

(2009) 07 SC CK 0119
In the Supreme Court Of India
Case No : Civil Appeal No. 4668 of 2007

Union of India (UOI)

APPELLANT

Vs

Devendra Kumar Pant and Others

RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 32, 33, 39, 44

Citation : AIR 2010 SC 1253 : (2010) AIRSCW 561 : (2010) 3 ALLMR 442 : (2010) 124 FLR 183 : (2009) 9 JT 552 : (2009) 4 LLJ 310 : (2009) 8 MLJ 134 : (2009) 9 SCALE 504 : (2009) 14 SCC 546 : (2010) 1 SCC(L&S) 374 : (2009) 12 SCR 1 : (2010) 1 SLJ 91

Hon'ble Judges : R. V. Raveendran, J;P. Sathasivam, J

Bench : Division Bench

Advocate : P.P. Malhotra, ASG, Rashmi Malhotra and D.S. Mahra, for the Appellant; Geeta Luthra and D.N. Goburdhan, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Raveendran, J.—The first respondent was appointed as a Lab Assistant in the Research Designs and Standards Organisation (RDSO), Ministry of Railways, in the year 1972 and was subsequently promoted as Junior Research Assistant in 1977 and Senior Research Assistant in 1983.

2. The first Respondent (referred to as the 'respondent' as he is the only contesting respondent) was selected for the next higher post of Chief Research Assistant, and by order dated 30.6.1997, he was promoted to the said post with the condition that his promotion will be effective from the date of submission of fit certificate in B-1 medical category.

3. The medical classifications for various categories of non-gazetted staff of RDSO, revised with a view to rationalize the medical standards, were notified by the RDSO, Ministry of Railways, by Office Order No. 4/1990 dated 19.7.1990. The annexures to the said office order stated that the Committee constituted to

decide upon the standards of medical examination had followed the following guidelines in rationalising the medical standards : (i) to the extent possible, the same medical standards were fixed for all RSDO staff of same capacity, doing similar type of work; (ii) the requirements stipulated in the Medical Manual with respect to the interest of public safety and administration, as also the interests of the employee himself and his fellow workers were taken into account while fixing the medical standards; and (iii) any possibility of medical decategorisation during promotion were obviated/minimized, while deciding upon the medical standards. The Committee had also recommended that in cases where a medical category, higher than that was then being followed, was recommended, the RSDO employees in those medical categories who were in service on 1.6.1990 should be granted relaxation at the discretion of the ADG. The medical standards that was being followed till introduction of revised medical standards and the revised medical standards that was introduced by office order dated 19.7.1990, for Research Assistants, were as follows:

Designation	Class of Medical Examination
-------------	------------------------------

Medical category before Revised medical category revision introduced by office order No.4 of 1990	
---	--

Chief Research Assistant B1	B1
-----------------------------	----

Senior Research Assistant B2	B1
------------------------------	----

Junior Research Assistant B3	B1
------------------------------	----

The main distinction between B1 and B2 medical categories referred to above was that colour perception was a requirement prescribed for B-1 category but not for B2 category.

4. When the promotion order dated 30.6.1999 required the respondent to submit B-1 Medical Category 'fit' certificate, the respondent filed objections contending that in the existing RSDO environment, the nature of work prescribed for the posts of JRA, SRA and CRA was the same, and as he was already cleared for B2 medical category, it was not necessary for him to secure fitness in the higher medical category of B1. By replies dated 24.7.1987 and 24.11.1997, the Directorate informed him that the different medical categories were prescribed in pursuance of rationalisation of medical standards, taking into account the requirements of the job, as also the safety and welfare of the public, fellow workers and the concerned employee himself. He was therefore once again called upon to present himself before the authorized Medical Officer for medical test and certification.

5. Being aggrieved, the respondent filed OA No. 395/1998 before the Central Administrative Tribunal, Lucknow Bench, praying that the promotion order dated 30.6.1997 to the extent it required him to produce Fit Certificate in B-1 medical category and the consequential memos/orders dated 7.7.1997, 24.11.1997 and 17.7.1998 requiring him to present himself before the concerned medical officers

for examination, be quashed. He also sought quashing of the office order No. 4/1990 dated 19.7.1990 insofar as it related to classification of medical category in respect of Research Assistants. The Tribunal by order dated 20.5.2005 dismissed the said application as being devoid of any merit. The Tribunal held that the rationalization of medical standards prescribed in Office Order dated 19.7.1990 was on the basis of recommendations of a Committee constituted for that purpose, keeping in view the job requirements and the interests of the employee concerned as also other employees, and therefore it did not suffer from any infirmity. It also held that unless the respondent obtained the required B-1 category fit certificate, he will not be fulfilling the required medical standard for the post of Chief Research Assistant.

