

**CENTRAL ADMINISTRATIVE TRIBUNAL**  
**GUWAHATI BENCH**  
**GUWAHATI-05**

(DESTRUCTION OF RECORD RULES, 1990)

**INDEX**

O.A/T.A No. 63/2007

R.A/C.P No.....

E.P/M.A No. 56/2007 (O.A 68/07)

1. Orders Sheet..... O.A Pg. 1 ..... to 4 .....  
M.P. 56/2007 overn Sheet — Pg. 1 — to 2 68/07 13.12.07
2. Judgment/Order dtd. 13/12/2007 Pg. 1 ..... to 4 ..... A.D. .....
3. Judgment & Order dtd..... Received from H.C/Supreme Court
4. O.A. .... 63/2007 ..... Pg. 1 ..... to 5! .....
5. E.P/M.P. .... 56/2007 ..... Pg. 1 ..... to 2 .....
6. ~~R.A/C.P.~~ ..... Pg. ..... to .....
7. W.S. .... Pg. 1 ..... to 7 .....
8. Rejoinder..... Pg. 1 ..... to 13 .....
9. Reply..... Pg. ..... to .....
10. Any other Papers..... Pg. ..... to .....
11. Memo of Appearance.....
12. Additional Affidavit..... Filed by the Applicant. Page 1 to 22 .....
13. Written Arguments.....
14. Amendment Reply by Respondents.....
15. Amendment Reply filed by the Applicant.....
16. Counter Reply.....

SECTION OFFICER (Judl.)

*Kalita*  
25/09/2017

5  
FORM NO. 4  
(See Rule 42)

CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH

ORDER SHEET

63 of 07

1. Original Application No.....
2. Misc. Petition No.....
3. Contempt Petition No.....
4. Review Application No.....

Applicant(s) .. P.K.Acharjee .....

Respondent(s) .....

Advocate for the Applicant(s) .. M.S.M.Pathak.. Mr.B.Pathak,  
Mr.H.K.Gogoi

Advocate for the Respondent(s) .. Railway Counsel ..

Notes of the Registry	Date	Order of the Tribunal
-----------------------	------	-----------------------

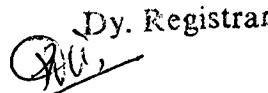
The application is in form  
is filed C.P. for Rs. 50/-  
deposited with P.C/BD  
No. 346651551  
Dated 10.3.07

16.3.07

The issue is involved in this matter in  
O.A.No.172 of 1998 vide order dated  
27.4.2001 this Court directed the  
respondents to consider for promotion of  
the applicant. The operative portion of  
the order is reproduced below:-

"In the circumstances set  
out above, we are of the opinion  
that the applicant's case for  
promotion requires to be  
considered by the authority on  
the basis of the ACRs sans the  
ACRs for the years 1993-94 and  
1995-96. We think it proper to  
issue a direction to the  
respondents to give an  
opportunity to the applicant to  
submit his reply against the  
adverse remarks made in the  
aforesaid two ACRs in view of  
the fact that the matter  
pertains to promotion of the  
year 1998 and also in view of  
our observation made relating

Petitions' copies for  
issue notices are received  
without envelops.

Dy. Registrar  


contd/-

16.3.07

to the nature of the performance appraisal. The respondents are accordingly directed to hold a review DPC towards selection against 70% vacancies drawn on 3.6.1998 on the basis of the available records mentioned therein. For the sake of fairness we feel that the respondents should also take steps to cause fresh medical examination of the applicant. The respondents are further directed to complete the above exercise as expeditiously as possible, preferably within a period of three months from the date of receipt of the order by holding a review DPC as well as refresh medical examination of the applicant."

Subsequently the matter has been filed by the respondents in the Gauhati High Court. The order of the High Court dated 20.6.2003 has been complied with and the applicant was called for a medical test on 16.1.2006. He was found unfit. In the High Court the respondents also did not press the application. Now, the O.A. has been filed by the applicant challenging the Medical certificate contending that the applicant is eligible for promotion.

We have heard Mr. B. Pathak, learned counsel for the applicant and Dr. J.L. Sarkar learned counsel for the respondents.

Considering the facts and circumstances, we are of the view that notice may be issued to the respondents.

Issue notice on the respondents.  
Post the matter on 30.4.07.

Member

Vice-Chairman

lm

27.4.07.

① Service report  
R.Waites.

30.4.2007

Further time is sought on behalf of Railways to file reply statement. Let it be done within three weeks. Post on 22.5.2007.

Notice duly served  
on R-4,5.

8/5/07.

Vice-Chairman

bb

No W.Ls have been  
filed.

27/5/07.

Recd.  
Recd. No 1 & 5

1/6/07

Dr. M. C. Sharma  
(Dr. M. C. Sharma)  
Adv. Admitted  
Plg. Adm'd

22.5.07. This application has been filed against the impugned order dated 16.1.2006(Annexure B) declaring the applicant as unfit for promotion from Non-Gazetted to Gazetted post, Group B. The issue is whether the promotion can be denied to such applicant on the basis of medical fitness.

I have heard Mr. B. Pathak, learned counsel for the applicant and Dr. M. C. Sharma learned counsel for the Respondents. When the matter came up for hearing the learned counsel for the respondents has submitted that he has no objection for admitting the O.A.

Application is admitted. Issue notice on the respondents. Post the matter on 5.7.07.

W.Ls not yet filed.

4.7.07

5.7.2007

Vice-Chairman

Lm:

W.Ls not filed.

26.7.07.

Three weeks time is allowed to the Respondents to file reply statement.

Post on 27.7.2007.

Vice-Chairman

/bb/

O.A. 63/07

27.7.07..

Counsel for the respondents is permitted to file written statement to-day itself. Post the matter before the next available Division Bench.

30.7.07

W.P. filed by  
the Respondents.  
page 1 to 7. Copy  
not served.

Q.W.

Lm

Vice-Chairman

10.12.07

Heard Mr B.Pathak, learned counsel appearing for the Applicant and Dr M.C.Sarma, learned counsel for the Respondents/Railways in part.

Call this matter on 13.12.07.

1.10.07

Rejoinder filed by  
the Applicant. Copy  
served. page 1 to 12.

Q.W.

pg

GR  
(G. Ray)  
Member(A)

MR  
(M. R. Mohanty)  
Vice-Chairman

13.12.2007

Heard Mr.B.Pathak, learned counsel appearing for the Applicant and Dr.M.C.Sharma, learned counsel appearing for the Railways-Respondents.

For the reasons recorded separately, this O.A. stands disposed of. No costs.

12.12.07

Additional affidavit  
by the Applicant.  
undertaking given for  
service copy.

GR

/bb/

GR  
(Gautam Ray)  
Member (A)

MR  
(M.R.Mohanty)  
Vice-Chairman

17.12.07

C. Copy has been  
collected by the applicant  
as well as by the Rly.  
counsel by to-day  
and copy of the  
judgment has been  
sent to the office  
for issuing the same  
to the respondents  
by P.O.T.

18.3.08 vide D.Nos.  
1849 & 1850 DD  
19.12.07/08/06

(3x1)  
v  
CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH

O.A. No.63 of 2007

DATE OF DECISION: 13.12.2007

Sri Pradip Kumar Acharjee

.....  
Mr.B.Pathak

.....  
Applicant/s

.....  
Advocate for the  
Applicant/s.

U.O.I. & Ors

- Versus -

.....  
Dr.M.C.Sharma, Railway counsel

.....  
Respondent/s

.....  
Advocate for the  
Respondents

CORAM

THE HON'BLE MR. M.R. MOHANTY, VICE CHAIRMAN

THE HON'BLE MR GAUTAM RAY, ADMINISTRATIVE MEMBER

1. Whether Reporters of local newspapers may be allowed to see the Judgment? Yes/No
2. Whether to be referred to the Reporter or not? Yes/No
3. Whether their Lordships wish to see the fair copy of the Judgment? Yes/No

Judgment delivered by

Vice-Chairman/Member (A)

CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH

Original Application No. 63 of 2007.

Date of Order: This, the 13th Day of December, 2007

THE HON'BLE SHRI MANORANJAN MOHANTY, VICE CHAIRMAN

THE HON'BLE SHRI GAUTAM RAY, ADMINISTRATIVE MEMBER

Sri Pradip Kumar Acharjee  
S/O Sri Manindra Chandra Acharjee  
Presently Serving as the Senior Section  
Engineer (Electrical), under the Senior  
Divisional Electrical Engineer  
Guwahati.

..... Applicant

By Advocates Dr. M. Pathak, Mr. B. Pathak & H. K. Gogoi.

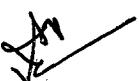
- Versus -

1. The Union of India  
Through the Secretary  
Ministry of Railway  
Government of India, New Delhi-1.
2. The Chairman, Railway Board  
Rail Bhawan, New Delhi.
3. The General Manager  
N.F.Railway, Maligaon  
Guwahati - 781 011.
4. The General Manager (Personnel)  
N.F.Railway, Maligaon  
Guwahati - 781 011.
5. The Chief Electrical Engineer  
N.F.Railway, Maligaon  
Guwahati - 781 011.

..... Respondents.

Dr.M.C.Sharma, Railway Counsel.

\*\*\*\*\*



ORDER (ORAL)**GAUTAM RAY, MEMBER (A):**

The present Original Application under Section 19 of the Administrative Tribunals Act, 1985 has been filed by the Applicant seeking the following reliefs:-

- 1. to set aside and quash the impugned Certificate of Fitness of Employees for Promotion From Non-Gazetted to Gazzetted Post (Group-B) vide No.H/37/5 dated 16.1.2006 (Annexure B) and declare the action of the respondents in issuing the said impugned certificate/order as arbitrary and illegal which can not sustain in law;
- 2. to set aside and quash the impugned Railway Board notification vide no. E(GP)80/2/8 dated 31.10.1991 (Annexure D) and declare the same to be issued without any authority or power and as being ultra vires of the constitutional mandate and as being violative of Article 14 of the Constitution of India;
- 3. To direct the respondents to consider the case of the applicant for promotion in light of and with reference to the order of this Hon'ble Tribunal dated 27.4.2001 in O.A. 172/1998 (Annexure-A);
- 4. Or may pass order for any other relief to which the applicant is found entitled to under the facts and circumstances of the case."

2. The Respondents have contested the Original Application by filing a counter reply. In the counter reply, inter alia, the Respondents have quoted the codal provisions of Rules 530 and 532(3) of the Indian Railway Medical Manual, Volume I – 2000 Edition which are as follows:-

"530. CLASSIFICATION OF GAZETTED POSTS FOR THE PURPOSE:- For the purpose of examination of visual acuity of Railway employees promoted from non-gazetted to gazetted posts, the gazetted posts should be divided into two categories as follows:-



- (a) All posts of Mechanical, Electrical, Civil and S&T Engineering and Traffic (Transportation and Commercial) Department.
- (b) All posts of other departments which are not connected with train working or use of trolley on open line.

532(3) All employees promoted to gazetted cadre from non-gazetted cadre will be examined for visual acuity and colour vision as per standards mentioned above irrespective of their medical category in the non-gazetted cadre."

3. We have heard Mr.B.Pathak, learned counsel appearing for the Applicant and Dr.M.C.Sharma, learned counsel appearing for the Railways-Respondents.

4. During the course of argument, the learned counsel for the Applicant, drew our attention to the additional affidavit filed by the Applicant along with which he has enclosed a copy of the representation dated 11.12.2007 (Annexure-4) addressed to the 3rd Respondent herein, a copy of which has been served on the learned counsel for the Respondents, praying for consideration of promotion from Non-Gazetted Group-C post to Gazetted Group-B post based on relaxation in medical standards and in terms of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. In this view of the matter, we are of the considered view that ends of justice will be met if we direct the 3rd Respondent herein to consider and dispose of the representation of the Applicant forthwith. Accordingly, we direct the third Respondent to consider the representation of the Applicant dated 11.12.2007 (Annexure-4) in accordance with Rules and issue a speaking order and communicate the same to the Applicant within a period of two months from the date of receipt of this order.



5. With the above observations and directions, this Original Application is disposed of with no order as to costs.

  
(GAUTAM RAY)  
MEMBER (A)

/bb/

  
(MANORANJAN MOHANTY)  
VICE-CHAIRMAN  
13/12/07

12 MAR 2007

गुवाहाटी बैचली  
Guwahati Bench

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH : AT GUWAHATI

O.A. No. 63 /2007

Sri Pradip Kumar Acharjee ..... Applicant  
-versus-  
Union of India & others ..... Respondents

**SYNOPSIS OF THE CASE:**

This application has been made against impugned rejection of the case of the applicant as unfit for promotion vide Certificate of Fitness of Employees for Promotion From Non-Gazetted to Gazetted Post (Group-B) No. H/37/5 dated 16.1.2006 (ANNEXURE B) and also the Railway Board notification vide no. E(GP)80/2/8 dated 31.10.1991 (ANNEXURE D) which has been issued without any authority or power and the vires of the said notification has been challenged in this application as being violative of Article 14 of the Constitution of India.

The main grievance of the applicant is that his case for promotion to Group B post has been rejected by the respondents on the ground of his being medically unfit. The impugned action of the respondents for rejecting the case of the applicant as unfit for promotion is violative of the express provisions as contained in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and corresponding provisions in the Indian Railway Establishment Manual. Whereas, the applicant has all along rendered duties at par with all others without any deficiency or dereliction, the respondents have all along clearly discriminated against him on the ground of his disability and such action of the respondents is therefore liable to be set aside and quashed.

Filed by

Bibhash Pathak  
Advocate  
12/3/2007

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH : AT GUWAHATI

O.A. No. 63 /2007

Sri Pradip Kumar Acharjee .....Applicant  
-versus-  
Union of India & others .....Respondents

**INDEX**

<u>Sl.</u>	<u>Annexure</u>	<u>Particulars</u>	<u>Page</u>
1.	—	Application	1-19
2.	—	Verification	20
3.	Annexure A	Order dated 27.4.2001 in OA. 172/1998	21-30
4.	Annexure B	Certificate of Fitness vide No. H/37/5 dated 16.1.2006	31
5.	Annexure C	Judgment and order dated 7.11.2006 in WPC No. 7249/2001	32-49
6.	Annexure D	Railway Board Letter No. E(GP)80/2/8 dated 31.10.1991	50
7.	Annexure E	Letter dated 25.5.98	51

**Filed by:**

*Bibhash Pathak*  
(Bibhash Pathak)  
Advocate  
Date: 12/3/2007

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH : AT GUWAHATI

(An Application under Section 19 of the  
Central Administrative Tribunal Act, 1985)

ORIGINAL APPLICATION NO. 63. OF 2007

BETWEEN

Sri Pradip Kumar Acharjee  
Son of Sri Manindra Chandra Acharjee  
Presently Serving as the Senior Section  
Engineer (Electrical), under the Senior  
Divisional Electrical Engineer, Guwahati.

... Applicant

-versus-

1. Union of India,  
Through the Secretary,  
Ministry of Railway,  
Government of India, New Delhi-1
2. The Chairman, Railway Board,  
Rail Bhawan, New Delhi
3. The General Manager,  
NF Railway, Maligaon  
Guwahati – 781011
4. The General Manager (Personnel)  
NF Railway, Maligaon  
Guwahati – 781011
5. The Chief Electrical Engineer,  
NF Railway, Maligaon  
Guwahati – 781011

... Respondents

Sri Pradip Kr. Acharjee

DETAILS OF THE APPLICATION**1. PARTICULARS OF THE ORDER AGAINST WHICH THE APPLICATION IS MADE:**

- (i) This application has been made against impugned rejection of the case of the applicant as unfit for promotion vide Certificate of Fitness of Employees for Promotion From Non-Gazetted to Gazetted Post (Group-B) No. H/37/5 dated 16.1.2006 (ANNEXURE B).
- (ii) The Railway Board notification vide no. E(GP)80/2/8 dated 31.10.1991 (ANNEXURE D) which has been issued without any authority or power and the vires of the said notification has been challenged in this application as being violative of Article 14 of the Constitution of India.
- (iii) The impugned action of the respondents for rejecting the case of the applicant as unfit for promotion is violative of the express provisions as contained in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and corresponding provisions in the Indian Railway Establishment Manual.

**2. JURISDICTION OF THE TRIBUNAL:**

The applicant declares that the subject matter of the instant application is within the jurisdiction of this Hon'ble Tribunal.

**3. LIMITATION:**

The applicant further declares that the subject matter of the application is within the period of limitation prescribed under the Section 21 of the Central Administrative Tribunal Act, 1985.

*Sri Pradip kr Acharyee*

#### 4. FACTS OF THE CASE:

- 4.1 That the applicant is a citizen of India and a permanent resident of Maligaon, Guwahati, in the District of Kamrup, Assam, and as such he is eligible to all the rights and privileges guaranteed under the Constitution of India and all other laws/ schemes framed thereunder.
- 4.2 The applicant is a B.E(Electrical) Degree holder (1984) from the Tripura Engineering College. Having been duly selected and appointed, the applicant joined the services in N.F. Railway from 12.7.1988 as Electrical Foreman in the Scale of Rs.2000/- to Rs.3200/-. The applicant was initially posted at the Railway Workshop, Dibrugarh where he served till February, 1989. The applicant was thereafter posted at the Train Lighting Depot, Dibrugarh where he worked till February, 1993. Thereafter he was again transferred and posted at the Train Lighting Depot, Guwahati. Subsequently, in November 1993 the applicant was posted in the same capacity as Senior Technical Assistant in the Office of the Assistant Electrical Engineer, Maligaon. On 7.8.96, the applicant was promoted to the post of Senior Electrical Foreman [now designated as Senior Section Engineer (Electrical)]. Since then, the applicant has been rendering his service in the said capacity with full diligence and sincerity.
- 4.3 That the applicant was allowed to cross the Efficiency Bar at the stage of Rs. 2300/- in the scale of Rs. 2000/- to Rs. 3200/- with effect from 1.7.1994.

