

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.916 OF 2018

DISTRICT : PUNE

Dr. Suhas Vishwanath Ganu.)
Age : 67 Yrs., Occu.: Retired as Medical Officer)
from Rural Hospital, Chinchgad, Tal.: Deori,)
Dist : Gondia, R/o. 601, Radha Building,)
Shrikrishna Nagar, Near Bank of Maharashtra,)
N.D.A, Bawdhan, Pune – 21.)...**Applicant**

Versus

1. The State of Maharashtra.)
Through Principal Secretary,)
Public Health Department, Mantralaya,)
Mumbai – 400 032.)
2. The Commissioner / Director of Health)
Services, M.S, Mumbai having office at)
Arogya Bhavan, in the campus of Saint)
Georges Hospital, P.D’Mello Road,)
Mumbai – 400 001.) ...**Respondents**

Mr. A.V. Bandiwadekar, Advocate for Applicant.

Mrs. K.S. Gaikwad, Presenting Officer for Respondents.

CORAM : A.P. KURHEKAR, MEMBER-J

DATE : 09.05.2019

JUDGMENT

1. In this Original Application, the Applicant is seeking retiral benefits as per Section 47 of ‘Persons with Disabilities (Equal Opportunities, Protection of Rights

and Full Participation) Act, 1995 (hereinafter referred to as 'Act 1995') invoking jurisdiction of this Tribunal under Section 19 of the Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to this application are as under :-

The Applicant was born on 17.01.1951. He joined Government service as Medical Officer on 01.09.1974 and during the tenure of service transferred to various places. Lastly, he was posted as Medical Officer, Rural Hospital, Chinchgad, Taluka Deori, District Gondiya. While serving at Chinchgad, he developed disease viz. 'Bipolar disorder' and was unable to discharge duties. He was referred to Mental Hospital, Nagpur for medical examination. Accordingly, the Superintendent, Mental Hospital, Nagpur by Certificate dated 12.09.2007 declared the Applicant completely incapacitated for further Government service. Thereafter again, he was referred to Government Medical College, Nagpur for grant of invalid pension under Rule 72 of Maharashtra Civil Services (Pension) Rule, 1982 (hereinafter referred to as 'Rules 1982'). He was again examined by Medical Board, Government Medical College, Nagpur and by Certificate dated 14.08.2008 declared the Applicant completely and permanently incapacitated for further service. In the meantime, the charge-sheet dated 06.02.2007 was issued to the Applicant for alleged misconduct viz. negligence and discharge of duties and Departmental Enquiry (D.E.) was initiated against him. However, in view of Medical Certificate declaring him 'permanently incapacitated for service', the D.E. was closed on 04.07.2012 as per Rule 13(2) of M.C.S. (Discipline & Appeal) Rules, 1979. After considerable delay, pension papers were prepared and sent to the office of Accountant General on 23.06.2015 on the basis of Medical Certificate issued by Superintendent, Mental Hospital, Nagpur for grant of invalid pension. However, the Office of A.G. raised objection that the invalid pension cannot be granted on the basis of Medical Certificate issued by Superintendent, Mental Hospital, Nagpur. Then again, the matter was processed and pension papers

were re-submitted to the Office of A.G. on 29.03.2017 on the basis of Medical Certificate dated 14.08.2008 issued by Medical Board. However, no further action was taken by the Respondents for grant of retiral benefits to the Applicant. Despite the representation made by the Applicant on 04.12.2017, no steps were taken by the Respondents for grant of retiral benefits. Ultimately, the Applicant has approached this Tribunal by filing this O.A. on 15.10.2018.

3. The Applicant contends that he acquired disability thereby rendering him permanently incapacitated for Government service, and therefore, entitled to the benefit of provisions of Section 47 of 'Act 1995' which inter-alia provides for extending all service benefits to such person till the date of his superannuation. As per date of birth, the Applicant has attained age of superannuation on 31.01.2009. The Applicant, therefore, prayed for service benefits having considered date of superannuation i.e.31.01.2009 in view of Section 47 of 'Act 1995'.

4. The Respondents resisted the application by filing Affidavit-in-reply (Page Nos.26 to 33 of Paper Book) *inter-alia* denying the entitlement of the Applicant to the relief claimed. The Respondents contend that the Applicant stands retired on 31.01.2009, but he has approached this Tribunal in 2018, and therefore, the O.A. is barred by limitation. The Respondents further contend that, initially in view of Medical Certificate issued by Superintendent, Mental Hospital, Nagpur, he was retired w.e.f.12.09.2007 as per order dated 04.04.2014. Later on, in view of Medical Certificate issued by Medical Board, Government Medical College, Nagpur on 14.08.2008, the Applicant was allowed to retire on his request w.e.f.14.08.2008 and accordingly, pension papers were submitted to the Office of A.G. It is not in dispute that the D.E. initiated against the Applicant was closed. The Respondents denied that the Applicant is entitled to the benefit of Section 47 of 'Act of 1995'. According to Respondents, it has no application to the present situation, and therefore, he was rightly retired on medical ground w.e.f.

