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

Date of Decision: September 2, 2015

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W.P.(C) 5344/2007

AIR INDIA LTD.

..... Petitioner

Through: Ms.Meenakshi Sood, Advocate with
Mr.Mukesh Kumar, Advocate

versus

CHIEF COMMISSIONER FOR PERSONS WITH DISABILITIES & ANR.

..... Respondent

Through: Mr.Pankaj Sinha, Advocate with
Ms.Nupur Grover, Advocate

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V.KAMESWAR RAO, J (Oral)

1. The challenge in this writ petition is to the order dated January 12, 2007 of the Chief Commissioner for Persons with Disabilities ("Chief Commissioner" in short), whereby the Chief Commissioner has directed the petitioner to fix the seniority of the respondent in the grade which she was holding prior to her transfer to Delhi on her own request and relegate her seniority only in relation to employees who were available in that grade and in the station/department/unit at that point of time.

2. The brief facts are, the respondent no. 2 joined the petitioner

organisation as Telephone Operator in Grade IV on February 13, 1984. She was confirmed on the said post on August 01, 1984. In July, 1989, she sought a voluntary transfer from Delhi to Kolkata. The terms and conditions for transfer from Delhi to Kolkata stipulated that she would be placed at the bottom of the seniority list of Telephone Operators in Kolkata. While working as Telephone Operator in Grade IV, the respondent no. 2 was promoted as Sr. Telephone Operator in the scale of Rs.1450-2285. While working as Sr. Telephone Operator in Kolkata, the respondent no. 2 had made a request for her re-transfer to Delhi. On October 07, 1992, the respondent no. 2 was transferred from Kolkata to Delhi. It appears that after a period of 8 months' on May 19, 1993, a communication was issued to the respondent no. 2 wherein it was mentioned that on her voluntary transfer to Delhi, her seniority amongst the Telephone Operators in the North India Region will be reckoned from the date of her reporting to Delhi Station and she would be relegated junior most amongst all the Telephone Operators including those on probation as on the date of transfer to Delhi Station. It was also communicated to the respondent No.2 that on her transfer, her pay shall be fixed in the pay scale of Rs. 1330-1755.

3. During the course of the submission, it was brought to my notice that

the respondent No.2 was promoted as Assistant Officer on January 10, 2001, Officer in the year 2006 and Assistant Manager in 2015. On November 04, 2005, the respondent no. 2 filed a complaint with the respondent no. 1 i.e. the Chief Commissioner. It appears that in her complaint, she has alleged that the petitioner has relegated her seniority and also reduced her basic pay on her transfer from Kolkata to Delhi on voluntary basis. The petitioner contested the complaint on the merit of the challenge justifying the seniority of the respondent no. 2 and also reducing her pay in a lower pay scale. The Chief Commissioner was of the following view:-

“11. Upon examining the submissions made by both the parties, this Court is of the opinion that relegation in seniority of an employee who has been transferred on his/her request should be done only within his/her own Grade to which he/she is substantively appointed or confirmed. It is observed that the reduction in pay has resulted due to reduction in rank of the complainant from Grade IX to Grade IV, which does not seem to be just and appropriate.

12. Keeping in view of the facts and circumstances of the case, Respondent is directed to fix the seniority of the complainant afresh in the grade which she was holding prior to her transfer to Delhi on her own request and relegate her seniority only in relation to employees who were available in that grade and station/department/unit at that point of time. The Respondent is further directed to protect the pay of the complainant that she was entitled in the confirmed grade before her transfer from Kolkata to Delhi.”

4. Ms. Meenakshi Sood, learned Counsel appearing for the petitioner submits that the Chief Commissioner had no authority nor was it within its power/competence in accordance with the provisions of the Persons with Disability (Equal opportunities, Protection of rights and Full Participation) Act 1995, to direct the re-fixing of the seniority of the respondent no. 2, which is an issue relating to a service dispute, need to be decided by Court of Competent Jurisdiction.

5. On merit, she would also justify the action of the petitioner in terms of staff notice dated September 07, 1981, more specifically clause (viii), which I reproduce as under:-

“(viii) In the case of categories of staff whose seniority was maintained unitwise/stationwise/departmentwise prior to June 30, 1974, their inter-se seniority on their transfer at their own request from one Promotional unit/station/department to another Promotional unit/station/department in the same scale of pay shall be reckoned from the date of their transfer to the latter Promotional unit/station/department, as the case may be, except in cases of categories of staff in respect of whom the inter-se seniority is maintained departmentwise. Subsequent to July 1, 1974, such staff, on voluntary transfer to another promotion unit/station/department in the same scale of pay, shall be ranked junior to the staff in the said promotion unit/station/department holding the post in the same grade from an earlier date on a substantive basis, irrespective of whether the former staff is confirmed or not, except in cases of categories of staff in respect of whom the inter-se seniority is maintained

departmentwise. In other words, such staff will be regarded as junior to all other staff, including probationers, in the same scale of pay, in the said promotion unit/station/department, subject to the exception mentioned below:

(a) Office Assistant confirmed in the grade

(b) Sr. Clerk promoted as a Office Assistant and on probation;

(c) Sr. Clerk recategorised as Office Assistant;

(d) Sr. Clerks.”