*Sri Pradip Kr Acharyee*

4.4 That the service career of the applicant has been blameless all along. However, the applicant was once show caused in the year 1994 for unauthorized absence but the authorities were satisfied with the reply of the applicant showing medical grounds for his absence and the said proceedings were closed with a simple warning to the applicant to be more punctual in future. The said warning is not a penalty.

4.5 That in the year 1996 applicant received letter No. EL/CON/CR-606/221 dated 22.2.96 whereby certain adverse remarks appearing in the A.C.R for the year ending 31.3.1995 were belatedly communicated to him and the same was received by the applicant only on 29.4.96. On receipt of the said communication, the applicant immediately submitted a representation on 30.4.96 praying that he be furnished with the substance on which the remarks are based as required under Railway Board's Memorandum No. E(NG)1/90/CR/4 dated 17.1.91. The applicant was, however, not favoured with the materials as sought for by him in his representation dated 30.4.96. Instead, the respondents by letter No. EL/CON/CR-606/288 dated 12.6.96 informed him that his appeal against the adverse remark has been considered by the authority and rejected.

4.6 That the applicant was highly aggrieved by the manner in which his representation dated 30.4.96 was converted into an appeal by the respondents and disposed of without affording him a chance to actually file an appeal with specific grounds. However, the applicant was in the meantime promoted on 7.8.96 to the post of Senior Electrical Foreman [now designated as Senior Section Engineer (Electrical)], and he had bonafide reasons to believe that he had earned the

*Sri Pradip K. Acharyee*

promotion as per law and the adverse remarks in his A.C.R. have not been considered to be material against his consideration for the promotion nor would it be used for weighing his chances for future promotion to Group B post.

4.7 That thereafter, it was notified by the respondent authorities vide Letter No. E/254/13/Pt.-II(O) dated 20.2.98 that it has been decided to hold a selection for forming a panel of 12 (11-UR and 1-ST) persons for the post of Assistant Electrical Engineers in Group-B against 70% vacancies. It was also notified that the selection would be based on the candidates' performance both in the written test as well as viva-voice test and that the written test would consist of one paper of 150 marks for which the qualifying mark was 90/5. Marks were also allotted for oral test, out of which 25 marks were given for five years' ACR and 25 marks for personality etc. The communication also mentioned that an employee was required to get a minimum of 15 marks in the ACR for five years in order to be qualified as fit for promotion. The communication contained a main list of 40 (later extended to 42) employees in order of seniority. It also enclosed a standby list of 19 persons. The name of the applicant figured at Sl.No. 38 of the main list.

4.8 That the applicant and the other candidates appeared in the written test which was held on 25.4.98. On 4.5.98, the respondent authorities forwarded a list of 15 candidates who had qualified in the said written test for promotion to Assistant Electrical Engineer. The name of the applicant appeared in Sl.No.1 in the said list. By the said list dated 4.5.98, the selected candidates were also directed to obtain physical fitness certificates and to appear in Viva-voice test on 28.5.98. But in the meantime, the vacancy position was reviewed due

*Sri Radip K. Acharyal*

increase in age of superannuation from 58 to 60 and the vacancies came down to 10 from 12 and consequently 13 candidates were called for viva-voce test which was finally held on 3.6.98.

- 4.9 That the applicant got himself medically examined and also appeared in the viva-voce test on 3.6.98. He could correctly answer all the questions put to him and it was informed to him in the viva-voce that the selection would now depend upon the marks obtained in the A.C.R. for last 5 years.
- 4.10 That thereafter, the respondent authorities issued the Office Order No. 12/98 (Elect.) communicated vide Memo No. E/203/128/Pt-VIII(O) dated 24.6.98 thereby promoting 9 employees to the Rank of Assistant Electrical Engineer. The name of the applicant was excluded from the said order. Being highly aggrieved by the action of the respondents and said order dated 24.6.98, the applicant approached this Hon'ble Tribunal by filing an Original Application which was registered as O.A.No. 172/1998. By the said OA.172/1998, the applicant assailed the exercise of the respondents in not considering him for promotion as arbitrary and discriminatory. It was inter alia averred in the application that the promotion has been denied to the applicant on the ground that he failed to get minimum 15 marks from 5 years A.C.R. while the respondents acted on the A.C.R. for the year 1994-95 which was belatedly communicated without affording him a chance to represent against it. The applicant also claimed that by the said promotion order, his juniors were made to supersede him and he implicated such juniors as party to the case.

*Sri Radip K. Acharyee*

4.11 That the respondents submitted their written statements in the case and disputed the claim of the applicant. It was inter alia stated that:

- (i) Adverse entries contained in the ACR for the year ending 31.3.95 was duly communicated to the applicant.
- (ii) Non-communication of favorable entries did not nullify the adverse remarks.
- (iii) The promotion of the applicant as Senior Electrical Foreman (non-gazetted cadre) has no bearing with Group 'B' selection.
- (iv) The Selection committee recommended only the eligible persons for promotion and the applicant was found not eligible.
- (v) The applicant did not qualify in the medical test.

4.12 That the applicant filed a rejoinder to the said written statements and contended that the adverse remark in his ACR was belatedly communicated and he was not given any opportunity to represent/appeal against it. Evaluation of points from his ACR therefore is vitiated and not as per rules. The applicant also categorically stated that his medical examination report with respect to promotion to Group 'B' clearly stated that he is fit for promotion but his post should not be connected with train working or use of trolley. It was stated that his case is covered under Rules 529(I) and Rule 532 (3) of the Indian Railway Medical Manual, 1971 (Edition).

4.13 That this Learned Tribunal heard the entire case at length and also perused the records of medical examination and the A.C.Rs produced before it by the respondent authorities. Upon

*Sri Pradyo Kr Acharyee*

such hearing, this Hon'ble tribunal was pleased to pass the final order in the case on 27.4.2001. By the said order dated 27.4.2001, this Tribunal was pleased to declare the action of the respondents as being vitiated with illegality and directed the respondents to hold a review DPC against the vacancies drawn on 3.6.98 and to consider the case of the applicant for promotion on the basis of the ACRs sans the ACRs for the years 1993-94 and 1995-96. for the sake of fairness, it was also directed that the respondents should take steps to cause fresh medical examination of the applicant. The respondents were further directed to complete the above exercise as expeditiously as possible, preferably within a period of three months from the date of receipt of the order by holding a review DPC as well as fresh medical examination of the applicant.

**A copy of the order dated 27.4.2001 in OA. 172/1998 is enclosed herewith as Annexure – A.**

4.14 That the Railway authority respondents, being aggrieved by the order dated 27.4.2001 in OA. 172/98 approached the Hon'ble Gauhati High Court seeking judicial review order the order dated 27.4.2001. The said case was registered as WPC. 7249/2001. The grounds raised in the WPC.7249/2001 by the writ petitioner, *inter alia*, were:

- (i) The applicant was not promoted both on count of not getting minimum qualifying marks of 15 and for not having a clear medical certificate.
- (ii) The learned Tribunal acted beyond jurisdiction and erred in law in directing to consider the case of the applicant by holding review DPC on the basis of the ACRs sans the ACRs for the years 1993-94 and 1995-96.

*Sri Radip M Acharyal*

- (iii) That the non communication of the adverse remarks in the ACR for 1994-95 did not render the adverse remarks non est.
- (iv) That the applicant made no prayer to set aside and quash the order of promotion of any of the proforma respondents.
- (v) That there is no vacancy to accommodate the applicant without reverting any one of the 9 proforma respondents/ promotes.

4.15 That the Hon'ble Gauhati High Court issued notice in the WPC No. 7249/2001 vide its order dated 20.12.2001 and by the same order was also pleased to stay the operation of the order dated 27.4.2001 in OA. 172/98 passed by this Hon'ble Tribunal. No immediate development therefore took place in the case and the matter remained subjudiced.

4.16 That the applicant/respondent No.1 in WPC No. 7249/2001 appeared before the Gauhati High Court and filed his affidavit-in-opposition and contested the case all along.

4.17 That the applicant/respondent No.1 in WPC No. 7249/2001 also filed a petition for vacation of the stay order dated 20.12.2001 and by the order dated 4.4.2003 passed in M.C. 384/2003, the Hon'ble High Court was pleased to vacate the stay order.

4.18 That on 20.6.2003, the Hon'ble High Court was pleased to admit the WPC No. 7249/2001. In the order dated 20.6.2003, the Hon'ble High Court was pleased to direct the Railways to keep one post out of consideration for promotion as Assistant Electrical Engineer Group-B till disposal of the writ petition.

*Sri Pradyip K. Acharyee*

4.19 That the applicant had also approached this Hon'ble tribunal once again through O.A. No. 128/2003 against a notification dated 15.5.2003 issued to hold written examination for limited Departmental Competitive Examination for selection for the post of AEE/Group B. While disposing of the said OA No. 128/2003, this Hon'ble Tribunal by its order dated 20.6.2003 observed that the applicant may appear in the said Departmental Competitive Examination without prejudice to his claim raised though O.A. 172/98.

4.20 That the applicant had also once again approached the Hon'ble Gauhati High Court through M.C. 1782/2005 in WPC No. 7249/01 against the selection process initiated by the respondents through notification dated 9.5.2005 and the Hon'ble High Court was pleased to pass an order on 29.8.2005 thereby directing that the Railways shall make no appointment without the leave of this Court. It was also directed to the Railway authorities to comply with the direction given by the learned Tribunal in O.A. No. 172/98 vide order dated 27.4.2001 and the order passed by the Hon'ble High Court on 20.6.2003.

4.21 That the Railways approached the Hon'ble High Court through M.C. No. 211/2006 thereby seeking modification/vacation in the order dated 29.8.2005 passed by the Hon'ble High Court in M.C. 1782/2005 in WPC No. 7249/01. Through that petition, the Railways contended that the order of the Hon'ble Tribunal in O.A. 172/98 and the order of the Hon'ble High Court dated 20.6.2003 has been complied with and the applicant was called for a medical test on 16.1.2006 which he failed to clear. Hence, the applicant cannot be considered for promotion as he failed

*Sri Radip K. Acharyee*

to clear the mandatory medical test which is required to be cleared for promotion to Group B. In view of that, the order dated 29.8.2005 is liable to be modified/vacated.

**A copy of the Certificate of Fitness of Employees for Promotion From Non-Gazetted to Gazetted Post (Group-B) vide No. H/37/5 dated 16.1.2006 is annexed hereto as Annexure B.**

- 4.22 That there after the applicant filed a contempt case in the Hon'ble Gauhati High Court vide Cont. Case No. 241/2006 alleging violation of the direction given by the Hon'ble High Court. The said Contempt case is pending disposal before the Hon'ble High Court. But in view of the writ petition itself having been finally disposed of and closed, the said contempt case has now become infructuous.
  
- 4.23 That the WPC No. 7249/2001 came up for hearing before the Hon'ble Gauhati High Court on 3.11.2006 and 7.11.2006. On 7.11.2006 the Railways filed another petition stating that the order of the Hon'ble Administrative tribunal has been complied with and in view of that the writ petition has become infructuous. The Hon'ble High Court heard both the parties in detail and passed the final judgment and order in the case on 7.11.2006. By the said judgment and order dated 7.11.2006, the Hon'ble High Court closed the writ petition has being infructuous. However, in para 31 of the said judgment and order dated 7.11.2006, liberty was granted to the applicant (respondent no.1) to approach appropriate forum for redressal of his grievance which read as under:

*Sri Pradip K. Acharyee*

" 31. In the backdrop of the above facts and circumstances, in our considered opinion, it is felt that if the respondent No.1 is at all aggrieved by any action taken by the writ petitioners in implementation of the impugned judgment and order in its letter and spirit and if the same has anyway prejudiced the interest of the respondent No.1, he has the liberty to approach any appropriate forum for redressal of his grievance....."

**A copy of the judgment and order dated 7.11.2006 passed in WPC No. 7249/2001 is annexed hereto as Annexure C.**

- 4.24 That in view of the above facts and circumstances, the applicant has preferred this application before this Hon'ble Tribunal challenging the legality and validity of the impugned report of medical; test dated 16.1.2006 based on which the case for promotion of the applicant to Group B post has been rejected by the respondents.
- 4.25 That the applicant humbly begs to state here that the case is not barred by res judicata as the learned High Court has not disposed of the writ petition on merit but the same has been closed as infructuous as the writ petitioner (Railways) did not want to pursue the writ proceedings. Hence, this Hon'ble Tribunal is the proper forum under the law to challenge the impugned action of the respondents in rejecting the claim of promotion of the applicant to Group B post.

*Sri Radhik Acharyee*

4.26 That the rejection for consideration for promotion of the applicant by the respondent authorities is based on the Railway Board Letter No. E(GP)80/2/8 dated 31.10.1991. By the said letter, the decision of the Board was conveyed that the Group "C" employees qualifying in the selections for promotion to Group 'B' posts but not passing the prescribed medical standard should not be promoted to Group "B" even on ad hoc basis. Decision was also taken that 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. According to the respondents, based on the said letter dated 31.10.1991, the applicant was called for medical test on 16.1.2006 which he failed and he was declared unfit for promotion. It is also pertinent to state here that the result of the said medical test on 16.1.2006 was not at all communicated to the applicant and the applicant could learn about the result of the said medical test at a much belated stage when the respondents filed the same before the Hon'ble High Court.

**A copy of the Railway Board Letter No. E(GP)80/2/8 dated 31.10.1991 is annexed hereto as Annexure D.**

4.27 That the applicant, though this instant application is challenging the constitutionality of the said Railway Board Letter No. E(GP)80/2/8 dated 31.10.1991. The classification sought to be made by the said letter between those who are medically fit and those who are not medically fit is an unreasonable classification violative of the provisions of Article 14, 16 and 21 of the Constitution of India.

*Sri Radip K. Acharyee*

4.28 That the applicant begs to state here that the nature of duties preformed by him in his present Group 'C' post is as strenuous, meticulous and deserving attention, concentration and efficiency as that any person in Group 'B' is required to perform. A comparative list of duties in Group B and Group C is presented hereunder -

Group B	Group C (duties preformed by the applicant)
Tender cases pertaining to power supply items including RSP and M&P items -- Revision of EAR of power items -- Monitoring of stock position of power supply items -- Leave of Group-D staff -- All works in connection with telephone etc. -- IN-charge of electrical control -- Preparation of technical specification, approved list of manufacturers for power items -- Misc. items like telephone bills, repairing of T& P items of CEE's office etc. -- Maintenance and repair contract of T&P items, machine items of HQ etc. -- Any other work assigned by CEE, Dy.CEE/PS & SEE/PS	Worked as incharge of work section of DEE/GHY's Office. His job included preparation of estimates, work schedule of tenders including design of electrical system and drawing-liasoning with field supervisor-prepared estimate, design, drawing and tender schedules of 33 KV sub-station at Gosala-Maligaon including supervision of construction work ---Worked as incharge of Pandu Power Station looking after about 3500 no. of quarters, 25 water pumps, 16 sewerage pumps-looking after contractual works, looking after electrical maintenance of Saraihat Bridge—looking after about 54 Nos. of HT Transformers --- Preparation of technical statements, MCDO/PCDO, liasoning with field supervisors, training lighting depot, air conditioning depot and power houses.

If the applicant, with his present medical condition is fit for duty in Group 'C' post, any criteria based on his present medical condition seeking to debar him from promotion to a job that would require the same sort of duties to be performed in a senior post is unreasonable and arbitrary and is liable to be set aside and quashed as being in clear violation of the mandate of Article 14 of the Constitution of India.

*Sri Pradyip Kr Acharyee*

4.29 That the applicant also begs to state here that he is entitled to the benefit under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The applicant comes under the definition of Section 2(u) of the Act and as per Section 47(2) of the Act, no promotion shall be denied to a person merely on the ground of his disability. It is also pertinent to state here that the Railway Board has itself made necessary amendments to the Indian Railway Establishment Manual in order to prevent discrimination merely on the ground of physical disability in view of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The impugned action of the respondents in rejecting to consider the promotion of the applicant on the ground of medical unfitness is therefore *prima facie* illegal and liable to be set aside and quashed.

4.30 That the respondents have also clearly contradicted themselves as much as in that in the year 1998 vide No.II/37/5(M/B) dated 25.5.98 the applicant was found fit for promotion to Group B service if the post is not connected with Train Working or use of Trolley.

**A copy of the letter dated 25.5.98 is annexed  
hereto as Annexure E.**

4.31 That because of the impugned discrimination done by the respondents, the service career of the applicant has received several set backs and as many as 15 persons who were much junior to him has been till date promoted to posts senior to him. Whereas, the applicant has all along rendered duties at par

*Sri Pradip Kr Acharye*

with all others without any deficiency or dereliction, the respondents have all along clearly discriminated against him on the ground of his disability and such action of the respondents is therefore liable to be set aside and quashed.

4.32 For that in any view of the facts and circumstances of the case and the provision of law the impugned action of the respondents in rejecting to consider the promotion of the applicant on the ground of medical unfitness is liable to be set aside and quashed.

