

(2021) 02 P&H CK 0427

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 28831 Of 2017 (O&M)

Kulbir Jakhar

APPELLANT

Vs

State Of Haryana And Others

RESPONDENT

Date of Decision : 16-02-2021

Acts Referred:

Rights Of Persons With Disabilities (Equal Opportunity, Protection Of Rights And Full Participation) Act, 1995 — Section 2(i), 20, 47, 58(a)(2)
Rights Of Persons with Disabilities Act, 2016 — Section 3, 34, 38
Constitution Of India, 1950 — Article 226

Citation : (2021) 02 P&H CK 0427

Hon'ble Judges : Amol Rattan Singh, J

Bench : Single Bench

Advocate : H.C. Arora, Shruti Jain

Final Decision : Allowed

Judgement

Amol Rattan Singh, J. (Oral)

Case heard by video conferencing.

By this petition filed under the provisions of Article 226 of the Constitution of India, the petitioner seeks issuance of a writ in the nature of certiorari,

quashing the letter dated 14.06.2016 (Annexure P-2) and order dated 15.09.2017 (Annexure P-5), issued by respondent no.2, sanctioning only extra

ordinary leave, while declining the request of the petitioner for payment of salary to him, for the period that he could not attend his duties, on account

of permanent physical impairment of 75%; with a further prayer made for issuance of a writ in the nature of mandamus, directing the respondents to

grant the petitioner salary and allowances for the entire period from 08.05.2015 to 20.06.2017, in terms of Section 47 of the Rights of Persons with

Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995, as continued under The Rights of Persons with Disabilities Act, 2016.

Notice of motion having been issued in this petition in the year 2017 itself, with various orders passed which are not necessary to be gone into in detail

at this stage. However, the order passed on 15.12.2015 is being reproduced as follows:-

All cases listed today have been taken up for hearing by way of video conferencing because of the situation existing due to the COVID-19 pandemic.

Before going onto the contentions raised by the State, it is first necessary to take on record the opinion given by the Board of Doctors of the Post

Graduate Institute of Medical Sciences, Rohtak, dated 25.06.2020, as was annexed with CM No. 6161-CWP-2020 filed by the petitioner, seeking an

early hearing in the petition, which application was allowed on 14.07.2020.

However, the aforesaid medical opinion dated 25.06.2020 was not ordered to be taken on record and therefore, since obviously the adjudication of the

case would depend very largely on the medical opinion given by the Board, the said medical opinion is ordered to be taken on record as Annexure P-6

with the accompanying petition.

The said opinion reads as follows:-

Sh. Kulbir Singh Jakhar has been examined by the Special Medical Board on 25.06.2020. He has been diagnosed as a case of Hypertrophic

Cardiomyopathy (HCM) disease of heart and suffering from same since 2001. He is severely symptomatic & presently in NYHA Class III. He has

undergone Automated Implantable Cardioverter Defibrillator (AICD) implantation for HCM induced life threatening arrhythmias in October 2014. His

investigations of ECG, Echocardiography & Cine-recording of AICD has been done. He is physically severely disabled by HCM disease and he is

suffering from physical disability of 75% due to HCM disease. Opinion regarding physical disability:

He is suffering from physical disability of 75% due to HCM disease.

Today, learned State counsel has submitted that the petitioner, in view of the aforesaid opinion of the Board, is actually not covered by the list of

illnesses enumerated in in the Schedule to the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act 1995, nor even in the subsequent Act of 2016.

Clauses (r), (s) and (t) of Section 2 of the Act of 2016 read as follows:-

(r) "person with benchmark disability" means a person with not less than forty per cent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;

(s) "person with disability" means a person with long terms physical, mental, intellectual or sensory impairment which, in inter-action with barriers, hinders his full and effective participation in social equally with others;

(t) "person with disability having high support needs" means a person with benchmark disability certified under clause (a) of sub-section (2) of Section 58 who needs high support."