6. According to her, in terms of staff notice on voluntary transfer to another promotional unit/station/department, the employee shall be ranked junior to the staff in the said promotional unit/station/department holding the post in the same grade from an earlier date on a substantive basis, irrespective of whether the former staff is confirmed or not. She would rely upon two judgments of this Court reported as **(2002) IV AD (Delhi) 876 Virender Kumar Gupta Vs. Delhi Transport Corporation** and **(2007) III AD (Delhi) 134 Bhupinder Singh Vs. Delhi Commission for Women and Others** in support of her contentions to contend that the Chief Commissioner does not have the power to give direction for re-fixing the seniority. She would also rely upon the judgment of this Court in the case reported as **(2006) 91 DRJ 68 (DB), Air India Ltd. Vs. N.K. Sethi & Anr.** to contend that transferred employee will have to forego his seniority till the date of transfer.

7. On the other hand, Mr.Pankaj Sinha, learned Counsel appearing for the respondent no. 2 would support the impugned order of the Chief Commissioner dated January 12, 2007. According to him, the Chief Commissioner was within his right in terms of provisions of the Act of 1995 to give the direction for re-fixing of the seniority, if there is deprivation of rights of persons with disability. According to him, the denial of appropriate seniority to the respondent no. 2 is a deprivation of rights in terms of the rules and instructions issued by the petitioner. He would rely upon the judgment of the Supreme Court in the case reported as **2013 (7) SCC 182 Geetaben Ratilal Patel vs. District Primary Education Officer**, more specifically para 16, wherein the Supreme Court has upheld the order passed by the Commissioner under Section 62 of the Act of 1995 on a complaint filed by the appellant before the Supreme Court. He would also rely upon the judgment of this Court in Writ Petition (Civil) 2869/2003 decided on September 23, 2008 in the matter of **Secretary (Education) and Ors vs. Mukesh Chand and Another** in support of his contention about the maintainability of the petition before the Chief Commissioner as well as the power and competence of the Chief Commissioner to direct re-fixing of the seniority of the respondent No.2.

8. Having heard the learned counsel for the parties, insofar as the competency of the Chief Commissioner to direct the petitioner to re-fix the seniority of the respondent No.2 is concerned, the same is no more res-integra. The Supreme Court in the case of *Geetaben Ratilal Patel* (supra) while considering a case wherein, the appellant in that case was appointed on July 30, 1990 as Primary Teacher in Gujarat, was transferred to a different district within the State of Gujarat. She proceeded on medical leave from June 21, 1999 to July 30 1999 and remained on leave upto September 7, 1999. She did not produce any type of leave report. She further remained absent from September 15, 1999 unauthorizedly without producing any kind of leave report. On December 31, 1999, a notice was issued to the appellant regarding her time to time absence and was called upon to explain in writing the grounds for her absence within seven days. On April 15, 2004, she was dismissed from service. After a period of three years, in the year 2007, she filed an application before the Commissioner under Section 62 of the Act. It was the case of the appellant that though she was physically healthy at the time of joining the services, because of mental illness that she developed afterwards, she was treated by doctors time to time who advised her to take rest. She also pleaded that she was divorced by her husband in the year

1998. She started suffering from mental depression, which resulted in 40% to 70% mental disability.

9. On the other hand, the respondent in that case defended the action dismissing the appellant. The Commissioner, after hearing the parties, declared the dismissal as void and directed to count the intervening period as continuous period in service without any break and also to select the place of service of the appellant in such a manner that she can live with her parents as she requires constant assistance to become mentally healthy. The learned Single Judge dismissed the petition, so also the Division Bench. The challenge before the Supreme Court was that the Division Bench committed the same error as the learned Single Judge by not deciding the question of jurisdiction of the Commissioner and the question whether the appellant was entitled for the benefits under Section 47 (1) of the Act of 1995. It is noted from the judgment of the Supreme Court that the main question, which arose for consideration of the Supreme Court was whether the Commissioner under Section 62 of the Act, can look into the illegality of the order of dismissal from service of a disabled person if it comes to his notice that the said person with disability has been deprived of his rights. The Supreme Court answered the question in para 16 of the judgment, which I reproduce

