

(2008) 03 MAD CK 0021

In the Madras High Court

Case No : W.A.M.P. No. 358 of 2007 in W.A. No. 1475 of 2004

John Peter A.

APPELLANT

Vs

Tamil Nadu State Transport Corporation

RESPONDENT

Date of Decision : 24-03-2008

Acts Referred:

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

Citation : (2008) 2 LLJ 777

Hon'ble Judges : P.K. Misra, J;K. Chandru, J

Bench : Division Bench

Advocate : T.S. Sivagnanam, for the Appellant; Jayesh B. Dolia, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—This miscellaneous petition is filed to modify the judgment dated April 7, 2005 made in W.A. No. 1475 of 2004 delivered

by N.V. Balasubramanian, J. and one of us (P.K. Misra, J.). It came to be posted, before this Division Bench by the orders of the Hon'ble Chief

Justice.

2. Heard the arguments of Mr. T.S. Sivagnanam, learned Counsel appearing for the petitioner in the Miscellaneous Petition (hereinafter referred to

as the "workman") and Mr. Jayesh B. Dolia, learned Counsel appearing, for the first respondent (hereinafter referred to as the "Management")

and have perused the records.

3. The main writ petition W.P. No. 4310 of. 2001 was filed by the workman seeking to set aside the order dated October 29, 1998 removing him

from the post of Conductor by the Management on medical grounds and also for

a direction to provide alternate employment to him with all benefits.

4. The workman was working as a Conductor with the Management. While he was serving in the bus, on a trip from Madurai to Ramanathapuram on April 15, 1997, the bus met with an accident and the workman suffered injuries such as fracture on the fore-arm and shortening of his legs by 6 and fracture in left knee as well as fracture in the left thigh. He underwent treatment in the Government Hospital and after his discharge from the hospital, he wrote to the Management on July 10, 1998 to provide him alternate employment as he could not continue to work as a Conductor. He was subjected to a test by the Medical Board and the Medical Board certified on August 21, 1998 that he was fit for duty other than the post of Conductor which requires work in the Billing and posting. In spite of the recommendation of the Medical Board, the Management removed him from service and it was that order which was challenged in the writ petition.

5. The learned single Judge allowed the writ petition by placing reliance upon Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, "Disability Act") and directed the Management to provide alternate employment with due protection to the last drawn salary earned by him. Aggrieved at same, the Management filed Writ Appeal being W.A. No. 1475 of 2004.

It was contended that the workman had claimed compensation under the Workmen's Compensation Act claiming 100% disability and, therefore, he cannot question his termination.

6. But this Court rejecting the argument of the Management, however, held that for availing the benefit under the Disability Act in terms of Rule 4 of the said Act, a Medical Board duly constituted by the appropriate Government is the authority to issue the certificate and, therefore, it gave liberty to the workman to be subjected for examination by a duly constituted Medical Board. This Court also recorded the fact that the workman had reached the age of superannuation on March 31, 2005 and, therefore, he was eligible to claim only monetary benefits and also gave a further direction to the Management to pay the arrears of salary, if any, till the date of termination viz., on October 29, 1998 and also the amount due to the worker in terms of G.O. Ms. No. 746 from the date of termination till the date

of superannuation. It was further directed that if the workman was found to be a disabled person in terms of the Act, then he will be eligible for the amount on the basis of the revised order and in that case, the amounts already paid will be adjusted.

7. Taking advantage of the said order, the petitioner was sent for examination by the Medical Board and it transpired that the workman suffered only 16% disability and it did not come within the disability specified u/s 2(t) of the Disability Act. In the light of the same, the Management informed the workman that since he was not found to be a disabled person in terms of the Disability Act, he was not eligible to get any further payment. Aggrieved by this conduct of the Management, the workman has filed the present Miscellaneous petition seeking for the modification of the judgment of this Court dated April 7, 2005 and consequently, to direct the Management to pay salary and other allowances in the scale of pay of Conductor from the date of his termination dated October 29, 1998 till the date of his superannuation viz., 31.3.2005.

8. Notice was ordered and a counter affidavit was filed in this miscellaneous petition by the management.

9. The main contention of the Management was that the Division Bench had given liberty to subject the workman to be examined by a duly constituted Medical Board so as to assess his disability in terms of the Disability Act and since the Medical Board had certified the workman not having any prescribed disability, he is not eligible to invoke the benefit conferred u/s 47 of the Disability Act. It is also stated that the Management had paid Rs. 600/- as a consolidated salary which is available to the post of Helper and had paid the workman a sum of Rs. 46,260/- in lieu of an alternate employment pursuant to the judgment dated April 7, 2005 and the workman cannot be given any more benefit and the miscellaneous petition seeking modification of a final judgment is not maintainable.

10. It is rather unfortunate that the Management should take an hypertechnical stand. In the present case, the workman was certified to have attained 100% loss of earning capacity by the District Hospital, Ramanathapuram. The Management, at that time, took advantage of the said report and removed the workman from service by an order dated October 29, 1998. Thereafter, when the petitioner sought for an alternate

employment in terms of medical disqualification the Management resisted the same claim by stating that the workman had availed compensation in

terms of the Workmen's Compensation Act and that he cannot challenge the termination made on the ground of medical disability.