She then points to Section 20 of the said Act, which reads as follows:-

"Non-discrimination in employment. (1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:

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, exempt any establishment from the provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

(3) No promotion shall be denied to a person merely on the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall 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.

(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.â??

She next points to the written statement filed in reply to the petition, by the Special Secretary to the Government of Haryana, Public Works (Building

and Rules) (sic) specifically to paragraph 4 therein, wherein it is shown that in Section 2 (i) of the Act of 1995, â??Disabilityâ? has been defined as

follows:-

(i) Blindness; (ii) Low vision; (iii) Leprosy-cured;

(iv) Hearing impairment;

(v) Loco motor disability;

(vi) Mental retardation and

(vii) Mental illness

She therefore submits from the said reply that since the petitioner is suffering from Cardiomyopathy (HCM) disease of heart, his illness is not covered

in the said definition.

Upon query to her as to what would be understood by the term â??Loco motor disabilityâ?, she reiterates that though otherwise Loco-motor disability

would be the impairment of the functioning of the limbs, however, since that has not been specifically stated in the opinion of the Medical Board, a

heart disease itself would not be 'covered in the said Act' and therefore no supernumerary post is required to be created for the petitioner and

consequently, he has been posted to Headquarters, where possibly the workload would be much lesser, but where he has not joined so far and hence,

the Government is unable to pay him the salary for the period that he has not joined his duty.

Upon query to Mr. Arora, learned counsel for the petitioner as to why the petitioner cannot work in the Headquarters itself, in view of what is

contained in Section 20 of the Act of 2016, he submits that the petitioner is unable to perform even his basic bodily function on his own and therefore

the question of him going to office, whether in Rohtak or at the Headquarters in Chandigarh/Panchkula, does not arise.

Though I find the attitude of the State rather surprising in the aforesaid circumstances, however, since the opinion given by the learned Board of

Doctors is simply to the extent that the petitioner is suffering from physical disability of 75% due to HCM disease, the Board of Doctors is

requested to give a firm opinion on:-

(i) Whether the petitioner is suffering from a loco-motor disability due to his present medical condition;

(ii) Whether, on account of such disability, he is able to attend office or not;

(iii) Whether or not he is completely bed-ridden; and

(iv) Whether he can be considered to be a person with disability having high support needs.

Adjourned to 21.01.2021.

Naturally, since the PGIMS, Rohtak, is an instrumentality of the State, the State counsel would inform the learned Director, PGIMS, Rohtak, to obtain

the opinion of the Board of Doctors constituted.

To be shown in the urgent motion list.

Thereafter, on 21.01.2021, the following order had been passed:-

Case heard by video conferencing.

Pursuant to the order dated December 15, 2020, an opinion of the learned Board of Doctors constituted in PGIMS, Rohtak, dated 07.01.2021, is on

record, stating to the effect that the petitioner, Kulbir Singh Jakhar, is suffering from 'Hypertrophic Cardiomyopathy (HCM)' heart disease and is

physically disabled and that he is also suffering from a locomotor disability, and on account of his permanent, physical impairment which constitutes

75%- 100% disability, he is not able to attend office because he is severely symptomatic.

It is further written that though he is not completely bed ridden, he becomes symptomatic even on the slightest of physical activity.

Lastly, it is stated that he is a person with a disability having high support needs.

In the light of the aforesaid report, learned State counsel would also take instructions as to why then the Government is not creating a supernumary

post for the petitioner who obviously is unable to work at all, in terms of the provisions of the Right of Persons with Disabilities (Equal Opportunity,

Protection of Rights and Full Participation) Act, 1995.

Adjourned to 10.02.2021.

An affidavit of the Additional Chief Secretary/Principal Secretary to Government of Haryana, Department of Public Works (B&R), be also filed at

least 3 days before the next date of hearing, giving therein an answer to the aforesaid query of this court.

To be shown in the urgent motion list.â??

