
(2015) 03 SIK CK 0005
In the Sikkim High Court
Case No : Writ Petition(C) No. 09 of 2014

Nasiruddin Ansari

APPELLANT

Vs

State of Sikkim and Others

RESPONDENT

Date of Decision : 02-03-2015

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 34, 41, 47

Citation : (2015) LabIC 2463

Hon'ble Judges : Sonam Phintso Wangdi, J.

Bench : Single Bench

Advocate : N.B. Khatiwada, Senior Advocate, Gita Bista and Monika Rai, Advocates and Party-in-person, for the Appellant; J.B. Pradhan, Additional Advocate General, Karma Thinlay Namgyal, Senior Government Advocate, S.K. Chettri and Pollin Rai, Assistant Government A

Final Decision : Disposed off

Judgement

Sonam Phintso Wangdi, J.

1.(i) By filing this Writ Petition, the Petitioner seeks, inter alia, for a mandamus directing the Respondents-NHPC to comply with the orders and directions of the Apex Court in Justice Sunanda Bhandare Foundation Vs. Union of India (UOI) and Another, and implement the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the "Act of 1995") and to appoint him in a regular post reserved for persons with disabilities.

(ii) The Petitioner who suffers from locomotor disability with 85% loss of earning capacity with amputated left hand is a "persons with disability" as defined under the Act of 1995. He was employed from May, 1991 as an Electrician under a Contractor, Shri Premchand Agarwal, engaged by the National Hydroelectric Power Corporation Ltd., Rangit Nagar, South Sikkim (for short the "NHPC").

(iii) During the course of his employment, on 19-01-1993 at about 12.30 p.m.,

the Assistant Engineer (Electrical), Shri S.C. Garg and the Assistant Manager (Electrical), Shri D. Chattopadhyay of the NHPC, ordered the Petitioner to climb a "High Tension Gang Operator Pole of 11 KV" and to repair its fuse. While undertaking this task, the Petitioner got electrocuted and sustained severe electric burn injuries. He was given first aid in the Office Dispensary of the NHPC at Rangit Nagar after which, he was removed to Siliguri in a critical condition and admitted in the Sunrise Nursing Home Pvt. Ltd. on 19-01-1993 where his left hand was amputated on the next day, i.e., 20-01-1993. When his condition did not improve even after 19 days, he was taken to Kolkata on 06-02-1993 and admitted in the S.S.K.M. Hospital on 07-02-1993 for further treatment. It is stated that all medical expenses incurred for the treatment was borne by the Respondents-NHPC.

(iv) The Petitioner sustained permanent disability due to the amputation of his left hand as a result of the electrocution causing 85% loss of his earning capacity. The Petitioner is presently working under Respondent-NHPC as an Attendant in the Electrical Division, ECD, Rangit Nagar, South Sikkim, on a salary as notified by the Government and is rendering efficient service despite his disability.

(v) Later, the Petitioner approached the Court of the Commissioner under the Workmen's Compensation Act, 1923 at Gangtok and vide its order dated 18-02-2006, compensation amounting to Rs. 1,08,013/- (Rupees one lakh eight thousand and thirteen) was awarded to him for the injuries sustained by him.

(vi) It is stated that on 07-02-2007 the Chief Commissioner constituted under the Act of 1995 issued a public notice announcing holding of a Mobile Court at the Community Hall, Namchi, South Sikkim, for redressal of grievances of persons with disabilities fixing 24-02-2007 as the date of hearing. In response thereto, the Petitioner appeared before the Chief Commissioner with his grievances resulting in a show cause notice being issued upon the Respondents-NHPC. In response to the notice the NHPC filed their reply categorically denying that the Petitioner was an employee under them asserting that no relationship of "employer" and "employee" subsisted between them.

(vii) The Petitioner's case, being Case No. 3781/2007 was heard by the Chief Commissioner at New Delhi on 17-03-2008 who passed an ex parte order to the detriment of the Petitioner on 26-03-2008 without affording him an opportunity of hearing. It is stated that the Chief Commissioner while holding that the Petitioner's request was unenforceable, observed that keeping in view the fact that the Complainant-Petitioner had acquired disability while being in the employment of the contractor who was working for the NHPC, they should consider giving him preference while making recruitments against reserved vacancies in future.

