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**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

O.A NO.060/01045/2014 Date of decision : 07.05.2015

**CORAM: HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J)
HON'BLE MR. UDAY KUMAR VARMA, MEMBER (A)**

...

Parmod Kumar son of Chanda Ram, H. No.3464/A, Sector 24-D,
Chandigarh.

...APPLICANT

BY ADVOCATE: Shri G.S. Sawhney

VERSUS

1. Union of India through Secretary, Ministry of Railways, Rail Bhawan, New Delhi.
2. Union Public Service Commission, through its Secretary, Dholpur House, Shahjahan Road, New Delhi-110069.
3. The Director General Health Services, Railway Board, Rail Bhawan, New Delhi.
4. The Director Establishment (Gazetted Recruitment), Railway Board, Rail Bhawan, New Delhi.
5. The Joint Director Establishment (Gazetted Recruitment), Railway Board, Rail Bhawan, New Delhi.
6. Deputy Director Establishment (Gazetted Recruitment), Railway Board, Rail Bhawan, New Delhi.

...RESPONDENTS

BY ADVOCATE: Shri R.T. P.S. Tulsi, Advocate

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ORDER

HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J):-

The applicant herein has preferred the present Original Application under Section 19 of the Administrative Tribunals Act, 1985 to assail order dated 30.07.2013 (Annexure A-1) whereby he was declared physically unfit for Engineering Services with the respondent-department and order dated 22.01.2014 (Annexure A-9) passed by the Appellate Medical Bxoard, rejecting his appeal against the order dated 30.07.2013. He sought further direction to direct the respondents to appoint him in the light of the opinion given by the Post Graduate Institute of Medical Education and Research, Chandigarh where the applicant was declared physically and medically fit for the job in question with all consequential benefits and further for any other order/direction as this Tribunal may deem fit under the peculiar facts and circumstances of this case.

2. The facts, which led to filing of the present Original Application are that the Pramod Kumar, the present applicant has done B. Tech (Civil Engineering) from Kurukshetra University and M. Tech (Transportation Engineering) from IIT, Delhi. He appeared in the

Engineering Services Examination conducted by the Union Public Service Commission (UPSC, for short) in 2012. The selection process for the said examination consisted of written test followed by the personality test/interview. The selected candidates were required to undergo medical examination before the recruitment. It is not in dispute that the applicant was declared selected on the basis of written examination and interview result. He ranked 136 in the merit list (civil) in the final list of successful candidates. He was called for medical examination at Gorakhpur, UP on 19.07.2013. He appeared before the medical board and the outcome of the medical examination was communicated to him on 30.07.2013, where he was declared unfit and he was provided an opportunity to file appeal to the Appellate Medical Board. He filed appeal on 07.08.2013 by annexing a report of Dr. R. Muralidharan, MD (Med) DM (Endo), Fortis hospital, Mohali. He was called to appear before the Appellate Medical Board on 05.09.2013. Accordingly he appeared before the Appellate Medical Board on that date, where Dr. Sanjeev Singhal, Surgery, orally opined that he was not physically fit. Subsequently, the applicant apprised the board members that he has been declared medically fit for Government service on 18.11.2003 by Professor & Head Department of Pediatric Surgery and Director, Postgraduate Institute of Medical Education & Research (PGIMER,

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for short), Chandigarh. Thereafter the applicant kept on making repeated request to consider the report of the aforesaid Doctor and declare him fit for the job but no outcome has been communicated to him by the Appellate Medical Board in writing, declaring him unfit for the job. He himself again approached the PGIMER for medical and physical examination with a view to get the certificate as to whether he is fit for engineering services. He was issued a certificate to this effect on 08.01.2014 by the Assistant Professor, Department of Endocrinology, PGIMER, Chandigarh. The same was also provided to the appellate medical board. When the appeal of the applicant was not decided, he submitted a representation on 11.01.2014 to disclose the outcome of the appellate medical board. Pending decision, he approached the Hon'ble High Court by filing CWP No.810/2014, which came up for hearing on 17.01.2014 where the respondents were directed to keep one post of Civil Engineer reserved for the applicant. The appellate medical board vide its communication dated 22.01.2014 rejected his appeal. Pending Writ Petition was disposed of as having been rendered infructuous as the respondent-appellate medical board has passed an order and he was given liberty to challenge that order. Thereafter he filed another Writ Petition on 27.03.2014, which was withdrawn on

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14.11.2014 with liberty to approach this Tribunal where the jurisdiction lies. Hence the Original Application.

