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THE HON'BLE SRI JUSTICE P.NAVEEN RAO

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WRIT PETITION NOs.382 & 384 of 2012

Date: 08.03.2016

W.P.No.382 of 2012:

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Between :

Y.Venkata Ramana (EC No.4017198),
S/o Raghavulu, Aged about 53 years,
Working as General Mazdoor (Surface)
at OCP-II, Singareni Collieries Co. Ltd.,
Manuguru, Khammam District.

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.... Petitioner

And

The Singareni Collieries Company Limited,
Rep.by its Chairman & Managing Director,
Kothagudem, Khammam district and others.

.... Respondents

This Court made the following :

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION NOS.382 & 384 of 2012

COMMON ORDER :

Petitioners initially joined services of Singareni Collieries Co., Ltd., as Dumper Operator (petitioner in W.P.No.382/2012), E.P. Operator (petitioner in W.P.No.384/2012) respectively. Both the petitioners are subsequently declared as medically unfit by the Medical Board, to perform the duties to which they were appointed and the report of the Medical Board also suggested that they were fit to perform the duties of General Mazdoor (Surface). Accordingly, petitioners were appointed as General Mazdoors. On appointment as General Mazdoors, the pay of the petitioners were fixed on per day basis, which is lower than the pay paid to them in initial post. The petitioners contend that they are entitled to pay protection as granted to them while they were working in the post to which they were recruited and cannot be relegated to a lower pay. Aggrieved by denial of the pay fixation as claimed by them, petitioners filed these writ petitions.

2. Heard Sri K.Vasudeva Reddy, learned counsel for the petitioners and Sri Nandigama Krishna Rao, learned Standing Counsel for the respondents.

3. Learned counsel for the petitioners contended that since petitioners were declared as medically unfit to perform the duties of the post held by them and appointed them in alternative post, they are entitled to pay protection and they cannot be put into the lower pay as now fixed and such action is ex-facie illegal, arbitrary and unconstitutional.

4. Learned counsel for the petitioners further contended that the very action of the respondent-Singareni Collaries, Co., Ltd., amounts to violating the mandate of 'The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995' (Act No.1 of 1996) (for short 'the Disabilities Act, 1995'). Learned counsel further contended that the Mines Act, 1952 (for short 'the Act') also provides for alternative employment. In terms of the provision contained in Section 9-A (4) & (5) of the Act, right is vested in the petitioners for provision of alternative employment once they are declared as unfit to perform the duties of the post to which they were recruited and it would necessarily imply that protection of pay has to be granted to them as was drawn by them in the earlier post. In support of the said contention learned counsel placed reliance on the decision of this Court in WP No.36797 of 1998.

5. Learned counsel further contended that in fact there was settlement between the management and the workers union and in terms of the said settlement the management has agreed for granting of pay protection to persons who were declared as unfit to perform the post held by them and are provided alternative employment.

6. Learned counsel for the petitioners further contended that the management cannot rely upon a stereo typed proforma application drawn up by the Respondent-Singareni Collieries, for the purpose of reference to Medical examination to deny the pay protection. The pay protection is an inherent right vested in the petitioners in the alternative job provided to them having suffered disability while in employment.

7. Learned counsel for the petitioners contended that the declarations to provide alternative employment were obtained on printed proformas and an employee seeking alternative employment had no option but to sign the printed proformas. These people are low

educated persons and they cannot be expected to understand or have knowledge of the terms used to protest any such condition. More over petitioners were in need of alternative employment and therefore, the petitioners had to sign on whatever is printed in the proformas.

8. Learned Counsel further submitted that Form P-1 appended to the Mining Rules, 1955 is for determination of standards of vision. According to the medical certificate issued on examination of the petitioners, they were assessed of not meeting the standard of vision as prescribed and therefore they were declared as medically unfit to do the job in which they were working and thus all the norms for provision of alternative employment would equally apply and the statutory protection given by Chapter IV-A of the Mining Rules would equally apply to the petitioners.

