

Fancy Babu Vs. Union of India, Represented by General Manager and Others

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Court : Central Administrative Tribunal CAT Ernakulam

Decided On : Feb-05-2010

Judge : The Honourable Mr. George Paracken, Judicial Member & the Honourable Mr. K. George Joseph Administrative Member

Appeal No. : O.A.NO.49 of 09

Appellant : Fancy Babu

Respondent : Union of India, Represented by General Manager and Others

Advocate for Pet/Ap. : For the Applicant : M.P. Varkey, Advocate. For the Respondent : Thomas Mathew Nellimoottil, Advocate.

Judgement :

HON'BLE MR. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER:

The applicant has filed this O.A. seeking a declaration that she is entitled to be reinstated in service with effect from 15.2.2002 and to get all the benefits including arrears of pay, promotion and restoration of leave debited against sick period with effect from 24.4.98/26.8.98 and direct the respondents accordingly.

2. Facts in brief. The applicant was appointed as Office Clerk at Southern Railway Headquarters, Madras in 1990 against sports quota (Basket Ball-Women). She was transferred as Office Clerk in the office of the Divisional Personnel Officer, Southern Railway, Palghat in 1995. While on maternity leave, she acquired a

disability of being a paraplegic on 24.4.98. She was medically unfitted in all classes for further service in the Railways. Her services were terminated with effect from 15.2.2002 on her request and was granted invalid pension with effect from 16.2.2002.

3. The applicant contends that ever since she acquired the disability on 24.4.98 she was so ill, incapacitated and secluded that she could not comprehend her rights under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 or the orders in that regard or the judicial decisions that followed. The medical certificate of 21.3.2007 from Medical College Hospital, Kottayam shows her disability at 75%. The Railway Administration was reluctant and evasive in implementing the provisions of the Disabilities Act. She heard about the same in April 2008 and realized that she had been wronged by the respondents. Her representation to grant her protection available under Section 47 of the Disabilities Act with effect from 24.4.98 as per Annexure A8 did not elicit any response from the Railways. The Disabilities Act, 1995 came into force on 7.2.96. Section 47 of the said Act is binding on the Railways. But it did not pass any order until 20.9.99 when they modified Chapter 13 of IREM Vol.I. But as per para 1303, the disabled person acquires a right on being declared medically unfit and not on acquiring a disability as mandated by Section 47(1) of the Disabilities Act. Therefore the applicant was denied her rights from 24.4.98/26.8.98 to 9.1.2002. The Railways resorted to invalidating and retiring such employees as per para 1303(a). Only after the decision of the Apex Court in Kunal Singh;(2003) SCC (LandS) 482, the Railway Board issued a clarification stating that provisions of Section 47(1) supra are to be complied with even in respect of those who have been declared totally incapacitated. Annexure A11 dated 7.12.2005 refers. The applicant was invalidated and retired before Annexure A11 was issued. Therefore her case needs a review. Annexure A11 itself should be quashed and set aside in so far as it provides for placement on supernumerary posts only after declaring medically unfit and not from the date of acquiring disability as mandated by the Disabilities Act. The applicant relies on the decisions of the Apex Court in Kunal Singh vs. Union of India;(2003) SCC (LandS) 482 and Bhagwan Das vs. Punjab State Electricity Board;(2008)1 SCC (LandS) 242, for having her case reviewed.

4. The respondents contested the O.A. Based on the request of the applicant for voluntary retirement only, her services were terminated. Therefore the applicant is estopped from filing the O.A. The applicant had submitted Annexure A4 letter dated 02.02.2002 stating that she was not in a position to attend office even against a supernumerary post due to paralysis and therefore she desired to retire voluntarily and also requested for appointment to her daughter on compassionate grounds. The second respondent never advised the applicant to seek voluntary retirement and get invalid pension. The case of the applicant cannot be reopened as her request for appointment of her daughter on compassionate grounds has already been accepted and registered for action when she attains the recruitment age.

5. In the rejoinder the applicant submitted that despite the Disabilities Act coming into force from 7.2.1996 the Railway Board did not give the protection of the said Act from the date she acquired disability. Invalid pension was the only means of succor for the applicant. The policy of the Railway Board was to deny the benefits of the Disabilities Act to those who acquired total disability as they were being invalidated . The applicant would have withdrawn her request for voluntary retirement had she known about the protection available to her. The applicant's ward has not been given any appointment. The respondents are expected to take suo motu steps to comply with the mandates of the Disabilities Act once they are aware of a Railway employee acquiring disability.