3. Shri Sawhney, learned counsel appearing for the applicant vehemently argued that the action of the respondents declaring applicant unfit for public employment only for the sole reason that he is suffering from 'Bilateral absent testes', which is incurable disease but while declaring him unfit neither the medical board nor the appellate medical board have examined this aspect of the matter that the above disease will interfere with the efficient performance of his duties, which would be required of the applicant. He further submitted that the medical board has not considered the opinion given by Dr. Murlidharan dated 06.08.2013 and of and PGIMER where he declared him fit for employment and opined that the said physical problem will in no way, interfere in discharge of his responsibility while in service. Lastly, he argued that even the medical board and subsequently the Appellate Medical Board never thought of seeking advice from a specialist doctor in the relevant field and they themselves have opined that the applicant is unfit for public employment. To buttress his submission he placed reliance upon an order passed by the Principal Bench of this Tribunal in the case of **Satwinder Kaur v. UPSC & Anr.** (OA no.2649 of 2012, decided on 13.11.2013 and the order passed by the Madras Bench

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of this Tribunal in OA-1743/2010 in the case of **H. Paul Johnson v. UOI & Ors.**, decided on 11.06.2014, which was affirmed by the Hon'ble jurisdictional High Court by dismissing the Writ Petition no.4268 of 2015 filed by the Union of India vide order dated 03.03.2015.

4. The respondents contested the claim of the applicant by filing their detailed written statement wherein they submitted that in terms of Engineering Services Examination 2012 Rules, particularly Rule 18 and Regulation-2 to Appendix-II the case of the applicant was considered and since he was declared unfit for the service by the Medical Board, therefore, his candidature has rightly been rejected by the respondents. It is further submitted that in terms of Regulation-13 of the above Regulations it is for the Chairman of the Medical Board to consider to take an opinion from the specialist or not and the applicant cannot force/claim the respondents to take opinion from a specialist in this regard. Shri R.T.P.S. Tulsi, learned Advocate appearing on behalf of the respondents placed reliance upon a judgment passed by the Hon'ble Supreme Court in the case of **Indian Council of Agricultural Research and another v. Smt. Shashi Gupta**, AIR 1994 SC 1241. Lastly he submitted that since the applicant is suffering from a disease which cannot be cured, therefore, in terms of the Regulations applicable to the post

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in question his candidature has rightly been rejected on medical grounds.

5. We have given our thoughtful consideration to the entire matter and have perused the pleadings available on record with the able assistance of the learned counsel appearing for the parties.

6. No doubt, the opinion of the Medical Board and the Appellate Medical Board cannot be contested by seeking resort to medical opinion of another specialist in the field. However, it is evident that neither the Medical Board, nor the Appellate Medical Board have addressed themselves to the issue whether the defect/ disease suffered by the applicant, and its manifestation, is likely to interfere with the efficient performance of duties by the applicant required of him. The respondents have proceeded only on the basis that the applicant is suffering from a chronic disease that is likely to demand a lifelong treatment.

7. The Medical Board, as well as the Appellate Medical Board, appears to have proceeded only on the basis that the applicant suffers from Bilateral absent testes, which is an incurable disease.

However, that, by itself, could not have been a ground to reject the applicant's case as being medically "unfit". Before doing so, the Medical Board as well as the Appellate Medical Board ought to have come to the conclusion that whether the disease, or defect was

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likely to interfere with the efficient performance of his duties, which would be required of the applicant. On this aspect, there is no opinion given by the Medical Board, or the Appellate Medical Board despite the fact that, at least, the Appellate Medical Board was aware of the medical opinion given by another expert, namely Dr.R. Murlidharan MD (Med.) of Fortis Hospital Mohali and Dr. Pinaki Dutta, Assistant Professor, Department of Endocrinology, PGIMER, Chandigarh. In fact, there appears nothing on record that suggests that the opinion of the two abovementioned experts was considered by the Medical Board/Appellate Medical Board and if indeed these opinions were considered, the reason for disregarding the same.

8. It also appears that the respondents did not take care to constitute the Medical Board, as well as the Appellate Medical Board, with due application of mind. When the applicant was found to be suffering from Bilateral absent testes, in the Appellate Medical Board, the respondents should have ensured the inclusion of a medical doctor who had adequate expertise in the relevant field, i.e. in the field of internal medicine. The respondents appear to have gone about the rejection of the applicant's candidature in a casual manner, which betrays non-application of mind by the Appellate Medical Board to the relevant considerations.

9. Merely because a disease may be chronic, or incurable, it cannot lead to medical unfitness for seeking employment with the respondent. In case in hand, even the expert in the relevant field has already expressed his opinion that the disease which the applicant is suffering in no way put obstruction in his day to day life in discharge of his official duties. It may also be recorded here that the rule maker have visualized the problem while formulating the rules, which the authority can face in future by way of inserting Rule 13 to the 2012 Rules empowering Appellate Medical Board to seek opinion of the expert in the relevant field.

10. Now also consider the sole arguments in the hands of the respondents in rejecting his candidature, which is in Para 4 (vi) to (vii), where they submitted that the individual opinion of the Assistant Professor does not make him fit for job as the same is without any authority, legal basis and therefore cannot be relied upon. Rule 13 of 2012 cannot be invoked, as there is no doubt regarding his report/health. Rule 13, which is relevant reads as under:-

"In case of doubt regarding health of a candidate the Chairman of the Medical Board may consult a suitable Hospital Specialist to decide the issue of fitness or unfitness of the candidate for the Government Service e.g. if a candidate is suspected to be suffering from any medical defect or aberration, the Chairman of the Board may consult a Hospital Psychiatrist/Psychologist.

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When any defect is found it must be noted in the Certificate and the medical examiner should state his opinion whether or not, it is likely to interfere with the efficient performance of the duties which will be required of the candidate."

