

(2018) 09 UK CK 0102
In the Uttarakhand High Court
Case No : Special Appeal No. 672 of 2018

Uttarakhand State Co-operative Federation Ltd	APPELLANT
Vs	
Shiv Kumar Sharma and another	RESPONDENT

Date of Decision : 27-09-2018

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(k), 47, 47(i)

Citation : (2018) 09 UK CK 0102

Hon'ble Judges : Manoj Kumar Tiwari, J; Sharad Kumar Sharma, J

Bench : Division Bench

Advocate : Subhash Upadhyaya

Final Decision : Dismissed

Judgement

Manoj K. Tiwari, J.

1. Heard on Delay Condonation Application No. 12403 of 2018.
2. Learned counsel for the respondent submits that he has no objection if the delay condonation application is allowed. There is 87 days delay in filing the special appeal. Cause shown in the delay condonation application is sufficient, therefore, delay is condoned. Delay condonation application is allowed.
3. Shiv Kumar Sharma-Respondent no.1 was a permanent employee of Uttarakhand State Co-operative Federation Limited and was serving as Electrician since 23.09.1987. While in employment, he acquired physical disability. Appellant ordered for his compulsory retirement, vide order dated 02.12.2015. Thus, feeling aggrieved respondent no.1 filed Writ Petition No. 1207 of 2015 (S/S) challenging the order of compulsory retirement and

also sought his reinstatement in service with all consequential benefits.

4. Learned Single Judge vide order dated 18.04.2018 allowed the writ petition by holding that the action taken by the employer is in violation of Section

47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the

Act'). Relevant portion of the impugned judgment is extracted below:

'It is an admitted fact that the petitioner acquired disability during his service. The respondent should have adjusted the petitioner against any post

or he could be kept on supernumerary post until the suitable post was available, till the attained the age of superannuation, whichever was earlier.

The action of the respondent retiring the petitioner compulsory without following the mandate of Section 47 of the Act, 1995 is illegal.

Accordingly, the writ petition is allowed. The impugned order dated 02.12.2015 (annexure No.12) is quashed and set aside. The petitioner will be

deemed to be continued in service of the respondent federation. It shall be open for the respondent to adjust the petitioner against any post or to keep

him on a supernumerary post until he attained the age of superannuation. '

5. Heard learned counsel for the parties and perused the material on record.

6. Appellant-Uttarakhand State Co-operative Federation Limited is an Apex Cooperative Society established under Uttarakhand Cooperative Societies

Act, which is funded by the State Government and the post of Managing Director is held by an I.A.S. Officer, therefore, there cannot be any doubt

that it is an establishment under Section 2(k) of the Act. Thus, provisions contained in Section 47 of the Act are applicable in the present case, which

is extracted below:

'47. Non-discrimination in Government employments.-(1) No establishment shall dispense with, or reduce 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 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 is 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.

7. Since, the order of compulsory retirement was passed against the respondent no.1 on 2. 12.2015, therefore, the new legislation namely, the Rights

of Persons with Disabilities Act, 2016 will not be applicable, as it was enforced only w.e.f. 19.4.2017. Undisputedly, respondent no.1 suffered paralytic

attack in the year 2014, while in employment, which resulted in physical disability and he was unable to perform his duties as an Electrician,

consequently, his salary was also withheld by the Federation. The Medical Certificate, submitted by respondent no.1, before the employer regarding

his disability, is on record.

8. On 18.02.2015, Managing Director of the Uttarakhand State Cooperative Federation Ltd. issued a circular inviting option from Officers/employees

of the Federation for voluntary retirement. Respondent no.1 also gave his option for voluntary retirement on

26. 02.2015 on account of his physical disability. However, no decision was taken on his option, instead respondent no. 1 was compulsorily retired

from service vide order dated 02.12.2015. Thus, it is contended on behalf of the appellant that petitioner himself had sought voluntary retirement,

therefore, there is nothing wrong if he was compulsorily retired from service.

9. Section 47 of the aforesaid Act is in the nature of guarantee to an employee, who acquires physical disability while in service. Since respondent

no.1 acquired disability during service, therefore, he is protected by Section 47 of the Act. Merely, because he gave option for voluntary retirement

pursuant to the circular issued by Managing Director, it cannot be said that he waived his rights available under Section

47 (i) of the Act. For a waiver of legally enforceable right earned by employee, same should be clear and unequivocal, conscious and with full

knowledge of consequences, as held by Honâ??ble Supreme Court in the case of Shashikala Devi Vs. Central Bank of India reported in (2014) 16

SCC 260.

10. From Annexure- 9 to the writ petition, it is apparent that respondent no.1 was not able to perform his duties. He had given option for voluntary retirement due to his physical disability. Thus, he was not aware of the rights available to him under law, therefore, the condition necessary for waiver of right is not present in the instant case. Since the option given by respondent no.1 was not unqualified, therefore, it was never accepted. In such view of the matter, the submission made on behalf of the appellant that respondent no.1 was not entitled to protection of Section 47 of the Act, cannot be sustained in the eyes of law.

13. In view of the language used in Section 47 of the Act, for no employer, who falls within the definition of "establishment" can dispense with services of an employee, who acquires disability during employment, notwithstanding any provision to the contrary contained in the Service Rules.

Service Rules are in the nature of subordinate legislation, which cannot override provisions of Parliamentary Legislation. Moreover, Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is a beneficial legislation which requires a liberal interpretation

to give effect to the legislative intent as held by Hon'ble Supreme Court in the case of Kunal Singh Vs. Union of India reported in (2003) 4 SCC

526.

14. In the present case, respondent no.1 was compulsorily retired from service on account of his physical disability, which he acquired during employment. Learned Single Judge has rightly held the same to be violative of Section 47 of the Act.

15. In such view of the matter, we do not find any reason to interfere with the impugned judgment, thus there is no merit in the case. The same is

liable to be dismissed and is hereby dismissed.

16. No order as to cost.