CASE NO.:
Appeal (civil) 5178 of 2004

PETITIONER:
Union of India

RESPONDENT:
Sanjay Kumar Jain

DATE OF JUDGMENT: 11/08/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U DG M E N T

(Arising out of SLP) No. 16541/2003)

ARIJIT PASAYAT, J

Leave granted.

The Union of India calls in question legality of the judgment rendered by a Division Bench of the Delhi High Court dismissing the Writ Petition filed by it while affirming the decision rendered by Central Administrative Tribunal, Principal Bench, New Delhi (in short 'CAT').

Factual position in a nutshell is as follows:

The respondent while working in Group-C post of the Railways applied for promotion to Group-B post. He qualified in the written test and was directed to undergo medical examination as per para 531(b) of the Indian Railway Establishment Manual (in short the 'Establishment Manual'). In terms of the Railway Board's Circular dated 31.10.1991 passing of the medical test is a requirement before the candidate is called for viva voce test. The respondent was found to be medically unfit as he was visually handicapped. His case is one of external squint with advanced petriritis pigments on both the eyes. This is a disease which affects the eye-sight progressively. He was considered unfit as he may become visually handicapped in future. The respondent was therefore not called for viva voce test. He filed O.A.No.439/2001 before the CAT challenging the order dated 20.9.2000 whereby it was indicated that he was not to be called for viva voce test as he had been declared medically unfit. The CAT after hearing the parties came to hold that while considering the case of the respondent (applicant before it) the provisions of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short the 'Act') were not kept in view. CAT took note of the fact that a new paragraph 189A was introduced in the Establishment Manual which clearly laid down that there shall not be discrimination in the matter of promotion merely on the ground of physical disability. The application was accordingly allowed by the CAT.

The Union of India questioned correctness of CAT's order by filing a Writ Petition which was dismissed by the impugned judgment. The High Court took note of sub-Section (2) of Section 47 of the Act to hold that CAT's order is perfectly in order.

In support of the appeal, it was contended by Mr. M.N. Krishnamani, learned senior counsel that while referring to sub-Section (2) Section 47 of the Act both the CAT and the High Court overlooked the proviso to sub-Section (2) of Section 47 which permits the appropriate Government to

exclude by notification any establishment from the provisions of the Section. According to him, looking at the nature of the duties which employees of Group-B have to undertake, a physically handicapped person, more particularly, one who is visually handicapped will not be able to do justice to the work. The High Court and the CAT were not justified in granting relief to the respondent after he had failed in the medical test. It was urged that the proviso makes it clear that in appropriate cases the protection provided by sub-Section (2) of Section 47 of the Act can be denied and the case at hand is one of such cases.

The respondent who appeared in person submitted that the judgments of both the CAT and the High Court do not suffer from any infirmity to warrant interference.

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

"Section 47: Non-discrimination in Government employments-(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

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

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

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

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

The 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. In a meeting to launch the Asian and Pacific Decade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, which was held at Beijing on 1st to 5th December, 1992, a proclamation was adopted on the Full Participation and Equality of People with Disabilities in the Asia and the Pacific Region. Our country is a signatory to the said proclamation. The proclamation was on the following lines:

"To give full effect to the proclamation it was felt necessary to enact a legislation to provide for the following matters:
(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against persons with

disabilities in the sharing of development benefits, vis-'-vis non-disabled persons;

(iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

(v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

(vi) to make special provision of the integration of persons with disabilities into the social mainstream."

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. Krishmani on the proviso to sub-Section (2) of Section 47. The same is not in any way helpful to further the case of the appellant. 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 unbriddled 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.

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.

The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (Per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St James, 9 B. & C. 836).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in Re Barker, 25 Q.B.D. 285).

A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See Jennings v. Kelly [1940] A.C. 206).

The above position was noted in Ali M.K. & Ors. v. State of Kerala and Ors. (2003 (4) SCALE 197).

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 fulfill the requirements of the proviso to 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 judgment suffers from no infirmity to warrant our interference. The appeal fails and is accordingly dismissed with no order as to costs.