

**(2016) 09 KL CK 0059**

**In the High Court Of Kerala**

**Case No :** WP(C).No. 22488 of 2009 (S), (Against the order in OA 206/2008 of central Administrative Tribunal, Ernakulam bench dated 29-10-2008)

Union of India

APPELLANT

Vs

N. Chandralal

RESPONDENT

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**Date of Decision :** 09-09-2016

**Acts Referred:**

Persons With Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 — Section 47

**Citation :** (2017) 2 KerLJ 301

**Hon'ble Judges :** Mr. P.R. Ramachandra Menon and Mr. Anil K. Narendran, JJ.

**Bench :** Division Bench

**Advocate :** Sri. James Kurian, SC, Railways, for the Petitioner; Sri. Martin G. Thottan, Advocate, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Anil K. Narendran, J.—This Writ Petition arises out of the order passed by the Central Administrative Tribunal, Ernakulam Bench dated 29.10.2008 in O.A.No.206 of 2008. The said Original Application was filed by the 1st respondent herein seeking a declaration that he is entitled to be promoted to the grade of Rs. 4000-6000 on par with his juniors and for an order directing the petitioners herein, the respondents before the Tribunal, to promote him to that grade on par with his juniors, namely, Shri. G. Thomas and Shri. Sunil Jose, who were promoted vide Annexure A3 order dated 29.6.2007, with all consequential benefits.

2. Before the Tribunal, the reliefs sought for in the OA were opposed by the petitioners herein by filing Ext.P2 reply statement. After considering the rival contentions, the Tribunal by Ext.P3 order dated 29.10.2008 allowed the OA declaring that the applicant is entitled to the scale of pay of Rs. 4000-6000 on par with his juniors with effect from 29.6.2007. Consequently, the Tribunal directed the petitioners herein to promote the applicant to the aforesaid grade,

with effect from 29.6.2007, i.e., the date on which his juniors, namely, Shri. G. Thomas and Shri. Sunil Jose and others were promoted to the post of Senior Assistant Loco Pilot in terms of Annexure A3 office order dated 29.6.2007. The petitioners herein were directed to issue necessary orders in this regard and to pay the applicant the consequential arrears of salary and allowances within a period of two months from the date of receipt of a copy of the order.

3. Feeling aggrieved by Ext.P3 order of the Tribunal, the petitioners herein are before this Court in this Writ Petition seeking interference under Article 226 of the Constitution of India.

4. We heard the arguments of the learned Standing Counsel for Southern Railway representing the petitioners and also the learned counsel for the 1st respondent/applicant.

5. The pleadings and materials on record would show that the applicant was originally appointed as Diesel Assistant in the scale of 950-1500 in the Madras Division of Southern Railway in the year 1993. He was promoted as Shunter in the scale of pay of Rs. 4000-6000 in the year 1998. Later, he was transferred to Trivandrum Division as Diesel Assistant in the scale of Rs. 3050-4590 in January, 1991. The post of Diesel Assistant is now re-designated as Assistant Loco Pilot. As evident from Annexure A1 seniority list of Diesel Assistant of Trivandrum Division as on 1.10.2001, published vide proceedings dated 9.11.2001 of the 2nd petitioner herein, the applicant is Sl.No.215. In the said seniority list, Shri. G. Thomas and Shri. Sunil Jose are Sl.Nos.216 and 217 respectively. While continuing as Diesel Assistant, the applicant was grievously injured while on duty on 4.2.2003 at Kottayam. Due to multiple fracture of both bones of left hand, the applicant was medically decategorised on 20.8.2004 and he was placed in a supernumerary post in the scale of Rs. 3050-4590, with effect from 20.8.2004 vide Annexure A2 letter dated 29.4.2004 of the 2nd petitioner herein. In Annexure A2 letter, the applicant is Sl.No.8.

6. The grievance of the applicant before the Tribunal was that, while he was continuing in the scale of Rs.3050-4590 his juniors like Shri. G. Thomas and Shri. Sunil Jose along with many others were promoted as Senior Assistant Loco Pilot in the scale of 4000-6000 vide Annexure A3 office order dated 29.6.2007 issued by the 2nd respondent. Aggrieved by non-consideration of the claim for promotion, despite the protection available under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the PWD Act, the applicant submitted Annexure A4 representation dated 11.9.2007 before the 2nd petitioner herein, seeking promotion as Senior Assistant Loco Pilot in the scale of Rs. 4000-6000. Due to the inaction on the part of the petitioners herein in taking a decision on Annexure A4 representation, the applicant approached the Tribunal in O.A.No.206 of 2008.

