

(2023) 05 JH CK 0022
In the Jharkhand High Court
Case No : W.P.(S) No.2537 Of 2019

Manasa Chandra Mahanta

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 08-05-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 — Rule 5
Persons With Disabilities (Equal Opportunities Protection Of Rights And Full Participation) Act, 1995 — Section 2(i), 2(p), 2(t), 33

Citation : (2023) 05 JH CK 0022

Hon'ble Judges : Sujit Narayan Prasad, J; Subhash Chand, J

Bench : Division Bench

Advocate : M.M.Pal, Leena Mukherjee, Hemant Kr. Chakrabarty, Akashdeep

Final Decision : Dismissed

Judgement

Sujit Narayan Prasad, J

1. The instant writ petition is under Article 226 of the Constitution of India by which the order dated 25.10.2018 passed by the learned Central Administrative Tribunal, Patna Bench, Circuit Bench at Ranchi in OA/051/00733/2018 has been assailed by which the order dated 29.01.2010 has been refused to be interfered with by which the claim for appointment in Railways against Physically Handicapped Quota has been rejected on the ground that the disability of the writ petitioner has been assessed to be less than 40%.

2. Brief facts of the case as per the pleadings made in the writ petition, which are required to be enumerated herein, read as under :-

That the case of the petitioner before the Tribunal was that in order to fill up 44 Group 'D' vacancies in the Railway, a notification was issued on 10.02.1999 inviting applications from the eligible candidates from the different categories. Out of 44 posts, 15 posts were reserved for Visually Handicapped, 15 posts for

Orthopedically Handicapped and rest 14 posts for Hearing Handicapped.

In pursuance of the said notification, the petitioner applied for consideration of his case against the vacancy meant for visually Handicapped persons annexing his disability certificate dated 05.07.1996 issued by the duly authorized Medical Board wherein his disability was assessed as 40%. After having been found suitable as visually handicapped person, his name was included in the panel published by the Railways on 09.01.2001.

Thereafter, on the request of the petitioner, he was sent for medical examination to the Medical Superintendent / BNDM and was declared fit in C-2 category. After being declared fit in the category of visually handicapped persons, he was appointed and was posted as Ty. Chowkidar under the Divisional (Signal and telecom) Engineer (Con.) / CKP vide office order dated 03.04.2001.

A complaint was received regarding the degree of visual disability of the petitioner and the petitioner was again sent to Ophthalmological Clinic (Eye specialist) at Division Railway Hospital, Chakradharpur for examination. On receipt of the findings of Medical examination, the matter was placed before the Chief Medical Director (Eye) of Railways, who opined that the petitioner cannot be considered as visually handicapped person as per the Ophthalmological findings. On the basis of such opinion vide order dated 21.06.2001 the service of the petitioner was terminated by the competent authority and the said order of termination was challenged by the petitioner in OA no. 300 of 2001 before the Tribunal.

The Tribunal on consideration of the materials placed before it, found that the degree of disability of the petitioner does not bring him within the required degree in order to make him eligible to be appointed against the post reserved for such category of candidates and accordingly declined to interfere with the order of termination vide an order dated 16.11.2005.

The petitioner challenged the order dated 16.11.2005 passed by the learned CAT in O.A. No. 300 of 2001 before the Orissa High Court in W.P (C)15699 of 2005 which was heard and allowed vide judgment dated 10.07.2009 whereby and where under the impugned judgment of the CAT as well as the order of termination were set aside with a direction to the opposite party no.2 to set up a Medical Board consisting Eye specialist for examination of the petitioner in order to find out as to whether he could be categorized as visually handicapped person or not and in the event that the petitioner is fit for employment as visually handicapped person, a fresh order shall be passed on the basis of the Medical Board.

While allowing the writ petition, the Orissa High Court was pleased to make it clear that so far the salary for the period he was kept out of service is concerned, the competent authority shall pass necessary orders keeping in mind the fact that the order of termination has been quashed and the petitioner is deemed to be continuing in service (though he has no actually worked) till a fresh order is

passed on the basis of the report of the Medical Board.

In compliance to the order and direction passed by the High Court, the respondent informed the petitioner to appear before the Medical Board at Central Hospital, Garden Reach, Kolkata.

In pursuance to the letter of the respondents, the petitioner went to the Central Hospital, Garden Reach, Kolkata on 08.10.2009 wherein he was examined.