6. In their reply to the rejoinder the respondents stated that there is no provision in the Disabilities Act for payment of salary to a medically incapacitated employee sitting at her home doing nothing when the applicant herself expresses her inability to attend office even against a supernumerary post. The applicant acquired disability not during the course of her employment during service, but after availing maternity leave. Having requested for voluntary retirement and appointment of her daughter on compassionate grounds, the applicant cannot say that her ward has not been appointed yet.

7. In the additional rejoinder the applicant submits that any undertaking given by the applicant cannot estopp her from availing the statutory rights under the

Disabilities Act. As Annexure A10 rules operate only after medical decategorisation, no protection is available for the period between the date of acquiring disability and the date of medical decategorisation.

8. In their additional reply the respondents submitted that the question of review of the case of the applicant does not arise vide Annexure R/5 letter dated 30.6.2005 as she had opted to retire asking for appointment of her daughter.

9. Arguments were heard and documents perused.

10. Admittedly the applicant was on sick list from 26.8.98. She became paraplegia and confined to wheel chair as per Annexure A3(1). Her disability is assessed to be 75% as per certificate issued from Medical College Hospital, Kottayam. Annexure A7 refers. As she acquired disability while in service, she is entitled to the protection provided under the Disabilities Act, 1995.

11. Section 47 of the Disabilities Act, 1995 is extracted as under:-

"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."

No establishment shall dispense with or reduce in rank an employee who acquired a disability during his service. It is mandatory for every establishment under the Government to make available the protection provided under the Disabilities Act, 1995 to an employee who acquires disability during his service. The Railways is an establishment under GOI. As it is not exempted from the provision of the Disabilities Act, it is bound to implement it. The said Act came into force on 7.2.1996. The Railways, however decided only on 30.6.2005 to give effect to the scheme for absorption in alternative employment to the disabled from 7.2.1996 vide circular reproduced below:-

"THE PERSONS WITH DISABILITIES (EQUAL OPPORTUNITIES,
PROTECTION OF RIGHTS and FULL PARTICIPATION)ACT, 1995-

ABSORPTION OF DISABLED/MEDICALLY DECATEGORISED

STAFF IN ALTERNATIVE EMPLOYMENT- DATE OF EFFECT OF

THE REVISED SCHEME-QUESTION REGARDING

P.B.Circular No.84/2005 RBE No.93/2005

Copy of Board's letter No.E(NG)-II/204/RE-3/9 dated 31st May 2005, from Director,Estt.,(N), Railway Board, New Delhi addressed to the General Manager, All Indian Railways and Production Units.

Copy of Board's letters dated 29th April 1999, 31st July 2001 and 1st July 2003 have been circulated as PBC's No.76/99 dated 9th June 1999, 132/01 dated 17th August 2001 and dated 17th 2003 respectively.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995- Absorption of disabled/Medically decategorised Staff in alternative employment- Date of effect of the revised scheme-Question regarding.

Chapter XII of Indian Railway Establishment Manual, Vol-I, 1989 incorporating the scheme for absorption in alternative employment of medically de-categorised staff has been amended pursuant to Section 47 (1) of the Persons with Disabilities

(Equal Opportunities Protection of Rights and Full Participation) Act, 1995, vide ACS No.77 issued under this Ministry's letter No.E9NG)1-96/RE3/9(2) dated 29th April 1999 read with ACS Nos. 122 and 148 issued under their letters No.E(NG) 1/2000/RE-3/5 dated 31st July 2001 and E(NG)1/2001/RE-3/8 dated 1st July, 2003, respectively.

2. The scheme so revised is being implemented in the Railways from the date of issue of the relevant instructions viz 29th April 1999. Representations have been received to the effect that since the Act came into force with effect from the date on which it was notified in the Govt. of India Gazette viz 7th February 1996. The matter has been considered carefully by this Ministry. It has now been decided that the scheme contained in this Ministry's letter of 29th April 1999 as modified may be made effective from 7th February 1996. Accordingly in respect of cases in which the disabled/ medically decategorised employees on or after 7th February 1996 and upto 28th April 1999 were absorbed in alternative employment in accordance with the earlier scheme in grade(s) lower than the grade(s) held by them on regular basis at the time of disablement/ medical decategorisation may be reviewed on representations received in this regard and decided at the level of the General Manager as per the revised scheme. In other type of cases wherein disabled/medically decategorised employees had opted to retire asking for appointment of eligible ward on compassionate ground, the question of review does not arise.

This issues with the concurrence of the Finance Directorate of the Ministry of Railway."

