

(2014) 12 AHC CK 0242
In the Allahabad High Court
Case No : Writ A No. 26980 of 2012

Munna Lal Sharma

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 19-12-2014

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 2(i), 47, 72, 8
Uttar Pradesh Co-operative Societies Act, 1965 — Section 71

Citation : (2015) 2 ADJ 223 : (2015) 109 ALR 126 : (2015) 2 AWC 2005 :
(2015) 145 FLR 1014 : (2015) 1 UPLBEC 402

Hon'ble Judges : Sunita Agarwal, J

Bench : Single Bench

Advocate : Pulak Ganguly and Arun K. Singh-I, Advocate for the Appellant; A.K. Lal, Sujeet Kumar and Sujeet Kumar Rai, Advocate for the Respondent

Judgement

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Sunita Agarwal, J.—Heard Shri Arun Kumar Singh, learned counsel for the petitioner, learned Standing Counsel for respondent Nos. 1 to 3, Shri Sujeet Kumar Rai, learned counsel respondent No. 4 and Shri A.K. Lal learned counsel for respondent No. 5.

2. While working as Secretary of the Cooperative Society Bijnor, namely, Kisan Sewa Sahkari Samiti, Saidpur, District Bijnor, petitioner has suffered visual impairment and lost his eyesight resultantly he has acquired complete visual disability i.e. blindness. The petitioner started losing his eyesight in the month of September, 2006 and had become 100% visually disabled in February, 2009. He has applied for medical leave which was sanctioned for the period from 15.1.2007 to 16.1.2008 and 16.1.2008 to 30.6.2008 by the Secretary/General Manager, District Cooperative bank, Bijnor. His salary has not been paid, therefore, he has approached this Court by filing writ petition No. 49740 of 2010 which was disposed on 19.8.2010. The order passed by this Court is as under:--

"Learned Standing Counsel represents respondent Nos. 1 to 4.

Issue notice to respondent No. 5.

The petitioner was serving as Cadre Secretary, Shadipur Kisan Sewa Cooperative Society Ltd. For the reasons, which could not be ascertained by the eye specialists, he started losing his eye sight. The petitioner could not recover even after treatment and has been certified to be 100% disabled on account of loss of vision in both the eyes [optic Atrophy both eye; visual disability 100% (hundred)] certified by the Chief Medical Officer, Udham Singh Nagar on 16.2.2009.

He had proceeded on leave and was sanctioned 18 months" medical leave (from 15.1.2007 to 16.1.2008 and thereafter from 16.1.2008 to 30.6.2008) by the Secretary/General Manager, District Cooperative Bank, Bijnor."

3. It is stated that inspite of sanction of leave and the protection given to him under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, (In short PWD Act, 1995) the society has not paid salary and has not provided a sheltered appointment to the petitioner. The petitioner has approached the Asstt. Registrar under Section 71 of the U.P. Cooperative Societies Act with an application dated 8.6.2010 for orders and recovery of arrears of salary from the society.

4. All the respondents are allowed three weeks" time to file counter affidavit. The petitioner will have one week, thereafter, to file rejoinder affidavit.

5. List on 27th September, 2010.

6. In the meantime, we direct the Asstt. Registrar, Cooperative Society, U.P. Distt. Bijnor to conclude the proceedings under Section 71 of the U.P. Cooperative Societies Act within a month; he will ensure the payment of atleast half of the salary to the petitioner for the period for which the leave was sanctioned from 15.1.2007 to 16.1.2008 and thereafter from 16.1.2008 to 30.6.2008, to be credited to the bank account of the petitioner positively within one month."

Pursuant to the order of this Court dated 19.8.2010 petitioner"s representation dated 8.6.2010 was considered and rejected vide order dated 12.9.2011 passed by the District Assistant Registrar, Cooperative Societies, Bijnor. Rejecting the claim of the petitioner for payment of salary the ground taken is that the petitioner was absent with effect from 1.7.2006 and decision has been taken by the Society to retire the petitioner on account of its bad financial condition. On 29.11.2011 District Administrative Committee has taken a decision to retire the petitioner from service. Consequently order dated 8.12.2011 was passed retiring the petitioner from service.

7. The present writ petition is directed against the order dated 12.9.2011 passed by the District Assistant Registrar and the order dated 8.12.2011 passed by the

Member Secretary, District Administrative Committee/General Manager, District Cooperative Bank.

8. Assailing the orders impugned, learned counsel for the petitioner submits that admittedly the petitioner has acquired visual disability while in service and hence the petitioner is protected under Section 47 of the PWD Act, 1995 which provides that an employee who is already in service and acquires a disability during his service should be provided suitable post, if it is available. In case, it is not possible to adjust the employee against any post, supernumerary post is to be created, he shall be allowed to continue till the date of superannuation. Service benefit cannot be denied to the employee on account of disability acquired while in service.

