

(2013) 07 SC CK 0138

In the Supreme Court Of India

Case No : Civil Appeal No. 9324 of 2012 (Arising out of SLP (C) No. 7647 of 2011)

Geetaben Ratilal Patel

APPELLANT

Vs

District Primary Education Officer

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 47, 47(1), 58, 61, 62
Primary Education Act — Section 24

Citation : (2013) 8 AD 276 : AIR 2013 SC 3092 : (2013) 5 AWC 4886 : (2013) 3 BLJ 537 : (2013) 5 BomCR 37 : (2013) 9 JT 158 : (2013) LabIC 3174 : (2013) 4 LW 836 : (2013) 6 MhLj 88 : (2013) 6 MLJ 73 : (2013) 4 MPLJ 312 : (2013) 8 SCALE 171 : (2013) 7 SCC 182 : (2013)

Hon'ble Judges : Sudhansu Jyoti Mukhopadhaya, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : Vipin Gogia and Brijendra Singh, for the Appellant;

Final Decision : Partly Allowed

Judgement

Sudhansu Jyoti Mukhopadhaya, J.—This appeal is directed against the order dated 4th November, 2009 passed by the Division Bench of Gujarat High Court in L.P.A. No. 1988 of 2009 whereby the Division Bench dismissed the said Letters Patent Appeal preferred by the Appellant and affirmed the order dated 10th December, 2008 passed by learned Single Judge in Writ Petition-Special Civil Application No. 27730/2007. In the said writ petition the order passed by the Commissioner u/s 62 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the Act") in case No. 253/2007 was set aside.

2. The main question that arises for our consideration is whether the Commissioner u/s 62 of the Act can look into the legality of the order of dismissal from service of a disabled person, if it comes to his notice that the said person with disabilities has been deprived of his rights.

3. The factual matrix of the case is as follows:

The Appellant who was appointed on 30th July, 1990 as Primary Teacher in Vagara School was transferred to Primary School, Tal. Manda, Bharuch from 18th June, 1999. Thereafter, she proceeded on medical leave from 21st June, 1999 to 30th July, 1999, and remained on leave upto 7th September, 1999. In that respect, she had not produced any type of leave report. Thereafter, from 15th September, 1999, she again remained absent unauthorisedly without producing any kind of leave report.

4. In the meantime, on 31st December, 1999, a notice was issued to the Appellant regarding her time to time absence and she was thereby informed to explain in writing the grounds for her absence within seven days. But neither written nor oral explanation was received by the authorities. Thereafter, she directly resumed her duties in the school on 25th November, 2000. The Principal of Primary School, Manad had informed the same to Taluka Development Officer, Bharuch, who in turn intimated the same to the District Panchayat Committee, Bharuch. After resumption of duty on 25th November, 2000, the Appellant went on leave from time to time without pay. In this respect, by memorandum letter dated 28th July, 2002 she was served with a charge-sheet and informed to submit her explanation in writing within 7 days. Since no explanation was submitted by the Appellant, she had been informed in writing vide letter dated 4th March, 2003 to submit the medical certificate of a Civil Surgeon with respect to her illness within 7 days. But neither any medical certificate nor any explanation in writing or in oral, was submitted. By letter dated 30th April, 2003 of Taluka Development Officer, Bharuch, the matter was referred to the higher authority. Thereafter, the final notice was issued by letter dated 9th July, 2003 directing the Appellant to explain in writing within 7 days for her continuous absence, irregularity and carelessness towards her duty. The Appellant failed to submit her reply or explanation to the said notice within the stipulated period. Therefore, by giving another opportunity of defence, a reminder letter was issued on 25th August, 2003 followed by another letter of similar nature dated 28th August, 2003. Having received no reply again, vide order dated 15th April, 2004 she was dismissed from service by the Respondent u/s 24 of the Primary Education Act read with Gujarat Panchayat Services (Discipline and Appeal) Rules, 1997 on the ground of carelessness towards duty, absence from duty, irregularity, breach of orders of the higher authorities and having badly affected the future of the children.

5. For about three years, no action was taken by Appellant. In the year 2007 she filed an application before the Commissioner u/s 62 of the Act. The said application was registered as Case No. 253/2007. In the said application, the Appellant took plea that the order of dismissal passed by the authorities while she was suffering from mental illness was in violation of Section 47(1) of the Act. The Appellant requested for her reinstatement with full back-wages.

6. The complaint on behalf of the Appellant was filed and verified by her father.

Therefore, the Commissioner while issuing notice to the Respondent authority also issued notice to the Appellant on 30th June, 2007 calling upon both the parties to be present on 24th July, 2007 at the time of hearing.

