

(2007) 10 MAD CK 0069

In the Madras High Court

Case No : Writ Petition No. 40730 of 2002

S. Raghuraman, Clerk

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-10-2007

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 38
Constitution of India, 1950 — Article 21
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 47, 47(1)

Citation : (2007) 10 MAD CK 0069

Hon'ble Judges : Prabha Sridevan, J;K. Suguna, J;Eliphe Dharma Rao, J

Bench : Full Bench

Advocate : L. Chandrakumar, for the Appellant; L. Chandrakumar, for R1 to R3, for the Respondent

Final Decision : Allowed

Judgement

Eliphe Dharma Rao, J.—Aggrieved by the order dated 22-11-2001 passed by the Central Administrative Tribunal (in short "the Tribunal"),

dismissing the original application, the original applicant has filed the present writ petition.

2. The writ petitioner, who was working as Station Master in the Chennai Division of Southern Railways in the pay scale of Rs.5000-8000, was

found to be medically unfit on 3-2-1997 and, therefore, he was offered an alternative employment as Head Train Clerk in the same pay scale of

Rs.5000-8000. The writ petitioner, however, did not accept the offer. Thereafter, he was offered the employment of Clerk Grade in the Integral

Coach Factory (in short ICF) with a condition that he will be placed at last in the seniority list of Clerk Grade.

3. Claiming that he should be given the pay protection as well as seniority protection, the writ petitioner filed an original application (O.A. No. 534 of 1998) before the Tribunal. The said original application was disposed of on 18-4-2000 with a direction to the respondents therein to consider the claim of the writ petitioner and pass suitable orders. The respondents considered the claim of the writ petitioner, but rejected the same by order dated 7-6-2000.

4. Challenging the order dated 7-6-2000, the writ petitioner filed the original application (O.A. No. 1441 of 2000) seeking the relief of direction to the respondents to place him in the grade of Rs.5000-8000 in the Clerk Grade with effect from 19-9-1997; to fix his seniority with effect from 8-11-1991 when he has been promoted as SM-II in the pay scale of Rs.1400-2300 (now Rs.5000-8000 with effect from 1-1-1996). The Tribunal dismissed the original application by observing that since the applicant had joined the post in the ICF on his own volition and knowing fully well the consequences after satisfying with the conditions set forth therein, under such circumstances it was not open to the applicant to claim protection of his pay and seniority. Aggrieved by the order passed by the Tribunal, the original applicant has filed the present writ petition.

5. Learned Counsel for the petitioner submitted that the Tribunal has erred in not considering the plea of the writ petitioner that he is entitled to the benefits of grade protection and consequential benefits including seniority in terms of Sec. 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Paragraph 1304 read with Paragraph 1314 (a) and (c) of the Indian Railways Manual provides for an alternative employment in the equivalent grade even after accepting an offer made in the lower grade either permanently or temporarily even by creating a supernumerary post. Paragraph 1310 of the Indian Railways Manual enables the petitioner to decline an offer duly reserving his right seek alternative employment in equivalent grade. When paragraph 1306(6) of the Indian Railways Manual provides for making an option for alternative employment in a specific category, the finding of the Tribunal that the petitioner had joined the post in the ICF on his own volition and therefore it was not open to him to claim protection of his pay and seniority is unsustainable. Further, the Tribunal went wrong in

holding that the petitioner was accommodated in the ICF by way of inter-railway transfer since there was no post other than Head Train Clerk was

available is untenable since even after declining to accept the offer as Head Train Clerk, the petitioner was still holding the right for alternative

employment in equivalent grade, for such an alternative employment there is no need for existence of a vacancy since the offer may be against a

permanent or temporary even by creating supernumerary and a transfer at request could be made only when the petitioner was holding a post in

the office clerk category at the time of making such request.

6. On the other hand, learned Counsel for the respondents submitted that the writ petition is liable to be dismissed for non-joinder of Southern

Railway as a party- respondent to this writ petition because ICF is in no way concerned with this case. Learned Counsel further submitted that

Sec. 47 of the Persons with Disability Act is not applicable to the petitioner since he had already been offered the alternative employment in the

same grade consequent to his medical decategorisation, but the petitioner did not accept the same and insisted for his posting in the clerical grade,

which could not be done in view of the ban in filling up the clerical vacancies. His case was forwarded to ICF for consideration against the

vacancies, if any, and as there were some vacancies in Clerk Grade II in the scale of pay of Rs.950-1500 at the relevant time, the petitioner's

request was considered for posting him as Clerk Grade II in ICF as an inter-Railway transfer subject to the conditions that he will rank as

junior-most to all permanent and temporary Clerks Grade-II in scale of Rs.950-1500 as on the date of his joining ICF; at any point of time, he

should not represent seeking fixation of seniority or absorption in any other higher grade other than Clerk Grade II in scale of Rs.950-1500; and

his request if any for re-transfer to Southern Railways at a later date will not be considered under any circumstances. Accepting all these

conditions, the petitioner has joined ICF as Clerk Grade-II. After joining ICF in the cadre of Clerk Grade-II, the petitioner made representation

dated 29-11-1997 requesting for accommodating him in the cadre of Head Clerk in the pay scale of Rs.5000-8000. The said representation was

forwarded to Southern Railway for disposal as he was medically decategorised only in Southern Railway. The Southern Railway has replied that

the petitioner was originally offered alternative appointment as Head Train Clerk in the equivalent grade of Head Clerk in the scale of Rs.1400-

2300 (now Rs.5000-8000) in Southern Railway cannot be agreed to and the same was informed to the petitioner by the ICF by letter dated 16-

4-1998. The petitioner thereafter filed O.A. No. 534 of 1998 before the Tribunal praying for a direction to post him in the grade of Rs.5000-

8000 in the clerical category with effect from the original date of absorption on medical decategorisation and to pay all the consequential benefits.

The Tribunal by order dated 18-4-2000 disposed of the application with a direction to the respondents to consider his claim and pass suitable

orders in the light of paragraph 1304 of Indian Railway Establishment Manual within a period of three months. The representation was considered,

but the claim was rejected. The contempt petition filed by the petitioner was also dismissed by the Tribunal, reserving liberty to the petitioner to file a

separate application, if he was so advised.

7. Learned Counsel further submitted that the transfer of the petitioner from Southern Railway to ICF was an inter-railway transfer (one way)

subject to certain conditions regarding his seniority and pay. Accepting these specific conditions, the petitioner had joined ICF as Clerk Grade-II

and his request for posting him as Head Clerk in ICF, which is equivalent to Station Master Grade II prior to his medical invalidation, cannot be

agreed to. The Southern Railways had already offered the post of Head Train Clerk in the same pay scale of Rs.1400-2300 (5000-8000) which

he was holding before being medically invalidated. The petitioner did not accept the same and made a representation to post him as Head

Clerk/Senior Clerk/Clerk. His application was then forwarded to ICF and ICF agreed to take him in the clerical grade-II with the scale of pay of

Rs.950-1500. The petitioner accepted the above post with the conditions imposed by the ICF Administration. Therefore, it is not open to the

petitioner at this stage to make a representation for absorption in the post of Head Clerk in ICF, which is equivalent to the post of Station Master

Grade II.

