

(2015) 09 BOM CK 0029

In the Bombay High Court

Case No : Writ Petition No. 5798 of 2012

Dattatraya Raghunath Kobarne

APPELLANT

Vs

Maharashtra State Road Transport Corporation and Others

RESPONDENT

Date of Decision : 09-09-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 34, 36, 38

Citation : (2015) 4 LLN 62

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

Bench : Single Bench

Advocate : Barde Parag Vijay, for the Appellant; Deshmukh B.S., Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

R.V. Ghuge, J—Heard.

2. Rule.

3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

4. The petitioner is aggrieved by the impugned judgment and order dated 3.1.2012, delivered by the Industrial Court in Complaint (ULP) No. 98 of 2008. Grievance is that though the complaint has been allowed, it has only been partly allowed and the petitioner has not been given his salary for the period 23.5.2008 till 9.7.2010.

5. Shri Barde submits that the petitioner who is an award winning driver with the MSRTC having joined duties in 1986, suffered a paralytic stroke on 8.4.2008, while on duty. With great efforts, he skillfully avoided an accident and ensured that the bus halted without causing any injury to any passenger. He was on medical leave till 23.5.2008.

6. He approached the respondent for allotment of duties on 23.5.2008. He was directed to approach the Civil Surgeon and obtain a fitness certificate. Despite offering himself for work, the respondents refused allotment of duties. The Civil Surgeon referred the petitioner on 9.7.2008 for a medical examination to the Sasoon General Hospital, Pune. By its report dated 4.8.2008, addressed to the Divisional Controller of the respondent, the Sasoon General Hospital opined that the petitioner, who had suffered a left MCA infarct, had improved considerably and in view of the said stroke, he was fit to perform table work and not fit to discharge duties as a Driver.

7. Shri Barde submits that despite the said medical certificate having been presented to the MSRTC, he was directed to get a certificate in a specific format, which the MSRTC had not earlier supplied to the petitioner. It is claimed that the Divisional Controller did not allot duties to the petitioner, though the documents were received by the Divisional Controller on 20.10.2008.

8. The petitioner served a notice upon MSRTC on 10.11.2008 requesting for allotment of duties and payment of wages. The respondent refused to allot duties until the medical certificate in format was received by him.

9. Shri Barde submits that the petitioner preferred Complaint (ULP) No. 98 of 2008 on 8.12.2008. By an interim order dated 5.9.2009, the Industrial Court directed the MSRTC to provide alternate work, which was finally allotted on 6.1.2010 after this Court dismissed the Writ Petition No. 7808 of 2009 filed by the respondent and by recording a statement of the MSRTC that alternate employment would be provided to the respondent.

10. The petitioner submits that, though the complaint was allowed, the Industrial Court has declined backwages to the petitioner from 23.5.2008 till 9.7.2009. Wages have already been granted by the Industrial Court from 10.7.2009 to 6.1.2010 on the ground that the medical certificate in format was received by the MSRTC and which is dated 10.7.2009.

11. Grievance is that the Industrial Court appears to have concluded that the petitioner was not able to work and could not have performed work. When he was not capable of working, he could not be granted the wages for the period 23.5.2008 to 9.7.2009. The petitioner submits that he had offered himself for work, despite his physical status. The respondents could have pragmatically accommodated the petitioner on a light job till the medical procedures were completed and could have treated the petitioner on duty recognizing his long standing service to the organization.

12. Shri Deshmukh, learned Advocate for the respondent has supported the impugned judgment. Contention is that the petitioner could not have been allotted the duty of a driver as he was medically unfit. He could not be allotted any alternate employment until the formalities prescribed by the MSRTC were fulfilled. He is however, unable to indicate as to what was the procedure that was mandatorily required to be followed under the Rules of the MSRTC. No document

indicating such procedure was placed before the Industrial Court.

13. Shri Deshmukh, yet submits that the respondent will have to suffer monetary loss if wages are paid to the petitioner despite having not worked. He submits that the claim of the petitioner is more on sympathy and cannot be claimed as a matter of right since the principle of "No work no wages" would apply to his case.

14. I have considered the submissions of the learned Advocates as have been recorded above.

15. The petitioner has been allotted light work by virtue of the certificate dated 4.8.2008 issued by the Sasoon General Hospital. The medical leave of the petitioner, therefore, could have been extended, if available, from 23.5.2008 till 3.8.2008 or leave could have been granted, if available to the credit of the petitioner, for the said period.

16. It is not contradicted that the petitioner has been an award winning driver. Despite suffering a paralytic stroke while driving a bus, he had skillfully avoided an accident. No passenger was injured and no loss was caused to the respondent MSRTC.