7. Relying on the provisions under the PWD Act, a copy of which was produced along with the OA as Annexure A5 and the revised Chapter XIII of Indian Railway

Establishment Manual, Volume I, a copy of which was produced along with the OA as Annexure A6, the applicant contended that he is entitled to be promoted as Senior Assistant Loco Pilot on par with his juniors Shri. G. Thomas and Shri. Sunil Jose and that he cannot be condemned to remain as Assistant Loco Pilot in the scale of 3050-4590 more so, when he was not being absorbed in a suitable alternative job as provided in Annexure A6.

8. The petitioners herein filed Ext.P2 reply statement before the Tribunal contending that the applicant has already been medically decategorised for the post in "running cadre" and he does not have the medical fitness to hold a post in "running cadre". Therefore, he is not entitled to be promoted as Senior Assistant Loco Pilot in the scale of Rs. 4000-6000. It was also contended that the juniors of the applicant, namely, Shri. G. Thomas and Shri Sunil Jose were promoted to officiate as Senior Assistant Loco Pilot in the scale of Rs. 4000-6000 as per office order dated 29.6.2007, since they were medically fit in "A-1" category. On the other hand, the applicant has been declared medically unfit in "A-1" category and he has been found fit in "C-1" category and below in sedentary job as per medical certificate dated 20.8.2004. Based on the decategorisation, the applicant is fitted against a supernumerary post in the scale of Rs. 3050-4590 with effect from 20.8.2004, duly taking out his name from the cadre of Assistant Loco Pilot pending alternative appointment according to his present medical classification. Therefore, it was contended that the applicant has no claim for promotion to the post of Senior Assistant Loco Pilot along with others who were juniors to him when he was working in the category of Assistant Loco Pilot. The petitioners herein have also raised a contention that on the basis of sub-section (2) of Section 47(2) of the PWD Act, Para 213A has been inserted in the Indian Railway Manual, Volume-I, as per which the applicant is not entitled to be promoted as Senior Assistant Loco Pilot as the said instructions are to be applied in the category where alternative employment is effected.

9. The sole issue that arises for consideration in this Writ Petition is as to whether the applicant is entitled for promotion as Senior Assistant Loco Pilot in the scale of Rs. 4000-6000 on par with his juniors who were given promotion with effect from 29.6.2007, in view of the statutory provisions contained in subsection (2) of Section 47 of the PWD Act.

10. Section 47 of the PWD Act deals with nondiscrimination of persons with disabilities in Government employments. Sub-section (1) of Section 47 of the PWD Act mandates that, no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. First proviso to sub-rule (1) 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. Second proviso to sub-rule (1) provides 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.

11. Similarly, sub-section (2) of Section 47 of the PWD Act mandates that, no promotion shall be denied to a person merely on the ground of his disability. However, the proviso to sub-section (2) of Section 47 provides 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 Section 47 of the PWD Act.

12. In *Kunal Singh v. Union of India* (2003 (4) SCC 524) the Apex Court held that, the very frame and contents of Section 47 of the PWD Act 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. Therefore, 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. The language of Section 47 is plain and certain, casting statutory obligation on the employer to protect an employee acquiring disability during service.

13. In *Union of India v. Sanjay Kumar Jain* (2004 (6) SCC 708) the Apex Court held that, the PWD Act has been enacted, as the preamble of the Act indicates, to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. Subsection (1) of Section 47 in clear terms provides that there cannot be any discrimination in Government employments and no establishment shall dispense with or reduce in rank an employee whatsoever during his service. Sub-section (2) of Section 47 in crystal clear terms, provides that no promotion shall be denied to a person merely on the ground of his disability. The proviso to sub-section (2) of Section 47 only permits the appropriate Government to specify by notification any establishment which may be exempted from the provisions of Section 47. It does not give unbridled power to exclude any establishment from the purview of Section 47, and such exclusion can be only done under certain specified circumstances. They are: (i) issuance of a notification, (ii) prescription of requisite conditions in the notification. The notification can be issued when the appropriate Government having regard to the type of work carried on in any establishment thinks it appropriate to exempt such establishment from the provisions of Section 47. The

proviso to sub-section (2) thereof does not operate in the absence of the notification.

