
(2007) 02 BOM CK 0009
In the Bombay High Court
Case No : Writ Petition No. 1937 of 2006

Jaikumar Kulkarni

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 20-02-2007

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(i)(viii), 47, 47(1)

Citation : (2007) 4 ALLMR 162 : (2007) 4 BomCR 362 : (2007) 113 FLR 1125 : (2007) 3 MhLj 130

Hon'ble Judges : R.M. Borde, J;Naresh H. Patil, J

Bench : Division Bench

Advocate : A.V. Patil holding for S.K. Barlotia, for the Appellant; V.B. Ghatge, Assistant Government Pleader for respondent No. 1 and K.M. Babhulgaonkar, for the Respondent

Judgement

Naresh H. Patil, J.—Rule, returnable forthwith. Learned counsel appearing for the respondents waive service. By consent of both the sides, the matter is taken up for final hearing.

2. The petitioner was appointed on 23-9-1985 as Compounder in Primary Health Centre, Ambad, District Jalna. By an order dated 24th January, 2001 the petitioner was declared as permanently incapacitated by the Medical Board of the Government College and Hospital, Aurangabad for rendering services as per rule 72(1) of the Maharashtra Civil Services (Pension) Rules, 1982. The petitioner contends that the Medical Board described the illness of the petitioner as chronic Schizophrenia. A medical certificate of unfitness for further service as per Rule 72(1) of the Maharashtra Civil Services (Pension) Rules, 1982 was issued on 24th January, 2001. Respondent No. 2 by his order dated 3rd March, 2001 retired the petitioner compulsorily with effect from 30th January, 2001 on the ground he was medically unfit to perform duties as Compounder as per certificate issued by the Medical Board.

3. The petitioner further contends that under the provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the Act of 1995") the petitioner's services ought not to have been discontinued. Instead, the petitioner ought to have been shifted to some other post with same pay scale and service benefits and if suitable post was not available he should have been accommodated on a supernumerary post.

4. Undisputedly, the petitioner started receiving invalid pension. The petitioner approached this Court directly by filing present writ petition with prayer to quash and set aside the order dated 3rd March, 2001 issued by respondent No. 2 and for seeking directions to the respondents to grant benefits of the provisions of Section 47 of the Act of 1995.

5. Respondent No. 2 filed affidavit-in-reply wherein it is contended that the petitioner never approached respondent No. 2 and requested for reinstatement in service. The medical papers were also not submitted concerning medical fitness of the petitioner. The deponent further states that the petitioner has approached this Court after more than 5 years. The petitioner himself asked for retirement and after getting pensionary benefits, he had approached this Court.

6. Learned counsel appearing for the petitioner, Shri. A. V. Patil, places reliance on a reported judgment of the Apex Court in Kunal Singh Vs. Union of India (UOI) and Another, , a reported judgment of the Bombay High Court in Shivaji Dongre Vs. State of Maharashtra and Others, and an unreported judgment dated 5th August, 2005 of the Division Bench of the Bombay High Court delivered in Writ Petition No. 3545 of 2005, annexed as Exhibit "C" to this petition.

7. The learned counsel for the petitioner submits that delay in approaching this Court for redressal of his grievances may not be an adverse circumstance for denying benefits to the petitioner which are granted to a disabled person under the provisions of the Act of 1995 and the rules made thereunder. The Counsel submits that the petitioner is willing to approach the competent authority by filing comprehensive representation for redressal of his grievances and for claiming benefits of the provisions of section 47 of the Act, 1995.

8. Shri. K. M. Babhulgaonkar, learned counsel appearing for respondent No. 2 states that in case application or representation is made by the petitioner seeking benefits of the provisions of the Act of 1995, the competent authority would consider the same in the light of the provisions of section 47 of the Act of 1995 and the reported judgments delivered by the Apex Court and the Bombay High Court in this regard.

9. We may refer to the provisions of section 47 of the Act of 1995 which reads thus :

47. Non-discrimination in Government employment. - (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."

While dealing with the scope of section 47 of the Act of 1995 the Apex Court in the case of Kunal Singh (cited supra) observed in para 9 thus:

" ... 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 supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. ..."

In the case of Shivaji Vishwanath Dongre (supra) the Division Bench of this Court held in para 9 thus :

"9. In the present case, in view of section 2(i)(viii) petitioner is a disabled person, he is, therefore, entitled to protection of section 47(1) of the Disabilities Act. Apparently, termination order issued by the respondents is in breach of the mandate of section 47 of the Disabilities Act, therefore, said termination order is liable to be quashed and set aside. The certificate issued by Civil Surgeon shows that petitioner is capable of doing light work. Thus, Respondents will have to adjust the petitioner by giving him some light work, if it is available. If no such light work is available, petitioner will be entitled to be kept on a supernumerary post until suitable post is available or he attains superannuation whichever is earlier."

10. The learned counsel for respondent No. 2 states that the petitioner did not make any representation to the authorities concerned in this regard. The petitioner after enjoying pensionary benefits has approached this Court at a belated stage. The arguments advanced by the learned counsel for respondent No. 2 needs to be considered in the light of the judgments cited supra and the provisions of the Act of 1995.

11. In the light of the facts and circumstances and the reasons stated above, we are of the view that the petitioner shall approach the competent authority i.e. respondent No. 2 - the Chief Executive Officer, Zilla Parishad, Jalna with a comprehensive representation in this regard for claiming benefits of the provisions of Section 47 of the Act of 1995.

12. In the light of the provisions of the Act of 1995, more particularly the provisions of Section 47 thereof, we are of the view that the petitioner's case deserves to be considered in the light of the provisions of Section 47 of the Act of 1995. It would be for the competent authority to consider as to whether the petitioner could be given alternate job or the petitioner could be kept on a supernumerary post after examining the petitioner's case on its own merits. The authorities shall also consider suitability of the petitioner to work on a post. We find that the authority did not take into consideration the effect of provisions of Section 47 of the Act of 1995 before passing order of compulsory retirement.

13. The learned counsel appearing for the petitioner states that the petitioner should be reinstated with backwages for the period during which the petitioner was not provided with alternate employment. In the facts of the case and petitioner's approaching this Court after near about 5 years, we leave this issue to be considered and decided by the competent authority. It is a fact that the petitioner did not work on any post during last five years, and he was receiving pension.

14. Respondent No. 2 - the Chief Executive Officer had compulsorily retired the petitioner by an order dated 3rd March, 2001. We quash and set aside the said order passed by the Chief Executive Officer, Zilla Parishad Jalna in view of aforementioned reasons.

15. The petitioner shall approach respondent No. 2 with a comprehensive representation. In case the petitioner makes such representation within four weeks from today the same shall be decided by respondent No. 2 within six weeks from the date of receipt of such representation on its own merits and in accordance with the provisions of the Act of 1995 and the judgments cited supra after hearing the concerned parties.

16. Rule is made absolute in the above terms with no order as to costs.

17. Authenticated copy be given to the parties as per rules.