8. Considering the above facts and circumstances of the case, the objection for not posting the petitioner in the grade of Head Clerk in the ICF is

that when the petitioner was medically invalidated to hold the post of Station

Master in the Southern Railway, he was offered alternative equivalent employment in the grade of Head Train Clerk, but when he refused to accept the said post, on his request, he was given employment in the clerical grade in the ICF. The petitioner accepted the employment and jointed and thereafter after a period of six months, the petitioner made a representation to appoint him as Head Train Clerk with the scale of pay of Rs.5000-8000. The request made by the petitioner was not accepted by the respondents. The reasons given by the respondents is that the petitioner was accommodated in the ICF on the basis of inter-railway transfer and the petitioner had also accepted the terms and conditions set forth therein when he was accommodated in the ICF. The petitioner having accepted the conditions when he was accommodated in the ICF on inter-railway transfer, his claim for pay and seniority protection cannot be sustained.

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

47. Non-discrimination in Government employment.-

(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 attained 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.

10. Chapter XIII of the Indian Railway Establishment Manual (IREM) deals with the absorption of medically incapacitated staff in alternative

employment. Clause 1301 provides that a railway servant who fails in a vision test or otherwise becomes physically incapable of performing the

duties of the post which he occupies should not be discharged forthwith but every endeavour should be made to find alternative employment for

him as expeditiously as possible. Such employment must be of suitable nature and on reasonable emoluments having regard to the emoluments

previously drawn by the railway servant. Clause 1303 deals with railway servant totally incapacitated for further service. It provides that a railway

servant in group (i) above cannot be retained in service and is not, therefore, eligible for alternative employment. If he is on duty, he shall be

invalidated from service from the date of relief of his duty, which should be arranged without delay on receipt of the report of medical authority. If,

however, he is granted leave, he shall be invalidated from service on the expiry of that leave or extension of leave. The leave or extension of leave

that may be granted to him after the report of the medical authority has been received, will be so limited that the amount of leave, as debited against

the leave account, together with any period of duty beyond the date of the medical authority's report does not exceed six months. Note 2 to

Clause 1304 says that in the matter of absorption of a medically incapacitated staff in alternative post, Railway administrations, should take care to

ensure that the interests of staff in service are not adversely affected as far as possible. The alternative appointment should be offered only in posts

which the staff can adequately fill.

11. The above said clauses in Chapter XIII of IREM are in consonance with Section 47 of the above said Act. Therefore the provisions of Section

47 of the Act as well as the above said clauses of IREM deal with the protection of employment of medically incapacitated staff by absorbing them

in alternative suitable employment with the protection of pay and other service benefits. Therefore, the stand taken by the Railway Administration

that the petitioner is not entitled for the reliefs sought for by him is incorrect and against the spirit of Section 47 of the Act and the above said

clauses of IREM. Therefore, we are not able to accept the contention raised by the respondents.

12. In the result, the impugned order passed by the Tribunal is set aside and the writ petition is allowed. The respondents are directed to fit the

petitioner in the grade of Rs.5000-8000 in the clerical cadre with effect from 19-9-1997 and to reckon the petitioner's relative seniority with effect

from 8-11-1991 when the petitioner has been promoted as Station Master Grade III in the scale of pay of Rs.1400-2300 (Rs.5000-8000 with effect from 1-1-1996) and to pay all other attendant benefits, including seniority. No costs.

Elipe Dharma Rao and K. Suguna, J.

13. In view of the difference of opinion expressed by the Bench with regard to the applicability of the provisions of Sec. 47 of the Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1955 read with Clause 1302 of the Indian Railway Establishment

Manual to the issue involved in this writ petition, Registry is directed to place this matter before the Hon"ble The Chief Justice for referring the

matter to a third Judge.

K. Suguna, J.

14. The above writ petition has been filed challenging the order dated 22.11.2001 passed in O.A. No. 1441/2000 by the Central Administrative

Tribunal.

15. The petitioner, while working as a Station Master Gr.III in the Chennai Division of Southern Railways in the pay scale of RS.1400-2300, was

medically decategorised and was declared unfit for safety categories under medical classification A-1, but found fit for A-2 classification and below

according to visual standards. As per paragraph 1304 of Indian Railway Establishment Manual (in short ""IREM""), the petitioner was offered

alternative appointment in equal cadre such as Head Train Clerk, which was an identical grade to that of the post which the petitioner was holding

before his medical decategorisation by letter dated 4.7.1997. But, by letter dated 17.7.1997, the petitioner requested to give posting as a Head

Clerk/Senior Clerk/Clerk in Southern Railway/ or in Integral Coach Factory (in short ""ICF""). As there were no vacancies to consider his request

and there was a ban on filling up clerical vacancies by the Southern Railway Administration, his case was forwarded to ICF for consideration

against the vacancies, if any. Since, at the relevant point of time, some vacancies were available in Clerk Grade II in the scale of Rs.950-1500, the

petitioner's request was considered for posting him as a Clerk in ICF, as an inter-railway transfer subject to the following conditions:

(i) He should rank junior-most to all permanent and temporary Clerk Grade II in

scale Rs.950-1500 as on the date of his joining the new seniority unit viz. Personnel Department in ICF.

(ii) At any point of time, he should not represent seeking fixation of seniority or absorption in any other higher grade other than Clerk Grade II in

scale Rs.950-1500 and

(iii) His request if any for re-transfer to Southern Railway at a later date will not be considered under any circumstances.