6. The respondent filed W.P. No. 1800/2005 before the Allahabad High Court, challenging the order of the Tribunal. Before the High Court, the respondent raised a new contention based on Section 47(2) of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'the Act') which provided that "no promotion shall be denied to a person merely on the ground of his disability". His contention was that the B1 medical category was of a higher standard than B2, as it required colour perception in addition to the requirements prescribed for B2 category; that lack of colour perception or reduced colour perception was a 'disability'; and that as he was otherwise qualified, having regard to Section 47(2), promotion could not be denied to him on the ground of any disability which existed with reference to B1 medical standard. The said contention found favour with the High Court and by order dated 8.11.2006, it allowed the writ petition. The High Court held that having regard to Section 47(2) of the Act, as explained by this Court in Union of India (UOI) Vs. Sanjay Kumar Jain, , 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 Act; and that as there was no such notification exempting RDSO from the provisions of Section 47 of the Act, the respondent could not be denied promotion. It therefore issued a direction that if the respondent submitted himself for medical examination and was found fit for B2 Medical category, he should not be denied promotion on the ground that he did not fulfil the requirements of B1 medical category. The said order is challenged by the employer in this appeal by special leave.

7. In the original application filed before the Tribunal, the petitioner had not raised any contention based on Section 47 of the Act. He had merely contended that as the nature of work of Senior Research Assistant and Chief Research Assistant was one and the same and as he was already cleared for B2 medical category standard, there was no need for getting the further clearance for B1 medical category standard for the purpose of promotion. The respondent did not also seek any relaxation of the requirement relating to higher medical standard, as his contention was that such a higher medical standard was inapplicable and unnecessary. In fact, even in the writ petition, the petitioner did not raise the ground based on Section 47(2) of the Act, but merely reiterated his earlier

contention. Only during arguments, he contended that his inability to fulfill the higher standard of B1 category could not be a ground for denying him promotion, having regard to Section 47(2) of the Act. The said contention was entertained by the High Court without giving proper opportunity to the appellant to meet it. The High Court without any discussion assumed that having regard to the said Sub-section and the interpretation thereof by this Court in Sanjay Kumar Jain, the respondent could not be denied promotion on the ground that he did not qualify in B1 medical category.

8. The question that arises for our consideration is whether refusal by the appellant to give effect to the promotion of respondent unless he obtains fit certificate in B-1 medical category, violates Section 47(2) of the Act. In short, what falls for our consideration in this case is the scope and purport of Sub-section (2) of Section 47 of the Act, which provides that no promotion shall be denied to a person merely on the ground of his disability.

9. An examination of the relevant provisions of the Act is necessary before considering the said question. The Act was enacted to give effect to the proclamation on the full participation and equality of the people with disabilities. Chapter IV relates to education to children with disabilities. It contains provisions requiring appropriate governments and local authorities to make provisions for free education and for making schemes and programmes for non-formal education to children with disabilities. Chapter VI relates to employment for persons with disabilities. It contains provisions for identification of posts which could be reserved for persons with disabilities and formulating schemes for ensuring employment of persons with disabilities. Chapter VII contains provisions for affirmative action by making special schemes to provide aids and appliances to persons with disabilities and making preferential allotment of land for certain purposes. Chapter VIII relates to non-discrimination. Section 44 deals with non-discrimination in transport. Section 45 deals with non-discrimination on the road. Section 46 deals with non-discrimination in the built environment. Section 47 with which we are concerned, deals with non-discrimination in government employment, and it is extracted below:

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 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.

10. The scope of Section 47 in general was considered by this Court in *Kunal Singh Vs. Union of India (UOI) and Another*, . This Court held:

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.

11. We may next refer to the decision in *Sanjay Kumar Jain (supra)*, on which considerable reliance was placed by the High Court and the respondent. One S.K.Jain was working in a Group 'C' post in the Railways. He applied for promotion to a Group 'B' post. He qualified in the written test and was directed to undergo medical examination as per Para 531(b) of IREM (the Indian Railway Establishment Manual). Passing of the medical test was a requirement before a candidate was called for viva voce test. S.K.Jain was found to be medically unfit

as he was visually handicapped. He was therefore not called for viva voce test nor selected for promotion. The order dated 20.9.2000 by which he was informed that he was not being called for viva voce as he had been declared medically unfit, was challenged before the Central Administrative Tribunal. The Tribunal held that the provisions of the Act and newly introduced para 189A of IREM which laid down that there shall be no discrimination in the matter of promotion merely on the ground of physical disability, were not kept in view and therefore quashed the said order dated 20.9.2000. The said decision was upheld by the High Court having regard to Section 47(2) of the Act. Before this Court, the Railways submitted that the proviso to Sub-section (2) of Section 47 permitted the appropriate government to exclude by notification, any establishment from the provisions of Section 47 and the said provision indicated that in appropriate cases the protection/benefit provided by Sub-section (2) of Section 47 could be denied, and therefore this Court may deny the protection u/s 47(2) to S. K. Jain. This Court held that unless a notification was issued by the appropriate Government, exempting the establishment from the provisions of Section 47, having regard to the type of work carried in any establishment, an establishment cannot be exempted from the operation of Section 47(2) of the Act. This Court therefore upheld the decision of the Tribunal and the High Court. Thus the issue that was considered by this Court was whether exemption from the operation of Section 47(2) could be claimed, when there was no exemption notification under the proviso to Section 47 of the Act, by the appropriate Government. The scope and purport of Section 47(2) did not really arise for consideration, nor considered in that decision. The observation of this Court that Sub-section (2) of Section 47 in crystal clear terms, provided that no promotion shall be denied to a person merely on the ground of his disability, strongly relied on by the respondent, is not enunciation of any principle, but a reiteration of what is stated in the section. Therefore the assumption of the High Court that according to the interpretation of Section 47(2) by this Court in Sanjay Kumar Jain, even if the respondent was not able to qualify in medical category B1 because of lack of or reduced colour perception, he could not be denied promotion and that he should be subjected only to a B2 category medical examination, is baseless. It is unfortunate that the High Court has totally misunderstood the scope and purport of Section 47(2) of the Act and the decision in Sanjay Kumar Jain.

