
(2018) 04 OHC CK 0038
In the Orissa High Court
Case No : O.J.C. No.681 of 2002

Kulwant Singh

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 09-04-2018

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(o), 2(t), 47, 47(1), 72
Central Civil Services (Pension) Rules, 1972 — Rule 38
Constitution of India, 1950 — Article 226, 227

Citation : (2018) 04 OHC CK 0038

Hon'ble Judges : SUJIT NARAYAN PRASAD

Bench : Single Bench

Advocate : D.K. Samantaray, H.K. Panigrahi, U.K. Samal, A.K. Bose

Final Decision : Allowed

Judgement

S. N. Prasad, J.

1. This writ petition is under Article 226 and 227 of the Constitution of India for quashing the order dated 10.01.2002 passed by the Commandant,

CISF Unit, Nalco, Angul, whereby and where under the petitioner has been medically boarded out due to suffering from Amputation from right Upper Arm.

2. Case of the petitioner in brief is that he while working as Constable in CISF under CISF Unit, Angul, he met with an accident on 11.09.2001 while travelling to his village and while trying to be boarded in the Train fell down, as a result, the Train ran over on his right hand above elbow which was completely detached from the body. The petitioner was shifted to S.C.B. Medical College and Hospital, Cuttack and discharged on 8.10.2001. The

petitioner thereafter has permanently declared incapacitated for further service as Constable in C.I.S.F., in terms of the procedure laid down in C.C.S.

(Medical Examination) Rules, 1957 incorporated in Appendix-9 to C.C.S. (Pension) Rules, 1972 and Rule 38 of C.C.S. (Pension) Rules, 1972. Case of

the petitioner as has been pleaded in the affidavits is that while passing the order dated 10.01.2002, the provision of Section 47 of the Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short Act, 1995) has not been taken into consideration, as

such the order dated 10.01.2002 is directly in the teeth of the statutory provision as stipulated under Section 47 of the said Act.

3. Learned counsel for the petitioner submits that CISF has been taken out from the purview of Section 47 by issuing the Notification under proviso to

Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the said Notification has

been issued on 10.09.2002, the occurrence took place on 11.09.2001 and the petitioner has been declared to be medically boarded out on 01.01.2002,

as such he is entitled to get the benefit of Section 47 and in view thereof, he cannot be discriminated from medically boarded out service.

4. Mr. A.K. Bose, learned Asst. Solicitor General of India has vehemently opposed the submission and prayer of the petitioner by submitting that the

petitioner has been medically boarded out in the light of the provision laid down in C.C.S. (Medical Examination) Rules, 1957 incorporated in

Appendix-9 to C.C.S. (Pension) Rules, 1972 and Rule 38 of C.C.S. (Pension) Rules, 1972, as such there is no implication of the provision of Section

47 of the Act, 1995. He further submits that even accepting the argument of the petitioner that he is entitled to get the benefit of Section 47 but the

establishment has been taken out from the purview of Section 47 vide Notification issued by the Ministry of Social Justice and Empowerment dated

10.09.2002, in view thereof he is not entitled to get the benefit. He further submits that the point related to Section 47 has not been pleaded in the writ

petition, as such no advantage can be given to the petitioner.

5. In response, learned counsel for the petitioner submits that the Notification has been issued by the Ministry of Social Justice and Empowerment on

10.09.2002 while the petitioner has been declared to be medically unfit vide report dated 1.1.2002, as such on the date when the petitioner has

declared medically unfit to retain in Government service is prior to issuance of Notification dated 10.09.2002, hence Section 47 is well be applicable to

the case of the petitioner, as such he is entitled to be protected under the said statutory provision. He submits that although there is no pleading in the

writ petition but it has been pleaded in the rejoinder filed by the petitioner, wherein specific plea has been taken regarding implication of Section 47 of

the Act, 1995, copy of the said rejoinder has duly been served upon the counsel appearing for the opposite parties way back on 2.4.2010 but no

response has been filed to that effect, hence it is incorrect to say that no pleading regarding Section 47 of the Act, 1995 has been made, the same is

being reproduced herein below for ready reference:-
47. Non-discrimination in Government employees.

