

(2016) 07 MAD CK 0095

MADRAS HIGH COURT

Case No: W.P .No. 13979 of 2016.

Bina Leela Prasad - Petitioner
@HASH The Union of India, Rep.
by The General Manager,
Southern Railway, Park Town,
Chennai - 3

APPELLANT

Vs

RESPONDENT

Date of Decision: July 22, 2016

Acts Referred:

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

Citation: (2016) LIC 4239

Hon'ble Judges: A. Selvam and P. Kalaiyarasan, JJ.

Bench: Division Bench

Advocate: Ms. N.R. Jasmine Padma, Advocate, for the Petitioners; Mr. M. Vellaisamy, CGSC, for the Respondent Nos. 1 to 3; Tribunal, for the Respondent No. 4

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Mr. P. Kalaiyarasan, J. - This writ petition is directed against the order of the Central Administrative Tribunal in O.A. No. 310/01681/2014, dated 29.09.2015, dismissing the Original Application.

2. The averments in the writ petition are as follows :

(i) The petitioner while he was working as Sr. Assistant Loco Pilot, selection for the post of Loco Pilot (Goods) was conducted in the year 2012. Having found the petitioner suitable, the duly constituted promotional Committee, recommended him for the promotion and the same was also approved by the competent authority on

24.08.2012. The petitioner was subjected to medical examination, as he was due for periodical Re-medical examination and the medical authorities declared him unfit for Aye One and fit in Cee one and below on 02.07.2013, after availing more than 80 days. Since the respondents were unable to identify a suitable alternative post, the petitioner was continued in the category of Loco Pilot in supernumerary capacity. While the petitioner was under medical examination, a promotion order was released permitting 17 personnels, ignoring petitioner's candidature. Thus, his juniors were promoted as Loco Pilot (Goods) in pay band of Rs. 9300-34800 with Grade Pay of Rs. 4200.

(ii) The petitioner was alternatively appointed as Clerk by the order of the third respondent, dated 18.10.2013 but the promotional benefits to the pay band of Rs. 9300-34800 with GP of Rs. 4200 was not extended. Without responding to the representation of the petitioner, the third respondent issued the above order and posted the petitioner as Clerk in the Pay band of Rs. 5200-20200 with GP of Rs. 2400, violating Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (herein after referred to as "the Disabilities Act") and Indian Railway Establishment Manual. Therefore, the present writ petition has been filed.

3. The respondents 1 to 3 in their counter contend that the petitioner was working as Sr. Assistant Loco Pilot in the scale of pay of Rs. 5200-20200 + GP 2400/-. (1) Asst. Loco Pilot, (2) Sr. Asst Loco Pilot, (3) Loco Pilot (Shunting), (4) Loco Pilot (Goods), (5) Loco Pilot (Passenger) and (6) Loco Pilot (Mail) posts require the medical classification of Aye One, as the Loco Pilot category comes under the safety category and in terms of the provisions contained in the Indian Railway Medical Manual, the safety category employees are sent for periodical medical examination. Notification was issued for filling up the post of Loco Pilot (Goods) in the scale of Rs. 9300-34800 + GP Rs. 4200. As part of the selection procedure and in terms of para 514 of Indian Railway Medical Manual, the petitioner who was in pay scale Rs. 5200-20200 + GP Rs. 2400 was sent for periodical medical examination to assess his medical suitability for the post of Loco Pilot (Goods).

4. During medical examination, it was diagnosed that the petitioner was having hearing problem. The petitioner was kept in sick list from 10.04.2013 and discharged on 24.06.2013, after conducting the medical examination. He was also examined by the Medical Board on 02.07.2013 in Railway Hospital and he was declared unfit in Aye One, Aye Two, Aye Three, Bee One, Bee Two but fit in Cee One and below with hearing aid in the left ear and with glasses. Due to this defect in the hearing, the petitioner could not pass the requisite medical test. The petitioner was kept under a supernumerary post in the equivalent grade of Rs. 5200-20200 + GP Rs. 2400 in terms of Section 47 of the Disabilities Act.

5. The petitioner was subsequently screened by a Committee, which recommended him to be absorbed as a Clerk in the same pay band of Rs. 5200-20200 + Grade pay

Rs. 2400/-. Claiming promotion to the pay band Rs. 9300-34800 + Grade Pay Rs. 4200/- w.e.f 12.06.2013 with reference to his junior, Mr. B. Mohan Gandhi is impermissible. He cannot compare himself with Mr. B. Mohan Gandhi, as the petitioner, after his medical de-categorisation is not borne in the cadre of Loco pilots.