A plain reading of the above provision leaves us in no doubt that though in normal circumstance, opinion of the expert cannot be called for, there is no bar to call for the opinion of the Specialist in the relevant field in this advance medical world. Though the respondents have argued that the word 'May' has been used, therefore, it is not mandatory and it is for the Authority to decide and an individual cannot claim it as a matter of right. To our mind, the stand of the respondents cannot be accepted for the simple reason that merely using word 'may' does not give them discretion. What they have to see is the merit or necessity of doing so in the given case to do complete justice so that no injustice is caused to individual. Though the power is conferred upon the statutory body by the use of the word 'may', this power must be construed as a statutory duty. Conversely, the use of the term 'shall' may indicate the use in optional or permissive sense. Although in general sense 'may' is enabling or discretionary and 'shall' is obligatory, the connotation is not inelastic and inviolate. Where to interpret the word 'may' as directory would render the very object of the Act as nugatory, the word 'may' must mean 'shall'. The Courts have

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further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the Statute which is of prime importance, as also the actual words employed. Wade also says (Wade & Forsyth; 'Administrative Law: 9th Edn.'): p.233):

"The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in which **permissive language has been construed as obligatory**. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances, prescribed by the Act, coupled with a duty to exercise it in a proper case."

(emphasis supplied)

11. To elucidate the words "may" and "shall", and interpret them, the Hon'ble Supreme Court in **Dinesh Chandra Panday v. High court of Madhya Pradesh, (2010) 11 SCC 500** has held as under:-

"15. The courts have taken a view that where the expression "shall" has been used it would not necessarily mean that it is mandatory. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provisions along with other provisions of the Rules, the purpose sought to be achieved and the object behind implementation of such a provision. This Court in Sarla Goel v. Kishan Chand, took the view that where the word "may" shall be read as "shall" would depend upon the intention of the legislature and it is not to be taken that once the word "may" is used, it per se would be directory. In other words, it is not merely the use of a particular expression that would render a provision

directory or mandatory. It would have to be interpreted in the light of the settled principles, and while ensuring that intent of the Rule is not frustrated."

12. Subsequently in the case of **Smt. Bachahan devi & Anr., V. Nagar Nigam, Gorakhpur & Anr.** Appeal (Civil) 992 of 2008 decided on 5.2.2008 reiterate the same. To reiterate the words "may" and "shall" are distinct in meaning. While one confers a discretionary power, the latter one pelts out mandatory directions. These words are not synonymous but may be used interchangeably if the context requires such interpretation.

13. Now considering the decision heavily relied upon by the respondents while rejecting the case of the applicant in the case of **Indian Council of Agricultural Research and another v. Smt. Shashi Gupta (supra)**. We are of the considered view that the facts of the case relied upon by the respondents and that of the present one are entirely different. In that case the Petitioner Smt. Shashi Gupta was found medically unfit by the Medical Board for promotion. The said Medical report was challenged and sought to be quashed by her before the Hon'ble Delhi High Court which was subsequently transferred to the Tribunal and the Tribunal quashed the medical reports and directed her appointment as Scientist Grade S and on being challenged, the Hon'ble Apex Court held that the Tribunal had no jurisdiction to quash the medical reports. The lordships have held

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that *"it is the inherent right of an employee to be satisfied about the medical fitness of a person before offering employment to him/her"*.

There is no second thought on this issue or we say quarrel on this subject. But in the present case the applicant is seek invalidation of the action of the respondent declaring him unfit on the plea that there is no finding either by the Medical board or by the Appellant Medical Board that how the disease is likely to interfere with the efficient performance of duties by the applicant required of him, particularly when there are clear opinions of the specialists that his physical problem " will not hamper his day to day activities in work" and "his present condition of "Anorchia" does not make him physically and medically unfit for a job in the Govt. service".

14. In the light of above sequence of facts we are of the consider view that before declaring a person unfit for the employment the respondents would have to examine as to what are the conditions of service, the nature of duties and responsibilities to be performed by the candidate, if appointed and other relevant consideration before coming to the conclusion that whether the candidate is 'fit' or 'unfit' for the job in question. This aspect have not been consider either by the Medical Board or by the Appellate medical Board, particularly in the present case when the applicant is working with them as section engineer and nothing has been shown suggesting that he is

not discharging duties satisfactorily. Rather the applicant has produced his APR for the ending year 2014 where he has been assed 'very good'.

15. For the aforesaid reasons, the impugned orders cannot sustain, accordingly same are quashed and set-aside. The matter is remitted by to the respondents to consider the case of the applicant in light of the observation made in the proceeding paras by considering the case of medical fitness of the applicant by instituting a Medical Board that comprises of, along with others, a known expert on the condition of 'Bilateral absent testes'. Such consideration shall be effected by the respondents within one month of the receipt of a certified copy of this order.

16. No other point was argued.

17. No order as to costs.

Sanj.
(SANJEEV KAUSHIK)
MEMBER (J)

Uday Kumar Varma
(UDAY KUMAR VARMA)
MEMBER (A)

Place: Chandigarh
Dated: 7.5.2015

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