Thereafter, the order dated 29.01.2010 was issued by the Sr. Divisional Personnel Officer whereby and where under it was informed that the Medical Board found him unfit for the post of visually handicapped quota giving the details of the opinion of the Eye specialists.

By the order dated 29.01.2010 the service of the petitioner has been again terminated w.e.f. 21.06.2001 with a direction that the intervening period i.e. from the date of his initial termination order to the order of findings of the Medical Board i.e. 21.06.2001 to 08.10.2009 wherein he was found unfit for the post reserved for physically handicapped quota and the period be treated as LPA and LHAP to the extent available at his credit at this material time and balance period as sanctioned LWP.

Being aggrieved with the aforesaid order, the petitioner moved before the learned CAT in O.A. No. 051/00733/2018 for quashing the rejection cum removal order and for reinstatement with full back wages with all consequential benefit and for a direction to give effect to the disability certificate issued by the competent Medical Board under the Disability Act 1995 and for further order and direction to pay the full salary for the period from 21.06.2001 to 08.10.2009.

The learned Central Administrative Tribunal heard the OA and dismissed the same vide order dated 25.10.2018 after holding that the rejection order dated 29.10.2010 cannot be impugned by the applicant before the Tribunal since it has been issued in compliance of the direction of the Orissa High Court against which the present writ petition has been filed.

3. It appears from the pleadings, as referred hereinabove, that in pursuance to the notification issued by the Indian Railways on 10.02.1999 by which applications were invited for various posts including the post of Ty. Chowkidar.

The advertisement stipulates to provide benefit of reservation to the physically challenged candidates.

The petitioner had participated in the process of selection and was selected under the Visually Handicapped Category and was appointed as Ty. Chowkidar under the Divisional (Signal and telecom) Engineer (Con.), Chakradharpur vide office order dated 03.04.2001.

A complaint was received regarding degree of visual disability of the applicant, pursuant thereto, the petitioner was subjected to medical examination of Ophthalmological Clinic at Division Railway Hospital, Chakradharpur wherein the

Board has opined that the extent of disability of the applicant was less than 40% hence the petitioner has been held not entitled for availing employment under the Physically Handicapped Category and accordingly, the petitioner was terminated from service on 21.06.2001.

The aforesaid order dated 21.06.2001 was challenged before the tribunal having its Bench at Orissa being O.A. No.300 of 2001 but was dismissed vide order dated 16.11.2005.

The order dated 16.11.2005 was challenged before the Orissa High Court by filing writ petition being W.P (C)15699 of 2005 which was disposed of vide order dated 10.07.2009 whereby and whereunder the Orissa High Court has passed an order after quashing the order of termination deeming the writ petitioner to be continuing in service till a fresh order is passed on the basis of the report of the Medical Board and in the event the petitioner is found fit for employment as visually handicapped person, he should be allowed to continue his service. In the event he is not found fit for employment as visually handicapped person, a fresh order shall be passed on the basis of the report of the Medical Board.

So far as the salary for the period he stayed out of service is concerned, the competent authority shall pass necessary order keeping in mind the fact that the order of termination as Annexure-10 has been quashed and the petitioner is deemed to be in service.

The petitioner was medically examined by duly constituted Medical Board consisting of three eye specialists at Central Hospital, Garden Reach, Kolkata on 08.10.2009. The Medical Board adjudged his impairment to be 20%. The concerned competent authority has passed the order on 29.01.2010 and has terminated him from service in the light of the order passed by the Orissa High Court holding him unfit for the post reserved for physically handicapped quota.

The aforesaid order has been challenged before the Tribunal but the Tribunal, after taking into consideration the order passed by the Orissa High Court and since in terms thereof the Medical Board has assessed the extent of disability to be 20%, hence refused to interfere with the impugned decision dated 29.01.2010 against which the present writ petition has been filed.

4. Mrs. M.M.Pal, learned senior counsel appearing for the writ petitioner, has submitted that by referring to the provision of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, hereinafter to be referred to as the Act, 1995, wherein there is no power conferred by the Medical Board to give a finding regarding the extent of the disability and hence, the finding by the Medical board holding the writ petitioner disabled to the extent of 20% is contrary to the statutory mandate.