Accepting these conditions, the petitioner had joined as Clerk Grade II in ICF vide office order No. PB/S1-C/2157 dated 27.9.1997. In the said

order, it has been clearly stated that the petitioner, who was working as a Station Master in the scale of pay of Rs.1400-2300 has been transferred

from Southern Railway to ICF on one way Inter- Railway Transfer. After joining in ICF, the petitioner filed a representation dated 29.11.1997

with a request to accommodate him in the equivalent cadre of Head Clerk in the scale of Rs.5000-8000 (new scale). The said representation was

forwarded to Chennai Division of the Southern Railway for disposal as he was medically decategorised only in the Southern Railway. The

Southern Railway has replied that the petitioner was originally offered alternative appointment as Head Train Clerk in the equivalent scale. But, the

petitioner had declined to accept the same and as per his request, his case was forwarded to the ICF and at his own request for posting as a Clerk

Grade II , he was posted as Clerk Grade II, which he had accepted. Therefore, the request for absorption in the equivalent cadre of Head Clerk

in the scale of Rs.1400-2300 (Rs.5000-8000) in Southern Railway cannot be granted and this has been communicated to the petitioner by letter

dated 16.4.1998. Challenging the same, the petitioner had filed O.A. No. 534/1998 before the fourth respondent. But, by order dated 18.4.2000,

the same was disposed of to consider the above said claim of the petitioner and pass suitable orders in the light of paragraph 1304 of IREM within

a period of three months from the date of service of the order. Accordingly, the representation of the petitioner was considered by the ICF

Administration and by order of the second respondent dated 7.6.2000, the petitioner's request was rejected and challenging the said order, the

petitioner had filed O.A. No. 1441/2000 praying for a direction to the respondents to fit him the grade of Rs.5000-8000 in the clerical cadre with

effect from 19.9.1997 and to reckon his relevant seniority with effect from 8.11.1991 i.e, the date on which he was promoted as Station Master in scale of Rs.1400-2300 (Rs.5000- 8000) and to pay the attendant benefits. But the same has been rejected by order dated 22.11.2001. As against that, the present writ petition has been filed.

16. According to the learned Counsel for the petitioner, the petitioner is entitled for grade protection, pay protection and consequential benefits

including seniority as per Section 47 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in

short "the Act"). That apart, according to the learned Counsel for the petitioner, the petitioner's claim has been rejected erroneously by the

Tribunal on the ground that having accepted the offer by the respondent Department for appointment in the grade of Rs.950- 1500, cannot aspire

for grade protection. That apart, according to the learned Counsel, the Tribunal has failed to take cognizance of the statutory provisions in

paragraph 1304 read with paragraph 1314 (a) and (c), which provide for an alternative employment in the equivalent cadre even after accepting

the offer made in the lower grade either permanently or temporarily. Besides, the finding of the Tribunal, since the petitioner had rejected the offer

of alternative employment as a Head Train Clerk in the identical scale of pay and made a request to offer a post in the ICF, the respondent

Department cannot be said to have failed to consider in a proper perspective the statutory provisions in paragraph 1310 of IREM cannot be

accepted. That apart, according to the learned Counsel, while offering an alternative employment, the provisions of Section 47 of the Act have to

be complied with and in the case of the petitioner, the respondent Department, totally ignoring the same, has appointed the petitioner as a Clerk

Grade II, contrary to the provisions of the above said Act.

17. On the other hand, learned Counsel for respondents 1 to 3 has contended that immediately on medical decategorisation, the petitioner was

offered alternative job in accordance with the relevant provisions and in an identical cadre with pay protection by order dated 4.7.1997. Since the

petitioner had refused to accept the same, by letter dated 17.7.1997 and requested to give a posting as a Head Clerk/Senior clerk/Clerk in

Southern Railway or in ICF as an alternative appointment, after bringing to his

notice that the pay of the post of Clerk Grade II is only Rs.950-1500 and with the condition that he should not make any representation seeking fixation of seniority or absorption in any other higher cadre, this offer was made. Accepting the offer, the petitioner had joined duty. As such, according to the learned Counsel for respondents 1 to 3, the petitioner is estopped from making a request seeking pay protection and absorption in the higher grade (equal grade). That apart, as far as ICF is concerned, it is a different entity and Southern Railway is a different entity. As an employee of the Southern Railway, the petitioner can seek an alternative employment with pay protection in terms of Section 47 of the Act only in the Southern Railway and not in the ICF. That apart, when the petitioner had refused to accept the offer made by the Southern Railway, by letter dated 17.7.1997, his right to seek protection u/s 47 of the Act elapses. According to the learned Counsel, it is not the case, as if the petitioner was not given any alternative employment in terms of Section 47 of the Act. Besides, having accepted the offer in ICF and joined the service accepting the terms and conditions imposed therein, the petitioner is estopped from making the representation dated 29.11.1997 seeking pay protection and other benefits. According to the learned Counsel, the order of the Tribunal has to be sustained.

18. I have considered the above submissions of the learned Counsel for the petitioner as well as respondents.

19. Admittedly, the petitioner was medically decategorised while he was working as a Station Master in the scale of pay of Rs.1400-2300

(revised as Rs.5000-8000). He was found unfit for safety categories under medical classification A-1, but found fit for A-2 classification and below

according to visual standards. Subsequent to this, it is not in dispute that by letter dated 4.7.1997, the Southern Railway has offered him alternative

employment as Head Train Clerk, which is an identical cadre, compared to the one which he was holding before his medical decategorisation. But,

the same was not accepted by the petitioner. On the other hand, the petitioner had submitted a representations dated 17.7.1997 and 4.8.1997

with a request to post him as Head Clerk/Senior Clerk/Clerk in the Southern Railway or in ICF. Basing on this, since there were no vacancies in

the clerical cadre in the Southern Railway, his case was referred to ICF.

Consequence of this, by letter dated 13.8.1997, the Chief Personnel Officer of the ICF has informed that vacancies are available in the clerical cadre in the scale of Rs.950-1500 and this fact has been brought to the notice of the petitioner also and by proceedings dated 19.9.1997, the petitioner was directed to report for absorption in the post of Office Clerk in the scale of pay of Rs.950-1500. Based on this, the petitioner was also relieved from the Southern Railway and he was directed to report before the ICF and in the office order dated 27.9.1997, it has been made very clear that the transfer and absorption of the petitioner is subject to the conditions mentioned therein. One of the conditions is that the petitioner should not represent seeking fixation of seniority or absorption in the higher cadre other than Clerk Grade II in the scale of pay of Rs.950-1500. That apart, it has been made very clear to him that he will rank as the ;junior-most to all the permanent and temporary Clerk Grade II in the scale of Rs.950-1500 as on the date of joining. Subsequently, the petitioner has submitted a representation dated 29.11.1997 for absorption in the higher cadre with pay protection and seniority.

20. As a medically invalidated person, the petitioner is entitled for protection u/s 47 of the Act and there is no dispute with regard to that. There is also no dispute that the petitioner was given that offer by letter of the Southern Railway dated 4.7.1997. But, the same was not accepted by the petitioner and at his request, and imposing certain conditions, he was offered employment in the ICF. Having accepted those conditions and joined the post, ignoring the acceptance given by him, the petitioner cannot seek either pay protection or seniority or grade protection. As far as protection u/s 47 of the Act and similar provisions in IREM are concerned, the same had come to an end when the petitioner had declined to accept the offer given by the Southern Railway. As far as the protection u/s 47 is concerned, it is a concession given to the employees based on their disability. But, that does not mean that gives a privilege to the concerned employee to seek employment at his choice and wherever he wants.