9. Learned Standing counsel submitted that the provisions of Section 47 of the Disabilities Act, 1995 are not attracted to the Singareni Collieries as the respondent company is exempted and therefore the petitioners are not entitled to claim pay protection as a consequence to granting them alternative job, once they are declared as unfit to perform the actual duties assigned to them.

10. Learned Standing counsel further contended that the letter written by the petitioners for reference to Medical Board itself amounts to their agreeing to take lower post. Once they have agreed to take the lower post, necessarily whatever, the pay attached to the lower post alone would be paid and cannot claim the pay of higher post. Even otherwise, once petitioners are declared as unfit to perform the duties of the existing post and as a matter of welfare measure alternative job is provided to them, only pay and allowances attached to the said posts have to be paid and not the higher pay as claimed by the petitioners.

11. Learned Standing counsel submitted that to attract Section 9-A

of the Act, it is necessary that an employee working in a mine should be chosen for examination in any safety and occupational health survey as mandated by Sub-Section (1) and in such examination, if he is declared as unfit, he is entitled to protection granted by Sub-Section (5) and only in such case, an alternative employment can be provided.

In the instant case, petitioners were not declared as unfit by following the said procedure. The decision relied upon by the learned counsel for the petitioners do not come to his rescue as they are rendered covering the situation arising out of Section 9-A of the Act.

12. Learned Standing counsel submitted that in terms of the agreement entered into with the Employees Union in the year 1990, whenever a person is declared as medically incapacitated to work in the mines, he should be provided alternative job on the surface with protection of increment in the lower cadre. The agreement does not envisage pay protection. The instant case is covered by Para No.7 of the said Agreement and the respondent company has duly complied with the said agreement. He further contended that the petitioners have agreed for taking alternative job and gave an undertaking that they would not claim pay protection and taking into consideration their undertaking, they were provided employment.

13. He raised objection on the maintainability of the writ petitions on the ground of delay. According to learned Standing counsel, employment was provided to the petitioners as requested by them in the year 2006, whereas these writ petitions are instituted in the year 2012 and therefore, on this ground alone the writ petitions are liable to be dismissed.

14. The point for consideration is whether petitioners are entitled to claim pay protection as granted to them while they were working as Dumper Operator and E.P. Operator respectively, on their appointment as General Mazdoor (surface) ?

15. The same issue has come up for consideration before this Court in W.P.No.36797 of 1998. In the said writ petition, petitioner joined service as Coal Cutter and promoted as Shot Firer. On account of the accident occurred to him, he was declared unfit for underground job. As a consequence, he was terminated from service by order dated 11.06.1987 w.e.f. 26.05.1987. However, by order dated 17.06.1987, he was temporarily appointed as Supervisor in Timber Yard for a period of three months. By order dated 29.12.1987, he was appointed as Shot Firer.

16. Praying to protect the pay drawn by him prior to his retirement and to treat him as in continues employment, he filed the above writ petition. In the said writ petition similar contentions were urged on behalf of the respondent company including delay and acquiescence. On detailed analysis of the relevant provisions of the Mines Act and contentions of the respondents, learned single Judge rendered judgment in favour of the petitioner therein.

17. The principles deducible from the above judgment are as under:

i) "When once a competent Medical Board declares a person, who is working in a mine, as not fit for undertaking the job, which he was performing earlier, be it because of a mine accident or sans such an accident, it makes no difference for his re-employment. To my mind, sub-section (5) of Section 9-A of the Act gets attracted to every case where performing earlier";

ii) Merely because an employee accepts alternative employment and receives pay at the basic minimum of the scale of pay attached to that post, to which he is subsequently appointed, without any protest, does not amount to waiver of his right to seek pay protection nor would it amount to acquiescence;

iii) Delay in instituting the writ petition should not be treated as fatal. Normally, delay and latches on the part of those who seek to invoke writ jurisdiction, if interests of another person or employee are

involved, would be put against them. In cases of this nature such principle cannot be applied. In cases of this nature, no interest of third parties are involved;

