

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6806 OF 2014

Shankar Kumar,	]	
S/o: Shree Bhim Prasad Mistry,	]	
Lallu Pokhar argarar road,	]	
Post Mungar district: Mungar,	]	
Pin: 811201 (Bihar).	]	..Petitioner

Versus

1] Union of India.	]	
2] C.I.S.C. (DG),	]	
Address: Block No.13, CGO's Complex,	]	
Lodhi Road, New Delhi-3.	]	
3] B. G. Das.	]	
4] G. C. Padhi.	]	
5] Mrs. S. Mehra.	]	
6] Sr. Commandant Mr. Sanjay Kumar Singh,	]	
Address: New Police Line Building No.12,	]	
Opp. SL Rehajga Hospital,	]	
Mahim, Mumbai – 400 016.	]	..Respondents

Mr. Vijay Kumar Bajpai, Advocate for the Petitioner.

Mr. D. A. Nalawade a/w Mr. M. S. K. Bhardwaj, Advocate for Respondent Nos.1 to 6.

**CORAM : B. R. GAVAI &
N. J. JAMADAR, JJ.
DATE : 4th MARCH, 2019**

ORAL JUDGMENT (Per B. R. Gavai, J)

1] Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2] The Petition arises out of peculiar facts and circumstances. After following the due selection process, Respondent Nos.1 to 6 had appointed the Petitioner in 2009. However, during the probation itself, while on duty, the Petitioner suffered an accident and his right hip was fractured. That accident was dated 11th January 2010. The Respondents were kind enough to give necessary treatment to the Petitioner in the hospital. However, on account of the injuries as sustained by the Petitioner, there came certain restrictions on his physical activities and he could not pass the medical examination. As such, though various extensions were granted to the Petitioner for enabling him to satisfy the medical test, he could not clear the said test. As such, his services came to be terminated vide order dated 26th February 2013. In these circumstances, the Petitioner has approached this Court.

3] The Division Bench of this Court vide order dated 29th November 2017, in paragraph Nos.6, 7 & 8 has observed thus :-

“6. At the same time, in the affidavit, on page 91 of the paper-book, it is stated that the Standing Welfare and Rehabilitation Board submitted a report. That Board found the petitioner fit for sedentary duties or fit for office duty, telephone duty, library duties, Mess or any kind of normal duties. Thus, he was not fit for the post of Constable and which is what the Force presently requires, according to the deponent.

7. It is on this specific aspect of the matter and after the petitioner, who is present in Court, informed his Advocate that he is prepared to take up any such non-field job such as office duty, telephone duty, etc., that we orally inquired from Mr. Nalawade, appearing for the respondents, as to whether the respondents would consider the petitioner for such jobs which he is now prepared to discharge. Meaning thereby, for duties other than that of a Constable in the Force.

8. Mr. Nalawade states that presently he has no instructions for no official or personnel from the Force is present in the Court. In the circumstances, at the request of Mr. Nalawade, we post the matter on 19-12-2017, only to enable Mr. Nalawade to take instructions and make an appropriate statement.”

4] In pursuance to the aforesaid order, the affidavit in reply is filed by Smt. Shipra Srivastava. Paragraph No.9 in the said affidavit reads thus :-

“9. I say and submit that there is no separate quota or provision in CISF for recruitment of personnel for sedentary duties. There are no specific duties which are declared as sedentary duties. In some Units there are few duties having the nature of sedentary duty. All such

duties are performed by the personnel in CISF who have successfully completed the basic training. In the case of the Petitioner, the basic issue is that he is not fit for successful completion of the period of probation and confirmation which is mandatory for further service in the Force.”

5] It could thus be seen that though the Respondents have admitted that there are certain duties, which are of sedentary nature, the Petitioner cannot be appointed on the same, since his services were not confirmed.

6] Hence, the peculiar situation arises. Had the Petitioner been confirmed after the completion of his probation and had he undergone similar accident while on duty, he would have been entitled to benefit under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (For short “the said Act”). No doubt that the employment of the Petitioner was on a post, which requires medical fitness, the service being of Para-Military nature.

7] Mr. D. A. Nalawade relied on the judgment of the Hon'ble Apex Court in the case of Kunal Singh Vs. The Union of India and another¹ with regard to the submission that the

¹ (2003) 4 SCC 524.

provisions of the said Act are not applicable to the services under the Respondents.

