
(2014) 08 DEL CK 0083

In the Delhi High Court

Case No : WP (C) No. 4965 of 2014 & CM No. 9934 of 2014

Rakesh Kumar Giri

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 47, 73

Citation : (2015) 214 DLT 296 : (2015) 144 FLR 327 : (2015) 3 SLJ 202

Hon'ble Judges : Najmi Waziri, J; Kailash Gambhir, J

Bench : Division Bench

Advocate : Arun Srivastava, Advocate for the Appellant; Monika Arora, CGSC, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Najmi Waziri, J.—In this Writ Petition under Article 226 of the Constitution of India, the petitioner seeks a writ of mandamus for setting aside the notification dated 10.9.2002 whereby the respondent/Union of India has exempted the application of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the Act") to the Border Security Force. He also seeks quashing of the order dated 11.7.2014, 1.8.2014 issued by the respondents and a further direction that he be kept in service till the age of superannuation. The petitioners case is that he joined the BSF on 9.3.1990 as Sub Inspector and was later promoted to the rank of Inspector on 24.8.1998. During the course of his service he received various commendations till the year 2004. However on 18.12.2004, he met with a serious accident resulting in a neck injury, which rendered him a Quadriplegic, i.e. loss of sensation in all four limbs. He was declared 100 per cent disabled. Now he moves around on wheelchair with some effort, but is mentally alert and suitably employable; that on 25.2.2008 the respondents permitted his retention into service till completion of 20 years of service with the option of his

proceeding on voluntary retirement after completion of the said period. By the opinion of the Medical Board dated 3.2.2014, he was considered not fit for further service and an order in this regard was communicated to the petitioner. He contends that he represented to the Government to be retained in service on various grounds including: his physical, mental and spiritual conditions, all being such that he could still work in the BSF with limited duties. He also apprehended to be beset with severe difficulties in case of retirement on the ground of medical unfitness. However, vide order dated 11.7.2014, his representation was rejected. His subsequent representation to the Court of Chief Commissioner for Persons with Disabilities resulted in notice being issued to respondent No. 3 on 25.7.2014.

2. It is noticed that the petitioner was required to appear before the Review Medical Board at BSF Hospital, RK Puram, New Delhi on 25.7.2014 and yet again on 31.7.2014 between 1000 hours and 1600 hours. It is an admitted position that the petitioner defaulted in appearance on both occasions. The petitioner's case is that he would be entitled to continue in service in terms of sub-section (1) of Section 47 of the Act and that his service could not be dispensed with on account of his disability; that since he is disabled and not suitable for the post he was holding he could be shifted to some other post with same pay scale and service benefits.

3. He states that inasmuch as the respondent/Union of India has exempted the application of Section 47 of the Act to the Border Security Force he has suffered irremediably and is not being treated at par with other disabled persons employed in the State/Union of India. Hence, he argues, the action is arbitrary and falls afoul of Article 14 of the Constitution of India. He submits that in the first instance the Government lacks the power to issue the impugned notification exempting the application of Section 47 of the Act. He relies upon a Division Bench judgement of the Allahabad High Court in Dileep Kumar Singh Vs. Union of India and Others, which held that "legislature itself has contemplated that Notification of exception has to be issued with reference to the Proviso to sub-section (2) of Section 47 only. Therefore, Notification for exemption of the establishment has to be dealt with regard to what is covered by sub-section (2) of Section 47 and not the entire Section 47."

4. Section 47 of the Act reads as under:

"47. Non-discrimination in Government Employment - (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."

5. The Notification reads as under:

"S.O. 995 (E). - In exercise of the powers conferred by proviso to Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) the Central Government having regard to the type of work carried on hereby exempts all categories of posts of "combatant personnel" only of the Central Para Military Forces (CPMFs) namely, Central Reserve Police Force (CRPF), Border Security Force (BSF), Indo-Tibetan Border Police (ITBP) Central Industrial Security Force (CISF) and Assam Rifles from the provision of the said section."

6. Quite clearly the exemption has been made on the basis of proviso to sub-section (2) of Section 47 of the Act which empowers the Government to exempt "any establishment from the provisions of this section". The language of the statute is clear inasmuch as it refers to the entire Section and not to the sub-section only. This Court notices that Section 73 of the Act deals with power of the appropriate Government to make rules for carrying out the provisions of the Act. Sub-section 3 thereof details the manner in which a notification by the Central Government made under the proviso of sub-section (2) of Section 47 would be laid before each House of Parliament. Sub-section 3 deals with the powers of the appropriate Government for making of a modification in the Rule, notification or scheme under the Rule making powers. It does not refer to or deal with the powers of the Government to exempt certain provisions of the Act from being applicable to an establishment. Section 73 of the Act is restricted to the Rule-making powers of the appropriate Government, whereas Section 47 of the Act deals exclusively with the powers of the appropriate Government to exempt the entire Section from its application to any establishment. Therefore, reference to Section 73 of the Act which limits merely the Rule-making powers of the appropriate Government is misplaced. We are, therefore, in respectful disagreement with the aforesaid judgement of the Allahabad High Court.

7. This Court is of the view that the appropriate Government has the powers under the proviso to sub-section (2) of Section 47 of the Act to exempt any establishment from the provisions of the entire Section 47 of the Act. The respondents/Government of India is competent to issue a notification of exemption. The aforesaid power was exercised by the Government of India exempting the Border Security Force from the application of Section 47 of the Act. The Notification having been duly issued, the protection and benefits envisaged u/s 47 of the Act would not be available to the petitioner. Hence, there

is no cause for grievance against the respondents. The petition is without merit and is accordingly dismissed.