(2023) 09 BOM CK 0015

In the Bombay High Court

Case No : Writ Petition No. 3989 Of 2023

Chandrakant C. Mishra APPELLANT

Vs

Union Of India And Others RESPONDENT

Date of Decision : 07-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 16
Rights Of Persons With Disability Act, 2016 — Section 2(t), 2(p), 2(r) 2(e), 57, 75, 75(b), 75(1)(b), 76

Citation : (2023) 09 BOM CK 0015

Hon'ble Judges : Nitin Jamdar, J;Manjusha Deshpande, J

Bench : Division Bench

Advocate : Rajeev Kumar, Amey Kanse, R.R. Shetty, Leena Patil

Final Decision : Dismissed

Judgement

Manjusha Deshpande, J

1. The Petitioner herein is challenging the order passed by the Central Administrative Tribunal, Mumbai ("CAT", for short) in Original Application No.296 of 2021 dated 2 March 2023. The Petitioner is seeking modification of the order passed by the Tribunal. It is further prayed that it may be declared that the Petitioner is eligible to be promoted to the Post of Tax Assistant from 22 November 2010 onwards. The consequential relief of grant of arrears of pay and fixation of pension alongwith interest @ 12 % consequent to his promotion with effect from 22 November 2010, has also been prayed for.

2 The Petitioner herein had approached the CAT, Mumbai with the following prayers :

(a) Call for the record of the case.

(b) Direct the respondents to consider and grant promotion to the post of Tax Assistant i.e. the form 18th December 2008 or any other Immediate DPC held afterwords with all consequential benefits.

(c) Direct the respondents to grant TA/DA as per the entitlement of physically disabled person with effect from 22/11/2010.

(d) Direct the respondents to grant consequential arrears and back wages with interest at the rate of prevailing GPF.

(e) Direct the respondents to initiate the process of refund of professional tax deducted from him as per rule and law.

(f) Pass any other order or direction which this Hon'ble Tribunal thinks fit and proper in the facts and circumstances of the case including the costs.

The brief facts of the case of the Petitioner before the Tribunal are that the Applicant is a person with Permanent Disability (orthopedically handicapped). He was appointed as a peon in the year 1989 under the reservation of physically handicapped category vide order dated 6 October 1989. The certificate of being physically handicapped was issued by the All India Institute of Physical Medicines and Rehabilitation Ministry of Health and Family Planning vide Rehab No.4278/80 dated 9 December 1980 which certified that the Petitioner was suffering disability to the extent of 40%. The Petitioner was thereafter promoted as a “Dafterband” on 30 August 2001, and as a Notice Server on 18 December 2008.

. The Additional Commissioner of Income Tax vide communication dated 18 November 2010 required the Petitioner to undergo Medical Examination at All India Institute of Physical Medicines and Rehabilitation, Haji Ali Park, Mahalaxmi, Mumbai. The said Medical Examination was to ascertain the physical status of the Petitioner prevailing at that point of time. A medical certificate dated 22 November 2010 certifying the Petitioner's disability to the extent of 25% came to be issued. The Petitioner was informed by the Assistant Commissioner of Income Tax, Mumbai vide his communication dated 29 March 2011 that his claim for the status of Physically Handicapped (hereinafter referred to as, “PH”, for short)cannot be considered as medical certificate dated 22 November 2010 certifies his disability only to the extent of 25%. It was further informed that according to the GIMF OM No.19029/1/78 – E IV

(B) dated 31 August 1978, 3 December 1979 and 26 May 1983 the percentage of orthopedically handicapped person should be minimum 40% of permanent/ partial disability of either upper limb or 50% permanent /partial disability of both upper and lower limbs together.