#### **5. GROUNDS FOR RELIEF WITH LEGAL PROVISIONS:**

5.1 For that the impugned rejection of the case of the applicant as unfit for promotion vide Certificate of Fitness of Employees for Promotion From Non-Gazetted to Gazetted Post (Group-B) No. H/37/5 dated 16.1.2006 (ANNEXURE B) is illegal and arbitrary and is liable to be set aside and quashed as being violative of the provisions of Art.14 and 16 of the Constitution of India.

5.2 For that the classification sought to be made by the Railway Board Letter No. E(GP)80/2/8 dated 31.10.1991 (ANNEXURE D) between those who are medically fit and those who are not medically fit is ultra vires of the constitutional mandate and an unreasonable classification violative of the provisions of Article 14, 16 and 21 of the Constitution of India.

5.3 For that the impugned rejection to consider the case of the applicant for promotion is violative of the provisions under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The applicant comes under the definition of Section 2(u) of the Act and as per

*Sri Pradyip K. Acharyee*

Section 47(2) of the Act, no promotion shall be denied to a person merely on the ground of his disability.

- 5.4 For that the impugned rejection to consider the case of the applicant for promotion is violative of the provisions of the para 189-A, 213A, 1301, 1302, 1303, 1309, 1310 and 1311 of Indian Railway Establishment Manual.
- 5.5 For that if the impugned action of the respondents in not considering the promotion of the applicant is allowed to operate and the same is not set aside and quashed, that would amount to violation of the provisions of Article 14, 16 and 21 of the Constitution of India.
- 5.6 For that in any view of the matter and the provisions of law the impugned Annexure B and Annexure D are not tenable in law and the same are liable to be set aside and quashed.

#### **6. DETAILS OF REMEDIES EXHAUSTED:**

That the applicant declares that he has exhausted all the remedies available to him and there is no alternative and efficacious remedy available to him.

#### **7. MATTERS NOT PREVIOUSLY FILED OR PENDING IN ANY OTHER COURT:**

That the applicant further declares that he has previously filed the OA No. 172/1998 before this Hon'ble Tribunal which was disposed of vide judgment and order dated 27.4.2001. The said order was challenged by the respondents in the Gauhati High Court vide WPC No. 7249/2001 which is also disposed of vide

*Sri Radip K. Acharyee*

judgment and order dated 7.11.2006. Other than this, the applicant has not filed any application, writ petition or suit regarding the grievances in respect of which this application is made, before any court or any other Bench of the Tribunal or any other authority nor any such application or suit is pending before any of them.

#### 8. RELIEF SOUGHT FOR:

Under the facts and circumstances of the case, the applicant most respectfully prays in this Hon'ble Court that the application be admitted, records of the case be called for and notices be issued to the respondents directing them so show cause as to why the relief sought for should not be granted to the applicant as prayed for and after hearing the parties and perusing the records including the causes, if any shown be the respondents, Your Lordships would also be pleased to direct the respondents :

- 8.1 to set aside and quash the impugned **Certificate of Fitness of Employees for Promotion From Non-Gazetted to Gazetted Post (Group-B)** vide No. H/37/5 dated 16.1.2006 (Annexure B) and declare the action of the respondents in issuing the said impugned certificate/order as arbitrary and illegal which can not sustain in law;
- 8.2 to set aside and quash the impugned **Railway Board notification** vide no. E(GP)80/2/8 dated 31.10.1991 (ANNEXURE D) and declare the same to be issued without any authority or power and as being ultra vires of the constitutional mandate and as being violative of Article 14 of the Constitution of India;

*Sri Pradip K. Acharyee*

8.3 To direct the respondents to consider the case of the applicant for promotion in light of and with reference to the order of this Hon'ble Tribunal dated 27.4.2001 in OA. 172/1998 (Annexure - A);

8.4 Or may pass order for any other relief to which the applicant is found entitled to under the facts and circumstances of the case.

**9. INTERIM ORDER PRAYED FOR:**

Pending disposal of the application, the applicant prays for grant of an interim order to direct the respondents to keep one post of Assistant Electrical Engineer Group 'B' vacant till the final disposal of the application.

10. The application is filed through Advocate.

**11. PARTICULAR OF I.P.O.:**

I.P.O. NO.	: 34G 651551
Date of Issue	: 10.3.07
Issued from	: Guwahati
Payable at	: Guwahati

**12. LIST OF ENCLOSURES:**

As stated in the INDEX.

Verification ...

*Sri Radip Kr Acharyee*

VERIFICATION

I, Sri Pradip Acharjee, son of Sri Monindra Chandra Acharjee, aged about 44 years, permanent resident of Maligaon, Guwahati-11, District- Kamrup, Assam do hereby solemnly affirm and state that the statements made in the application in para 1, 2, 3, 4:1, 4:4, 4:6, 4:24, 4:25, 4:27, 4:28, 4:29, 4:31, 4:32, <sup>5, 6, 7 & 8</sup> are true to my knowledge and belief, those made in para 4:2, 4:3, 4:5 to 4:15, 4:17 to 4:23, 4:26 & 4:30 being matter of records, are true to my information derived therefrom and the rest are my humble submission and legal advice. I have not suppressed any material fact of the case.

March  
And I sign this verification on this 12th day of February 2007 at Guwahati.

*Sri Pradip Kr. Acharjee*

Deponent

ANNEXURE : A

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH

Original Application No.172 of 1998

Date of decision: This the 27<sup>th</sup> day of April 2001

The Hon'ble Mr Justice D.N. Chowdhury, Vice-Chairman

The Hon'ble Mr K.K. Sharma, Administrative Member

Shri Pradip Kumar Acharjee,  
Senior Section Engineer (Electrical),  
Pandu Power House, N.F. Railway,  
Guwahati.

.....Applicant

By Advocates Mr G.K. Bhattacharyya, Mr G.N. Das and  
Mrs B. Dutta Das.

- versus -

1. The Union of India, represented by the General Manager, N.F. Railway, Maligaon, Guwahati.
2. The General Manager (Personnel), N.F. Railway, Maligaon, Guwahati.
3. The Chief Electrical Engineer, N.F. Railway, Maligaon, Guwahati.
4. The Divisional Electrical Engineer, N.F. Railway, Maligaon, Guwahati.
5. Shri K.K. Sen Laskar,
6. Shri B.B. Das
7. Shri S. Mazumdar
8. Shri S.B.P. Singh
9. Shri U.K. Biswas
10. Shri D. Kahali
11. Shri Arunangshu Roy
12. Shri A. Kundu
13. Shri S.K. Bhowmick

Applicant Nos.5 to 13 are working as Assistant Engineers under the N.F. Railway.

.....Respondents

By Advocate Mr J.L. Sarkar, Railway Counsel.

*.....*  
Certified to be true Copy.  
Hemanta Kr. Gogoi  
Advocate

ORDER

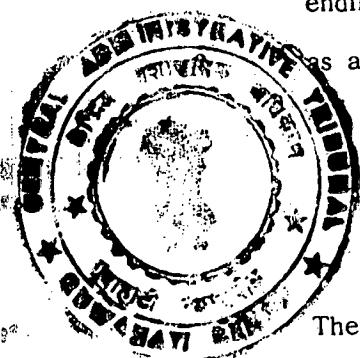
CHOWDHURY J. (V.C.)

The application under Section 19 of the Administrative Tribunals Act, 1985 has arisen and is directed against the Office Order No.12/98 dated 24.6.1998 promoting nine officers including the respondent No.5, who is junior to the applicant, to the rank of Assistant Electrical Engineer superseding the claim of the applicant as well as the selection process including the Select List prepared by the Selection Committee for the post of Assistant Electrical Engineer Group 'B' against the 70% vacancies, in the following circumstances:

The applicant, on obtaining the B.E. degree (Electrical), joined the N.F. Railway as Electrical Foreman in the scale of pay of Rs.2000 to Rs.3200/- He was posted at Dibrugarh and Guwahati. In November 1993 he was posted in the same capacity as Senior Technical Assistant in the Office of the Assistant Electrical Engineer, Maligaon. While the applicant was serving under the Assistant Electrical Engineer, Maligaon, he was served with a letter dated 22.2.1996 communicating adverse remarks in the Annual Confidential Report (ACR for short) for the year ending 31.3.1995. The relevant part of the adverse remarks communicated as above are reproduced below:

"3.(a) Initiative and direction - Needs further improvement.  
(c) Keenness/promptness - He is not keen and prompt in discharging his duties efficiently.  
15. Has his work been satisfactory - Almost satisfactory. But his attitude is reluctant."

The applicant wrote to the Chief Electrical Engineer, N.F. Railway requesting him to furnish the substance of the favourable remarks contained in the ACR for the year ending on 31.3.1995 to enable him to put up an appeal against the adverse remarks. Alongwith the representation the applicant also enclosed the Railway Board's letter No.E(NG)I/90/CR/4 dated 17.6.1991 indicating the requirement of furnishing the favourable remarks in the ACR. The applicant was, however, not favoured with the materials as sought for by him in his representation dated 30.4.1996.



: 2 :

The respondents, however, by their communication dated 12.6.1996 informed the applicant that on consideration of his appeal against the adverse remarks appearing in the ACR of 1994-95 the same was rejected. However it will be pertinent to mention that by his communication dated 30.4.1996 addressed to the Chief Engineer, he only sought for certain materials to enable him to submit an effective representation. The respondents by Office Order dated 7.8.1996 promoted seven officers including the applicant to officiate in the post of SS/CTA/Sr.EF in the scale of Rs.2375-3500. The respondent authority decided to hold the selection for forming a panel of 12 (11 Unreserved and 1 Scheduled Tribe) persons for the post of Assistant Engineer, Group 'B' against 70% of the vacancies. A communication to that effect was sent vide memo No.E/254/13 Pt.II(O) dated 20.2.1998 addressed to the General Manager (Construction)/Maligaon, General Manager (Personnel)/Metro Railway, Calcutta, CEE, Maligaon, etc. The communication also indicated that the selection would be based on the candidate's performance both in written test as well as viva-voce test and that the written test would consist one paper of 150 marks for which the qualifying marks was 90.5. Marks were also allotted for oral test, out of which 25 marks were given for five years' ACR and 25 marks for personality etc. The communication also mentioned that an employee was required to get a minimum of 15 marks in the ACR for five years in order to be qualified as fit for promotion. The communication contained a main list of forty employees in order of seniority. It also enclosed a standby list of nineteen persons. The name of the applicant figured at serial No.38 of the main list and the name of the respondent No.5 appeared at serial No.2 of the standby list. By a message dated 4.5.1998 the respondent No.2 forwarded a list of fifteen candidates who had qualified in the written test for Assistant Electrical Engineer (AEE for short) and the name of the applicant in that list appeared at serial No.1. The message instructed the applicant and the other successful candidates to obtain physical fitness certificates and to appear in the viva voce test on 28.5.1998. Due to the extension

01.....

: 3 :

on the age of retirement from 58 to 60 years the vacancy position was reviewed. As a result of the review, the number of vacancies against 70% quota came down to 10 (Unreserved - 9, SC - nil, ST - 1). As a result of the said exercise, six junior candidates were excluded and only 13 persons were called for the viva-voce test. The viva-voce test was finally held on 3.6.1998. The applicant appeared in the said viva-voce test.

2. By the impugned Office Order No.12/98, communicated vide memo No.E/283/128/Pt-VIII(O) dated 24.6.1998, nine persons including respondent No.5 were promoted to the rank of AEE. The applicant assailed the aforesaid exercise for not considering him for promotion as arbitrary and discriminatory. It was averred in the application that the reason for not empanelling the applicant was on the ground that the applicant failed to get the minimum 15 marks from 5 years ACR. According to the applicant the respondents acted upon the entries of the ACRs without giving him an opportunity to explain or represent against the entries of the said ACRs. It was alleged that against the adverse remarks in the ACR for the year 1994-95, the applicant since could not submit his representation, the same could not have been acted upon and the ACR of 1994-95 was not before the Selection Board and for which no marks could be provided to the applicant.

3. The respondents submitted their written statement and denied and disputed the applicant's claim. In the written statement it was stated inter alia, that the adverse entries contained in the ACR for the year ending 31.3.1995 was duly communicated to the applicant advising him to submit appeal against the adverse remarks, if he so desired, or due consideration of the accepting authority. According to the respondents the applicant chose not to submit any representation. Instead, the applicant requested the administration to furnish him with the substance of the favourable remarks appearing in the ACR. Non-communication of favourable entries did not nullify the communicated adverse remarks. As regards the promotion of the applicant to the non-gazetted cadre from the grade

O.....

o. Rs.2000-3200 to the grade o. Rs.2375-3500, it was stated that the said promotion had no bearing with the communication o. adverse remarks in the ACR for the period ending 31.3.1995. For promotion to non-gazetted cadre, the actual points earned in the ACR were added to the total marks obtained by the candidates. For Group 'B' selection, one has/had to acquire minimum 15 marks out o. 25 under the head 'Record o. Service'. There is/was no qualifying marks laid down for promotion within non-gazetted cadre under the head 'Record o. Service' and there is/was a specific minimum qualifying mark, i.e. 15 out o. 25 under the head 'Record o. Service'. For promotion to Group 'B' post, passing o. the prescribed medical examination was a necessary prerequisite. In the instant case, the other candidates were cleared on medical examination, but the applicant was given a conditional certificate and relaxation o. medical standard was not contemplated under the system. The respondents denied the allegation o. the applicant that the ACR for the year 1996-97 was not made available before the Selection Board. The Selection Committee on objective assessment, recommended the eligible persons for promotion. The case o. the applicant was fairly considered and the competent authority did not find him eligible for promotion. Therefore, the promotions were lawfully made. The respondents placed the relevant ACRs before us and asserted that the gradings were made on the basis o. record o. service. It was also asserted that the applicant did not qualify in the medical test and for that purpose referred to the records.

4. Mr. G.K. Bhattacharyya, the learned Sr. counsel for the applicant, in course o. his arguments, urged that passing o. the visibility test for the post o. Assistant Engineer was not an essential condition. The learned counsel for that purpose invited our attention to the Indian Railway Medical Manual and referred to some o. the provisions, more particularly, the provisions contained in paras 529 and 530 of the said Manual. The learned counsel submitted that since the post in question is not connected with train working and use o. trolley on open line, the question o. examination o. visual acuity was not a statutory requirement.

5. Mr. J.L. Sarkar, learned Railway Counsel, countering the arguments o. Mr. Bhattacharyya, also referred to the Indian Railway Medical.....

Medical Manual and particularly referred to paras 530, 531 and 532 and submitted that all employees for promotion to the gazetted cadre from non-gazetted cadre are required to be examined for visual acuity and colour perception as per standard mentioned in respect of medical examination of non-gazetted cadre. On perusal of the provisions of the Manual, the examination for visual acuity and colour vision as per standard prescribed cannot be ruled out.

6. Mr Bhattacharyya next referred to the medical examination report and placed at our disposal reports of eight officers for the purpose of promotion. The learned counsel submitted that the report that was heavily relied upon by the respondents for excluding the applicant from consideration for promotion was a casual and perfunctory report. The learned counsel, particularly referred to the forms differently used for different purposes. Pointing to the report dated 25.5.1998, the learned counsel submitted that the concerned officer remarked that the applicant was not to be connected with train working or use of trolley. The learned counsel submitted that the report was not used in the written statement nor the full materials justifying the remark of the Medical Officer was placed, and therefore, it would not be just and fair to act upon ipse dixit. Mr Sarkar, however, submitted that the reports were submitted by the Medical Officer on proper assessment of the fact situation and this could not be lightly brushed aside.

7. We have perused the three medical examination reports dated 13.5.1998, 15.5.1998 and 25.5.1998. The first two reports were addressed to the General Manager(P), Maligaon and copies of the reports were endorsed to the concerned staff, besides sending a copy to the Deputy Chief Engineer/CON/Maligaon. The aforementioned two reports were furnished as per the requisition sent by the General Manager on 4.5.1998. The report dated 25.5.1998 was instead addressed to the DEE/Elect/MLG on the requisition of the DE dated 6.5.1998. Why separate procedures were adopted by the Railway Administration in this matter was not made known to us. The first two requisitions were sent by the General Manager, but.....

but as to why a different requisition had to be sent by the DEE in the case of the applicant was, however, not made known to us. The report found the applicant fit for promotion to Group 'B' service, but qualified the said remark by stating that the post was not to be connected with train working or use of trolley. Why that remark had to be made by the communication dated 25.5.1998 was not discernible. The nature of the test applied for determining the visual acuity as well as the reasons made it difficult to accept the conclusion indicated in the report.

8. Admittedly, the ACRs were the inputs for the record of service and marks were awarded on the basis of the 'Record of Service'. As per their own showing marks for 'Record of Service' was to be given on the basis of confidential report for the last five years. For that purpose the weighted average of the five attributes of Section II of the ACRs of non-gazetted staff in grades of Rs.1600-2660 and above was to be taken. The ratings on the ACRs were already indicated by executive instructions/circulars. As per the ratings on the ACRs, 5 marks were to be allotted for 'Outstanding', 4 marks for 'Very Good', 3 marks for 'Good', 2.5 marks for those who were found 'not fit', 2 marks for 'Average' and 1 mark for 'Below Average'. Therefore, the ACRs play a vital role. A person who is/was shown as 'average' in the ACR is/was not found fit for promotion. Naturally, for the sake of fairness, the concerned person is to be intimated or made known ahead of time about the remarks 'average' entered in the ACR to enable him to improve his performance or otherwise to clarify his position. An adverse remark is not to be acted upon for denying the promotional benefit unless the same was communicated to the person concerned so that such person is provided with an opportunity to improve his quality of work and conduct and otherwise to explicate and/or demonstrate his quality. An ACR is the index of the performance of a Government servant. The object of such confidential report is basically with an object to improve the performance of the Government servant by making him aware of his area of weakness. The reason for communicating the adverse entries is to enable the Government servant either to have the opportunity to

explain.....

explain his conduct so that he may effectively explain the adverse entries as uncalled for or to provide him with an opportunity to ponder over the matter for his improvement.