14. Chapter II, Section-B of Railway Establishment Manual, Volume-I, deals with promotion of Group "C" Staff. Para.213A of Chapter II, Section-B deals with promotion of persons with disability. Para 213A mandates that, there shall be no discrimination in the matter of promotion merely on ground of physical disability. This will apply to the categories of staff who have been recruited from the open market against the vacancies reserved for recruitment of physically handicapped and the staff who acquire disability during service and are absorbed in suitable alternative employment as per provisions contained in Chapter XIII. Such staff will be considered for promotion in their turn on their eligibility and suitability along with others in the selection/suitability/trade test, for promotion to higher grade post.

15. Para 213A was inserted after the existing Para 213 under Chapter II, Section-B of Railway Establishment Manual, Volume-I, which deals with promotion of Group "C" Staff, vide Advance Correction Slip No.76 enclosed to Railway Board letter No.E(NG)I/90/PM1/2 (RBE No.86/1999) dated 29.4.1999. By the very same letter, Para.189A was inserted after the existing Para.189 under Chapter I, Section-B, Sub-section-IV of Railway Establishment Manual, Volume-I, which deals with recruitment of Group "D" Railway Servants and their promotion to higher grades in Group "D" and Group "C", vide Advance Correction Slip No.75 enclosed thereto. The said Railway Board letter states that, the physically handicapped persons recruited on the Railways are considered for promotion in their turn based on their eligibility and suitability and there is no discrimination against them in this regard merely on ground of physical disability. However, the enactment of the PWD Act has necessitated incorporating these non-discriminatory provisions in the Manual. These provisions apply equally to the staff who acquire disability during service and are absorbed in suitable alternative employment as per provisions of Chapter XIII of Indian Railway Establishment Manual, Volume-I (Revised Edition-1989).

16. Chapter XIII of Railway Establishment Manual, Volume-I, which deals with absorption of medically incapacitated staff in alternative employment, was also substituted vide Advance Correction Slip No.77 enclosed to Annexure A6 Railway Board letter No.E(NG)I/96/RE-3/9(2) (RBE No.89/1999) dated 29.4.1999. The said Railway Board letter also states that, the enactment of the PWD Act has necessitated modification of the existing scheme of absorption in alternative employment of staff medically decategorised. The Ministry of Railways have considered the matter and have decided that the Indian Railway Establishment Manual, Volume-I (Revised Edition 1989) may be amended as in the Advance Correction Slip No. 77 enclosed.

17. Section B to Chapter V of the Indian Railway Medical Manual (IRMM) deals with medical examination of candidates for appointment to non-gazetted Railway services and of serving non-gazetted Railway employees. Going by sub-para (1)

of Para 509 of IRMM, medical examination of candidates for appointment to non-gazetted Railway service and for periodical medical re-examination of serving Railway employees includes (i) general physical examination, and (ii) vision tests. Para 510 of IRMM, which deals with classification of staff/candidates for the purpose of visual acuity and general physical examination, reads thus;

"510. Classification of staff :- (1) for the purpose of visual acuity and general physical examination of candidates and of serving Railway employees, the non-Gazetted Railway services are divided into the following broad groups and classes. The detailed categories of Railway posts under each of the classes/groups mentioned below are given in Annexure IV to this chapter :-

Groups

Classes

A. Vision tests required in the interest of public safety

A-1. Foot plate staff, Rail car drivers and Navigating staff. (For foot plate staff see para 520)

A-2. Other running staff, Other shunting staff, Point lockers Station masters, and other staff in operative control of signals.

A-3. Loco, signal and transportation Inspectors, staff authorised to work trolleys, Yard supervisory staff, Road motor drivers and gate keepers on level crossings.

B. Vision tests required in the interest of the employee himself or his fellow workers or both.

B-1. Such station and yard non supervisory, shed and other staff, excluding shed man, as are engaged on duties where failing eye sight may endanger themselves or other employees from moving vehicles, road motor drivers, permanent way mistries, gang mates, keymen, and staff of the Railway Protection Force.

B-2. Certain staff in workshops and engine rooms engaged on duties when failing eye sight may endanger themselves or other employees from moving parts of the machinery and crane drivers on open line.

C. Vision tests required in the interest of administration only.

C-1. Other workshop and engine room staff, shed stockers and other staff in whom a higher standard of vision than is required in clerical and kindred occupation is necessary for reasons of efficiency and others not coming in group A or B.

C-2 Staff in clerical occupations not included in A, B and C-1.

(2) As the foot-plate staff have to pay sustained attention, it is necessary to have separate standards for these staff. These are enumerated in para 520 below.