(viii) Aggrieved by the aforesaid order of the Commissioner for Workmen's Compensation, Sikkim at Gangtok, and the Chief Commissioner, New Delhi, the

Petitioner preferred WP(C) No. 15 of 2008 before this Court. This Court vide its judgment dated 27-08-2009, while rejecting the claim of the Petitioner for being absorbed in the regular establishment of Respondents-NHPC, observed that the case of the Petitioner be considered for recruitment against any reserved vacancies for persons with disability as defined under the Act of 1995, expressing hope and trust that such consideration shall be taken at the earliest as and when such vacancies would arise. The Petitioner was also directed to make a detailed application setting out the grievances expressed by him in the Writ Petition before the Competent Authority, particularly the Respondent No. 2, the Chief Engineer, NHPC, within a period of one month from the date of the judgment dated 27-08-2009.

(ix) The detailed application submitted by the Petitioner to the Respondent No. 2 as directed by this Court, was also not responded to. Even after the lapse of 5 (five) years since the judgment dated 27-08-2009 in WP(C) No. 15 of 2008, the Respondents-NHPC has failed to make an appointment in the post of Electrician to which the Petitioner belonged or to consider his case in an equivalent post as a person with disability despite several representations submitted by him.

(x) In reply to an application under the RTI Act seeking information as to the number of candidates appointed by the NHPC under Section 33 of the Act of 1995, it was informed that the Respondents-NHPC had indeed made provisions for reservation of persons with disabilities of 40% and above. Despite such provisions, the Petitioner's case who was suffering from 85% disability, has not been considered on the ground that the Petitioner was not engaged by the Respondent-NHPC but, by its contractor. The Petitioner re-emphasises that the injury suffered by him was as a result of his climbing on a "High Tension Gang Operator Pole of 11 KV" on the instructions of the officers under the Respondent No. 2 and, therefore, the Respondents-NHPC cannot avoid its liability and compliance of the judgment of this Court dated 27-08-2009 in WP(C) No. 15 of 2008.

(xi) It is alleged that in spite of the fact that the Petitioner was given written assurances by the Respondents No. 2 and 3 that his case would be considered in preference to the others as and when any reserved vacancy would arise and recruitment process to such post would be taken up they have failed to take steps for such recruitment.

(xii) It is stated that although the Respondent No. 2 asserts that it has not been taken up such recruitment, about 150 (one hundred and fifty) persons belonging to the Grade of the Petitioner were appointed and posted in different Power Projects under Respondents-NHPC in India and later sent to a Project in Bhutan and their services regularised in November, 2002 and, after completion of the Project they were transferred to different Projects in India. However, in spite of the written assurances given by the Respondents-NHPC, the case of the Petitioner had not been considered.

(xiii) Similarly, 13 (thirteen) posts in the same category have fallen vacant from year 2006 to February, 2015 due to retirements in one of which the Petitioner ought to have been and could have been considered for appointment.

(xiv) The Petitioner being a person with disability having been rendered so while being in the service of the Respondents-NHPC, was entitled to be protected under Sections 33, 34, 41 and 47 of the Act of 1995 and, it was incumbent upon the Respondents-NHPC to implement the Act of 1995 in its letter and spirit as mandated in the case of Justice Sunanda Bhandare Foundation (supra). It is stated that in spite of the aforesaid provision of law, specific written assurances and specific observations of this Court, the Respondents-NHPC had failed to consider the case of the Petitioner and appoint him in a suitable post as a person with disability.

(xv) The Petitioner thus prays for a mandamus, inter alia, directing the Respondents No. 2 and 3 to appoint him in one of the vacant posts or to create posts/vacancies in the reserved category under the Act of 1995 and appoint him to one of such posts in preference to the others as assured by the Respondents No. 2 and 3 in the year 1999.