3 The Petitioner was informed vide communication dated 30 May 2012 that, the Respondents have recovered an amount of Rs.15,600/- from his salary towards “Physically Handicapped” (“PH”, for short) allowance drawn by him from 22 November 2010 i.e. the date on which a certificate of 25% disability was issued to the Petitioner. The Petitioner made representations for restoring his status of disability by stating his entire history. The Petitioner thereafter had made various applications to different Institutions for issuance of Disability Certificate. The following are the details of the Institutions and percentage of disability certificate

issued to Petitioner:

Sr. No.	Date	Name of hospital	Percentage of disability
1.	22/11/10	All India Institute of Physical Medicine and Rehabilitation, Mumbai.	25.00%
2.	13/04/11	St.Jorge Hospital, Mumbai.	40.00%
3.	24/10/11	All India Institute of Physical Medicine and Rehabilitation, Mumbai.	30.00%
4.	22/02/12	Sir J.J. Group of Hospitals, Mumbai.	50.00%
5.	12/03/14	All India Institute of Physical Medicine and Rehabilitation, Mumbai.	30.00%
6.	28/08/15	Sir J.J. Group of Hospitals, Mumbai.	59.00%

4 The Petitioner was constantly making efforts to get his disability status

restored. In one of his representation dated 2 August 2017, he requested the Joint Commissioner of Income Tax (HQ) Personnel, Mumbai, for restoration of his disability status and further prayed to exempt him from Typing test for promotion to the post of Tax Assistant. In response to one of his communication, the Deputy Commissioner of Income Tax (HQ) Mumbai, instructed the Petitioner to register on the new Website as per the Right of Persons with Disability Act, 2016.

5 The Petitioner had filed Application before the Chief Commissioner for Persons With Disability under Section 75(b) of Rights of Persons with Disability Act, 2016, In the said Application as reflected in order placed on record passed by the said Authority i.e. the Chief Commissioner of Persons with Disability, the relief sought by the Petitioner was

(i) Restoration of disability status; and

(ii) Refund of disability allowance deducted from the salary of the Petitioner.

The said complaint/application was heard by the Chief Commissioner of Persons with Disability, and decided the same by making recommendations as follows:

(a) Respondent shall restore the disability status of the complainant;

(b) Respondent shall restore the disability allowance of the complainant; and

(c) Respondent shall refund an amount of Rs.15,600/-, which was recovered from the salary of the complainant.

The said recommendations were made by the Chief Commissioner on the background that there were atleast three certificates issued by the certifying competent Authority who is authorised to determine percentage of Disability. Hence, considering that the certificate was issued for more than 40% disability, in view of Section 2(t), (p), (r) (e) and Section 57 of Rights of Persons with Disabilities Act, 2016 the recommendations were made by the Chief Commissioner. On the basis of the said recommendations, the case of the Petitioner was considered compassionately for the subsequent promotion, which was to the post of Tax Assistant [Level–4 of Pay Matrix (Rs.25,500–Rs.81,100) of 7th CPC] for the vacancy year 2021 vide order dated 15 February 2021.

. Being aggrieved and dissatisfied by this order of promotion, the Petitioner herein filed Original Application No.296 of 2021, seeking directions to consider and grant him promotion to the post of Tax Assistant from 18 December 2008 or any other immediate date when meeting of DPC was convened, with all consequential benefits and to grant him T.A./D.A. as per the entitlement of PH status with effect from 22 November 2010.

6 The OA was resisted by the Respondents by filing reply affidavit by contending that, the period during which the status of disability of Petitioner itself was under question, the Petitioner could not have been granted promotion during the said period. The other point which was raised by the Respondent was that though the Petitioner had produced various certificates issued by different authorities, so far

as the establishment of the Respondent is concerned, as per Ministry of Social Justice and Empowerment Press Information Bureau dated 6 January 2011 on the subject "Simplification and Streamlining the Procedure for Issue of Disability Certificates to the Persons with Disabilities, a list of Central Government Hospitals/ Institutes is notified for issuance of Disability Certificates for various kind of Disabilities. The Petitioner is suffering from Locomotor disability. The institute authorised for issuance of certificate for such disability is All India Institute of Physical Medicines and Rehabilitation, Mumbai. Therefore, the only Disability certificate issued by the said institute was considered to be a valid certificate and not any other certificate issued by the other institution would be considered by the department.

