

CDJ 2012 CAT ERNAKULAM 048

Court : Central Administrative Tribunal, Ernakulam Bench

Case No : O.A No. 929 of 2010

Judges: THE HONOURABLE MR. JUSTICE P.R. RAMAN, JUDICIAL MEMBER, THE HONOURABLE DR. K.B.S. RAJAN, JUDICIAL MEMBER & THE HONOURABLE MS K. NOORJEHAN, ADMINISTRATIVE MEMBER

Parties : C.V. Gupthan Versus Union of India represented by General Manager, Chennai & Another

Appearing Advocates : For the Applicant: M.P. Varkey, Advocate. For the Respondents: K.M. Anthru, Advocate.

Date of Judgment : 31-01-2012

Head Note :-

Subject

Judgment :-

HON'BLE Dr.K.B.S. RAJAN, JUDICIAL MEMBER

1. This Full Bench has been constituted to deal with the following reference made by a Division Bench of this Tribunal in OA No. 929 of 2010:-

"For the purpose of medical decategorization and for alternative employment or accommodation of the persons with disabilities in supernumerary post, what should be the date from which the individual could be considered as having acquired the medical disability - viz from the date of he acquired the ailment (say date of accident if the disability is as a direct and proximate consequence of such accident) or from the date he is so certified by the competent medical authority.

2. The need to make the above reference arose on account of the fact there were conflicting decisions relating to the date from which the benefits under the provisions of Persons with disabilities (equal opportunities Protection of Rights and Full Participation) Act 1995 (hereinafter referred to as 'Persons with disabilities Act, 1995') would apply - viz., (a) date of

acquiring the disability and (b) date as certified by the Medical authority as per the provisions of Section 2(t) of the said Act.

3. Counsel for the applicant had invited our attention to the definition of certain terms as per section 2 of the said Persons with disabilities Act 1995 as also to Sec. 47 of the said Act which are as under :-

"2. Definitions.--In this Act, unless the context otherwise requires,--

(i) `disability' means--

(i) blindness

(ii) low vision

(iii) leprosy - cured

(iv) hearing impairment

(v) locomotor disability;

(vi) mental retardation

(vii) mental illness

* * *

(t) `person with disability' means a person suffering from not less than forty per cent of any disability as certified by a medical authority;"

"47. Non-discrimination in government employment.--(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."

4. Counsel for the applicant argued that section 47 refers only to the 'disabilities' and not 'persons with disabilities' and since the two terms 'disabilities' and 'persons with disabilities' have two independent meanings, the respective meaning only should be assigned while interpreting the relevant provisions of the Act and accordingly, in so far as provisions of Sec 47 are concerned, the term, 'an employee who acquires a disability' should be interpreted in terms of section 2(i) and not 2(t). In that event, the certification from the medical authorities would not be essential and the benefits have to percolate from the date the individual acquired the disability irrespective of the date of certification.

5. Counsel for the applicant further argued that the said provisions of the Act specify that the only requirement for shifting an employee from one post to another or being kept in supernumerary post, is that due to acquiring the disability, the person should be incapable of performing the duties attached to the post he is holding.

6. Counsel for the applicant also argued that in this particular case, the certificate by the Medical authorities would evidence the fact that the disability had been due to an accident which took place in April 2004 and accordingly, the benefit should be available from the date of accident.

7. The counsel further referred to the other relief claimed regarding the promotion of the applicant. However, that argument could not be registered by the Bench in view of the fact that the same is outside the scope of reference to the full bench.