2(i). The Respondents No. 2 and 3, the NHPC, without denying the factual aspects of the case in their reply, took the same stand as they had taken before the Chief Commissioner for Persons with Disabilities and this Court in WP(C) No. 15 of 2008 and state that the injury was sustained by the Petitioner in the employment of a contractor under the NHPC and was not employed by them and no relationship of "employer" and "employee" subsisted between them. It is asserted that the provisions of the Act of 1995 have been fully implemented by the Respondent No. 2 as required under Section 33 of the Act of 1995 and as directed by the Hon'ble Supreme Court in Justice Sunanda Bhandare Foundation (supra). It is their case that the Petitioner not being the employee who acquired the disability during the service under the Respondents-NHPC, the question of shifting him to some other post with the same pay scales and service benefits did not arise as required under Section 47 of the Act of 1995.

(ii) It is also asserted in the counter-affidavit that the Petitioner is at present not engaged by the Respondents-NHPC as claimed by the Petitioner but, by the contractor as an Attendant in the Electrical Division, ECD, Rangit Power Station, NHPC Limited, South Sikkim. The help extended by the NHPC for his medical treatment was on humanitarian grounds and, that the compensation awarded to the Petitioner by the Commissioner for Workmen's Compensation, Sikkim and the liability fixed on them to pay the compensation to the Petitioner awarded under the Workmen's Compensation Act, 1923, by the Commissioner under that Act, did not vest the Petitioner with any right as an employee under the Respondents-NHPC.

(iii) The 150 (one hundred and fifty) persons who were sent to a Project in Bhutan and whose services were regularised in November, 2002, were directly

employed by the Respondents-NHPC, unlike the Petitioner who was employed by a contractor under the Respondents-NHPC. So far as the vacancies arising on account of superannuation of the employees is concerned, it is specifically pleaded that such vacancies shall be created only after the surplus employees are adjusted against such posts and that the surplus manpower of the NHPC is being reduced with the introduction of VRS Scheme from time to time.

(iv) By referring to the Office Memorandum of the Ministry of Finance, Department of Expenditure, Government of India dated 18-09-2013, Annexure "C", it was stated that the austerity measures set out therein were also applicable to the Respondents-NHPC.

(v) The Respondents No. 2 and 3, however, have reiterated its commitment to consider the case of the Petitioner for employment against any reserved vacancies that may occur at the Rangit Power Station subject to him meeting the requisite criteria.

3(i). Mr. N.B. Khatiwada, Learned Senior Advocate, appearing for the Petitioner, argued that the Respondents No. 2 and 3 were deliberately not considering the case of the Petitioner and were giving untenable reasons to camouflage their failure to comply with their own written assurances in 1999, the observations of the Mobile Court of the Chief Commissioner for Persons with Disabilities in its order dated 05-03-2007 and the judgment of this Court dated 27-08-2009 in WP(C) No. 15 of 2008.

(ii) It was argued that contrary to their submission, the Respondents-NHPC have failed to implement the Act of 1995 in its letter and spirit as directed by the Apex Court in Justice Sunanda Bhandare Foundation (supra). Referring to Annexures "A" and "B" series filed by the Respondents-NHPC which are list of vacancies said to have been advertised for persons with disabilities, it was submitted that while Annexure "A" series pertain to Group "A" officers and staff of Group "C" categories, Annexure "B" series were only in respect of officers. It is thus clear that neither Annexure "A" nor Annexure "B" indicate any provision made in Category "D" employees to which the Petitioner belongs.

(iii) As per Mr. Khatiwada although the austerity measures, Annexure "C", was announced vide Office Memorandum dated 18-09-2003, the advertisement Annexure "A" would reveal that vacancies were still being filled up by the Respondents No. 2 and 3 even in 2013 and 2014 thereby eminently establishing that the austerity measures were not being strictly followed by them.

4. Mr. A.K. Upadhyaya, Learned Senior Advocate, appearing on behalf of the Respondents No. 2 and 3, on the other hand, submitted that apart from the Petitioner not being an employee of the Respondents-NHPC but under its contractor, his case has not been taken into consideration thus far as the Respondents-NHPC had not taken up any recruitment in the category of posts to which the Petitioner belong.

5(i). I have given anxious consideration to the rival submissions of the respective parties, pleadings and the documents on record.

(ii) There is no denial of the fact that the Petitioner was not employed by the Respondents-NHPC but by a contractor working under them. This fact was also noticed by the Chief Commissioner in his order dated 26-03-2008 and by this Court in its judgment dated 27-08-2009. It is for that very reason that the Chief Commissioner in his order held that the request of the Petitioner was unenforceable and by this Court that the Petitioner could not be given the benefit of the provision of Section 47 of the Act of 1995.

