
(2008) 08 OHC CK 0068
In the Orissa High Court

Union of India (UOI) and Others

APPELLANT

Vs

Somanath Mishra

RESPONDENT

Date of Decision : 29-08-2008

Acts Referred:

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

Citation : (2008) 2 OLR 866

Hon'ble Judges : Mohapatra, J;Indrajit Mahanty, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Indrajit Mahanty, J.—In this writ application, the East Coast Railway has sought to challenge the order dated 26.6.2007 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 167 of 2006 by which the Tribunal has been pleased to quash the order dated 20.01.2006 rejecting the representation of the Opp.party seeking promotion and consequently, directing the petitioners to take viva voce test of the Opp.party for the purpose of considering his promotion.

2. From the pleadings in the present writ application it appears that the Opp.party - Somanath Mishra had been found suitable in the open competitive examination conducted by the petitioner and was empanelled by the Railway Recruitment Board (RRB) vide its Notification published on 7.12.1990. After the aforesaid empanelment, on medical examination, the Opp.party was declared unfit for the above post, but was declared medically fit for C-I category for which he was provided with an alternative appointment as "Senior Estimator" and was posted in Sambalpur Division. While the opp.party was working as such, the petitioners published a Notification dated 8.7.2004 notifying 25.7.2004 as the date for holding examination for the formation of Group-B panel of AENs against 70% vacancies. Along with the Notification, a list of candidates eligible for appearing the said examination was also published and the name of the

Opp.party found place at Serial No. 61. The Opp.party appeared in the test conducted for the above post and was found qualified along with other candidates in the written test. Thereafter, the petitioners intimated the Senior Divisional Engineer (Co-ordination) that D & A clearance and medical fitness certificates of the qualified persons were required to be sent to the Deputy Chief Personnel Officer (Gaz.) and instructions were issued to the Opp.party, along with other qualified candidates to be ready to face the viva voce test. Further vide letter dated 30.9.2004, the Divisional Railway Manager (Engg.), East Coast Railway, Sambalpur intimated the Opp.party to appear the viva voce test on 1.10.2004.

The Opp. Party appeared before the Chief Engineer, East Coast Railway for taking part in viva voce test, but he was not permitted to sit in the test on the ground that he was declared medically unfit and prepared a list of 14 candidates (excluding the name of Opp. Party) for promotion to the post of Assistant Engineer Gr.B.

3. The Opp.party being aggrieved by such action of the petitioners, made a representation on the ground that promotion should not be denied to a person merely on the ground of his physical disability and the said representation being rejected vide the order dated 20.1.2006, filed O.A. No. 167 of 2006 before the Central Administrative Tribunal.

As noted hereinabove, the O.A. was allowed with a direction to the petitioners to take the viva voce test of the Opp.party as per Rules. Being aggrieved by the said order of the Tribunal, the East Coast Railway has filed the present writ application.

4. Mr. Ashok Mohanty, learned Senior Counsel appearing for the East Coast Railway, inter alia, submitted that in terms of paragraph-206.2 of IREM Vol.1 (1989 Edition) issued by the Ministry of Railways, employees selected for promotion to Gr.B service should be fit in all respects including physical fitness for the duties one is required to discharge in the promotional post. Learned Counsel submitted that since the post of Gr.B in the present case comes under the safety category, as per Rules referred hereinabove, passing of medical examination and medical fitness is a pre-condition for viva voce test. According to Mr. Mohanty, the candidates those who have qualified in written test and who have submitted their medical fitness certificates, were allowed to sit in viva voce test held on 1.10.2004. Since the Opp.party was found medically unfit, he was not permitted to sit in the said test. In essence, the contention advanced by Mr. Mohanty was to the effect that no promotion could be contemplated for the Opp.Party since he was found to be medically unfit and the post to which the promotion was sought was a safety category post which could merit no lenient consideration.

Mr. Mohanty, learned Counsel for the petitioners further submitted that Indian Railway Department of Civil Engineering, Assistant Engineer (Class-II)

Recruitment Rules clearly envisage that educational and other qualifications laid down in the Rules for the concerned Engineering Services (IRSE) conducted by the UPSC is similar to the norms adopted by the Railways and that the UPSC has in its Notification under Annexure-R/9 to the original application specifically indicated through the advertisement that appointment of the physically handicapped candidates to the service/posts is subject to medical fitness. Therefore, it was contended that since the Rules of the Railways clearly provide that before effecting promotion, a candidate has to be medically fit, the Disability Act, 1995 based on which the Opp.party seeks relief has no role to play and can provide no assistance to the Opp.party.

