

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

TUESDAY, THE 3RD DAY OF MARCH 2015/12TH PHALGUNA, 1936

WP(C).No. 24189 of 2006 (D)

PETITIONER :

**SANTHOSHKUMAR YADAV,
TC 32/9987, BEACH P.O., THIRUVANANTHAPURAM,
OFFICIAL ADDRESS: W/NO.1954, PRODUCTION DEPARTMENT,
TRAVANCORE TITANIUM PRODUCTS LTD.,
THIRUVANANTHAPURAM.**

BY ADV. SRI.K.T.SHYAMKUMAR

RESPONDENT(S):

- 1. THE TRAVANCORE TITANIUM PRODUCTS,
KOCHUVELI, THIRUVANANTHAPURAM.**
- 2. THE MANAGING DIRECTOR,
TRAVANCORE TITANIUM PRODUCTS, KOCHUVELI,
THIRUVANANTHAPURAM.**
- 3. STATE OF KERALA,
REPRESENTED BY THE SECRETARY,
DEPARTMENT OF INDUSTRIES, THIRUVANANTHAPURAM.**

**R1 & R2 BY SRI.B.S.KRISHNAN (SENIOR SC),TRAV.TITANIUM
ADVS. SRI.K.ANAND
SMT.LATHA KRISHNAN
R3 BY SR GOVERNMENT PLEADER SRI.SOJAN JAMES**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 03-03-2015,ALONG WITH WP(C).NO.9811 OF 2008, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

sts

APPENDIX

PETITIONER'S EXHIBITS:

- P1 COPY OF THE CERTIFICATE ISSUED BY THE DEPARTMENT OF ORTHOPEDIC TO THE PETITIONER DATED 14/1/2005**
- P2 COPY OF THE ORDER DATED 5/9/2005 OF THE LABOUR WELFATE OFFICER OF THE 1ST RESPONDENT COMPANY.**
- P3 COPY OF THE MEMORANDUM OF WRIT PETITION IN WP(C).NO.30245/2005**
- P4 COPY OF THE COUNTER AFFIDAVIT FILED IN WP(C).NO.30245/2005**
- P5 COPY OF THE ORDER PASSED BY THE 2ND RESPONDENT DATED 24/11/2005**
- P6 COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER DATED 6/12/2005**
- P7 COPY OF THE REPLY SUBMITTED TO THE PETITIONER BY THE MANAGER (PERSONNEL & ADMINISTRATION) OF THE 1ST RESPONDENT COMPANY**
- P8 COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER DATED 29/4/2006 TO THE 2ND RESPONDENT**

RESPONDENT'S EXHIBITS:

- R1(A) COPY OF THE AMENDMENT NOTIFICATION DATED 8/11/1997**
- R1(B) COPY OF THE BYE-LAWS OF THE TITANIUM EMPLOYEES BENEVOLENT FUND SCHEME 1983 AND SUPPLEMENTARY MEDICAL ASSISTANCE SCHEME**
- R1(C) COPY OF THE MD'S ORDER NO.02/2006 DATED 2/1/2006**
- R1(D) COPY OF THE DECISIONS OF THE MEETING HELD ON 2/12/2005**

/TRUE COPY/

P.S.TO JUDGE

sts

C.K.ABDUL REHIM,J.

WP(C).NO. 24189 of 2006 & 9811 of 2008

Dated this the 3rd day of March, 2015

JUDGMENT

Since the issue involved in both these cases pertain to the service conditions of the common petitioner, both the cases were heard together and disposed of through this common judgment.

2. The petitioner is a regular employee of the 1st respondent company which is an undertaking of the Government of Kerala. He was appointed as 'Work Assistant' in the company, on 26.9.1996. The petitioner met with an accident on 13.12.2002 and was remaining bed ridden for a long period from 13.12.2002 to 24.5.2004. He suffered compound comminuted fracture of both bones of his right leg as well as comminuted fracture of tibial condyle of the right leg. The injuries suffered had resulted in shortening of his leg as well as stiffness of the right knee. Exts.P1 and P2 certificates issued by the Orthopedic

