

(2006) 08 DEL CK 0193
In the Delhi High Court
Case No : LPA 360 of 2006

Delhi Development Authority

APPELLANT

Vs

Omvati Kalshan

RESPONDENT

Date of Decision : 11-08-2006

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 38(4)
Constitution of India, 1950 — Article 14, 21
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 44, 45, 46, 47

Citation : (2008) 116 FLR 10 : (2008) 2 LLJ 407

Hon'ble Judges : Mukul Mudgal, J;Dr. S. Muralidhar, J

Bench : Division Bench

Advocate : Arun Birbal, for the Appellant; Mahima, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This appeal challenges the judgment of the learned Single Judge dated 19th October, 2005 in Writ Petition (C) No. 879/2005. By the impugned judgment, the DDA was directed to treat Smt. Omvati Kalshan, the writ petitioner (and respondent herein) as eligible for promotion to the next higher grade, subject to her having put in the requisite eligibility period of service and on her being otherwise qualified. It was further directed by the learned Single Judge that the respondent was to be considered for promotion in accordance with the rules on the basis of her seniority in the grade of P.A., and the DDA was required to treat the period spent by her on the lower post as the receptionist, a post served by her on account of her disability, as the period served on the post of P.A. A consequent direction to pay conveyance allowance was also given.

2. The relevant facts have been succinctly set out by the learned Single Judge and are as under:

(a) While working for DDA in the cadre of Private Secretary, holding the post of

Welfare Officer in the grade of Rs. 650-1200 (pre-revised), the respondent started suffering from deteriorating eye-sight in the year 1985.

(b) On 29th July, 1985, the DDA insisted on her physical examination and sought production of her fitness certificate. On 21st November, 1985, Dr. Rajendra Prasad Centre of Ophthalmic Sciences certified that though the respondent was visually impaired, she could perform the duties of Welfare Officer but would find it difficult to adjust to desk work.

(c) As a result of this report, the DDA as per Section 38(4) of the CCS Pension Rules decided to utilise the services of the respondent in the lower post of Reception Officer in the scale of Rs. 550-900 (pre-revised).

(d) The post was accepted by the respondent under compulsion, otherwise it would have led to her premature retirement on medical ground. Though, the respondent initially resisted but later joined the lower post of Reception Officer in August, 1986.

(e) The respondent however, represented to the appellant DDA to treat the period spent as reception officer to be treated as period spent on the post of P.A. for the purposes of protection of seniority in the grade of P.A., and the Central Government by communication dated 22nd August, 1986 asked the DDA to consider granting the relief to the respondent. On 21st September, 1999, the DDA had written to the Deputy Chief Commissioner for Disability, Government of India that the respondent's case for higher pay scale was under active consideration and subsequently with effect from 1st January, 1996, the respondent was placed in the pay scale of Rs. 6500-10500, by order dated 12th October, 1999, specifying that the said pay scale was in respect of the post of Personal Assistant.

3. The writ petition before the learned Single Judge was occasioned by the order dated 9th July 2004, by which the DDA turned down the respondent's request for promotion to the next higher cadre and denied the protection of seniority sought by the respondent in the grade of Personal Assistant/Secretary. The petitioner, inter alia, relied on Article 14 of the Constitution and Section 47 of the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the "Act"). Section 47 of the said Act reads as follows:

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. The appellant DDA took the following stand in its counter affidavit filed before the learned Single Judge:

(a) The visual impairment of the respondent led to her being offered the lower post on humanitarian consideration and the alternative would have been to superannuate her on invalid pension.

(b) The respondent's seniority was maintained separately as a Reception Officer as distinct from the higher cadre of the Private Secretary. Thus she was found disentitled for promotion to the post of Deputy Director for which only those persons working as PA/PS were eligible.

(c) The conveyance allowance was not payable to the the respondent as it as payable only to blind persons or Orthopedically handicapped persons with 40% permanent disability of both upper and lower extremity deformities.

(d) Section 47 of the Disabilities Act cannot come to the aid of the respondent as the Act is of the year 1995 and the disability was prior to the coming into force of the Act.

(e) The respondent's visual impairment was 75% as per the report of Dr. Rajendra Prasad Centre of Ophthalmic Sciences.

5. The learned Single Judge recorded the following findings:

(a) Several judgments of this Court have held that the 1995 Act to be a piece of beneficial legislation and is required to be construed liberally.

(b) Even before the coming into force of the 1995 Act, the Hon'ble Supreme Court had in Narendra Kumar Chandla Vs. State of Haryana and others, spelt out the obligation of the employer to take measures for rehabilitation and re-deployment of such disabled persons.