11. When the workman filed writ petition before the learned single Judge, the Management contended that he was only eligible for an alternative

employment that too, as a fresh hand on a consolidated salary and not entitled for any pay protection of the last drawn wages. When the learned

single Judge rejected the argument and directed that the workman was covered by Section 47 of the Disability Act, the present writ appeal was

filed by the Management contending for the first time that the Act will not apply to the case of the workman as his disability was not certified by a

qualified Medical Board and that he had also moved the forum under the Workmen's Compensation Act. This stand of the respondent

Management is really unfortunate and it is not expected from that of a Public Sector Corporation who are expected to act like a model employer.

12. The Supreme Court in a recent judgment lamented about the attitude of certain Public Sector Undertaking in implementing the Disability Act on

its letter and spirit. In the case relating to Bhagwan Dass and Another Vs. Punjab State Electricity Board, expressed its concern and the following

passages found in paragraphs 2 and 14 may be usefully extracted below:

2. This case highlights the highly insensitive and apathetic attitude harboured by some of us, living a normal healthy life, towards those unfortunate

fellowmen who fell victim to some incapacitating disability. The facts of the case reveal that officers of the Punjab State Electricity Board were

quite aware of the statutory rights of appellant No. 1 and their corresponding; obligation yet they denied him his lawful dues by means that can only

be called disingenuous.

14. We understand that the concerned Officers were acting in what they believed to be the best interests of the Board. Still under the old mindset it

would appear to them just not right that the Board, should spend good money on someone who was no longer of any use. But they were quite

wrong, seen from any angle. From the narrow point of view the officers were duty-bound to follow the law and it was not open to them to allow

their bias to defeat the lawful rights of the disabled employee. From the larger

point of view the officers failed to realise that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largess but their right as equal citizens of the country.

13. We had the benefit of perusing the order made in W.C. Act 92/1999 wherein the learned Workmen's Compensation Commissioner had found by his order dated June 1, 2000 that the workman had suffered 100% loss of earning capacity. Therefore, both the Management and the Compensation Commissioner went by the Medical Certificate given by the Hospital which were marked as Exhibits A-1 and A-5. At that time, the Management did not independently examine the workman so as to find out the degree of disability attained by him. On the contrary, a discharge order was passed placing reliance upon the certificate of the District Medical Board certifying 100% loss of earning capacity. The order of the Workmen's Compensation Commissioner was not challenged. Even before the learned single Judge, no such arguments were advanced by the Management. It was for the first time before this Court that the disability must be certified by the duly constituted Medical Board in terms of Rule 4 of the Disability Rules, 1996. This argument is not available to the Management at this stage, especially, when the workman was discharged on the basis of the certificate given by the District Medical Hospital and also paid compensation at the rate of 100% loss of earning capacity as per the orders of the Workmen's Compensation Commissioner and they are estopped from making any submission on the question of degree of disability suffered by the workman.

14. The question is not whether the workman is entitled to seek protection as per Section 47 of the Disability Act but whether his employment can be protected notwithstanding the disability attained by him which was also accepted by the employer. In this context, it is relevant to refer to Section 47(1) along with the first proviso of the Disability Act.

47. Non-discrimination in Government employment:- (I) 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:

(emphasis added)

15. It must be noted that Section 47 gives a complete protection to any workman getting dispensed with his services if he acquired a disability

while in service. The term "disability" found in this Section is referable only to Section 2(i) defining disability and need not refer to "person with

disability" found in Section 2(t). It is only in Section 2(t) the requirement of 40% of any disability as certified by a medical authority is available and

that a minimum percentage of disability may be relevant in terms of reservation of posts found in Chapter VI of the, Disability Act.

16. Even before the Disability Act was enacted in the year 1995, the Supreme Court in two decisions highlighted the necessity to give solace to

workmen who were sought to be discharged on grounds of acquiring disability; (Anand Bihari and others Vs. Rajasthan State Road Transport

Corporation, Jaipur and another, and Narendra Kumar Chandla Vs. State of Haryana and others, .

17. In fact, after reviewing all the cases relating to the Disability Act in respect of the very same Management Corporation, a Division Bench of this

Court vide its decision The Management of Tamil Nadu State Transport Corporation (Villupuram Division-III) Ltd. Vs. B. Gnanasekaran,

emphasised the distinction between the terms "disability" and "persons with disability". In this context, it is relevant to extract paragraph 17 from the

said judgment:

Para 17: In the instant case, the respondent workman became unfit for the duty of the driver as he lost knee movement and there is no possibility of

regaining his normal movement It is not disputed before us that the workman is suffering from locomotor disability within the meaning of Section

2(o) of the Disabilities Act. In view of the Supreme Court's decision in Kunal Singh v. Union of India and Anr. (supra) it is clear that the

acquisition of disability is not the same as a person with disability and it was not necessary for the workman to establish that he suffer more than

40% disability. In our considered opinion the decision of the Division Bench in General Manager, Tamil Nadu State Transport Corporation v. A.

