(2006) 04 MAD CK 0083

In the Madras High Court

Case No : Writ Petition No. 38241 of 2005

J. John Wincent APPELLANT

Vs

The Commissioner of Central Excise, The Chief Commissioner of Excise (Cadre Controlling Authority), The Chairman, Central Board of Excise and Customs and The Registrar, Central Administrative Tribunal RESPONDENT

Date of Decision : 27-04-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 33, 47(1), 47(2)

Citation : (2006) 4 MLJ 108

Hon'ble Judges : R. Sudhakar, J;P.D. Dinakaran, J

Bench : Division Bench

Advocate : V. Raghavachari, for the Appellant; R. Santhanam, Senior Central Govt. for Respondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

P.D. Dinakaran, J.—The petitioner seeks a writ of Certiorarified Mandamus to call for the records on the file of the fourth respondent in

O.A.No. 136 of 2005, dated 7.10.2005 and that of the first respondent in proceedings C.No. II/3/13/2002-CF, dated 4.1.2005, to quash the

same and to direct the respondents to consider the petitioner''s name for promotion to the post of Inspector of Central Excise and Customs.

2.1. Brief facts giving rise to the filing of this writ petition are as under:

The petitioner joined the services of the respondents as a Lower Division Clerk on 4.5.1990. Thereafter, he was promoted as Upper Division

Clerk in the year 1995. Consequent to the re-designation of the post in the year 2002, he is holding the post of Tax Assistant. The petitioner, by virtue of his experience, made a representation to the respondents to consider him for promotion to the post of Inspector of Central Excise and

Customs. However, the respondents did not consider the representation of the petitioner and he was informed that, being a physically challenged

person, he would not be able to do the arduous job of Inspector of Central Excise and Customs.

2.2. It is the further case of the petitioner that when persons who suffered serious disability and were refused promotion approached the Central

Administrative Tribunal by way of O.A.No. 884 of 2003, directions were issued by the Tribunal to the respondents to consider the applicants

therein, who are all physically challenged persons, to the post of Inspector of Central Excise and Customs.

2.3. Pursuant to the aforesaid directions, respondents 1 to 3 called upon the petitioner to undergo endurance test of cycling and walking, and he

was found to have performed the same successfully. However, by proceedings dated 27.12.2004 of the second respondent, the case of the

petitioner was rejected as he does not have the prescribed height.

2.4. Aggrieved by the proceedings of the second respondent dated 27.12.2004, the petitioner preferred an application before the Tribunal in

O.A.No. 136 of 2005. The Tribunal, taking note of the fact that the respondents have implemented the order of the Tribunal in O.A.No. 884 of

2003 except in the case of the petitioner, whose candidature was rejected on the ground of failure to possess the prescribed standard of height,

held that there is no scope for relaxing the standards prescribed in the Recruitment Rules, and rejected the application of the petitioner. Hence, this

writ petition.

3.1. The learned Counse for the petitioner contends that the Tribunal erred in rejecting the claim of the petitioner to the benefits conferred u/s 47(2)

of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for brevity ""the Act"") in the matter of

promotion.

3.2. The reason that was projected by the respondents and weighed by the Tribunal, that the petitioner was not qualified even though he passed

the endurance test, is not justified as the petitioner claims promotion as a matter of right reserved for the persons with disability.

4. Per contra, Mr. R. Santhanam, learned Senior Central Government Standing Counsel for respondents 1 to 3, reiterated the contentions urged

before the Tribunal and supported the view of the Tribunal.

5. The short but core point for consideration in this writ petition is: whether the petitioner is entitled to promotion to the post of Inspector of Central

Excise and Customs in spite of the disability suffered by him during the course of his employment?

6. One of the great world leaders, Nelson Mandela had said: ""All countries today need to apply affirmative action to ensure that the women and

the disabled are equal to all of us.

7. The worldwide disability rights movement has initiated a new thinking among non-disabled persons that people with disabilities must also be

provided with equal opportunities and equal treatment by society, a thinking that there is no pity or tragedy in a disability and that is a myth that

being disabled is difficult.

8. The Constitution of India does not specifically prescribe discrimination on the ground of ""disability"", but it does contain non-discriminatory

provisions that guarantee equality and equal opportunities for all citizens as in Articles 14 and 16.

9. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 treats disability as a civil right rather

than a health and welfare issue, and recognises the need to integrate persons with disabilities with the mainstream of society by some normative

action.

10.1. In this context, it is apt to refer Section 47 of the Act, which reads as follows:

Section 47: Non-discrimination in Government employments.-

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the

same pay scale and service benefits.

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) 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.

(emphasis supplied)

10.2. Section 47(1) of the Act, in clear terms, provides that there cannot be any discrimination in Government employment and no establishment

shall dispense with or reduce in rank an employee whatsoever during his service. Section 47(2) of the Act is relevant for our purpose. It in crystal

clear terms provides that no promotion shall be denied to a person merely on the ground of his disability.

10.3. Indisputably, (i) at the time of joining the service the height of the petitioner was 160 cms. and the same is substantiated by the physical

fitness certificate, which was marked as Annexure-6 before the Tribunal; (ii) the petitioner underwent the endurance tests, namely, cycling and

walking and was found to have performed successfully; and (iii) pursuant to the directions of the Tribunal in O.A.No. 884 of 2003, by order dated

30.9.2003, the persons with disability were considered for the post of Inspector of Central Excise and Customs on the basis of the communication

from the Department of Revenue, Government of India to the Commissioner of Central Excise, Coimbatore dated 27.1.2004 marked as Ex.A-3

before the Tribunal.