7 It was contended that since the Commissioner for Persons with Disability had addressed the issue and made recommendations to the Central Government as contemplated under Section 75(b) of the Rights of Persons with Disability Act, 2016, the status of Petitioner as PH was restored vide office order dated 13 November 2020. His Disability allowance was also restored. The arrears of disability allowance (TA/DA) with effect from 22 November 2010 were also directed to be paid to him.

. After the PH status of the Petitioner was restored, he again applied for exemption to appear for the Typing test. The said exemption was granted to him by Respondent employer by order dated 8 December 2020. After the said exemption was granted, he came to be considered for the promotion to Tax Assistant on 15 February 2021.

8 The Respondents have categorically stated that passing of Typing test for the Lower Department Clerk ("LDC") was mandatory. However, so far as Physically Handicapped persons are concerned as per the DoPT OM F.No.14020/1/2014–Estt (D) dated 22 April 2015, instructions for exemption from passing typing have been provided. The said office memorandum provided that the physically handicapped persons who are otherwise qualified to hold clerical post and who are certified as being unable to "Type" by the Medical Board attached to Special Employment Exchanges for the Handicapped (or by a Civil Surgeon where there is no such Board) may be exempted from passing the Typing test. The Respondents have considered the applicant's case compassionately and exempted him from passing the Typing test in 8 December 2020.

9 The Recruitment Rules for the post of "Tax Assistant" provides that the candidate should qualify the Typing test or seek exemption as per the Rules. The Petitioner neither passed typing test nor sought any exemption. Therefore until his exemption on 8 December 2020, he was not at all eligible for the post of Tax Assistant.

10 After considering the respective contentions, the learned Member of the Central Administrative Tribunal, Mumbai has been pleased to partly allow the O.A. by granting relief to the Petitioner by holding that since the PH status of the

Applicant was restored by the respondents with effect from 13 November 2020, the promotion which was granted to him on 15 February 2021 can be granted to him with effect from 13 November 2020. So far as the claim of back-wages is concerned, it was refused by holding that since he did not work on the post of "Tax Assistant", from 2008 he could not be granted back-wages.

11 The Petitioner is challenging the said order in the present Writ Petition claiming retrospective promotion and seeking modification of order dated 2 May 2023, passed by CAT, Mumbai to the extent that the retrospective promotion of the Petitioner should be granted from 22 November 2010 instead of 13 November 2020.

12 We have heard learned counsel for the respective parties at length. As per the contention of the Petitioner, the recommendations of Commissioner of Disability is not challenged by the Respondents Authorities, therefore, considering that the recommendations are accepted, all benefits arising from the said recommendations will have to follow. It is his contention that the Commissioner of Disability has restored his status of PH, therefore, the said status stands restored from the date on which it was withdrawn. Hence, he ought to be granted promotion considering the restoration of his PH status retrospectively from the date on which his PH status has been restored. (add same here)

The learned counsel for the Petitioner has strenuously argued that as as result of restoration of his PH status, the necessary consequences of promotion ought to have been followed. He should have been promoted from 2010, and he should have been granted enhanced pay from 2010 to 2020 of the promotional post. It was merely a question of necessary consequences of the order to be followed. So also, it is contended that it is merely a question of grant of monetary benefit retrospectively. It is further contended that the scope of the present Writ Petition is limited only to the extent of grant of benefit retrospectively from 2010. The status of PH was withdrawn by order dated 29 March 2011, hence, when the said status of PH was restored, the said status relates back to the date of the certificate dated 22 November 2010. Therefore, on the analogy that once the PH status being restored, it would relate back to the date of certificate dated 22 November 2010 has been claimed by the Petitioner. It is urged by the Petitioner that it is merely a question of grant of monetary benefits retrospectively. Therefore, the said course ought to have been followed by the CAT while passing the order.

12 The Writ Petition is resisted by the Respondents by filing the reply affidavit, in addition to reply affidavit filed before the CAT. The affidavit states that in order to avail benefit of exemption from Typing test, a pre requisite for promotion to the post of Tax Assistant, the Petitioner was asked to undergo the Medical Examination regarding his present Medical condition. It was for the purpose of considering him for the further promotion, he was asked to undergo the Medical Examination. However, unfortunately the said Examination resulted in issuance of Medical certificate dated 22 November 2010, certifying his disability at only 25%.

