting his scale of pay of Rs 1400-2300 and direct to pay all the arrears of salary.

7. Again, the applicant relied upon the decision of the Apex Court in the case of Kunal Singh v. Union of India, (2003) 4 SCC 524, wherein the Apex Court has discussed in extenso the provisions relating to Persons with disabilities (equal opportunities and Protection of Rights and Full Participation) Act, 1995 held as under:-

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.

5. According to the learned counsel for the appellant, his disability falls under Section 2(i)(v), namely, locomotor disability. What is meant by locomotor disability is stated in Section 2(o). There is no dispute that the Act applies to the establishment of the respondents and this establishment is not exempted under any notification issued under Section 47 of the Act. □ Persons with disability means a person suffering from not less than 40% of any disability as certified by a medical authority as per the definition given under Section 2(t).

6. Short question that arises for consideration in this appeal is whether the appellant is entitled to the benefit of Section 47 of the Act.

7. From the facts, which are not in dispute, it is clear that the disability suffered by the appellant is covered by Section 2(i)(v) read with Section 2(o) of the Act. It is also not in dispute that this disability was acquired by the appellant during his service. Under Section 2 disability and person with disability are separately defined and they are distinct. We may also notice some provisions in Chapter VI of the Act relating to employment. Section 32 deals with identification of posts which can be reserved for persons with disabilities. Section 33 speaks of reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability of which 1% each shall be reserved for persons suffering from: (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy. Section 38 requires the appropriate Governments and local authorities to formulate schemes for ensuring employment of persons with disabilities. Section 47 is included in Chapter VIII of the Act. Chapter VI deals with employment relating to persons with disabilities including identification of posts and reservation of vacancies for such persons. Under this Chapter, reservation of vacancies for persons with disabilities is made for initial appointments. Section 47 in Chapter VIII deals with an employee of an establishment who acquires a disability during his service.

8. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. To realize the objective that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view a meeting called the Meet to Launch the Asian and Pacific Decades of Disabled Persons was held in Beijing in the first week of December 1992 by the Asian and Pacific countries to ensure full participation and equality of people with disabilities in the Asian and Pacific regions. This meeting was held by the Economic and Social Commission for Asia and Pacific. A proclamation was adopted in the said meeting. India was a signatory to the said proclamation and agreed to give effect to the same. Pursuant thereto this Act was enacted, which came into force on 1-1-1996. The Act provides some sort of succour to the disabled persons.

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,



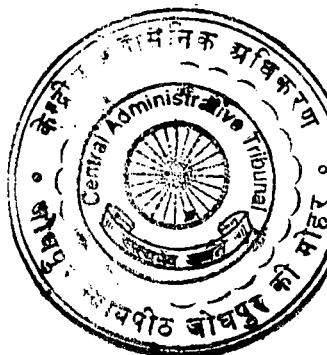
is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very 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(1) 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(1) 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.

13. For the reasons stated and discussions made above, the appeal deserves to be accepted. Hence the impugned order affirming the order of termination of services of the appellant is set aside and the appeal is allowed. We direct the respondents to give relief in terms of Section 47 of the Act. (Emphasis supplied)

8. Affirming the spirit behind the enactment of the above Act, the Apex Court, in its judgment in **Union of India v. Sanjay Kumar Jain, (2004) 6 SCC 708**, has held as under:-

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-?vis non-disabled persons;
- (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 equalisation of opportunities for persons with disabilities; and
- (vi) to make special provision for the integration of persons with disabilities into the social mainstream.

9. Learned counsel for the respondents had contended that the applicant having given his consent, he cannot be permitted to agitate against his pay scale being fixed at Rs 4500 - 7000. The retort of the applicant's counsel to the same is that there is no such bar in claiming the rights provided under the statute and he had invited our attention to the decision of the Apex Court in the case of **Secy.-cum-Chief Engineer v. Hari Om Sharma, (1998) 5 SCC 87** :

In this case, the Apex Court has held as under:-

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"8. Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872."



10. In view of the above, the **OA succeeds**. Orders dated 17-05-2004 (Annexure A-1), 06-09-2000 (Annexure A-2) are hereby quashed and set aside. The respondents are directed to consider the applicant's appointment as Head Enquiry-cum-Reservation Clerk in the pay scale of Rs 5000 – 8000 and afford him the attendant benefits of seniority etc., as per the extant rules. The pay scale of the applicant shall not be less than Rs 5000 – 8000 all through after decategorization. The applicant is entitled to arrears of pay and allowances, if any due to him in this regard. Suitable orders shall be passed by the respondents.

11. As the seniority of the applicant is also to be fixed, we are not inclined to fix any time limit but certainly hope that the respondents would accord priority to this case and pass suitable orders, as directed above, within a reasonable time.

12. No costs.

Dated, the 2007.

Kauseem Lal
TARSEM LAL

ADMINISTRATIVE MEMBER

Dr. K.B.S. Rajan

JUDICIAL MEMBER

R/C
SOM
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Date

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27/4/07
for Mr. Manoj Bhendari