14.08.2008 and pension papers for grant of invalid pension was forwarded to the Office of A.G. With these pleadings, the Respondents contend that there is no delay in the matter of finalization of pension and as soon as the orders are passed by A.G., the invalid pension will be granted to him.

5. After filing of the present O.A, having noticed that there is considerable delay in grant of retiral benefits of the Applicant and on hearing the learned Advocate for the Applicant as well as learned P.O, interim orders were passed to process the pension papers of the Applicant immediately and further directions were also given to consider the provisions of Section 47 of 'Act 1995' while passing final order in the matter of pension of the Applicant. In view of these directions, the interim orders passed by this Tribunal from time to time, finally, the Respondent No.1 passed order for grant of invalid pension under Rules 68 to 80 of 'Rules 1982' w.e.f.14.08.2008 by belated order dated 22.03.2019. Thus, the Respondent No.1 seems to have refused the benefit to the Applicant under Section 47 of 'Act 1995'. It is on this background, the arguments were heard for final adjudication.

6. Shri A.V. Bandiwadekar, learned Advocate for the Applicant vehemently urged that the Respondent No.1 completely ignored the provisions of Section 47 of 'Act 1995', which mandates grant of service benefits to a person who acquired disability during his service. In this behalf, he referred to the decisions of Hon'ble Supreme Court in **(2003) 4 SCC 524 (Kunal Singh Vs. Union of India)** and also pointed out that, on the basis of said decision, in similar situation, the benefit of Section 47 of 'Act 1995' has been extended by this Tribunal in **O.A.No.741/2007 (Surendra Malge Vs. Director General and Inspector General of Police, M.S.) decided on 06.01.2009** and **O.A.No.1160/2010 (Ashok Pawar Vs. State of Maharashtra) decided on 23.04.2011.**

7. Per contra, Smt. K.S. Gaikwad, learned Presenting Officer sought to support the decision of Respondent No.1 to grant invalid pension to the Applicant w.e.f.14.08.2008 in reference to Rules 68 to 80 of 'Rules 1982'. She further sought to contend that only because the Applicant suffered disability during service, that itself does not entitle him to benefit of Section 47 of 'Act 1995' unless it is shown that he suffered disability while discharging duties. On this line of submission, she prayed to dismiss the O.A.

8. In so far as the point of limitation raised in reply is concerned, in fact, no submission was advanced in this behalf. I find no substance therein. Needless to mention that pension is not bounty, but it is statutory right of the Applicant and is treated as 'right to property'. Though the Applicant was declared permanently incapacitated twice, once by Superintendent, Mental Hospital, Nagpur and secondly, by Medical Board, Government Medical College, Nagpur in 2007-2008 respectively, the matter was stuck-up at the Government level for years together and it is only after filing of the O.A, the Respondent No.1 finally passed an order dated 22.03.2019 granting invalid pension w.e.f.14.08.2008 invoking Rules 68 to 80 of 'Rules 1982'. As such, it is a case of continuous cause of action and lethargy as well as inaction on the part of Respondents to release retiral benefits to the Applicant as per his entitlement is obvious. This being the position, the point of limitation raised by the Respondents in reply is without any substance and deserves to be rejected. Indeed, the Respondents ought to have been sensitive to the matter and should not have raised such technical plea though in fact fault lies on their part for delaying release of retiral benefits for a long period.

9. Now, the material question comes whether the Applicant is entitled to the benefit of Section 47 of 'Act 1995'. As stated above, he is granted invalid pension w.e.f.14.08.2008 under Rules 68 to 80 of 'Rules 1982', which he has challenged being it is violation of Section 47 of 'Act 1995'.

10. In fact, the issue of applicability of Section 47 of 'Act 1995' and its applicability to the present situation is no more *res-integra* in view of the decision of Hon'ble Supreme Court in **Kunal Singh's** case (cited supra) as well as the decisions rendered by this Tribunal relying on the Judgment in **Kunal Singh's** case in O.A.741/2007 and O.A.1160/2010. The learned Advocate for the Applicant has tendered the copies of orders and has pointed out that the Judgment in O.A.741/2007 has been confirmed by Hon'ble High Court in Writ petition No.7920/2009 decided on 19.11.2009.

11. The defence sought to be raised by the learned P.O. that, unless disabilities incur while discharging duties, the Applicant is not entitled to the benefit of Section 47 of 'Act 1995' has been also considered and answered in negative in view of the reasoning and the observations made by this Tribunal in earlier matters.

