(2010) 05 P&H CK 0293

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Writ Petition No. 1399 of 2010

Joginder Kaur		APPELLANT
	Vs	
Central Administrative Tribunal and Another		RESPONDENT

Date of Decision: May 13, 2010

Acts Referred:

- Central Civil Services (Pension) Rules, 1972 - Rule 38
- Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - Section 2, 47, 47(2)

Citation: (2010) 159 PLR 549 : (2010) 5 SLR 245

Hon'ble Judges: M.M. Kumar, J; Jitendra Chauhan, J

Bench: Division Bench

Judgement

M.M. Kumar, J.

The petitioner has approached this Court challenging order dated 24.12.2009 (P.4) passed by the Central Administrative Tribunal, Chandigarh Bench in TA No. 99/CH/2009 dismissing her Original Application. The petitioner had prayed before the Tribunal that after she was declared medically unfit to perform the duties of ''Dental Room Operation Assistant'' then while posting her as Class IV her last pay drawn be protected. of the petitioner.

2. Brief facts of the case are that on 22.8.1987 the petitioner was appointed as ''Dental Room Operating Assistant'' in the Postgraduate Institute of Medical Education and Research, Chandigarh (for brevity ''the PGI''). His services were regularised on 31.5.1988 in the pay scale of 950- 1500. On 15.2.1994, the petitioner developed the problem of bronchial asthma and the PGI authorities advised the petitioner to avoid exertion and to perform light duties. In view of the medical advice, the petitioner represented the PGI authorities on 2.5.1994 for assigning her some other job of light nature. A Medical Board was constituted. The Board held a meeting on 2.9.1994 to examine the fitness of the petitioner and submitted its

report. On 20/31.10.1994, without supplying the copy of the report of the Medical Board, the petitioner was served with a show cause notice as to why she should not be retired on medical ground and be given invalid pension under the provisions of Central Civil Services (Medical Examination) Rules, 1957 read with Rule 38 of the CCS (Pensions) Rules, 1972. On 15.11.1994, the petitioner submitted reply to the show cause notice mentioning that opinion of the Medical Board is wrong and she is perfectly all right to perform her duties. The petitioner only requested for adjustment on some light duties on Class III post. The petitioner submitted that she was ready to even accept Class IV job. The respondent PGI on 12.1.1995 without considering the request of the petitioner for transfer on medical grounds was appointed her to a Class IV post in the pay scale of Rs. 750-940. On 2.2.1995, the petitioner submitted a representation for protection of her pay. She also sent a legal notice through her counsel on 9.8.1995. When no response was received, the petitioner filed CWP No. 372 of 1996 on 9.1.1996 which was disposed of by this Court with a direction to the respondents to pass a reasoned and speaking order on the representation/ legal notice within a period of two months. On 16/18.3.1996, the PGI authorities rejected the claim of the petitioner on the ground that her pay was to be regulated under Rule 22(3)(b) of Service Rules and she was to draw the initial pay on the minimum of the time scale. The said order was challenged by the petitioner by filing CWP No. 7579 of 1996 which was transferred to the Tribunal. The Tribunal vide impugned order rejected the case of the petitioner on the ground that appointment of the petitioner on Class IV post was a fresh appointment and not by transfer.

3. The operative part of the order passed by the Tribunal reads as under:

The petitioner has based her prayer on FR 22(a)(iii). However, the actual rule is FR 22(1)(a)(3) which is as follows:

(3) When appointment to the new post is made on his own request under sub rule (a) of Rule 15 of the said rules, and the maximum pay in the time-scale of that post is lower than his pay in respect of the old post held regularly, he shall draw that maximum as his initial pay. Rule 15 relates to transfer and we are of the view that the present case is not that of transfer since she was being retired and was offered fresh appointment on a lower post on her own request. Therefore, this rule is of no benefit to the applicant. The applicant has failed to quote any rule in support of her prayer. It is an admitted fact that she was offered fresh appointment on compassionate grounds. Otherwise she would have been retired on medical grounds with invalid pension. In fact, the respondent organization had offered her this job as a welfare measure and to save her from hardship. But, there is no provision in the rules under which her pay would be protected under such circumstances. Therefore, we find that the relief asked for by the applicant in respect of pay protection is not maintainable.

