

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No. 10729/2009**

% **Date of Decision: 08.09.2010**

RAJINDER SINGH RANA Petitioner
Through Ms. Priyanka M. Bhardwaj, adv. for
Mr.M.K. Bhardwaj, Adv.

Versus

UOI AND ANR. Respondents
Through Nemo.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

: **MOOL CHAND GARG, J.** (ORAL)

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1. The petitioner who was appointed as Constable in RPF in 1974 declared as medically unfit after being subjected to a medical examination on 26.08.1991. At that time, the petitioner was getting salary in the pay scale of ₹950-1400 (₹4000-6000) but his pay was downgraded and he was granted pay scale of ₹850-1100 (2650-4000) after his medical examination, instead of permitting the petitioner to work as Naik, the petitioner was adjusted against the post of Parcel Maker without any protection of pay as per Rule 1309 of the Indian Railways Establishment Manual (IREM). Even though as per Rule 1314 of the IREM the respondents were required to offer post of equal grade to the petitioner. All this happened in 1991. The petitioner started making representation.

2. It is also the case of the petitioner that on 14.11.2007 the petitioner taking benefit of the judgments delivered in the case of similarly placed persons whose pay was protected in the original

scale, served a notice upon the respondents calling upon them to give benefits of the judgment passed in cases of others. However, the respondents failed to take any cognizance and thus, on 15.04.2009 the petitioner filed original application No.857/2009 before the Central Administrative Tribunal which was dismissed by the Tribunal vide order dated 15.04.2009 primarily on the ground that the application was time barred inasmuch as the cause of action arose in favour of the respondent sometime in the year 1991 but he approached the Tribunal in 2009.

3. It is in these circumstances, the petitioner approached this Court by filing this writ petition. It is contended that in terms of Rule 1301 and 1304 sub clause 2 in the matter of absorption of medically incapacitated in alternative post the railway staff is required to take care to ensure that the interest of the staff is not adversarially affected as far as possible. The alternative post to be offered to a person who is declared medically unfit should be such in which the staff can adequately work and get the same remuneration. It has been submitted that violating the aforementioned rules, the respondent appointed the petitioner as Parcel Maker in a lower scale.

4. On account of the same, not only has the petitioner been denied his correct scale of pay but he has also been put at loss with respect to grant of ACP etc. It is also the case of the petitioner that the respondents have protected the pay of similarly placed persons even after their medical decategorization. It is submitted that the action taken by the respondents is illegal and in contravention of paragraph 1314(a)(c)(1) of the Railway Code which reads as under:

“Quite often it happens that due to vacancies not being available in equivalent grade a medically decategorized employee has to be offered absorption in a lower grade. In some cases, such employees refuse to lower grades in the hope of vacancies in higher grades materializing. It should be open in such cases for an employee to accept a lower grade with a request that if a vacancy in a grade equivalent to what he held before de-categorization occurs in the same cadre he would be considered eligible for the same in preference to a junior medically de-categorized employee. It is also necessary for the administration suo-

moto, when considering the subsequently de-categorised employee for absorption in a cadre to look into cases where senior de-categorised employees may have been absorbed in lower grade in the same cadre during previous years and reinstating him.”

5. It is submitted that the respondents have not even considered the representation made by the petitioner for protection of his pay.

6. During the course of the arguments, the petitioner has also relied upon the judgments given by the Tribunal as well as by this Court in the case of other similarly situated persons where the pay protection has been granted. Reference has been made to a judgment delivered by a co-ordinate bench of the Tribunal in O.A.No.1377/2005. Mention has been also made about cases of others.

7. Nobody has come forward to oppose the writ petition.

8. At the outset we may observe that in view of the provisions contained under Section 47 of the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short ‘the Disability Act), the respondents were duty bound to have protected the pay of the petitioner in the pay scale in which he was originally appointed i.e. the pay scale of ₹950-1400 (₹4000-6000) instead of pay scale of ₹850-1100 (₹2650-4000). Section 47 of the Disability Act reads as under:

47- Non-discrimination in Government employment:

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.

