

(2015) 08 BOM CK 0133
In the Bombay High Court
Case No : Writ Petition No. 655 of 2005

Ashok and Others

APPELLANT

Vs

Assistant Director (A), the Director General, Information and
Public Relations and Others

RESPONDENT

Date of Decision : 06-08-2015

Acts Referred:

Industrial Disputes Act, 1947 — Section 2(oo)
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full
Participation) Act, 1995 — Section 2, 2(i), 2(i)(viii), 2(t), 47

Citation : (2015) 6 ABR 569 : (2016) 1 ALLMR 100 : (2015) 6 BomCR 346 :
(2016) 1 MhLj 940

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : V.Y. Patil, for the Appellant; S.D. Shelke, AGP, Advocates for the
Respondent

Final Decision : Allowed

Judgement

R.V. Ghuge, J—This petition was Admitted by order dated 31/01/2007. The stay to the recovery ordered by this Court on 10/03/2005 was confirmed on 31/01/2007.

2. The petitioner challenges the judgment and order of the Labour Court dated 23/04/1999 in Complaint (ULP) No. 155/1990, by which his complaint was dismissed. By an interim order passed by the Labour Court, pending the complaint, the petitioner was granted 75% wages till the decision in the complaint. The Labour Court, therefore, directed recovery of all benefits received under its interim order.

3. The petitioner also challenges the judgment of the Industrial court dated 05/08/2004 in Revision (ULP) No. 4/2004 (Old No. 709/1999) by which the revision petition preferred by the petitioner, was dismissed.

4. This case involves the rights of the petitioner under the Persons with

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for Short, the Act of 1995).

5. The petitioner submits that he was appointed as a "Peon" on 28/04/1981. He continuously worked and served as a Messenger, as well. By letter dated 22/09/1987, it was informed that the petitioner is unfit due to a defect in the left eye. He was still continued. By letter dated 26/02/1990, the respondent relying upon the letter dated 22/09/1987 issued by the Board of Referees from J.J. Ophthalmic Hospital, Bombay, terminated the petitioner.

6. The petitioner submits that the termination has occurred in 1990 on the basis of a letter dated 22/09/1987. The petitioner has subsequently died on 04/01/2015 and his legal heirs are on record. His date of superannuation would have been 31/03/2020.

7. The petitioner submits that besides the letter dated 22/09/1987, there has been no charge levelled upon the petitioner and his past record was clean and unblemished. He, therefore, submits that the dismissal of the complaint by the impugned judgment of the Labour Court is erroneous and the recovery order is unsustainable.

8. He further submits that the judgment of the Industrial Court is equally perverse as the Industrial Court failed to note the error committed by the respondent and the Labour Court. He, therefore, prays for setting aside of the impugned judgment.

9. The learned AGP has strenuously supported the impugned judgments. An affidavit in reply dated 15/04/2005 has been placed on record. The respondents have contended that they have acted only on the report of the Board of Referees and as such neither can the report dated 22/09/1987 be faulted, nor can the petitioner claim continuance in employment despite being blind. It is further submitted that the respondent have no grievance against the petitioner. This is not adversarial litigation. An unfit employee and more so with defective eye sight, could not have been kept in employment.

10. I have considered the submissions of the learned Advocates. The report dated 22/09/1987 is shown to the Court. It is not disputed that the report dated 22/09/1987 issued by the Board of Referees, Bombay, J.J. Ophthalmic Hospital, Bombay mentions that the petitioner is declared unfit to perform duties as a "Peon".

11. By communication dated 26/02/1990, the petitioner was informed that his employment is brought to an end from 01/03/1990 as he is medically unfit. It does not appear from the record that a show cause notice before terminating the service of the petitioner was issued to him or that he was heard, more so when the respondent was relying on a medical report issued three years ago on 22.9.1987.

12. The principles of natural justice mandate an opportunity of hearing. The

cardinal principle of affording an opportunity of hearing and giving a fair hearing to a person, has not been adhered to in the instant case.

13. Section 47 of the Act of 1995 reads as under :-

"47. Non-discrimination in Government Employment - (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."

14. The Apex Court in the case of Kunal Singh Vs. Union of India (UOI) and Another, AIR 2003 SC 1623 : (2003) 96 FLR 990 : (2003) 2 JT 132 : (2003) 2 LLJ 735 : (2003) 2 SCALE 78 : (2003) 4 SCC 524 : (2003) SCC(L&S) 482 : (2003) 1 SCR 1059 : (2003) 2 SLJ 365 : (2003) 1 UJ 733 : (2003) AIRSCW 1013 : (2003) 2 Supreme 102 , has held in paragraph Nos. 9, 10 and 12 as under :-

"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.