9. From the records made available before us in the ACR of 1993-94 the applicant was shown as 'Average'. The Reporting Officer in his report dated 3.2.1996 against the columns 'Attendance', 'General Intelligence', 'Power to control others', 'Organising/Supervising ability', 'Capacity for hard work', 'Power of drafting' and 'Knowledge of Rules, Regulations and procedure' remarked as 'Good'. Against the columns 'Relations with others: (a) those above' it was remarked as 'Average' and '(b) those below' it was remarked as 'Good'. Against the column 'Integrity' it was shown as 'Beyond doubt'. However, against the columns 'Tact and Temper', 'Conduct', 'Initiative and direction' and 'Keenness/promptness and efficiency', the applicant was shown as 'Average'. Against the column 'Technical abilities', the applicant was shown as 'Good'. Against the column 'Has his/her work been satisfactory? If not, in what respect, he/she has failed?', the Reporting Officer remarked as 'No so satisfactory. He does not take initiative in discharging his duties promptly and efficiently.' In the last column, 'Grading' the Reporting Officer remarked as 'Average'. It would be pertinent to mention that in the column for Sel. Appraisal of Part II, the applicant at serial No.2 made the following report at item 2 under the heading 'Award':

"(2) AWARD: Mr J. Upadhyay, Member Electrical, RLY. BOARD Inspected TL depot GHY on 1.10.93 and sanctioned Rs.5000/- as award to TL and AC staff vide Rly. Board's L/No.93/Elec(G)/145/1 dt. 2.10.93 New Delhi."

The Reporting Officer in column 1 against the entry: 'Does the Reporting Officer agree with the statement made in Part-II? If not the extent of disagreement and reasons therefor?', remarked as 'Yes, agreed to except Item No.2 since it is not his self-contribution.' In the self appraisal resume, the applicant clearly pointed out that the award was given to TL and AC staff. In the ACR of 1994-95 the applicant was graded as 'Good'. In the same report at column 17 it was remarked as 'One minor penalty chargesheet was issued and censured'. However in Section II of

the.....

the ACR, the applicant was reported as 'Average' except in column 2(e) 'Ability to enforce discipline, where he was shown as 'Good'. The aforesaid report showing the applicant 'Average' for the year 1994-95 was, admittedly, not furnished. Against the adverse entries in the ACR of 1993-94, the applicant was informed about the adverse remarks vide communication dated 22.2.1996. The applicant sought for more details for submitting the representation and/or appeal. In a most cavalier fashion the respondents turned down his application dated 30.4.1996 by their communication dated 12.6.1996. Despite the aforesaid adverse entries in the ACR of 1993-94 the applicant was promoted to a higher grade. Naturally, it can be inferred that despite the purported remarks in the ACR of 1993-94 the applicant was promoted.

10. We have already mentioned about the nature of the performance appraisal. The sanctity and importance of appraisal of performance cannot be gainsaid. The authority who is entrusted with the preparation of the ACR is to act with full responsibility and since those remarks are of crucial nature in determining the career of an officer, the authority must objectively judge the situation and only after due care and caution make such entries. Such remarks as mentioned earlier are necessary to be introduced to set at right the wrong committed by the officer and provide him with an opportunity for improvement. An ACR is not meant to be used only as a punitive measure. It may be pertinent to recall the following observations of the Supreme Court in P.K. Shastri vs. State of M.P. and others, reported in (1999) 7 SCC 329:

  
".....Be that as it may, we think that the CRs of an officer are basically the performance appraisal of the said officer and go to constitute vital service record in relation to his career advancement. Any adverse remark in the CRs could mar the entire career of that officer. Therefore, it is necessary that in the event of a remark being called for in the confidential records, the authority directing such remark must first come to the conclusion that the fact situation is such that it is imperative to make such remarks to set right the wrong committed by the officer concerned. A decision in this regard must be taken objectively after careful consideration of all the materials which are before the authority directing the remarks being entered in the CRs....."

1. The right guaranteed under Article 16 is not confined to mere consideration for promotion, but it also includes right to be considered justly.....

justly, fairly and reasonably. Where the considerations fall far short of just and reasonable consideration it amounts to a breach of the constitutional imperatives guaranteed under Articles 14 and 16.

12. In the circumstances set out above, we are of the opinion that the applicant's case for promotion requires to be considered by the authority on the basis of the ACRs sans the ACRs for the years 1993-94 and 1995-96. We do not think it proper to issue a direction to the respondents to give an opportunity to the applicant to submit his reply against the adverse remarks made in the aforesaid two ACRs in view of the fact that the matter pertains to promotion of the year 1998 and also in view of our observation made relating to the nature of the performance appraisal. The respondents are accordingly directed to hold a review DPC towards selection against 70% vacancies drawn on 3.6.1998 on the basis of the available records mentioned therein. For the sake of fairness we feel that the respondents should also take steps to cause fresh medical examination of the applicant. The respondents are further directed to complete the above exercise as expeditiously as possible, preferably within a period of three months from the date of receipt of the order by holding a review DPC as well as fresh medical examination of the applicant.

13. The application is allowed to the extent indicated. There shall, however, be no order as to costs.

Sd/ VICE CHAIRMAN

Sd/ MEMBER (Adm)

*Certified to be true Copy*

*প্রাপ্তি প্রতিশিল্প*

*4/5/2001*

*Section Officer (U)*

*গুৱাহাটী অধিকারী (ন্যায়িক শাখা)*

*Central Administrative Tribunal*

*কেন্দ্রীয় প্রাপ্তি প্রতিশিল্প*

*Guwahati Bench, Guwahati-8*

*গুৱাহাটী ন্যায়বৰ্ষীক প্রাপ্তি প্রতিশিল্প*

nkm

CERTIFICATE OF FITNESS OF EMPLOYEES FOR PROMOTION FROM  
NON-GAZETTED TO GAZETTED POST (GROUP-'B')

No. 8/37/5

Date 16/1/06

Signature of the employee P. K. Acharya

Designation SSE/Tech/Select/SHY

Date 12/1/05

I, Dr. L. P. Das

S. no. 04/01/06  
Designation/Station

after examination of Shri/Smt. P. K.

Designation/Station SSE/Tech/Select/SHY

do hereby certify that he/she is

(I) Fit/unfit for promotion to Group-'B' post in Technical Category.  
 (II) Fit/unfit for promotion to Group-'B' post in Non-Technical Category.

Signature Dr. L. P. Das

Full Name Dr. L. P. Das

CMS/MS S. no. 04/01/06

Date 16/01/06

Office - Seal St. Divisional Officer

Central Electricity Board

Metugon.

Counter signed.

Dr. L. P. Das  
16/01/06

Note:-

- A) Technical Category:- All posts in Mechanical, Electrical, Civil & S&T Engineering & Traffic (Transportation & Commercial) Departments.
- B) Non-Technical Category:- All posts in other departments which are not connected with train working or use of trolley on open line.
- C) Certificates should be prepared in duplicate retaining one copy in the office of the concern CMS/MS & MD/CH/MLG.
- D) Certificate should be issued by MD/Chief Physician, CMS and MS only; not by any body below MS/IC.
- E) Please strike out what is not applicable.

W.M.D. Attested

S. no. 04/01/06/002/3/1  
Date of issue 16/01/06  
P. no. 2/2  
P. no. 2/2  
H. no. 100/100  
M. no. 100/100

Certified to be true Copy.

Hemanta Kr. Gogoi  
Advocate

लिए आवेदन की तारीख Date of application for the copy.	स्टाम्प और फोलोओ की अपेक्षित संख्या सूचित करने की नियमित तारीख Date fixed for notifying the requisite number of stamps and follow.	अपेक्षित स्टाम्प और फोलोओ देने की तारीख Date of delivery of the requisite stamps and follow.	तारीख, जबकि देने के लिए प्रतिलिपि तैयार थी Date on which the copy was ready for delivery.	आवेदन को प्रतिलिपि देने की तारीख Date of making over the copy to the applicant.
01/12/06	01/12/06	01/12/06	21/12/06	21/12/06

IN THE GAUHATI HIGH COURT.  
( THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA,  
MANIPUR TRIPURA MIZORAM AND ARUNACHAL PRADESH)

W.P.C. NO. 7249/2001

21/12/06

1. The Union of India, represented by The General Manager, N.F.Railway Maligoan, Guwahati.
2. The General Manager (Personnel) N.F.Railway, Maligoan, Guwahati.
3. The Chief Electrical Engineer, N.F.Railway, Maligoan, Guwahati.
4. The Division Electrical Engineer, N.F.Railway, Maligoan, Guwahati.

.....Petitioners.

-versus-

1. Shri Pradip Kumar Acharjee, Senior Section engineer (Electrical) Pandu Power House, N.F.Railway, Guwahati. .... Respondent.
2. Shri K.K.Sen Laskar, Assistant Electrical Engineer, N.F.Railway, Lumding.
3. Shri B.B.Das  
Assistant Electrical Enginner, H.Q, N.F.Railway, Maligoan, Guwahati.

Certified to be true Copy.

Hemanta Kr. Gogoi  
Advocate

4. Shri S.Mazumdar  
Assistant Electrical Engineer,  
Railway Construction, Agartala  
C/O General Manager , Construction  
N.F.Railway, Maligaon.
5. Shri S.B.P.Singh,  
Asstt.Electrical Engineer (W) HQ.  
N/F/Railway, Maligaon, Guwahati..
6. Shri U.K.Biswas,  
Asstt.Electrical Engineer (C ),  
New-Bongaigaon.
7. Shri D.Kahali  
Assistant Eletrical Engineer (CON),  
Planning, Maligaon, guwahati.
8. Shri Arunabgshu Roy,  
Assistant Electrical Engineer (Con).  
Railway, Silchar.
9. Shri A.Kundu, Assistant Eletrical  
Engineer, Lumding..
10. Shri S.K.Bhowmik,  
Assistant Electrical Engineer (S),  
New-Bongaigaon.
11. Shri Monoj Kr. Dasgupta  
Son of Late Rohini Das  
Resident of Rest Camp, Pandu  
Working as Sr. Section  
Engineer (Elect.)  
As per Hon'ble Court's Order  
dated 22.2.06 passed in MC  
No. 469/06, respondent No. 11  
has impleaded.

Proforma R  
Private. Re  
O.A.

nts in the

PRESENT  
THE HON'BLE MR. JUSTICE A. H. SAIKIA  
THE HON'BLE MR. JUSTICE B.D.AGARWAL

For the petitioners :  
For the respondents

Mr. S.Sharma, SC, NF.Railway.  
Mr.G.K.Bhattacharjee, Sr. Advocate  
Mr. B.Chakravorty,  
Mr.B.Choudhury, Advocates.

Dates of hearing  
Judgment and order

3.11.06 and 7.11.06  
7.11.06.

JUDGMENT AND ORDER ( ORAL )

H. A.H.Saikia J.

1. Heard Mr. S.Sharma, learned Standing Counsel, N.,F.Railway appearing for the petitioners as well as Mr. G.K.Bhattacharjee, learned Sr. counsel assisted by Mr. B.Choudhury, learned counsel representing the respondent No.1.

2. By means of this writ petition filed under Articles 226/ 227 of the Constitution of India, the petitioners have sought for issuance of writ of or in the nature of Certiorari and / or Mandamus and / or any other appropriate writ, order or direction for quashment of the impugned judgment and order dated 27.4.2001 passed by the Central Administrative Tribunal Guwahati Bench ( for short, 'the CAT') in O.A. No. 172. of 1998.

3. On close perusal of the impugned judgment and order, it appears that the respondent No.1, being aggrieved by the order dated 24.6.98 (i) promoting the nine officers, respondent Nos. 2 to 10, being junior to him, to the rank of Assistant Electrical Engineer superseding the respondent No.1 as well as (ii) the selection process including the select list prepared by the Selection Committee for the post of Assistant Electrical Engineer Group -B against the 70 % vacancies, moved the application being O.A. No. 172/98 before the CAT seeking interference with the said order of promotion by which the respondent No.1 was superseded without considering his case for promotion though he fell within the zone of consideration for such promotion.

4. The CAT, by the impugned order, upon hearing the learned counsel for the parties as well as on proper scanning of the materials available on record including the pleadings exchanged by and between the parties, passed the following orders :-

*b3*  
.....The respondents are accordingly directed to hold a review DPC towards selection against 70 % vacancies drawn on 3.6.1998 on the basis of the available records mentioned therein. For the sake of fairness we feel that the respondents should also take steps to cause fresh medical examination of the applicant. The respondents are further directed to complete the above exercise as expeditiously as possible, preferably within a period of three months from the date of receipt of the order by holding a review DPC as well as fresh medical examination of the applicant.”

*A.*

5. Dissatisfied with the said direction, this writ petition has been filed as mentioned above basically on the grounds - that (1) the CAT ought not have interfered with the selection process for the promotion to the post of Assistant Electrical Engineer i.e from Grade "C" to Grade 'B' post directing to hold a review DPC on evaluation of the relevant A.C.Rs of the applicant itself and thereby it exceeded in its jurisdiction and (2) since the respondent No.1 was earlier medically found to be unfit for promotion in terms of report dated 25.5.98 by which the concerned Officer remarked that the respondent No.1 was not to be connected with train working or use of trolley, the question of causing fresh medical examination on the respondent No.1 in view of the above direction, did not arise.

6. Initially while this writ petition was moved, this Court vide order dated 20.12.2001, by issuing notice of motion, in the interim, passed the following order :-

  
"Till the matter is taken up after notice, the impugned judgment of the Central Administrative Tribunal, Guwahati Bench dated 27.4.2001 in O.A No. 172/98 ( as in Annexure-6 to the writ petition ) shall remain stayed."

7. However, by order dated 4.4.03, this Court upon hearing the learned counsel for the parties at the time of entertaining the Misc. Application No. 384/03 preferred by the respondent



No.1, vacated the interim order of stay passed on 20.12.2001 as referred to above.

8. Eventually, this writ petition was admitted to be heard on 20.6.2003 and by the same order, on the basis of the submission advanced by the learned counsel for the respondent No.1 to the effect that the Department was going to conduct a limited departmental competitive examination for promotion to four posts of Assistant Electrical Engineer Group-B and if the respondent No.1 was not being permitted to appear in the said examination or his case was not being considered taking into consideration his ACRs for the year 1993-94 and 1995-96, he would suffer irreparable loss and injury, this Court directed that the petitioners/ Department should keep one post out of consideration for promotion as Assistant Electrical Engineer Group -B till disposal of the writ petition.

9. During the pendency of the writ petition and when the order dated 20.6.03 above was in force, , an attempt was made by the petitioners to fill up 70 % vacancies by initiating process of selection by issuing a Notification dated 9.5.05 and the respondent No.1 apprehending to be prejudiced by such selection process, approached this Court by filing Misc. application No. 1762/05 for staying the abovementioned selection process for

7

Assistant Electrical Engineer (Grade "B" ) against 70 % vacancies in terms of Notification dated 9.5.05 and this Court on 29.8.05 after hearing the learned counsel for the parties passed the following relevant orders:-

" Considering the direction given by the learned Tribunal, Guwahati Bench in O.A. No. 172/98 by order dated 27.4.01 and the order dated 20.6.03 passed by this court, we direct that the respondent/ authority may proceed with the selection process in pursuance of the notification dated 9.5.05 ( Annexure-A) but shall not make any appointment without the leave of this court. In the meantime, the respondent / authority is directed to comply with the direction given by the learned Tribunal in O.A. No.172/98 vide order dated 27.4/01 and the order passed by this court on 20.6.03."

10. Thereafter, the Union of India/ petitioners filed Misc. application being MC Case No. 211/2006 arising out of W.P. ( C) No. 7249/2001 praying for modification/vacation of the interim order dated 29.8.2005 passed in Misc. case No. 1782/2005 as already quoted above. In the instant Misc. application, the petitioners informed the Court that since the stay of the impugned judgment and order was already vacated on 4.4.03, pursuant to the direction of the CAT given in the impugned judgment and order, the medical examination was caused upon the respondent No.1 on 16.1.06 and he was found medically unfit for promotion to Grade-'B' post in technical category for' sub-standard vision'

*[Handwritten signatures and initials are present on the left margin]*

and to this effect a Certificate of Fitness of Employees for Promotion from Non-Gazetted to Gazetted post ( Group 'B') was issued on 16.1.06 which was annexed as Annexure-2 to Misc. Case No. 211/06.

11. In view of such medical examination ,being a condition precedent for consideration of promotion of respondent No.1 from Group 'C post' to Group 'B' posts , by which the respondent No. 1 was found to be medically unfit, the petitioners have complied with the direction given by the impugned judgment and order and this writ petition has therefore, become infructuous.

12. However, this Court on 27.2.06, instead of closing the writ petition as being infructuous, disposed of the Misc. case No.211/06 modifying the order dated 29.8.06 passed in Misc. Case No. 1782/05 which reads as follows:-

  
"..... This court vide its order dated 29.6.05 in MC No. 1782/05 having considered the direction given by the Central Administrative Tribunal, Gauhati Bench in OA No. 172/98 by order dated 27.4.01 and as well as the order dated 26.6.03 passed by this court directed the respondent Railway Authorities to proceed with the selection in pursuance of the notification dated 9.5.05 but did not make any appointment without leave of this Court.