Consultant at the Medical College, Thiruvananthapuram reveals that the petitioner had acquired partial permanent disability, the extent of which is assessed as 22%, as per the Mc Bride's scale. It is mentioned in the certificate that the petitioner is precluded from prolonged walking, climbing stairs, carrying heavy weight etc. After rejoining duty, the petitioner was assigned with "other duty" in clerical works. Exts.P3 to P6 are evaluation reports issued by the Medical Committee attached to the 1st respondent establishment, after fitness of the petitioner. It is evident that the medical committee had recommended to give the petitioner suitable working arrangement in posts where he can perform duties with his upper limbs in sitting posture. The above said reports would indicate that fitness of the petitioner was periodically assessed by the Medical Committee from 2004-2007. On the basis of those reports the petitioner was given 'other duties' which are suitable for him, considering his permanent disablement. In the meanwhile, during the year 2005, the Managing Director of the 1st respondent

company had issued an order dt. 24.11.2005 (Ext.P5 in WP (C).No.24189/2006) modifying the system with respect to payment of 'Production Incentive Bonus'. In the said order it was clarified that, employees on "other duties" are not performing their normal duties contributing to productivity and therefore no 'Production Incentive Bonus' will be paid to such employees. Eventhough the petitioner submitted a representation against the said decision, he was informed that Production Incentives cannot be paid to employees on 'other duty', who are posted outside their parent department on medical grounds. It was also informed that the petitioner cannot be re-posted to the Production Department, because suitable duties which can be performed using his upper limbs are not available in the said Department. It is challenging the said decision, WP(C). No.24189/2006 is filed.

3. During pendency of the said writ petition, WP(C). 24189/2006, in February 2008 the 3rd respondent had issued Ext.P9 proceedings informing that the 1st respondent

company is not in a position to engage the petitioner for work in his Department, till he is certified as fit by the Medical Committee. The petitioner was requested to report duty with fitness certificate from the Medical Committee. Reference contained in Ext.P9 is with respect to the report of the Medical Committee dt. 8.2.2008, copy of which is produced as Ext.P8. In Ext.P8 it is mentioned that the petitioner is unfit to perform duties in the Production Department because of his disability in the right lower extremity. On receipt of Ext.P9 the petitioner caused a lawyer notice demanding the 1st respondent to permit the petitioner to continue in the clerical work which was presently assigned in the Safety Department. But the 1st respondent had caused a reply notice refuting such demand. Hence the petitioner had filed the second writ petition, WP (C).No.9811/2008, seeking relief to quash Ext.P9 and also seeking declaration to the effect that the petitioner is entitled to protection as contemplated under section 47 of the Persons with Disabilities (Equal Opportunities ,

Protection of Rights and Full Participation) Act 1995 (hereinafter referred to as the Act for short).

4. When WP(C). No.9811/2008 came up for consideration on 2.7.2008 this court passed an interim order, based on the submission made on behalf of the 1st respondent that the petitioner will be accommodated in a post where he can discharge his duties with the disability. This court directed the petitioner to present himself on 7.7.2008 and the respondents were directed to accommodate the petitioner in a suitable post as contemplated under section 47 of the Act. It is submitted by the learned counsel appearing for the petitioner that pursuant to the above said interim order the petitioner was assigned with duty in a suitable post and is continuing as such. It is contended that the 1st respondent company is willing to accommodate the petitioner in such post until he is relieved of the permanent disability in any manner or till he attains superannuation. In view of the above situation prevailing the issue agitated in WP(C).9811/2008 no more

survives for consideration. In WP(C).No.24189/2006 the petitioner is challenging denial of benefit of 'Production Incentive Bonus' on the basis that he is assigned with 'other duty'. The petitioner is relying on section 47 of the Act to contend that on acquiring disability during service he is entitled to be protected by shifting him to some other post with the same pay scale and service benefits. It is pointed out that the proviso to section 47 imposes an obligation on the employer to adjust such employee himself on a supernumerary post, if it is not possible to adjust the said employee against any posts available. The said provision also insists that, promotion shall not be denied to any employee merely on the ground of his disability.

5. In the counter affidavit filed by the respondents in WP(C).24189/2006 it is contended that, the petitioner cannot be considered as a person with disability defined under section 2(t) of the Act, because he is not a person suffering from 40% disability as certified by the Medical Authority. It is contended that the Medical Certificate issued

from the Medical College hospital would indicate that the petitioner is suffering only from partial permanent disability to the extent of 22%. Contention is that since the petitioner will not come within the purview of 'persons with disability' as defined under the Act, he is not entitled to any of the protection envisaged under section 47. Further contention raised is that 'Production Incentive Bonus' is paid only as an incentive to achieve more production to workers engaged in production activity. Therefore the petitioner who is engaged in 'other duty' is not eligible to get such benefits.

6. However, it is pointed out that the orders impugned in WP(C).24189/2006 was subsequently reviewed and Ext.R1(c) order was issued by the Managing Director of the 1st respondent on 2.1.2006, directing clear-cut norms with respect to payment of 'Production Incentive Bonus' to workers on 'other duty' on medical grounds. Ext.R1(c) would indicate that employees posted on medical ground consequent to accident while on duty shall be eligible for Incentive Bonus. But they shall not be eligible for additional

Incentive Bonus payable to direct group of employees during the period of such posting.

