

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.No.85/08

Monday this the 30th day of March 2009

C O R A M :

HON'BLE Mr.GEORGE PARACKEN, JUDICIAL MEMBER

N.Dasan,
S/o.Nallathampi,
Ex-Casual Labourer,
Southern Railway, Trivandrum Division.
Residing at Ooranavilayil Veedu,
Kannancode, Marthandom,
Kanyakumari District.

...Applicant

(By Advocate Mr.T.C.Govindaswamy)

Versus

1. Union of India represented by the General Manager,
Southern Railway, Headquarters Office,
Park Town P.O., Chennai – 3.
2. The Divisional Railway Manager,
Southern Railway, Divisional Office,
Trivandrum.
3. The Senior Divisional Personnel Officer,
Southern Railway, Trivandrum Division,
Trivandrum.
4. The Chief Medical Director,
Railway Hospital, Perambur.

...Respondents

(By Advocate Mr.Thomas Mathew Nellimootttil)

This application having been heard on 30th March 2009 the Tribunal
on the same day delivered the following :-

ORDER

HON'BLE Mr.GEORGE PARACKEN, JUDICIAL MEMBER

The applicant is a retrenched casual labourer of Southern Railway,
Trivandrum. He worked under the Permanent Way Inspector,
Construction, Southern Railway, Kottar, Nagercoil from 16.10.1978 to
1.8.1981 and thereafter under the Permanent Way Inspector, Alwaye from

9.3.1989 to 29.4.1989 as revealed from Annexure A-1 casual labour card.

Taking his aforesaid service into account, he was offered an appointment as Group 'D' Temporary Gangman with probation of one year vide Annexure A-2 letter dated 1.12.1998. One of the conditions of the said appointment was that he should undergo medical examination and that he would be governed by provisions of Indian Railway Code and other extant orders as amended/issued from time to time. He was also directed to remit Rs.16/- towards medical examination fee. He had undergone the medical examination on 16.12.1998 at Railway Hospital, Pettah and thereafter he was referred to Railway Hospital, Palghat on 18.12.1998 for further examination. It was reported that he was suffering from defective vision due to cataract and, therefore, the appointment was accordingly deferred. He immediately underwent an eye operation at the Bajan Singh Eye Hospital at Nagercoil on 24.12.1998. According to their report his visual capacity in both eyes is 6/6 with glasses. Thereafter, he approached the respondents with Annexure A-4 representation dated 4.3.1999 to reconsider his case stating that defects in his vision has since been cured and he has become fit to be appointed as temporary Gangman. Since there was no response to his aforesaid representation, he took up the matter through Shri.N.Dennis, the then Member of Parliament of his constituency. Thereafter, the Senior Divisional Personnel Officer, Trivandrum, vide Annexure A-5 letter dated 16.4.1999, advised him to appeal against the result of previous medical examination before the Chief Medical Officer, Railway Hospital, Perambur, Chennai through the Medical Superintendent, Trivandrum. Accordingly, he did it on 22.4.1999 and vide Annexure A-7 letter dated 27.4.1999 the Medical Superintendent, Trivandrum informed the Medical Officer, Railway Hospital, Perambur that



the applicant had reported for medical examination on 16.12.1998 and at that time he had already been operated upon for cataract in the right eye with IOL in situ. His vision at that time was R.E.6/9, L.E.6/60. He has also forwarded his application for proper action in the matter. On the basis of the said letter, the Senior DMO/SG/ADMN for MD/RH/PER, vide Annexure A-8 letter dated 10.8.1999, directed the applicant to report to his office on any working 'Wednesday' with proper requisition and cash receipt for second medical examination. Accordingly, the applicant was again medically examined but he was found unfit in 'B One' category and the said result was intimated to the applicant as well as to Medical Superintendent, Trivandrum vide Annexure A-10 letter dated 24.9.1999. On receipt of the aforesaid letter, the applicant submitted Annexure A-11 representation dated 20.6.2000 to issue necessary orders to appoint him as Gangman or as any other Group 'D' post. Since there was no response from the respondents, he sent Annexure A-12 reminder to consider him under medical category 'C One' which is sufficient for engagement in Group 'D' posts like Safaiwala, Drainage Khalasis etc. Again, there was no response from the respondents and he sent the Annexure A-13 representation dated 14.7.2007. Thereafter, he has filed this O.A seeking the following reliefs :-

1. Declare that non-feasance on the part of the respondents to consider and absorb the applicant as a Group 'D' employee in preference to his juniors in the list of retrenched casual labourers is arbitrary, discriminatory and unconstitutional
2. Direct the respondents to consider and absorb the applicant against one of the existing vacancies of Trackman or any other Group 'D' post for which medical classification 'Cee One' and below is required and direct further to grant the consequential benefits thereof with effect from the date of absorption of his juniors.

