

(2013) 04 GUJ CK 0075

In the Gujarat High Court

Case No : Letters Patent Appeal No. 63 of 2013 in Special Civil Application No. 11516 of 2012

Chandrasinh P. Raulji

APPELLANT

Vs

Regional Director and Another

RESPONDENT

Date of Decision : 15-04-2013

Acts Referred:

Constitution of India, 1950 — Article 12
Industrial Disputes Act, 1947 — Section 25F
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 2(i), 2(t), 47, 47(1)

Citation : (2013) 138 FLR 474

Hon'ble Judges : Mohinder Pal, J; Jayant M. Patel, J

Bench : Division Bench

Advocate : Bhargavi G. Thakar, for the Appellant; Hardik C. Rawal and Paritosh Calla, for the Respondent

Final Decision : Allowed

Judgement

Jayant Patel, J.—The present appeal is directed against the order dated 14.12.2012 passed by the learned Single Judge of this Court in

Special Civil Application No. 11516 of 2012, whereby the learned Single Judge, for the reasons recorded in the order, has dismissed the petition.

We have heard Ms. Bhargavi Thakar, learned Counsel for the appellant and Mr. Hardik Rawal, learned Counsel for respondent No. 1. Mr.

Paritosh Calla, learned Counsel has filed his appearance for respondent No. 2, who is a formal party.

The short facts of the case are that the original petitioner-appellant was working as conductor in the respondent corporation. While on duty, he met

with an accident. As a result thereof, he had to undergo treatment and ultimately, the Civil Surgeon, as per the Certificate dated 24.4.2002,

declared him unfit for the work of conductor and certified him as fit for the work of peon. Thereafter, as per the petitioner, it was obligatory on the part of the respondent to offer work of peon, but he was initially denied the work on the ground as to whether he could work on any other post or not and thereafter the post of peon was not available, etc. It is an admitted position that the petitioner, on account of the same was not taken on duty from 23.1.2002 to 30.5.2004. Thereafter, the respondent authority took the petitioner on the post of peon from 5.6.2004. The original petitioner-appellant herein raised the dispute for non-offering of the work to him and the non-payment of salary for the period from 23.1.2002 to 30.5.2004. The said dispute came to be referred to the Industrial Tribunal for adjudication being Reference (IT) No. 160/2005. The Tribunal ultimately did find that there was deprivation of the employment and financial loss to the petitioner from 23.1.2002 to 30.5.2004. But in the evidence at Exh. 15 in the deposition of the workman, it had not come on record that he made attempt to get the employment and the Tribunal also found that there was delay in filing the affidavit, therefore, the Tribunal found that the amount of Rs. 20,000/- as lump sum compensation would meet with the ends of justice. Accordingly, the Tribunal declared the action of the respondent for not offering the work on the post of peon from 23.1.2002 to 30.5.2004 as illegal and causing injustice, but towards the salary for the period from 23.1.2002 to 30.5.2004, the Tribunal ordered lump sum compensation of Rs. 20,000/- and cost of Rs. 1,000/- by passing appropriate award. The petitioner being aggrieved by the said award preferred Special Civil Application No. 11516 of 2012. The said petition came to be heard by the learned Single Judge and the learned Single Judge did not interfere with the award and dismissed the petition mainly on the ground that the petitioner did not make any attempt to get the work anywhere else and the said reason recorded by the Tribunal was convincing and, therefore, different view was not called for. It is under these circumstances, the present appeal before us.

2. It appears to us that there is a finding recorded by the Industrial Tribunal and the award is also passed accordingly to the effect that the action of not offering employment to the petitioner on the post of peon by the respondent and consequently not offering the employment during the period

from 23.1.2002 to 30.5.2004 was illegal and had caused injustice to the appellant original petitioner. The said finding is not disturbed by any higher forum. The respondent has not preferred any appeal against the award. Therefore, the said conclusion of facts remains.