7. Question to be considered is as to whether the petitioner is entitled to protection as envisaged under section 47 of the Act. Contention of the respondent is that he is not a person coming within the definition of persons with disability under section 2(t), cannot be countenanced. The term 'disability' is defined under section 2(i) of the Act. It means blindness, low vision, leprosy cured, hearing impairment, locomotor disability, mental retardation and mental illness. It is evident that the petitioner is having locomotor disability, due to shortening of his leg and stiffness on the knee. Section 2(o) defines 'locomotor disability' which means disability of bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy. It is not in dispute that the petitioner is suffering from substantial restriction of the movements of his limbs due to the disability. Therefore it cannot be disputed that the petitioner is a person suffering

from disability as defined under section 2(i)(v) read with section 2(o). Contention is that the petitioner is not a person coming within the definition of the persons with disability defined under section 2(t) which means a person suffering from not less than 40% of any disability as certified by a Medical Authority. The issue now stands clarified through a judgment of the hon'ble Supreme Court in **Kunal Singh vs. Union of India and another (2003 (4) SCC 524)**. It is held that, Chapter VI of the Act relates to employment and provisions contained therein deals with identification of posts which can be reserved for persons with disabilities and further deals with reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability and further requires the appropriate Government to formulate schemes for ensuring employment for persons with disabilities. But section 47 is included in Chapter VIII of the Act deals with an employee of an establishment acquiring disability during his service. Chapter VI deals with employment relating to persons with

disabilities. A persons who is entitled for protection under section 47 is a person who acquires disability during service, is not the person with disabilities defined under Act. If the person had acquired disability as defined under section 2(i) and 2(o) he cannot be denied such protection on the basis that he will not fall within the definition of persons with disability provided under section 2(t).

8. This court is of the considered opinion that the dictum contained in **Kunal Singh's case (cited supra)** will squarely apply on the facts and circumstances. It is not in dispute that the petitioner had suffered locomotor disability as defined under section 2(i) read with 2(o). Therefore it is to be held that the petitioner is a person who had acquired disability during his service. Going by the mandate of section 47 the 1st respondent is liable to provide the petitioner with some other post with the same pay scale and service benefits. If no such suitable post is available, the 1st respondent is at an obligation to keep the petitioner on supernumerary post, until a suitable post is available or the

petitioner attains the age of superannuation, which ever is earlier.

9. The next question to be considered is as to whether the denial of 'Production Incentive Bonus' on the basis that the petitioner is not working in the Production Department can be sustained or not. Learned Standing Counsel appearing for the respondents raised vehement contentions that the payment of 'Production Incentive Bonus' cannot be considered as pay scale or service benefits, as contemplated under section 47. According to him, the 'Production Incentive Bonus' is declared only as an incentive to acquire more production and such benefit is available only to those who are directly engaged in the production activities. But the respondents are not in a position to deny that the 'Production Incentive Bonus' is given as a benefit attached to the service of those who are engaged in the production activity. If that be so, the petitioner being a person entitled to protection envisaged under section 47 of the Act is perfectly entitled to have such

benefit. If the petitioner could not have acquired disability during his service, he could have definitely continued as 'Work Assistant' in the Production Department. In such case, he would have been entitled for 'Production Incentive Bonus' declared by the company from time to time. When the statute protects all service benefits for which the petitioner was entitled prior to his acquisition of disability, it cannot be contended that the petitioner can be denied of such benefits, because he was shifted from the Production Department to 'other duties' because of disability acquired while in service. Hence, this court is of the considered opinion that, the petitioner is entitled for all incentives declared from time to time by the 1st respondent company with respect to the post of 'Work Assistant' employed in Production Department. If the petitioner makes any representation with respect to payment of any such benefits which were denied during any particular year, the 1st respondent shall consider the same and shall take necessary steps to disburse such benefits.

10. Therefore these writ petitions are disposed of by declaring that the petitioner is entitled to the protection envisaged under section 47 of the Act and that he is entitled to continue in any suitable post with protection of equal pay scale and service benefits as available to the post of 'Work Assistant'. It is further declared that the petitioner is entitled to all service benefits attached to the post of 'Work Assistant' including the 'Production Incentive Bonus' and 'Additional Incentive Bonus. Respondents are directed to consider claim if any put forth by the petitioner on the basis of the above declaration and to disburse the same at the earliest, at any rate within a period of 6 weeks from the date of receipt of any such claim.

C.K.ABDUL REHIM, JUDGE

Pmn/