12. At this juncture, firstly, it would be apposite to see Para Nos.9, 10, 11 and 12 of the Judgment of Hon'ble Supreme Court in **Kunal Singh's** case, wherein the scope and applicability of Section 47 of 'Act 1995' has been considered in following words :-

"9. 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.

10. 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.

11. 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.

12. *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 other provisions of Section 47 of the Act."*

13. As such, in view of Judgment of Hon'ble Supreme Court in ***Kunal Singh's*** case, even grant of invalid pension on the basis of State Pension Rules cannot be the ground to deny the protection mandatorily made applicable to the persons coming under the purview of Section 47 of 'Act 1995'. Once the person is found acquired disability during his service and found not suitable to the post he was holding, he should be shifted to some other post with same pay and scale and if it is not possible to do so, he need to be kept on supernumerary post till he attains the age of superannuation. This is the law laid down by Hon'ble Supreme Court in ***Kunal Singh's*** case.

14. Now, turning to the facts of O.A.741/2007, it was filed by the Applicant viz. Surendra malge, who was working as Assistant Sub-Inspector with State Reserve Police and was granted invalid pension on the basis of Medical Certificate w.e.f.22.12.2006. He then approached this Tribunal by filing O.A.741/2007 claiming the benefit of Section 47 of 'Act 1995', which came to be allowed with direction to keep the Applicant on supernumerary post and till suitable post is available or he attains the age of superannuation. In O.A, the Government raised contention that the Applicant has not acquired disability while on duty, and therefore, mere suffering from disability while in service will not entitle him to the protection of Section 47 of 'Act 1995'. However, the Tribunal turned down the Government's stand and allowed the O.A. This Tribunal in Para No.12 observed as under :-

"12. It has come on record that the applicant is suffering from Hemiplegia and the said disease is covered by Section 2(i)(v) of the Act. However, the main and the material question is whether it can be said that the applicant has acquired said disability during service. Shri Rajpurohit, learned Presenting Officer submitted that "during his service" means "while actual on duty". So, according to him, benefit of this Section can be given only if the employee sustains disability while on duty. However, it must be noted that if really the intention of the legislature would have been to restrict the cases of the employee sustaining injury while on duty, then certainly the legislature would have specifically used such words and in that event, the legislative would have mentioned "disability arising out of and in the course of his employment or service". But no such

phraseology is used and it is simply mentioned “acquires a disability during his service”. The plain and simple meaning of the same would be, ‘when an employee is in the service’. It does not mean that he must acquire disability while actually working or doing official duty. Incidentally, it must be noted that in this very Act, the legislature has at times used the word “person with disability”. However, these two words viz. “disability” and “person with disability” are separately defined and they are distinct. It must be mentioned that in other Acts, for example, in Workmen’s Compensation Act, 1923, the legislature has specifically used the word “accident arising out of and in the course of his employment”. Similarly, in the instant cases, had it been the intention of the legislature to give protection only to those Government employee who sustained injury while performing their official duties, the legislature could have very well used specific phraseology to that effect. But that has not happened. So, under the circumstances, the words “an employee who acquires the disability during his service” has to be construed liberally and then it means that an employee who has acquired disability while in service. So, we are of the considered view that in the instant case, the applicant is entitled for benefit of Section 47 of the “Disabilities Act.”

15. The Judgment of this Tribunal in O.A.741/2007 was challenged by the Government in Writ Petition No.7920/2009 and the Hon’ble High Court by Judgment dated 19.11.2009 confirmed the Judgment of this Tribunal. The Hon’ble High Court in Para Nos.6 and 7 held as follows :-

“6. Section 47 reads as under :-

47. Non-discrimination in Government employments – (1) No establishment shall dispense with, or reduce in rank, an employee who acquired 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.

A perusal thereof will show that establishments which are covered by the Act cannot dispense with or reduce in rank, an employee who acquires disability during his service. Thus, the disability has no connection with the employment. The proviso thereof provides, as to what has to be done on an employee acquiring disability. After considering the various provisions, in Devki Nandan

(Dr.) and considering the Judgment of the Supreme Court in Kunal Singh vs. Union of India & another AIR 2003 SC 1623, this Court took the view that it is not open to an employer to remove such a person but a supernumerary post will have to be created and he will have to be kept on that post till such time he is able to work on a suitable post commensurate with the disability. However, if no such posts are available, then till he attains the age of superannuation.

7. It is not doubt true that this is contrary to the provisions for removal of a person on medical unfitness in terms of the Service Rules governing continuation in employment. We have to bear in mind that those Rules are an exercise in subordinate legislation where the Disabilities Act being primary legislation and as such the subordinate legislation must give way to the primary legislation. In our opinion, considering the law as settled, no case made out to interfere with the order passed by the learned Tribunal.”