11. In Shri Suhas Vasant Karnik v. Union of India and Ors., the Bombay High Court had the occasion to examine whether person suffering from

blindness could be declared ineligible for seeking promotion. The High Court held that the respondent is not entitled to discriminate amongst the

members of staff merely because some of its members are physically challenged. It further held that the respondent is under constitutional obligation

to encourage participation of the visually handicapped persons in activities of the Bank on par with other members of the staff and consider the

cases of visually handicapped for promotion fairly and equitably. Having regard to the judgment of the Apex Court in National Federation of Blind

Vs. Union Public Service Commission and Others, , it allowed the petitioner and all other similarly situated persons to appear in the promotional

examination and participate in the process of promotion, vide National Human Rights Commission Disability Manual 2005, Page:142.

12. In the case of Union of India v. San jay Kumar Jain 102 (2003) DLT 525, where a person who was blind due to Retinitis Pigmentosa was

denied permiss ion to appear for viva voce test for promotion to a Group B post by the management of Western Railway, the Division Bench of

the Delhi High Court upheld the order of the Principal Bench, Central Administrative Tribunal and quashed the order of denial of permission to

appear in viva voce test. It held, ''provision of Section 47(2) is mandatory, i.e., no promotion shall be denied to person merely on the ground of his

disability.''

13. Even though there is a provision in the Act to accord exemption to establishments from employing disabled, this is possible only after a set

procedure given in Section 47(2) of the Act is followed, viz.,

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.

14. However, no guidelines have been evolved nor any rules included in the implementing rules for deciding a case for exemption. In such a

situation, there is a danger of arbitrary operation of this proviso jeopardizing the future prospects of a disabled employee. When Union of India

questioned the decision of the Division Bench of the Delhi High Court in Union of India v. Sanjay Kumar Jain 102 (2003) DLT 525, before the

Apex Court in Union of India (UOI) Vs. Sanjay Kumar Jain, , the Apex Court held that in the absence of any notification exempting the

establishment in question, the blind employee could not be denied promotion.

15. At this juncture, it is apt to refer the relevant portion of the communication dated 27.1.2004 from the Department of Revenue, Government of

India to the Commissioner of Central Excise, Coimbatore:

1. I am directed to refer to your office letter No.11/39/9/2002-ESSTCO) Part II dated 1.12.2003 on the above cited subject and to say that the

Ministry of Social Justice and Empowerment vide their notification dated

31.5.2001 has identified the posts of PO/EO and Inspector, Central

Excise and Customs as suitable to be handled by the handicapped persons. Since these posts have arduous field duties, which cannot be expected

to be performed by the handicapped persons, the Board has submitted a proposal to the Ministry of Social Justice and Empowerment for

exclusion of these posts from the purview of their notification dated 31.5.2001. The matter is still under consideration of that Ministry.

2. However, in compliance with Section 33 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act,

1995 the Board has considered the matter further and it has been now decided to permit physically handicapped persons to undertake the physical

endurance test and promote them as per Reservation quota if they qualified the test till an exemption is received from the Ministry of Social Justice

and Empowerment.

16. The communication dated 27.1.2004 expressly makes it clear that the Department of Revenue, Government of India was satisfied that the

posts of PO/EO and Inspector, Central Excise and Customs are suitable to be handled by the physically challenged persons, even though

correspondence with the Ministry of Social Justice and Empowerment in this regard is pending consideration. It was further decided to permit the

physically challenged persons to undertake the physical endurance test and promote them as per reservation quota if they qualify the test till an

exemption is received from the Ministry of Social Justice and Empowerment. Moreover, there is no notification exempting the establishment in

question, from the provisions of Section 47(2) of the Act.

17. In the instant case, even though in compliance of the directions of the Tribunal in an earlier application, the case of persons with disabilities

were considered for promotion to the post of Inspector of Central Excise and Customs, the case of the petitioner was rejected as he did not

possess the prescribed height. It is not in dispute that the petitioner has performed the endurance test successfully. Under the communication dated

27.1.2004, what was decided is ""to permit physically handicapped persons to undertake the physical endurance test and promote them as per

Reservation quota if they qualified the test till an exemption is received from the Ministry of Social Justice and Empowerment."" In our considered opinion, as the petitioner has performed the endurance test successfully, his case can be considered for promotion to the post of Inspector of

Central Excise and Customs, on par with others, who suffered physical disabilities and were promoted subsequent to the directions of the Tribunal.

This portion of the communication dated 27.1.2004 in our considered opinion, not properly appreciated by the Tribunal, and the same warrants

our interference.

In the result, the writ petition is allowed and the order of the Tribunal dated 7.10.2005 made in O.A.No. 136 of 2005 is set aside and respondents

1 to 3 are directed to consider the case of the petitioner for promotion to the post of Inspector of Central Excise and Customs from the due date,

if he is otherwise entitled to and pass appropriate orders within two months from the date of receipt of copy of this order. No costs. Consequently,

W.P.M.P.No. 40884 of 2005 is closed.