

(2013) 09 GUJ CK 0022

In the Gujarat High Court

Case No : Special Civil Application No. 10355 of 2012

Kutarbhai Keshlabhai Rathva

APPELLANT

Vs

Assistant Geologist and Others

RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

Citation : (2014) 1 GLR 70

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : P.M. Lakhani, Mrs. R.P. Lakhani, Ms. Chetnaben Joshi and Ms. Dimple L. Joshi, for the Appellant; H.S. Soni, A.G.P. for Respondent Nos. 1 to 5, for the Respondent

Judgement

K.M. Thaker, J.—An employee who incurred physical disability-handicap during and while in service, has preferred present petition upon being constrained to challenge the action of employer-respondent State of terminating his service only on the ground that the petitioner is not able to perform his duties as Driver (though he incurred the disability during and while in service). The petitioner has, in this petition under Arts. 14, 16, 21 and 226 of the Constitution of India, prayed, inter alia, that:

6(b) YOUR LORDSHIP BE PLEASED to allow this petition by way of issuing a writ of mandamus or any other appropriate writ, order or direction by holding and declaring that the inaction on the part of the respondent authorities is highly arbitrary, illegal, bad in law and against the Service Rules and the Rules of Principles of Natural Justice;

(c) To direct the respondent authorities to allow the petitioner to perform his duty by accommodating him on the suitable post of Class-IV cadre other than the job of driving in view of the provisions of Sec. 47 of "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995;

(d) To quash and set aside the impugned order dated 30-7-2011 of compulsory

retirement of the petitioner, which is at Annexure-W to the petition, by holding that the same is illegal, bad in law, arbitrary and discriminatory;

(e) To direct the respondents to make payment of salaries of the petitioner from the date on which it fell due forthwith;

(f) To direct the respondents more particularly the respondent No. 2 to take action against Gadhvi Saheb, who had caused harassment and mental torture to the petitioner, and also direct the authority to initiate an appropriate inquiry in this regard and submit the report of such inquiry to this Hon''ble Court within stipulated time.

2. The factual backdrop which is involved in and relevant for present petition, and which according to the petitioner, led to submission of present petition, can be summarised thus:

2.1. The petitioner has claimed that he was serving as Driver since last about 22 years with the Department of Geology, Mines and Minerals. It is also claimed that since last about 3 years, he was transferred to the office of respondent No. 1 where he was discharging his duties as Driver.

2.2. The petitioner has alleged that after his posting to the office of respondent No. 1, for reasons not known to him, respondent No. 1 started causing harassment and that respondent No. 1 used to harass other employees as well, who due to harassment by respondent No. 1, used to proceed on leave so as to avoid conflict with respondent No. 1.

2.3. The petitioner has further alleged that on 14-10-2009, when he reported for his duty, respondent No. 1 directed him to drive the car to Gandhinagar since he (i.e. respondent No. 1) had to attend a meeting. The petitioner has also alleged that while returning from the meeting, respondent No. 1, without any cause and justification, started abusing him and also slapped him. The petitioner has claimed that for some time, he continued to tolerate and suffer mental as well as physical abuse by respondent No. 1, however, when they reached near Sevaliya (while returning from Gandhinagar), respondent No. 1 again slapped him (i.e. the petitioner) due to which he (i.e. the petitioner) suffered haemorrhage which subsequently resulted into paralysis. The petitioner has claimed that on account of the said action of respondent No. 1, he fell down and slipped into unconsciousness, but instead of acting with any sympathy and compassion, respondent No. 1, even in such condition, left the petitioner and went off driving the vehicle on his own.

2.4. The petitioner has further alleged that he had to be shifted to the hospital and that he was not able to speak for about 3 months.

2.5. The petitioner has claimed that after he was discharged from the hospital and was able to speak, he narrated the details to his family members, and therefore, his son, on his behalf, addressed an application dated 22-2-2010 to respondent No. 2 requesting that appropriate action may be initiated against

respondent No. 1.

2.6. It appears that during the period of treatment, the petitioner was not able to attend his duty and was submitting leave application from time to time. On or around 5-4-2010, respondent No. 1 directed the petitioner to submit medical certificate.

2.7. It appears that the said intimation, i.e. letter directing the petitioner to submit medical certificate, was followed by a show-cause notice dated 29-4-2010.

2.8. The petitioner had submitted his reply dated 6-5-2010 in response to the said show-cause notice dated 29-4-2010.

2.9. Respondent No. 1, vide communication dated 26-5-2010, again directed the petitioner to submit medical certificate for the period from 16-2-2010 to May, 2010. Similar directions were again issued vide communication dated 6-7-2010. On 6-9-2010, the petitioner was informed that his salary was withheld because he had not submitted medical certificate for the period from 16-2-2010 to May, 2010. The petitioner was also asked to submit medical certificate issued by the Medical Board, Civil Hospital.