iv) Once an employee reaches particular stage of pay structure and if he is re-categorized because of the requirement of certain standards of health or physical fitness, he should not be made to restart his career by drawing his salary and allowances at the bottom of the scale of pay. The pay drawn by him in the previous assignment/post should continue to be protected from that stage in the alternative employment; and

v) Reengagement of an employee declared unfit to continue in the post to which he is working, on re-engagement in an alternative post should not mean a fresh appointment and cannot be made to lose the benefits of continuity of service. Such persons are entitled to the benefit of continuity of service as well.

18. Aggrieved by the said decision, the respondent company preferred W.A.No.265 of 2010. When the writ appeal was taken up for consideration, on behalf of the respondent company, it was represented that the company would like to settle the matter amicably and, therefore, proceedings were issued calculating the difference of arrears and gratuity from the date due till the date of death of that employee. The writ appeal was disposed of based on the said statement.

19. The issue can also be examined from another angle. There are people who are disabled by birth or acquired during the life time. Due to such disability, their dependence is more on others. A disabled person is neglected/ill treated and same care and affection is not extended as is given to ordinary persons. In many instances, their basic needs are not attended. It is an un-equal treatment to persons who are also entitled to all rights and safeguards bestowed in them by the Constitution of India. What is not appreciated is disabled persons

are also equally entitled to mandate of Articles 14, 16 and 21. They have right to a decent and honorable living. Though, State and its instrumentalities must endeavor to protect and preserve their rights, they are ill-treating and adopting arbitrary policies.

20. This ill treatment/neglect is a universal phenomenon. World over, several movements launched to achieve some sort of protection and helping hand, yielded results in the form of Beijing Proclamation of 1992. India was a signatory to this proclamation. As per the commitment made by India, "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was enacted.

21. The Act intends to provide a mechanism to ensure equal participation, safeguards and all the other objectives of the enactment. Act deals with safeguards in the matter of education, employment and in social life.

22. While so the United Nations General Assembly passed resolution on 13.12.2006 on the 'Convention on the Rights of Persons with disabilities'. India ratified the convention on 01.10.2007. The convention came into effect on 03.05.2008.

23. The convention recognizes that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. Some of the important provisions of the Convention are listed here under:

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Preamble :

The States Parties to the present Convention

(a) to (d)

(e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

.....
.....

(h) Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(i) Recognizing further the diversity of persons with disabilities,

(j) Recognizing the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(k) Concerned that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.

Article - 2

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment of exercise, on equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation ;

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment of exercise on an equal basis with others of all human rights and fundamental freedoms;

Article – 4 :

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and

practices that constitute discrimination against persons with disabilities.

Article 27 : Work and Employment:

1. State parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by making appropriate steps, including through legislation, to , inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances.

24. As a consequence to ratification of United Nations Convention, Government of India set in motion the process of revamping the Act, 1995 and to bring in tune with the international commitments. A comprehensive bill is drafted for consideration of Indian Parliament. The bill is pending approval of the Parliament. Bill seeks to bring about significant changes in the provisions on various aspects including the definition of disability. It is wider and incorporates provision for addition. The endeavour is to ensure full participation by disabled persons in all activities of life an able bodied person can perform without any hindrance and not to discriminate disabled persons in all aspects of life. The point in issue require consideration, having due regard to the above legal framework.

25. **Anand Bihari and others vs. Rajasthan State Road Transport Corporation, Jaipur**^[1] is a case prior to Act 1 of 1996.

Several drivers working in Rajasthan State Road Transport Corporation were prematurely terminated from their services on the ground that they became medically unfit to drive the heavy vehicles as they developed defective eyesight and not meeting the required vision for driving the heavy motor vehicles.

