

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

(101+237)

CM No.13896-CWP of 2023 in/and
CWP No.13674 of 2006 (O&M)
Date of Decision : 28.08.2023

Bahadur Singh

...Petitioner

Versus

State of Haryana and others

...Respondents

AND

CWP No.17475 of 2021

Saroj

...Petitioner

Versus

State of Haryana and others

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. R.S. Malik, Advocate for the petitioner.

Mr. Harish Nain, Assistant Advocate General, Haryana.

Harsimran Singh Sethi J. (Oral)

CM No.13896-CWP of 2023

The present application has been filed for fixing some actual
date in the present petition.

Notice of the application to the counsel opposite.

Mr. Harish Nain, Assistant Advocate General, Haryana, who is present in the Court accepts notice and raises no objection for the grant of the prayer as made in the present petition.

Keeping in view the above, application is allowed and on the oral request of learned counsel for the parties, the main case is taken up for hearing today.

CWP No.13674 of 2006

1. By this common order, two writ petitions, the details of which have been given in the heading are being disposed of as both the writ petitions involve the similar issue on similar facts.

2. The facts in CWP No.13674 of 2006 are being mentioned.

3. In the present petition, the challenge is to instructions dated 20.08.1992 (Annexure P-1) by which, the petitioner has been compulsorily retired from service on the ground that keeping in view the accident which the petitioner had met with, he is no longer fit to perform the duties of a Driver on which post he was working.

4. The petitioner was appointed on the post of Driver by the respondent-transport department on 26.04.1989. At the time when the petitioner was offered the appointment, he was medically examined and found fit to perform the duties of the post of the Driver.

5. Unfortunately, while on duty, the petitioner met with an accident on 01.05.2000 and in the said accident, he suffered disability. Keeping in view the said disability, the petitioner was got examined by the Medical Board on 29.10.2003 and the Medical Board declared that the petitioner is unfit to drive the heavy vehicle. On 10.11.2003, the petitioner

was issued a show cause notice as to why, he should not be compulsorily

retired keeping in view the fact that he is no longer in a position to perform the duties of the post of Driver. By the impugned order dated 27.11.2013, the petitioner was compulsorily retired from service on the ground that the petitioner is not fit to drive the heavy motor vehicle and his case was considered for the alternate job under the Policy but the petitioner has been found as not eligible for the posts which are lying vacant. The challenge is to the said order passed by the respondents.

6. Learned counsel for the petitioner argues that keeping in view the provision of the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the 1995 Act'), upon acquiring the disability to perform the duties of a particular post, the employee is liable to be considered for working on the post on which he/she is suitable and in case there is no suitable post available, a supernumerary post is to be created by the department till the said employee attains the age of superannuation. Hence, retiring the petitioner upon acquiring disability merely by stating that for the post of Driver he is unfit to drive and qua the posts which are available, the petitioner is not eligible to perform the duties, which order passed by the respondents is contrary to the provisions of the 1995 Act hence, the impugned order is liable to be set aside and the petitioner should be treated in service for all intents and purposes till he attained the age of superannuation.

7. Learned counsel for the respondents submits that though, it is a conceded fact that the petitioner performed the duties of the post of Driver from the date of his initial appointment and he suffered disability while in service as he has met with an accident due to which, he was found not medically fit to drive the heavy motor vehicle but, as the petitioner was not

found suitable for the vacant post, there is no other option but to dispense with the services of the petitioner by compulsorily retiring him. Hence, in the facts and circumstances of the present case, the order passed by the department is perfectly valid and legal.

8. I have heard the learned counsel for the parties and have gone through the record of the case with their able assistance.

9. The facts which have been stated hereinbefore are not in dispute but the only question which arises for consideration of this Court is whether, upon acquiring disability, even if there are no other posts available for accommodating the disabled employee whether, the services of such employee can be dispensed with while compulsorily retiring him/her or the said employee is to be retained in service till he/she attains the age of superannuation by creating a supernumerary post. The 1995 Act takes care of such eventuality. Section 47 of the said Act is as under:

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.

10. A bare perusal of the above Section of the 1995 Act shows that even if an employee suffered disability while in service, and there is no other post on which he/she can be accommodated, then the respondents are under an obligation to create a supernumerary post to adjust such kind of employee till he/she attain the age of superannuation hence, by merely stating that there was no other vacant post for which the petitioner was eligible, is no ground to pass an order retiring the disabled employee i.e. the petitioner.

11. Furthermore, the question as to whether, a disabled employee can be retired on acquiring the disability while in service came for consideration before the Division Bench of this Court while deciding CWP No.16092 of 2005 titled as **Gurbachan Singh Vs. State of Haryana and others**, decided on 08.05.2006. In the said case also, an employee who was working in transport department of the Haryana Roadways on the post of Driver, was retired from service on the ground that the said employee had been declared unfit to perform the duties of the post of Driver. By considering the settled principle of law as well as the provisions of the 1995 Act, this Court came to the conclusion that a disabled employee cannot be retired from service and the employee has to be retained in service by creating a supernumerary post. Even the argument of the State that Section 47 of the Act is not applicable as the post of Driver stands excluded, has also been considered and found non applicable.