12. Merely because under Rule 38 of CCS Pension Rules, 1972, the appellant got invalidity pension is no around 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 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."

15. The learned Division Bench of this Court has considered a similar situation in the case of Shivaji Dongre Vs. State of Maharashtra and Others, (2006) 2 BomCR 261 : (2006) 1 LLJ 1024 : (2006) 1 MhLj 417 and has observed in paragraph No. 9 as under :-

"9. In the present case, in view of Section 2(i)(viii) petitioner is a disabled person, he is, therefore, entitled to protection of Section 47(1) of Disabilities Act. Apparently, termination order issued by the respondents is in breach of the mandate of Section 47 of the Disabilities Act, therefore, said termination order is liable to be quashed and set aside. The certificate issued by Civil Surgeon shows that petitioner is capable of doing light work. Thus, respondents will have to adjust the petitioner by giving him some light work, if it is available. If no such light work is available, petitioner will be entitled to be kept on a supernumerary post until suitable post is available or he attains superannuation whichever is earlier."

Reliance was placed upon the judgment of the Apex Court in the case of Kunal Singh case (supra).

16. The Apex Court in the case of Bhagwan Dass and Another Vs. Punjab State Electricity Board, AIR 2008 SC 990 : (2008) 2 CLT 233 : (2008) 116 FLR 627 : (2008) 1 JT 240 : (2008) 1 LLJ 696 : (2008) 1 SCALE 64 : (2008) 1 SCC 579 : (2008) 1 SCC(L&S) 242 : (2008) 3 SLJ 1 : (2008) 1 UJ 148 : (2008) AIRSCW 5142 : (2008) AIRSCW 534 : (2008) 1 Supreme 75 , has relied upon the judgment of the Apex Court in Kunal Singh (supra) and has observed in paragraph Nos. 12 to 15 as under :-

"12. From the materials brought before the court by none other than the respondent -Board it is manifest that notwithstanding the clear and definite legislative mandate some officers of the Board took the view that it was not right to continue a blind, useless man on the Board's rolls and to pay him monthly salary in return of no service. They accordingly persuaded each other that the appellant had himself asked for retirement from service and, therefore, he was not entitled to the protection of the Act. The only material on the basis of which the officers of the Board took the stand that the appellant had himself made a request for retirement on medical grounds was his letter dated July 17, 1996. The letter was written when a charge sheet was issued to him and in the letter he was trying to explain his absence from duty. In this letter he requested to be retired but at the same time asked that his wife should be given a suitable job in his place. In our view it is impossible to read that letter as a voluntary offer for retirement.

13. Appellant No. 1 was a Class IV employee, a Lineman. He completely lost his vision. He was not aware of any protection that the law afforded him and apparently believed that the blindness would cause him to lose his job, the source of livelihood of his family. The enormous mental pressure under which he would have been at that time is not difficult to imagine. In those circumstances it was the duty of the superior officers to explain to him the correct legal position and to tell him about his legal rights. Instead of doing that they threw him out of service by picking up a sentence from his letter, completely/out of context. The action of the concerned officers of the Board, to our mind, was depreciable.

14. We understand that the concerned officers were acting in what they believed to be the best interests of the Board. Still under the old mind-set it would appear to them just not right that the Board should spend good money on someone who was no longer of any use. But they were quite wrong, seen from any angle. From the narrow point of view the officers were duty bound to follow the law and it was not open to them to allow their bias to defeat the lawful rights of the disabled employee. From the larger point of view the officers failed to realise that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or

largess but their right as equal citizens of the country.

15. In light of the discussions made above, the action of the Board in terminating the service of the disabled employee (appellant No. 1) with effect from March 21, 1997 must be held to be bad and illegal. In view of the provisions of Section 47 of the Act, the appellant must be deemed to be in service and he would be entitled to all service benefits including annual increments and promotions etc. till the date of his retirement. The amount, of terminal benefits paid to him should be adjusted against the amount of his salary from March 22, 1997 till date. If any balance remains, that should be adjusted in easy monthly installments from his future salary. The appellant shall continue in service till his date of superannuation according to the service records. He should be reinstated and all due payments, after adjustments as directed, should be made to him within six weeks from the date of presentation of a copy of the judgment before the Secretary of the Board."