17. I can gauge from the fact situation emerging from the record that the petitioner was made to run from pillar to post initially for obtaining the medical opinion from Sasoon General Hospital. Despite the opinion received dated 4.8.2008, the respondent then directed the petitioner to produce a certificate in format, which was available after 11 months on 10.7.2009. Till then, the petitioner was not allotted any duties and deprived of his day to day earning.

18. I find this conduct of the respondent to be in opposition to the statement of objects and reasons in introducing the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("1995 Act"). For clarity the statement of objects and reasons are reproduced herein below:-

" An Act to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region.

Whereas the Meeting to Launch the Asian and Pacific Decade of Disabled Persons 1993-2000 convened by the Economic and Social Commission for Asia and Pacific held at Beijing on 1st to 5th December, 1992, adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region;

AND whereas India is a signatory to the said Proclamation;

AND whereas it is considered necessary to implement the Proclamation aforesaid.

be it enacted by Parliament in the Forty-sixth year of the Republic of India as follows:-....."

19. The thought process on disability is now transcending generosity based perspective to rights -based perspective. The world for the disabled is changing

and the aspirations as well as expectations of the physically challenged are also changing. Now there is a greater understanding of the cause of disability and increasing consciousness of civil rights. It is now being accepted that the physically challenged are to be treated with dignity and deserve a dignified status in society, so as to be treated equally with the able bodied.

20. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 has several provisions to ensure equal opportunities, protection of rights and full participation of the disabled people so as to bring them in the mainstream activities of the society.

21. The Honourable Supreme Court in the case of D.N. Chanchala Ors. Vs. The State of Mysore and Others, AIR 1971 SC 1762 : (1971) 2 SCC 293 : (1971) SCR 608 Supp , while considering the case of reservation in Universities, has provided preferential treatment to the disabled / physically challenged persons.

22. In the case of J Javed Abidi Vs. Union of India and Others, AIR 1999 SC 512 : (1998) 8 JT 632 : (1998) 6 SCALE 597 : (1999) 1 SCC 467 : (1998) 3 SCR 610 Supp : (1999) 1 UJ 143 : (1999) AIRSCW 111 : (1998) 9 Supreme 446 , the Apex Court dealt with the grievance of a physically challenged person, expressing difficulty in having an easy access and seeking concessional facilities in domestic travel by Indian Airlines.

23. The learned Division Bench of this Court, in the matter of Patel Suleman Gaibi Vs. The State of Maharashtra, (2014) 6 ABR 715 , has considered in paragraph Nos. 16, 17, 20 and 22 as under:-

"16. In the interpretation of the provisions of the said Act the concept of "reasonable accommodation" shall have to be imported. The significance of the concept of reasonable accommodation is that it is a way of moving beyond respecting difference to actually accommodating the difference. In fact the requirement of accommodation of differences has been recognized as an integral part of the concept of equality under Article 14 by the Supreme Court in the case of Ashok Kumar Gupta and Another Vs. State of U.P. and Others, (1997) 4 JT 251 : (1997) 3 SCALE 289 : (1997) 3 SCALE 288 : (1997) 5 SCC 201 : (1997) SCC(L&S) 1299 : (1997) 3 SCR 269 . This concept promotes the dignity of every individual, which again has been accepted as one of the concomitants of Article 21 of the Constitution of India. The recognition of the value of human dignity serves as a powerful reminder that people with disabilities have a stake in and a claim on society that must be honoured quite apart from any considerations of social or economic utility. They are ends in themselves and not means to the ends of others. This view militates strongly against the contrary social impulse to rank people in terms of their usefulness and to screen out those with significant differences.

17. In the context of "employment" Section 32 of the said Act requires the appropriate Governments to identify the posts in the establishments, which can be reserved for the persons with disability. At periodical intervals, not exceeding

three years, the appropriate Government is required to review the list of posts so identified and update the list taking into consideration the developments in technology. Section 33 of the said Act requires every appropriate Government to reserve in every establishment, such percentage of vacancies not less than 3% of persons or class of persons with disability, of which 1% each shall be reserved for persons suffering from blindness or low vision, hearing impairment, locomotor disability or cerebral palsy, in the posts identified for each disability. The proviso to the Section permits appropriate Government, having regard to the type of work carried out in any department or establishment by notification and subject to such conditions, if any, as may be specified in such notification, to exempt any establishment from the provisions of reservation. Section 34 deals with provision for special employment exchanges. Section 36 provides for carry forward of vacancies reserved for persons with disabilities. Section 38 provides for formulation of Schemes for ensuring employment of persons with disabilities and Section 41 urges the appropriate Government and the Local Authorities, within limits of their economic capacity and development, to provide for incentives to employers, both in public and private sectors to ensure that at least 5% of their work force is composed of persons with disabilities.