(iii) It is, however, noted that while rejecting the claim of the Petitioner, the Chief Commissioner in his order dated 26-03-2008 had observed as follows:--

"6. In view of the above submissions of the complainant, neither of the requests of the complainant can be enforced. However, keeping in view the fact that the complainant acquired disability while in employment of the contractor, who was working for the respondents, the respondents are advised to consider the complainant and give him preference while making recruitment against the reserved vacancies in future. The matter is disposed of accordingly." (iv) This Court had also, while dismissing the WP(C) No. 15 of 2008 filed by the Petitioner by its judgment dated 27-08-2009, observed as under:--

"22. However, before parting with the judgment, keeping in view the permanent disablement of the petitioner, who is personally present before this Court at the time of hearing and also considering his poor economic condition, we would like to reiterate, in the interest of justice, the observation made by the Chief Commissioner in paragraph 6 of the judgment and order dated 26.03.2008 as quoted above and accordingly we say that the respondents, i.e. NHPC may consider the case of the petitioner for his recruitment against any such reserved vacancies under the Act.

23. We hope and trust that such consideration shall be undertaken at the earliest possible date as and when such vacancy arises. The petitioner is directed to make a detailed application ventilating all his grievances so narrated in this writ petition before the competent authority, particularly respondent No. 2, the Chief Engineer, Ranjit Hydro-Electric Power Corporation, South Sikkim within a period of one month from today.

24. Be it mentioned that the dismissal of the writ petition shall not be a bar to consider the case of the petitioner as indicated above."

(v) From the above, it is quite evident that both the Court of the Chief Commissioner for Persons with Disabilities and this Court had taken note of the fact that the Petitioner had sustained the injury that caused his disability while being in the employment under the contractor working for the Respondents-NHPC as well as his poor and economic condition as would appear from paragraph 6 of the order of the Chief Commissioner and paragraph 22 of the

judgment of this Court reproduced above.

(vi) There can be no doubt that the Petitioner perhaps may not be entitled to a mandamus on the strength of the above, those obviously being observations. However, when we go deeper into the matter, it is quite apparent that the Respondents-NHPC had given written assurances to the Petitioner way back on 25-01-1999 by a letter in Hindi of that date and on 10-03-2010 in English filed as Annexure P-2 (collectively), intimating that his application for appointment in a suitable post in the NHPC may be considered when the Corporation would go for such recruitment.

(vii) It is also conceded on the part of the Respondent-NHPC that about 150 (one hundred and fifty) persons were appointed in the Grade of the Petitioner in different Power Project Sites under the NHPC in India and sent to "Kurichu" Project in Bhutan whose services were regularised in the year 2002 and on completion of the Project, they were transferred in different Power Projects in India. It is also undisputed that 13 (thirteen) vacancies were anticipated but, as per the Respondents-NHPC, those were being adjusted against the surplus employees. I have carefully read paragraph 23 of the counter-affidavit which is reproduced below:--

"23. That in reference to Para 25 (C) of the amended Writ Petition, it is stated that on achieving the age of superannuation, employee will be retired; however, the vacancies occurred due to retirement shall be created once the surplus employees of the corporation shall be adjusted against such posts. Presently, there are surplus manpower in the corporation and the surplus manpower is being reduced with the introduction of VRS scheme from time to time." (viii) Quite obviously the pleadings is confusing. It is not understood how surplus employees are being adjusted against vacant posts. No policy decision were forthcoming from the Respondents-NHPC when asked for from them. Although in the verification to the contents of this paragraph it has been stated to be matters of record, no record could be produced by the Respondent No. 2 in support of the contention. Reference was then made to Office Memorandum dated 18-09-2013 issued by the Ministry of Finance, Department of Expenditure, containing austerity instructions which as per Respondent No. 2 was binding on them being a Central Public Sector Undertaking. Paragraph 2.5 of the Memorandum has been strongly emphasised which we may reproduce below:--

"2.5 Creation of Posts:

(i) There will be a total ban on creation of Plan and Non-Plan posts.

(ii) Posts that have remained vacant for more than a year are not to be revived except under very rare and unavoidable circumstances and after seeking clearance of Department of Expenditure."