As rightly contended by the learned Counsel for the respondents, the Southern Railway wherein the petitioner was working at the time of his medical decategorisation is a separate entity and ICF is a separate entity. If at all, the petitioner can get protection only in the Southern Railway

and it is not in dispute that an order to alternative employment with pay protection was offered to the petitioner by the Southern Railway. On his refusal to accept the same, the petitioner lost his right to claim any protection either u/s 47 of the said Act or under similar provisions in IREM. The protection given u/s 47 of the Act , certainly, does not confer a right on the disabled employee to claim any post according to his own whims and fancies. If the contention of the learned Counsel for the petitioner has to be accepted, the concession given u/s 47 will amount to a privilege without any limitation and that it can be demanded at any time. In fact, by getting medical decategorisation, instead of getting an alternative employment, one will be able to get what he could not get otherwise as per the Rules. That apart, it is not the case of the petitioner that inspite of his refusal, he was compelled to accept the post in ICF. On the other hand, on his choice, the same was given to him and as referred to above, the benefits given either u/s 47 of the Act or under the provisions in IREM come to an end on his refusal to accept the offer made by order dated 4.7.1997 and the concession/protection u/s 47 is certainly not carried over to ICF where the petitioner was appointed basing on his choice. If it is held otherwise, sympathetic consideration will become a matter of right, which is not permissible u/s 47 of the Act. That apart, no provisions have been brought to the notice of this Court that even after accepting the offer in the lower cadre, the petitioner can seek absorption in the higher cadre, that too, in a different entity. Hence, I find no merit in the writ petition and the same is dismissed. The order of the Tribunal dated 22.11.2001 is confirmed. No costs.

Prabha Sridevan, J.

21. In view of the difference in the decision between Dharmarao Elipe, J. and K. Suguna, J. with regard to the right of the petitioner protection of his service conditions in terms of the Disabilities Act this matter has been placed before me.

22. The dispute is with regard to the question whether a Railway employee who has been medically decategorised and has been given alternative employment in Integral Coach Factory is entitled to such protection. K. Suguna, J. Found that his claim was without merit, whereas, Dharmarao Elipe, J. allowed the claim.

23. The chronological dates and events are as follows:

W.P. No. 40730 ...Sri. S. Raghuraman, now working as of 2002 Clerk Gr.II in ICF is the petitioner.

Prayer in W.P ...W.P. is filed to quash the order dated 22.11.2001 passed by CAT/MAS in O.A. 1441/2000, rejecting Petitioner's claim for

fitment of his scale of pay in Rs.5000-8000 as Head Clerk from 19.9.1997 and to reckon his seniority with effect from 9.11.91, i.e. the date on

which he was promoted as Station Master in scale Rs. 1,400-2300 (Revised as Rs.5000 - 8000 with effect from 1.1.96).

w.e.f.9.11.91 ...Petitioner was promoted as Station Master Gr.III in scale Rs.1400 - 2300 (Revised as 5000 - 8000) and posted at Jolarpettai

and later on transferred to Athipattu.

13.3.1989 ... Petitioner was initially appointed as Asst. Station Master in Scale Rs.1200 - 2040 (Revised as Rs.4500 - 7000).

03.02.1997 ...Petitioner was declared medically unfit to continue in the safety category of Station Master.

02.06.97 ...Suitability Test. Orders Passed.

04.7.1997 ...Petitioner was offered alternate post of Head Train Clerk in the same scale of pay of Rs.1400 -2300(RP Rs.5000 - 8000).

17.7.1997 ...Petitioner representation declining (Page 2) to accept the alternate employment as Head Train Clerk.

04.08.1997 ...Further representation requesting to (Page 3A) appoint him as Head Clerk/Sr.Clerk/Clerk either in MAS Divn./HQ/ICF(equivalent)

08.08.1997 ...DRM/MAS wrote to CPO/MAS informing (Page4) Applicant's request to post him as Office Clerk either in Dn.Or.HQ orICF,

and that there is no clerical vacancies, besides ban on copy was marked to CPO/ICF

13.08.1997 i.e.½ CPO/ICF informed DRM/MAS that they have few in clerical cadre in scale Rs.950-1500 and the medically decategorised

employee can be absorbed as Clerk Gr.II in scale Rs.950-1500. (RP Rs.3050 - 4590).

...His suitability to the post of Clerk Gr.II should be assessed before directing to report duty to ICF.

17.08.1997 ...DRM/MAS appointed DCM-I and DPO-I to form a committee.

15.09.1997 ...CPO'S letter to DRM/MAS asking to take further action, pursuant

to CPO/ICF letter dated 13.8.1997.

17.09.1997 ...Petitioner was asked to attend the suitability test at Sr.DPO's Office at 15.00 Hrs. on 18.9.1997.

15.09.1997 ...CPO's letter to DRM/MAS asking to take further action, pursuant to CPO/ICF letter dated 13.8.1997.

17.09.1997 ...Petitioner was asked to attend the suitability test at Sr.DPO's Office at 15.00 Hrs. on 18.9.1997.

18.09.1997 ...Suitability test conducted and found suitable for the post of Office Clerk.

19.9.1997 ...DRM/MAS passed orders directing the petitioner to report to CPO/ICF.

19.9.1997 ...Same day, petitioner reported to CPO/ICF and joined duty in ICF as Office Clerk.

27.09.1997 ...Posting Order in ICF given with conditions.

29.11.1997 ...Petitioner gave a representation requesting to post him as Head Clerk instead of clerk Gr.II.

12.02.1998 ...Petitioner's representation was forwarded to southern Railway.

30.03.1998 ...Southern Railway replied that the transfer was at the request of the Petitioner and hence he could continue in ICF only

16.4.1998 ...ICF informed the petitioner that his request is not agreed to. Petitioner filed O.A.534/98 in CAT/Madras, praying for a direction to

post him in Grade Rs.5000 -8000, w.e.f. the date of absorption.

18.4.2000 ...R4 Tribunal directed R1 & R2 to consider his claim and pass suitable orders in the light of para 1304 of IREM within 3 months.

07.06.2000 ...R2 informed that Petitioner's request (page 4) to post him in the Grade of Rs.5000 - 8000 is not agreed to.

... Petitioner filed Contempt Petition 61/2000 alleging that the order dated 7.6.2000 passed by R2 is not in compliance of the directions of the R4

Tribunal.

10.10.2000 ...½contempt Petition was dismissed with an observation that the petitioner could challenge the order dated 7.6.2000, if so advised.

20.12.2000 ...½Thereafter, the petitioner filed O.A. No. 1441/2000.

22.11.2001 ...CAT dismissed O.A.

...Aggrieved by this order, petitioner filed the present W.P.