4. We have heard learned Counsel for the parties at some length. Mr. Dinesh Kumar, learned Counsel for the petitioner has argued that legally the petitioner could not be removed from the post of Dental Room Operating Assistant at the first instance and appointed against a Class IV post. According to the learned Counsel such a course is not available to the petitioner in view of the express provisions of Section 47 of the Disability Act, 1995 (for brevity ''the Act'') prohibiting any establishment from dispensing with or reducing in rank an employee who has acquired disability during service. If such an employee is to be posted against another post then his pay scale in any case cannot be reduced nor any promotion could be denied to such a person.

5. Ms. Rita Kohli learned Counsel for the PGI has however submitted that order passed by the Tribunal does not suffer from any illegality. There is no rule to protect her last pay drawn to support the petitioner''s claim. Moreover, it was on her own request that a Class IV post was offered to her. Therefore, there is no substance in the submission and the petition is liable to be dismissed. We find that Section 47 of the Act came up for determination of the Supreme Court in the case of Kunal Singh Vs. Union of India (UOI) and Another, . The Hon''ble Supreme Court referred to the background of Disabilities Act, 1995 and referred to the details of commitment at an international meet held at Beijing in the first week of December 1992. In that meet, a proclamation was adopted to which India is signatory and it had agreed to give effect to the proclamation for safeguarding the rights of person with disabilities and enabling them to enjoy equal opportunity. As a consequence of the aforementioned proclamation, the Disabilities Act, 1995 was passed. The interpretation given by the Supreme Court to Section 47 emerges from reading of paras 9 of the judgment which is extracted as under at p. 738 of LLJ:

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.

6. The Section further provides that if 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 it 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." (emphasis added)

7. The aforementioned observations of their Lordships do not leave any manner of doubt that an employee who has suffered disability during service could be deprived of the benefits which would have otherwise accrue to him merely on account of disability. There is complete prohibition against termination, reversion or reducing pay. The aforesaid principles were followed and applied to the case of a driver of Haryana Roadways by a Division Bench of this Court in the case of Shri Rupender Singh Vs. State of Haryana and Others, (which comprised of one of us, M.M. Kumar, J.). The driver had become medically unfit for performing his duties on account of accident. The authorities have ordered his retirement and gave him alternative job in the lower pay scale. The writ petition was allowed and the order of pre-mature retirement and offering him lower pay scale on an alternative post was quashed. While construing Section 47 of the Act and applying the ratio of judgement rendered in Kunal Singh''s case (supra), the Division Bench has observed as under:

A perusal of the above extracted provisions, makes it clear that there is a complete prohibition to dispense with or reduce in rank an employee who has acquired disability during his service. This provision has been incorporated in Chapter-VIII which deals with an employee of an establishment who has acquired disability during service. There are two provisos in Section 47 that if such a disabled person is not suitable for the post which he was earlier holding then he should be shifted to some other post with same pay scale and service benefits and that if it is not possible to adjust such an employee then he be kept on a supernumerary post till such time a suitable post is available for him or he attained the age of superannuation whichever is earlier. Sub-section (2) of Section 47 goes to the extent of prohibiting denial of any promotion to any such person on the ground of his disability. A proviso to Sub-section (2) empowers the appropriate Government to exempt any establishment from the provisions of Section 47 by keeping in view the type of work carried in that establishment.

8. When the facts of the present case are examined in the light of the observation made by the Supreme Court in the case of Kunal Singh (supra), and the provisions of

Section 47 of the Act, it becomes evident that order dated 18.3.1996 passed by the PGI authorities offering her class IV post cannot be sustained in the eyes of law and has to be held as violative of Section 47 of the Act. The prohibition against retirement of an employee who acquired disability while in harness has been completely ignored by respondent while passing the aforesaid order. Firstly, the petitioner cannot be given fresh appointment, and secondly efforts ought to have been made to adjust him on a post carrying equal pay scale and thirdly if no post is available, an employee like the petitioner has to be permitted to work on a supernumerary post. Therefore, the impugned order dated 24.12.2009 passed by the Tribunal is unsustainable and it suffers from a serious legal infirmity and is thus liable to be set aside.

9. In view of the above enunciation of law laid down by Hon''ble the Supreme Court, the instant petition is allowed, the impugned order dated 18.3.1996 is hereby quashed. Consequently the order of the Tribunal dated 24.12.2009 is also set aside. Respondent No. 2-PGI is directed as under:

a) If possible appoint the petitioner to a post equivalent to pay scale of the post of ''Dental Room Operation Assistant'' b)If no such post is available then create a supernumerary post in the cadre of ''Dental Room Operation Assistant'' and pay her salary from that post. In that case, respondent No. 2 may utilize the services of the petitioner for any other post including Class IV post.

The aforesaid directions be implemented within a period of two months from the date of receipt of copy of this order.