2.10. The petitioner has claimed that he appeared before the Medical Officer, Civil Hospital, Panchmahals, who examined the petitioner and issued certificate dated 2-11-2010 certifying that the petitioner is not physically fit to discharge duties as Driver, but he is physically fit to perform any other duty, i.e. any duty other than driving a vehicle. The petitioner has claimed that he also submitted medical certificates for the period from February, 2010 to May, 2010.

2.11. The petitioner has claimed that when he reported for duty on 3-11-2010, he was not allowed to perform his duties and respondent No. 1 did not allow the petitioner even to sign the muster roll. On the next day, i.e. 4-11-2010, the petitioner was informed by respondent No. 1 that his medical certificate was forwarded to the Commissioner (i.e. respondent No. 2) and instructions are awaited. The petitioner has claimed that, even thereafter, he continued to report for duty on every working day and though he remained present at the office he was not allowed to sign the muster roll. The petitioner has also claimed that he was not being paid his salary, though he was reporting for duty every day.

2.12. The petitioner has further claimed that in view of such circumstances, he submitted a detailed representation dated 19-11-2010 to respondent No. 1. It is also claimed that when he was asked to submit sick leave report for the period from 15-10-2010 to 3-11-2010 in prescribed form, he complied the said direction and submitted his leave report in prescribed form.

2.13. It appears that the petitioner had also submitted requests/ representations to the Human Rights Commission as well as office of the Chief Minister, office of the Minister of Social Justice, office of the Principal Secretary, Industries, Mines and Minerals Department.

2.14. The petitioner has claimed that he also satisfactorily demonstrated that he was able to perform all other work except driving.

2.15. The petitioner has averred that since despite all efforts, he was not allowed to perform his duties either as driver or on any other post and since he was not even paid salary though he was reporting for duty, he was constrained to prefer writ petition being Special Civil Application No. 9066 of 2011.

2.16. It is further claimed by the petitioner that after hearing the petitioner, the Court was pleased to direct the office vide order dated 13-7-2011 to issue Notice to the respondents making it returnable on 28-9-2011, however, in the meantime, an order of compulsory requirement came to be passed by the respondent and the petitioner was made to compulsorily retire vide order dated 30-7-2011, and that therefore, the Court disposed of the said petition being Special Civil Application No. 9066 of 2011, vide order dated 20-6-2012, with a liberty to file fresh petition on all available grounds including the contention invoking provisions under Sec 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and it is in pursuance of the said order that present petition is preferred. In this petition, the petitioner has, inter alia, challenged the said order dated 30-7-2011 whereby the petitioner is compulsorily retired.

2.17. The petition is opposed by the respondents. One Mr. M.M. Barot, Assistant Geologist, Panchmahals has filed reply-affidavit dated 28-9-2012. Subsequently, the said deponent filed another affidavit-in-reply dated 16-4-2013. The said deponent has averred and stated in the reply-affidavit dated 28-9-2012 that-

6. I say and submit that the present petition is filed by the petitioner challenging the alleged inaction on part of the respondent's authority for not taking appropriate action against officer Shri R.M. Gadhvi and not allowing the petitioner to perform his duties. I respectfully submit that petitioner wrote a letter on 29-1-2010, for sanctioning him medical leave, but he did not submit any medical certificate for the period between 15-10-2009 to 14-11-2009. The petitioner had given medical certificate only for the period from 16-2-2010 to 5-4-2010. Therefore, the authority vide its letter dated 5-4-2010 asked the petitioner to provide medical certificate, and the petitioner has failed to provide the same.

8. I say and submit that, thereafter on 5-4-2010 wrote a letter to the petitioner to submit the medical certificate, but the same was not submitted, therefore, the respondent No. 1 again wrote a letter to submit his medical certificate for the period between 16-2-2010 to May, 2010. The respondent No. 1 once again on 26-5-2010 wrote a letter to the petitioner stating that the petitioner has been paid salary till April, 2010 but since the petitioner has not yet submit his medical certificate for the period from 16-2-2010 to May, 2010 he would not be paid salary for next month i.e. May, 2010, if he fails to produce the medical certificate for the above stated period. A copy of said letter dated 26-5-2010 is annexed

herewith and marked as ANNEXURE-R-I to this affidavit-in-reply.

9. I respectfully say and submit that as the petitioner is suffering from paralysis, the Deputy Director (Administration) wrote a letter dated 6-7-2010 to the petitioner to undergo medical fitness test by remaining present before Medical Board, Civil Hospital, Godhra and submit report/fitness certificate of the said test to the Assistant Geologist, Godhra i.e. respondent No. 1, and also to submit his duly renewed driving licence from R.T.O., Godhra as to whether he is fit for driving or not. A copy of the said letter dated 6-7-2010 is annexed herewith to the petition. Thus the allegation and averments made by the petitioner that there is inaction on the part of respondent authorities is not valid.