24. The relevant rules that apply to the petitioner are Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full

Participation) Act, 1995 (Act 1 of 1996) ("Disabilities Act" in short), Paragraph Nos.312 and 313 of the Railway Establishment Manual (Volume-

I) and Paragraphs 1301 to 1310 under Chapter XIII of the Absorption of Medically Incapacitated Staff in Alternative Employment Rules. These

are extracted hereunder:

Section 47. Non-discrimination in government employment.- (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.

312. TRANSFER ON REQUEST:

The seniority of railway servants transferred at their own request from one railway to another should be allotted below that of the existing confirmed,

temporary and officiating railway servants in the relevant grade in the promotion group in the new establishment irrespective of the date of

confirmation or length of officiating or temporary service of the transferred railway servants.

Note:- (i) This applies also to cases of transfer on request from one cadre/division to another cadre/division on the same railway.

(Rly.Bd. No. E(NG) I-85 SR 6/14 of 21/01/1986)

(ii) The expression ""relevant grade"" applies to grade where there is an element of direct recruitment. Transfers on request from Railway employees

working in such grades may be accepted in such grades. No such transfers should be allowed in the intermediates grades in which all the posts are

filled entirely by promotion of staff from the lower grade(s) and there is no element of direct recruitment.

(No. E(NG) I-69 SR 6/15, dated 24.06.1969) ACS-14)

313. MEDICALLY UNFITTED RAILWAY SERVANTS:

(a) (i) Medically decategorised staff may, as far as possible, be absorbed in such alternative posts which should broadly be in allied categories and

where their background and experience in earlier posts could be utilised. For example, traffic running and operating staff need not necessarily be

absorbed in the ticket checking cadre alone but they could also be absorbed in other commercial, station or yard categories.

(ii) The medically decategorised staff absorbed in alternative posts, whether in the same or other cadre, should be allowed seniority in the grade of

absorption with reference to the length of service rendered in the equivalent or corresponding grade, irrespective of the rate of pay fixed in the

grade of absorption under the extant rules. In the case of staff who are in grade higher than the grade of absorption at the time of medical

decategorisation, total service in the equivalent and higher grade is to be taken into account.

Provided that if a medically decategorised employee happens to be absorbed in the cadre from which he was originally promoted, he will not be

placed above his erstwhile seniors in the grade of absorption.

(iii) While absorbing the medically decategorised Running Staff in alternative posts, a percentage of basis pay representing the pay element in

Running Allowance, as decided by the Government through administrative instructions from time to time, should be added to the minimum as well

as maximum of the scale of pay for purposes of identifying "equivalent" posts and their seniority should then be fixed in the equivalent absorbing

posts.

(No. E(NG) II/77/RE-3-2 OF 2-9-77 and E(NG) I-80-SR-6/83 of 5.3.1981)

(b) Railway servants whose services were terminated either because of the maximum limit of all leave including extraordinary leave having been

exceeded or the medical authorities could not recommend the grant of extraordinary leave in the case of tuberculosis, pleurisy and leprosy patients

and are re-employed in railway service after being declared fit to work by the medical authority should take their seniority below all permanent

railway servants on the date of their re-employment provided they were permanent before medical unfitness or would have been confirmed in the meantime. Railway servants who were officiating or temporary at the time of medical unfitness or would not have been confirmed in the meantime should be placed below the officiating or temporary employees as the case may be on the date of their re-employment.

(c) Seniority of medically unfitted staff mentioned in Sub-para (a) above, on restoration to their original posts should be determined as under:

(i) Railway servants who properly appeal within the time limit laid down for appeals or whose appeal is entertained in a reasonable period waiving the time limit and get declared fit, should not lose their seniority or their claim for consideration for promotion for which they were eligible in the original category in which they were employed.

(ii) Seniority of railway servants who prefer delayed appeals and are declared fit or who take treatment and consequently get declared fit, if they were formerly confirmed in the grades in which they were, would be affected to the extent of any persons who may have been confirmed before their re-absorption into the original category. If however, they were only officiating in the original category, then their seniority should be below the staff confirmed till then, but need not be affected vis-a-vis their original juniors who happen to be till officiating.

(d) In the case of staff coming to a new unit on own request by accepting bottom seniority and then getting medically decategorised, provision of

Sub-para (a)(ii) above will be applicable only to the extent of service in the new unit.

(No. E(NG)I-71 SR 6/39 dated 31-5-1977)

(e) In the case of staff who are not required to undergo periodical Medical examination but who of their own accord request for change of category on grounds of health, and are recommended change of occupation by the medical authority, their change will be treated as transfer on own request and dealt with as per para 312.

(No. E(NG)I - 76 SE 6/37, dated 18.09.1976)

CHAPTER XIII ABSORPTION OF MEDICALLY INCAPACITATED STAFF IN ALTERNATIVE EMPLOYMENT

1301. A railway servant who fails in a vision test or otherwise becomes physically

incapable of performing the duties of the post which he occupies

should not be discharged forthwith but every endeavour should be made to find alternative employment for him as expeditiously as possible. Such

employment must be of suitable nature and on reasonable emoluments having regard to the emoluments previously drawn by the railway servant.

1302. Classification of railway servants declared medically unfit - Railway servants declared medically unfit for further service are divisible into two

groups:

(i) Those completely incapacitated for further service in any post on the railway, ie., those who cannot be declared fit even in the "C" medical

category;

(ii) Those 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.

1303. Railway servant totally incapacitated for further service : (Not Applicable)

1304. Railway servants incapacitated for service in posts held by them -

(a) Permanent Railway Servants : A permanent railway servant in group (ii) of Para 1302 above must also cease to perform the duties of the post,

he was holding from the date he is declared medically unfit. Here again, no officer has the authority to permit him to perform his duties in that post

beyond that date. He should be granted leave as admissible to him, under the leave Rules by which he is governed, from that date he is

incapacitated subject to the proviso that where the railway servant has not got six months leave to his credit, his leave shall be made up to six

months by the grant of extraordinary leave. If an alternative employment cannot be found for such a person within the period of leave so granted

his service should be extended by grant of extraordinary leave, subject to the condition that the total amount of extraordinary leave to be granted

to the railway servant does not exceed six months. It should be possible within the period of leave thus extended to find either a permanent or a

temporary post for his absorption. If the railway servant is absorbed against a temporary post in a permanent cadre a supernumerary post may

also be created and his lien counted against the post. It should, however, be noted that,

(i) the actual creation of supernumerary post will follow the acceptance of offer of alternative post;

(ii) the supernumerary post should be abolished as soon as a permanent post is found for the railway servant concerned.

