
(2006) 05 P&H CK 0027
In the Punjab And Haryana At Chandigarh

Gurbachan Singh

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 08-05-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 3, 47

Citation : (2007) 1 SLJ 523 : (2007) 3 UPLBEC 78

Hon'ble Judges : M.M.S. Bedi, J;M.M. Kumar, J

Bench : Division Bench

Judgement

M.M. Kumar, J.—This petition filed under Article 226 of the Constitution prays for quashing order dated 15.9.2005 (P-5) passed by General Manager, Haryana Roadways, Kurukshetra. By the aforementioned order, the petitioner has been retired for service w.e.f. 15.9.2005 from the post of driver on the ground that the Special Medical Board, Pt. B.D. Sharma PGIMS, Rohtak, vide Memo No. PGI/MS/C.II/MB/02/03, dated 6.1.2003 (P-1) declared that the petitioner is unfit for further service as Driver and that he is completely and permanently incapacitated for further service in the Department of Haryana Roadways on account of Post Traumatic Stress Disorder (PTSD).

2. Brief facts of the case are that the petitioner had joined as driver with the Haryana Roadways, Kurukshetra Depot, in October, 1987 on ad hoc basis through Employment Exchange. His services were regularised in June, 1988 on the post of Driver. It is claimed that the petitioner performed his duties to the entire satisfaction of his superiors and in the year 1996 he was assigned the duties of Diesel Pump Clerk and since then he was performing his duties as such. The petitioner was referred to Pt. B.D. Sharma Postgraduate Institute of Medical Sciences, Rohtak, for medical check, where he was examined by the Medical Board on 8.12.2002. The Special Medical Board, vide Medical Certificate bearing Memo No. PGI/ MS/C.II/MB/02/03 (P-I), declared that the petitioner is unfit for further service as Driver and that he is completely and permanently

incapacitated for further service in the Department of Haryana Roadways on account of "PTSD". On the basis of the aforementioned Medical Certificate, respondent No. 3 issued him a show cause notice on 21.1.2003 seeking option of the petitioner whether he wanted to be appointed on the post of Peon. The aforementioned show cause notice was challenged by the petitioner by filing a Civil Suit bearing No. 15/ 2003 in the Court of Civil Judge (Senior Division), Kurukshetra. The Civil Judge vide order dated 29.1.2003 ordered for maintaining of status quo with regard to the service of the petitioner. On 18.7.2005, the petitioner made a statement before the Civil Court that he does not want to proceed with the suit as he was assured by the Department that a legal order on the show cause notice should be passed (P-2). Thereafter, another show cause notice dated 4.8.2005 (P-3) was issued, which was similar to the earlier show cause notice. Reply of the second show cause notice was filed by the petitioner on 5.8.2005 (P-4) requesting therein that show cause notice be filed and he may be allowed to continue on the post of Driver. However, respondent No. 3 passed an order dated 15.9.2005 (P-5) retiring the petitioner from service w.e.f. 15.9.2005, from the post of driver, on the ground that the Special Medical Board, Pt. B.D. Sharma, PGIMS, Rohtak, has declared that the petitioner is unfit for further service as Driver and that he is completely and permanently incapacitated for further service in the Department of Haryana Roadways. It has further been mentioned that the petitioner was offered an alternative job i.e., Class IV post of Peon, vide letter No. 627/ ECD, dated 21.1.2003 and letter No. 5072/ECD, dated 4.8.2005 but he refused to accept the above mentioned offer. Consequently, the petitioner has been retired from service under Rule 5.18 of Civil Services Rules, Volume I, Part II in the public interest. In addition to the other retiral benefits admissible under the Rules, an amount of Rs. 33, 181/- has also been paid as additional compensation, vide draft No. 678192, dated 15.9.2005, keeping in view the instructions issued by the Transport Commissioner, vide Memo No. 4392/4410, dated 20.8.1992 which is subject-matter of challenge in this petition.

3. It is appropriate to mention that the pay scale of the post of Driver is Rs. 4000-6000 and the petitioner was enjoying the ACP scale of Rs. 5000-7850/- plus usual allowances at the time of passing the impugned order dated 15.9.2005.