(ix) The Respondents-NHPC does not appear to be certain as regards the basis of the averments contained in paragraph 23 of the counter-affidavit reproduced

above. Obviously two inconsistent stand are being taken to justify their failure to recruit employees of the Petitioner's category. Paragraph 2.5 of the Office Memorandum relied on by the Respondents-NHPC quite apparently does not create a blanket ban in filling up existing vacancies or those that may arise for any reason. As would be evident on a bare perusal, what it bans under Clause (i) is the creation of new posts under both Plan and Non-Plan. However, under Clause (ii), posts are not to be revived only if they remained vacant for more than a year but, under very rare and unavoidable circumstances, it could be so revived after seeking necessary clearance from the Department of Expenditure. I am, therefore, not convinced by the reason put forth by the Respondents-NHPC for their inability to take up the recruitment of Group "D" employees. The case of the Petitioner could have been considered under clause (ii) against the reserved vacancies for persons with disabilities as assured by them and as expected of them by both the Court of the Chief Commissioner and this Court in their order and judgment referred to earlier.

(x) On 26-02-2015, the Respondents No. 2 and 3 sought permission of this Court to file lists of posts reserved for persons with disabilities under Group "A", "B", "C" and "D" as Annexures "D", "E", "F" and "G" respectively and the Learned Counsel for the parties were again heard on 02-03-2015. Those were filed to show that the Respondents-NHPC had complied with the Act of 1995 and had identified the various posts as required under Section 32 of the Act of 1995 to be reserved for the persons with disabilities as defined thereunder. Annexure "G" pertaining to Group "D" employee to which the Petitioner belong, indicates that 10 (ten) posts have been identified to be reserved for persons with disabilities, namely, Starter (Motor Transport), Daftary Attendant, Peon Office (Boy), Bearer, Wash Boy/Dish Cleaner, Supporting Staff, Technical Operator (Drilling), Topass, Washerman and Postal Attendant. However, nothing has been brought on record to show compliance of Section 33 of the Act of 1995 by appointing the percentage of vacancies as required thereunder. Annexure "G" only indicates that the posts had been identified. When asked, it was conceded by Mr. A.K. Upadhyaya, Learned Senior Counsel for the Respondents-NHPC, that there were no further documents. It is, therefore, quite clear that the Respondents-NHPC is not forthright in their stand.

(xi) There does not appear to be any impediment in the Respondents-NHPC considering the case of the Petitioner preferentially and to appoint him in any one of the vacancies arising due to the retirement of persons of the category of the Petitioner. The Petitioner may not have an enforceable right under Section 47 of the Act of 1995 but, considering the categorical written assurances of the Respondents-NHPC as far back as in 1999 and 2010 and, their reiteration of the commitment to consider the case the Petitioner for employment against any reserved vacancies as would appear from paragraph 21 of their counter-affidavit, it was expected of the Respondents-NHPC to have taken up the case of the Petitioner in any one of the vacancies that arose between the year 2006 and February, 2015. They also ought to have considered his case when about 150

(one hundred and fifty) persons were recruited and their services regularised in the year 2002. The judgment of this Court which was rendered by a Division Bench, also ought to have been given due regard. Hope and trust had been expressed therein that the case of the Petitioner would be considered "at the earliest possible date" as and when such vacancy arises making it very clear that the dismissal of the Writ Petition did not bar the Respondents-NHPC from considering the case of the Petitioner.

(xii) Contrary to what have been averred in their counter-affidavit in paragraph 24, the Respondents-NHPC have failed to comply with the Act of 1995 in its letter and spirit. Identification of posts short of any of those being actually reserved cannot be regarded as implementation of the law.

(xiii) As already noted, the Respondents-NHPC were not forthcoming with any material indicating that such reservation have indeed been made. They are thus in the breach not only of the law but, also of the directions contained in the case of Justice Sunanda Bhandare Foundation (supra), relevant portion of which reads as follows:--

"13. In our view, the 1995 Act has to be implemented in the letter and spirit by the Central Government, State Governments and Union Territories without any delay, if not implemented so far.

14. We, accordingly, direct the Central Government, State Governments and Union Territories to implement the provisions of the 1995 Act immediately and positively by the end of 2014."