8] We are grateful to Mr. D. A. Nalawade for placing on record judgment of the Hon'ble Apex Court which rather than supporting the case of the Respondents, fully supports the case of the Petitioner. It will be relevant to refer to the following observations of the Hon'ble apex Court :-

“The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. To realize objective that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view a meeting called the 'Meet to Launch the Asian and Pacific Decades of Disabled Persons' was held in Beijing in the first week of December, 1992 by the Asian and Pacific countries to ensure 'full participation and equality of people with disabilities in the Asian and Pacific Regions'. This Meeting was held by the Economic and Social Commission for Asia and Pacific. A Proclamation was adopted in the said meeting. India was a signatory to the said Proclamation and they agreed to give effect to the same. Pursuant thereto this Act was enacted, which came into force on 1st January, 1996. The Act provides some sort of succor to the disabled persons. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the

Act has given distinct and different definitions of “disability” and “person with disability”. It is well settled that in the same enactment if two distinct definitions are given defining a word/ expression, they must be understood accordingly in terms of the definition. It must be remembered that person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads “no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service”. The Section further provides 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; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service. The argument of the learned counsel for the respondent on the basis of definition given in Section 2(t) of the Act

that benefit of Section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee, who has acquired 'disability' within the meaning of Section 2(i) of the Act and not a person with disability.

We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pensions Rules. The Act is a special Legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act. Further Section 72 of the Act also supports the case of the appellant, which reads:- "72. Act to be in addition to and not in derogation of any other law. - The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities."

Merely because under Rule 38 of CCS Pension Rules, 1972, the appellant got invalidity pension is no ground to deny the protection, mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such efforts were made by the Respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of the other provisions of Section

47 of the Act.

For the reasons stated and discussions made above, the appeal deserves to be accepted. Hence the impugned order affirming the order of termination of services of the appellant is set aside and the appeal is allowed. We direct the respondents to give relief in terms of Section 47 of the Act.” (emphasis supplied)

9] It could thus be seen that Hon'ble Apex Court has specifically held that Section 47 of the said Act requires that if a person acquiring disability is not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits and if no such post is available, then the employee will have to be kept on supernumerary post until suitable post is available or attains the age of superannuation. Their Lordships have held that since the legislation is a social welfare legislation, enacted for protection of the person acquiring disabilities, the same has to be scrupulously followed. It could be seen that in the said case also, Their Lordships were considering the case of a Constable, who was working in special services which is also service of Para-Military nature. The Appellant therein had suffered amputation of leg and therefore, terminated after grant of compensatory pension. The Hon'ble Apex Court found the

termination to be not sustainable in law.

10] The Petitioner herein stands on much better footing. The Petitioner is personally present in the Court and we have found him to be physically fit. Though he may not be able to discharge his duties as a Constable, he can very well discharge other duties in the Force. Needless to state that Smt. Shipra Srivastava has herself admitted in her affidavit that there are certain duties which are of sedentary nature. We find that in Para Military Force, there would be requirement of office boys, cooks, assistant to cooks etc. to give illustrations. We therefore find that stand of the Respondents is totally unjustified.

11] We are therefore of the considered view that the impugned order of termination is liable to be set aside. Normally we could not have granted back-wages to the Petitioner. However, since the action taken by the Respondents is contrary to the mandate of Section 47 of the said Act and also contrary to the judgment of the Hon'ble Supreme Court. We find that the Petitioner deserves to be granted back-wages. In the result, following order is passed :-

ORDER

I] Rule is therefore made absolute by quashing and setting aside the termination order.

II] The Petitioner is directed to be reinstated forthwith alongwith continuity in service and all the back-wages.

12] We once again express our appreciation for the fairness shown by Mr. D. A. Nalawade in placing on record judgment of the Hon'ble Apex Court, though it is against the Respondents.

13] At this stage, Mr. D. A. Nalawade, learned counsel for the Respondents prays for stay of the order for a period of eight weeks from today.

14] However, since the view that we have taken is on the basis of the Apex Court judgment, which is brought to our notice by Mr. D. A. Nalawade, we do not find that the case is made out for grant of stay. The prayer for grant of stay is rejected.

[N. J. JAMADAR, J.]

[B. R. GAVAI, J.]