

CENTRAL ADMINISTRATIVE TRIBUNAL : HYDERABAD BENCH
AT HYDERABAD

OA/021/01609/2015

Date of CAV : 26-09-2018
Date of Order : 09-10-2018

Between :

B. V. Lakshman Rao Son of B. L. V. Rao,
aged about 56 years, R/o H.No.12-1-1497,
Shanthi Nagar, Secunderabad, Occ : Technical Grade II,
Signal and Telecommunication Work Shop,
South Central Railways, Mettuguda,
Secunderabad.

....Applicant

AND

1. Union of India,
South Central Railways,
Represented by General Manager,
Rail Nilayam, Secunderabad.
2. The Deputy Chief Signal &
Tele Communications Engineer (Shops),
S & T Work Shop, Mettuguda,
Secunderabad.

...Respondents

Counsel for the Applicant: Mr. P. Ravi Shankar
Counsel for the Respondents : Mr. V. Vinod Kumar, Sr. CGSC

CORAM :

THE HON'BLE MR.B.V.SUDHAKAR, ADMINISTRATIVE MEMBER
THE HON'BLE MR.SWARUP KUMAR MISHRA, JUDICIAL MEMBER

(Order per Hon'ble Mr.Swarup Kumar Mishra, Judicial Member)

This application is filed under section 19 of the Administrative Tribunal's Act, 1985 to direct the Respondents to consider the case of the applicant for promotion to the post of Technician Grade I (Riveter) from the

date on which his immediate Junior one Mohd. Sabir Hussain is promoted as Technician Grade I (Riveter) and denying promotion on the ground of sustaining disability while on duty as highly irregular, arbitrary, illegal and against Articles 14, 16, 19 and also Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case.

2. The brief facts of the case are that, the applicant was originally appointed as Kalasi in the year 1980 and later appointed as Helper in the year 1984 and subsequently promoted as Technician Grade III (Riveter) after putting in more than 14 years of service. The applicant was later promoted as Technician Grade II in the year 1997. The applicant is presently working as Technician Grade II. While performing the official duties he met with an accident in the work shop and the accident is so severe that his leg was amputated above knee level. This has happened on 17.11.2008.

3. It is further submitted that, after thorough examination by Medical Board and also Special Medical Team and the Medical Examination found in favour of the applicant and thereafter he was admitted to duty and attending to his works normally. The applicant is eligible for promotion for the post of Technician Grade I way back in the year 2011 itself. Though the applicant is fully fit to be promoted to the post of Technician Grade I (Riveter), number of his juniors were promoted overlooking his case on the ground that he met with an accident and lost his leg.

4. The applicant further submits that the respondents issued

proceedings O.O.No.40/S/2011, dated 11.7.2011 promoting certain persons as Technician Grade I and the Juniors of the applicant are promoted ignoring the rightful claim of the applicant without assigning any reason. The applicant made a representation but till date they have not replied to the said representation. Again the respondents have issued proceedings No.65592/RS/Estt., dated 28.01.2013 promoting far juniors to the applicant to the post of Technician Grade I (Riveter) ignoring the rightful claim of the applicant. As the respondents have not considered the representation, the applicant filed OA No.296/2013 and the same was disposed of at the admission stage vide order dated 19.3.2013 directing the respondents to consider and pass orders on the representation dated 1.8.2011 within four weeks, but inspite of the same the respondents have not passed any orders and further number of his juniors are promoted ignoring the claims of the applicant.

5. The applicant further submits that he can discharge his duties more efficiently and therefore denying promotion on the ground of incapacity is totally arbitrary, irregular and against the law relating to The Persons With Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995. In fact when the Medical Board itself gave the certificate that the applicant is hale and healthy and can perform any duties denying promotion and overlooking him for promotion to Grade I Technician is totally arbitrary, irregular and against the Articles 14, 16, 19 and Section 47 of The Persons With Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995. Even according to Section 47 of the Act the applicant should have given a paper promotion and could have been shifted

to some other equivalent post in the same pay scale and service benefits, but denying the promotion and promoting juniors is totally arbitrary, irregular and against the very spirit of the Act. Therefore denying promotion on the ground of disability is totally irregular, illegal and against the said Act. The applicant ought to have promoted as Technician Grade-I (Riveter) from the date on which his immediate junior one Md.Sabir Hussain is promoted ie on 11.7.2001. Hence this application.

6. The Respondents have filed reply statement stating that during an unfortunate incident the applicant met with an accident on 17.11.2008 while performing duty. He was immediately rendered emergent medical aid and treatment. As per Employees Compensation Act, 1923, an amount of Rs.2,42,495/- (Rupees two lakhs forty two thousand four hundred and ninety five only) was also offered to him towards compensation. As his injury worsened, his left leg was amputated below the knee. He subsequently recovered and was fixed with an artificial limb. He was declared unfit for C1 medical classification and was made fit for C-II medical classification by the medical authorities vide Sr DMO(SG)/CH/LGC Memo No. HQ/MD/84/ME, dated 10.8.2009. Consequent upon his medical de-categorization, he was allowed only table work but not the regular work. As he was medically de-categorized from C1 classification to C II, he has not considered for promotion.