The purpose of granting extraordinary leave envisaged in this para is that in case the Railways administration is able to find a suitable alternative

employment for a medically incapacitated employee, there should be no break in his service. Since the period of such extraordinary leave counts

for the purpose of special contribution to P.F. in the case of a railway servant governed by the state Railway Provident Fund Rules but not in the

case of pensionable Railway servant the latter employee may not like to avail of the extraordinary leave but may instead prefer to quit service on

pension, immediately on the expiry of his period of leave with allowances. In such case extraordinary leave need not be granted to a railway

servant, if he so desires.

2. In the matter of absorption of a medically incapacitated staff in alternative post, Railway administrations, should take care to ensure that the

interest of staff in service are not adversely affected as far as possible. The alternative appointment should be offered only in posts which the staff

can adequately fill.

(b) Temporary Railway Servants : A temporary Railway Servant in group (ii) of para 1302 above who becomes medically unfit for the post held

by him on account of circumstances arising out of and in the course of his employment, the benefit admissible to permanent Railway servants as at

(a) above should be given.

A temporary employee has become medically fit for the post held by him, on account of circumstances which did not arise out of and in the course

of employment, the benefit of Rule 304 RI (of Fifth edition 1985) will not be admissible. While, therefore, it is strictly not obligatory to find

alternative employment for such an employee, every effort would nevertheless, be made to find alternative employment. The employee concerned

should be granted such leave as is due to him plus extraordinary leave not exceeding three months; the total not exceeding six months. If no

alternative employment be found in this period, the employee should be discharged from service.

1305. Alternative employment must be found in the case of permanent and temporary railway servants:

Medically decategorised staff may, as far as possible, be absorbed in such alternative posts which should broadly be in allied categories and where

their background and experience in earlier posts could be utilised. There should be no difficulty in providing such alternative employment and no

reversion of any officiating railway servant for the purpose of absorbing the disabled railway servant should be necessary. For this purpose

attempts should be made to absorb the disabled railway servant not only within the District/Division or Department but in another District/Division

or Department.

1306. Steps to be taken for finding alternative employment:

1. With a view to determine the categories in which a medically incapacitated railway servant is suitable for absorption, a Committee should

examine him. The committee may consist of two or three officers under whom the medically incapacitated railway servant was working, the railway

servant's immediate officer being one of the members of the Committee. After the Committee has examined the railway servant and determined his

suitability for certain categories of posts, the officer under whom the railway servant was working will proceed to take further action to find suitable

alternative employment for him.

2. The officer concerned will prepare a list of vacancies within his jurisdiction in the categories for which the medically incapacitated railway servant

has been found suitable and a post with emoluments as near as possible to his earlier emoluments will be offered to him.

3. It will be the responsibility primarily of the officer under whom the railway servant is directly serving to find suitable alternative employment for

him. This will be done first by trying to find alternative employment for him. This will be done first by trying to find alternative employment in the

officer's own district, sub-district, sub-division, office, workshop and c. and a register. Vide sub-paragraph (7) below will be maintained for this

purpose.

4. If there is no immediate prospect of employment in his own district, sub-district, sub- division, office and c. the name of the Railway servant with

particulars as given in sub-paragraph (7) below, will be circulated to all other

offices or establishments where suitable employment is likely to be found.

(5) The names of railway servants likely to be suitable for clerical appointments should be intimated to the Divisional Office as well as to the Headquarters Office.

(6) Nothing in the previous sub-paragraphs debars a railway servant from applying for a particular post for which he is likely to be deemed suitable and which is known to be vacant under any officer. Such an application must be addressed through the immediate officer of the railway servant concerned and must contain full particulars of his service and must be forwarded to the officer to whom addressed or to the authority competent to make the appointment. The result of the application must be communicated to the railway servant....

(8) A medically incapacitated railway servant who is permanent will be appointed substantively to the alternative post subject to his suitability. His further chances of promotion thereafter will be in accordance with the normal channels of promotion, and he will not be entitled to consideration for out-of-turn promotions merely because of his absorption into the post as a consequence of medical incapacitation.

1307. Absorption in alternative employment to be circularised.

1308. Before any post is filled or a promotion is ordered, officers concerned will refer to their registers and satisfy themselves that no medically incapacitated servant who is suitable for the post is available. Such medically incapacitated railway servant under all circumstances be given preference over surplus retrenched or demoted railway servant and shorter service.

1309. Alternative employment to be suitable. -

(i) The alternative post to be offered to a railway servant should be the best available for which he is suited, to ensure that the loss in emoluments is a minimum....

(E(NG) ISO SR6/83 dt. 5.3.81).

NOTE :- Care should be taken by Railway administration to see that the interests of the staff in service are not affected adversely as far as possible and alternative appointment should be offered only in post which the staff can

adequately fill. Their suitability for the alternative posts be judged by holding suitability test/interview as prescribed under the extent instructions....

(E(NG) II-73 RE 3/16 dt. 11.4.75)

1310. Offer of alternative employment to be in writing. - The alternative employment must be offered in writing, stating the scale of pay and the rate of pay at which it is proposed to reabsorb him in service. On no account should the Railway servant be posted to an alternative appointment until he has accepted the post. A railway servant is at liberty to refuse an offer of alternative appointment and the leave granted to him will not be terminated pre-maturely merely because of his refusal. The Leave must run its course. He will continue to remain eligible for other alternative offers of appointment till his leave expires and efforts to find such appointments should, therefore, continue throughout the currency of his leave.

These are the rules based on which the petitioner claims relief.

25. Learned Counsel for the petitioner submits that the petitioner is entitled to protection of his rights in terms of Section 47 of the Disabilities Act

as well as the provisions of Indian Railway Establishment Manual which is extracted above and that he cannot be treated as a person seeking transfer on request or as a one way transfer case. The learned Counsel submitted that he has a statutory right to be fitted in an alternative

employment without loss of pay and if necessary a super numerary post must be created.

26. The learned Senior counsel appearing for ICF submitted that the petitioner was informed even at the earliest possible time that he could go

back to the Southern Railway and that in ICF a post commensurate with the post he was holding Southern Railway was not available. In spite of

that, he opted to come to ICF and he knew the terms subject to which is transfer was ordered. The learned senior counsel submitted that if the

petitioner were to be fitted in ICF it would disrupt the seniority in ICF. The learned senior counsel also submitted that the petitioner ought to have

impleaded the Southern Railway to get a binding adjudication.

27. On the side of the petitioner, the judgment in Writ Appeal No. 860 of 2007 [The Management of Tamil Nadu State Transport Corporation

(Villupuram Division-III) Ltd., Kancheepuram v. B. Gnanasekaran] was relied on. Comptroller and Auditor General of India and Others Vs. Farid

Sattar, is cited on behalf of the respondent. In the latter case, the claim for protection of pay was rejected on the ground that the workman had applied for universal transfer after seeking reversion to the lower post of Accountant as a direct recruit, which the respondent before the Supreme Court accepted and thereafter had prayed for protection of pay and it was rightly rejected by the Supreme Court. This does not apply to the present case.