3. The only aspect to be considered is whether the Tribunal is justified in awarding lump sum compensation of Rs. 20,000/- towards arrears of salary for the period from 23.1.2002 to 30.5.2004 or not. In our view, the case was required to be examined by the Tribunal keeping in view the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Act). Section 47 of the Act reads 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) xxx

4. Section 47(1) of the Act provides that even if it is not possible to adjust the employee against any post, he may be kept in supernumerary post

until a suitable post is available or he attains the age of superannuation, whichever is earlier. The aforesaid is mandate of the law for which

appropriate protection is required to be extended by any statutory body like respondent Corporation, which is a State within the meaning of

Article 12 of the Constitution of India. At this stage, we may refer to the decision of the Apex Court in the case of Kunal Singh Vs. Union of India

(UOI) and Another, wherein the Hon"ble Apex Court, after considering section 47 of the Act, has observed at paragraphs 8, 9, and 10, which

reads as under--

8. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities

and to help them to fully participate in natural life was felt for a long time. To realize objective that people with disabilities should have equal

opportunities and keeping their hopes and aspirations in view a meeting called the Meet to Launch the Asian and Pacific Decades of Disabled

Persons was held in Beijing in the first week of December, 1992 by the Asian and Pacific countries to ensure full participation and equality of

people with disabilities in the Asian and Pacific Regions. This Meeting was held by the Economic and Social Commission for Asia and Pacific. A

Proclamation was adopted in the said meeting. India was a signatory to the said Proclamation and they agreed to give effect to the same. Pursuant

thereto this Act was enacted, which came into force on 1st January, 1996. The Act provides some sort of succor to the disabled persons.

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 mat 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 u/s 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.

(Emphasis supplied)

5. If the facts of the present case are examined in light of the aforesaid legal position, it is not in dispute that the original petitioner appellant herein

sustained injury while on duty. He was disabled to discharge the duty as conductor and he was found fit for discharging duty on a lower post of

peon. In view of the aforesaid mandate of law, even if the post was not available, it was obligatory for the respondent to keep the petitioner on a

supernumerary post and to continue the person concerned. As against that the employment was not offered to the petitioner on the ground mat the

post was not available at the division at which, he was working and also on the ground as to whether he can be posted for other work or not Since

the finding for deprivation of the employment from 23.1.2002 to 30.5.2004 was already recorded by the Industrial Tribunal and the same is not

under challenge, we need not discuss the said aspect further. However, on the question of deprivation of salary for the period from 23.1.2002 to

30.5.2004 is concerned, the Tribunal has taken the view, which was absolutely uncalled for. Be it noted mat it was not a case where the

relationship of employer and the employee had come to an end, nor was it a case where there was violation of section 25-F of the Industrial

Disputes Act (ID Act) and the dispute was raised. The principles of payment of lump sum compensation is to be applied where the question is for

violation of section 25-F of ID Act and more particularly qua daily-wager or working as purely temporary and ad hoc workman. Such cannot be

applied in a case where there is regular employment, more particularly when the relationship of employer and employee had not come to an end.

The petitioner for all purposes was continued as an employee, but there was actually deprivation of the work and consequently, the salary for the

period from 23.1.2002 to 30.5.2004. Therefore, in facts of the present case, it appears to us that the ground that the original petitioner did not

make any attempt to get the employment at any other place could not be said as germane to the exercise of discretion for the payment of the

legitimate wages/salary for the aforesaid period. We may record that we are inclined to take the aforesaid view in view of the peculiar facts and

circumstances in the present case that the person was declared physically disable to do the work of conductor because he met with an accident

while on duty and he was certified by the Civil Surgeon as unfit for the post of conductor and as fit for the post of peon and the said aspect is

required to be considered in light of the aforesaid mandate of law for extending the benefits for the protection of physically disabled person.

6. In view of the aforesaid discussion, we find that the exercise of discretion by the Tribunal for deprivation of the salary to the petitioner-appellant

cannot be said to be germane to the ground and rather can be said as an error apparent on the face of record and the consideration is beyond the

scope and exercise of power by the Tribunal in a matter of dealing with the case of physically disabled person. The exercise of power could also

be said as running counter to the provisions of the Act and more particularly section 47 of the Act. Hence, the award passed by the Tribunal for

payment of lump sum compensation of Rs. 20,000/- cannot be sustained, but the petitioner appellant herein would be entitled to full salary for the

aforesaid period. Hence, the impugned award passed by the Tribunal so far as it relates to giving direction No. 3 for payment of lump sum

compensation of Rs. 20,000/- is set aside and it is directed that the appellant-petitioner herein would be entitled to full salary with allowances from

23.1.2002 to 30.5.2004. The said amount shall be paid by the respondent to the appellant within a period of three months from the date of receipt

of the order of this Court. If the amount of Rs. 20,000/- is already paid as compensation, the same shall be given set off. The award of the Tribunal

shall stand modified to the aforesaid extent. The judgment and order of the learned Single Judge is set aside. The appeal is allowed to the aforesaid extent. Considering the facts and circumstances, the respondent shall pay cost of Rs. 10,000/- to the appellant original petitioner within the aforesaid period.