20. In our judgment, considering the peculiar facts and circumstances of the present case, as also the tests to be applied in the interpretation of beneficial legislations, like the said Act, the answer to the posed question, has to necessarily be in the negative. At the stage of identification and reservation of the post of peon for persons with disabilities, it is reasonable to expect that some thought process has gone into the question, as to whether the duties assigned to such posts can be discharged with some reasonable degree of proficiency, by persons with disabilities. The petitioner, in the present case, had not suppressed any facts with regard to his disability. The Board of Medical Referees, which examined the petitioner in August, 2012, just before he was issued his appointment orders, certified that the petitioner was "temporary fit" to discharge the duties as a peon in the Irrigation Department. The Board, however, made an endorsement that there should be "review after one year". This procedure and more particularly, the endorsement with regard to review after one year is sought to be justified by reference to the 1981 Rules. In matters of identification and reservation of posts, for persons with disabilities and the appointments thereto, there is no question of adverting to the 1981 Rules. The said Act is a special legislation dealing with persons with disabilities so as to protect their rights, provide them with equal opportunities and promote their full participation in the mainstream. It being a special enactment, the doctrine of "generalalia specialibus non derogant" would apply. Any provisions in the 1981 Rules, to the extent they conflict with the provisions of the said Act would stand over-riden. In the context of the Central Civil Services (Pension) Rules, 1972, the Supreme Court, by invoking the doctrine of generalalia specialibus non derogant has ruled that the provisions of the said Act will over-ride the provisions of the Pension Rules 1972.

22. In making the impugned order terminating the petitioner's services, the relevant considerations have been ignored and irrelevant considerations taken into account. In the case of National Federation of Blind Vs. Union Public Service Commission and Others, AIR 1993 SC 1916 : (1993) 2 JT 541 : (1993) 2 LLJ 452 : (1993) 2 SCALE 181 : (1993) 2 SCC 411 : (1993) 2 SCR 556 : (1993) 3 SLJ 16 . The Supreme Court had noted that the visually challenged constitute a significant section of our society and as such it is necessary to encourage their participation in every walk of life. In the said case, the Supreme Court directed the Union of India and UPSC to permit visually disabled persons (persons who are blind, partially blind and with low vision) to compete and write civil service examinations, as some of the posts in the Indian Administration Services and other allied services, were identified by a committee, as suitable to be filled from amongst the visually challenged persons. In the case of Amita Vs. Union of India (UOI) and Another, (2005) 4 ESC 497 : (2005) 7 JT 288 : (2005) 3 LLJ 749 : (2005) 13 SCC 721 : (2006) SCC(L&S) 1507 : (2005) 2 SCR 565 Supp : (2005) 3 SLJ 410 the Supreme Court has held that only restriction which could be spelt out from the ratio of the decision in the case of National Federation of Blind (supra) was whether the post in respect whereof the petitioner sought consideration was "totally unsuitable for visually handicapped persons having regard to the nature of duties attached to the office / post". In the present case, as noted earlier, the post of peon in the Irrigation Department had been identified and reserved as suitable for persons with disability, having regard to the nature of duties attached to the said post. This relevant consideration does not appear to have been taken into account by the respondents in issuing the impugned order and terminating the petitioner's services."

24. In the light of the above, I find that the view taken by the Industrial Court is pedantic and not pragmatic. The reasons adduced for refusing wages to the petitioner are not convincing and are unacceptable in the light of the intent and object of the 1995 Act.

25. In the fact situation as above, I find it appropriate to direct the respondent to treat the services of the petitioner for the period 23.5.2008 till 3.8.2008 as "on Leave". From 4.8.2008 when the Sasoon General Hospital issued the medical certificate till 9.7.2009, the petitioner shall be entitled for his monthly wages payable at the relevant time.

26. As such, this petition is partly allowed. The impugned judgment dated 3.1.2012, to the extent of the direction at Clause No. 3 is modified and the respondent is directed to treat the period 23.5.2008 till 4.8.2008 as "on leave" and shall pay the petitioner his salary from 4.8.2008 till 9.7.2009 within a period of twelve weeks from today, failing which the petitioner will be entitled to simple interest at the rate of 6% per annum on the unpaid wages from 4.8.2008 onwards.

27. Rule is made partly absolute in the aforesaid terms.