  
This order , in our considered opinion, requires modification as it served as a bar by stalling the whole selection process. The selection and appointment pursuant to the notification dated 9.5.05

shall be subject to further orders to be passed in the writ petition. The very selection process need not be interrupted at this stage. The order is accordingly modified.”.

13. In the course of hearing of the instant petition on 3.11.06, Mr. Sharma, learned Standing Counsel, N.E.Railway, reiterating his earlier stand taken in Misc. Application No. 211/06, has contended that in view of the Medical Certificate dated 16.1.06 above, the direction given in the impugned judgment has been implemented and as such, this writ petition may be closed on becoming infructuous.

14. To-day also when the matter has been taken up for further hearing, Mr. Sharma has placed before us an additional affidavit dated 7.11.06, renewing his earlier prayer to close the writ petition as being infructuous, stating therein that causing of medical examination is a condition precedent for a holding a review of DPC because only those who are qualified in the medical examination with the prescribed standard shall only be called for viva-voce. In other words, before consideration for promotion of the incumbent from the post of Grade 'C' to Grade 'B' in technical cadre, one must be medically examined first proving his fitness for the job.

*[Handwritten signature]*

15. Learned Standing Counsel has also referred to Paras 530 and 532(3) of Indian Railway Medical Manual Volume-1 Third Edition-2000 corrected up to 30.9.99( for short, ' the Manual'). which has been annexed as Annexure-5 to the writ petition.

16. Paras 530 and 532(3) of the Manual may be noticed as under :-

**530. Classification of gazetted posts for the purpose:-**  
For the purpose of examination of visual acuity of Railway employees promoted from non-gazetted to gazetted posts, the gazetted posts should be divided into two categories as follows :-

- (a) All posts of Mechanical, Electrical, Civil and S & T. Engg. and Traffic ( Transportation and Commercial ) Department.
- (b) All posts of other departments which are not connected with train working or use of trolley on open line.

**532(3).** All employees promoted to gazetted cadre from non- gazetted cadre will be examined for visual acuity and colour vision as per standards mentioned above irrespective of their medical category I the non-gagetted cadre."

17. An ordinary reading of those above mentioned paras, it would go to show that all posts in Mechanical, Civil and S & T Engg. and Traffic ( Transportation and Commercial) Department connected with train working or use of trolley on open line require examination of visual acuity and colour vision at the time

18. In view of the same, it transpires that for promotion to the post of Grade 'B', being in the technical cadre, medical examination is a condition precedent and as such, before going to considering the case of promotion of respondent No.1, he has been medically examined in compliance of the direction given in the impugned judgment and order and accordingly he is found unfit for such promotion due to his sub-standard vision as reflected in the Certificate dated 16.1.06.

19. Opposing vehemently the submission and prayer of the learned counsel representing the N.F.Railway for closure of the writ petition as being infructuous, Mr.Bhattacharjee, learned Sr. counsel has contended that it is not permissible for this Court to close the petition in the facts and circumstances so narrated on behalf of the writ petitioners. His firm stand is that in the case at hand, the ground taken by the learned standing counsel for the petitioner for closure of the writ petition as infructuous as the respondent No.1 is found to be unfit, is not a valid and legal one as the direction so given by the CAT has not yet been complied with in its letter and spirit which is clearly evident from the pleadings filed on behalf of the petitioners-N.F.Railways as well as from the submissions canvassed on their behalf because the petitioners have failed to hold a review DPC towards selection

*[Handwritten signature]*

against 70% vacancies and as such the vital part of the direction i.e. consideration of the case for promotion of respondent No.1 from the post of Grade 'C' to Grade 'B', has not yet been complied with till date. In such backdrop of the factual premises, it cannot be said by any stretch of the imagination that the impugned judgment and order has wholly been complied with and as such it is submitted that such circumstances should not influence and persuade this Court to declare this writ petition to be rendered infructuous.

20. Having given our anxious consideration to the rival contentions advanced on behalf of both the parties as well as upon meticulous examination of the materials available on record including the pleadings of the parties, it transpires that the writ petition has been filed by the N.F.Railway/petitioners challenging the impugned judgment and order containing the direction given against the interest of the N.F.Railway.

21. But the impugned judgment and order has at no point of time been challenged by the respondent No.1 before this Court. Even non-compliance of the impugned order has not also been raised before any appropriate forum by filing appropriate application.

22. What reveals from the perusal of the materials available on record is that though initially the stay of the impugned judgment was granted, the same was later on vacated by the order as indicated above and thereafter the modified order dated 20.6.03 in this writ petition was passed to the extent of directing the Union of India/ N.F.Rly, to keep one post vacant out of consideration for promotion as Assistant Electrical Engineer Group B till disposal of the writ petition.

23. It also appears that during the pendency of the writ petition, in view of the direction given on 29.8.05 in Misc. Case No.1782/05, the petitioners have initiated for medical examination of the respondent No.1 and accordingly, on 16.1.06 he has been medically examined and is found him to be unfit for promotion to Grade B post in technical category for 'substandard vision'.

24. The said fact situation of medical examination has also been highlighted before this Court by filing Misc. application No. 211/06. However, this Court by order dated 27.2.06 rendered in the said Misc. case gave direction to proceed with the selection and appointment in pursuance of the notification dated 9.5.05 as

mentioned above which was the subject matter in Misc. Case No. 1782/05, opining that in view of the order dated 29.8.05 no similar direction was necessary and it was open to the respondent to initiate appropriate steps as against the Railways for non-compliance of the order dated 29.8.05. However, it is seen from the records made available before us that no steps have been taken by the respondent No.1 for non-compliance of the order dated 29.8.05, if any.

25. At this juncture, Mr. Bhattacharjee, learned Sr. counsel, raising the plea of the application of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation ) Act, 1995 ( 1 of 1996 )( for short, 'the Act' ) , has strenuously argued that once the respondent No.1 is found to be medically unfit, his case ought to have been considered under Section 47(2) of the Act which provides that no promotion shall be denied to a person merely on the ground of his disability. However, the writ petitioners have failed to carry out in the instant case their statutory obligation so entrusted upon them by the statute book.

*AKB*

26. Per contra, Mr. Sharma, learned counsel for the N.F.Railway, refuting the statements made by Mr. Bhattacharjee, has straightway submitted that no such pleading has been set

*AS*

out by the respondent No.1 before the CAT nor even before this Court when they have exchanged their pleadings. Drawing attention of the Court to the application in O.A. No. 172/98, Mr. Sharma has read out each and every averments so narrated by the respondent No.1 as applicant therein to support his submission. It is stated that the respondent No.1's only case was for quashment of the order dated 24.6.98 (Annexure X of the said application) by which the respondent No.1 was superseded by his juniors, Respondent Nos.2 to 10 herein, ignoring his claim for promotion to the post of Grade "B" and nowhere in the said petition he claimed that he was a person with disability i.e. person with low vision as defined under Sections 2(i)(ii) and 2(ii) of the Act.

27. In reply to this argument, Mr. Bhattacharjee, learned Sr. counsel has forcefully urged that a pure question of law can be raised at any point of time and there is no bar as such in entertaining such question of law in the higher Court. To supplement his submission, the learned counsel has relied on a decision of the Apex Court reported in AIR 2003 SC, 1623 (equivalent (2003) 4 SCC-524 )( Kunal Singh Vs. Union of India and another ) wherein it was held in para 1 that although before the High Court no argument was advanced specifically in support





of the writ petition on the basis of Section 47 of the Act, a specific ground was raised in the appeal based on that section and since it was a pure question of law, contentions of the parties were heard on that point. In view of the above, it is submitted that since application of Section 47 of the Act is a pure question of law, the same is permitted to be raised even though there is no pleading in this regard as such.

28. As regards the question of 'infructuous', the learned Sr. counsel appearing for the respondent No.1, has also relied upon a decision of the Apex Court reported in ( 2005) 6 SCC-106 (Union of India and others Vs. Narender Singh ).

29. In Narender Singh's case ( supra ), the respondent was proceeded against departmentally on a charge of accepting illegal gratification for getting two Afghan nationals cleared through Customs without paying the customs duty payable. Ultimately he was dismissed from service by the authority. The appeal preferred by the respondent before the appellant authority was also rejected. Against such order, the respondent preferred an Original Application before the Central Administrative Tribunal, Principal Bench, New- Delhi. ( for short, 'the CAT') which quashed and set aside the order of dismissal and directed the Union of India to

*AB*

Application before the Central Administrative Tribunal, Principal Bench, New- Delhi. ( for short, 'the CAT') which quashed and set aside the order of dismissal and directed the Union of India to reinstate the respondent. Being aggrieved by such decision, the Union of India preferred an application under Article 226 of the Constitution of India before a Division Bench of the Delhi High Court. The Division Bench of the Delhi High Court dismissed the writ petition as infructuous holding that once the respondent was reinstated, the matter became infructuous. However, though the Union of India still tried to justify the departmental action, the Court was not impressed as the petitioners, as stated, had already implemented the order of the CAT.

30. The ratio of the case stated above cannot be attracted the case at hand in factual premises emerged herein to accept the instant case as not being infructuous due to non-implementation of vital direction as regards holding of a review DPC for consideration of the case of respondent No.1 for production. From a meticulous screening of the paras 530 and 532(3) of the Manual we are satisfied that for consideration of production for all posts in Technical grade from non- gazetted to gazetted posts not involving train working or use of trolley on open line, medical examination of the incumbent is a condition

*[Handwritten signature]*

*[Handwritten signature]*

*[Handwritten signature]*

precedent. It is admitted that the case of promotion of the respondent No.1 falls under the above category of post and hence, since the respondent No.1 was found to be medically unfit in a medical examination conducted in compliance of one of two directions issued by the CAT, it can be easily said that the impugned judgment and order has been duly implemented.

31. In the backdrop of the above facts and circumstances, in our considered opinion, it is felt that if the respondent No.1 is at all aggrieved by any action taken by the writ petitioners in implementation of the impugned judgment and order in its letter and spirit and if the same has anyway prejudiced the interest of the respondent No.1, he has the liberty to approach any appropriate forum for redressal of his grievance. Since the petitioners themselves do not want to pursue the writ proceeding, we do not think that the respondent No.1 would have, or, can raise any grievance against passing of any order of withdrawal/closure of this writ petition as infructuous.

32. In view of what has been discussed and observed above, we are inclined to close this writ petition as being infructuous. We order accordingly.

5014 B.D. Agarwal SRI-A. H. Saikia

Ad.

Judge

Judge

P/NO 64895  
001 01-12-66

CERTIFIED TO BE TRUE COPY  
Date ..... 21/12/66  
Superintendent (Copying Section)  
Gauhati High Court  
Authorised U/S 76, Act L 1871

182 - 21/12/66

GOVERNMENT OF INDIA  
MINISTRY OF RAILWAYS  
(RAILWAY BOARD)

No.E(GP)80/2/8

New Delhi, dt. 31-10-91

*Repl.*  
The General Managers,  
All Indian Railways including  
Production Units/Projects.

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

Ref: This office letter of even number  
dated 16.12.1983.

The Board have been according approval to the ad hoc promotion of Group 'C' employees empanelled for Group 'B' posts who do not pass prescribed medical examination, in a 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 supersession of the instructions contained in their letter dated 16.12.1983, the Board have decided that the Group 'C' employees qualifying in the selections for promotion to Group 'B' posts but not passing the prescribed medical standard should not be promoted to Group 'B' even on ad hoc basis. Accordingly, the proposals for such ad hoc promotions need not be sent to this office henceforth.

2. 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.

Please acknowledge receipt.

*Kohli*  
(R.R.Kohli)  
Director, Establishment (Gaz.P.)  
Railway Board.

*cc: RO  
Balan  
PL SP 4  
12/11*  
Copy to: The General Secretary, AIRF, 4, State Entry Road, New Delhi (with 35 copies).

The General Secretary, NFIR, 3-Chelmsford Road, New Delhi (with 35 spares).

Shri K. Hasan, General Secretary, Indian Railway Class. II Promotee Officers Federation, 715-A, Railway Stadium Colony, Gorakhpur 273 012.

Certified to be true Copy.

*Hemant Kr. Gogoi*  
Advocate

No. 11/37/5 (M/E).

M.D's OFFICE/CH/MLG.  
Dt. 25-5-98.

To. DEE/Elect/MLG.

Sub: Medical examination report of  
Sri P.K.Achorjee, SEE(P)/PNO.  
for promotion to group 'B' service  
as AEE.

Ref:- Your L/No. DL/1/264/1/Pt.I (275)  
dt. 6.5.98.

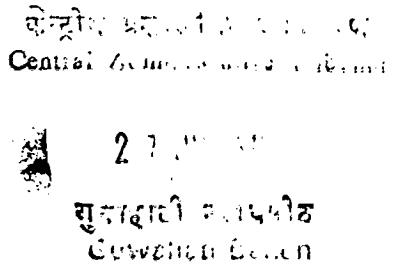
As per your letter No. quoted above, Sri  
P.K.Achorjee, SEE(P)/PNO, has been examined and found fit  
for promotion to group 'B' service but post should not be  
connected with Train working or use of Trolley.

Sd/- 25.8.98.  
Dr(Mrs) T.Dutta Chowdhury  
Sr.DMO/C.H./MACIGACI.

Attested:

ग्राम पंचायत अधिकारी / एम्स  
I. M. 323 / असम  
Assistant Personnel Officer/Gen  
I. F. Railway/Malikaon, Gauhati

Certified to be true Copy.  
Hemanta Kr. Gogoi  
Advocate



IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,  
GUWAHATI BENCH.

IN THE MATTER OF

O.A.63/2007

Shri Pradip Kumar Acharjee

...

Applicant

Versus

Union of India & 4 Others

...

Respondents

AND

IN THE MATTER OF

Written Statement on behalf of respondents.

The answering respondents respectfully SHEWETH :

1. That they have gone through the copy of the application filed and have gone through and understood the contents thereof. Save and except the statements which have been specifically admitted hereinbelow or those which have been borne on records all other averments/allegations made in the application are hereby emphatically denied and the applicant is put to the strictest proof thereof.

2. That for the sake of brevity meticulous denial of each and every allegation/statement made in the application has been avoided. However, the answering respondents have confined their replies to those allegations/averments of the applicant which are found relevant for enabling the Hon'ble Tribunal to take a proper decision on the matter.

3. That the application is barred by Resjudicata as can be found from a careful study of Annexures A and C of the application. These annexures prove beyond doubt that the same matter has been repeatedly ~~been~~ <sup>by</sup> dealt with and disposed of by the Hon'ble Central Administrative Tribunal, Guwahati Bench in Order dated 27.04.2001 and by the Hon'ble Gauhati High Court in order dated 07.11.2006. In fact, the Hon'ble High Court ordered that the writ petition filed by the applicant be treated as closed "as being infructuous". In view of the above, it is submitted respectfully that the O.A. merits dismissal.

4. That the application suffers from want of a cause of action. The applicant is well aware that for promotion from non-gazetted to gazetted rank in the Electrical Engineering department of Indian Railways one has to pass a strict medical test particularly concerning visual acuity.

Handwritten Note: 27/7/2007

Dr. M. C. Sarmah  
M.Com, Ph.D., LL.B.  
Advocate, Gauhati High Court  
Railway Advocate, Central Administrative Tribunal,  
Guwahati

37, F. 3114, 31st Street, Gauhati  
Dy. Chief Personnel Officer (RZ)  
N. F. Railway, Gauhati  
Pradip Kumar Acharjee  
N. F. Railway, Gauhati

The medical test includes test of colour vision as trains run and are controlled by colour signals. As per Annexure B of the O.A. (at page 31), the medical officer concerned has certified the applicant "Unfit for promotion to Group B post in Technical category for sub-standard vision". In view of this clear medical certificate therefore, the applicant does not qualify for promotion to Group B service in the Electrical department of the Railways. It is therefore urged that the application be dismissed for want of any cause of action.

Reason for strict medical test for promotion to Gr.B.

Guideline for medical examination of railway employees for promotion from non-gazetted to gazetted posts is laid down in Indian Railway Medical Manual, volume I - 2000 edition, paragraphs 530 and 532 as follows:-

**"530. CLASSIFICATION OF GAZETTED POSTS FOR THE PURPOSE:-**

For the purpose of examination of visual acuity of Railway employees promoted from non-gazetted to gazetted posts, the gazetted posts should be divided into two categories as follows:-

- (a) All posts of Mechanical, Electrical, Civil and S & T Engineering and Traffic (Transportation and Commercial) Department.
- (b) All posts of other departments which are not connected with train working or use of trolley on open line.

केंद्रीय न्यायालय अधिकारी  
Central Administrative Tribunal

3001

गुवाहाटी न्यायालय  
Guwahati Bench

532(3) All employees promoted to gazetted cadre from non-gazetted cadre will be examined for visual acuity and colour vision as per standards mentioned above irrespective of their medical category in the non-gazetted cadre".

An attested copy of the paragraphs 530 and 532 of the code is enclosed herewith and marked as ANNEXURE A

The reason why the codal provision for medical examination of non-gazetted employees for promotion to gazetted posts is strict and exacting is that in the gazetted rank the Officer may have to undertake footplate drives on Engines and Trolleys where accurate and correct reading of signal lights is required for safe train running. A wrong reading of the signal light at night or the signal arm at daytime may lead to a disaster. Train drivers, their assistants, Guards and officers on footplates or in trolleys are therefore subjected to strict standards of visual acuity and colour vision tests.

