

(2011) 04 MAD CK 0387

In the Madras High Court

Case No : Writ Petition No. 10694 of 2011

E. Murugan

APPELLANT

Vs

The General Manager (Operation) Metropolitan Transport Corporation Ltd.

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

Constitution of India, 1950 — Article 141, 21
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 47, 47

Citation : (2011) 04 MAD CK 0387

Hon'ble Judges : N. Paulvasanthakumar, J

Bench : Single Bench

Advocate : S.T. Varadarajulu, for the Appellant; T. Chandrasekar, for the Respondent

Final Decision : Allowed

Judgement

N. Paulvasanthakumar, J.—The prayer in the Writ Petition is to quash the order of the Respondent dated 2.4.2011 and consequently direct the Respondent management to grant pay protection with continuity of service, back wages and other attendant benefits from the date of appointment i.e., on 9.12.1994 as per Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

2. The Petitioner, who was appointed as a Driver in the Transport Corporation on 16.5.1988 met with an accident on 30.1.1991 and due to the injuries and disabilities, the Petitioner submitted an application before the Respondent for an alternate employment and he was appointed as Helper non-ITI as fresh entrant in the minimum scale of pay. After joining the post, the Petitioner made a representation on 21.2.2011 to fix the corresponding scale of pay with continuity of service and the same was rejected on 2.4.2011 on the ground that there is no provision under the Rules. The said request is made in terms of Section 47 of the

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter called as "Disabilities Act"). The Respondent management has not considered the same. Hence, the present writ petition.

3. The learned Counsel for the Petitioner submitted that alternate employment shall be given to the employees who sustained disability even though the disability has occurred prior to Act 1 of 1996 and the said issue was considered by me in the decision reported in (2008) 8 MLJ 1079, (R. Mani v. Labour Court, Trichy and Another) which was also confirmed in W.A. No. 482 of 2009, by order dated 18.03.2010. The learned Counsel for the Petitioner further submitted that in W.P. No. 19928 of 2005, by order dated 24.3.2008 I had ordered alternate employment with salary protection and other benefits to the similarly placed person. The said order was also confirmed by the First Bench of this Court in W.A. No. 2073 of 2010 by order dated 25.10.2010.

4. The learned Counsel for the Transport Corporation submitted that the Petitioner having accepted the appointment given to him as Helper as a fresh entrant with minimum scale of pay on 9.12.1994 and serving all these years without challenging the said order, is not entitled to get any benefit and even assuming that the Petitioner is entitled to get benefit u/s 47 of the Disabilities Act, the Petitioner is not entitled to get any back wages as the Petitioner is challenging the order dated 9.12.1994 by filing this Writ Petition after 17 years. The learned Counsel for the Respondent is justified in requesting this Court to deny back wages. In reply to the said submission, the learned Counsel for the Petitioner submitted that the Petitioner may be denied back wages and he may be given alternate employment with pay protection and other benefits from the date of discharge. The said submission made by the learned Counsel for the Petitioner is recorded.

5. In the decision reported in (2008) 8 MLJ 1079, (R. Mani v. Labour Court, Trichy and Another), in paragraphs 10 to 15 it is held as follows:

10. The enactment of Act 1 of 1996, was made for giving effect to the proclamation of full participation and equality of people with disabilities in the Asian Pacific region held in Beijing in the first week of 1992 to which the Government of India is a signatory. Even prior to the enactment of Act 1 of 1996, similar issue came up before the Supreme Court in the decision Anand Bihari and others Vs. Rajasthan State Road Transport Corporation, Jaipur and another, : wherein it is held that in case of the employees acquiring disability during employment, the employer should provide for adequate safeguards to remedy the situation by giving them alternate job or by compensating them in some form for the alround loss they suffered for no fault of theirs. In that case, the drivers of the roadways buses of the Respondent Corporation who have put in long years of service, during their routine medical examination were found to have developed defective eyesight and did not have the required vision for driving heavy motor vehicles like buses. The Corporation terminated their services since their eyesight was not of the standard required to drive buses. The

Honourable Supreme Court held that the action of the Corporation was not proper and equitable and directed the Corporation to offer them alternative employment or grant compensatory relief for the loss they suffered on account of the premature retirement necessitated by their unfitness to work as drivers. The Court observed that the workmen are not denizens of an animal farm to be eliminated ruthlessly the moment they become useless to the establishment. They have not only to live for the rest of their lives, but also to maintain the members of their family and other dependents, and to educate and bring up their children. Their liability in this respect at the advanced stage at which they are thus retired stands multiplied. They may no longer be of use to the Corporation for the job for which they were employed, but the need of their patronage to others intensifies with the growth in their family responsibilities. In the circumstances of the case, the Court proposed a scheme to give relief to the workmen involved in that case.