(c) The only ground for down grading the respondent was her bad eye sight. Her services were utilized for the last 15 years, but only in the lower grade, and the higher grade was restored to her only upon several representations and that too only with effect from 1st January, 1996.

(d) The placing of the respondent in a separate ``seniority`` list was an illusory measure and it was not disclosed to the Court whether such separate list would lead to any promotional avenue or opportunity. Further, the counsel for the appellant herein was unable to place any material to indicate the post to which the respondent could be promoted.

(e) Section 47(2) of the Act was enacted for a specific purpose of preserving the right of disabled employees to promotion notwithstanding their disability. The proviso to Section 47(2) granted exemption to certain classes of establishments from the obligation cast on them by the said provision. The appellant herein was not in any of these exempted categories.

(f) Nothing was brought on record to show that the assignment of a suitable job involving higher responsibility was not within the competence of the respondent. Indeed, but for the disability suffered by the respondent she was in fact working as PA/Welfare Officer.

(g) The disability u/s 2(i) of the Act includes the blindness as well as low vision. Section 2(u) of the Act defines a person with low vision as one 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 assertive device.

(h) Since even the appellant had averred that the respondent suffered 75% disability, the denial of conveyance allowance in view of the impact of Sections 2(i) and 2(u) of the Act was unjustified.

6. One of the main contentions of the learned Counsel for the appellant is that the Act could not be given retrospective effect more particularly since the respondent was seeking restoration of the seniority in the cadre of PS as on 1.1.1986, on which date the Act was not in force. We are unable to accept this plea for more than one reason. It is factually incorrect to contend that the dispute in the present case pertains to a period prior to the coming into force of the Act. On 19.1.1986, by a memorandum issued to the respondent the DDA informed her that her plea for allowing lower scale under the CCS Pension Rules 38 (4) had been referred to the Government of India and that a clarification was still awaited from the Government. In a letter dated 21.9.1999 to the Deputy Chief Commissioner for Disability, Government of India, the DDA stated that ``the request of Smt. Omvati Kalshan to grant a higher pay scale is under active consideration and has been put up to the Vice Chairman, DDA''. On 12.12.1999 the DDA passed an order refixing the pay scale of the respondent from Rs. 5500-9000 to Rs. 6500-10500 with effect from 1.1.1996 against the cadre of Personal Assistant. Thus, when this order 12.12.1999 passed, the Act had already come into force and DDA was bound to give effect to the provisions of the Act. By postponing the taking of a decision on her representation by over twelve years, the DDA had kept the respondent in a state of uncertainty and when ultimately the time arrived for taking a decision, it chose to ignore the law that had already come into force on that date. The plea that Act will not apply to the case on hand cannot, in these circumstances, be countenanced at all.

7. The Act is undoubtedly a beneficial legislation which has been enacted with the avowed object of eliminating discrimination against persons with disabilities. It is not as if prior to the coming into force of the Act, it was perfectly valid for

persons with disabilities to discriminated against and that the obligation to eliminate such discrimination arose only after coming into force of that Act. An approach of this nature to the interpretation of a beneficial statute would defeat the very purpose of such a law. The Act only acknowledges the constitutionally unacceptable discrimination practiced against the disabled for many years and seeks to correct that discrimination by unambiguously casting a positive obligation on the State and authorities of State to eliminate such discrimination. In other words, there is no ``cut-off date'', as it were, for recognizing and eliminating discrimination. A constitutional obligation has been operationalised by the statutory instrument of the Act. A useful aid to interpretation is the Statement of Objects and Reasons which indicates, in the following clauses, the nature of state obligation in the context of the Act.

Statement of Objects and Reasons

The 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, held at Beijing on 1st to 5th December, 1992 adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific region. India is a signatory to the said proclamation and it is necessary to enact a suitable legislation to provide for the following:

- (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-a-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 equalisation of opportunities for persons with disabilities; and
- (vi) to make special provision of the integration of persons with disabilities into the social mainstream.

8. The obligation of conduct of the state has two facets. One is a negative obligation i.e., not to discriminate against the disabled only on account of their disability. The other is a positive one. The state is enjoined to act affirmatively to remove an existing discrimination. The various provisions of the Act indicate that the Act encompasses both facets of state obligation. It would defeat the objective of the Act if it were to be constricted in the ``prospective-retrospective'' limitation. As will be pointed out hereafter, the constitutional obligation of non-discrimination, now widely accepted as a universal characteristic of the basic human right to equality, nevertheless remained, de-

hors the Act, on the date that the petitioner made her representation first and continued even on the date when the DDA accepted her request, although only in part.