9. Learned counsel for the petitioner has placed reliance upon the judgment of Apex Court in Bhagwan Dass and Another Vs. Punjab State Electricity Board, , wherein similar situation came up for consideration before the Apex Court. It was held in paragraphs 13 and 14, which are as follows:--

"13. Appellant No. 1 was a Class IV employee, a Lineman. He completely lost his vision. He was not aware of any protection that the law afforded him and apparently believed that the blindness would cause him to lose his job, the source of livelihood of his family. The enormous mental pressure under which he would have been at that time is not difficult to imagine. In those circumstances it was the duty of the Superior Officers to explain to him the correct legal position and to tell him about his legal rights. Instead of doing that they threw him out of service by picking up a sentence from his letter, completely out of context. The action of the concerned officers of the Board, to our mind, was deprecable."

14. We understand that the concerned officers were acting in what they believed to be the best interests of the Board. Still under the old mind-set it would appear to them just not right that the Board should spend good money on someone who was no longer of any use. But they were quite wrong, seen from any angle. From the narrow point of view the officers were duty bound to follow the law and it was not open to them to allow their bias to defeat the lawful rights of the disabled employee. From the larger point of view the officers failed to realise that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largess but their right as equal citizens of the country."

10. In Bhagwan Dass (Supra) observations made in Kunal Singh Vs. Union of India (UOI) and Another, has been relied upon. While interpreting import of section 47 of PWD Act, 1995 it was held that there cannot be any discrimination in Government employments and no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service. Sub-section (2) of Section 47 of PWD Act, 1995, further provides that no promotion shall be

denied to a person merely on the ground of his disability.

In paragraph 9 of the Kunal Singh (Supra) it was held as follows:--

"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 person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 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 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 is 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 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 serves its purpose must be preferred to the 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. "

Further reliance has been placed upon the judgment of Union of India and others v. State of U.P. and another 2010 (8) ADJ 280, wherein it was observed that the PWD Act 1995 guaranteed to a person, who develops disability as defined in the Act from being put off the employment. He has to be offered an alternate/sheltered job. The right of the disabled person to receive sympathetic consideration to continue in employment on acquiring disability during course of his tenure has been replaced by a statutory right by PWD Act, 1995. This statutory right is not subject to any discretion and cannot be defeated on the prejudice of the employer unless the establishment has exempted any particular category of work and valuable right of an employee, who has acquired disability during the course of employment is guaranteed under section 47 of the PWD Act,

1995. It was held that services of the petitioner therein who has acquired disability during the course of tenure in service could not be terminated. Reliance has been placed in Kunal Singh (supra) and Union of India (UOI) Vs. Sanjay Kumar Jain, .

11. Keeping in view of the above legal position, present case is to be examined. Admittedly in the instant case, the petitioner has acquired visual disability during service. He submitted leave application and leave for certain period was granted to the petitioner. However, salary was not paid as such he had to rush to this Court. Pursuant to the order of this Court dated 19.8.2010 an amount of Rs. 58,000/- was paid to the petitioner towards half salary for the period from 15.1.2007 to 30.6.2008. However remaining amount of Rs. 58,600/- has been refused by order dated 12.9.2011 on the ground that decision has been taken by the Committee to retire the petitioner on account of bad financial condition of the Society. It is further apparent from the order passed by the Assistant Registrar, decision taken whatsoever to retire the petitioner from the service was not served upon the petitioner. However, payment of salary for the rest of the period and half salary from 15.1.2007 to 30.6.2008 has been denied on the ground that the petitioner was absent without leave with effect from 1.7.2006.

12. It is apparent from the order dated 20.5.2009 passed by Member Secretary, District Administrative Committee that leave for the period from 16.1.2007 to 15.1.2008 was accorded on full salary, whereas leave from 16.1.2008 to 30.6.2008 was sanctioned on half salary. As leave of the petitioner was sanctioned, there was no question of withholding the salary for the period of leave. Admittedly only half salary has been paid for the period from 15.1.2007 to 30.6.2008, however, the petitioner is found entitled for the payment of full salary for the period of leave i.e. 15.1.2007 to 30.6.2008. The sanctioned leave on half salary from 16.1.2008 to 30.6.2008 is not justifiable for the reason that the petitioner has submitted medical papers for sanction of medical leave and the fact that he has acquired complete visual impairment thereafter. It is apparent from the record that since after 30.6.2008, petitioner has approached the respondents on various occasions. He has prayed for payment of salary for the period of leave and further to allow him to continue. Respondent did not allow the petitioner to continue and did not offer an alternate/sheltered job. The denial of salary to the petitioner on the ground that he has remained absent from 1.7.2006 is nothing but an act of termination of the services of the petitioner, which is clearly prohibited under section 47 of the PWD Act 1995. Further the petitioner was made to retire by order dated 8.12.2011 pursuant to the decision taken by the District Administrative Committee on 29.11.2011 but admittedly salary for the said period has not been paid to the petitioner. It appears that certain disciplinary inquiry was also initiated against the petitioner at some point of time for his absence but was not continued thereafter. It does appear from the record that the petitioner has approached the respondents continuously but he was not offered an alternative job. In Kunal Singh (Supra) the Apex Court has observed that Section 8 of the PWD Act 1995 provides that it was the duty of the