4. In the written statement, the respondents have admitted the factual position mentioned in the writ petition. However, the stand taken by the respondents is that the impugned order dated 15.9.2005 (P-5) is legal and sustainable, inasmuch as, the same has been passed on the basis of the report of the Special Medical Board and the petitioner has been retired from service in public interest because the Medical Board has declared the petitioner unfit for the post of driver and, thus, he cannot be allowed to drive the passenger buses and to take risk with the lives of a large number of passengers. Further assertion of the respondents is that similar controversy is pending before the Hon'ble Supreme Court in SLP (C) No. 19880 of 2003, titled as State of Haryana and Ors. v. Babu

Ram and Ors. arising out of the order dated 16.9.2003, passed by this Court in L.P.A. No. 104 of 2003 in C.W.P. No. 14107 of 1992 (R-5). It has further been averred that the Hon'ble Supreme Court has been pleased to grant ad-interim stay in the aforementioned case, therefore, the instant petition deserves to be dismissed on this score. The respondents have asserted that the impugned order dated 15.9.2005 (P-5) has been passed keeping in view the instructions dated 20.8.1992 (R-I) wherein procedure to remove the drivers on account of their being medically unfit to continue in service has been prescribed. In so far so withdrawal of civil suit by the petitioner is concerned, it is denied that any assurance was given to him as alleged by the petitioner. It is, however, admitted that the petitioner was given light duty of Diesel Pump Clerk in the lower scale post but he had been paid the usual pay scale of driver, which is higher than the duties performed by the petitioner. It has also been admitted that the posts of Diesel Pump Clerk are lying vacant at Kurukshetra as well and Pehowa.

5. Mr. J.P. Dhull, learned Counsel for the petitioner has argued that in face of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for brevity, "the Act") the petitioner cannot be retired from the post of driver. According to the learned Counsel, such a course is not available to the respondents in view of the expressed provisions of Section 47 of the Act prohibiting any establishment from dispensing with or reducing in rank an employee who has acquired such a disability. If he is to be posted against another post then his pay scale cannot be reduced nor could any promotion be denied to such a person.

6. Mr. Harish Rathee, learned State Counsel, while justifying the impugned order dated 15.9.2005 (P-5) has argued that the respondents have acted within the four corners of law. He has argued that according to the provisions of the Act, the respondent-State is entitled to exempt any category or class of people from the operation of the Act, which has been done by issuing notification dated 27.6.2005, which is taken on record as Mark "A". He has maintained that this notification would govern all the pending cases and there is no retrospectivity if the same is applied to the case of the petitioner. However, copy of the said notification has not been placed on record.

7. Having heard learned Counsel for the parties, it would be necessary to reproduce the extract of the provisions of Sections 2 and 47 of the Act, which read as under:

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

xxx xxx xxx

xxx xxx xxx

(i) "disability" means-

(i) blindness;

- (ii) low vision;
- (iii) leprosy-cured;
- (iv) hearing impairment;
- (v) locomotor disability;
- (vi) mental retardation;
- (vii) mental illness;

xxx xxx xxx

xxx xxx xxx

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

(u) "person with low vision" means a person 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 assistive device;

(Emphasis added)

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 in 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.

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 provisions 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 in 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 of the Act goes to the extent of prohibiting denial of any promotion to any such person on the ground of his disability. Proviso to Sub-section (2) empowers the appropriate Government to exempt any establishment from the provisions of Section 47 of the Act by keeping in view type of work carried in that establishment.

8. The aforementioned provision came up for determination of the Hon''ble 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 the Act, giving 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 persons with disabilities and enabling them to enjoy equal opportunity. As a consequence of the aforementioned proclamation, the Act came into being. The interpretation given by the Hon''ble Supreme Court to Section 47 of the Act emerges from reading of Para 9 of the judgment, which is extracted as under:

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 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 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 socially 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 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.

The aforementioned observations of their Lordships do not leave any manner of doubt that an employee who has suffered disability during service cannot be deprived of the benefits, which would otherwise accrue to him, merely on account of disability. When the facts of the present case are examined in the light of the observations made by the Hon'ble Supreme Court in the case of Kunal Singh (supra), and the provisions of Section 47, it becomes evident that the order dated 15.9.2005 (P-5) cannot be sustained in the eyes of law and has to be held violative of Section 47 of the Act. A perusal of definition of expression "disability" as given in Section 2(i) of the Act, would show that Sub-clause (vi) deals with "mental retardation" and Sub-clause (vii) deals with "mental illness". In the impugned order dated 15.9.2005 (P-5) the petitioner has been declared medically unfit to serve the department as driver. The aforementioned opinion has been formed on the basis of medical certificate dated 6.1.2003 (P-1) issued by the Special Medical Board of PGIMS, Rohtak, after examining the petitioner. The opinion of the Medical Board, as expressed in the report dated 6.1.2003 (P-1), reads as under:

Certified that the Special medical board has carefully examined to Gurbachan Singh S/o Maghar Singh whose signature/thumb impression is appended below on dated 18.12.2002.