9. In Delhi Transport Corporation Vs. Rajbir Singh, a Division Bench of this Court considered the impact of Section 47 of the Act on a pending industrial disputes. One of the contentions raised there was that the Act would apply only if the disability had resulted from an accident that took place in the course of employment. This was expressly negated by the Court by referring to a judgment dated 29.8.2002 in Government of NCT v. Bharat Lal Meena in CWP 2461/2002 where it was held as under:

9. Section 47 of the said Act occurs in Chapter VII thereof which deals with non-discrimination. Section 44 deals with non-discrimination in transport whereas Section 45 deals with non-discrimination on the road. Section 46 deals with non-discrimination in the built environment.

10. History of the legislation as noticed hereinbefore clearly shows that the said Act was enacted in conformity with the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. It is not in dispute that the Act is beneficent in nature. It is also not in dispute that by reason of the said Act provisions have been made so that the persons with disability feel themselves as a part of the society which eventually may lead to his full participation at the work place. Nobody suffers from disability by choice. Disability comes as a result of an accident or disease.

11. The said Act was enacted by the Parliament to give some sort of succour to the disabled persons. By reason of Section 47 of the said Act which is beneficent in nature, the employer had been saddled with certain liabilities towards the disabled persons. Section 47 of the Act we may notice does not contemplate that despite disability, a person must be kept in the same post where he had been working. Once he is not bound suitable for the post he was holding, he can be shifted to some other post but his pay and other service benefits needs to be protected. The second proviso, appended to Section 47 of the Act in no uncertain terms, state 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. The said Act provides for social security for the disabled persons and it for the said purpose a statutory liability has been thrust upon the employer, the same cannot be held to be arbitrary.

10. Further in the DTC case (supra), it was noticed that the dictum of the learned Single Judge in Baljeet Singh Vs. Delhi Transport Corporation, had been followed in Jaipal Singh v. DTC to hold that the Act would apply notwithstanding any regulation to the contrary. It was held in para 30 of the DTC case (supra) as under:

30. Baljit Singh (supra), was followed by one of us in Jaipal Singh v. DTC decided on 10.2.2000. Even in a case where in terms of regulation the appellant is

permitted to compulsorily retire its employees it was required to pay 50% of the wages but now in place thereof by reason of the said Act entire basic pay is protected subject to the condition that the disabled person shall perform a job which is suitable to him. Such a provision has been made having regard to the fact that a person could not be discriminated against only because he had suffered disability while in service. Furthermore, the said Act contains a non-obstinate clause. It has, thus, an overriding effect over the other statutes.

11. A specific argument was raised in DTC case (supra) by learned Counsel for the DTC in the following words as found in para 6 of the judgment:

6. Mr. Vibhu Shanker would further submit that the Act having come into force on 7.2.1996 and the disability of the concerned employee having been taken place in 1995, Section 47 must be held to have no application in the instant case. In support of the said contention reliance has been placed on *Nelson Motis v. Union of India* AIR 1999 SC 1981 , and *Anand Bihari and others Vs. Rajasthan State Road Transport Corporation, Jaipur* and another, .

12. The above contention of the DTC to the effect that the Section 47 of the Act cannot have retrospective effect was expressly negated by the Court in the following passages:

31. So far as submission of Mr. Vibhu Shanker to the effect that the said Act could not be given retrospective effect is concerned, the same is stated to be rejected. The services of the respondent had not been terminated prior to coming into force of the said Act and thus, the question of the said Act becoming enforceable retrospectively does not and cannot arise.

32. Whether a substantive right can be taken away by giving retrospective effect to a statute is not in question in these matters. Accident might have occurred in 1995, and the Act might have come into force on 7.2.1996 but the submission of the Mr. Vibhu Shanker that the date of acquisition of disability must be considered to be the cut off date for the purpose of Section 47 of the Act cannot be accepted. After coming into force of the said Act only the order impugned was passed. If prior to coming into force of the said Act, services had been terminated the matter would have been different but as the services were not terminated till the Act came into force the same must be held to be bad in law.

33. Once the Act came into force having regard to the phraseology used in Section 47 the appellant herein became debarred from terminating the services of the respondent.

37. There cannot be any doubt that the said Act provides for special provisions. Doctrine of *generalia specialibus non derogant*, thus would apply in the instant case. Service conditions laid down under the Regulations made under the Delhi Transport Corporation Act will be subject to the provisions of the said Act having regard to the aforesaid maxim. Section 47 is couched in negative language and the same, necessarily, must be construed as mandatory in nature. So construed

the appellant was bound to give effect to these irrespective of any consequences.

