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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No. 2868 of 2016

1. South East Central Railway Through General Manager S.E.C.R. Bilaspur, Distt. Bilaspur, (Chhattisgarh) 495004
2. Chief Personnel Officer, South East Central Railway, Personnel Department, Bilaspur, Distt. Bilaspur, (Chhattisgarh) 495004
3. Divisional Railway Manager, South East Central Railway, Raipur Division, Raipur, Distt. Raipur, (Chhattisgarh) 492008
4. Senior Divisional Personnel Officer, South East Central Railway, Raipur Division, Raipur, Distt. Raipur, (Chhattisgarh) 492008

---- Petitioners

Versus

- Rajiv Nagaria S/o Shri D. P. Nagariya, Aged About 41 Years Presently Posted As Office Superintendent Grade-I (OS-I) Personnel Department Office Of Sr. D P O, South East Central Railway, Raipur, (Chhattisgarh) 492008

---- Respondent

For Petitioners	:	Shri Abhishek Sinha, Advocate
For Respondent	:	Shri Amrito Das, Advocate

Hon'ble Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Judgment on Board

Per Thottathil B. Radhakrishnan, Chief Justice

01.05.2017

1. This writ petition under Article 227 of the Constitution of India is filed by the South East Central Railways challenging Annexure-P/1, order dated 11.03.2016, issued by the Central Administrative Tribunal, Jabalpur Bench on an Original Application filed by the Respondent herein.
2. We have heard the learned counsel for the petitioners and the learned counsel for the Respondent.

3. Respondent joined duty in the Railways on 22.08.1997 before which he was subjected to medical examination by the Senior DMO of the Railways. Later, while the respondent was serving the Railways as Section Engineer (TRS), he was subjected to second medical examination on 17.01.2000 and thereupon by a Medical Board. Consequently, on 17.01.2001 the establishment served a charge-sheet on the respondent alleging that he had committed serious misconduct by manipulating the colour blindness test at the time of recruitment and that was detected in the later examination of the Medical Board held of 17.01.2000. The disciplinary authority concluded the disciplinary proceedings against the delinquent and imposed the punishment of removal of the respondent from service. The institutional Appellate Authority dismissed the respondent's appeal on 31.12.2003. A revision petition filed by him on 02.03.2004 was dismissed on 19.10.2004. That was carried by the respondent to the Central Administrative Tribunal by instituting O.A. No.58/2004. The Tribunal decided that Original Application holding that the disciplinary proceedings against the delinquent was a situation of no evidence and the testimony of Dr. Juneja, who was the Senior DMO was itself testimony to show that there was no material which could be held to conclude that the delinquent had suppressed the material facts or was instrumental in manipulating records or for that matter, had obtained medical certificate by suppressing materials from the Medical Officer. Resultantly, the Tribunal held that the disciplinary proceeding was unsustainable and resultantly quashed the disciplinary authority's order and consequently the appellate and the revisional authorities order's of the establishment. After setting aside the disciplinary proceeding and the decisions, the

Tribunal directed the respondents (Establishment) to consider the case of the delinquent in accordance with Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'PWD Act'). That was to be carried out within a period of three months from the date of receipt of a copy of the Tribunal's order. Dissatisfied by that decision, the establishment filed Writ Petition No.6222 of 2005 before this Court. After elaborate consideration of the relevant facts and factors and also detailing the quality of jurisdictional concept under Article 227 of the Constitution of India, this Court dismissed the writ petition filed by the Establishment. That was carried to the Hon'ble Supreme Court through an unsuccessful Special Leave Petition which appears to have been dismissed at threshold.

4. Thereafter, the Establishment considered the case of the employee under Section 47 of the PWD Act and extended the benefit of that provision to the employee *w.e.f.* 03.10.2013. The employee took the stand that he was entitled to back-wages from the date on which he was kept out of duty as a consequence of his removal from service which was interfered with by the Tribunal, that is to say, from 01.10.2003 upto 03.10.2013 when he was re-admitted to duty invoking the provisions of Section 47 of the PWD Act. Since the Establishment did not give him the benefit as sought for by him, he filed the Original Application from which this writ petition arises. The Tribunal through judgment dated 11.03.2016 recorded that the petitioner gives up all the other contentions and claims and confines to his plea for an order for backwages. As is discernible from paragraph 10 of the Tribunal's order, the Tribunal, noticing the contents of Section 47 of the PWD Act and the

effect of that provision on the facts of the case, directed that the employee be paid his back-wages from the period from removal of service to reinstatement. That was ordered to be done within 90 days from the date of receipt of a copy of Tribunal's order. This is impeached by the Railways through the institution of this writ petition under Article 227 of the Constitution.

5. The learned counsel for the Railways argued, among other things, that the employee stands concluded by the earlier round of litigation where the Tribunal had not passed any order for back-wages and that the doctrine of “no work no pay” applies in the case in hand. He further argued that there is no question of any automatic entitlement for payment of back-wages in terms Section 47 of the PWD Act, which does not provide for any such payment. It is also argued that the Tribunal, having not granted back-wages in the earlier round, though it interfered with the respondent's removal from service, should be held to have constructively refused to grant back-wages and such order of the Tribunal has merged in the decision of this Court in the writ petition filed by the Railways in the earlier round. It is pointed out that the not granting of back-wages by the Tribunal in the earlier round was not impeached by the employee at any point of time even while contesting the writ petition filed by the Establishment before this Court. The Apex Court also did not speak anything on that, it is pointed out. Learned counsel for the Railways relied upon the judgment of the Apex Court in **State Bank of India v. Ram Chandra Dubey** {(2001) 1 SCC 73} and **Union Territory, Chandigarh v. Brijmohan Kaur** {(2007) 11 SCC 488}.