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2. The respondents in their reply has stated that there is no merit in the applicant's case and requested to dismiss the same. In para 7 of their reply it has been stated as under :-

"7. The rules on the subject stipulate that such of the casual labourers who have rendered a minimum of 6 years service and are found on medical examination unfit for a particular category for which they were sent for medical examination, only can be considered for an alternative category requiring a lower medical classification. The number of days of service at the credit of the applicant as per the merged seniority list of retrenched casual labourers finalised and published in compliance of this Hon'ble Tribunal in O.A.1706/1994 is 1071 $\frac{1}{2}$ days. As this is less than 6 years, he is not entitled to be considered for appointment in an alternative category requiring lower medical classification."

3. I have heard the counsel for the applicant as well as the respondents. On the last date of hearing, the respondents were directed to produce the relevant rules on the basis of which their averments in para 7 supra has been made. However, the same has not been forthcoming. However, it is seen from the various representations of the applicant that he was prepared to accept any Group 'D' posts for which the medical category of 'Cee One' is sufficient. The respondents have been keeping dead silence over his various representations. It is not a sound administrative practice to just ignore the representations of the employees, particularly, when his request is for appointment. It is a right of every employee that his representations are considered and suitable replies are received. In their reply also, the respondents have not denied anywhere that the applicant was not entitled for consideration for appointment as a Group 'D' employee against any post for which the medical category required is only 'Cee One'. The only objection raised is that he had not completed 6 years of service as a casual labourer for claiming alternative category requiring a lower medical classification.

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4. This Tribunal had occasions to consider a similar case in O.A.43/91 – V.V.Sidhardhan Vs. Union of India and others – reported as [(1992) 20 ATC 328]. The operative part of the said order is as under :-

“10. In the instant case there is no material to show that the applicant was at any time after finding him as medically unfit in B-1 class was notified that he should be available for further medical check up for satisfying as to whether he is medically fit for continuing as casual labour and he failed to undergo such a medical check up.

11. In Annexure A-6 the applicant's name is at Sl.No.119. Many of the juniors of the applicant are allowed to continue to work without any break from 25.4.1989. Hence there is no substance in the contention of the respondents that the service of the applicant was terminated for want of work and due to expiry of his term of appointment. Similarly, Annexure A-4 also provides that casual mazdoors who are found medically unfit in B-1 class are engaged as soon as they are found medically fit in other categories. One Shri.K.K.Kunjan, who was found medically unfit for B-1 category but medically fit in C-2 category was empanelled for appointment in Group 'D' category as Gangman in the scale of Rs.775-1025. There is no justification for denying the same benefits to the applicant. No reason is given as to why the applicant was also not considered along with persons like Shri.Kunjan for filling up of the vacancies that arose after 30.6.1989. Under these circumstances, we are of the view that the applicant's case of discriminatory treatment can be sustained and he is entitled to the reliefs.

12. Accordingly, we have considered the matter in details and allow the application to the extent of directing the respondents to re-engage the applicant as casual mazdoor with consequential benefits, if any, legally due to the applicant under the rules. We make it clear that the respondents are free to subject the applicant for medical examination in the categories to which the applicant will be allowed to work in accordance with law.

13. We further direct that the applicant's case for regularisation in the category to which he is medically fit should also be considered by the respondents without any delay.”

5. In Union of India Vs. Sanjay Kumar Jain [2004 SCC (L&S) 869] the Apex Court has held as under :-



"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 circumstances. They are :

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

6. Again in Amita Vs. Union of India and another [2006 SCC (L&S) 1507] the Apex Court has held as under :-

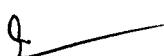
"9. From the aforesaid decision of this Court, it would also be clear that the only restriction which can be spelt out from the ratio of that decision was whether the post in respect whereof the petitioner sought consideration was whether the post is liable to be considered as totally unsuitable for visually handicapped person having regard to the nature of duties attached to the office/post. (Emphasis supplied)