28. It must be remembered that the petitioner herein was only aged 36 years when he was medically incapacitated. The relevant rules have been extracted. It is clear even from a reading of the paragraphs extracted from the Manual that the transfers on request and transfers on medical incapacitation are different. The former is dealt with under paragraph 312 and the latter is dealt with under paragraph 313 of Indian Railway Establishment Manual. The relevant clauses in Chapter XIII of the Absorption of Medically Incapacitated Staff in Alternative Employment Rules protect the rights of medically incapacitated staff. There is reference to supernumerary posts as provided in Section 47 of the Disabilities Act and the creation of supernumerary posts is only until a permanent post is found for the railway servant concerned, which is almost similar to the proviso to Section 47 of the Act. Extraordinary leave is granted to such railway servants to ensure that there was no break in his service. It is also made clear that in the matter of absorption in an alternative post, the railway administration should take care that the interest of the staff is not adversely affected as far as possible. Paragraph 1305 declares in no uncertain terms that alternative employment must be found in the case of railway servants (emphasis supplied). The insistence that the railway servant shall not suffer any prejudice is seen from the fact that this paragraph requires the administration to absorb a disabled railway servant not only within the district division or department, but in another district, division or department. Paragraph 1306(2) shows the list of vacancies which is prepared for accommodation of the railway servant must contain posts with emoluments as near as possible to the earlier emoluments. Paragraph 1306(3) shows that this alternative employment should be first found in the officer's own district, sub-division, office, workshop etc., but if it is not possible, then the administration shall circulate the name of the railway

servant with particulars to all other offices or establishments where suitable employment is likely to be found. Paragraph 1306(8) shows that he is entitled to all normal channels of promotion. What he cannot claim is an out-of-turn promotion because of his absorption in the post as a consequence of medical incapacitation.

29. Much was stressed on the side of the respondent to show that Southern Railway and I.C.F. are different organisations under the Ministry of

Railways, and cannot be treated as one unit. Paragraph 56 of the Manual of Office Procedure shows that Southern Railway, Madras is listed

under A(vi) and Integral Coach Factory, Madras is listed under A(xi). But, when their own Manual shows that they are bound to accommodate

the medically unfit employee in any other district or establishment, the fact that I.F.C. has a different General Manager and Southern Railway has a

different General Manager is hardly significant. It is true that after his medical decategorisation, the petitioner was offered alternative employment as

HTNC. He made a request that because of his vertigo and bronchitis, it will not be possible for him to discharge his duty satisfactorily since as a

HTNC, he will have to maintain the relevant records, physically collecting the materials by moving in and around the coach yard (petitioner's letter

dated 17.7.1994). Therefore, he requested that he should not be given work in the Open Line. He requested that he may be given a post of

headclerk/senior clerk/clerk under the control of the Southern Railway in a headquarters or in I.C.F. The fact that he had written the word "Clerk"

in his request does not mean that he was waiving his right to claim pay protection because that benefit is given to him under the relevant laws and

rules. Not just once, but repeatedly, both the Manual and the categorical language of Section 47 of the Disabilities Act stress that the loss in pay

suffered by the medically incapacitated person should be at a minimum. It is in this background that we should view his appointment as Clerk in

I.C.F. on 18.9.1997.

30. The Office Circular reads as follows:

INTEGRAL COACH FACTORY, CHENNAI-38

General Manager's Office,

Personnel Branch/Shell

Dated 27.9.07

OFFICE ORDER NO.PB/S1C/2157

The undermentioned employee who was working as Station Master Gr.III in scale Rs.1400-2300 has been transferred from S.Rly to IFC on Inter

Railway Transer (One way). He has been taken on the rolls of ICF as Clerk G.II in Scale Rs.0950-1500 from the date mentioned against him.

Sl. Name & Emp. No. Date of Date of Date of Pay Unit

No. Father's Name Birth Appt. reporting fixed

S/Shri in ICF

1. RAGHURAMAN S. 30.5.65 13.3.89 19.9.97 Rs.1500 9OD

806354

R.SETHURAMAN

He has declared that he is not residing in Railway Quarters. The above Inter Railway One Way Transfer is ordered subject to the following

conditions:

i. He will rank Junior most to all permanent and temporary Clerks Gr.II in Scale Rs.0950-1500 as on the date of joining the new seniority unit i.e.

Personnel Dept.

ii. At any point of time, he should not repersent seeking fixation of seniority or absorption in any higher grade other than Clerk G.II in Scale

Rs.0950-1500.

iii. His request if any for retransfer to South Railway at a later date will not be considered under any circumstances.

SENIOR PERSONNEL OFFICER/R&T

The first flaw in this order is that this is not an inter- railway transfer of the ordinary category. He is transferred to another establishment only

because he was medically incapacitated. He is entitled to this under Paragraph 1306. It is not a transfer on request. It is a right of transfer which

the law gives him and therefore, the respondent can neither say that he will rank junior to all permanent and temporary clerks, neither can they say

that his request for re-transfer will not be considered in any circumstances. On 29.11.1997, the petitioner requested that he may be

accommodated in the Headquarter Grade and that he came to understand that there are vacancies. This letter is extracted hereunder:

S. Raghuraman,
Emp. No. 806354,
CG-II, General Section,
Personnel Branch,
ICF/Chennai-38.

To

The CPO,

ICF.

Thro" Proper Channel

Sir,

Sub : Absorption of Medically decategorised SM - Self - Representation - Submitted

Ref : Your office order No. M/153/97 dated 19.9.97 and letter No. M/P-439/I/Opt/ R/Vol.VI dated 19.9.1997

Consequent to my decategorisation, I was directed to report to the CPO/ICF for absorption in an alternative employment. Accordingly, I have

been absorbed as an Office Order mentioned above and now I am working in that category in ICF from 19.9.1997. In this connection, I wish to

submit as follows.

Prior to decategorisation, I was working as a Station Master (permanent employee) of the Railways from 13.3.1989 and I have been promoted to

the grade of Rs.1400-2300 with effect from 8.11.1991.

I now come to understand that there are vacancies in Head Clerk Grade in scale Rs.1400- 2300. With respect to Para 1314(C)(1) of IREM, I

am privileged to be accommodated as an Head Clerk in grade Rs.1400-2300 with due protection of the last drawn pay and other consequential

benefits. In as much as I had been working on the grade SM- III i.e. in the above said scale of pay and the above mentioned vacancy being a

clerical category in which I could be fitted after decategorisation, I request your

goodself to kindly consider absorption to the above grade at the earliest.

On 7.6.2000, his request is treated as an inter-railways transfer on bottom seniority.