6. Learned counsel appearing for the petitioner repeatedly argued that the petitioner was though selected by the competent selection committee for the post of Loco Pilot (Goods), he was not given promotion along with his juniors, w.e.f 12.06.2013 and was alternatively appointed as Clerk, as per the order, dated 18.10.2013. He should have been alternatively appointed to a post carrying a pay band of Rs. 9300-34800 + GP Rs. 4200. It is in violation of Section 47 of the Act.

7. Learned counsel appearing for the respondents 1 to 3 per contra contends that loco pilot category posts come under the safety category and the petitioner on account of disability is unable to meet the higher minimum standards and therefore, Section 47(2) of the Act is not attracted. The petitioner was kept in supernumerary post immediately after de-categorisation by the Medical Board and has been given with alternative appointment as Clerk with pay protection. It is further contended that the petitioner has been provided with job, as he suffered disabilities while he is in service, in consonance with the provisions of the Disabilities Act.

8. There is no dispute that when the petitioner was working as Sr. Asst. Loco Pilot in pay scale of Rs. 5200-20200 with GP Rs. 2400/-, a notification was issued for filling up the post of Loco Pilot (Goods) in scale of Rs. 9300-34800 + GP Rs. 4200/-. Loco Pilot posts including the post of Sr. Asst. Loco Pilot, which the petitioner was holding require the medical classification of AYE 1, as those categories come under the safety category. The petitioner also applied for the post of Loco pilot goods in pay scale of Rs. 9300-34800 + GP Rs. 4200/-. He was subjected to periodical medical examination to assess his medical suitability. The petitioner was kept under sick list from 10.04.2013 to 24.06.2013 and after examination by the Medical Board, he was declared unfit in Aye One, Aye Two, Aye Three, Bee One, Bee Two but fit in Cee One and below with hearing aid in the left ear and with glasses.

9. The petitioner was holding the post of Sr. Asst. Loco Pilot, carrying pay band of Rs. 5200-20200 + GP Rs. 2400, when he applied to the promotional post of Loco Pilot (Goods), carrying pay band of Rs. 9300-34800 + GP Rs. 4200. The category of Loco Pilots, including Sr. Asst. Loco Pilot are subjected to periodical medical examination. When the petitioner applied for selection to the promotional post of Loco Pilot (Goods) and when the process of selection was on, the petitioner was sent for periodical medical examination to assess his medical suitability. He was kept under sick list and finally the Medical Board declared him unfit. In the meantime, promotional list selecting 17 persons was issued, which came into effect from 12.06.2013. Since the petitioner was medically found not fit even for the post he was

holding, by order, dated 18.10.2013, the petitioner was given alternative appointment as Clerk, though he was continued as a Loco Pilot in supernumerary capacity.

10. Considering the safety, the employer fixed certain minimum standards of medical fitness to certain category of posts. Though the selection committee found the petitioner suitable for promotion to the post of Loco Pilot (Goods), the denial of the said benefit on medical incapacitation cannot be said arbitrary.

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

"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."

12. The Hon"ble Supreme Court in **Union of India v. Devendra Kumar Pant reported in (2010) 1 AISLJ 91 : (2009) 14 SCC 546** has held as follows :

"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 a 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.

16... If any employee or group of employees are of the view that a particular minimum medical standard prescribed does not serve the interest of public safety, interest of the employee and fellow employees or the interest of administration, but has been introduced only with the intention of keeping a person with disability from securing the promotional post, it is always open to him or them to give a representation to the employer to review/revise the minimum medical standards. On such representation the employer will refer the issue to a committee of experts to take appropriate decision, if that was not already done. But once a decision regarding medical standards has been taken by the management bona fide and in the usual course of business on the report/recommendation of an expert committee, the same cannot be found fault with on the ground that it affects the right of a person with disability for promotion.

19...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. "

13. From the above provisions of law and the law laid down by the Hon"ble Supreme Court, it is clear when the employer stipulates minimum standards for promotion, keeping in view safety, security and efficiency and if the employee is unable to get the higher minimum standards on account of any disability or failure to possess the minimum standards, Section 47 (2) of the Disabilities Act will not be attracted.

14. Here in this case on hand, the petitioner was found medically incapacitated and therefore, he cannot claim promotion to the post of Loco Pilot (Goods), when the employer stipulated certain minimum standards for that post, considering the safety. The respondents 1 to 3 have also given alternative appointment to the petitioner as Clerk with pay protection, as per Section 47 of the Disabilities Act. The petitioner is not entitled to higher pay band of promotional post as he was found medically unsuitable to the promotional post though suitable in other aspects. In other words the petitioner was not selected for the promotional post and hence alternative appointment with pay protection of the serving post is to be made under Section 47 of the Disabilities Act. The respondents 1 to 3 have rightly provided

alternative employment with pay protection. The Central Administrative Tribunal (Madras Bench) has rightly rejected the claim of the petitioner and therefore, the writ petition is liable to be dismissed.

15. In fine, this writ petition is dismissed. No costs.