

(2004) 02 MAD CK 0059
In the Madras High Court
Case No : Writ Petition No. 19341 of 1996

E. Subramani

APPELLANT

Vs

The General Manager, (Administration) Puratchi Thalaivar
MGR Transport Corporation

RESPONDENT

Date of Decision : 18-02-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full
Participation) Act, 1995 — Section 47

Citation : (2004) WritLR 751

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : R. Shanmugham, for S. Ravi, for the Appellant; G. Muniratnam, for
the Respondent

Final Decision : Allowed

Judgement

K.P. Sivasubramaniam, J.—The petitioner seeks for the issue of a writ of certiorari to call for the records relating to the show-cause notices

dated 4.10.1996 and 19.11.1996 and to quash the same.

2. The petitioner joined the service of the Pallavan Transport Corporation as driver in the year 1976. He has received a show-cause notice stating

that during the training it was found that his vision was not clear and hence why he should not be removed from service. He was asked to submit

his explanation within seven days. He submitted his representation requesting the authorities to give 10 days time for submitting the explanation.

The petitioner further states that he had been to an Eye Doctor and on testing his eyes, the Doctor has given him a certificate that his vision was

alright and he was provided with spectacles. Therefore, according to the

petitioner, his condition was normal and he can drive the vehicle. On receipt of the petitioner's explanation another show-cause notice was served on the petitioner on 7.12.1996. The petitioner would submit that the conclusion of the authority to discharging him from service was opposed to the rules and principles of natural justice and no opportunity has been given to him to prove that his vision was alright and that he was able to drive the vehicle. As the respondent had taken decision to discharge the petitioner from service, the petitioner has approached this Court for quashing the show-cause notices.

3. In the counter filed by the respondents it is stated that drivers who are involved in an accident are given training in the Driving School and they are also sent for testing their vision. The petitioner was involved in an accident on 10.7.1995 and he was sent for training and after completion of the training his eyes were tested on 26.7.1995. He was referred for complete vision test at the Government Ophthalmic Hospital at Chennai and the Director has given his report dated 16.8.1996 stating that the petitioner's eyes were unfit for driving the vehicle. As a result he was unfit for the post of driver and hence he was rightly issued with a show-cause notice. Without awaiting for further orders, the petitioner has approached this Court. The contention of the petitioner that no opportunity was given to him to prove that his vision was alright, was incorrect and false. The petitioner was given sufficient opportunity to state his case inclusive of the present show-cause notice.

4. Learned Senior counsel for the petitioner contends that the accident had taken place in the year 1983 and he has been sent for testing after 12 years viz., during July, 1995. He has also produced a proper certificate from a competent Ophthalmologist certifying that the eye sight of the petitioner was normal and he can continue to discharge his duties as driver.

5. Mr. R. Shanmugam, learned Senior counsel for the petitioner further contends that even otherwise the petitioner would be entitled to alternate appointment in a suitable post and that the petitioner cannot be discharged mainly on the ground that he has acquired disability.

6. Mr. G. Muniratnam, learned counsel for the respondent contends that the testing was carried out by the competent experts and that it is not open to the petitioner to submit a certificate from a Doctor of his own choice.

The conclusions of the Medical Board/Specialist who was requested to submit the report are binding on the employee and he cannot be heard to contend that the certificate of the Medical Board was not acceptable.

In the context of the entitlement for alternate post, learned counsel for the respondent contends that in terms of G.O.Ms.No.746 Transport Department dated 02.07.1981 the petitioner has to be discharged from service and for any reemployment, he has to wait. Further employment be only in accordance with the priority and seniority considering that many other disabled persons are awaiting alternate employment. Therefore, alternate employment was not automatic or immediate. Hence, the petitioner cannot avoid the order of discharge.

7. I have considered the submissions of both sides. On the claim of the petitioner that his eye sight is perfectly normal and that the Medical Board's finding was unsustainable, I am inclined to hold that it is not for this Court to sit in judgment over the expert's opinion or by a Medical Board and in this case, the opinion of the Director of the Government Ophthalmic Hospital, Chennai. Employees obtaining certificates from other Doctors in their favour, cannot be entertained. Therefore, the decision of the respondent in holding that the petitioner is found unfit to continue as a driver, cannot be interfered with.

8. However, the right of such an employee to be appointed in an alternative post, is mandatory not only in the context of G.O.Ms.No.746, but also under Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1955. Section 47 of the said Act is as follows:-

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) 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.

9. A perusal of the above provisions shows that it is mandatory on the part of the employer to give suitable appointment in the event of the

employee being found unfit when he acquires a disability during his service. In fact, the second proviso, envisages even creation of supernumerary

post to accommodate the employee in alternate employment.

10. While considering the scope of the Act in *Kunal Singh Vs. Union of India (UOI)* and *Another*, , the Supreme Court has held that Section 47

contains a clear directive that the employer shall not dispense with the service of the employee and that the provisions are social welfare measure

which have to be enforced.

11. Therefore, the contention of learned counsel for the respondent that the employee has to be terminated or discharged from service and then

only his entitlement for alternative post will arise, cannot be sustained. The provisions of the Act are very clear to the effect that the service of such

employee shall not be dispensed with. Reference to the Government Order No.746 by learned counsel for the respondent, cannot be sustained

and the said G.O. to the extent that it runs counter to the provisions of the said Act, has to be held as invalid and unenforceable. Therefore, it

follows that the petitioner without being discharged from service, has to be accommodated in an alternative post.

12. The contention of learned counsel for the respondent that there are already similar individuals waiting for appointment, cannot also be sustained

in view of the clear mandatory provisions. The contention that there are no vacancies cannot also be accepted in view of the second proviso to

Section 47, which envisages that the employer should accommodate the employee by creating supernumerary posts. I am inclined to hold that in

fixing the priority, the Government should ensure that there should be a distinction between the employees who acquire disabilities while

discharging their duties towards the employer and in contrast, an employee who

acquires disability due to his own personal or health reasons who may stand on a different footing and may have to await for vacancy. In this case, the disability admittedly arises out of an accident while the employee was discharging his duties. It is also not the case of the respondent that the accident was due to any negligence on the part of the employee himself. Therefore, the case of the petitioner being one who acquired disability while in the course of the his performance of his duty, he is entitled to alternative post and priority over the other individuals whose disability is only due to personal or health reasons and not in connection with the discharge of their duties.

13. In the result, the above writ petition is allowed and the respondent is directed to provide to the petitioner an alternative employment within a period of four weeks from the date of receipt of a copy of this order, with effect from 1.1.2004. It is made clear that the petitioner shall not be entitled to any wages prior to 1.1.2004. The writ petition is ordered accordingly. No costs.