

(2016) 08 KAR CK 0097

In the Karnataka High Court

Case No : Writ Petition No. 6761 of 2016 (S-KAT)

T. Nagaraja Gowda

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 30-08-2016

Acts Referred:

Karnataka Civil Services (General Recruitment) Rules, 1977 — Rule 16(a)(iii)
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full
Participation) Act, 1995 — Section 47

Citation : (2017) 1 AirKarR 210 : (2017) 1 KantLJ 89 : (2016) 4 KCCR 3625 :
(2017) LIC 501

Hon'ble Judges : Jayant Patel and S. Satyanarayana, JJ.

Bench : Division Bench

Advocate : Sri Vijayakumar A. Patil, Additional Government Advocate, for the
Respondents; Sri P. Rajashekar, Advocate, for the Petitioner

Final Decision : Dismissed

Judgement

Jayant Patel, J. - Heard. Issue Rule.

2. With the consent of the learned Advocates appearing for both sides, the petition is finally heard.

3. The short facts of the case appears to be that on 26-10-1976, the petitioner was appointed as Primary School Assistant Teacher. On 27-8-2001, he was promoted as Headmaster in the Government Higher Primary School. On 4-4-2002, he was promoted as "Secondary School Assistant Teacher, Grade-IT. On 20-5-2002, the Medical Board advised him to change the cadre as he was suffering from chronic allergic bronchitis. On 4-11-2002, the second respondent submitted a proposal to the first respondent seeking approval for change of cadre of the petitioner from teaching to non-teaching cadre. On 20-1-2003, such permission was granted to change the cadre from "Secondary School Assistant Teacher, Grade-II" to "First Division Assistant" as per Rule 16(a)(iii) of the Karnataka Civil Services (General Recruitment) Rules, 1977 (hereinafter referred

to as "the Rules"). On 21-6-2003, the second respondent ordered for change of cadre of the petitioner in the pay scale of Rs. 3,850-7,050 under Rule 16(a)(iii) of the Rules. As per the petitioner, in the cadre of "Secondary School Assistant Teacher, Grade-II", prior to the change of cadre in the First Division Assistant, he was drawing the basic salary of Rs. 8,200/- in the pay scale of Rs. 4,575-8,400 (old pay scale) and as per the petitioner, the same pay scale was required to be protected even after change of cadre in "First Division Assistant" since change of cadre was on medical grounds. On 27-8-2007, fourth respondent sought clarification of his official superiors for fixation of the pay of the petitioner in the cadre of "First Division Assistant". On 28-3-2008, the second respondent also addressed a letter to the first respondent seeking clarification. On 10-9-2008, first respondent clarified that the pay of the petitioner be fixed in the changed cadre of "First Division Assistant". Accordingly, on 14-11-2008, the pay of the petitioner was changed in the cadre of "First Division Assistant" at Rs. 7,400/- on 1-10-2000, then at Rs. 7,600/- as on 1-10-2001 and at Rs. 7,800/- as on 1-10-2002 in the pay scale of Rs. 4,150-7,800 as against the pay scale of "Secondary School Assistant Teacher Grade-II" of Rs. 4,575-8,400. Under the circumstances, the petitioner preferred petition before the Tribunal for challenging the decision and for getting pay fixation in the pay scale of "Secondary School Assistant Teacher, Grade-II". The Tribunal, ultimately for the reasons recorded in the order, found that since the change of cadre was at the request of the petitioner and highest pay scale in the cadre of "First Division Assistant" was already given, the petitioner was not entitled to the protection of pay scale of Rs. 4,575-8,400, dismissed the petition. Under the circumstances, the present petition before this Court.

4. We have heard Mr. P. Rajashekar, learned Counsel appearing for the petitioner and Mr. Vijayakumar A. Patil, learned Additional Government Advocate appearing for the respondents.