Superior Officer to explain to the employee, who has suffered disability, the correct legal position and informed of his legal rights. Petitioner was approaching the authorities but his legal rights have not been taken care of. Instead a disciplinary proceeding was initiated against him, the salary for the period of his sanctioned medical leave has not been paid till date. These facts indicate that the authorities were not fully conscious of their statutory obligations.

13. There is nothing on record to indicate that an effort was made to find out alternative job for the petitioner as mandated under PWD Act 1995. Even in case, no such job was available, the petitioner was required to be kept on a supernumerary post until suitable employment could be found for him. On the other hand taking recourse of provision of Rule 27(ss) of Regulations 1978 for appointment of Cadre Secretary, the Petitioner was made to retire on 8.12.2011. This litigation in this Court is for payment of salary for the period of medical leave and, thereafter, against the order of retiring the petitioner from service on the ground of medical incapacitation being in violation of section 47 of PWD Act 1995.

14. The order of retirement is nothing but termination of services of the petitioner on the ground of permanent disability suffered by him. Admittedly disability occurred during the course of employment and, therefore, the provision of section 47 of PWD Act 1995 would be attracted. It is held in Kunal Singh (Supra) that PWD Act 1995 is specific legislation dealing with persons' disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. It was held that the decision to grant invalidity pension to the appellant therein under Rule 38 of CCS (Pension) Rules, 1972, was no ground to deny the protection mandatorily made available to the appellant under Section 47 of the PWD Act 1995. Rule 38 of Central Civil Services (Pension) Rules cannot override Section 47 of the PWD Act 1995. Reference was also taken to Section 72 PWD Act 1995 which provides that the PWD Act 1995 override any other enactment or any instructions enacted or issued for the benefit of person with disability. It was directed that as appellant therein has acquired disability during his service he could be shifted to some other post with the same pay scale and all service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. Paragraphs 11 and 12 of Kunal Singh (Supra) are relevant and reproduced as under:--

11. We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pensions Rules. The Act is a special Legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act.

Further Section 72 of the Act also supports the case of the appellant, which reads:--

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

12. Merely because under Rule 38 of CCS Pension Rules, 1972, the appellant got invalidity pension is no ground to deny the protection, mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provisions of Section 47 of the Act."

In the instant case recourse has been taken to Rule 27(c) of Service Regulation 1978 pertaining to appointment of Cadre Secretary which provides that on account of long medical incapacitation of an employee a decision can be taken to retire him from service.

Present is not a case of medical incapacitation of an employee rather it is case where the petitioner has acquired disability during his service. The word "disability" has been defined in section 2(i) of PWD Act 1995. Section 47 of the Act clearly provides that the services of employee could not be dispensed with if he has acquired disability during his service. The recourse of Rule 27(s) of Regulations of Rules pertaining to Cadre Secretary could not be taken and the petitioner could not have been retired from 8.12.2011. Petitioner has a statutory right to continue in service till the age of superannuation. He is entitled to continue in service or another suitable post/sheltered job which should be offered to the petitioner till age of retirement on the same pay scale and service benefit.

The respondents have proceeded to hold that the petitioner was permanently medically incapacitated to continue in service and had retired him without considering the effect of PWD Act 1995. The order dated 8.12.2011 passed by respondent No. 4 District Administrative Committee retiring the petitioner from the service is, therefore, illegal and is hereby set aside. However, at this stage the submission of the learned counsel for the petitioner needs consideration that the petitioner does not want to continue in service and has had suffered a lot on account of repeated litigations and enormously suffered as a result of his disability and inhumane approach adopted by the respondents. He has, therefore, decided not to challenge the order of retirement but the petitioner is

pressing his entitlement for full payment and all service benefits till date of his retirement i.e. till 8.12.2011.

15. In view of this submission, while setting aside the order dated 8.11.2012 retiring the petitioner from service, the respondents are directed to pay the petitioner entire arrears of salary till 8.11.2012 along with all services benefit admissible to the petitioner with interest @ 9% till the date of actual payment. It is directed that computation be done and payment shall be made to the petitioner within a period of two months from the date a certified copy of this order is produced.

16. In view of the above observation, the order passed by the Assistant Registrar dated 12.9.2011 denying salary to the petitioner on account of his absence during the period of medical leave with effect from 1.7.2006 is unsustainable and is hereby set aside.

17. With the above direction, the writ petition is allowed.