as under:-

“16. The provisions of Sections 47 and 62 of the Act, when read together, empower the Commissioner, to look into the complaint with respect to the matters relating to deprivation of rights of persons with disabilities and non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions issued by the appropriate Government or local authorities and to take up the matter with the appropriate authorities for the welfare and protection of rights of persons with disabilities including matter relating to dispensation with service or reduction in rank. The power of the Commissioner “to look into the complaints with respect to the matters relating to deprivation of rights” as provided under Section 62 of the Act is not an empty formality and the Commissioner is required to apply his mind on the question raised by the complainant to find out the truth behind the complaint. If so necessary, the Commissioner may suo motu inquire into the matter and/or after giving notice, hearing the concerned parties and going through the records may decide the complaint. If it comes to the notice of the Commissioner that a person with disability has been deprived of his rights or that the authorities have flouted any law, rule, guideline, instruction etc. issued by the appropriate Government or local authorities, the Commissioner is required to take up the matter with the appropriate authority to ensure restoration of rights of such disabled person and/or to implement the law, rule, guideline, instruction if not followed. A complaint may be made by any disabled person himself or any person on behalf of disabled persons or by any person in the interest of disabled persons. Thus the issue as involved is decided affirmatively in favour of the appellant and against the respondent.”

10. Thereafter, the Supreme Court went on to consider the merits of the issue raised in the petition and upheld the order of the Commissioner in that

case and directed the authorities to reinstate the appellant in service with regular salary every month and arrears thereto with effect from February 1, 2008. In view of the aforesaid conclusion of the Supreme Court, I am of the view that the complaint against appropriate seniority before the Chief Commissioner was maintainable and has been rightly decided by him.

11. Insofar as the merit of the dispute is concerned, the question that would arise for consideration is whether on her voluntary transfer from Kolkata to Delhi, the respondent No.2 shall be ranked junior most amongst all Telephone Operators including those on probation as on the date of transfer of respondent No.2 to Delhi and whether the pay of the respondent No.2 can be fixed in the lower pay scale of Rs.1330-1755. I note, both the parties have relied upon the aforesaid staff notice dated September 7, 1981. A perusal of clause 8, which I have already reproduced above would reveal that the employee who is transferred voluntarily to another unit/station/department shall be ranked junior to the staff in the said promotion unit/station/department holding the post in the same grade from an earlier date on a substantive basis irrespective of whether the former staff is confirmed or not. In other words, such staff will be regarded as junior to all other staff including the probationer in the same grade in the said

promotion unit/station/department subject to the following exceptions:-

- (a) Office Assistant confirmed in the grade*
- (b) Sr. Clerk promoted as a Office Assistant and on probation;*
- (c) Sr. Clerk recategorised as Office Assistant;*
- (d) Sr. Clerks.”*

12. The case of respondent No.2 does not fall under the exceptions mentioned above nor it the case of the petitioner. As is clear from clause 8, the seniority would be at the bottom of the unit/station/department in the same scale of pay, which in this case was Rs.1450-2285 and not Rs.1330-1755 in which scale, the seniority of the respondent No.2 has been fixed. The fixing of seniority of respondent No.2 cannot be justified. That would amount to reduction in rank/grade as well, which is permissible only under Conduct Rules as a penalty.

13. Ms. Meenakshi Sood, during her submission, submits that the respondent No.2 having accepted the terms of letter dated May 19, 1993 could not have challenged the seniority as a Telephone Operator and the direction of the Chief Commissioner would create administrative chaos.

14. The plea of administrative chaos, is not applicable, as I note, such plea on the ground of delay has not been taken by the petitioner in their reply before the Chief Commissioner and as such, there was no occasion for the Chief Commissioner to look into the issue from that perspective. In

view of the fact that such an issue was not raised, this Court rejects the plea as that is a mixed question of fact and law. That apart, I note that the impugned order is dated January 12, 2007, eight years have passed thereafter. Even in this petition, the petitioner has not specifically pleaded delay. Further, the plea would not be applicable as I have been informed the person junior to her in her batch is also working as Asstt. Manager on which post, she has been promoted in 2015. Further, the issue relates to deprivation of rights of a person who is physically challenged, this Court is of the view that in exercise of its power under Section 226 of the Constitution, the impugned order need not be interfered. The order of the Chief Commissioner dated January 12, 2007 is sustained.

15. The petition is dismissed. No costs.

V. KAMESWAR RAO, J

SEPTEMBER 02, 2015

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