5. The contention raised on behalf of the petitioner was that by virtue of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the "Act") on account of the physical disability while in service if any employee is required to work in the lower post, his pay is required to be protected. He submitted that after considering Section 47 of the Act, the Tribunal in other matter in Application No. 6614 of 2001 decided vide Order dated 19-8-2008 has held that pay was required to be protected. He also submitted that the very decision of the Tribunal was carried before this Court in Writ Petition No. 65474 of 2010 and this Court vide Order dated 17-9-2010, did not interfere with the view taken by the Tribunal and therefore in his submission, when legal position is that pay was required to be protected by Section 47 of the Act, any fixation of the pay lower than the pay scale in the cadre of "Teacher" which he was working can be said as illegal and the petitioner would be entitled to the protection of the pay and consequently his pay was required to be fixed in the cadre of "Secondary School Assistant Teacher, Grade-II" and also the consequential benefits. In his

submission, the Tribunal has not properly considered the matter and this Court may consider the same.

6. Sri Vijayakumar A. Patil, learned Additional Government Advocate appearing for the respondents has supported the judgment of the Tribunal by contending that no interference is called for.

7. Section 47 of the Act for ready reference can be reproduced as under:

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

8. It is true that as per Section 47 of the Act in any establishment of the Government if any employee acquires disability during the service, he shall be reduced in rank and even if he is shifted to the other posts, he is entitled for the same service benefit. But the relevant aspect is that he should have acquired disability". The word "disability" has been defined under the Act itself as per Section 2(i) of the Act which reads as under:

"2. (i) "Disability" means.---

(i) blindness;

(ii) low vision;

(iii) leprosy-cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness;"

9. The said disability again is to be read with Section 2(t) of the Act which reads

as under:

"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."

10. Therefore, it is not that all type of physical ailments are included within the meaning of the word "disability" nor it is that any percentage of such disability is to be treated as the disability for the purpose of availing the benefits of the Act. It is only certain disability as provided under Section 2(i) of the Act are identified by the Statute for extending the benefits of the Act and further as per Section 2(t), a person should be suffering from such disability not less than forty per cent of any disability as certified by the medical authority.

11. In the present case, the disability certified by the Medical Board was "chronic allergic bronchitis" which is not at all falling in the word "disability" as defined under the above referred Section 2(i). When the disability itself is not falling within the definition of the word "disability" as provided under the Act, the question of degree or percentage of such disability would hardly assume any importance. Under these circumstances, it cannot be said that petitioner would be entitled to the benefit of Section 47 of the Act for the protection of the pay scale on account of his physical ailment of chronic allergic bronchitis.

12. As such, the view taken by the Tribunal in the above referred decision dated 19-8-2008 in Application No. 6614 of 2001 is not a correct view so far as the applicability of Section 47 of the Act because the Tribunal has lost sight of the aspect that all disabilities are not included for extending the benefit under Section 47 of the Act, but only disability which are so defined under the Act itself are to be considered for the purpose of giving effect to Section 47 of the Act.

13. In the decision of this Court dated 17-9-2010, it is true that decision of the Tribunal dated 19-8-2008 was not interfered with, but there is no discussion in the order of this Court for the applicability or otherwise of Section 47 of the Act and hence the said decision as such cannot be read to confirm the view of the Tribunal for applicability of Section 47 of the Act.

14. In our view, even if the contention of the learned Counsel for the petitioner is considered for the sake of examination that indirectly the view taken by the Tribunal for applicability of Section 47 of the Act is confirmed by this Court, then also such contention would not be of any help to the petitioner for two reasons, one is that unless this Court expressly considers the point for applicability of Section 47 of the Act and expresses the view, it is no binding precedent as per law of precedent and the second is that even if such view is expressed, for applicability of Section 47 of the Act as was considered by the Tribunal but since the definition of the word "disability" as provided under Section 2(i) read with Section 2(t) is not considered, such view may result as per incuriam.

15. In view of the above, we find that when the petitioner is not entitled to the benefit of Section 47 of the Act, the ultimate decision taken by the Tribunal for

dismissal of the application calls for no interference. Hence, the petition fails and the same is dismissed.

No order as to costs. Rule discharged.