Pursuant to the above order dated 21.01.2021, an affidavit of Sh. Alok Nigam, Addl. Chief Secretary to the Government of Haryana, Department of

Public Works (B&R), dated 09.02.2021, has been filed, stating therein that a supernumary post of Executive Engineer (Civil) has been created for the

petitioner since 21.04.2015, which would continue to exist till either his retirement from service (obviously as per his normal date of superannuation in

terms of the Haryana Civil Service Rules, 2016) or till his joining duty after his medical fitness, whichever is earlier.

The response of the learned Addl. Chief Secretary is to be highly appreciated even though it has come at a rather late stage.

Mr. Arora however submits that the post having rightly been created since 21.04.2015, i.e. the date from which the petitioner had to remain absent on

account of his illness, a direction may be issued to release his salary to him from that period, till date; and thereafter obviously with that salary to be

continued to be paid.

In view of the fact that the petitioner, admittedly, as per the learned Board of Doctors, is absolutely unable to perform any work at all, therefore in

terms of Section 47 of the Rights of Persons with Disabilities (Equal Opportunity, Protection of Rights and Full Participation) Act, 1995 and Sections 3

and 34 (and 38) of The Rights of Persons with Disabilities Act, 2016, he would, in the opinion of this court, be entitled to salary for the entire period, he

also being a person with high support needs.

The â??immediate relevantâ?? provisions are reproduced herein below:-

Section 47 in The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995

â??47. Non-discrimination in Government employments.â??

(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.â??

Section 3 in the Rights of Person with Disabilities Act, 2016

â??3. Equality and non-discrimination.â??

(1) The appropriate Government shall ensure that the persons with disabilities enjoy the right to equality, life with dignity and respect for his or her

integrity equally with others.

(2) The appropriate Government shall take steps to utilise the capacity of persons with disabilities by providing appropriate environment.

(3) No person with disability shall be discriminated on the ground of disability, unless it is shown that the impugned act or omission is a proportionate

means of achieving a legitimate aim.

(4) No person shall be deprived of his or her personal liberty only on the ground of disability.

(5) The appropriate Government shall take necessary steps to ensure reasonable accommodation for persons with disabilities.â??

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â??34. Reservation.â??

(1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in

the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent. each shall be reserved for

persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark disabilities under clauses (d) and (e),

namely:â??

(a) blindness and low vision;

(b) deaf and hard of hearing;

(c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;

(d) autism, intellectual disability, specific learning disability and mental illness;

(e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities: Provided that

the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may,

having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be

specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to non-availability of a suitable person with benchmark disability or for any

other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also

suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no

person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with

disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be

interchanged among the five categories with the prior approval of the appropriate Government.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark

disability, as it thinks fit.â??

Thus, with the petitioner having been unfortunately disabled since about April, 2015, first Section 47 of the Act of 1995 would have become applicable

to him and thereafter with the Act of 2016 having come into effect from 27.12.2016, the provisions of that Act would be applicable, with obviously, in

the opinion of this court at least, the rights that had already accrued to him under the old Act, not to be taken away from him.

Be that as it may, with Section 34 of the Act of 2016 directing even reservation of posts for persons with a benchmark disability, including locomotor

disability, whether such locomotor disability was caused due to a heart disease or any other disease, would be irrelevant.

In any case, with the Government itself having graciously (even though late), granted him the relief that the petitioner has sought, no further comment

is required to be made by this court, in the present petition.

Consequently, the petitioners' arrears of salary be released to him, with interest @ 6% per annum, running from the date that each month's

salary became due, till the date of payment thereof.

The needful be done within a period of two months from today, with his monthly salary to obviously be paid on time from now onwards.

Naturally, as submitted by Ms. Shruti Jain, DAG, Haryana, if any such unfortunate case comes up in the future before the Government, it would need

to be seen on its own facts and circumstances as regards the extent of disability and any exclusion of any particular disability from the provisions of

the aforesaid Acts, of course also ensuring compliance of the scheme of the Act, as contained in its individual (and collective) provisions.

The petition stands allowed in the above terms.