9. A co-ordinate bench of this Court in the case of Chairman Railway Board Vs. Jagmohan Singh, ILR (2008) I Delhi 1039 considering the issue of promotion of a disabled person in the light of the provisions of the Disability Act has observed:

12. Our constitutional governance, as envisaged, respects basic human rights and promotes human development in all situations wherein the dignity and the worth of an individual lies at the core of a democratic value. The noble objectives and rights enshrined in our Constitution are to be materialized in regard to the entire Indian Society which also includes Communities that had remained disadvantaged and under developed due to various reasons and includes people with disabilities. It is the aim of any civilized society to secure dignity to every individual. There cannot be dignity without equality of status and opportunity. The absence of equal opportunities in any walk of social life is a denial of equal status and equal participation in the affairs of the society, and therefore, of its equal membership. The dignity of the individual is dented and direct proportion to his deprivation of the equal access to social means. The democratic foundations are missing when equal opportunity to grow, govern and give one's best to the society is denied to a sizable section of the society. The deprivation of the opportunities may be direct or indirect as when the wherewithals to avail of them are denied. Nevertheless, the consequences are as potent (See: **Indira Sawhney v. Union of India** AIR 1993 SC 477).

Let us understand the rights of disabled with aforesaid constitutional mandate in mind. Disability is a result both of the biological condition of the individual and of the social status that attaches to that biological condition. Till recently, persons with disabilities were depicted not as subjects of legal rights but as objects of welfare, health and charity programs. The underlying policy had been to segregate and exclude people with disabilities from mainstream society, sometimes providing them with special schools, sheltered workshops, special housing and transportation. This policy was perceived as just because disabled persons were believed incapable of coping with

both society at large and all or most major life activities. A Division Bench of this Court in ***Social Jurist, A Lawyers Group v. UOI & Ors.*** 2002 VI AD (DELHI) 217 was forced to pass the following comments:

"It is the common experience of several persons with disabilities that they are unable to lead a full life due to societal barriers and discrimination faced by them in employment, access to public spaces, transportation etc. Persons with disability are most neglected lot not only in the society but also in the family. More often they are an object of pity. There are hardly any meaningful attempts to assimilate them in the mainstream of the Nation's life. The apathy towards their problems is so pervasive that even the number of disabled persons existing in the country is not well documented.

T.R.Dye, Policy Analyst, in his book 'Understanding Public Policy' says:

"Conditions in society which are not defined as a problem and for which alternatives are never proposed, never become policy issues. Government does nothing and conditions remain the same."

This statement amply applies in the case of the disabled. At least this was the position till few years ago. The condition of the disabled in the society was not defined as a problem, and therefore, it did not become public issue. It is not that this problem was not addressed. Various NGOs, Authors, Human Rights Groups have been focusing on this problem from time to time and for quite sometime. But it was not defined as a problem which could become public issue. Until the realisation dawned on the Government and the policy makers that the right of the disabled was also a human right issue.

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Various kinds of rights are recognised in this legislation which is on the Statute book for last about 6 years now but the question is as to whether the Act is implemented in its true spirit and the rights conferred upon disabled under this Act have been translated into reality? Whether the disabled are able to reap the fruits of this legislation? The present case is a pointer to the fact that all is still not well.

Unless the mindset of the public changes; unless the attitude of the persons and officials who are given the duty of implementation of this Act changes, whatever rights are granted to the disabled under the Act, would remain on paper."

13. The subject of the rights of people with disabilities

should be approached from human rights perspective, which recognizes that persons with disabilities are entitled to enjoy the full range of guaranteed rights and freedoms without discrimination on the ground of disability. There should be a full recognition of the fact that persons with disability are the integral part of the community, equal in dignity and entitled to enjoy the same human rights and freedoms as others.