10. From the aforesaid observations of this Court, we are confident that the visually impaired candidate would be entitled to sit and write the examination for selection for the post of Probationary Officer in a Bank but only restriction that would be standing in the way of the writ petitioner for selection is that the nature of duties attached to the office/post would be unsuitable for the visually impaired candidate. Accordingly, we are of the view that the order passed by the authorities rejecting the application of the writ petitioner on the ground shown in the order was erroneous, illegal and invalid in law and therefore cannot be sustained. In any view of the matter, so far as prayer for permitting the writ petitioner to sit and write the examination for the year in question of which rejection order was passed, in our view, the Writ Petition had rendered infructuous as it is now an admitted position that the examination for selection in the post of Probationary Officer in the Bank of the year in question was held, result was subsequently published and the vacancies were duly filled in by making appointments on the basis of such selection of

candidates. In view of the other reliefs prayed by the writ petitioner in the amended Writ Petition, the question now needs to be decided is whether the writ petitioner being a visually impaired lady would be allowed to sit and write the forthcoming examination for the post of Probationary Officer and can be appointed in such post, in view of nature of duties attached to a Probationary Officer. As found herein earlier, it cannot be doubted that a visually impaired candidate is entitled to sit and write the Probationary Officer examination along with other general candidates where any post is not earmarked for handicapped persons, as a general candidate.

11. Taking our findings, as made herein earlier to the extent that the writ petitioner was entitled to sit and write the examination for selection of Probationary Officer in the Bank, let us now proceed to consider whether the writ petitioner would be entitled for appointment in the post of Probationary Officer of the Bank in question, if successful in the written examination in view of the nature of the job to be performed as Probationary Officer. Before we deal with this aspect of the matter, we may take into consideration yet another aspect of the matter, namely, whether denial of permission to the writ petitioner to sit and write the examination for the post of Probationary Officer in the Bank offends Articles 14 and 16 of the Constitution of India. Article 14 of the Constitution of India guarantees to every citizen of India the right to equality before the law or the equal protection of law. The first expression "equality before the law" which is taken from the English common law, is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favour of any individual. It also means that amongst the equals the law should be equal and should be equally administered and that likes should be treated alike. Thus, what forbids is discrimination between persons who are substantially in similar circumstances or conditions. It does not forbid different treatment of unequal. Article 14 of the Constitution of India is both negative and positive right. Negative in the sense that no one can be discriminated against anybody and everyone should be treated as equals. The latter is the core and essence of right to equality and state has obligation to take necessary steps so that every individual is given equal respect and concern which he is entitled as a human being. Therefore, Art.14 contemplates reasonableness in the state action, the absence of which would entail the violation of Art.14 of the Constitution.

12. In our view, and in view of the discussions made herein earlier, in the facts and circumstance of this case, Art.14 was infringed for denial of permission to the petitioner to sit and write the examination for selection of Probationary Officers. As noted herein earlier, writ petitioner was not allowed to sit for the competitive examination for the post of the Bank Probationary Officer on the ground that she was visually impaired candidate although the advertisement in the



newspaper did not disclose that a visually impaired candidate cannot be allowed to sit and write the examination as the nature and duty of the job were not suitable for the visually impaired candidate. It is not in dispute that the writ petitioner had qualified for the post of Bank Probationary Officer as per the advertisement. Statement has been made in the writ petition by the writ petitioner to the effect that the writ petitioner like other visually impaired persons can perfectly perform the job of a Probationary Officer. She also applied for the same post to the B.S.R.B. and received her admit card for the same. Thus, there is discrimination by the respondent No.2 between the writ petitioner and persons who are substantially in similar circumstances or conditions. Here the writ petitioner was not allowed to sit for the entrance examination and hence was discriminated against the others who qualified for the same entrance examination. Therefore, the rejection of the application by the respondents besides the ground already stated hereinearlier, was not on reasonable grounds and was arbitrary and violative of Art. 14 which is a fundamental right of every citizen to be treated equally. In this connection, it is stated by the writ petitioner that a visually impaired lady Ms.Nafisa is now functioning as a Probationary Officer in one of the Central Bank of India situated at Bombay. Under Art.16 of the Constitution the general rule laid down is that there should be equal opportunity for citizens in matters relating to "employment" or "appointment to any office" under the State. The expression "matter relating to employment or appointment" includes all matters in relation to employment both prior and subsequent to the employments which are incidental to the employment and form part of the terms and conditions of such employment. Therefore, under Art.16 of the Constitution what is guaranteed is the equal opportunity to all persons. This Clause accordingly does not prevent the state from laying down the requisite qualifications recruitment for government service, and it is open to the authority to lay down such other conditions of appointment as would be conducive to the maintenance of proper discipline among government servants. Like other employers, government is also entitled to pick and choose from amongst a large number of candidates offering themselves for employment. But this can only be done only on one condition that all applicants must be given an equal opportunity along with others who qualify for the same post. The selection test must not be arbitrary and technical qualifications and standards should be prescribed where necessary. In this case, in our view, there is violation of the right of the writ petitioner under Art. 16(1) which provides for general rule, that there should be equal opportunity for citizens in matters relating to "employment" or "appointment to any office" under the State, matters incidental to employment both prior and subsequent to the employments which form part of the terms and conditions of such employment. In this case, the writ petitioner was in the first instance denied equal opportunity as given to other applicants from appearing in the entrance examination on the ground of