18. Para 512 of Section B to Chapter V of IRMM, which deals with vision tests

reads thus;

"512. Vision tests :-

(1) Acuity of vision :- The following are the tables of standards of visual acuity requirements.:-

(A) Standards at examination on appointment :-

Class

Distant Vision

Near Vision

A-1

6/6, 6/6 without glasses with fogging test (must not accept +2 D)

Sn.0.6, 0.6 without glasses

A-2

26/9, 6/9 without glasses(no fogging test)

...Do...

A-3

6/9, 6/9 with or without glasses. Power of lenses not to exceed 2D.

Sn.0.6, 0.6 with or without glasses.

B-1

6/9, 6/12 with or without glasses. Power of lenses not to exceed 4D.

Sn.0.6, 0.6 with or without glasses when reading or close work is required

B-2

same as above

...Do...

C-1

6/12, 6/18 with or without glasses.

...Do...

C-2

6/12, nil with or without glasses

Sn.0.6 combined with or without glasses where reading or close work is required

Note: (a) No glasses are to be permitted at the time of initial recruitment of

Railway Protection Force staff where their medical category is B-1.

(b) Candidates in C-1 and C-2 medical categories having power of glasses of more than 4 D should be examined by an eye specialist and may be declared fit if there is no evidence of any progressive eye disease.

(c) One eyed person: There is no bar to the admission into non-gazetted clerical service of a candidate who is blind in one eye. The guiding consideration in such cases should be whether the candidate's vision is adequate for the performance of the duties attached to the service or the post to which he/she is proposed to be appointed, and whether undue risk attaches in his being accepted. The medical officer while examining such cases should take into account the cause of blindness in relation to it's possible effects on the sound eye in course of time.

(d) Candidates with Pseudophakia : Posterior Chamber IOL implant in one or both eyes for correction of vision of candidates in C-1 and C-2 categories may not be a bar for their appointment as such.

(B) Standards at re-examination during service:- The standards at re-examination would apply only for employees with not less than six years service. This could be permanent or temporary, including continuous service as casual labour, if in the same medical category.

Class

Distant Vision

Near Vision

xx

xxx

xxx

19. The detailed categories of Railway posts under each of the classes/groups are given in Annexure IV to Chapter V of IRMM. The details of Railway posts under "A-1" category given in Annexure IV to Chapter V of IRMM reads thus;

Annexure IV

(Para.510)

Class A-1

(1) Foot-plate staff

1

Driver/Assistant Driver

2

Electric train driver/motorman/Motor trolley driver

3

Fireman/Augwala/Trainee firemen

4

Shunter

5

Staff instructor

6

Driver instructor

7

Engine Cleaner

(2) Apprentices

1

Apprentice motorman/Assistant Apprentice Driver

20. In the instant case, as we have already noticed, the applicant was grievously injured while on duty as Diesel Assistant (now re-designated as Assistant Loco Pilot) in Trivandrum Division, on 4.2.2003. It is not in dispute that, the applicant was initially found medically fit in "A-1" category and he was holding the post of Assistant Loco Pilot in Trivandrum Division. After the accident, the applicant was medically decategorised vide Annexure A2 letter dated 20.8.2004, as he was found medically unfit in "A-1" category and found fit only in "C-1" category and below in sedentary job. He was placed in a supernumerary post in the scale of Rs. 3050-4590, with effect from 20.8.2004. According to the petitioners, this was done duly taking out his name from the cadre of Assistant Loco Pilot, pending alternative appointment according to his medical classification.

21. In view of the statutory mandate under sub-section (1) of Section 47 of the PWD Act that, no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service, the course open to the petitioners is to shift the applicant to some other post with the same pay scale and service benefits. If such a course is not possible, the applicant will have to be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Therefore, the applicant was placed in a supernumerary post in the scale of Rs. 3050-4590, with effect from 20.8.2004, pending alternative appointment according to medical classification, with the same pay scale and service benefits, as mandated by sub-section (1) of Section 47 of the PWD Act and Para.213A under Chapter II, Section-B of Railway Establishment Manual, Volume-I.

22. The learned Standing Counsel for the petitioners relied on the judgment of

the Apex Court in *Union of India v. Devendra Kumar Pant* (2009 (14) SCC 546) in order to contend that, sub-section (2) of Section 47 of the PWD Act bars promotion being denied to a person on the ground of disability, only if the disability does not affect his capacity to discharge the higher functions of a promotional post. Where the disability is likely to affect the maintenance of safety and security norms, or efficiency, then the stipulation of standards for maintaining such safety, security and efficiency will not be considered as denying a person with disability, promotion, merely on the ground of his disability.