11. Again in the decision *Narendra Kumar Chandla Vs. State of Haryana and others*, i.e., prior to the enactment of the Disabilities Act, the Supreme Court considered similar issue and ordered to give alternate employment taking note of the fundamental right guaranteed under Article 21 of the Constitution of India. The operative portion of the order reads as follows:

Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the post he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. Asking the Appellant to discharge the duties as a Carrier Attendant is unjust. Since, he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For Clerk, typing generally is not a must. Therefore, the State Electricity Board should relax his passing of the typing test and appoint him as an LDC. Since, on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs. 1,400-2,300, his last drawn pay and scale of pay have to be protected. He will also be entitled to arrears of salary.

The said judgment is having binding force in terms of Article 141 of the Constitution of India.

12. In *A. Subramani Vs. The Management of Tamil Nadu State Transport Corporation (Coimbatore Division I) Ltd. and The Presiding Officer Labour Court, Division Bench of this Court* held that even if a workman received compensation under the Workmens Compensation Act, 1923, still he is entitled to get benefit envisages u/s 47 of the Act 1 of 1996 and in fact the order of the single Judge directing the workman to refund the compensation received for getting the benefit u/s 47 of the Act was set aside.

13. The decision relied on by the learned Counsel for the second Respondent

State, rep. by the General Manager, T.N.S. Transport Corporation, Madurai Division-IV, Dindigul v.K. Mohammed Mustafa 2008 (1) LLN 871 to support his contention that the Petitioner is eligible to get benefit only under G.O. Ms. No. 746, Transport Department, dated 2.7.1981 cannot be sustained since the above referred Supreme Court decisions Anand Bihari v. R.S.R.T. Corporation (supra) and Narendra Kumar Chandla v. State of Haryana (supra) were not brought to the notice of the Division Bench while deciding the said case.

14. Act 1 of 1996, even though came into force from February, 1996, the principles contained in the said Act can be applied to this case since the Petitioner's right guaranteed under Article 21 of the Constitution of India has been violated and by enactment of the said Act, the pre-existing right available as fundamental right as well as human right was reiterated in the said Act. The Petitioner is having a fundamental right to demand alternate employment even without reference to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Similar issue was considered by the Honourable Supreme Court in the decision M. Nagaraj and Others Vs. Union of India (UOI) and Others, and in paragraph 20, the Supreme Court held as follows:

20. This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value...

In the said judgment it is held that the enactment of the Constitution of India, particularly Part-III confirms the existing rights and the same cannot be treated as new rights to the citizens. Similarly, Act 1 of 1996 has not created any new right and it only recognised the pre-existing right.

15. Thus, the contention of the learned Counsel for the second Respondent that the Petitioner having sustained disability prior to Act 1 of 1996 is not entitled to seek alternate employment, is unsustainable.

The said findings were confirmed in W.A. No. 482 of 2009 dated 18.03.2010. In paragraph 8, it is held as follows:

8. We have considered the rival submissions as well as the law on this aspect. The rights of the disabled have been spelt out in the Disabilities Act which is only an expansion of the rights enshrined in Article 21 of the Constitution of India. Our Country has also signed the UN Convention on the Rights of Persons with

Disabilities. Therefore, a person who had suffered disability is entitled to be employed without any loss financially and in fact, the Act provides that ad hoc posts must even be created so that he is not kept out of employment. When this is the legal position, the Appellant - Corporation ought to have come-forward to calculate the amount that is due to him, had he been employed right from the day of his accident. They could have excluded the period when he has been on leave. They should have given him a lighter job, a desk job which he could have discharged on receiving the Certificate from the Medical Board. This was their duty under the Act. Therefore, the order of the learned Single Judge with regard to the direction for giving alternate employment with seniority and pay protection is confirmed. Even with regard to the direction to pay 75% of back wages, we are accepting here to the request made to the learned Counsel, only because he pleads financial inability and that to ask them to pay the entire amount would impose a burden on them. We are really reluctant to interfere with the discretion exercised by the learned Single Judge in reducing the back wages to only 75%. But considering the Appellant's plea, we modify the award of 75% of back wages to a lump sum of Rs. 12,00,000/- . This shall be paid within a period of twelve weeks from the date of receipt of a copy of this order in the following manner:

Rs.4,00,000/- should be paid within four weeks (15-04-2010) and the next four lakhs within the next four weeks (13-05-2010) and the remaining four lakhs on 10-06-2010. If this amount is not paid as per this direction the Appellant is bound to pay interest on Rs. 12,00,000/- at the rate of 12% till the full payment is made.

9. The appeal is partly allowed as above.

6. In the light of the above finding the impugned order is set aside and it is held that the Petitioner is entitled to get alternate employment in the same scale of pay with promotional benefits from the date of his discharge without any back wages / difference in pay as the Petitioner has not challenged the order for 17 long years. The Petitioner is entitled to get all other benefits other than back wages. The Respondent is directed to pass order in terms of the order passed in this Writ Petition and communicate the same to the Petitioner within a period of three weeks from the date of receipt of a copy of this order and the benefits arising out of the said order without back wages shall be calculated and paid to the Petitioner from June 2011.

7. The Writ Petition is allowed with the above directions.

8. No costs.