16. Thereafter again, similar issue was posed for consideration in O.A.No.1160/2010. In that case, the Applicant Ashok Pawar was working as Head Constable. On 07.08.2006 during night shift as Bit Marshal while he was riding motor-cycle met with an accident and suffered severe head injury. He was referred for medical examination and having found him permanently disabled and unfit for continuation in service, invalid pension was granted under ‘Rules 1982’. The Applicant challenged the said decision before this Tribunal contending that he is entitled to protection of Section 47 of ‘Act 1995’. Accordingly, in view of the law laid down by Hon’ble Supreme Court in **Kunal Singh’s** case, the O.A. was allowed with a finding that Section 47 of ‘Act 1995’ will prevail over ‘Rules 1982’ and all service benefits were ordered to be given to the Applicant till he attained the age of superannuation.

17. The aforesaid decisions have attained finality. Therefore, the defence of the Government that to attract Section 47 of ‘Act 1995’, a person must suffer disability literally while discharging duties is devoid of any merit. There is no such stipulation in Section 47 of ‘Act 1995’ that disability should suffer while discharging duties or official work. All that, it says that the protection is available to an employee who acquired disability during his service. In other words, such disability has no connection with the actual employment. If the interpretation

sought to be made by the Respondents is accepted, it would render Section 47 of 'Act 1995' nugatory. The phraseology used in Section 47 of 'Act 1995' "where employee acquired disability during his service" is very much clear and left no scope of interpretation is canvassed by learned P.O. In the present case, the Applicant was diagnosed with bipolar disease, which comes under the definition of 'Disability' given in Section 2(i) of 'Act 1995', which is as follows :-

"Disability means –

- (i) Blindness;
- (ii) Low vision;
- (iii) Leprosy cured;
- (iv) Hearing impairment;
- (v) Locomotor disability;
- (vi) Mental retardation;
- (vii) Mental illness."

Bipolar disorder means 'a mental condition marked by alternating periods of elation and depression'. As such, Section 47 of 'Act 1995' is fully attracted.

18. True, now 'Act 1995' has been repealed in the wake of enforcement of the "Rights of Persons with Disability Act, 2016" (hereinafter referred to as 'Act 2016'). However, repeal and saving provision under Section 102 of 'Act 2016' makes it quite clear that nothing done or any action taken under 'Act 1995' shall be deemed to have been done or taken under the corresponding the provisions of this Act. In the present case, the Applicant was declared permanently incapacitated for service in 2008, and therefore, the provisions of 'Act 1995' i.e. then existing Act would apply with full force. Apart, the Applicant also falls within the definition of "Persons with Disability" as defined in Section 2(s) of 'Act 2016', which is as follows :-

"2(s) Person with Disability means a person with long term physical, mental, intellectual or sensory impairment which in interaction with barriers hinders his full and effective participation of society equally with others".

Whereas, as per Section 20(4) of the 'Act 2016', no Government establishment shall dispense with or reducing in rank of employee who acquires disability during his or her service. As such, the Applicant is also covered within the definition of "Person with Disability" and in view of embargo in Section 20(4) of 'Act 2016', the Respondent No.1 cannot dispense with or reduce in rank of the Applicant having acquired disability during his service.

19. For the aforesaid discussion, I have no hesitation to sum-up that the Act of Respondent No.1 granting invalid pension to the Applicant w.e.f.14.08.2008 in reference to Rules 68 to 80 of 'Rules 1982' is violative of Section 47 of 'Act 1995' as well as Section 20(4) of 'Act 2016' i.e. new Act. The Applicant is entitled to service benefits till he attends the age of superannuation i.e. 31.01.2009 and O.A. deserves to be allowed. The Applicant attained the age of superannuation on 31.01.2009 but deprived of his retiral benefits for ten years. It is only after interim orders passed by this Tribunal, the pension was finalized, that too, without giving the benefit of Section 47 of the 'Act 1995' to him. The Respondents are, therefore, liable to pay cost of this litigation quantified at Rs.20,000/-. Hence, the following order.

ORDER

- (A) The Original Application is allowed.
- (B) The Respondents are directed to grant retiral benefits to the Applicant by treating his date of superannuation as 31.01.2009 and shall grant all other consequential benefits to him as per his entitlement.
- (C) All monetary benefits as well as retiral benefits be accordingly released within six weeks from today.

- (D) The Applicant is at liberty to make an application to the Respondent No.1 for grant of interest on delayed retiral benefits, which will be dealt with in accordance to Rule 129(A) and (B) of M.C.S. (Pension) Rules, 1982.
- (E) The Applicant is entitled to cost of Rs.20,000/- from the Respondents jointly and severally.

Sd/-
(A.P. KURHEKAR)
Member-J

Mumbai

Date : 09.05.2019

Dictation taken by :

S.K. Wamanse.

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