By Chief Personnel Officer (Gaz.)  
N. Prakash Singh, IAS  
W.M.Y. 2000

5. Parawise comments:

5.1. That as regards paragraphs 4.1, 4.2 and 4.3, respondents have no remarks to offer as the applicant's claims are part of the records and the applicant is put to the strictest proof of his claims.

5.2. That as regards paragraph 4.4, respondents beg to submit that the service record of the applicant was partly tainted by the admitted incident of his remaining absent from duty without authority. Being a senior staff of the administration the applicant is expected to set an example of good conduct to his subordinate staff. Therefore, his failure to live up to the required standard of good conduct left a bad impression on the seniors although, as claimed by the applicant, the warning given to him for his bad conduct was not a penalty, in that sense.

5.3. That as regards paragraph 4.5, respondents beg to submit that the applicant himself has admitted that he was conveyed certain adverse remarks in his confidential report for the year ending on 31.03.1995 and that his representation made in this regard was rejected. It is clear that these remarks remained on the records and may act to adversely affect his future service life, especially in the background of his case of unauthorised absence as stated by the applicant in paragraph 4.4 of the O.A. The stance of the applicant that these incidents are technically not to be considered blots in his service records for purpose of future promotion may not help him in future service prospects as the overall subjective impression leaves much to be desired in his conduct.

5.4. That as regards paragraph 4.6, respondents beg to state that the administration favourably considered the applicant's promotion to the post of Senior Section Engineer in spite of his background tainted by the above-mentioned incidents concerning his service records and treated him without prejudice. This also proves without any trace of doubt that the respondents treated the applicant with fairness and justice as far as his non-gazetted service was concerned. He was also allowed to appear for the test for promotion to group B service in the gazetted cadre but could not clear the mandatory medical test and thus

केन्द्रीय प्रशासनिक अधिकारी  
Central Administrative Tribunal

प्राप्तिकारी अधिकारी (प्राप्ति)  
Dy. Compt. Officer (Prapti)  
R.S.

300720

...P.4....

गुरुवारी दोपहर  
Guruvi Dohar

3 OCT 20

(4)

গুৱাহাটী ন্যায়পীঠ  
Guwahati Bench

5.5. That as regards paragraphs 4.7, 4.8, 4.9, 4.10, 4.11, 4.12 and 4.13, the respondents beg to state that the statements made therein are part of the records in O.A. 172/1998 and the Hon'ble Tribunal was pleased to issued order on the same on 27.04.2001.

5.6. That as regards paragraphs 4.14, 4.15, 4.16, 4.17, 4.18, 4.19, 4.20, 4.21, 4.22 and 4.23, the respondents beg to state that in these paragraphs the applicant has given only a detailed description of the process through which the WPC7249/2001 filed by the respondents in the Gauhati High Court proceeded till 7.11.2006 on which date the Hon'ble High Court closed the writ petition as infructuous in view of the fact that the respondents had in the mean while complied with the directions of the Hon'ble CAT, Guwahati Bench in their order dated 24.04.2001. In this connection, it is submitted that as per Hon'ble Tribunal's orders a fresh medical examination was conducted on the applicant and it was unfortunate that the applicant was declared medically unfit for promotion to gazetted cadre.

5.7. That in regard to paragraph 4.24, respondents beg to submit that the medical test report of the applicant dated 16.01.2006 cannot be questioned or challenged by the applicant as the same is based on codal provisions applicable to all employees similarly placed as that of the applicant. The medical examination of the applicant was based strictly on the technical guidance provided in the prescribed codes. The applicant has not cited any technical flaw in the process of examination nor has he pointed out any case to prove prejudice against him or show of favour to another person to his own detriment. In view of this, therefore, the challenge to the medical examination report cannot stand judicial scrutiny.

5.8. That in regard to paragraphs 4.25, 4.26 and 4.27, respondents beg to state that annexure D of the O.A. itself indicates the reason why "Only those who qualify in the medical examination of prescribed standard should be called for viva-voce". The letter indicates in paragraph 1 that the ~~বেন্দু~~ have "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". Since the medical examination standard for all non-gazetted staff is uniformly applicable there is no question of any violation of provisions of Articles 14, 16, 21 or any other Article of the constitution of India.

আ. প. কামুক অধিকারী ( রাজ )  
Dy. Com. P. & S. Bd. Office ( S. 2 )  
প্ৰিয়া মুখোপাধি  
P. M. Mukhopadhyay

3 OCT 200

(5)

गुवाहाटी न्यायपीठ  
Guwahati Bench

5.9. That as regards paragraph 4.28, the respondents submit that the contention of the applicant about the nature of duties of Group C and Group B employees is not correct. The duties of a group-B officer in the Electrical Engineering department, which is the subject matter of the present O.A., is comprehensive and a group B Officer is often required to conduct footplate and motor trolley inspection along with officers of other technical departments such as civil and mechanical engineer and are required to guide subordinate officials of their department by issue of instructions and for implementing them in the interest of safety in train and trolley running. Since railway trains run on colour light and semaphor signals the eye sight tests of Group B Officers of departments mentioned in paragraph 530 of Indian Railway Medical Manual Volume I (para 530-a) are very strict as stated in the manual. The prescribed standard of test for non-gazetted staff is comparatively less strict as far as eye sight and colour vision is concerned. In the table given in paragraph 4.28 the applicant himself states under Group B the words "Any other work assigned by CEE, Dy.CEE/PS & SEE/PS" and this work very often and regularly includes footplate and trolley inspection and such other assignments concerning safety in train running. These are the reasons why the Railway Board was required to issue instructions vide their letter dated 31.10.1991 quoted by the applicant as Annexure D to the O.A. under consideration. It is submitted that these instructions issued by the Board are reasonable and necessary preventive steps taken to ensure safety of passengers and public property and therefore cannot be questioned for purely personal reasons.

5.10. That as regards paragraph 4.29, respondents respectfully submit that the applicant has no "disability" as defined in section 2(i) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 but only suffers from "sub standard vision" as clearly indicated by the Medical Officer concerned in the medical certificate dated 16.01.2006 (Annexure B of the O.A.). Since a non-gazetted employee such as the applicant cannot be allowed to work in open line train running and trolley duties his promotion to group B may endanger passenger safety. This consideration of safety of life and property of passenger appears to be an overwhelming consideration beyond the scope of the Act of 1995 mentioned in the O.A.

3 OCT 19

(6)

गुवाहाटी न्यायपीठ  
Guwahati Bench

5.11. That in regards to paragraph 4.30, respondents beg to submit that there is no contradiction in the medical certificate issued by the concerned medical officer as it is clearly stated that the applicant cannot be allowed to work in "Train working or use of Trolley". At the ground level the concerned paragraph of the Medical Manual may not have been quoted in the certificate, but the certificate has clearly stated the essential condition and spirit of the provision of the medical manual concerned. The so-called "contradiction" appears to be a reflection of the frustration of the applicant due to his unfortunate failure to clear the medical test.

5.12. That as regards paragraphs 4.31 and 4.32, respondents beg to state that the employees who were junior to the applicant were promoted to group B on merit and after they duly passed the required medical test. It is also a fact that the applicant was promoted to his highest non-gazetted post without any discrimination whatsoever. Since his promotion to group B post could not be considered on strictly medical ground, the respondents regret that the applicant could not be helped under the circumstances.

5.13. The applicant himself has stated in paragraph 4.29 that the Railway Board has made necessary amendments to the Indian Railway Establishment Manual in order to "prevent discrimination". This clearly proves the earnest of the Railway Ministry to follow the spirit and letter of the Act in question, namely the "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. All these however do not help the cause of the applicant as he suffers from "sub-standard vision", as stated in paragraph 5.10 above, and he cannot be promoted from his existing non-gazetted rank to group B gazetted rank due to disabilities prescribed by the Medical Manual.

Various amendments to the Indian Railway Establishment Manual, Volume I made vide Advance Correction slips No. 75, 76 and 77 are given in Annexure B enclosed.

Respondents beg to state that these amendments are consistent with the provisions of Section 47 of the "Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. It is mentioned

गुवाहाटी न्यायपीठ ( राज )  
Guwahati Bench ( RAZ )  
Dy. Chieff Physician Officer ( RAZ )  
भू. न्यायपीठ  
Pradeep Singh

3 OCT 2007

(7)

गुवाहाटी न्यायपीठ  
Guwahati Bench

in this connection that the applicant has been allowed to continue in his non-gazetted job as per his medical category and has not been reduced in rank or discriminated against in any manner due to his medical condition. His promotion to Group B gazetted cadre is not possible due to the provisions of the Medical Manual as stated above.

Under the circumstances, the respondents beg to state that for the reasons stated in the foregoing, the application is devoid of any merit and deserves to be dismissed with costs.

#### VERIFICATION

I, Shri Pradeep Kumar Singh, son of Bheup Lal Singh aged about 41 years, at present working as Dy. epol Gaz N.F.Railway, do hereby solemnly affirm that the statements made in paragraphs 1 to 5 are true to the best of my knowledge and derived from records ~~2~~ which I believe to be true and the rest are my humble submissions before the Hon'ble Tribunal.

And I sign this verification on this the 26<sup>th</sup> day of July, 2007.

*pradeep kumar singh*

Signature *दृ. मु. कौमिं के अविकारी (राज)*  
Dy. Chief Personnel Off cer (Gaz)

Designation *रेलवे मालिगांव*  
N. F. Railway, Matligon

3 OCT 2007

গুৱাহাটী ন্যায়পীঠ

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH : AT GUWAHATI

Filed by:  
Bisbari Pathak  
Advocate  
31/10/2007

ORIGINAL APPLICATION NO. 63 OF 2007

**BETWEEN**

Sri Pradip Kumar Acharjee

... Applicant

-versus-

Union of India & others

... Respondents

(A Rejoinder filed by the applicant against the written statements of the Respondents)

The re-joinder of the applicant is as follows:

I, Sri Pradip Acharjee, son of Sri Monindra Chandra Acharjee, aged about 44 years, permanent resident of Maligaon, Guwahati-11, District- Kamrup, Assam do hereby solemnly affirm and state as under:

1. That I am the applicant in the instant case. A copy of the written statements (hereafter referred to as the "WS") filed by the respondents has been served on the applicant. The applicant has gone through the same and under stood the contents thereof.
2. That save and except whatever has been specifically admitted in this re-joinder, the other statements made in the written

*Sri Pradip K. Acharjee*

30 OCT 2007  
गुवाहाटी न्यायालय  
Gauhati Bench

2

statements filed by the respondents are hereby denied by the applicant.

3. That with regard to the statements made in para 1 and 2 of the WS, the applicant has no comments to offer.
4. That with regard to the statements made in para 3 of the WS, the applicant beg to state that the respondents have taken the plea of res judicata without application of mind to the facts and circumstances of the case. No writ petition was filed by the applicant before the Hon'ble Gauhati High Court. Rather it is the respondents who approached the Hon'ble High Court and the writ petition filed by them was closed "as being infructuous". The applicant also beg to clarify here that the Hon'ble High Court in para 31 of the judgment dated 7.11.2006 has clearly granted liberty to the applicant(respondent) to approach the appropriate forum if aggrieved. Accordingly this application has been filed before this Hon'ble Tribunal.
5. That with regard to the statements made in para 4 of the WS, the applicant vehemently denies the correctness of the assertions made by the respondents. The respondents have tried to create a picture that the applicant is colour blind and he cannot see colour signals. This is a totally illegal and prejudicial comment made by the respondents. Even the impugned medical report of the applicant does not say that he is colour blind. It is further submitted here that the applicant is performing all field duties assigned to him like any other Electrical Engineer in the Railways. The applicant also beg to clarify here that the Footplate duty as mentioned by the respondents involves check on performance of the driver and co-driver of trains as per Footplate duty roster. It is therefore primarily an inspection and does not have anything to do with actual running of trains which will jeopardize life and property. The footplate duty performing officer is to check inter

Sri Pradip K. Acharyee

30 OCT 2007  
गुवाहाटी न्यायालय  
Guwahati : ch

3

alia whether the driver/co-driver is making proper assessment of signals etc. It is again reiterated here that the applicant is not colour blind as asserted by the respondents. He is very much able to read colour signals and competent to carry out such inspection. Besides, the Foot Plate duty performing officer is not performing any duty relating to engine equipments like application of brake or navigation of the train or any duty related to regular running of trains. So the virtual image created by the respondents that hundreds of passengers may die if the applicant is promoted is only illusionary and not true. The applicant also begs to state that he stood first amongst the candidates who passed the written test and he was the only B.E Degree holder while all the others were either diploma holder or apprenticeship passed candidates.

It is also further clarified by the applicant here that Foot Plate duty is not the only duty that a Group B officer carries out. The major duties in Group B includes dealing with Tender cases pertaining to power supply items including T&P and M&P items -- Revision of EAR of power items -- Monitoring of stock position of power supply items -- Leave of Group-D staff -- All works in connection with telephone etc. -- IN-charge of electrical control -- Preparation of technical specification, approved list of manufacturers for power items -- Misc. items like telephone bills, repairing of T& P items of CEE's office etc. -- Maintenance and repair contract of T&P items, machine items of HQ etc. The applicant also states that there are many Group B officers who have never performed footplate duty in their whole service life and the respondents be put to the strictest proof of the fact that a Group B officer necessarily have to do footplate duty. Besides, the applicant can very well do foot plate duty and can be tested for the same. Not admitting anything, for the sake of argument, even if it is considered that the applicant is unfit for Footplate inspection, such duty is always interchangeable with any other Group B officer.

Sri Pradip K. Acharyal

30/1/2007  
गुवाहाटी न्यायिक बोर्ड  
Guwahati Bench

Moreover, with regard to the statements relating to para 530/532 of the Indian Railway Medical Manual, the applicant would like to refer to certain other relevant provisions of law as laid down in the Persons with Disabilities Act, 1995. the relevant Section 47 is quoted below:

*"Section 47: Non-discrimination in Government employments -*

*(2) No promotion shall be denied to a person merely on the ground of his disability"*

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 on 1st to 5th Dec. 1992, a proclamation was adopted on the Full Participation and Equality of People with Disabilities in the Asia and the Pacific Region. Our country is a signatory to the said 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;

*Sri Pradip K. Acharyee*

३०८ २०११

गुवाहाटी न्यूयार्क  
Guwahati, N.Y.C.

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-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 equalization of opportunities for persons with disabilities; and

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

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) in crystal clear terms, provides that no promotion shall be denied to a person merely on the ground of his disability. Para 189-A, 213A, 1301, 1302, 1303, 1309, 1310 and 1311 of Indian Railway Establishment Manual also has subsequently provided for similar provisions. Obviously, in the instant case, the applicant was not considered for promotion on the ground that he was considered to be visually handicapped. Law is now well settled in this regard that such action is discriminatory not tenable in the eye of law.

A copy of the proforma for footplate inspection is annexed hereto as **Annexure F**.

6. That with regard to the statements made in para 5.1, the applicant has no comments to offer.

Sri Pradip K. Acharyee

3 OCT 2001  
गुवाहाटी अदायकी

7. The with regard to the statements made in para 5.2, the applicant states that the allegation raised against the applicant is not supported by any records. The applicant had to remain absent for a period as he was sick and this has been duly brought to the knowledge of the office. The applicant is not tainted for unauthorized leave. The applicant was once shown caused in the year 1994 for unauthorized absence but the authorities were satisfied with the reply of the applicant showing medical grounds for his absence and the said proceedings were closed with a simple warning to the applicant to be more punctual in future. The said warning is not a penalty.
8. That with regard to the statements made in para 5.3 and 5.4, the applicant state that order of this Hon'ble Tribunal in O.A 172/1998 (Annexure A to the OA) has clarified all matter relating to the adverse remarks against the applicant. The respondents have not challenged the said before any higher Court and hence the order on OA 172/98 has attained finality. Rather, the stand taken by the respondents in the WPC 7249/2001 revolved around the "medical unfitness" of the applicant and the WPC was withdrawn as infructuous as appropriate orders were passed after medical re-examination the applicant in compliance with the order dated 27.4.2001 in OA 172/1998. As the order dated 27.4.2001 has attained finality to the extent of adverse remarks in ACR of the applicant, the respondents cannot seek to reopen the said question before this Hon'ble Tribunal again and any argument advanced in this regard by the respondents would be asking this Hon'ble Tribunal to review its earlier order dated 27.4.2001 which is not permissible at this stage, particularly after the fact that the Hon'ble High Court has not interfered with the order of this Hon'ble Tribunal in any manner.
9. That with regard to the statements made in para 5.5 and 5.6, the applicant has no comments to offer. Nothing contrary or inconsistent with the records is admitted.