Resultantly, his status of PH was withdrawn, and, therefore, consequences followed. The Respondents have taken a stand that even if the case of the Petitioner is sympathetically considered, it would not be possible to promote the Petitioner from 22 November 2010, due to the Rules governing Promotions. Reliance is placed on DoPT OM No.22011/9/98 Estt (D) dated 9 September 1999, and O.M. No.22011/3/98 Estt (D) dated 17 September 1998 with respect to crucial date of eligibility of the officer for promotion for vacancy year. It is stated that the official should fulfill eligibility criteria for promotion. In the light of the Rules for promotion, the Petitioner did not fulfill the crucial eligibility criteria before the vacancy year 2021, because he has been exempted from passing the Typing test on 18 December 2020. Hence, he was rightly considered for promotion in the vacancy year 2021. Reference is made to DoPT OM dated 29 September 1992. The said DoPT OM provides that the Physically Handicapped persons who are otherwise qualified to hold clerical posts, and who are certified as being unable to Type, by the Medical Board attached to Special Employment Exchanges for the Handicapped (or by a Civil Surgeon where there is no such Board) may be exempted from passing the Typing test. Subsequently, the said OM was also extended for the Promotion to the post of Tax Assistant vide its memorandum dated 7 October 2011.

13 It is clarified by the Respondents that recommendations issued by the Commissioner of Handicapped have been complied with. The PH allowance was refunded to the Petitioner with retrospective effect from 22 November 2010, the status of disability was also restored on 13 November 2020.

14 The eligibility criteria for promotion to the post of Tax Assistant is as follows:

(i) Five years of common service in Group "C" and "D" including in service rendered in erstwhile group "D";

(ii) Passing Matriculation Examination or equivalent;

(iii) Computer Proficiency test (In case of PH candidates they have to produce medical certificate for exemption from typing test as per DoPT Office No.29 September 1992)

. The Petitioner fulfilled the first two criteria for promotion to the post of Tax Assistant in 2008. Being a candidate of Physically Handicapped category, he was asked to undergo medical examination regarding his present status of disability in order to avail exemption from Typing test. But, he could not submit any documents/certificate in support of his case that he is unable to Type, in order to enable him to be exempted from the Typing test. It is only after compassionate evaluation of his case, he was permitted to be exempted from Typing test on 8 December 2020. Thereafter the Petitioner became eligible for promotion to the post of "Tax Assistant" in the vacancy year 2021.

15 Therefore, the issue before us would be that whether the Petitioner can be granted promotion to the post of Tax Assistant from the 22 November 2010.

After hearing the respective counsel and going through Writ Petition and reply affidavits, the position that emerges is that the Petitioner was aspiring for promotion to the post of “Tax Assistant”. The qualification for said post are as stated above in paragraph 14.

. It is clear from the office memorandum issued by the Department that the person who is physically handicapped is required to undergo physical examination and get it certified from the concerned Doctor/Authority that he is unable to conduct typing and only upon such certificate being issued, he can be exempted from the said necessary test.

16 So far as the Petitioner’s case is concerned, the Petitioner has never produced any certificate whereby he was exempted from the such test. The Department on his application on 18 November 2020 has exempted him from the said condition by its order dated 18 December 2020. Therefore, on the said date, he became eligible to be considered for promotion as Tax Assistant for the first time. He was thereafter considered for promotion to the post of Tax Assistant and accordingly promoted vide order dated 15 February 2021 in the vacancy year 2020–21.

. The Petitioner had prayed to grant him promotion retrospectively from 2010, the learned Member of the Tribunal thought it fit to grant him benefit considering the peculiar facts and circumstances by granting him promotion from the date on which his PH status was restored by the Respondent.