23. In *Devendra Kumar Pant*'s case (*supra*) the Apex Court was dealing with a case in which the respondent therein was promoted to the post of Chief Research Assistant with the condition that his promotion will be effective from the date of submission of fitness certificate in "B-1" medical category. This was objected to on the ground that once he has cleared for "B-2" medical category, he was not required to secure fitness in "B-1" medical category. However, he was informed that different categories of medical standards have been specified looking at the requirement of job, safety and welfare of public, fellow workers and the employee himself, therefore, he should present himself before the authorised medical officer for medical test and certification. Being aggrieved, the respondent therein filed OA before the Tribunal, which ended in dismissal, holding that unless he obtained the required "B-1" category "fit" certificate, he will not be fulfilling the required medical standard for the post of Chief Research Assistant.

24. Challenging the verdict passed by the Tribunal, the respondent therein approached the High Court of Allahabad, contending that promotion could not have been denied to him in view of sub-section (2) of Section 47 of the PWD Act. The High Court allowed the said Writ Petition holding that, no person could be denied promotion merely on the ground of disability unless there was a notification exempting the establishment from the provisions of Section 47 of the PWD Act. Since there was no notification exempting the institution in question from the provisions of Section 47 of the PWD Act, the respondent therein could not be denied promotion.

25. The verdict passed by the High Court was challenged before the Apex Court by the Union of India. The question formulated by the Apex Court was as to whether refusal by the appellant therein to give effect to the promotion of the respondent therein unless he obtains "fit" certificate in "B-1" medical category, violates sub-section (2) of Section 47 of the PWD Act.

26. In *Devendra Kumar Pant*'s case (*supra*) the Apex Court clarified further that, sub-section (2) of Section 47 of the PWD Act deals with non-discrimination in promotion and provides that no promotion shall be denied to a person merely on the ground of his disability. This would mean that a person who is otherwise eligible for promotion shall not be denied promotion merely or only on the ground that he suffers from a disability. Thus sub-section (2) of Section 47 bars disability *per se* being made a disqualification for promotion. But the position is different if the disability would affect the discharge of functions or performance in

a higher post or if the disability would pose a threat to the safety of the co-employees, members of the public or the employee himself, or to the assets and equipments of the employer. If promotion is denied on the ground that it will affect the safety, security and performance, then it is not denial of promotion merely on the ground of his disability, but is denial of promotion by reason of the disability plus something more, that is adverse effect of the disability upon the employee's performance of the higher duties or functions attached to the promotional post.

27. In Devendra Kumar Pant's case (supra), the Apex Court observed that sub-section (2) of Section 47 does not provide that even if the disability comes in the way of performance of higher duties and functions associated with the promotional post, promotion shall not be denied. Sub-section (2) of Section 47 bars promotion being denied to a person on the ground of disability, only if the disability does not affect his capacity to discharge the higher functions of a promotional post. Where the employer stipulates minimum standards for promotion keeping in view safety, security and efficiency, and if the employee is unable to meet the higher minimum standards on account of any disability or failure to possess the minimum standards, then sub-section (2) of Section 47 will not be attracted, nor can it be pressed into service for seeking promotion. In other words where the disability is likely to affect the maintenance of safety and security norms, or efficiency, then the stipulation of standards for maintaining such safety, security and efficiency will not be considered as denying a person with disability, promotion, merely on the ground of his disability.

28. As discernible from the decision of the Apex Court in Devendra Kumar Pant's case (supra), it relates to recruitment to the post of Research Assistants in the Research Designs and Standard Organisation (RDSO) under the Ministry of Railways. The medical classification for various categories of non-gazetted staff of the said organisation was revised and notified vide Office order dated 19.7.1990. The medical classification that was being followed till introduction of the revised medical standards by Office order dated 19.7.1990 and thereafter are as follows :

Designation

Class of Medical Examination Medical category before revision

Revised medical category introduced by office order No.4 of 1990

Chief Research Assistant

B1

B1

Senior Research Assistant

B2

B1

Junior Research Assistant

B2

B1

The main distinction between "B-1" and "B-2" medical categories referred to above was that power perception was a requirement prescribed for "B-1" category, but not for "B-2" category. The specific stand taken by the Department was that the different medical categories are prescribed in pursuance of rationalisation of medical standards taking into account the requirements of the job, as also the safety and welfare of public, fellow workers and the concerned employee himself. Paras 33 to 38 of the judgment of the Apex Court in Devendra Kumar Pant's case (supra) read thus :