Sri Pradip K. Acharyee

3 OCT 2008

गुवाहाटी न्यायपाल  
Guwahati Bench

7

10. That with regard to the statements made in para 5.8, the applicant states that these averments of the respondents are contrary to the settled position of law. The applicant has been clearly discriminated.
11. That with regard to the statements made in para 5.9 and 5.10, the applicant reasserts and reiterates that statements made in para 5 of this rejoinder.
12. That with regard to the statements made in para 5.11 and 5.12, the applicant beg to state the comments by the respondents relating to the frustration of the applicant is unethical and uncalled for. The applicant, despite being illegally deprived of promotion, has been sincerely doing his duties. The legal battle waged by the applicant is a fight for his rights and the sarcastic comment about his "frustration" made by the respondents only reflects the malafide attitude that the respondents is maintaining towards the applicant. The applicant also beg to state there that all other promotes of the batch of the applicant were given grace marks to pass the qualifying examination and the applicant alone passed the examination without any grace marks and he stood first. However, the merit of the applicant has been overlooked by the respondents at each and every stage and he has been subjected to hostile discrimination which any civil society governed by the rule of law would not permit.
13. That with regard to the statements made in para 5.13, the applicant states beg to reassert and reiterate the statements made in para 5 of this rejoinder. The applicant further submits that as per Railway Board's letter No. E(NG)11/2000/RC-2/18 dated 28.6.2000, 3% reservation to persons with disabilities has been extended to Grade B and A service. Moreover, Railway Board letter No. 2005/H/5/13 dated 9.4.2007 have made provisions for relaxation including relaxation in medical standards with specific approval of the concerned Board Member of railway board. As such, under the provisions of law, there is no for non consideration of the case of the applicant and the

Sri Pradip K. Acharya

3 OCT 2007

गुवाहाटी न्यायपीठ  
Guwahati Bench

8

impugned action of the respondents is liable to be set aside and quashed and the applicant be given all benefits as per his lawful entitlement.

A copy of the Railway Board letter dated 9.4.2007 is annexed as **Annexure G.**

14. That the statements made in para 1, 2, 3, 4, 6, 9 and 11 are true to my knowledge and belief, those made in para 5, 7, 8, 10, 12 and 13 being matter of records are true to my information derived there from and the rest are my humble submission and statements on legal advice. I have not suppressed any material facts.

And I sign this affidavit on this 3<sup>rd</sup> day of <sup>October</sup> September 2007 at Guwahati.

*Sri Radupreter Acharyee*

Deponent

Identified by me

*Bibhash Pathak*

Advocate

Solemnly affirmed and signed before me by the deponent, who is identified by Sri *B. Pathak*....., Advocate, on this 3<sup>rd</sup> day of <sup>October</sup> September 2007 at Guwahati.

*H. K. Gogoi*

Advocate

From \_\_\_\_\_ to \_\_\_\_\_ Date \_\_\_\_\_

1) Train No. \_\_\_\_\_

2) Engine No. \_\_\_\_\_ of \_\_\_\_\_ shed, in \_\_\_\_\_  
(Long hood/short hood).

Air pressure in Eng. EP \_\_\_\_\_ KG/CM<sup>2</sup>

EP \_\_\_\_\_ KG/CM<sup>2</sup>

Vacuum " " \_\_\_\_\_ /CM<sup>2</sup>

3) Lead \_\_\_\_\_

4) Driver Shri \_\_\_\_\_ Driver \_\_\_\_\_

D.O.A. \_\_\_\_\_ as \_\_\_\_\_

D.O.B. \_\_\_\_\_

Promoted as Driver/Goods on \_\_\_\_\_

" " Driver/Pass on \_\_\_\_\_

" " Driver/ME on \_\_\_\_\_

Last date of PME \_\_\_\_\_

Last date of Ref.Course \_\_\_\_\_

Competency certificate issued by \_\_\_\_\_ on \_\_\_\_\_

valid upto \_\_\_\_\_ Gradation \_\_\_\_\_

Certified by LI/ \_\_\_\_\_

Psychological test held at \_\_\_\_\_ on \_\_\_\_\_

whether in uniform \_\_\_\_\_

5) DAD Shri \_\_\_\_\_ DAD/ \_\_\_\_\_

D.O.A. \_\_\_\_\_ AS \_\_\_\_\_

D.O.B. \_\_\_\_\_

Promoted as DAD on \_\_\_\_\_

Last date of PME \_\_\_\_\_

Last date of Ref. Course \_\_\_\_\_

whether in uniform \_\_\_\_\_

Psychological test held on \_\_\_\_\_ at \_\_\_\_\_

contd.

Certified to be true Copy

*Biblesh Pathak*  
Advocate

6) Engine equipments :

- 1) Engine repair book, (ii) Engine log book, (iii) Mech. Tool box.
- ii) Fire Extinguisher-2, (iv) Spare electric head light bulb-1.
- iii) Cab light bulb-2

7) Personal equipments :

- i) Tri couleur torch-1
- ii) H.S.flag(G-1, R-2)
- iii) Detonators-10 of \_\_\_\_\_ make, (iv) Fusco-1 of \_\_\_\_\_ make.
- v) WTT, (vi) Washer-4, (vii) Drivers hand book. (viii) Health card.
- ix) Rough journal book, (x) Misc. emergency tools.
- xi) Two pairs of spectacles.
- 3) Flasher lights both front & rear \_\_\_\_\_
- 9) Walkie-talkie \_\_\_\_\_ (10) Speedometer Electrical/ Mechanical \_\_\_\_\_ (11) Engineering restriction \_\_\_\_\_

Points are generally checked :

- i) Whether Driver & DAD call out signal aspect loudly to each other as soon as the signal/Engineering indicator becomes visible.
- ii) Whether Driver & DAD look back frequently in curves to see that the train is following in a proper and safe manner.
- iii) Whether the Engine Crew exchange signal with the Guard before starting the train.
- iv) Whether signals are acknowledged by the engine crew with the station staff while passing through a station & with the Guard after passing the station.
- v) Whether staff is deputed to watch the passing train from the opposite side of the station building.
- vi) Whether Engineering Indicators (stop board/caution indicator/ speed indicator/T/P & T/G Beard) are provided for temporary/ ~~excessive~~ <sup>excessive</sup> speed restriction

Contd.. (3)...

- vii) Whether Drivers whistle continued from the W/L Board till passing the L.C. gate/level crossings.
- viii) Whether Gateman exchanges signed with the Guard after passing the L.C. gate.
- (ix) Whether Driver follows the sped restrictions rigidly.
- (x) Whether Km posts/Hectometre posts are available & clearly visible.
- (xi) Whether train crew test the brake bower of the train at the first opportunity.
- (xii) Whether the signals are clearly visible to the Engine crew(burning brightly/obstructed by branches of trees).
- (xiii) Whether Gateman & station staff are in proper uniform.
- xiv) Whether brake power certificate caution order issued is adequate and related to the train.

ABBREVIATIONS: BP = Brake pressure; FP = Fuel pressure.  
DOA = Date of Appointment; DOB = Date of Birth  
PME = Periodic Medical Examination  
ME = Mail, Express; Ref. Course = Refresher Course  
L.I. = Loco Inspector  
H.S. flag = Hand Signal flag.

N.F.Railway

MED - 233.

No.E/171/o/PT IV(C)

To

GM (Con)/ Maligaon, AGM/Maligeon,  
All PHODS, DRMs, ADRMs, CWM/NBQ, DBWS, ADRM/NJP,  
All Sr. DPO/DPOs DFMS, WAO/NBQs, DBWS, AM(P&KGN, SAU/NJP,  
All Area Managers, AMM/BLST, DEN/DBRT, WM/EWS/BNGN,  
ALL CMS/MS, PRINCIPAL, ZRTI/APDJ, PRINCIPAL, STC/NBQs,  
SR. DEN/MLG, SR. EDPM/MLG, DY CSTE (MWY)MLG, DY CMM/PNO,  
DY CSTE (TC)/MLG, CPRO, Dy CAO/Cash & Pay/MLG, All Non-divisionalised Units,  
MD/CH/MLG, Sr.DEN/MLG, DY CMM/NJP. All Sr. DME(D)s, Dy. CPO(Con)/MLG,  
DSTE(WS)/PNO, Dy. CPO/GAZ, DY CPO/HQ, Dy CPO/IR,  
Dy CPO/Recit., Chairman/RRB/GHY, All SPOs and APOS, DGM/G/MLG  
The GS/NFREU, NFRMU, AISCTREA, NFROBCEA, NFRPFA/MLG.

Office of the  
General Manager(P)  
Maligaon,  
dated, 30-04-07.

Sub:- Medical exam criteria for various categories for promotions from  
Group 'C' to Group 'B'.

A copy of Railway Board's letter No.2005/H/5/13 dated 9-4-07 on the above  
mentioned subject is forwarded herewith for information and necessary action pl.

DA-as above.

*J. S. S. 27/4/07*  
(H. K. SEN) 27/4/07  
890/MPP  
For General Manager(P)

( Copy of Railway Board's letter No.2005/H/5/13 dated 9-4-07)

Sub:- Medical exam criteria for various categories for promotions from  
Group 'C' to Group 'B'.

The matter of relaxation of medical examination standard for Railway employees  
on promotion from Non-Gazetted to Gazetted posts have been under examination of  
the Board for some time. After careful examination of the issue the Board has approved  
the following clause:-

"any one of the conditions may be relaxed in favour of any candidate for  
special reasons. The relaxation in medical standards in each case should have  
specific approval of the concerned Board Member of Rly. Board".

In view of this relaxation, it is for the Zonal Railways to decide the post in the  
department where the employee can be absorbed on promotion from Non- Gazetted to  
Gazetted post.

A sub para under para 532 of IRMM, 2000 may be added as per advance  
correction slip enclosed:

Enccl: ACS to para 532 of IRMM, 2000

*27/4/07*  
(Dr. Hanuman Singh)  
Executive Director/Health  
Railway Board.

Certified to be true Copy.

*Bishash Pathak*  
Advocate

Advance Correction to para 532 of IRMM, 2000

The following may be added to para 532 of IRMM.

532(4) :-

The relaxation of medical standards on promotion from Group 'C' to Group 'B' in all categories may however be considered for specific posts in the concerned Department on case to case basis under the following clause:- "any one of the conditions may be relaxed in favour of any candidate for special reasons. The relaxation in medical standards in each case should have specific approval of the concerned Board Member of Rly. Board".

(Authority: Board's letter No. 2005/H/5/13 dated 9.4.2007)

**Note:-**

1. CMD/Zonal Railway if satisfied with adverse Medical exam report, can refer the case to PHOD for examining the concerned employee for a suitable posting if available in his department, where if posted, the underlying medical condition shall not compromise the safety & productivity of work.
2. After obtaining the above certification from PHOD, a fresh medical exam may be processed for the specified post.
3. The report of re-medical exam if in favour of the employee, will be forwarded through CMD/Zonal Railway to DG/RHS for obtaining the approval of concerned Railway Board Member.
4. The Board decision shall be communicated to Zonal Railway for further action.

26 MAY 2007

গুৱাহাটী ন্যায়পীঠ

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
GUWAHATI BENCH : AT GUWAHATIAdmitted  
Bishakhatra  
Advocate  
12/7/2007ORIGINAL APPLICATION NO. 63 OF 2007In the matter of:

Sri Pradip Kumar Acharjee

... Applicant

-versus-

Union of India &amp; others

... Respondents

-and-

In the matter of:

Additional Affidavit filed by the Applicant

I, Sri Pradip Kumar Acharjee, son of Sri Monindra Chandra Acharjee, aged about 44 years, permanent resident of Maligaon, Guwahati-11, District- Kamrup, Assam do hereby solemnly affirm and state as under:

*Received copy*

1. That I am the applicant in the instant case and as such I am familiar with the facts and circumstances of the case.

*DR. M. C. Samanta  
Advocate*

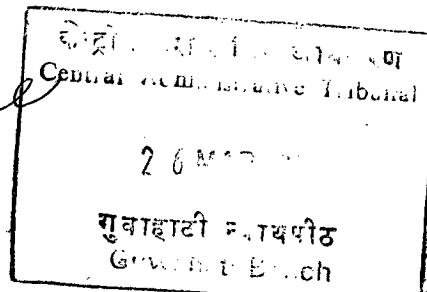
2. That on 12.3.2007 I had filed the instant OA No. 63/2007 before this Hon'ble Tribunal contending that my non consideration for promotion is violation of the provisions of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The said OA has been admitted by the Hon'ble Tribunal and the case is now pending for hearing.

*Pradip Kr. Acharjee*

3. That during the pendency of the instant case, Railway Board letter No. 2005/H/5/13 dated 9.4.2007 has been issued which provides for provisions for relaxation including relaxation in medical standards with specific approval of the concerned Board Member of Railway Board. This has been circulated vide No. E/171/o/Pt.IV(C) dated 30.4.2007. As such, under the provisions of law, there is now ample scope for fresh consideration of the case of the applicant for promotion by means of relaxed medical standards. A copy of the order dated 30.4.2007 has been annexed by the applicant as Annexure G in the rejoinder filed by the applicant.

4. That in view of the above development, the applicant has now submitted a fresh representation dated 11.12.2007 before the General Manager, NF Railway, Maligaon inter alia stating that being considered of "substandard vision" he falls in the category of Disabled Person under the Definition of Section 2(u) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. And as per Section 47(2) of the Act, no promotion shall be denied to a person merely on the ground of his disability. It was also stated that the Railway Board has itself made necessary amendments to the Indian Railway Establishment Manual in order to prevent discrimination merely on the ground of physical disability. Para 189-A, 213A, 1301, 1302, 1303, 1309, 1310 and 1311 of Indian Railway Establishment Manual provides for such provisions. The applicant has further submitted in the said representation that that the Hon'ble Gauhati High Court in an identical case of promotion from Group C to Group B gazetted post in Railways, held that non consideration for promotion for 'disability of vision' is illegal and contrary to the provisions of Section 47(2) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. [Judgment and order dated 5.6.2007 in WPC 7113/2004 – Sri Alokanda Sarkar –vs- Union of India]. Similar view has been

Pradip Kr Acharya



taken by the Hon'ble Supreme Court of India in the case of Union of India -vs- Sanjay Kumar Jain [reported in (2004)6 SCC 708] which is again a case of promotion from Grade C to Grade B post in Railways relating to persons with 'disability of vision'.

A copy of the representation-dated 11.12.2007 is annexed herewith as **Annexure H**.

5. That by this affidavit, the applicant seeks to bring into record the above development. It is prayed that the above representation dated 11.12.2007 (Annexure H) may be treated as a part of the record of the OA No. 63/2007.
6. That the statements made in para 1, 2 and 3 are true to my knowledge and belief, those made in para 4 being matter of records are true to my information derived there from and the rest are my humble submission and statements on legal advice. I have not suppressed any material facts.

And I sign this affidavit on this 11<sup>th</sup> day of December 2007 at Guwahati.

*Pradip K. Acharyee*

Identified by me

*Paibhash Pathak*

Advocate

Deponent

Solemnly affirmed and signed before me by the deponent, who is identified by Sri *Paibhash Pathak*, Advocate, on this 11<sup>th</sup> day of December 2007 at Guwahati.

*Hemanta K. Gogoi*  
Advocate

केन्द्रीय विधायक अधिकरण Central Administrative Tribunal
7/11/07
गुवाहाटी न्यायालय Guwahati Bench

To,

Date- 11.12.2007

The General Manager,  
NF Railway, Maligaon  
Guwahati - 781011

(Through ADEE/M.G.)

**Subject- Representation praying for consideration of promotion from non-gazetted Group C post to gazetted Group B post based on relaxation in medical standards and in terms of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995**

Sir,

With due respect, I would like to submit the following for your due consideration-

1. That Sir, since 7.8.96 I am working in the Group C post of Senior Electrical Foreman [now designated as Senior Section Engineer (Electrical)] with full diligence and sincerity without any blemish.
2. That Sir, in 1998 a selection process for promotion to the post of Assistant Electrical Engineer in Group-B against 70% vacancies was advertised. I appeared in the said process and secured 1<sup>st</sup> position in the written examination. However, my case was not considered for promotion interalia on the ground of medical unfitness.
3. That Sir, aggrieved by my non selection, I approached the Hon'ble Central Administrative Tribunal, Guwahati Bench by way of OA No. 172/1998 which was heard by the Hon'ble Tribunal on 27.4.2001. By the said order, it was directed to hold a review DPC for consideration of my case and also to hold a fresh medical examination.

D. No. 788  
u/12/07.

MR  
u/12/07 (T.S. RAJU)  
Clerk  
ADEE Office M.G.

Contd→

certified to be true copy  
Hemanta Kr. Gogoi  
Advocate  
12.12.07

4. That Sir, the Railways preferred to challenge the order of the Tribunal by way of WPC No. 7249/2001. However, during the pendency of the said petition, a fresh medical examination was done and I was again declared unfit for promotion for having "sub standard vision". This was done vide medical report dated 16.1.2006. Based on this fact, the Railways sought to withdraw the WPC No. 7249/2001 as infructuous and the Hon'ble High Court accordingly ordered vide judgment and order dated 7.11.2006 that the writ petition is closed as being infructuous giving liberty to me to approach the appropriate forum for redressal of my grievance, if any.
5. That Sir, thereafter on 12.3.2007, I approached the Hon'ble Central Administrative Tribunal, Guwahati Bench vide OA No. 63/2007 contending that my non consideration for promotion is violation of the provisions of the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The said OA has been admitted by the Hon'ble Tribunal and the case is now pending for hearing.
6. That during the pendency of the said case, Railway Board letter No. 2005/H/5/13 dated 9.4.2007 have been issued which provides for provisions for relaxation including relaxation in medical standards with specific approval of the concerned Board Member of Railway Board. This has been circulated vide No. E/171/o/Pt.IV(C) dated 30.4.2007. As such, under the provisions of law, there is now ample scope for fresh consideration of my case for promotion by means of relaxed medical standards. A copy of the order dated 30.4.2007 is enclosed herewith for ready reference.
7. That Sir, I also beg to state here that being considered of "substandard vision" I fall in the category of Disabled Person under the Definition of Section 2(u) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. And as per Section 47(2) of the Act, no promotion shall be denied to a

*Contd→*

—b—

person merely on the ground of his disability. It is also pertinent to state here that the Railway Board has itself made necessary amendments to the Indian Railway Establishment Manual in order to prevent discrimination merely on the ground of physical disability. Para 189-A, 213A, 1301, 1302, 1303, 1309, 1310 and 1311 of Indian Railway Establishment Manual provides for such provisions. In the instant case, my case was not considered for promotion on the ground that I am considered to be visually handicapped. Law is now well settled in this regard that such action is discriminatory and not tenable in the eye of law.