It has been contended that in absence of any power conferred to the Medical Board since the extent of disability has been shown to be 20% which is the basis of holding the writ petitioner not eligible under the physically handicapped

category since is based upon the order passed by the Medical Board said to be in the teeth of the statutory mandate as contained under the Act/Rule, 1995/1996, hence the order of holding the writ petitioner to be not eligible to hold the post under the physically handicapped category cannot be said to be sustainable in the eyes of law.

The contention has been made that apart from the issue of termination, the back wages has also not been paid even though there is specific direction in this regard by the Orissa High Court by which the writ petitioner has been deemed to be in continuous service till a fresh order is passed and hence, when the writ petitioner has been deemed to be in continuous service, therefore, he became entitled for the back wages for the aforesaid period.

5. Per contra, Mr. Akashdeep, learned counsel appearing for the respondents, had defended the order passed by the learned Tribunal by making submission that the Medical Board was constituted on the basis of the direction of the Orissa High Court passed in W.P.(C) No. 15699 of 2005 which was preferred by the writ petitioner and in compliance to the aforesaid direction, it is the writ petitioner who had participated before the Medical Board and thereafter he was assessed and after assessment, his disability has been found to the extent of 20% and hence, the writ petitioner has not been considered to be disabled person in view of the definition of "disability" as under Section 2(i) of the Act, 1995.

Learned counsel for the respondents, by rebutting the contention that the Medical Board cannot give the extent of disability being not the competent authority under the statutory mandate, has submitted that it is only the Medical Board who is to furnish a certificate of the extent of disability and none else.

The further argument has been made that even accepting that the extent of disability as has been given by the Medical Board ought not to have been given, but the question is that why such extent of disability has been accepted by the writ petitioner having not challenged before the reviewing authority as per the mandate of Rule 5 of the Rules, 1996.

So far as the issue of back wages is concerned, the Orissa High Court has only passed an order deeming the writ petitioner to be in continuous service but that does not mean that the principle of 'no work no pay' will not be applicable and in that view of the matter, the decision has already been taken.

Learned counsel for the respondents, on the basis of aforesaid ground, has submitted that the learned Tribunal has taken into consideration the aforesaid fact basis upon which order since has been passed, therefore, the same required no interference.

6. We have heard learned counsel for the parties, perused the documents available on record as also the finding recorded by the learned Tribunal in the impugned order.

7. The issue which has been raised on behalf of the petitioner that the Medical

Board constituted in the light of the order passed by the Orissa High Court, was not competent enough to give the extent of disability to the extent of 20%. The argument has been advanced by making reference of the statutory mandate of the Act, 1995 wherein, according to the learned senior counsel, there is no such provision to assess the extent of disability.

8. This Court, in order to answer the aforesaid argument, deems it fit and proper first to refer the basis upon which the Medical Board was constituted, which is the order passed by the Orissa High Court in W.P.(C) No.15699 of 2005. The said writ petition was filed by the writ petitioner assailing the order passed by the Tribunal wherein the order of termination dated 21.06.2001 issued on the ground that the writ petitioner was not under the category of physically handicapped category, when refused to the interfered with.

The Orissa High Court has passed the following order which reads hereunder as :-

6. We, accordingly set aside the impugned judgment of the Tribunal as well as the order of termination and direct the opposite party No.2 to set up a medical board consisting of Eye Specialist for examination of the petitioner in order to find out as to whether he could be categorized as Visually Handicapped person or not. In the event, the petitioner is found fit for employment as Visually Handicapped Person, he should be allowed to continue in service. In the event he is not found eligible for employment as a Visually Handicapped Person, a fresh order shall be passed on the basis of the report of the Medical Board, So far as salary for the period he is kept out of service is concerned, the competent authority shall pass necessary orders keeping in mind the fact that the order of termination in Annexure-10 has been quashed and petitioner is deemed to be continuing in service (though he has not actually worked) till a fresh order is passed on the basis of the report of the Medical Board.

It is evident from the order passed by the Orissa High Court that while setting aside the impugned order passed by the Tribunal as well as the order of termination, the direction

was upon the Opposite Party No.2 to set up a medical board consisting of Eye Specialist for examination of the petitioner in order to find out as to whether he could be categorized as Visually Handicapped person or not.

It is, thus, evident that the Orissa High Court has passed specific direction for constitution of the Medical Board. The Medical Board was constituted consisting three eye specialists who had examined the writ petitioner on 08.10.2009 and the impairment of the writ petitioner was adjudged to be 20%.

9. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 has been enacted in order to give benefit of reservation to physically challenged persons.

The "person with disability" has been defined under

Section 2(t) of the Act, 1995 which reads hereunder as :-

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

Further, "disability" has been defined under Section 2(i) of the Act, 1995 which reads hereunder as :-

"(i). "disability" means -

- (i) blindness;
- (ii) low vision;
- (iii) leprosy-cured;
- (iv) hearing impairment;
- (v) loco motor disability;
- (vi) mental retardation;
- (vii) mental illness;"

It is evident from the definition of the "person with disability" that the disability if is assessed to the extent of 40%, such person can be held to be disabled so as to give benefit of the Act, 1995 including the benefit of reservation.

Section 33 thereof provides the benefit of reservation to be given to the extent of 3% preference wise. For ready reference, Section 33 is being referred herein which reads hereunder as :-

"33. Reservation of Posts - Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from -

- (i) blindness or low vision;
- (ii) hearing impairment;
- (iii) locomotor disability or cerebral palsy, in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

It is evident from the provision of Section 33 that the benefit of reservation is to be given preference wise, i.e., (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy.

The fact is not in dispute that the Act, i.e., The Persons with Disabilities (Equal

Opportunities, Protection of Rights and Full Participation) Act, 1995, has been enacted in order to achieve the objects for the purpose of full participation and equality of people with disabilities.

The provision as contained under Section 33 clarifies that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons with disability, which suggests that the benefit is to be given to the actual disabled persons who are coming under the fold of the meaning of the "person with disability" as per the definition under Section 2(t) of the Act, 1995 wherein the person with disability has been defined, which means, a person suffering from not less than 40% of any disability, as certified by the medical authority.

The "medical authority" has been defined under Section 2(p), which means any hospital or institution specified for the purposes of this Act by notification by the appropriate Government.

The "appropriate Government" means in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924, the Central Government.

It is, thus, evident that the Medical Board, if constituted under the command of the Central Government or any establishment wholly or substantially financed by that Government, such Medical Board will be competent to give disability certificate of a person.

10. Herein, the Central Hospital, Garden Reach, Kolkata was the establishment where the Medical Board consisting of three eye specialists had examined the writ petitioner.

The purpose of the Act, 1995 to provide the benefit of reservation in view of the object, will only be said to be served if the benefit of reservation or the other benefits stipulated therein is granted to the disabled persons who are coming within the meaning of person with disability.

The stipulation made under Section 2(t) that the extent of 40% of the disability is required to be there as per the certificate given by the medical authority which itself suggests that it is the medical authority who is to give a certificate regarding the extent of the disability.

Here, in the instant case, it is the Medical Board constituted on the basis of the direction of the Orissa High Court, has examined the writ petitioner and assessed his disability to the extent of 20% and hence, the writ petitioner, according to our considered view, is not coming within the meaning of "person with disability" as per the definition of "person with disability" as under Section 2(t) of the Act, 1995, and hence, he cannot be held entitled for the benefit of reservation under the Act, 1995.

Further, the writ petitioner has neither challenged the extent of disability before the appellate authority as per the provision of Section 54 of the Act, 1995 nor challenged the same before the reviewing authority under Rule 5 of Rules, 1996 which confers a forum to the aggrieved to challenge the opinion of the Medical Board, meaning thereby, the extent of disability to the extent of 20% has been accepted by the writ petitioner.

The Medical Board, since has assessed the extent of disability to the extent of 20% which is in the light of the order passed by the Orissa High Court, therefore, if on that ground the learned Tribunal while giving adherence to the direction of the Orissa High Court to the effect that in the event he is not found eligible for employment as a visually handicapped person, a fresh order shall be passed on the basis of the report of the Medical Board and if the order has been passed in pursuance thereto, which according to our considered view, has correctly been not interfered with by the learned Tribunal.

11. So far as the issue of back wages of is concerned, admittedly herein, there is no direction by the Orissa High Court by holding the writ petitioner entitled for back wages, save and except, the order has been passed that the order of termination since has been quashed and the petitioner is deemed to be continuing in service, though he has not actually worked, and in the light of the aforesaid observation the prayer is being made to hold the writ petitioner entitled for the back wages but we are not in agreement with the same when the decision to that effect has been taken by the competent authority by adjusting the same period by treating him on leave on LAP and LHAP, the same according to our considered view, cannot be said to suffer from an error due to the reason that the principle of back wages will not be applicable if the concerned employee has failed to discharge his duty on his own.