13. In view of the authoritative pronouncement of the Division Bench of this Court, as noticed hereinabove, is not longer open for the appellant herein to contend that the Act can not have any retrospective operation.

14. Before parting with this aspect of the matter, we may notice the recent judgment of the Hon'ble Supreme Court in Kunal Singh Vs. Union of India (UOI) and Another, where again the applicability and the mandatory nature of the Section 47 of the Act adverted to. The fact of this case is that the employee was declared permanently incapacitated vide order dated 20.11.1998 passed by the Commandant, Group Centre, SSB Shamshi (Kullu) and discontinued from service. The plea of the employee was that he could have been assigned an alternative duty. Although the writ petition was dismissed by the High Court without relying upon the Act, in appeal before the Hon'ble Supreme Court Section 47 of the Act was pressed into service. Accepting the plea of the employee, the Hon'ble Supreme Court set aside the order of termination and observed in para 8 and 9 as under:

8. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. To realize the objective that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view a meeting called the ``Meet to Launch the Asian and Pacific Decades of Disabled Persons'' was held in Beijing in the first week of December 1992 by the Asian and Pacific countries to ensure ``full participation and equality of people with disabilities in the Asian and Pacific regions''. This meeting was held by the Economic and Social Commission for Asia and Pacific. A proclamation was adopted in the said meeting. India was a signatory to the said proclamation and agreed to give effect to the same. Pursuant thereto this Act was enacted, which came into force on 1.1.1996. The Act provides some sort of succour to the disabled persons.

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 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 not possible to adjust the employee against any post he will be kept on a 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 serve its purpose must be preferred to the one which obstructs the object and paralyzes 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.

15. The above ruling of the Hon"ble Supreme Court is a complete answer as regards the liberal and purposive construction to be placed on the Act which is a beneficial legislation.

16. Even de-hors the Act, it was not open for the appellant (DTC) to discriminate against the respondent on account of her disability. The Hon"ble Supreme Court in Narender Kumar Chandla's case (supra) has clearly held that the last drawn salary of the disabled has to be protected. The Hon"ble Supreme Court held as follows:

7. Article 21 protects the right to livelihood as an integral facet of right of life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the post he was holding, the employer must make every endeavor to adjust him in a post in which the employee would be suitable to discharge the duties as a Carrier Attendant is unjust

...Necessarily, Therefore, his last drawn pay has to be protected. Since he has been rehabilitated in the post of L.D.C. we direct the respondent to appoint him to the post of L.D.C. protecting his scale of pay of Rs. 1400-2300 and direct to pay all the arrears of salary.

17. The Hon"ble Supreme Court, in the above decision, by relying on Article 21 had clearly held that a person who acquires a disability while in service cannot be placed on a lower scale.

18. Therefore, even on the basis of the above position of law laid down in Narender Kumar Chandla's case (supra) we find that there is no merit in the plea of the appellant.

19. As regards the denial of conveyance allowance, the plea of the appellant herein is based on a certain circular according to which the said allowance is admissible to the following persons:

I. to a blind person;

II. to an Orthopedically handicapped person with minimum of 40% permanent disability of both upper and lower extremity deformities.

21. It is contended that unless the appellant satisfies the above requirement, she cannot be granted conveyance allowance. As noticed hereinbefore, the learned Single Judge examined the definition of the term ``disabled'' u/s 2(i) of the Act which includes blindness as well as low vision. Further Section 2(u) defines the person with "low vision" as a person with impairment of visual functioning. The circular sought to be relied upon by the appellant will have to give way to the definition contained in the Act and will have to be subject to the provisions of the Act. A circular which restricts the grant of conveyance allowance on an understanding of "blindness" which is inconsistent with the provisions of the Act, cannot be sustained. Since "disability" under the Act means blindness as well as low vision and Section 2 (u) specifically defines a person with low vision, the respondent satisfies the description of such a disabled person and cannot be denied conveyance allowance on a restricted understanding of disability as is sought to be brought about by the circular relied upon by the appellant. We, accordingly, agree with the learned Single Judge that denial of conveyance allowance to the respondent herein was unsustainable in law.

22. For all the above reasons, we find no merit in this appeal and is hereby dismissed with costs which are quantified at Rs. 5,000/-. The cost will be paid to the respondent within a period of three weeks from today.

23. This appeal stands dismissed accordingly.