. It needs to be appreciated that granting of promotion retrospectively would require holding of review of DPC conducted from the year 2008. It would result in disturbing the subsequent promotion which were granted, adversely affecting the seniority list and also adversely affecting the persons who were not before the Tribunal. The said aspect of the matter has been rightly considered by the Tribunal and, has therefore granted relief only to the extent of granting promotion with effect from 13 November 2020 in place of 15 February 2021.

. Much reliance is placed by the Petitioner on the recommendations issued by the Commissioner for disability, for claiming retrospective promotion. It needs to be appreciated that the jurisdiction of the said Authority is limited only to the extent of making a recommendations it does not have character of binding nature.

. Section 75 of the Right of Persons with Disabilities Act, 2016, reads as under:

“75.Functions of Chief Commissioner.—(1) The Chief Commissioner shall —

(a) identify, suo motu or otherwise, the provisions of any law or policy, programme and procedures, which are inconsistent with this Act and recommend necessary corrective steps;

(b) inquire, suo motu or otherwise, deprivation of rights of persons with disabilities and safeguards available to them in respect of matters for which the Central Government is the appropriate Government and take up the matter with appropriate authorities for corrective action;

(c) review the safeguards provided by or under this Act or any other law for the time being in force for the protection of rights of persons with disabilities and recommend measures for their effective implementation;

(d) review the factors that inhibit the enjoyment of rights of persons with disabilities and recommend appropriate remedial measures;

(e) study treaties and other international instruments on the rights of persons with disabilities and make recommendations for their effective implementation;

(f) undertake and promote research in the field of the rights of persons with disabilities;

(g) promote awareness of the rights of persons with disabilities and the safeguards available for their protection;

(h) monitor implementation of the provisions of this Act and schemes, programmes meant for persons with disabilities;

(i) monitor utilisation of funds disbursed by the Central Government for the benefit of persons with disabilities; and

(j) perform such other functions as the Central Government may assign.

(2) The Chief Commissioner shall consult the Commissioners on any matter while discharging its functions under this Act.

. The subsequent section i .e. Section 76 of the Right of

Persons with Disabilities Act, 2016 provides that:

" 76. Action of appropriate authorities on recommendation of Chief Commissioner. —Whenever the Chief Commissioner makes a recommendation to an authority in pursuance of clause (b)1[of sub-section (1)] of section 75, that authority shall take necessary action on it, and inform the Chief Commissioner of the action taken within three months from the date of receipt of the recommendation:

Provided that where an authority does not accept a recommendation, it shall convey reasons for non -acceptance to the Chief Commissioner within a period of three months, and shall also inform the aggrieved person."

. After going through Section 76, it is evident that after recommendations are made by the Chief Commissioner of Disabilities, there are two options open to the Authorities concerned. Firstly, to take necessary action as per recommendations and inform the same to the Chief Commissioner within three months about its compliance. It is further provided that if the concerned Authorities do not accept the recommendations, then, in such case, it shall convey the reason for non acceptance of the said recommendations.

. However, in the present case, as per recommendations of the Chief Commissioner of Disabilities, the Respondents have already complied with the recommendations and granted relief to the Petitioner. Being an authority constituted under the Act of Persons with Disability, the Respondents have thought it fit to accept the recommendations and have complied with the said recommendations of the Chief Commissioner by restoring the disability status vide order dated 13 November 2020, restoring his allowance retrospectively with effect from 22 November 2010, and refunding of the amount of Rs.15,600/-, which was recovered.

. It needs to be appreciated that the said recommendations were made by the Commissioner on the basis of the complaint. The said recommendations were issued during the peak of Covid–19 period. Hearing was conducted via Video Conferencing by the Commissioner for Disability on 30 October 2020. There was none to represent the Respondents. Inspite of the same, all the recommendations made by the said Authority have been accepted and complied by considering the case of the Petitioner sympathetically. There was no prayer made by the Petitioner before the Commissioner for Disability for retrospective promotion. Only relief sought before the Commissioner was:

(i) Restoration of PH status; and

(ii) Refund of PH allowance deducted from the salary of the complainant.