Further, the principle of back wages will not be applicable in a case where the employee concerned has legitimately been appointed but deprived from discharging his duty even though the concerned employee was willing to discharge the duty, as has been settled by the Hon'ble Apex Court in the case of Union of India and Others v. K.V. Jankiraman & Ors., (1991) 4 SCC 109, at paragraph 25, which reads as under:-

"25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases."

Thus, it is evident that larger Bench of the Hon'ble Apex Court in the case of Union of India and Others v. K.V. Jankiraman (supra) has held that although no work no pay is the normal rule, but it has got exception and it will not be

applicable in a case where the employee was willing to work but had not been allowed to discharge the duty and if such a condition would be there, the principle of no work no pay will not be applicable.

12. We have examined the given facts of the case on the basis of the aforesaid position of law and are of the view that here the principle of "no work no pay" will be applicable it is for the reason that the appointment of the writ petitioner itself has been found to be illegal and once the appointment has been held to be illegal, then there will be no right of the terminated employee to seek the benefit of back wages.

Even the Orissa High Court has not passed any specific direction, rather, the Orissa High Court, only for the reason that that order of termination was quashed for the purpose of medical examination of the writ petitioner, has considered the writ petitioner deemed to be in service but deeming to be in service does not confer any right to the writ petitioner to claim the back wages, rather, the same will ultimately result into the consequence of the opinion of the Medical Board and since the Medical Board has opined his disability to the extent of 20%, hence, he has not been found to be entitled to be retained in service and, therefore, he has been terminated.

The matter would have been different if the Medical Board would have opined holding the disability of the writ petitioner to the extent of 40% which may have entitled him for the appointment and in that view of the matter, if the writ petitioner would have been appointed then he will certainly be held to be entitled for the back wages on the principle that it is the respondent who has deprived the writ petitioner from discharging of his duty but it is not the case, rather, the appointment of the writ petitioner itself has been held to be illegal basis upon which the order of termination was passed and when it was quashed by the Orissa High Court, again the same decision was taken vide impugned order holding him not entitled to hold the post.

13. This Court, on the basis of the discussion made hereinabove and on consideration of the order passed by the learned Tribunal where the entire aspect of the matter, as discussed hereinabove, since has been made while rejecting the original application, therefore, is of the view that the said order requires no interference.

14. Before parting with the judgment, this Court deems it fit and proper to deal with the judgment upon which reliance has been place by the learned senior counsel.

The first judgment of the Hon'ble Apex Court upon which the reliance has been placed is Union of India v. Madhusudan Prasad reported in (2004) 1 SCC 43. This Court, on consideration of factual aspect, has found therefrom that the issue of entitlement of back wages has been considered in a situation where the order of dismissal has been reversed to that of the order of reinstatement. There is no denial about the fact that when the order of dismissal has been rendered to be

illegal and in consequence thereof, the order of reinstatement has been passed then the principle of forcefully depriving the concerned employee in discharging duty will be applicable and in that view of the matter, the concerned employee will be entitled for the back wages. But the fact is quite different in the present case herein, the appointment of the writ petitioner itself has been held to be illegal basis upon which the order of termination was passed and when it was quashed by the Orissa High Court, again the same decision was taken vide impugned order holding him not entitled to hold the post and hence, the judgment relied upon by the learned counsel for the petitioner will not be applicable in the facts of the present case.

The second judgment upon which reliance has been placed has been rendered by Hon?ble Apex Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.ED) and Others reported in (2013) 10 SCC 324 but this Court, after going through the aforesaid judgment, has found that the same pertains to the labour dispute and the same is also in connection with the wrongful/illegal termination and the illegal termination if quashed and set aside then in that circumstances the guidelines have been given as under paragraph 38 of the said judgment but considering the fact of the given case herein, it is not a case of illegal appointment since we have come to the conclusion as above that the order of termination of the writ petitioner on the basis of his extent of disability he cannot be said to be entitled to hold the post and his appointment has been considered to be illegal appointment, hence, this judgment will also not be applicable.

15. Accordingly, the instant writ petition fails and is dismissed.