Sengaan (supra) does not lay down the correct law.

18. The above decision of the Division Bench is a complete answer to the contention raised by the Management. Section 47 is an injunction against any employer from either discharging or reducing in rank of an employee on grounds of his acquiring disability. This does not pre-suppose any percentage of disability. If the arguments of the Management is accepted, then Section 47 of the Disability Act is available only when an employee suffers disability ranging from 40% to 100% and such protection is not available if he acquires disability ranging from 1% to 39%. Such an interpretation will result in absurdities and goes against the very protection sought to be conferred on disabled persons by the Parliamentary enactment. That is why the Supreme Court and this Court have repeatedly emphasised the distinction between Chapter VI dealing with employment and Chapter VIII dealing with non-discrimination. At the time when this Court directed a fresh, medical examination, this Court did not refer to the binding precedents of the Supreme Court on interpreting the provisions of the Disability Act.

19. Once it is held that degree of disability is not material for application of Chapter VIII of the Disability Act, then notwithstanding the certification of 16% disability suffered by the workman, the order of the learned single Judge must be upheld. If, according to the Management, the workman had not suffered any disability, then his services ought not to have been dispensed with in the absence of a valid certificate by a competent Medical; Authority as prescribed under the Disability Act. The Management cannot have best of both worlds. Viewed from any angle, the claim made by the workman in this Miscellaneous Petition, cannot be rejected. But, on the contrary, deserves to be accepted.

20. Mr. Jayesh B. Dolia, learned Counsel appearing for the Management submitted that-this Court cannot sit on appeal over the final judgment passed by the Division Bench dated April 7, 2005 wherein the Division Bench had given a categorical finding that only if the, workman is successful in establishing, his disability in terms of Section 2(t), he is eligible to get any relief. We have no hesitation in rejecting the said hypertechnical argument advanced by the Management. The primary concern of this Court is to implement the justice of the legislation and the rights vested by a statute cannot be divested by any other consideration.

21. In this context, it is relevant to refer to the decision of the Supreme Court in *Rajesh D. Darbar and Others Vs. Narasingrao Krishnaji Kulkarni*

and *Others*, . The opinion of DR. Arijit Pasayat, J. as found in paragraph 4 of the said judgment can be usefully extracted to repel the submission

made by the learned Counsel for the Management.

4. Where the nature of the relief, as originally sought, has become obsolete or unserviceable or a new form of relief will be more efficacious on

account of developments subsequent to the suit or even during the appellate stage, it is but fair that the relief is moulded, varied or reshaped in the

light of updated facts. *Patterson v. State of Alabama* illustrates this position. It is important that the party claiming the relief or change of relief must

have the same right from which either the first or the modified remedy may flow. Subsequent events in the course of the case cannot be constitutive

of substantive rights enforceable in that very litigation except in a narrow category (later spelt out) but may influence the equitable jurisdiction to

mould reliefs. Conversely, where rights have already vested in a party, they cannot be nullified or negated by subsequent events save where there is

a change in the law and it is made applicable at any stage. *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri* falls in this category. Courts of

justice may, when the compelling equities of a case oblige them shape reliefs -- cannot deny rights -- to make them justly relevant in the updated

circumstances. Where the relief is discretionary, Courts may exercise this jurisdiction to avoid injustice. Likewise, where the right to the remedy

depends, under the statute itself, on the presence or absence of certain basic facts at the time the relief is to be ultimately granted, the Court, even

in appeal, can take note of such supervening facts with fundamental impact. This Court's judgment in *Pasupuleti Venkateswarlu v. Motor &*

General Traders read in its statutory setting, falls in this category. Where a cause of action is deficient but later events have made up the deficiency,

the Court may, in order to avoid multiplicity of litigation, permit amendment and continue the proceeding, provided no prejudice is caused to the

other side. All; these are done only in exceptional situations) and just cannot be done if the statute, on which the legal proceeding is based, inhibits,

by its scheme or otherwise, such change in the cause of action or relief. The primary concern of the Court is to implement the justice of the

legislation. Rights vested by virtue of a statute cannot be divested by this equitable doctrine (see V.P.R. V. Chockalingam Chetty v. Seethai Ache).

(emphasis added)

22. In the light of the above, we allow the application filed by the workman in W.A.M.P. No. 358 of 2007 in W.A. No. 1475 of 2004 and direct

the respondent/Management to grant the salary and allowance to the petitioner (A. John Peter) from the date of his termination (i.e., October 29,

1998) till the date of his superannuation (i.e., March 31, 2005) together with all attendant benefits and in addition, to pay 6% interest on the

amounts to be paid. However, the Management is at liberty to adjust the amounts already paid. This exercise shall be carried out by the

respondent Management within a period of four weeks from the date of receipt of a copy of this order. However, there will be no order as to

costs.