Special Medical Board considers Sh. Gurbachan Singh completely and permanently incapacitated for further service in the Deptt. of Haryana Roadways on account of PTSD.

His incapacity does not appear to us to have been caused by irregular or intemperate habits, Special Medical Board is of the opinion that Gurbachan Singh is UNFIT for further service as Driver in the Deptt. of Haryana Roadways. However, may continue alternative work which does not involve driving.

The Medical Board had repeatedly used the expression that the petitioner is completely and permanently incapacitated for serving the department as driver and he is unfit. The reason in support of unfitness given is "PTSD". The expression "PTSD" stands for "Post Traumatic Stress Disorder", which is a mental disorder. To illustrate, such a condition some time results from sudden shock and the patient keeps on experiencing the similar condition by imagination. Therefore, the disability of the petitioner is safely covered by "mental retardation"/ "mental illness".

9. The prohibition against retirement of an employee who acquired disability while in harness has been completely ignored by respondent No. 3 while passing

the impugned order on 15.9.2005. Firstly, the petitioner cannot be retired, 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. In the present case, it is conceded by the respondents that the posts of Diesel Pump Clerk are lying vacant at Kurukshetra as well as Pehowa. It is also an undisputed fact that the petitioner was, prior to passing of the order dated 15.9.2005 (P-5) was given the light duty of Diesel Pump Clerk in the lower scale post but he had been paid the usual pay scale of driver, which is higher than the duties performed by the petitioner as Diesel Pump Clerk. The above mentioned position is discernible from Sub-para (ii) of Para 10 of the written statement, which reads as under:

(ii) That in reply to the contents of Sub-para (ii) it is submitted that the petitioner was given light duty in the pay scale of driver. Although the petitioner was given the light duty of Diesel Pump Clerk in the lower scale post but he had been paid the usual pay scale of driver which is higher than the duties performed by the petitioner. However, it is submitted that the petitioner has got no right to continue as Diesel Pump Clerk. However, it is admitted that posts of Diesel Pump Clerk are lying vacant at Kurukshetra as well as Pehowa.

10. There is another aspect of the matter. The impugned order dated 15.9.2005 (P-5) has been passed by the General Manager, Haryana Roadways, Kurukshetra, by invoking Rule 5.18 of the Punjab Civil Services Rules, 1953, Part-II (as applicable to Haryana) (for brevity, "the Rules"), retiring the petitioner prematurely from service. The aforementioned order reads as under:

Special Medical Board, Pt. B.D. Sharma PGIMS Rohtak vide Memo No. PGI/ MS/ C.II/MB/02/03 dated 6.1.2003 declared that Sh. Gurbachan Singh Driver No. 32 S/o Sh. Maghar Singh is unfit for further service as Driver. In pursuance of instructions issued by the Transport Commissioner, Haryana, Chandigarh vide Memo No. 4392/4410 dated 20.8.1992 laid down policy to deal with these cases of such drivers who have been declared medically unfit to drive vehicles. Sh. Gurbachan Singh, Driver No. 32 is hereby retired from Govt. service w.e.f. 15.9.2005 AN under Rule 5.18 of CSR Vol. I Part II in the public interest.

The opportunity for suitable alternative job was also offered vide letter No. 627/ECD dated 21.1.2003 and letter No. 5072/ECD dated 4.8.2005 but the same has not been accepted by the driver Sh. Gurbachan Singh Driver No. 32. A draft bearing No. 678192 dated 15.9.2005 amounting to Rs. 33, 181/- (Rs. Thirty-three thousand one hundred eighty-one) is enclosed herewith as additional compensation as worked out keeping in view the aforesaid instructions issued by the Transport Commissioner, Haryana, Chandigarh has become payable to Sh. Gurbachan Singh Driver No. 32. This is in addition to other retiring benefits admissible under the rules.

Sd/- General Manager Haryana Roadways, Kurukshetra.