12. Not only this, this Court has occasion to deal with the same issue while passing order in CWP No.27158 of 2015(O&M) decided on

27.09.2019 titled as **Harjit Singh Vs. State of Punjab and others** wherein, the compulsory retirement of a disabled employee was held to be bad.

13. Learned counsel for the respondents has not been able to rebut that in somewhat similar circumstances qua the post of driver, the Division Bench while passing order in **Gurbachan Singh (supra)** has already granted the benefit which is being claimed by the petitioner herein and all the arguments being raised in the present petition, have been considered and rejected by the Division Bench.

14. Keeping in view the above, the claim of the petitioner that compulsory retirement of the petitioner on acquiring the disability is not only contrary to the 1995 Act but also the settled principle of law noticed hereinbefore is liable to be accepted. The writ petition is allowed and the impugned order Annexure P-4 retiring the petitioner compulsorily is set aside. The petitioner will be treated in service for all intents and purposes from the date of passing of the impugned order till he attained the age of superannuation and will also be entitled for the salary on the post he was working at the time when the impugned order was passed.

15. Any amount which has already been paid to the petitioner after his compulsory retirement, will be adjusted by the respondents while reinstating the petitioner so as to treat him in service upto the date of his superannuation and the amount will be adjusted from the arrears for which the petitioner will become entitled for. It may be noticed that unfortunately the petitioner has died during the pendency of the present petition and the legal heirs have been brought on record to pursue the petition. Hence, the benefits for which the petitioner is found entitled for, be released in accordance with law to his legal heirs.

CWP No.17475 of 2021

16. In the present petition, the husband of the petitioner had joined the department of prosecution on the post of Clerk on 08.08.1984 and was thereafter promoted as Head Clerk-cum-Accountant on 08.07.2005.

17. In the year 2009-2010, due to various ailments being suffered by the husband of the petitioner, he had become mentally sick and had turned virtually blind and keeping in view the medical health of the husband of the petitioner, the special medical board which examined him declared him as medically unfit to continue in service vide report dated 07.08.2010. Keeping in view the said medical report, the proposal was sent for creating a supernumerary post so as to allow the husband of the petitioner to continue in service but during the pendency of the said proposal, the husband of the petitioner unfortunately died on 20.11.2013.

18. Thereafter, keeping in view the proposal to create a supernumerary post, a supernumerary post was created w.e.f. 07.08.2010 to 20.11.2013, copy of which has been appended as Annexure P-2.

19. The grievance of the petitioner is that though a supernumerary post has been created so as to treat the husband of the petitioner in service for the period w.e.f. 07.08.2010 to 20.11.2013 but no benefit of pay and allowances for the said period has been given to the petitioner and further no benefit of the period in question has been granted while calculating the benefits such as gratuity, pay, leave encashment, financial assistance and the qualifying service for computing the pensionary benefits. The prayer of the petitioner is to grant the said benefits to the petitioner.

20. In the reply filed, the respondents have mentioned that though a supernumerary post has been created but for the said period, no benefit can

be given and the said period is not to be counted for any purpose and that is why, no benefit of the same has been extended to the petitioner after the death of the husband of the petitioner.

21. Qua the prayer of the petitioner, for release of the benefits for the period, a supernumerary post was created so as to accommodate the husband of the petitioner, who had become medically unfit to discharge the duties of the post of Head Clerk-cum-Accountant. Once, as per Section 47 of the Act, an employee has to be adjusted against the supernumerary post, the said employee is also entitled for the benefit of pay etc. for the period in question. The supernumerary post is only created to give the salary to a disabled employee who is not in a position to perform the duties of the post in question. Hence, creation of a supernumerary post in the present case but without any financial benefit is totally arbitrary and illegal and rather serves no purpose as envisaged under Section 47 of 1955 Act, Hence, the action of the respondents in denying the petitioner the benefit of salary for the period her husband was treated to be working against the supernumerary post starting from 07.08.2010 to 20.11.2013 as well as not counting the said period for computing the pensionary benefits is totally arbitrary and illegal.

22. The petitioner is held entitled for the salary, which the late husband of the petitioner was drawing on the post of Head Clerk-cum-Accountant, for the period he is to be treated as working against a supernumerary post along with all other benefits. The said period will also be taken into account as a period spent on duty to be treated as a qualifying service for computing the benefits for which the petitioner becomes entitled for after the death of her husband. Keeping in view the facts that the action

of the respondents in not extending the benefit to the petitioner for the said

period is totally arbitrary and illegal and the petitioner is being made to run from pillar to post to get the said benefit and the arrears for which the petitioner becomes entitled for, she will also be entitled for interest @6% per annum keeping in view the judgment of the Coordinate Bench of this Court In **J S Cheema Vs. State of Haryana, 2014(13) RCR (Civil), 355**, according to which, in case any amount belonging to an employee has been retained by the department, the department becomes entitled to pay the interest while making the payment of the amount in question.

23. The present petitions are allowed in above terms.

August 28, 2023
jt

(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No