disability which was not mentioned as a condition in the advertisement. That apart, the writ petitioner, although a visually impaired lady had not asked for any special favour for the post of Probationary Officer for selection in the post of Probationary Officer. The writ petitioner without asking for any favour had only applied for writing the examination for selection not as a reserved handicapped candidate but along with general candidates who were allowed by the Board to sit and write the examination. Since the writ petitioner was similarly situated with other general candidates, and the writ petitioner had not asked for any advantage for being a visually impaired candidate, we failed to understand why she was not permitted to sit and write the examination for the post of Probationary Officer in the Bank."

7. In a recent judgment of the Apex Court decided on 19.11.2008 in **Ritesh Vs. Dakshin Haryana Bijli Vitran Nigam.Ltd. & Ors** it was held as under :-

" Appellant was appointed in the post of Junior Engineer (Electrical) on 3.8.2004. One of the clauses contained in the 'offer of appointment' reads as under :-

7. This offer is being issued and you are allowed to join the services subject to submitting the required Medical certificates from the concerned CMO in view of Haryana Government letter No.16/34/2003-04 Power dated 29.7.2004. In case you are medically unfit your services are liable to be terminated without any notice.

Admittedly, the appellant was medically examined in September, 2004. Whereas in other respects he was found medically fit, it was however stated in the medical report :

For defective color vision as per Ishihara's color vision book but can recognize three primary colors separately.

A show cause notice was issued to the appellant as to why his services shall not be terminated on and from 10.8.2005.

Upon consideration of the cause shown by the appellant and furthermore on the basis of an opinion of the Medical Board which was constituted for the said purpose, the services of the appellant were terminated on 1.8.2006.



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The writ petition preferred by the appellant before the High Court has been dismissed by reason of impugned order.

On 16.4.2008, this Court has issued a limited notice as to whether the appellant can be accommodated in any other department in terms of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

Mr. Manjit Singh, learned counsel appearing on behalf of the respondents has drawn our attention to the fact that according to the medical report, appellant was a color blind from his birth and, thus, he would not have been able to perform his duties as Junior Engineer.

Having regard to the fact that the appellant had been in service for about two years without interruption, we in exercise of our jurisdiction under Article 142 of the Constitution of India direct that the appellant may be accommodated in any other wing of the respondent – corporation on the post which would be commensurate with his qualification. His salary shall, however, remain protected. We make it clear that the question as to whether in a case of this nature, the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, shall apply or not has not been gone into by us. With the aforesaid directions and observations, the appeal is allowed."

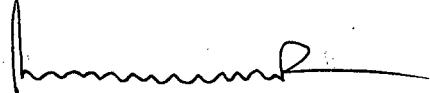
8. In the aforesaid facts and legal position it is quite clear that the respondents ought to have considered the applicant to any Group 'D' posts for which 'B 1' medical classification is not necessary. It is not the case of the respondents that they do not have any posts for which medical classification 'C 1' is only necessary. The applicant being a casual labourer admittedly having 1071 ½ days of service at his credit cannot be just ignored in the matter of regularisation. It is seen that the respondents have not considered his various requests for subjecting him for fresh medical examination and to appoint him against a post for which lower medical classification is sufficient. I, therefore, direct that the respondents shall subject the applicant for re-medical examination within a period of one month from the date of receipt of a copy of this order and to re-assess his



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medical fitness and he shall be offered Group 'D' post for which the lower medical classification in which he has been placed is sufficient. If he is so appointed, he shall also be given the notional seniority vis-a-vis his junior who has been appointed to the same category. With the aforesaid directions, the O.A is allowed. There shall be no order as to costs.

(Dated this the 30th day of March 2009)



GEORGE PARACKEN
JUDICIAL MEMBER

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