7. At the time of hearing the Appellant herself remained present alongwith her father and on behalf of the Respondent Shri Maganbhai B. Vasava, Head Clerk and Shri Dilavarshinh A. Raj, Junior Clerk had remained present. The Appellant contended that though she was physically healthy at the time of joining the services because of mental illness that developed afterwards she was treated by doctors time to time, who advised her to take rest. She specifically pleaded that since she was divorced by her husband in the year 1998, she started suffering from mental depression which resulted in 40 to 70 per cent mental disability. A certificate issued by the Medical Board of Government Hospital was also produced before the Commissioner.

8. On behalf of Respondent, it was contended that the Appellant unauthorisedly remained absent from service from time to time and in spite of giving opportunity to her, she never replied and because of her carelessness and negligence towards duty, the students suffered. It was further submitted that a charge sheet was also issued to her in this regard but having received no reply from her, she was dismissed from service.

9. The Commissioner after hearing the parties and on perusal of the evidence held that as the Appellant was suffering from 40 to 70 per cent mental disability at the time of dismissal, the said order of dismissal was void. It was also held that if the Appellant is not in a position to work in the large educational interest of the students then an appropriate post should be created for her and her appointment to that post be made as per Section 47 of the Act. It was also directed to count the intervening period as continuous period in service without any break and also to select the place of service of the Appellant in such a manner that she can live with her parents as she requires constant assistance to become mentally healthy.

10. The Respondent challenged the said order before the learned Single Judge of the High Court in Special Civil Application No. 27730/2007. In the said case, the learned Single Judge passed an interim order on 11th January, 2008 with following observation:

2. Upon hearing the learned Counsel for both the sides, it prima facie appears that the Respondent was engaged as a teacher in the year 1990 and it is an admitted position that she continued in service up to 1999, for a period of about 9 years. In the year 1999, on account of the divorce, she sustained mental disability and as a result thereof, she had undergone a prolonged treatment. Due to mental disability, it appears that she might not have appeared in the inquiry proceedings initiated by the Petitioner. As per the Petitioner, she remained absent and not even defended the inquiry proceedings and the order of dismissal was passed. It is true that the order of dismissal is not challenged by the Respondent

before the higher forum, however, she has approached the Commissioner for physically Handicapped persons and ultimately, the Commissioner has passed the order, setting aside the dismissal and also interim directions.

3. Whether the Commissioner has no power to set aside the order of the dismissal or not deserves consideration, but at the same time, it also appears that it is on account of the mental disability, the Respondent could not defend in the proceedings and as a result thereof, the order of dismissal came to be passed. It is an admitted position that the Respondent is mentally disabled and, therefore, had the order of dismissal not been there, the Respondent otherwise would have been entitled to the benefits of the Act, namely; The Persons with Disabilities (Equal Opportunities, etc.) Act, 1995 and more particularly, Section 47 of the Act.

4. Ms. Mandavia, learned Counsel appearing for the Petitioner, however, submitted that it is not a case of dismissal from the service on account of the mental disability or reduction in rank and, therefore, if the dismissal has already taken place, it cannot be set aside by the Commissioner, which may result into consequential reinstatement in service with back wages and other directions. She also submitted that on account of the mental disability of the Respondent, she is not at all in a position to discharge any other work also.

5. Whereas, Mr. Jani, learned Counsel appearing for the Respondent submitted that as per the medical certificate produced on page 60 of the Chief District Medical Officer and Civil Surgeon, she has mental disability upto 40 to 70% and, therefore, she may be in a position to do minor manual work in the School, if assigned to her.

6. It appears that if the person has sustained physical disability, including that of mental disability while in service, it would be required for the authority to extend benefit of Section 47 of the Act. Keeping in view the peculiar facts and circumstances that when the departmental actions were initiated, she had already sustained mental disability, a pragmatic approach is required to be taken. Further, it will be for the concerned Doctor to certify regarding the nature of duty, which can safely and conveniently be performed by the Respondent after due examination.

7. Since, at this stage, the order of dismissal is yet not finalized by this Court, there may not be any payment of back wages and ultimately whether the Commissioner has power or not is an aspect finally to be decided at the later stage. However, it appears that since the Respondent is having mental disability of 40 to 70 per cent, it would be just and proper to allow the operation of the order passed by the Commissioner so as to enable the Respondent to get regular salary and after examination by the competent doctor appropriate duty may be assigned to her.