31. Learned senior counsel appearing for the Southern Railway repeatedly said that the petitioner should have made Southern Railway as a party

since it is only from Southern Railway that he was transferred to I.C.F. The first respondent is the Union of India and both Southern Railway,

Madras and Integral Coach Factory are only field organisations under the Ministry of Railways. The following paragraphs of Kunal Singh Vs.

Union of India (UOI) and Another, are relevant:

8. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities

and to help them to fully participate in national life was felt for a long time. To realize the objective that people with disabilities should have equal

opportunities and keeping their hopes and aspirations in view a meeting called the ""Meet to Launch the Asian and Pacific Decades of Disabled

Persons"" was held in Beijing in the first week of December 1992 by the Asian and Pacific countries to ensure ""full participation and equality of

people with disabilities in the Asian and Pacific regions"". This meeting was held by the Economic and Social Commission for Asia and Pacific. A

proclamation was adopted in the said meeting. India was a signatory to the said proclamation and agreed to give effect to the same. Pursuant

thereto this Act was enacted, which came into force on 1-1- 1996. The Act provides some sort of succour to the disabled persons.

9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in

Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2

of the Act has given distinct and different definitions of ""disability"" and ""person with disability"". It is well settled that in the same enactment if two

distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that

a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected u/s 47

of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on

him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of the section reads

no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The section further provides 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; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available

or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his

disability as is evident from Sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce

in rank an employee who acquires a disability during the service. In construing a provision of a social beneficial enactment that too dealing with

disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act

and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is

plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.

10. The argument of the learned Counsel for the respondent on the basis of the definition given in Section 2(t) of the Act that benefit of Section 47

is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee, who has

acquired ""disability"" within the meaning of Section 2(i) of the Act and not a person with disability.

11. We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pension Rules. The Act is a

special legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a

special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot

override Section 47 of the Act. Further, Section 72 of the Act also supports the case of the appellant, which reads:

72. Act to be in addition to and not in derogation of any other law. The provisions of this Act, or the rules made thereunder shall be in addition to,

and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the

benefit of persons with disabilities.

12. Merely because under Rule 38 of the CCS (Pension) Rules, 1972, the appellant got invalidity pension is no ground to deny the protection

mandatorily made available to the appellant u/s 47 of the Act. Once it is held that the appellant has acquired disability during his service and if

found not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits; if it was not

possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of

superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was

permanently incapacitated to continue in service without considering the effect of other provisions of Section 47 of the Act.

So, for the purpose of ensuring that the Disabilities Act is given its full effect, the Indian Railways must be treated as an Establishment and it is

obliged in law to see that its disabled employee does not suffer reduction of rank. There may be other situations where such unit of the Indian

Railways may have to be treated as different units. But, for advancing the objects of the Disabilities Act and to give effect to Para 1306(3) of the

IREM, the Indian Railways must be treated as an Establishment.

32. In 2007 W.L.R. 256 [The State v. K. Mohammed Mustafa], a Division Bench had held that the benefit envisaged u/s 47 of the Disabilities Act

can be considered in addition to the benefits contemplated under the Act and observed thus:

If in a given case the provisions contained in the G.O. are more beneficial notwithstanding any provision contained in the Act, such beneficial

provision of the G.O. can be made applicable, and similarly, if the provisions contained in the Act are more beneficial as compared to the

provisions contained in the G.O., benefit of such Act can be made available.

33. In Tamil Nadu State Transport Corporation (Villupuram Division-I) Limited v. R. Jayakumar [Writ Appeal No. 610 of 2007] decided on

13.4.2007, a Division Bench held that Section 47 of the Disabilities Act casts a mandatory duty on the part of the employer to provide an alternative employment to an employee who has suffered disability during the course of his employment, and the fact that such an employee has received some compensation under the Motor Vehicles Act is no ground to deny him the alternative employment, to which he is otherwise entitled under the Disabilities Act.

34. In *A. Veeriyar Perumal Vs. The Secretary to Government, Health and Family Welfare Department*, a Division Bench held that Sub-section

(1) of Section 47 of the Disabilities Act is clear in terms that "no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service". The Division Bench held that the right to livelihood, which is an integral facet of the right to life as guaranteed under

Article 21 of the Constitution of India, coupled with the protection u/s 47 of the Disabilities Act entitles the employee who was incapacitated during

service for continuance of service in suitable alternative post with same scale of pay drawn by him and other service benefits. It was also held that

the appellant/employee's right to alternate employment cannot be deprived solely on ground of medical invalidation, as his right is protected u/s 47

of the Disabilities Act.

35. Under the Indian Railway Establishment Manual, the employee has the right not to be treated as a new entrant. A transfer on request is a

transfer which is made on the volition of the employee, whereas a transfer or an alternative accommodation given to a workman on being found

medically incapacitated is a right given to the railway servant to choose the best option that is available to him, since he is no longer able to serve in

the post where he was serving earlier and it is not a transfer on request. It is an option that he exercises by virtue of the right that is made available

to him. In the Manual, under Chapter II dealing with General Conditions of Service, Paragraph 226 deals with transfers. It reads thus:

Ordinarily, a railway servant shall be employed throughout his service on the railway or railway establishment to which he is posted on first

appointment and shall have no claim as of right for transfer to another railway or another establishment. In the exigencies of service, however, it

shall be open to the President to transfer the railway servant to any other

department or railway or railway establishment including a project in or out of India." So, under normal circumstances, a railway servant will be employed throughout in the same railway or railway establishment. But medical incapacity and diminishment of vision at the age of 36 is not an ordinary situation, so in that situation, the rule does not apply. Moreover, the same rule states:

Railway Ministry's decision. - Requests from railway servants in Groups C & D for transfer from one railway to another on grounds of special cases of hardships may be considered favourably by the railway administration. Such staff transferred at their request from one railway to another shall be placed below all existing confirmed and officiating staff in the relevant grade in the promotion group in the new establishment, irrespective of date of confirmation or length of officiating service of the transferred employees.

Therefore, on the Railway Ministry's decision, such requests can be considered in special cases of hardship. A case of an employee who has suffered medical disability is indisputably a case of hardship.

36. Therefore, the writ petitioner's prayer deserves to be granted since that is a right given to him in law and the rules can also be construed so as

to advance the objects of the Act and to protect the rights of the person who has been medically incapacitated. I am inclined to agree with

Dharmarao Elipeti, J. The writ petition is, therefore, allowed. It is always open to the Integral Coach Factory and the Southern Railway to arrive at

a satisfactory solution with regard to the fitment of the petitioner since this should be treated as a special case and not a routine case of inter-

railway transfer and we earnestly hope that both these wings of the Ministry of Railways will consider the case of the petitioner in the spirit of the

Act and the purpose for which the relevant paragraphs of the Manual have been introduced.