8. The following decisions/Act have been referred to by the counsel for the applicant:-

(a) S.K.M. Haider vs Union of India (2011) 4 SCC 700

(b) Kunal Singh vs Union of India (2003) 4 SCC 524

(c) Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act 1995

9. Counsel for the respondents on the other hand submitted that be it 'disability' or 'persons with disabilities', for deriving any benefit under the Act, medical opinion about the disability is a condition precedent. Without the same on the basis of the employee's opinion or on any other opinion the benefits under the Act cannot be made available. Counsel for the respondents relied upon the decision of the Apex Court in the case of Union of India vs Devendra Kumar Pant (2009) 14 SCC 546 wherein the Apex Court has held that the term 'No promotion shall be denied to a person merely on the ground of his disability' 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.". He has also emphasized the requirement of fulfilling the prescribed medical standards for promotion to any particular post. Attention was invited for this purpose to para 31 of the aforesaid decision of Devendra Kumar Pant wherein, the Apex Court has held as under:-

"31. 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."

10. Arguments were heard and documents perused. Counsel for the applicant relied upon para 9 In the case of Kunal Singh (supra), and Sec. 47 (already extracted in para above) of the Persons with Disabilities Act. In para 9 in Kunal Singh, the Apex Court has held as under:-

"9. 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 under Section 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. In a subsequent case of Union of India vs Devendra Kumar Pant (supra) relied upon by the Counsel for the respondents, the Apex Court has reiterated the spirit and scope behind the provisions of Sec. 47 of the Act in the following words:-

"29. 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."

12. Thus, as per the above two authoritative pronouncements of the Apex Court, it is clear that full protection to a person acquiring disabilities should be afforded. Again, disability is one matter and a 'person with disabilities' is another. Specific infirmity in the body of the individuals has been reflected as 'disabilities'. There is absolutely no quarrel in this regard. What is spinal to the reference is as to what is the date from which the railway employee (or for that matter any government servant) shall be held to be entitled to the benefits of the Act - i.e. from the date he acquired the disability or from the date as such, certified by the competent medical authority.

13. In order to derive the benefits of the Provisions of the Persons with disabilities Act 1995, there must be a person and that person should be affected by the specific infirmities as defined in 2(i) of the Act. At this stage, apart from the definition of the term 'disabilities' the definition of the term, 'person with disabilities' also springs into play. Thus, if an employee is suffering from not less than forty per cent of any disability (i.e. blindness or low vision, or leprosy-cured, or hearing impairment, or locomotor disability or mental retardation or mental illness) and if so certified by a medical authority, then only he becomes entitled to the benefits conferred under provisions of the said Act. For, it is only the medical authorities that are competent to give the expert opinion about the disabilities. It is appropriate to refer to the following observation of the Apex Court in the case of Om Prakash Singh vs Union of India (2010) 12 SCC 667, wherein the Apex Court has held -

"We are clearly of the view that the Medical Board is an expert body and they take into consideration all relevant factors and essential practice before arriving at any opinion and its opinion is entitled to be given due weight, merit, credence and value."

14. Further, Chapter XIII of the Indian Railway Establishment Manual (I.R.E.M.) which deals with 'Absorption of medically incapacitated staff in alternative employment' also refers to

declaration by the 'medical authority' over the fitness or otherwise of a Railway employee to continue in the post he was holding at the time of acquiring the disability etc., Thus, the provisions contained in the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act 1995, and the provisions of the I.R.E.M. with regard to the requirement of declaration by a Medical Authority go in tandem.

15. Thus, medical report as well as the opinion of the medical authority is a condition precedent for invoking the provisions of the Persons with Disabilities Act, 1995.

16. The next question is as to the date from which the benefits under the Act shall become available to a person with disabilities. Necessarily, declaration by a competent Medical Authority, of any kind of disability, is posterior to a person's acquiring disabilities. Invariably, it is only after administering necessary medical treatment to the individual suffering from any kind of the specified disability, that the extent of disability that would remain permanently with the person would be ascertained. Generally, such a certificate would be effective from the date of issue of the certificate. However, if there be any other date/period reflected in the medical certificate as to the date/period from which the disabilities persist, obviously, it would be such a date/period as so reflected that would be reckoned. Reference made to the Full Bench is answered accordingly.

17. The reference made to the Full Bench is answered accordingly. The OA may be listed before the appropriate Division Bench for further consideration of the case, keeping in mind the aforesaid decision.