5. Mr. Nayak, learned Counsel for the Opp.party, on the other hand, strenuously refuted the contentions advanced by the petitioners and submitted that upon introduction of Section 47(1) and 47(2) of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1985, the Rules relied upon by the Railway are to be subservient to the Disabilities Act, 1995 and the Opp. Party has a right to be considered for promotion to the post in question. Learned Counsel for the Opp.party placed reliance on a judgment of the Apex Court in the case of Union of India v. Sanjay Kumar Jain 2005 (1) AISLJ 40 and submitted that a similar issue arose for consideration in that case as the candidate therein, namely, Sanjay Kumar Jain, while working in Gr-C post applied for promotion to Gr-B post. He qualified in the written test and was directed to undergo medical examination in terms of paragraph-531(b) of the Indian Railway Establishment Manual, since in terms of Railway Board's Circular dated 31.10.1991, passing of medical test is a requirement before the candidate is being called for viva voce test. On medical examination, Sanjay Kumar Jain was found medically unfit as he was visually handicapped for which he was not called to appear in the viva voce test. The Principal Bench of the Central Administrative Tribunal, New Delhi considered the case of Shri Jain keeping in view the provisions of the Disabilities Act, 1995. The Tribunal took note of the new paragraph-189 A which was introduced to the Establishment Manual of the Railways which clearly laid down that there shall be "no discrimination in the matter of promotion" merely on the ground of physical disabilities. In other words, paragraph-189A was incorporated into the Establishment Manual of Railways in order to comply with the requirement and stipulations of the Disabilities Act, 1995. Relying upon the above, the prayer made by Sanjay Kumar Jain was allowed and direction was issued to the Railways to allow the applicant to take part in viva voce test.

6. The Indian Railways questioned the correctness of the aforesaid order passed by the Principal Bench of the CAT before the Hon''ble Delhi High Court and the High Court came to hold that there was no error in the order passed by the Tribunal. Thereafter, the matter was carried to the Hon''ble Apex Court by the Railways in Civil Appeal No. 5173 of 2004. The Hon''ble Supreme Court upon examining the Rules prescribed by the Railways for the medical test vis-a-vis various provisions made in the Disabilities Act, 1994, vide order dated

11.08.2004 dismissed the civil appeal holding that there was no infirmity in the order of the Tribunal as affirmed by the High Court.

7. On a consideration of the contentions advanced by the learned Counsel for the respective parties, we are of the view that the issues involved in the present case at hand are the para materia to the facts of the case dealt with by the Hon"ble Supreme Court in the case of Sanjay Kumar Jain (supra). Relevant observations made by the Hon"ble Supreme Court are quoted herein below:

6. Since the controversy revolves around Section 47 of the Act, it would be appropriate to quote the observation which reads as follows:

Sections 47: Non-discrimination in Government employments:

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

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits;

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

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this Section.

(Emphasis supplied).

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8. Sub-section (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) is relevant for our purpose. It, in crystal clear terms, provides that no promotion shall be denied to a person merely on the ground of his disability. Obviously, in the instant case, the respondent was not considered for promotion on the ground of as he was considered to be visually handicapped, much stress was laid by Mr. Krishnamani on the proviso to Sub-section (2) of Section 47. The same is not in any way helpful to further the case of the applicant. In fact it 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. The exclusion can be only done under certain specified circumstances. They are:

(i) Issuance of a Notification;

(ii) Prescription of requisite conditions in the notification.

9. 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.

(Emphasis supplied).

Though several documents were referred to contend that the intention of the employer was to exclude certain establishments, a bare perusal thereof shows that they have no relevance and do not in any way fulfil the requirements of the proviso of Sub-section (2) of Section 47. It goes without saying that if a notification in this regard is issued by the appropriate Government, the same shall be operative in respect of the establishment which is specifically exempted. That is not the position so far as the present case is concerned. Therefore, on the facts of the case, the order of the Tribunal as affirmed by the High Court by the impugned judgments suffers from no infirmity to warrant our interference. The appeal fails and is accordingly dismissed with no order as to costs.

8. Placing reliance on the above, we are of the opinion that the contentions advanced by the learned Counsel for the East Coast Railway cannot be accepted in view of the judgment of the Hon^{ble} Supreme Court in the case of Sanjay Kumar Jain (supra). Further, if such a contention advanced by the Railways is accepted, effectively a disabled person would never get an opportunity for promotion. In terms of Section 47(2) of the Disabilities Act, 1995, no promotion shall be denied to a person merely on the ground of his disability. The existence of disability in the present case has to be considered from the "issue of promotion". No doubt a provision has been made under Sub-section (2) of Section 47 to the effect 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. It is not the case of the petitioners that any such exemption Notification has ever been published by the appropriate Government.

9. Further, paragraph-189A has been introduced by the petitioners into the Establishment Manual of the Railways to the effect that there shall not be discrimination in the matter of promotion merely on the ground of physical disabilities. This incorporation obviously has been made in order to implement the Disabilities Act, 1995 and therefore, the consequence of accepting the petitioner's contentions would not only run counter to Section 47(2) of the Disabilities Act, 1995 and paragraph-189A of Railways Establishment Manual, but would also effectively deny such a person a right from ever getting promotion in future. This has to be held to be diametrically opposed to both the letter and spirit of the Disabilities Act, 1995.

10. We, therefore, find no justifiable reason to interfere with the judgment dated 26.6.2007 passed in O.A. No. 167 of 2006 by the Central Administrative Tribunal, Cuttack Bench, Cuttack. Accordingly, the writ application is dismissed and the petitioners are directed to comply with the direction of the Tribunal within the period specified by the Tribunal from the date of this judgment. No costs.