33. When invoking or applying the provisions of the Act, it is necessary to keep in view that the intention of the Act is to give a helping hand to persons with disability so that they can lead a self-reliant life with dignity and freedom. But the intention of the Act is not to jeopardize the safety and security of the public, co-employees, or the employee himself or the safety and security of the equipments or assets of the employer nor to accept reduced standards of safety and efficiency merely because the employee suffers from a disability. In this case, office order No.4/1990 makes it clear that the minimum medical standards have been fixed taking into account the requirements in the medical manual with reference to interest of public safety, interest of the employee himself and fellow employees and in the interest of the administration.

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

35. As noticed above, in this case the higher medical standard of B1 was prescribed not only for the post of Chief Research Assistant but for Senior Research Assistants and Junior Research Assistants. As the respondent with a B2 medical category clearance, had already been appointed as Senior Research Assistant, he cannot be reduced from that rank merely on the ground that under the revised guidelines, the post requires a B1 medical standard clearance. But

when the issue of promotion comes up, the requirement of B1 medical standard cannot be dispensed with.

36. It should be remembered that for Chief Research Assistant, the minimum medical standard was B1 even before the revision of standards whereby the medical standard for even Senior Research Assistant was revised from B2 to B1. The said standard having been fixed in the interest of the public safety, as also interest of the employee concerned, co-employees and administration, the respondent cannot, by relying upon S.47(2) of the Act, avoid subjecting himself to medical examination for ascertainment of B1 medical category fitness.

37. Prescription of a minimum medical standard for promotion should be considered as such, and should not be viewed as denial of a promotional opportunity to a person with disability. We may illustrate. When an advertisement for the post of a police inspector prescribes a minimum height or a minimum chest measurements or a minimum physical stamina, a person who lacks the same and therefore denied appointment, cannot contend that he is discriminated on the ground of physical disability. Firstly being short or very thin or lacking stamina is not a physical disability but a physical characteristic. Therefore in such a situation the question of applicability of the Act does not arise at all. If a person not having a colour perception is denied appointment to the post of a driver, he cannot complain that he is discriminated on the ground of his disability. Same would be the position where the colour perception is a required minimum standard for a particular post. A person not possessing it is not being denied appointment or promotion on the ground of disability. The denial is on the ground of non-fulfilment of a minimum required standard/qualification. Viewed accordingly, it will be seen that S.47(2) is not attracted at all.

38. Therefore we are of the view that the S.47(2) only provides that a person who is otherwise eligible for promotion shall not be denied promotion merely on the ground that he suffers from disability. The use of the words "merely on the ground" shows that the section does not provide that if the disability comes in the way of performing the higher duties and functions associated with the promotional post, promotion shall not be denied. In other words promotion shall not be denied to a person on the ground of his disability only if the disability does not affect his capacity to discharge the higher functions of a promotional post."

29. It was in that factual matrix that, the Apex Court held that if promotion is denied on the ground that it will affect the safety, security and performance, then it is not denial of promotion merely on the ground of his disability, but is denial of promotion by reasons of the disability it was something more, i.e., adverse effect of the disability upon the employee's performance of the higher duties of functions attached to the promotional post.

30. In Annexure A1 seniority list of Diesel Assistant of Trivandrum Division as on 1.10.2001, the applicant is Sl.No.215. In the said seniority list, Shri. G. Thomas

and Shri Sunil Jose are Sl.Nos.216 and 217 respectively. By Annexure A3 office order, the said persons and many others who are admittedly juniors to the applicant in Annexure A1 seniority list were promoted as Senior Assistant Loco Pilot in the scale of Rs. 4000-6000. However, the applicant was not promoted as Senior Assistant Loco Pilot. The petitioners contended that, the applicant has already been medically decategorised for the post in "running cadre" and as such he does not have the medical fitness to hold the post of Senior Assistant Loco Pilot. The juniors of the applicant were promoted to officiate as Senior Assistant Loco Pilot in the scale of Rs.4000-6000 since they were found medically fit in "A-1" category. Therefore, according to the petitioners, the applicant is not entitled to be promoted as Senior Assistant Loco Pilot in the scale of Rs. 4000-6000.

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

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

33. In that view of the matter, we find absolutely no grounds to interfere with the reasoning of the Tribunal in Ext.P3 order.

34. The Writ Petition fails and the same is accordingly dismissed.