14. With this objective in mind the Disability Act was enacted. The Disability Act enacts a disability-equality law and does not limit itself to prohibiting discrimination, but addresses a wide range of issues relating to persons with disabilities. It is the legislative attempt to open up employment, education, housing, and goods and services for persons regardless of their disabilities in order to change the understanding of disability from a medical to a social category.

15. Therefore, providing employment to persons with disability is absolutely essential. As, with unemployment, comes isolation and fewer opportunities to participate in the life of a community or in recreational and social activities. Thus, a human rights approach offers both the platform for such societal transformation and a way for disabled people to transform their sense of who they are – from stigmatised objects of care to valued subjects of their own lives. For people who are poor and oppressed this is a key starting point of any meaningful process of social and economic development. According to **Gerard Quinn and Theresia Degener** (*Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability*. Geneva, Office of the High Commission for Human Rights. (2002) Available at, <http://193.194.138.190/disability/study.htm>, p.1.):-

“[T]he human rights perspective means viewing people with disabilities as subjects and not as objects. It entails moving away from viewing people with disabilities as problems toward viewing them as rights holders. Importantly, it means locating any problems outside the person and especially in the manner by which various economic and social processes accommodate the difference of disability or not as the case may be. The debate about disability rights is therefore connected to a larger debate about the place of difference in society.”

16. Introduction of provisions like Section 33 and Section 47 of the Disability Act is to be seen with this objective in mind.

10. We may also make a reference to the judgment of the Apex Court in Kunal Singh Vs. Union of India, AIR 2003 SC 1623 also relied upon by the co-ordinate bench in the aforesaid case, where also the issue of the benefit accrued to a disabled person has been discussed. In the said case, the Apex Court observed as under:

"9. 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 a 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 the 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 a 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."

11. In the light of what has been discussed above, the approach of the respondents who themselves were champions in the case to take care of the benefits of the disabled persons having made provisions of reservation for such persons even prior to coming into force of the Disability Act cannot be appreciated as they have acted with material irregularity and in ignorance of the social and legal rights of a disabled person namely the petitioner. They have not only committed constitutional wrong but also wrong towards human being who is not responsible for his being becoming disabled but has become so disabled on account of the circumstances for which he cannot be blamed. In any event his legal rights have to be protected even by the respondents.

12. No doubt there is delay in approaching the Tribunal by the petitioner. However, taking into consideration number of orders which have been passed with respect to similarly placed person, it was incumbent upon the respondents to have themselves straightened the record and in any case to have granted similar pay scale even if the petitioner was not eligible for working as a Naik and was only offered to work at a lower post, similar pay scale which was admissible to him earlier.

13. Taking all the facts into consideration, we cannot uphold the order passed by the Tribunal. Consequently, we allow the writ petition filed by the petitioner and direct the respondent to grant pay scale of ₹4000-6000 to the petitioner which was the pay scale in which he had been working at the time when he was declared medically unfit i.e. the year 1991. The petitioner would also be entitled to all benefits such as grant of ACP etc. which might have accrued to him in the course of time including higher pay scales as might be recommended by various pay commissions including the subsequent pay commissions. The respondents will fix the pay of the petitioner notionally as on the date when he was called upon to work at a lower post by taking into consideration the pay scale which was admissible to him before he was declared medically unfit. However,

keeping in view the delay in having approached the Tribunal, we restrict the payment of arrears only for a period upto three years prior to the petitioner having filed the Original Application before the Central Administrative Tribunal. The arrears so calculated would be paid by the respondents to the petitioner along with interest @ 9%. Needless to say that till the petitioner is superannuated he would be entitled to similar benefits which would include even the higher pay subject to his availing benefits of upgradation of pay. The needful be done by the respondents within a period of three months.

14. The writ petition is accordingly allowed. The order passed by the Tribunal is set aside.

15. No costs.

MOOL CHAND GARG, J.

SEPTEMBER 08, 2010
'anb'

PRADEEP NANDRAJOG, J.