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

CWP NO. 15761 of 2001

DATE OF DECISION : 06.12.2022

Hawa Singh

...Petitioner

Versus

The State of Haryana and another

...Respondents

CORAM : HON'BLE MR. JUSTICE ARUN MONGA

Present : Mr. Vikram Singh, Advocate,
For the petitioner.

Mr. R. D. Sharma, DAG, Haryana.

ARUN MONGA, J.(ORAL)

The case in hand is that of a driver, who in the course of his employment, owing to an accident, lost one of his eyes which disabled him to work as a driver. Instead of adjusting the petitioner on an alternative post, his services were dispensed with by way of compulsory retirement. Aggrieved, the petitioner filed a civil suit wherein he sought quashing of compulsory retirement order dated 19.12.1997 (Annexure P-2) and also sought the entitlement of an alternative job i.e on the post of Yard Master which at the relevant time was vacant in the transport department. Plea of the petitioner was found to be admissible by the trial Court and vide judgment and decree dated 18.08.1999 (Annexure P-4) suit of the petitioner was decreed with a direction to the department to adjust him in an alternative job. However, while offering alternative job, the petitioner was appointed as Peon and his salary was reduced from that

of a driver to a Class-IV pay-scale which was admissible on the post of Peon. Aggrieved, petitioner preferred this instant writ petition.

2. In the return filed and in the course of arguments of learned State counsel, defence taken is that the writ petition is not maintainable on the principles of *res judicata*, as envisaged under Order 2 Rule 2 of CPC.

3. Learned State counsel vehemently argued that the petitioner was fully conscious at the time of filing of the earlier suit that in case he is given the relief of alternative job which he had prayed, he was entitled to pay protection and he did not make any such prayer before the trial Court, having thus acquiesced to *fait accompli* as well as consciously chosen not to make any such prayer. It is too belated now to seek the same through the present proceedings.

4. I have heard competing arguments of learned counsels for the parties and having given my thoughtful consideration, I am of the opinion that rigors of Order 2 Rule 2 CPC and *res judicata* are not attracted in the present case. The petitioner having got the suit decreed in his favour at the relevant time would not have known that when alternative job is offered :
a) the same would be below the status of a driver as there was no such finding and/or direction by the trial Court; b) there was no cause of action for him at the relevant time to make any prayer for pay protection since the trial Court had already observed that for the period the petitioner had remained out of job, the same shall be treated as *dies-non*.

5. In fact, for better appreciation of the entire controversy, the relevant extract of judgment and decree dated 18.08.1999 (Annexure P-4) passed by the trial Court is reproduced herein below :

“12. After giving thoughtful consideration on the arguments advanced by the learned counsel for the parties and on an appraisal of the documentary evidence placed on the case file. I am of the considered opinion that order dated 19.12.1977 passed by defendant No.2 is illegal, bad in law and against the principles of natural justice, therefore, order dated 19.12.1977 is hereby set aside to the extent that plaintiff will not be entitled to recover any salary for the period he has not been done the work in the department. This period will be treated as dies-non and further plaintiff will deposit the compensatory amount alongwith interest @ 12% p.a. within a period of two months then he can be entitled to get the alternative job as suitable to the defendant department. This issue disposed of accordingly.”

6. Perusal of the above clearly shows that neither was there any finding qua entitlement of the petitioner to be lowered from Class-III to Class-IV, nor was there any such occasion for the trial Court to either observe or render any finding in respect of the entitlement of the petitioner qua pay protection.

7. On the contrary, the trial Court has clearly stated that the period for which the petitioner remained out of service be treated as *dies-non* and further plaintiff will deposit the compensatory amount alongwith interest @ 12% p.a. within a period of two months then he can be entitled to get the alternative job as suitable to the defendant department.

8. Reverting to the finding of *dies-non* plain and simple meaning that can be derived is that at worst the petitioner is not entitled for any salary for the said period of *dies-non* on the principle of no work no pay. That position has to be restored to status quo ante as one day prior to his compulsory retirement. Being so, I see no reason as to why the petitioner be not given pay protection since his compulsory retirement was held to be not legal and the Court had clearly directed the department to offer him an alternative job, of course, with riders as may be ‘*suitable*’ to the defendant department.

9. On a Court query, it transpires that the judgment and decree was upheld in the first appeal and the department has duly complied with the said decree.

10. As regards entitlement of the petitioner on merits, other than the objections of *res judicata* and Order 2 Rule 2 CPC taken, which have been repelled above, I find that claim of the petitioner is admissible and controversy is no more *res integra*. In the judgment dated 12.01.2015 rendered by Division Bench of this Court in case CWP No.9492 of 2008 titled “*Kalyan Singh v. State of Haryana and others*”, my learned brother Deepak Sibal, J., while speaking for the Division Bench held as under :

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7. *So far as the challenge to the vires of the impugned notification dated 27.06.2005 is concerned, we are of the view that the same being issued after the accident incurring of disability and subsequent appointment of the petitioner as Chowkidar, the same would not apply to the facts of the case in hand. It is undisputed before us that the petitioner met with an accident on 30.03.1999, he was retired on 08.03.2001, he was appointed as Chowkidar in the year 2004 and that the impugned notification is dated 27.06.2005 is not retrospective in operation. That being so, according to us, the impugned notification would not apply to the facts of the case in hand.*

8. *Once the notification exempting Drivers and Conductors from purview of Section 47 of the Act is not applicable to the facts of the case in hand, then the petitioner would be entitled to the benefits so granted under the proviso to Section 47 (1) of the Act. On perusal of proviso to Section 47 (1) of the Act (as reproduced above), it is clear that on adjustment of an employee against a suitable post after he has incurred disability while in service, his pay is required to be protected. That being so, we have no difficulty in holding that from the date the petitioner joined on the post of Chowkidar, he would be entitled to protection of the pay that he was drawing as a Driver before he was retired vide order dated 08.03.2001.*

9. *The plea raised by learned counsel appearing on behalf of the State, with regard to non-maintainability of the present writ qua the issue of pay protection, as the same had not been pressed in the earlier two writ petitions by the*

petitioner, is concerned, the same needs to be considered only to be rejected. In the first writ petition, no effective order was passed. So far as the second writ petition i.e CWP No. 16050 of 2003 is concerned, in that writ petition, only the issue with regard to the appointment of the petitioner was considered and decided. The issue of pay protection would only arise after the petitioner would be appointed on the subsequent post and not granted the benefit of pay protection. Thus, the cause of action, so raised by the petitioner through the present writ petition, came into being only after the disposal of the second writ petition, when he was appointed as Chowkidar and not granted the benefit of pay protection, which the respondents were obliged to give under proviso to Section 47 (1) of the Act. The representation to the same effect so made by the petitioner was also rejected after the disposal of second writ petition. In view of the above, the present writ petition is allowed. The petitioner is held entitled to the benefit of pay protection, as prayed for by him, with all consequential benefits. The arrears be now paid to the legal heirs of the petitioner, as brought on the record vide order dated 18.08.2011, within three months from the date of receipt of certified copy of this order.”

11. In fact, perusal of the aforesaid Division Bench judgment reflects that not only claim of the petitioner is admissible on merits, but also it strengthens my view in para 4 to the effect that rigors of Order 2 Rule 2 CPC and *res judicata* are not attracted in the present case.

12. As an upshot of the discussion, the writ petition is allowed. The respondents are directed to carry out the necessary calculations and pay arrears with interest @ 5% per annum from due date till payment.

13. Let the needful exercise be done as expeditiously as possible but not later than three months.

DECEMBER 06, 2022
Shalini

(ARUN MONGA)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No