7. Respondents further state that based on the representation of the applicant dated 01.08.2011 and in compliance with the directions in OA

No.296/2013 dated 19.3.2013, the applicant was again subjected to medical examination by the prescribed medical authorities have certified that the applicant is not fit in C-I classification vide proceedings Lr No. HQ/MD/84/ME/Employee, dated 06.03.2018, Medical certificate No.01534. The applicant was also advised about the same vide a reasoned order Lr No.2977/SR/Est, dated 06.03.2018.

8. The applicant also states that he was not promoted as the medical classification for the post of Tech-I/Revitter is C-1 where as the applicant is unfit in C-1 and fit only in C-II. He could not be absorbed in the workshop against any C-II fit post as there are no posts in Artisan category with C-II medical classification.

9. The Respondents further states that he was awarded financial upgradation under MACP scheme which is personal to the employee on 24.4.2010 in G.P Rs.2800/- on completion of 10 years in Tech II category with retrospective effect from 1.9.2008. All the allowances and privileges attached to the particular GP were offered and utilized by the applicant, except change of designation. The grade pay of Rs.2800/- is the same as that of Tech-I / Revitter and it is imperative to mention that the applicant has not been left out for any kind of financial loss. But for the medical de-categorization and non availability of posts in C-II medical classification his candidature was not considered for promotion as Tech-I and his pay also cannot be stepped on par with his juniors in Tech II as the pay fixed under MACP is personal to the particular employee and stepping up of pay with

junior cannot be undertaken. The financial benefit under MACPS in GP Rs.2800/- has been awarded to him with effect from 1.9.2008 much before his juniors were promoted as Tech-I on regular basis in 2011 and 2013.

10. The Respondents further submit that, the applicant was promoted as Helper in the year 1984 and subsequently promoted as Tech-III (Rivetter) on 20.08.1994 and again promoted as Tech-II on 01.05.1997. Now he is not assigned duties which are assigned normally to Tech-II. The Respondents further state that the employees disabled / incapacitated for further service in the post they are holding but declared fit in a lower medical category and eligible for retention in service in posts corresponding to this lower medical category cease to perform the duties of the posts they are holding from the date they are declared medically unfit for the present post. As the applicant was not fit in C-I medical classification which is a prerequisite for promotion in the hierarchy of normal channel of promotion prescribed for the post of Tech I and having declared medically unfit prior to the consideration of his juniors for promotion to the post of Gr I, he was not considered for the same and his juniors were promoted as Tech-I (Revitter) on 11.7.2011. He could not be offered alternative appointment for absorption in other trade / shops in Workshop as there are no posts with C-II medical classification.

11. The Respondents further state that, as the applicant was not fit in C-1 medical classification and only fit in C-2 medical classification, he is not eligible for promotion to the post of Tech Gr I as an employee who was declared medical unfit to the post ceases to perform the duties of the post and to be redeployed to alternative post with suitable medical classification

without discharging him from service. However, there were no other posts in C-2 medical classification his services were utilized in productive areas and unconnected with the regular work expected from a person fit in C-1 medical classification in order to enable to justify the payment of wages.

12. The Respondents further state that, the applicant was awarded financial upgradation under MACP scheme which is personal to the employee in GP Rs.2800/- vide office order No.17/S/2010, dated 24.04.2010 with retrospective effect ie from 01.09.2008. On completion of 10years in G.P as Tech II as the MACP scheme is operational since 1.9.2008, it can be noted from the above financial upgradation order that the employee is enjoying the benefits attached to the post of Tech I except discharging the duties of the post of Tech I prior to the promotion of his junior and also before his medical de-categorization on 10.8.2009. All the allowances and privileges attached to the particular G.P were offered and enjoyed by the applicant, except the physical change of designation and discharge of duties of the promoted post which can arise only on actual promotion. The grade pay of Rs.2800/- is the same as that of Tech – I / Revitter and it is imperative to mention that the applicant has not been put to any kind of financial / monetary loss caused to him by the administration. As per extant rules awarding promotion as Tech-I in GP Rs.2800/- after financial upgradation under MACPS is granted in same GP will not entitle the applicant to any financial increase in pay or allowances except the designation provided fit in prescribed medical classification of C-1.

13. The Respondents further state that, the juniors to the applicant having been considered for promotion to the post of Tech I on 11.07.2011, which was subsequent to the medical unfitness of the employee for fit to the post of Tech II with effect from 10.08.2009 which is the immediate eligible category for promotion to the post of Tech I, the claim of the applicant to consider his case for his promotion on par with his erstwhile juniors who were medically fit to hold the post of Tech I is not in accordance with the rules and therefore the request of the applicant in OA to consider him for promotion on par with his erstwhile juniors before medical de-categorization is devoid of any merits. Accordingly the respondents pray for dismissal of the OA.

