

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Dated this Thursday, 19th day of June, 2003

Coram: Hon'ble Mr.V.K.Majotra - Member (A)
Hon'ble Mr.Shankar Raju - Member (J)

O.A.739 of 1999

Harun Kassam Muzawar,
R/o Near Hotel Samrat,
C/o Super Silver Marketing,
Complex and Guest House,
Diu -362 520.
employed as Meter Reader
Electricity Department,
Sub Division No.II,
Administration of Daman & Diu.
(By Advocate Shri S.R.Atre) - Applicant

Versus

1. Union of India
through the Administrator,
Union Territory of Daman & Diu,
& Dadra & Nagar Haveli, Secretariat,
Daman - 396 220.
2. The Development Commissioner and
Appointing Authority,
Administration of Daman & Diu,
Secretariat, Daman - 396 220.
3. The Executive Engineer (Electrical),
Electricity Department, Power House
Building, 2nd Floor, Nani Daman,
Daman.
4. The Collector,
O/o the Collector,
Diu - 362 540.
5. The Assistant Enginee (Electrical),
Sub Division No.II,
Diu - 362 540.
(By Advocate Shri R.K.Shetty) - Respondents

ORAL ORDER

By Hon'ble Mr.Shankar Raju, Member (J) -

The Applicant impugns respondents order dated 2.2.1999 retiring him of invalid pension under Rule 38 of the CCS (Conduct) Rules, 1972 as well order dated 7.5.1999 rejecting his request for reinstatement. He has sought quashment of these orders with a prayer for continuing him in service till

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superannuation in a post equivalent in pay scale to the post held by him or in the alternative on a supernumerary post till a suitable post is available for him.

2. Applicant who was working as a Meter Reader during the course of duty met with an accident and was physically impaired. Applicant was thereafter assigned ~~alternate~~⁴ work which he had performed to the satisfaction of the authority.

3. Applicant requested the Respondents for appointment as Lower Division Clerk which was forwarded to the competent authority and certificate issued by the Civil Surgeon, opinion was given as to incapability of the applicant to undertake duties of continuous standing and walking.

4. By a letter dated 29.8.1996, the Applicant was asked to appear before the Medical Superintending Government Hospital. Applicant accordingly appeared and by Office Order dated 11.8.1997 it was opined that the Applicant was suffering shortening of 1/2 inches of right extremity and was declared unfit for performing duties of a Meter Reader.

5. A representation was preferred on 2.8.1997 against the aforesaid decision and further stated the earlier Medical Board, recommended Applicant fit for alternative clerical work since 1990 and that he had been working as such he should have been considered for an alternate post. He also apprised to the

Respondents, the statutory provisions of persons with disabilities (equal opportunities protection of rights and full participation) Act, 1995 hereinafter called the Disability Act.

6. The Review Medical Board as requested by the Applicant was stated to be under consideration. Till then the Applicant was directed to proceed under leave as per CCS (Medical Examination) Rules, 1957. Applicant appeared before the Review Medical Board on 12.1.1998 and to the best of his knowledge was declared fit and to continue in Government service but not as a Meter Reader.

7. Respondents again on 20.11.1998 asked the Applicant to appear before the Review Medical Board and had sought furnishing of earlier notice of first, second and third Review Medical Board.

8. By an order dated 2.2.1999, Applicant was retired on ^umedical grounds and representation against which has been rejected giving rise to the present OA. By referring to Section 2 (k) read with Section 47 of the Disability Act it is stated that an employee who has acquired disability during his service and in discharging of duties if not found suitable for the post he was holding could not be shifted to other post with the same pay scale and service benefits. It is also provided that in case _h it is not possible to adjust the employee against any post he may

be kept in supernumerary post until suitable post is available or till he attains the age of superannuation. To substantiate this a Division Bench of Central Administrative Tribunal, Jaipur in *Hasan Khan Vs. Union of India & others*, 2003 (1) ATJ 141 has been relied upon.

9. On the other hand Respondents counsel - Shri Shetty opposes the application and states that no vacant post is available. The Applicant has been declared permanently incapacitated for the post on which he was working. The order passed under Rule 38 is perfectly legal.

10. We have carefully considered the rival contentions of the parties and perused the material on record. The circumstances of the present case and the action taken by the Respondents to retire the Applicant on invalid pension under Rule 38 of the Rules (ibid) has been declared illegal and is no more res integra in the light of the recent decision of the Apex Court in the case of *Kunal Singh Vs. Union of India & another*, 2003 (1) SC SLJ 300, where the following observations have been made -

"10. The argument of the learned counsel for the respondent on the basis of definition given in Section 2 (1) 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 the 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."

If one has regard to the aforesaid it was incumbent upon the respondents to have adjusted the Applicant as he had already been adjusted to an alternate post since his acquiring disability to some other alternate post with the same pay scale and in the even the post is not available to continue him on a supernumerary post till his superannuation. Rule 38 of the Pension Rules (ibid) is overridden by the provisions of Section 47 of the Disability Act.

11. In view of the above agreeing with the decision of the Tribunal in Hasan Khan's case (supra). this OA deserves to be allowed. Accordingly the impugned orders are quashed and set aside. Respondents are directed to act in accordance with the directions of the Apex Court in Kunal Singh's (case). In that event, the Applicant would be deemed to be on duty with all consequential benefits. No order as to costs.

S. Raju
(Shankar Raju)
Member (J)

V.K. Majotra
(V.K. Majotra)
Member (A)

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