

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No. 1818 of 2015
Date of decision: 20.11.2017

Surender Kumar

....Petitioner(s)

Versus

Haryana State Federation of Cooperative Sugar Mills Ltd. and others

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Jagbir Malik, Advocate,
for the petitioner.

Mr. Deepak Balyan, Advocate,
for the respondents.

G.S.SANDHAWALIA, J. (Oral)

The petitioner seeks quashing of the show cause notices dated 21.02.2013 and 16.12.2014 (Annexures P-4 and P-6) served upon him by respondent no. 3 for termination of his service. Challenge is sought on the ground of violation of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Right and Full Participation) Act, 1995 (in short 'the Act'). Resultantly, the withholding of the salary of the petitioner from March, 2011 and to consider the petitioner in service for all intents and purposes and to pay him salary w.e.f. March, 2011 with 18% interest is prayed for.

The pleaded case of the petitioner is that he was appointed on daily wages with respondent no. 2-The Panipat Cooperative Sugar Mills Ltd. Gohana Road, Panipat on 08.12.1978. On 01.04.1982, he was made seasonal permanent on the post of Collie. Thereafter, vide order dated

03.09.2009 (Annexure P-2), he was promoted as Centrifugal Operator (Seasonal). It is his case that in March, 2011, the petitioner fell ill and due to paralysis, his right portion of the body stopped working and he is in bed and is not in a position to stand and walk. The medical certificate dated 14.12.2011 (Annexure P-3) has been attached to show that there was 83% physical disability as per the Medical Board constituted by the Civil Surgeon, Panipat. It is his case that the son of the petitioner visited the office of respondent no. 3 several times for requesting for release of salary of the petitioner but it was not granted. The show cause notice dated 21.02.2013 (Annexures P-4), thus, was served on account of the absence from service from 19.11.2012 to 21.02.2013. It is case of the petitioner that on the service of the first notice (Annexure P-4), he had replied on 02.03.2013 (Annexure P-5) that he could not join duty due to paralysis and the treatment was still going on and he would join duty after he was in a position to come on duty. The treatment documents and disability certificate issued by the CMO Panipat were attached alongwith the reply. As noticed, instead of taking a decision on the same, no action was taken by the respondents who only served another show cause notice dated 16.12.2014 (Annexure P-6) of absence from 19.11.2014 in the same format.

Faced with no positive response, a legal notice dated 22.12.2014 (Annexure P-8) was also served upon the respondents after the service of the second show cause notice. In the legal notice, specifically reference was made to the provisions of Section 47 of the Act that the dispensing of the service of the petitioner was not permissible on account of having acquired the disability during his service. Respondent having failed to act, the present writ petition came to be filed.

The defence taken by the respondents is that the writ petition is not maintainable under Articles 226 and 227 of the Constitution of India as the respondent is a Co-operative Sugar Mill and does not come within the definition of State. Secondly, Section 62 of the Act has been relied upon to submit that there is an alternative and efficacious remedy before the Commissioner and, therefore, the writ petition was not maintainable. On account of non-joining of the duties and not submitting the leave application, the show cause notices have been served and, therefore, there was no explanation regarding unauthorized absence.

The petitioner had also placed reliance upon judgment of the Apex Court in ***Anil Kumar Mahajan vs. Union of India, 2013 (7) SCC 243*** in the pleadings. A bald averment is taken that the said judgment is not applicable in the facts and circumstances of the case. It is, thus, apparent that on merits, there is no such defence as to factum of either the respondents having taken any stand or denying the petitioner's disability or passing any order in view of the reply to the show cause notice and the legal notice. The petitioner, thus, has been left with no remedy except to approach the writ court.

The reliance, in such circumstances, upon taking technical shields regarding the alternative remedy and the writ Court having no jurisdiction is without any basis. Counsel for the petitioner was well justified in placing reliance upon judgment of the Division Bench in ***Raj Narayan Yadav vs. State of Haryana and others, 2008 (1) SCT 756*** wherein, reliance had been placed upon Full Bench judgment in ***Miss Ravneet Kaur vs. The Christian Medical College, 1997 (3) SCT 210*** to submit that a writ would lie against a Cooperative Sugar Mill. Similarly,

reliance was also rightly placed upon Division Bench judgment in ***Kuldeep Singh vs. State of Punjab, 1994 (3) PLR 468*** and in ***Nardeep Kumar Maheshwari vs. Indian Oil Corporation, 2002 (2) SCT 691***. Accordingly, reliance upon Section 62 of the Act that there is an alternative remedy also would be of no help as it is settled principle that jurisdiction of the writ Court is wide and untrammelled and it can always reach out where injustice is being done and the Court is not to relegate the petitioner to such an alternative remedy.

In the present case, a person with disability to the extent of 83% had to approach this Court on account of inaction of the respondents whereby, they have failed to act in spite of the fact that there is a statutory requirement under the provisions of the 1995 Act in force at that point of time. Section 47 of the 1995 Act reads thus:-

“47. Non-discrimination in Government

Employment - (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.”

Disability has been defined under Section 2(i) of the Act which also provides for locomotor disability and under Section 2(t), person with disability means a person suffering from not less than 40% of any disability as certified by a Medical Authority. As noticed, the medical certificate has not been denied or the fact that the disability does not exist and, therefore, the petitioner falls within the definition of such a person with disability who is entitled to the above protection. The definition of establishment is also wide and pervasive under Section 2(k) and in such circumstances, the inability of the respondents to act upon the demand cannot be held to be justified in any manner. Section 20 (4) of the Rights of Persons with Disabilities Act, 2016 Act (in short 'the 2016 Act'), now in force, reads thus:-

“20. Non-discrimination in employment.—(1) No Government establishment shall discriminate against any person with disability in any matter relating to employment:

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, exempt any establishment from the

provisions of this section.

(2) Every Government establishment shall provide reasonable accommodation and appropriate barrier free and conducive environment to employees with disability.

(3) No promotion shall be denied to a person merely on the ground of disability.

(4) No Government establishment shall dispense with or reduce in rank, an employee who acquires a disability during his or her service:

Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall 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.

(5) The appropriate Government may frame policies for posting and transfer of employees with disabilities.”

Resultantly, this Court is of the opinion that the show cause notices dated 21.02.2013 and 16.12.2014 (Annexures P-4 and P-6) are liable to be quashed. Accordingly, the same are quashed. A writ of mandamus is further issued to respondent no. 2 to take action upon the legal notice dated 22.12.2014 (Annexure P-8) in view of the provisions of Sections 20(4) of the 2016 Act in view of the fact that the employee has suffered disability during his service. Appropriate action either to shift him to some other post in the same pay scales and service benefits or that he should be kept in supernumerary post until a suitable post is available or till

he attains the age of superannuation, whichever is earlier to be taken.

The petitioner shall accordingly be paid the arrears of his due amounts from March, 2011 i.e. when he became absent. The said amount be paid within a period of 4 weeks from today alongwith interest @ 7% per annum. Necessary orders accordingly be passed to make payments of the amounts due as per the provisions of Section 20(4) of the 2016 Act .

Writ petition stands allowed in the abovesaid terms.

20.11.2017
shivani

(G.S. SANDHAWALIA)
JUDGE

Whether reasoned/speaking

Yes/No

Whether reportable

Yes/No