26. Drivers contended that the said termination violates Section 2(oo) of the Industrial Disputes Act, 1947 and also contrary to an agreement between the drivers' union and the corporations, where under it was agreed to provide alternative job to the drivers declared as unfit. While rejecting both contentions, Supreme Court, however, found that the action of the respondent corporations therein was not proper, equitable and justified on the touch stone of the constitutional mandate. The Supreme Court was of the view that the defects developed by the drivers was directly attributable to the nature of the employment. As suggestion made by the Court to formulate a scheme to ameliorate their suffering was not properly responded by the respondent corporation, the Supreme Court itself formulated the scheme. Salient features of the scheme formulated by the Supreme Court were, (i) to provide alternative job that may be available to which a driver is eligible; (ii) in case no alternative job is available, the driver should be paid retirement benefits and additional compensatory amount; the Supreme Court indicated payment of amounts depending on the left over service; (iii) Supreme Court further directed that if the alternative job was not immediately available, it should be offered as and when such job is available. The scheme formulated by the Supreme Court in the above case is now incorporated in Section 47 of the Act.

27. In **Narendra Kumar Chandla vs. State of Haryana and others**^[2], Supreme Court held that Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to

perform the duties of the post he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge his duties. This case was also decided prior to Act 1 of 1996.

28. Thus, even before the Act 1 of 1996 was notified, Supreme Court was of the opinion that having regard to the constitutional mandate, an employer cannot through the employee to hindrance on account of disability suffered by him during the course of the employment, which disability may be directly attributable to the nature of the employment.

29. Ordinarily, a Dumper Operator/E.P.Operator once appointed to service is entitled to continue in service until he attains the age of superannuation or disciplinary action initiated against him ends in abrupt termination of his service. The medical invalidation only advanced his retirement, a premature retirement. Such medical invalidation, in most cases, is on account of higher standards of fitness required to work in a local mine but such employee is suitable to do any other job. Such medical invalidation is acquired during the course of employment. The employer recognizes this fact but shows disinclination to grant full benefits. This is the reality in all sectors and by all employers. The employer is looking at granting alternative job itself as conferring undue favour.

30. A person who acquired disability while in employment and declared as unfit to work in a mine and capable of doing any other job with equal competence cannot be denied right to work with dignity, honor and self respect. He cannot be denied at least protection of pay he was drawing though post offered to him is lower than he was holding.

31. Accepting a post lower than he was holding itself amounts to sacrificing his self respect, though financial constraints compel them to take the job offered. If an employee is declared as unfit to perform the

duties in a mine on the ground that he acquired disability while in employment, he must be treated with dignity and respect he deserves. Employee has every right to command such respect from employer. It is the responsibility of employer to provide alternate job of equal status and emoluments. If it is not feasible to provide alternative job of same status, it is incumbent on employer to at least to provide him pay protection hitherto drawn by him. The alternative post offered to him cannot be treated as a fresh appointment. It is in continuation to job held by him prior to disqualification. The principle laid down by this Court in W.P.No.36797 of 1998 has become final and the said principle is equally attracted in the cases on hand. In view of "U.N. Convention of rights of persons with disabilities" and two decisions of Supreme Court, referred to above, it is no more open to employer, more so a public sector organization to ill-treat a disabled person in the matter of provision of alternative job and protection of pay and allowances.

32. I, therefore, see no justification in denying the benefit of pay protection to petitioners as per the pay scales attached to the posts of Dumper Operator and E.P. Operator and the last pay drawn by them.

33. The impugned orders are set aside. Writ petitions are allowed. Respondents are directed to revise the pay of petitioners in the post of General Mazdoor (Surface) by applying the scale of pay to the posts of Dumper Operator and E.P. Operator respectively, fix the pay of petitioners as per the last pay drawn by them in the posts of Dumper Operator and E.P. Operator respectively with all consequential benefits and shall settle the arrears of pay and allowances payable to them on such determination within three months from the date of receipt of copy of this order. There shall be no order as to costs.

Miscellaneous petitions if any pending in the writ petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 08.03.2016

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[\[1\]](#) (1991) 1 SCC 731

[\[2\]](#) (1994) 4 SCC 460