6. Per contra, the learned counsel for the employee, who was the applicant before the Tribunal, argued that Section 47 of the PWD Act is not a measure of reinstatement and is not governed by those concepts of service jurisprudence or labour welfare legislations, which deal with reinstatement with back-wages. He argued that said provision is one which is automatic and a liability gets fastened on an employer to do the needful in terms of that section, the moment an employee is found to be one who falls within the term 'disability' for the purposes of that Act. Accordingly, it is argued that when the provisions of Section 47 of the PWD Act was found to be eligible to be extended to the applicant, it was the automatic corollary that the applicant was entitled to backwages from the date of removal from his service.
7. Section 47 of the PWD Act reads as follows :

“47. Non-discrimination in Government employments. - (1) 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.”

8. Sub-section (1) of Section 47 of the PWD Act creates a statutory embargo on any Establishment from dispensing with an employee who acquires a disability during his service. The manner in which the Establishment has to handle such a situation is delineated through the two provisos to Section 47(1) of that Act. They include the modality of shifting the employee to some other post and also of creating a supernumerary post to provide accommodation for such an employee until a suitable post is available. This exercise has to be carried till the employee concerned attains the age of superannuation. The conjoint effect of the two provisos to sub-Section (1) Section 47 of the PWD Act is to the effect that the employee who acquires a disability during his service are to be provided the measures delineated in those provisos and that is the manner in which the Establishment has to discharge its obligation under sub-Section (1) of Section 47 of the PWD Act to continue to retain such an employee in service. There is no other way of looking at the issue because sub-Section (1) of Section 47 of the PWD Act opens with the statutory prohibition against any Establishment dispensing with, or reducing in rank, an employee who acquires a disability during his service. This is what emanates out of a pure interpretation of the contents of sub-Section (1) of Section 47 of the PWD Act alongwith its two provisos.
9. Applying the aforesaid, it can be seen that the Railways had a statutory obligation and therefore the duty to the employee to consider his case under Section 47 of the PWD Act and the procedure prescribed therein,

the moment it is seen that the said person is entitled to the protection of that beneficial provision. In the case in hand, the fundamental foundation on which the Establishment proceeded against the employee was that he had the physical disability of red and green colour deficiency, meaning thereby an element of colour blindness. That physical deficiency is the only reason on which the employee could have been found to be ineligible to be in service in the post to which he was appointed. Attribute was made against him of having obtained a tailor-made medical certificate to suit his convenience and thereby get employment. He was alleged to have suppressed vital relevant material particulars regarding his health. These allegations against him have been founded against by the Tribunal in the earlier round, through the order delivered in O.A. No. 58/2004 in which the Tribunal has categorically held that the case built against the employee is a case of "no evidence". That decision has become final. Hence, the only possible conclusion on the facts of the case is that the respondent who is the employee in question, was one who had to be treated as a person who had acquired a disability during his service. This is all the more so because the Tribunal had accepted the testimony of the Doctor that colour blindness is not only genetically inherited but can also be an element that comes by reason of different other factors including as an aftermath of food poisoning etc. The benefit of appreciation of evidence thus stands in favour of the employee. Under such circumstances it cannot but be held, that the respondent is a person who had acquired a disability during his service. That being so, his eligibility for protection in terms of Section 47 of the PWD Act arose *eo instante* his incurring the disability to continue in service, in the post to which he was appointed,

that is to say on 17.01.2000 when the Medical Board had classified him as colour blind. His continuance thereafter could not have been at his peril and he was entitled to continue in service notwithstanding the so-called order of dismissal which was passed by the Establishment and later quashed by the Tribunal. In this view of the matter, he was entitled to continue to hold a post with the same pay scale and service benefits in terms of the first proviso to sub section (1) of Section 47 of the PWD Act. That being the entitlement, he is eligible to be paid such amounts as would accrue to him or would have accrued to him, had he been permitted to work since it is not a case where that he had not worked on a ground which could be attributed to him but only relatable to the order of dismissal which was held to be baseless and could not stand because there was no jurisdiction to dismiss him on account of the mandate of the statutory provision in the form of Section 47(1) of the PWD Act.

10. As regards the applicability of the ratio of **State Bank of India** (supra) and **Union Territory, Chandigarh** (supra), referred to by the learned counsel for the Railways, we are of the view that those precedents do not have a decisive bearing on the case in hand, because the eligibility of the respondent to what the Tribunal has called as 'back-wages' is essentially a compensation for keeping the person out of service though he was entitled to the benefits of the protective covenant in Section 47 of the PWD Act. The amount that is termed by the Tribunal as 'back-wages' is jurisprudentially not the same as 'back-wages' as conceived in service jurisprudence and labour jurisprudence but is referable to a component which is equivalent to what has been deprived by reason of placing a person out of service while he was entitled to enjoy the

benefits of the protection available to a disabled human being by virtue of provisions of Section 47 of the PWD Act.

11. For the aforesaid reasons, we do not find any illegality or jurisdictional error in the decision of the Tribunal in having held that the respondent is entitled to the back-wages for the period during which he was out of service on a ground referable to the order of dismissal which was set aside by the Tribunal through the order rendered in Original Application No. 58 of 2004. Hence, we do not find any ground to exercise authority under Article 227 of the Constitution as against the Tribunal's order which is challenged by the Establishment in this writ petition. Therefore, the writ petition fails.
12. In the result, the writ petition is dismissed. No costs.

Sd/-
(Thottathil B. Radhakrishnan)
Chief Justice

Sd/-
(P. Sam Koshy)
Judge