8. That in connection with the above, I further submit that the Hon'ble Gauhati High Court in an identical case of promotion from Group C to Group B gazetted post in Railways, held that non consideration for promotion for 'disability of vision' is illegal and contrary to the provisions of Section 47(2) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. [Judgment and order dated 5.6.2007 in WPC 7113/2004 – Sri Aloknanda Sarkar –vs- Union of India....copy enclosed]. Similar view has been taken by the Hon'ble Supreme Court of India in the case of Union of India –vs- Sanjay Kumar Jain [reported in (2004)6 SCC 708.....copy enclosed] which is again a case of promotion from Grade C to Grade B post in Railways relating to persons with 'disability of vision'.
9. That Sir, in view of the above well settled law, my case for promotion needs to be reconsidered and the medical report dated 16.1.2006 alone should not be considered a bar for blocking my future promotional avenue if I am otherwise suitable for the same. I also pray that since the position of a Group B officer necessarily does not involve matters directly related to safety and security and many such duties are always interchangeable with any other, Group B officers within the scope of the rules, there is ample scope for adjusting me in any suitable Group B post and the same should be done in view of the

*Contd—>*

provisions of the Section 47(2) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 read with the provisions of the Para 189-A, 213A, 1301, 1302, 1303, 1309, 1310 and 1311 of Indian Railway Establishment Manual and also as per the law settled by the Gauhati High Court and also the Hon'ble Supreme Court of India.

10. That Sir, I would like to pray for a personal hearing in this regard before any decision is arrived at on the instant representation.

In view of the above, it is once again respectfully prayed that my case for promotion be taken up and considered sympathetically as per the provisions of law.

DA: 14 sheets  
(Fourteen sheets)

Yours sincerely,

Pradip Kumar Acharjee  
11/12/07

Sri Pradip Kumar Acharjee  
Presently Serving as the Senior Section  
Engineer (Electrical), under the Assistant  
Divisional Electrical Engineer, Maligaon

-8-

12

G

N.F.Railway

MED - 233.

No.E/171/o/Pt IV(C)

To

GM (Con)/ Maligaon, AGM/Maligaon,  
All PHODS, DRMs, ADRMs, CWM/NBQ, DBWS, ADRM/NJP,  
All Sr. DPO/DPOs DFMS, WAO/NBQs, DBWS, AM(P&)KGN, SAC/NJP,  
All Area Managers, AMM/BLST, DEN/DBRT, WM/EWS/BNGN,  
ALL CMS/MS, PRINCIPAL, ZRTI/APDJ, PRINCIPAL, STC/NBQs,  
SR. DEN/MLG, SR. EDFM/MLG, Dy CSTE (MW)/MLG, Dy CMM/PNO,  
DY CSTE (TC)/MLG, CPRO, Dy CAO/Cash & Pay/MLG, All Non-divisionalised Units,  
MD/CH/MLG, Sr.DEN/MLG, DY CMM/NJP. All Sr. DME(D)s, Dy. CPO(Con)/MLG,  
DSTE(WS)/PNO, Dy. CPO/GAZ, DY CPO/HQ, Dy. CPO/IR,  
Dy CPO/Recrt., Chairman/RRB/GHY, All SPOs and APOS, DGM/G/MLG  
The GS/NFREU, NFRMU, AISCTREA, NFRPFA/MLG.

Office of the  
General Manager(P)  
Maligaon,  
dated, 30-04-07.

Sub:- Medical exam criteria for various categories for promotions from  
Group 'C' to Group 'B'.

A copy of Railway Board's letter No.2005/H/5/13 dated 9-4-07 on the above  
mentioned subject is forwarded herewith for information and necessary action pl.

DA-as above.

(A. K. SPN) 27/4/07  
BRC/MPP  
For General Manager(I)

(Copy of Railway Board's letter No.2005/H/5/13 dated 9-4-07)

Sub:- Medical exam criteria for various categories for promotions from  
Group 'C' to Group 'B'.

The matter of relaxation of medical examination standard for Railway employees  
on promotion from Non-Gazetted to Gazetted posts have been under examination of  
the Board for some time. After careful examination of the issue the Board has approved  
the following clause:-

"any one of the conditions may be relaxed in favour of any candidate for  
special reasons. The relaxation in medical standards in each case should have  
specific approval of the concerned Board Member of Rly. Board".

In view of this relaxation, it is for the Zonal Railways to decide the post in the  
department where the employee can be absorbed on promotion from Non- Gazetted to  
Gazetted post.

A sub para under para 532 of IRMM, 2000 may be added as per advance  
correction slip enclosed.

Encl: ACS to para 532 of IRMM, 2000

(Dr. Hanuman Singh)  
Executive Director/Health  
Railway Board.

Advance Correction to para 532 of IRMM, 2000

The following may be added to para 532 of IRMM.

532(4) :-

The relaxation of medical standards on promotion from Group 'C' to Group 'B' in all categories may however be considered for specific posts in the concerned Department on case to case basis under the following clause:- "any one of the conditions may be relaxed in favour of any candidate for special reasons. The relaxation in medical standards in each case should have specific approval of the concerned Board Member of Rly. Board".

(Authority: Board's letter No. 2005/H/5/13 dated 9.4.2007)

Note:-

1. CMD/Zonal Railway if satisfied with adverse Medical exam report, can refer the case to PHOD for examining the concerned employee for a suitable posting if available in his department, where, if posted, the underlying medical condition shall not compromise the safety & productivity of work.
2. After obtaining the above certification from PHOD, a fresh medical exam may be processed for the specified post.
3. The report of re-medical exam if in favour of the employee, will be forwarded through CMD/Zonal Railway to DG/RHS for obtaining the approval of concerned Railway Board Member.
4. The Board decision shall be communicated to Zonal Railway for further action.

प्रतिलिपि के लिए आवेदन की तारीख Date of application for the copy	स्टाम्प और फोलियो की अपेक्षित दरम्या सुनित करने की तिथि Date fixed for notifying the requisite stamp and folio.	अपेक्षित स्टाम्प और फोलियो देने की तारीख Date of delivery of the requisite stamp and folio.	तारीख, जबकि देने के लिए प्रतिलिपि तैयार ही Date on which the copy was ready for delivery.	आवेदक को प्रतिलिपि देने की तारीख Date of making over the copy to the applicant.
8/8/02	9/8/02	9/8/02	9/8/02	9/8/02

(High Court of Assam, Nagaland,  
Mizoram & Arunachal Pradesh)

CIVIL APPELLATE SIDE

Appeal from

Civil Rule

WP (c)

No.

7113 of 2004

Appellant

Petitioner

Sri Alokendra Sarkar

Versus

Union of India:

Respondent

Opposite Party

Appellant  
For  
Petitioner

Mr. N. Choudhury  
Mr. A. Chakraborty

Respondent  
For  
Opposite Party

S.C. (Railway)

Noting by Officer or Advocate	Serial No.	Date	Office notes, reports, orders or proceedings with signature
	2	3	4

11.2.2

- AND -

IN THE MATTER OF:

Section 47(2) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

AND

IN THE MATTER OF:

Sri Alokananda Sarkar  
S/o Sri Bhabananda Sarkar,  
Qtr. No.1798, Arabinda Colony,  
P.O. Alipurduar Junction,  
Dist. Jalpaiguri,  
PIN-736123.

Petitioner

VERSUS -

1. The Union of India represented by the General Manager, N.F. Railway, Maligaon, Guwahati-11.
2. The General Manager(P), N.F. Railway, Maligaon, Guwahati-11.
3. The Divisional Railway Manager(P), N.F. Railway, Alipurduar Junction.
4. Railway Board through the Chairman, Rail Bhawan, New Delhi.

3

++ 3 ++

6. The Chief Medical Director,  
N.F. Railway, Maligaon, Guwahati-11.

6. The Chief Medical Superintendent,  
N.F. Railway, Alipurduar Junction.

7. Sri Lakshman Ram, <sup>1</sup>  
Assistant Commercial Manager,  
(Ticket Checking), N.F. Railway,  
Maligaon, Guwahati-11.

8. Sri Khagendra Nath Boro,  
Assistant Commercial Manager,  
(Claims Prevention), N.F. Railway,  
Maligaon, Guwahati-11.

9. Central Administrative Tribunal,  
Guwahati Bench,  
Bhangagarh, Guwahati-5.

Respondents

Noting by Officer or Advocate	Serial No.	Date	Office notes, reports, orders or proceedings with signature
1	2	3	4

WP(C)7113/2004

**BEFORE**  
**HON'BLE THE CHIEF JUSTICE MR. J.CHELAMESWAR**  
**THE HON'BLE SMT. JUSTICE A HAZARIKA**

5-6-2007

**(CHELAMESWAR, CJ)**

Aggrieved by the decision of the Central Administrative Tribunal, Guwahati Bench in O.A. No. 178/2003 dated 14.5.2004 the unsuccessful applicant preferred the present writ petition. The basic facts are not in dispute. The petitioner is an employee of the Indian Railways. He was initially recruited as a junior clerk and now he is working as Instructor Commercial (Group-C) at Zonal Training Centre, N.F. Railway, Alipurduar. Admittedly the next higher post to which the petitioner can be promoted is the Assistant Commercial Manager which once again admittedly is a Group-B post. In the year 2003 a Limited Departmental Competitive Examination for selection of candidates for filling up the post of Assistant Commercial Manager was held. It may be mentioned here that the posts of Assistant Commercial Manager are required to be filled up partially by direct recruitment and partially by

Noting by Officer or Advocate	Serial No.	Date	Office notes, reports, orders or proceeding with signature
1	2	3	4

promotion from Group-C category. The other details may not be necessary for the present case.

The petitioner appeared in the above mentioned examination. It appears that he obtained 3<sup>rd</sup> rank in the written examination among the competing candidates. As per the procedure applicable for the promotion, the petitioner and other successful candidates in the written examination are required to be subjected to a viva voce examination which is preceded by a medical examination. In the medical examination it was found that the petitioner is colour blind. Therefore the petitioner was not called upon to participate in the viva voce examination.

After exhausting all the departmental remedies the petitioner approached the Administrative Tribunal by way of the above mentioned Original Application.

The Administrative Tribunal declined to grant any relief in favour of the petitioner principally on the ground that the petitioner who commenced his career as a junior clerk and now working in the category of group-C and if promoted to Group-B post in which category the nature of the job involves the petitioner to be well equipped with the operational aspect of the

Noting by Officer or Advocate	Serial No.	Date	Office notes, reports, orders or proceedings with signature
-------------------------------	------------	------	---

1	2	3	4
---	---	---	---

railways and in due course he will be entitled to promotion in the next category i.e. group-A where once again he would be required to be associated with the operation of the railways and therefore in both these categories a person with defective vision is unsuited. Insofar as the requirement of normal vision for safe and successful discharge of duties in Group-B category for which the petitioner seeks promotion, the Tribunal did not record any definite finding but it is the case of the respondent as can be seen from the pleadings and also taken note of by the Tribunal in the order under challenge that the Group-B post of Assistant Commercial Manager is available both in transportation wing as well as the commercial wing of the railways and the post is interchangeable and in the event of the petitioner being promoted to the post of Assistant Commercial Manager there is a likelihood of his being posted to the operational wing where persons with defective vision are not suitable having regard to the safety requirements of the Indian Railways.

The learned counsel for the petitioner submitted that the issue involved in the present writ petition is squarely covered by the decision of the Supreme Court in (2004) 6 SCC 708 Union

Office copies, reports, orders or proceedings with signature

Noting by Officer or Advocate

No.

Date

Office copies, reports, orders or proceedings with signature

1 of India vs. Sanjay Kumar Jain. The Supreme Court was dealing with an identical situation of promotion from Group-C to Group-B post where the railways sought to deny the promotion to the respondent before the Supreme Court on the ground that the respondent suffers from disability of vision. The Supreme Court concluded that the decision of the respondent railways was illegal and contrary to the provision of Section 47(2) of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

In the circumstances, we have no alternative but to allow the present writ petition.

The writ petition is allowed setting aside the order under challenge of the Central Administrative Tribunal. Consequently the petitioner is entitled to be considered for promotion to the post of Assistant Commercial Manager, if he is otherwise suitable for the same post in accordance with law.

Sd/- J. Chelameswar  
Chief Justice

Sd/- A. Hazarika

Adv.

Sl. No. 804610

Date 8/8/82

SWORN TO BE TRUE COPY

Keneng Ram Deon

Date 9/8/82

Superintendent (Copying Section)

Gauhati High Court

Authorised U/S 16 and 1 1999

8/8/82

— 17 —  
**Union of India**

V.

**Sanjay Kumar Jain**

Union of India, Appellant v. Sanjay Kumar Jain, Respondent.

Persons With Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act  
(1 Of 1996), S. 47(2)

2004-AIR(SC)-4139

CORAM : Arijit Pasayat and C. K. Thakker, JJ.

Date of Decision: 11-Aug-04

Civil Appeal No. 5178 of 2004, (arising out of SLP (C) No. 16541 of 2003), D/- 11-8-2004.  
(From: 2003 (102) Delhi LT 525))

ADVOCATE(S): M.N. Krishnamani, Sr. Advocate, Hemant Sharma and Mrs. Anil Katiyar,  
Advocates with him, for Appellant; Respondent-in person.

Head Notes.

(1) Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act (1 of 1996), S. 47(2) - Indian Railway Establishment Manual, Paras 189-A, 531(b) - Promotion - Denial of - Employee in railways.

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 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.

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.

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.

## (2) Interpretation of Statutes - Proviso to enactment - Function

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 Survey* (1880) (5) QBD 170 (referred to in *Shah Bhojraj Kurverji Oil Mills and Ginning Factory v. Subhash Chandra Yogravji Sinha*, (AIR 1961 SC 1596) and *Calcutta Tramways Co. Ltd v. Corporation of Calcutta* (AIR 1965 SC 1728); 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 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, 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) (H.L.). 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 and others v. Raje Ram Sheoram and others*, (AIR 1991 SC 1406); *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and others*, (AIR 1991 SC 1538) and *Kerala State Housing Board and others v. Ramapriya Hotels (P) Ltd. and others*.

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

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

A statutory proviso "is something engrafted on a preceding enactment" (R v. Taunton St. James

9 B & C 836).

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

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).

Judgement:

ARIJIT PASAYAT, J. :- Leave granted.

2. The Union of India calls in question legality of the judgment rendered by a Division Bench of the Delhi High Court dismissing the Writ Petition filed by it while affirming the decision rendered by Central Administrative Tribunal, Principal Bench, New Delhi (in short 'CAT').

3. Factual position in a nutshell is as follows:

The respondent while working in Ground-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 5.31(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 petririties pigments on both the eyes. This is a disease which affects the eye-sight 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 O.A. No. 439/2001 before the CAT challenging the order dated 20-9-2000 whereby it was indicated that he was not be called for *viva voce* test as he had been declared medically unfit. The 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 189A 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 the CAT.

4. The Union of India questioned correctness of CAT's order by filing a Writ Petition which was dismissed by the impugned judgment. The High Court took note of subsection (2) of Section 47 of the Act to hold that CAT'S order is perfectly in order.

5. In support of the appeal, it was contended by Mr. M.N. Krishnamani, learned senior counsel that while referring to subsection (2) Section 47 of the Act both the CAT and the High Court overlooked the proviso to sub-section (2) of Section 47 which permits the appropriate Government to exclude by notification any establishment from the provisions of the Section.

According to him, looking at the nature of the duties which employees of Group-B have to undertake, a physically handicapped person, more particularly, one who is visually handicapped will not be able to do justice to the work. The High Court and the CAT were not justified in granting relief to the respondent after he had failed in the medical test. It was urged that the proviso makes it clear that in appropriate cases the protection provided by sub-section (2) of Section 47 of the Act can be denied and the case at hand is one of such cases.

6. The respondent who appeared in person submitted that the judgments of both the CAT and the High Court do not suffer from any infirmity to warrant interference.

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

"Section 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."

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 on 1st to 5th Dec. 1992, a proclamation was adopted on the Full Participation and Equality of People with Disabilities in the Asia and the Pacific Region. Our country is a signatory to the said 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-a-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 equalization of opportunities for persons with disabilities; and
- (vi) to make special provision of 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 of as he was considered to be visually handicapped. Much stress was laid by Mr. Krishmani 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 Survey* (1880) (5) QBD 170, (referred to in *Shah Bhojraj Kurverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha*, (AIR 1961 SC 1596) and *Calcutta Tramways Co. Ltd. v. Corporation of Calcutta*, (AIR 1965 SC 1728); 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 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; 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) (H.L.). 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 and others v. Raje Ram Sheoram and others*, (AIR 1991 SC 1406), *Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and others*, (AIR 1991 SC 1538) and *Kerala State Housing Board and others v. Ramapriya Hotels (P) Ltd. and others*.

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

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

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

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

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).

The above position was noted in *Ali M.K. and others v State of Kerala and others*, (2003 (4) Scale 197).

12. 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 17. 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.

Appeal dismissed.