12. Sub-section (2) of Section 47 provides that no promotion shall be denied to a person merely on the ground of his disability. 'Disability' as per the definition in Section 2(i) of the Act, means blindness; low vision; leprosy-cured, hearing impairment, locomotor disability, mental retardation; and mental illness. "Person with disability" is defined in Clause (t) of Section 2, as a person suffering from not less than forty percent of any disability as certified by a medical authority. What is significant is all persons with disability are not treated equally or similarly, under the Act. The benefits extended under the Act depends upon the nature of disability and extent of disability. Different principles relating to non-discrimination apply depending upon the context in which the benefit is

extended. Let us illustrate. Section 33 refers to reservation of posts for persons or class of persons with disability. But it however makes it clear that the reservations will be made only to those suffering from (i) blindness or low vision, (ii) hearing impairment, (iii) locomotor disability or cerebral palsy. There is no provision for reservation of posts for persons suffering from mental retardation, mental illness or leprosy-cured, though they are also 'persons with disability'. On the other hand Section 39 requires all educational institutions to reserve seats for persons with disability, without restricting the reservation only to certain categories of persons with disability. Similarly some of the provisions in Sections 44, 45 and 46 with reference to non-discrimination in transport, non-discrimination on the road and non-discrimination in the built environment may be user-specific depending upon the nature of disability, that is some are meant only for persons with locomotor disability and some for persons suffering from blindness or low vision and not for others. Therefore the provisions of the Act cannot be applied mechanically to all persons with any and every kind of disability. It will be necessary to keep in view, the object of the Act, identification of the category of persons for whom a particular beneficial provision has been made, and the extent of the benefit provided.

13. 'Blindness' is a disability defined in Clause (b) of Section 2 and refers to (i) total absence of sight or (ii) visual acuity not exceeding 6/60 or 20/200 (snellen) in the better eye with correcting lenses; or (iii) limitation of the field of vision subtending an angle of 20 degree or worse. 40% disability referred to in Section 2(t) to identify persons with disabilities, will apply to categories (ii) and (iii) of Section 2(b) but will be irrelevant in regard to persons with total absence of sight falling under category (i) of Section 2(b). Section 2(u) defines a "person with low vision" as "a person with impairment of visual functioning even after treatment or standard refractive correction but who uses or is potentially capable of using vision for the planning or execution of a task with appropriate assistive device". Lack of colour perception is neither blindness nor low vision and is therefore apparently not a disability under the Act. It is therefore, doubtful whether a person lacking colour perception can claim to be a person entitled to any benefit under the Act. Be that as it may. We will examine the issue assuming that respondent is a person with disability.

14. Section 32 refers to identifications of posts which can be reserved for persons with disability. Section 33 deals with reservation of posts for persons with disability. Sections 32 and 33 therefore apply to pre-employment situation, that is where persons with disability are yet to secure employment. Section 47 applies to a post-employment situation, that is to those who are already in government employment. Section 47 contains two distinct provisions. The first is a provision for non-discrimination when an employee who is already in government employment acquires a disability during his service. Sub-section (1) extends the following protection to the employees in government service who acquire a disability during service : (a) their service shall not be dispensed with or reduced in rank on the ground that they acquired a disability during service;

and (b) if an employee who acquires a disability during service is not suitable for the post he was holding, he could be shifted to some other post with same pay scale and service benefits, and if it is not possible to adjust the employee 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.

15. Sub-section (2) of Section 47 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 Section 47(2) bars disability per se being made a disqualification for promotion. To give an example, a person working as a Lower Division Clerk (LDC) suffering from the disability of low vision, cannot be denied promotion to the post of Upper Division Clerk (UDC) merely because of his disability. This is because the efficiency with which he functioned as a LDC will be the same while functioning as a UDC also and the disability as such will not affect his functioning in a higher post. 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. It is significant that Section 47(2) 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. Section 47(2) 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 Section 47(2) 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.

16. 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. 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 bonafide 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.

17. 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. 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 Section 47(2) of the Act, avoid subjecting himself to medical examination for ascertainment of B1 medical category fitness.

18. 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- fulfillment of a minimum required standard/ qualification. Viewed accordingly, it will be seen that Section 47(2) is not attracted at all.

19. Therefore we are of the view that the Section 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.

20. The appeal is therefore allowed, and the order of the High Court is set aside and the order of the Tribunal is restored, resulting in the respondent's original petition before the Tribunal being dismissed.