(No.P(R)11/P/Vol.III dated 30th June 2005)

Further amendment vide letter dated 7.12.2005 (Annexure-11) made Section 47(1) of the Act applicable to totally incapacitated persons. That the Railway Board was slow in giving effect to the provisions of the said Act does not absolve it from the responsibility of implementing the Act from 7.2.96. The Railway Board is not only legally bound to implement fully the Disabilities Act in its establishment w.e.f. 7.2.96 but also it is duty bound, as a model employer, to make a disabled employee aware of the protection available to him under the Act. When Govt. talks

about corporate social responsibility, the Railway Board cannot drag its wheel in discharging its social responsibility towards its own employees who acquire disability while in service and are protected by the Act. Sensitivity and responsibility towards disabled employees would stimulate greater productivity in a satisfied and secure work force. Discharging social responsibility is a highly productive investment in the long run.

12. The officers of the Railways who were dealing with case of the applicant were not in a position to implement the Disabilities Act when the top management of the Railways was slow to implement the same in the Railways. Therefore the officers at the lower level cannot be faulted.

13. In *Kunal Singh vs. Union of India and another*; 2003 SCC (LandS) 482, the Apex Court held that :-

"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 employee 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."

14. In *Bhagwan Dass and another vs. Punjab State Electricity Board*; (2008)1 SCC (LandS) 242 the appellant therein like the applicant under compelling circumstances sought retirement from service. The respondents accepted the same and paid terminal benefits without considering the entitlement of the applicant to benefits under Section 47 of the Disabilities Act. The Apex Court treated the request for retirement as not voluntarily given by the appellant and held that "in view of the provisions of Section 47 of the Act, the appellant must be deemed to be in service and he would be entitled to all service benefits including annual increments and promotions, etc. till the date of his retirement."

15. Section 72 of the Disabilities Act reads:-

"72. Act to be in addition to and not in derogation of any other law- The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefit of persons with disabilities."

16. To quote again from 2003 SCC (LandS)482:-

"Merely because under Rule 38 of the CCS(Pension)Rules, 1972, the appellant got invalidity pension is no ground to deny the protection mandatorily made available to the appellant under Section 47 of the Act".

The applicant who got invalidity pension from the Railways is similarly placed and she cannot be denied the mandatory protection of the Disabilities Act. The Disabilities Act, 1995 is a social beneficial enactment intended to ensure equal opportunities, protection of rights and full participation of disabled persons. It being a special legislation, the provisions of IREM cannot override Section 47 of the Act. Therefore the decision of the Railways not to review as per notification dated 30.6.2005 the cases like the applicant's because of voluntary retirement asking for appointment of eligible ward, is bad in law. Unaware of the protection available under the Disabilities Act and under extreme physical and mental stress and in utter penury and dependency, the applicant had, with or without well intentioned promptings from the local Railway officials sought voluntary retirement. This

retirement and receipt of invalid pension cannot override the provisions of the Disabilities Act, which are mandatory.

17. On the facts and circumstances of this O.A., the provisions of the Disabilities Act and the law laid down by the Apex Court, the applicant is entitled to the protection available to her under Section 47(1) of the Disabilities Act. The facts that the applicant sought voluntary retirement and is receiving invalidity pension should be ignored. The fact that the applicant was so disabled that she cannot even come to office to receive her salary even if she were appointed on a supernumerary post as mandated under the said Act does not permit the Railways to dispense with the applicant who acquired a disability during her service. Even when she was on maternity leave she was in service and therefore she acquired the disability during service. In such a situation as the applicant is in, it is not necessary for the applicant to visit the office to receive her salary. It should be credited into her bank account . In terms of the provisions of the Disabilities Act, the applicant is entitled to protection of pay scale and service benefits including promotion in due course.

18. The applicant has claimed that she acquired the disability on 24.4.98 when she was on maternity leave. There is no reason to disbelieve her. Annexure A1 certificate from Sree Chitra Tirunal Institute for Medical Sciences and Technology dated 16.5.1998 shows that on admission she was immediately taken up for surgery. Annexure A2 shows that she was on sick list from 26.8.98. Therefore it is reasonable to accept that she acquired disability on 24.4.98, as claimed by the applicant.

19. In view of the above, the O.A. succeeds. Accordingly, we direct the respondents to ignore Annexure A4 letter for voluntary retirement. Annexure A5 order terminating her services from 15.2.2002 and Annexure A6 order for payment of pension, are quashed and set aside. Annexure A11 is set aside to the extent it provides for placement of supernumerary post only after declaring medically unfit and not from the date of acquiring disability. The respondents are further directed to reinstate the applicant in service with effect from the A.N. of 15.2.2002 and to give her all consequential benefits including arrears of pay and promotion within a

period of 3 months from the date of receipt of a copy of this order. No order as to costs.

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