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**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No.180/00100/2015

Tuesday, this the 22nd day of January, 2019

C O R A M :

**HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER
HON'BLE Mr.ASHISH KALIA, JUDICIAL MEMBER**

Sudhir Kumar B,
S/o.Bhaskaran Pillai,
Junior Clerk, Office of the Section Engineer/
Carriage & Wagon/Southern Railway/
Kochuveli Railway Station/Trivandrum Division.
Permanent Address : Pournami, Near KPHS,
Kalluvathukkal P.O., Kollam District – 691 578. ...Applicant

(By Advocate – Mr.T.C.Govindaswamy)

V e r s u s

1. Union of India represented by the General Manager,
Southern Railway, Headquarters Office,
Park Town P.O., Chennai – 600 003.
2. The Divisional Railway Manager,
Southern Railway, Trivandrum Division,
Thiruvananthapuram – 695 014.
3. The Divisional Personnel Officer,
Southern Railway, Trivandrum Division,
Thiruvananthapuram – 695 014. ...Respondents

(By Advocate Mrs.K.Girija)

This Original Application having been heard on 15th January 2019,
the Tribunal on 22nd January 2019 delivered the following :

O R D E R

HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER

O.A.No.180/100/2015 is filed by Shri.Sudhir Kumar B, working as
Junior Clerk at Kochuveli Railway Station, aggrieved by the denial of

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consideration and grant of the benefit of promotion on par with his juniors.

The reliefs sought by the applicant is as follows :

1. Declare that the applicant is entitled to be considered and promoted as Senior Assistant Loco Pilot in PB-1 + GP Rs.2400/- on par with his juniors at Sl.No.5 and below in A2, with all consequential benefits arising therefrom.

2. Direct the respondents to consider and promote the applicant as a Senior Assistant Loco Pilot in PB-1 + GP Rs.2400/- on par with his juniors at Sl.No.5 and below in A2 and direct further to grant all the consequential benefits of arrears of pay and allowances arising therefrom.

3. Award costs of and incidental to this application.

4. Pass such other orders or directions as deemed just, fit and necessary in the facts and circumstances of the case.

2. The brief facts leading to the case are : the applicant was initially appointed in the Chennai Division of Southern Railway during May, 1993.

He was transferred on request to the Trivandrum Division of Southern Railway as Assistant Loco Pilot on 30.3.2001 in the then scale of pay of Rs.3050-4590/-. Subsequently, vide Memorandum bearing No.V/P/11/XII/SNP/Med.Decat. Dated 11.1.2002 he was medically decategorized and declared as unfit to work in the post of Assistant Loco Pilot. He was, therefore, fitted against a supernumerary post with effect from 20.12.2001. In the interregnum he continued to be gainfully utilized by the respondents as Assistant Loco Pilot until he was given an alternative appointment as a Junior Clerk during the year 2011. While so, the 3rd respondent issued Annexure A-2 Office Order dated 18.9.2009 promoting his juniors to the post of Senior Assistant Loco Pilots in PB-1 + GP Rs.2400/-. Pointing out the same, the applicant submitted Annexure A-3 representation dated 4.12.2009 to consider and promote him as a Senior

Assistant Loco Pilot with effect from the date of promotion of his juniors.

In this regard the applicant calls to his assistance the order in O.A.No.206/208 dated 29.10.2008 wherein in an identical situation this Tribunal had declared that the applicant therein is entitled to be granted the benefit of promotion on par with his junior (Annexure A-4). The respondents took up the matter before the Hon'ble High Court of Kerala in W.P.(C) No.22488/2009. While upholding the order of this Tribunal, the Hon'ble High Court vide judgment dated 9.9.2016, a copy of which is available at Annexure A-6, held as under :

“.....38. Therefore we are of the view that the S.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 a promotional post.

29. It was in that factual matrix that, the Apex Court held that 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 reasons of the disability it was something more, i.e., adverse effect of the disability upon the employee's performance of the higher duties of functions attached to the promotional post.

30. In Annexure A1 seniority list of Diesel Assistant of Trivandrum Division as on 1.10.2001, the applicant is Sl.No.215. In the said seniority list, Shri.G.Thomas and Shri.Sunil Jose are Sl.Nos.216 and 217 respectively. By Annexure A3 office order, the said persons and many others who are admittedly juniors to the applicant in Annexure A1 seniority list were promoted as Senior Assistant Loco Pilot in the scale of 4000-6000. However, the applicant was not promoted as Senior Assistant Loco Pilot. The petitioners contended that, the applicant has already been medically decategorised for the post in 'running cadre' and as such he does not have the medical fitness to hold the post of Senior Assistant Loco Pilot. The juniors of the applicant were promoted to officiate as Senior Assistant Loco Pilot in the scale of 4000-6000 since they were found medically fit in 'A-1' category. Therefore, according to the petitioners, the applicant is not entitled to be promoted as Senior Assistant Loco Pilot in the scale of 4000-6000.