(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. It also needs to refer the

definition of "disability" which includes locomotor disability. Locomotor disability has been defined under the provision of Section 2(o) of the Act,

1995 which means the disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral

palsy. Section 2(t) of the Act, 1995 defines the "person with disability" which means a person suffering from not less than forty per cent of any

disability as certified by a medical authority.

6. Thus, it is evident that Section 47 is mandatory in nature which is to be followed by the establishment, if not taken out from the purview of Section

47 of the Act, 1995. It is mandatory for the reason that under Section 47 (1),

the word "shall" has been used by keeping the stipulation that no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service. The word "shall" denotes the mandatory nature of the said provision, meaning thereby no person can be discriminated on the basis of disability. It also needs to refer the provision of Section 72 of the Act, 1995, which is being reproduced herein below for ready reference:-

"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 instruction issued thereunder, enacted or issued for the benefits of persons with disabilities."

The provision of Rule 38 of Central Civil Services (Pension) Rules, 1972 contains the Invalid Pension and invoking the said power, the petitioner has been boarded out vide order dated 10.01.2002 (impugned).

7. The Hon'ble Supreme Court while dealing with the scope of Section 47 and 72 of the Act, 1995 in the case of Kunal Singh vrs. Union of India and another reported in 2003 (4) SCC 524 has been pleased to hold the mandatory nature of Section 47 and also deprecated the action of the authority in taking decision of granting invalid pension under the provision of Rule 38 of the CCS (Pension) Rules, 1972 by keeping the provision as contained in Section 72 of the Act, 1995 which speaks that any other Act will be in addition to and not in derogation and further the Hon'ble Supreme Court in the said judgment has been pleased to come with the conclusion that since the Act, 1995 is a beneficial legislation and as such it has to be complied with mandatorily.

8. In the light of this factual situation, now question fell for consideration before this Court is;

(a) whether the petitioner is entitled to get protection under the provision of Section 47 of the Act, 1995;

(b) whether the impugned order 10.01.2002 is illegal and arbitrary.

It is not in dispute that the petitioner has sustained injury and declared medically unfit by its Medical Report dated 1.1.2002. It is also not in dispute

there is Amputation from right upper arm, meaning thereby the petitioner is coming under the category of permanent disability i.e. more than 40%, as

such he is coming under the purview of provision of Section 2(t) which contains the definition of "disability". It is also not in dispute that the CISF is

a paramilitary Force and the said establishment has been taken out from the purview of Section 47 w.e.f. 10.09.2002 i.e. the date of Notification. It is

settled that any notification will not be given its retrospective effect and as such keeping the said settled position into consideration, it is held herein that

the Notification dated 10.09.2002 will be given effect to on or after 10.09.2002 since herein the petitioner has been declared to be unfit w.e.f. 1.1.2002

which is prior to issuance of Notification, as such the petitioner is entitled to be protected under the provision of Section 47 of the Act, 1995. In view

thereof, first question has been answered. So far as second question related to legality and propriety of the impugned order dated 10.01.2002 is

concerned, since there is no dispute about the fact that the petitioner has been declared medically unfit from 1.1.2002 and that is the reason in exercise

of power conferred under Rule 38 of the CCS (Pension) Rules, 1972, which speaks regarding "invalid pension" which may be granted if a

Government servant retires from the service on account of any bodily or mental infirmity which permanently incapacitates him for the service. As has

been discussed above regarding implication of the provision of Section 47 of the Act, 1995 and as has been held by the Hon'ble Supreme Court in the

case of Kunal Singh vrs. Union of India & another, reported in 2003 (4) SCC 524, it reveals that the Act 1995 is to be in addition and not in derogation,

hence the decision of the authority to medically board out the petitioner from service in the light of the Rule 38 of the CCS (Pension) Rules, 1972, if

allowed to be continued, it will be directly in the teeth of the provision of Section 47 of the Act, 1995 which will not be said to be justified decision.

9. In view thereof, the order dated 10.01.2002 will be held to be not sustainable in the eye of law, in the result the impugned order dated 10.01.2002 is

quashed. In consequence, thereof, the matter is remitted before the competent authority to take decision afresh within a period of six weeks in the

light of observations, the provision of Section 47 of the Act, 1995 and the judgment rendered by the Hon'ble Supreme Court in the case of Kunal

Singh (supra). Accordingly, the writ petition is allowed.