8. In view of the aforesaid, I am inclined to pass the following order:

RULE

(a) By interim order, there shall be stay against the impugned order of the Commissioner to the extent that the Petitioner shall not be required to pay any backwages to the Respondent, but the Petitioner shall reinstate the Respondent in service by paying regular salary to her from 1.2.2008.

(b) It is further observed that directed that the Petitioner shall get Respondent examined through a Government Doctor of their choice and if it is so opined by the doctor, such duty may be assigned to the Respondent at a place or a nearby place, where she can comfortably and conveniently, in a safe atmosphere, discharge duty.

11. The case was subsequently taken up by another learned Single Judge on 10th December, 2008 who finally disposed of the matter. This time the learned Single Judge neither perused the report of the government doctor nor noticed the question whether the interim order passed by the High Court on 11.1.2008 was complied by assigning duty to the Appellant at the nearby place where she can comfortably and conveniently in safe atmosphere discharge her duties. Learned Single Judge also failed to decide the question whether the Commissioner had jurisdiction to interfere with the order of dismissal. On 10th December, 2008, learned Single Judge dismissed the writ petition on the following grounds and observation:

14. In the present case, the Respondent has remained on long leave and she has not responded to any of the communications by the Petitioner. Her services were terminated in the year 2004 on the ground of absenteeism. Though the Respondent was asked to produce certificate she has failed to comply with the same.

15. In short, after 2004 she was not in service and therefore, the Respondent cannot rely upon the provisions of said section which clearly states that no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. I am therefore of the view that the said section would be of no help to the Respondent. Even otherwise, she had served for only 2 months and she remained absent from 1990 prior to act came into force.

16. As regards the contention that the Respondent sick, it is required to be noted that the Respondent was asked to produce medical certificate which was not produced. Further it is required to be noted that she has served only for 20 months in all.

17. Even otherwise the Respondent was dismissed in the year 2004. She has challenged the said decision after a period of more than three years, which is grossly time-barred. The competent authority ought to have applied their mind before passing the impugned order. The Commissioner has therefore committed an error in setting aside the order of termination.

18. In any case the absenteeism is from the year 1990, prior to the Act came

into force. The provisions of the Act will apply only during service. Therefore the contention of the Petitioner cannot be accepted.

19. It is also required to be noted that the Respondent was teacher and she remained absent unreasonably long period as a result of which the post was vacant and the Petitioner was not able to appoint anybody. The ultimate sufferers were the students. In such situation, I am of the view that the competent authority was justified in dismissing the Respondent after following the proper procedure.

12. On an appeal, the Division Bench by its impugned order dated 4th November, 2009 affirmed the order passed by the learned Single Judge and the same is under challenge before this Court now. The Division Bench also committed the same error as the Single Judge, by not deciding the question of jurisdiction of the Commissioner and the question whether the Appellant was entitled for benefits u/s 47(1) of the Act.

13. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act was enacted in 1995 pursuant to meet the following object and reasons:

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-à-vis non-disabled persons;

(iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

(v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and

(vi) to make special provision of the integration of persons with disabilities into the social mainstream.

14. To decide the present issue, it is also relevant to notice Section 47 of the Act which deals with non-discrimination in Government employment and reads 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.

15. The appointment, function and duties of the Chief Commissioner and Commissioners for Persons with Disabilities have been laid down under Chapter XII of the Act.

Under Section 58(c) of the Act the Chief Commissioner shall take steps to safeguard the rights and facilities made available to persons with disabilities.

The Commissioner is empowered u/s 62 of the Act to look into the complaints in respect to matters relating to deprivation of rights of persons with disabilities, which reads as follows:

62 - Commissioner to look into complaints with respect to matters relating to deprivation of rights of persons with disabilities.-Without prejudice to the provisions of Section 61 the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to--

(a) deprivation of rights of persons with disabilities;

(b) non-implementation of laws, rules, bye-laws, Regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities, and take up the matter with the appropriate authorities.