14. The Respondents, in support of their contentions, rely on the decision of the Hon'ble Supreme Court in the case of Union of India Vs. Devenda Kumar Pant & Others (CA No.4668/2007) dated 9.7.2009

“15. Sub-section (2) of Section 47 deals with non-discrimination in promotion and provides that no promotion shall be denied to a person *merely on the ground of his disability*. This would mean that a person who is otherwise eligible for promotion shall not be denied promotion merely or only on the ground that he suffers from a disability. Thus Section 47(2) bars disability per se being made a disqualification for promotion. To give an example, a person working as Lower Division Clerk (LDC) suffering from the disability of low vision, cannot be denied promotion to the post of Upper Division Clerk (UDC) merely because of his disability. This is because the efficiency with which he functioned as a LDC will be the same while functioning as a UDC also and the disability as such will not affect his functioning in a higher post. But the position is different if the disability would affect the discharge of functions or performance in a higher post or if the disability would pose a threat to the safety of the co-employees, members of the public or the employee himself, or to the assets and equipments of the employer. If promotion is denied on the ground that it will affect the safety, security and performance, then it is not denial of promotion merely on the ground of his

disability, but is denial of promotion by reason of the disability plus something more, that is adverse effect of the disability upon the employee's performance of the higher duties or functions attached to the promotional post. It is significant that Section 47(2) does not provide that even if the disability comes in the way of performance of higher duties and functions associated with the promotional post, promotion shall not be denied. Section 47(2) bars promotion being denied to a person on the ground of disability, only if the disability does not affect his capacity to discharge the higher functions of a promotional post. Where the employer stipulates minimum standards for promotion keeping in view safety, security and efficiency, and if the employee is unable to meet the higher minimum standards on account of any disability or failure to possess the minimum standards, then Section 47(2) will not be attracted, nor can it be pressed into service for seeking promotion. In other words where the disability is likely to affect the maintenance of safety and security norms, or efficiency, then the stipulation of standards for maintaining such safety, security and efficiency will not be considered as denying a person with disability, promotion, merely on the ground of his disability.

18. Prescription of a minimum medical standard for promotion should be considered as such, and should not be viewed as denial of a promotional opportunity to a person with disability. We may illustrate. When an advertisement for the post of a police inspector prescribes a minimum height or a minimum chest measurements or a minimum physical stamina, a person who lacks the same and therefore denied appointment, cannot contend that he is discriminated on the ground of physical disability. Firstly being short or very thin or lacking stamina is not a physical disability but a physical characteristic. Therefore in such a situation the question of applicability of the Act does not arise at all. If a person not having a colour perception is denied appointment to the post of a driver, he cannot complain that he is discriminated on the ground of his disability. Same would be the position where the colour perception is a required minimum standard for a particular post. A person not possessing it is not being denied appointment or promotion on the ground of disability. The denial is on the ground of non – fulfilment of a minimum required standard / qualification. Viewed accordingly, it will be seen that Section 47(2) is not attracted at all.

19. Therefore we are of the view that the Section 47(2) only provides that a person who is otherwise eligible for promotion shall not be denied promotion merely on the ground that he suffers from disability. The use of the words merely on the ground shows that the section does not provide that if the disability comes in the way of performing the higher duties and functions associated with the promotional post, promotion shall not be denied. In other words promotion shall not be denied to a person on the ground of his disability only if the disability does not affect his capacity to discharge

The higher functions of promotional post. “

15. In the present case there is no specific or categorical material from the side of the Respondents to show that the disability in question, as such while the functioning of the applicant in his post. There is also no material from the side of the Respondents that the disability in question would pose a threat to co-employees, members of the public, or the employee himself, or to the assets and equipments of the employer. Therefore promotion could not have been denied to the applicant merely on the ground of his disability in question. It was incumbent on the part of the Respondents to find out that if there were any alternative posts in the promotional cadre in which the applicant could have been accommodated, without compromising with the said aspects. In the facts and circumstances and taking into consideration the medical fitness certificate issued in favour of the applicant, the Respondents are directed to consider the promotion of the applicants to the higher post in accordance with law taking into consideration the observations of the Hon'ble Apex Court cited supra, the Respondents are directed to consider the applicant's case within a period of three months from the date of receipt of a copy of this order and to pass a reasoned order in this regard within the said period.

16. Original Application is accordingly allowed to the extent indicated above. No order as to costs.

(SWARUP KUMAR MISHRA) (B.V.SUDHAKAR)

JUDICIAL MEMBER

ADMINISTRATIVE MEMBER

Dated : 09th October, 2018.

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