(xiv) It is to be noted that the assurances given by the Respondents-NHPC and observations made by this Court as well as by the Court of the Chief Commissioner under the Act of 1995 were notwithstanding the fact that the Petitioner did not fall within the provision of Section 47 of the Act of 1995. It would also be relevant to note that the Petitioner has not been deprived of his employment but allowed to continue to serve as an Attendant in the Electrical Division, ECD. The Respondents-NHPC does not dispute this but states that the service is not under the NHPC but under the contractor engaged by it.

(xv) It is, however, not denied that he is engaged within the NHPC premises from where the contractor functions. Undeniably, the source of the contractor's payment to the Petitioner is the NHPC. It is, therefore, not understood as to why he could not have been directly recruited under the Corporation. The Respondents-NHPC quite obviously have been adopting an extremely pedantic approach in denying to extend the benefits provided under the Act of 1995 on the ground of the Petitioner's ineligibility thereunder. Their undertaking that the case of the Petitioner may be considered as and when vacancy would arise and recruitment process of such post would be taken up, appears to be empty incantations bereft of sincerity. It is orally submitted by Mr. A.K. Upadhyaya, Learned Senior Advocate for the Respondents-NHPC that the Corporation has been ensuring the continuance of the Petitioner's employment and assures that

it shall be continued in future also. But this, in my view, does not secure the Petitioner's service as it is left at the mercy of the persons who would be at the helms of affairs of the NHPC and the contractors.

(xvi) It is pertinent to note that the Petitioner is more than 44 years old with no hope of employment elsewhere. He has been languishing with uncertain future since 1993 with 85% disability and yet rendering his service with the hope of being absorbed in the regular service as a person with disability on the assurances extended to him by the Respondents-NHPC.

(xvii) Although it has been denied on the part of the Respondents-NHPC that the Petitioner had climbed on a "High Tension Gang Operator Pole of 11 KV" under the direction of its officers named by the Petitioner in paragraph 5 of the Writ Petition on 19-01-1993, the admitted fact that the Respondents-NHPC had borne the entire expenditure of his medical treatment of the injuries sustained by him leads me to be convinced of the assertions made by the Petitioner. This is reinforced by the fact that neither of the two officers, namely, Shri S.C. Garg, Assistant Engineer (Electrical) and Shri D. Chattopadhyay, Assistant Manager (Electrical), have come forward with any denial nor has paragraph 4 of the counter-affidavit containing reply to paragraph 5 of the Writ Petition been verified as being based on the information derived from the said two officers. It has been simply verified as being true to the knowledge of the Deponent, Jitendra Kumar, who is the Deputy Manager (HR) of the Respondent-NHPC at Rangit Nagar, South Sikkim.

6. For the reasons stated above, it is deemed appropriate in the interest of justice to direct the Respondents No. 2 and 3 as follows:--

"(i) To comply with the directions contained in paragraph 13 of Justice Sunanda Bhandare Foundation Vs. Union of India (UOI) and Another, and implement the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Respondents-NHPC shall ensure that reservation under Section 33 of the Act of 1995 is made in terms of the identification of the posts indicated in Annexure "G" filed with the application dated 26-02-2015, is made within a period of 60 (sixty) days from the date of this judgment;

(ii) After such reservation, within 30 (thirty) days and not later than that, the case of the Petitioner shall be considered in light of the observation made by the Division Bench of this Court in its judgment dated 27-08-2009 in WP(C) No. 15 of 2008 reproduced in sub-paragraph (iv) of Paragraph 5 above and also the written assurance given to the Petitioner by the Respondent No. 2 way back in the year 1999 and 2010, Annexure P-2 (collectively).

(iii) In the meanwhile, the Respondents No. 2 and 3 shall consider as to whether the Petitioner can be appointed in any one of the vacancies arising up to the month of February, 2015, in keeping with the commitment expressed by the Respondents No. 2 and 3 in paragraph 21 of the counter-affidavit by considering

the circumstance as very rare and unavoidable having regard to the observations made by the Division Bench of this Court in WP(C) No. 15 of 2008 and the assurances of the Respondents-NHPC referred to above."

7. With the aforesaid directions, the Writ Petition stands disposed of.

8. No order as to costs.