17. The Delhi High Court, in the case of Shri Dilbagh Singh Vs. Delhi Transport Corporation, (2005) 123 DLT 318 : (2005) 84 DRJ 208 : (2005) 107 FLR 1106 : (2006) 1 LLJ 480 , has held in paragraphs 17 and 18 as under:-

"17. Section 47 has come up for consideration in a number of cases, by this court. It has been held that it applies, regardless of where the employee incurs the disability; it acquires primacy, and can be invoked, without application of laches; its benefits have to be given even if compensation is paid, for premature retirement of an employee. The position emerging from the various authorities are broadly summarized below:

i. Laches cannot be set up to deny relief, since the Act is a beneficial legislation: Krishan Chander and P.O. Bhainswal Kalan Vs. Delhi Transport Corporation, (2003) 71 DRJ 11 ;

ii. The provisions of the Act have to be given effect to in respect of grievances that arose before enactment of the Disability Act: Mr. Vijender Singh Vs. Delhi Transport Corporation, (2003) 5 AD 606 : (2003) 105 DLT 261 : (2003) 69 DRJ 641 : (2004) 1 SLJ 86 ; Delhi Transport Corporation Vs. Sh. Harpal Singh, Ex. Security Guard and Another, (2003) 4 AD 429 : (2003) 105 DLT 113 : (2003) 69 DRJ 537 : (2004) 1 SLJ 66 ;

iii. The provisions categorically enjoin every employer not only to retain, and desist from discriminating employees suffering from impairment, but also to place them in other posts, without depriving any service conditions or benefits, if they are unable to function in their posts: Delhi Transport Corporation Vs. Rajbir Singh, (2002) 100 DLT 111 : (2003) 2 SLJ 102 ;

iv. Construction of the Act should be made in the light of international conventions: Delhi Transport Corporation Vs. Rajbir Singh, (2002) 100 DLT 111 : (2003) 2 SLJ 102 (DB) ;

v. Reinstatement possible even after premature retirement, and grant of

compensation: Baljeet Singh Vs. Delhi Transport Corporation, (2000) 2 AD 88 : (2000) 83 DLT 286 ;

vi. Benefits of the enactment, and entitlements under Section 47, available irrespective of where the employee contracted the disability: Rajbir Singh Vs. Delhi Transport Corporation and Others, (2002) 8 AD 432 : (2002) 97 DLT 19 .

18. The above analysis would show that Section 47 was enacted as an absolute, unalterable, non-discriminatory standard to be followed by every establishment, in relation to their disabled employees, at the workplace. The provision is broad in its coverage, and does not allow deviation on account of an employer's compulsion or inability to provide an alternative post or employment; indeed he is under a positive obligation to give some work or job to the disabled employee, who suffers injury or incurs disability, and protect the existing terms and conditions of service, if necessary, by keeping him "on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier."

The authorities, viz decisions of this court, serve to underline the width and scope of the provision. Hence, the defense of DTC that the petitioner cannot be given employment, rings hollow; it is unacceptable."

18. It is apparent from the impugned judgments that neither the Labour Court nor the Industrial Court have considered the scheme under the 1995 Act. The Labour Court could not have dismissed the complaint on the ground that because the petitioner had developed loss of sight in one eye, he could not have been continued in employment and deserved to be terminated.

19. The conclusion of the Labour Court that the case of the petitioner falls under the exception to retrenchment carved out under Section 2(oo) of the I.D. Act, is a perverse conclusion. The agonies of the petitioner have been further multiplied by the fact that though the Labour Court granted interim relief on 06/03/1990 to the petitioner by directing the respondent to pay 75% of the wages from 07/02/1990, it has directed recovery of the entire amount while dismissing the complaint. 12% interest has been imposed on the said amount. Surprisingly, the Industrial Court concurred with the conclusions of the Labour Court. Non-application of mind by both the Courts, is apparent.

20. In the light of the above, this petition is allowed. The impugned judgments of the Labour Court dated 23/04/1999 and the judgment of the Industrial Court dated 05/08/2004 are quashed and set aside. Since the petitioner has passed away on 04/01/2015, there can be no order of reinstatement notwithstanding that he would have attained the age of superannuation on 31/03/2020.

21. Considering the above, I deem it proper to direct the respondents to pay the residual 25% wages of the deceased petitioner from the date of his termination till the date of the dismissal of the complaint on 23/04/1999 and full wages from 24/04/1999 till the date of death of the petitioner. The same shall be paid to

petitioner No. 1A Smt. Sulochana Ashok Ahire, who is the wife of deceased petitioner Ashok Ahire, within a period of 12 weeks from today.

22. This petition is, therefore, allowed. Rule is made absolute in the above terms.