16. The provisions of Sections 47 and 62 of the Act, when read together, empower the Commissioner, to look into the complaint with respect to the matters relating to deprivation of rights of persons with disabilities and non-implementation of laws, rules, bye-laws, Regulations, executive orders, guidelines or instructions issued by the appropriate Governments or local authorities and to take up the matter with the appropriate authorities for the welfare and protection of rights of persons with disabilities including matter relating to dispensation with service or reduction in rank. The power of the Commissioner "to look into the complaints with respect to the matters relating to deprivation of rights" as provided u/s 62 of the Act is not an empty formality and the Commissioner is required to apply his mind on the question raised by the complainant to find out the truth behind the complaint. If so necessary, the Commissioner may suo motu inquire into the matter and/or after giving notice,

hearing the concerned parties and going through the records may decide the complaint. If it comes to the notice of the Commissioner that a person with disability has been deprived of his rights or that the authorities have flouted any law, rule, guideline, instruction, etc. issued by the appropriate Government or local authorities, the Commissioner is required to take up the matter with the appropriate authority to ensure restoration of rights of such disabled person and/or to implement the law, rule, guideline, instruction if not followed. A complaint may be made by any disabled person himself or any person on behalf of disabled persons or by any person in the interest of disabled persons. Thus the issue as involved is decided affirmatively in favour of the Appellant and against the Respondent.

17. The Appellant was appointed as Primary Teacher on 30th July, 1990 and continued for nine years without any complaint till she proceeded on medical leave on 21st June, 1999. She thereafter, remained absent from time to time for about 1360 days from June, 1999 till the date of dismissal. The Appellant has taken a specific plea that she was divorced by her husband in the year 1998 and since then she suffered mental depression. The Government Medical Board also held the Appellant mentally disabled as she was suffering from 40 to 70 per cent mental disability. The order of dismissal was passed during her mental disability in violation of Section 47(1) of the Act. In this background, the Commissioner having declared the order of dismissal as void, it was not open to the High Court to interfere with such order and to restore the illegal order of dismissal.

18. Whether u/s 62 of the Act, the Commissioner was competent to declare the order of dismissal as void, was one of the question framed by the learned Single Judge by order dated 11.1.2008. But at the time of hearing, the learned Single Judge failed to notice and decide the question so raised. The Division Bench also failed to notice the aforesaid fact and remained silent on the issue.

19. From the documents on record, we find that show cause notices were issued to the Appellant and charges were framed but there is nothing on the record to suggest that any departmental proceeding was initiated. Neither any inquiry officer was appointed, nor any notice was issued by any inquiry officer to the Appellant to remain present in the departmental proceeding. No evidence was relied upon by the Respondent to bring home the charges. Aforesaid facts also show that the order of dismissal was passed in violation of rules of natural justice.

20. Now the question remains about the back wages, if any, to which the Appellant is entitled. The Appellant remained absent from duty from time to time for about 1360 days when she was in service. Therefore, she cannot claim any wages for the said period. The order of dismissal was passed on 15.4.2004, but she moved before the Commissioner after a span of three years i.e. in the year 2007. There being delay on her part, in moving before the Commissioner, she cannot claim any salary for such intervening period.

21. Learned Single Judge by interim order dated 11th January, 2008 directed the

Respondent to reinstate the Appellant and to pay her regular salary w.e.f. 1.2.2008 on the following terms:

8. RULE

(a) By interim order, there shall be stay against the impugned order of the Commissioner to the extent that the Petitioner shall not be required to pay any backwages to the Respondent, but the Petitioner shall reinstate the Respondent in service by paying regular salary to her from 1.2.2008.

(b) It is further observed that directed that the Petitioner shall get Respondent examined through a Government Doctor of their choice and if it is so opined by the doctor, such duty may be assigned to the Respondent at a place or a nearby place, where she can comfortably and conveniently, in a safe atmosphere, discharge duty.

22. In spite of the same, the Respondent authority have neither reinstated the Appellant nor paid salary w.e.f. 1.2.2008. So, they cannot take advantage of their own wrong and, thereby, cannot deny the benefit of wages to which the Appellant was entitled pursuant to the order passed by the High Court on 11th January, 2008.

23. There is nothing on the record to suggest that the Respondent authority got the Appellant examined by a Government Doctor to determine the duty to be assigned to her. In view of her reinstatement, now the Respondent authority may get opinion of the doctor for assigning her duty. In case the Appellant is not in a position to perform the normal duty because of her mental condition, the competent authority will apply Proviso to Section 47(1) of the said Act.

24. Having regard to the fact that we have upheld the order passed by the Commissioner, we direct the authorities to reinstate the Appellant in service immediately and to pay her regular salary every month. The Appellant shall be entitled to arrears of salary w.e.f. 1.2.2008 which the Respondent shall pay within three months, else the Appellant shall become entitled to interest at the rate of 6% per annum with effect from 1.2.2008 till the actual payment.

25. The appeal is allowed in the manner indicated above and the orders passed by the learned Single Judge and the Division Bench of the High Court are set aside. There shall be no order as to costs.