11. It is appropriate to mention that Chapter V, concerning Rule 5 along with sub-

rules of the Rules, in fact, deals with different kind of pensions and conditions for their grant. Section 3 of Chapter V further deals with a branch of pension, namely, "invalid pension", which is in two parts:

(A) Conditions of Grant (Rule 5.11 to Rule 5.17); &

(B) Procedure (Rule 5.18).

The nature and contents of Rule 5.18 of the Rules does not show that it could be invoked for the purposes of retiring a Government servant prematurely merely because he has become medically unfit. Rule 5.18 in turn deals with grant of pension in cases where an employee produced a medical certificate showing that he was unfit to perform the duties of the post held by him. Rule 5.18 of the Rules is reproduced hereunder for facility of reference:

5.18. A Government employee, who has submitted a medical certificate of incapacity for further service shall, if he is on duty, be invalided from service, from the date of relief of his duties which should be arranged without delay on receipt of the medical certificate or, if he is granted leave under Rule 8.18 of Punjab Civil Services Rules, Volume I, Part I, on the expiry of such leave. If he is on leave at the time of submission of the medical certificate, he shall be invalided from service on the expiry of that leave or extension of leave, if any, granted to him under Rule 8.18 of Punjab Civil Services Rules, Volume I, Part I.

Note 1.-The report required by this rule may in the case of head constables and constables of Police be submitted to the Inspector-General of Police instead of to the Government.

Note 2.-When a Government employee is retained in service, after he has submitted a medical certificate of invalidment, and, is, therefore, granted leave under Rule 8.18(c) of Volume I of these Rules, the maximum period up to which, he can be allowed under second sub-paragraph of this rule to count for pension, the service after the date of medical certificate shall not exceed six months.

A perusal of the above Rule shows that the nature and contents of the rule does not contemplate premature retirement of an employee on the ground of medical unfitness. Therefore, on that ground also, the order passed by the respondent authority would not stand the scrutiny of law.

Therefore, the order dated 15.9.2005 (P-5) suffers from a serious legal infirmity and is, thus, liable to be quashed.

12. The argument of the learned State Counsel that the benefit of Section 47 of the Act cannot be extended to the petitioner on account of exclusion of driver from the operation of the Act as per the notification dated 27.6.2005 would not require any detailed consideration for more than one reason. Firstly no subordinate legislation could be considered retrospective in nature unless it is expressly provided in such a legislative instrument. There is no provision made in the notification dated 27.6.2005 for implementation of the same w.e.f. a

retrospective date. Therefore, such a notification would not apply to the case of the petitioner. Secondly, the above mentioned notification dated 27.6.2005 has been placed on record by the respondents only at the time of arguments, although no such objection has been raised in the written statement, which was admittedly filed on 6.1.2006. In the absence of any pleadings in the written statement, the respondents cannot take shelter of the notification dated 27.6.2005. Moreover, the petitioner was examined by the Medical Board on 6.1.2003 and he was declared unfit to serve as driver on account of his mental retardation/ mental illness described as Post Traumatic Stress Disorder (PTSD). This shows that on the date when he was found unfit, the notification dated 27.6.2005 was not in operation. Therefore, the argument for applying the aforementioned notification has to be rejected.

13. The other argument that the rights of the petitioner have to be considered strictly in accordance with the considerations/directions issued by a Division Bench of this Court in C.W.P. No. 5382 of 2003, decided on 20.5.2004, has to be rejected because the instructions dated 20.8.1992 to which reference has been made does not exclude Section 47 of the Act. It is apparent that the aforementioned instructions could not have excluded the operation of Section 47 of the Disability Act, 1955 as instructions were issued in 1992, therefore, the submission made by the learned State Counsel is rejected.

For the reasons stated above, the order dated 15.9.2005 (P-5) passed by respondent No. 3 is set aside. As a result, the petitioner is ordered to be reinstated in service on the post of driver or on the post of Diesel Pump Clerk at the same stage of the pay scale of Rs. 4000-6000 (ACP Scale of Rs. 5000-7850) which he was drawing prior to passing of the order dated 15.9.2005 along with allowances given from time to time along with consequential benefits with regard to seniority, promotion, payment of arrears of salary etc. The petitioner shall report for duty on the post of driver within six weeks today. He shall also be entitled to costs which are qualified at Rs. 5,000/-