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31. The fact that, before the applicant was medically decategorised in 'C-1' category and below in sedentary job, he was medically fit in 'A-1' category is evident from Annexure A2. Therefore, before the applicant was grievously injured while on duty, he was medically fit in 'A-1' category and entitled to be promoted as Senior Assistant Loco Pilot in the scale of 4000-6000. Sub-section (2) of Section 47 of the PWD Act in crystal clear terms, provides that no promotion shall be denied to a person merely on the ground of his disability. In view of the statutory mandate under sub-section (2) of Section 47 of the Act and Para.213A under Chapter II, Section-B of Railway Establishment Manual, Volume-I, the applicant cannot be denied promotion as Senior Assistant Loco Pilot in the scale of 4000-6000, pending alternative appointment according to medical classification, merely on the ground of his disability.

32. The stand taken by the petitioners in their reply statement is that the name of the applicant has already been taken out from the rolls of Assistant Loco Pilot from the date of decategorisation and that he has not been fitted with an alternate employment cannot be legally sustained in view of the mandate under sub-section (1) of Section 47 of the PWD Act by which, if an employee who acquires a disability during service is not suitable for the post he was holding, he should be shifted to some other post with the same pay scale and service benefits and if it is not possible, to adjust him against any post, he should be kept on a supernumerary post until a suitable post is available or until he attains the age of superannuation, whichever is earlier. In view of the mandate under sub-section (1) of Section 47 of the Act, until a suitable post is available, the applicant will have to be kept as Assistant Loco Pilot in a supernumerary post. If that be so, as on the date on which persons admittedly junior to the applicant were given promotion as Senior Assistant Loco Pilot in terms of Annexure A3 Office Order dated 29.6.2007, the applicant is also eligible to be promoted to that post carrying a scale of pay of 4000-6000 with all consequential benefits."

3. As grounds the applicant submits that in terms of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the respondents are not justified in discriminating against the applicant in the consideration and grant of such promotion.

4. The respondents in their reply statement raised preliminary objection of delay and non-joinder of parties. They submitted that the promotion to the post of Senior Assistant Loco Pilot is on seniority-cum-suitability basis, the suitability being assessed on the basis of records and the medical fitness

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required for the post. The applicant admittedly was not having suitability required for the post as he did not possess the medical fitness in the class required at the relevant point of time and that seniority alone is not the deciding factor for awarding promotion. Further it is stated that Annexure A-2 order by which his juniors were promoted as Senior Assistant Loco Pilots was not challenged in the O.A. On the contrary it is pointed out that he has accepted the orders by which he was placed under the special supernumerary post in 2002 initially and thereafter posting him as Junior Clerk in 2011.

5. We have heard Shri.T.C.Govindaswamy, learned counsel for the applicant and Smt.K.Girija, learned standing counsel for the Railways. We have perused all the pleadings and documents on record. The present O.A is squarely covered by the order of this Tribunal in O.A.No.206/2008 which, relying on Section 47(2) of the Disability Act, 1995 and provision as contained in para 213A of Railway Establishment Manual, had made it explicitly clear that no promotion shall be denied to a person merely on the ground of disability. The aforesaid order of this Tribunal has also been upheld by the Hon'ble High Court of Kerala.

6. We have, therefore, no hesitation in allowing this O.A on similar lines. We declare that the applicant is entitled to the scale in PB-1 + GP Rs.2400/- on par with his junior at Sl.No.5 and those below in Annexure A-2. We, therefore, direct the respondents to promote the applicant to the post of Senior Assistant Loco Pilot from the date on which his junior at

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Sl.No.5 and those below in Annexure A-2 were promoted. The consequential arrears of salary and allowances arising out of this order shall be paid to the applicant within a period of three months from the date of receipt of a copy of this order. No order as to costs.

(Dated ts the 22nd day of January 2019)

ASHISH KALIA
JUDICIAL MEMBER

E.K.BHARAT BHUSHAN
ADMINISTRATIVE MEMBER

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List of Annexures in O.A.No.180/00100/2015

1. Annexure A-1 - True copy of the Memorandum bearing No.V/P.11/XII/SNP/Med.Decat dated 11.1.2002, issued by the 3rd respondent.
2. Annexure A-2 - True copy of the Office Order bearing No.33/2009/Ele/Op dated 18.9.2009, issued by the 3rd respondent.
3. Annexure A-3 - True copy of the representation dated 4.12.2009, addressed to the 3rd respondent.
4. Annexure A-4 - True copy of the order in O.A.No.206/2008 dated 29.10.2008 rendered by this Hon'ble Tribunal.
5. Annexure A-5 - True copy of the appeal dated 15.8.2013, submitted to the 2nd respondent.
6. Annexure A-6 - True copy of the judgment in WP(C) No.22488/2009 dated 9.9.2016 rendered by the Hon'ble High Court of Kerala, Ernakulam.