17 The Petitioner is claiming something more than what is already granted as per the recommendations made by the Chief Commissioner. The Petitioner is claiming retrospective promotion from the date from which his PH status was withdrawn. The said claim of the Petitioner is based on the fact that his PH status was restored and he has been granted monetary benefits arising out of the PH status retrospectively from the date from which the said status was withdrawn.

. The Respondents herein have opposed it on the ground that, in order to grant promotion to a person there are various factors which requires to be taken into consideration seniority, vacancy and eligibility criteria. As far as eligibility is concerned, for the post of

Tax Assistant three conditions which are required to be fulfilled are:

(a) Five years regular service in concerned region in the Grade (MTS/NS/LDC/ Record Keeper/Sr.Gest.Op.) including service rendered in the erstwhile Group "D";

(b) Having passed Matriculation Examination or equivalent;

(c) Having qualified the prescribed Departmental Examination for Data Entry Skill for 5000 key depressions per hour.

Amongst the said conditions, the third condition of examination of data entry skill is concerned, it is necessary condition for being considered for promotion. The Petitioner was not fulfilling the said qualification, and, he was claiming exemption from passing the said Typing Test.

. For claiming exemption, the Petitioner is required to be examined by a Civil

Surgeon or by the Medical Board attached to the Special Employment Exchange for PH. Only after being certified that he is unable to "Type", he could be considered for further promotion. Hence, unless either he passed the said examination or got himself examined and certified that he is exempted, he cannot claim the said promotion. The Respondents have rightly pointed out that his request of granting him retrospective promotion cannot be considered at this stage for the reason that grant of promotion is always preceded by decision of the Departmental Promotion Committee ("DPC", for short) on whose recommendations promotion are effected. Apart from eligibility, seniority is one of the other condition for being considered for promotion. The Petitioner will have to be placed in a appropriate place in the seniority entailing in disturbing the all earlier promotions having cascading effect on it. The Petitioner has also failed to demonstrate the vacancy position on the date on which he claimed promotion. Unless there is a vacancy there cannot be promotion.

The learned counsel for the Respondents has placed reliance on the decision of the Hon'ble Supreme Court of India in Udit Narain Singh Malpaharia Vs. Additional Member Board of Revenue, Bihar and Anr. 1963 Supp (1) SCR 676. More particularly paragraph 9 of the said judgment. For the purpose of impressing upon the Court that unless the parties who are directly affected are before the Court, the Court cannot issue substantial order affecting their rights behind their back. Therefore, it is necessary that those parties who are directly affected should be impleaded and should be before the Court.

18 While dealing with the issue of grant of seniority retrospectively, the Hon'ble Apex Court in case of Puran Das Vs. Union of India (2006) 3 SCC 97 had an occasion to deal with the facts similar to the present Petitioner for the consideration before the Hon'ble Apex Court. The Petitioner in that case had acquired requisite qualifications subsequently and was claiming promotion with retrospective effect. While dealing with the case, the Hon'ble Apex Court has observed that the "Appellant could not be considered for promotion as he did not have the basic qualifications under the Indo–Tibetan Border Police Rules, 1983. He became eligible for promotion test and became qualified subsequently". The Hon'ble Apex Court has been pleased to observed that the question of giving any retrospective effect to his qualification is clearly impermissible. In the present case also only after getting exemption from the typing test in 2020, the Petitioner has became eligible to be considered for promotion. Therefore, the question of granting him retrospective promotion does not arise.

In the context of seniority and retrospective application of the same, useful reference can be made to the observations made in paragraph 45 of the judgment referred by the Hon'ble Apex Court in Pawan Pratap Singh & Ors. Vs. Reevan Singh & Ors. (2011) 3 SCC page 267. While dealing with the matter of seniority and placement in seniority retrospectively, after taking into consideration the various judgments delivered on this issue, the legal position has been summarized by the Hon'ble Apex Court as follows:

(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the back date and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even born in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the mean time.”

19 Therefore, considering that Petitioner was not eligible for grant of promotion on the date on which the Petitioner is claiming retrospective promotion, the said relief has been rightly refused by the Administrative Tribunal. Therefore, the said decision does not warrant any interference and the Writ Petition is hereby dismissed.