11. I respectfully say and submit that the petitioner had remained present before the respondent No. 1 and submitted his Medical Certificate No. 5951. It is clearly mentioned in the said certificate that the petitioner is suffering from HTN/CVA/ With Hemiplegia and he is not fit for driving but fit for other work than driving. He is also not fit for working as a peon in the office and there is no other work which can be assigned to the petitioner in the office of the Assistant Geologist, Godhra. So, respondent No. 1, Assistant Geologist, Godhra wrote a letter to Commissionerate of Geology and Mining, Gandhinagar on 4-11-2010 for granting compulsory retirement to the petitioner. A copy of letter dated 4-11-2010 is annexed herewith and marked as ANNEXURE-R-II to this affidavit-in-reply.

13. I respectfully say and submit that as the Assistant Geologist, Godhra i.e. present deponent, is newly appointed at Godhra Office on 20-1-2011, he studied the Medical Certificate of petitioner and other letter dated 16-7-2010 for the transfer of petitioner and letter dated 4-11-2010, for granting compulsory retirement to the petitioner, letter dated 10-12-2010 for sanctioning of leave period of the petitioner and letter dated 29-12-2010 for compulsory retirement of the present petitioner. Therefore, the present deponent wrote a letter dated 31-1-2011 and sought guidance from the Office of Commissioner, Geology and Mining, Gandhinagar regarding the same. Thus, the averments made by the petitioner that there is inaction on part of the respondent is not correct and required to be rejected.

15. I respectfully say and submit that the petitioner is not fit for driving and other official work. Therefore on 30-7-2011, the office order was issued under Rule 64 of the State Government Civil Services (Mulki Seva) (Pension) Rules, 2002 considering all evidences and on the ground that the petitioner is physically disabled person, he is discharged and retired from the service and separate decision was also be taken of his leaves as it is more than 240 days, therefore it will be taken by the State Government in view of G.R. dated it will be taken by the Government of Gujarat. It was further clarified in the said order that as the petitioner has joined the office of the respondent on 18-11-1989 and has completed 10 years of the service according to the State Government Civil Services (Mulki Seva) (Pension) Rules, 2002 under provision of Rule 52 if the person serving the Government, suffer from any disablement during the tenure

of his service or is unable to perform the duty allotted to him then in that case he is compulsorily discharged and retired from the service. I further submit that the respondent No. 1, once again wrote a letter dated 14-12-2011. A copy of the said letter is annexed and marked as ANNEXURE-R-V to respondent No. 2 regarding the sanctioning of leave application of the petitioner. Respondent No. 3 has sanctioned total 654 days leave of petitioner vide letter dated 3-4-2012. A copy of the said letter is annexed and marked as ANNEXURE-R VI it was communicated by respondent No. 2 to Asst. Geologist, Godhra to pass order regarding leave sanction. Assistant Geologist, Godhra has passed an order of leave sanction vide order dated 12-4-2012. A copy of the said letter is annexed and marked as ANNEXURE-R-VII and leave pay done by Cheque No. 102715 dated 18-4-2012 and amount of 1,27,801 directly deposited in a Bank account of petitioner.

2.18. In another reply-affidavit dated 16-4-2013, the respondents through Mr. Nirav Madhusudhan Barot, Assistant Geologist, Godhra, have stated that:

1. It is respectfully submitted that, as by the Notification No. MAKAM-2004-2537-KH-3 dated 30-11-2006. A copy of the Notification dated 30-11-2006 is annexed herewith and marked as ANNEXURE-R-I to this affidavit-in-reply. The vacant Class-IV post in all offices of the Government of Gujarat it was decided to appoint the servants for the vacant post through the outsourcing agency on contract basis. Afterward, as per General Administration Notification No. MAKAM-2004-2539(1)-KH-3 dated 1-4-2010. The department of Sachivalaya Offices and Head of the Department in State Government and District Offices. A copy of the letter dated 1-4-2010 is annexed herewith and marked as ANNEXURE-R-II to this affidavit-in-reply. Instead of appointing Class-IV servants through outsourcing agency for cleaning and other work/services, permission for appointing new Class-IV servants is not approved by General Administration Department, as it was decided to take service through outsourcing. In order to, for appointing staff at Tapi District, it was instructed to appoint the outsourcing agency against the Class-IV servants and District Offices of Geology and Mining Department are mostly situated at Bahumali Makan under Road and Building Department due to department facilities are covered under Administration Services, therefore without services of the Class-IV officers, maintenance of offices, including movement of files and/or security of the offices is able to be maintained easily.

2. It is respectfully submitted that, the details for the permanent post of the Pattawala/Nayak of Geology and Mining Department are as follows:

As per above mentioned details as of today's date, there is no post available for the post of Pattawala/Nayak due to which Shri K.K. Rathva cannot be appointed on Class-IV post.

3. It is respectfully submitted that the work related to Mineral Exploration is carried out by outsourcing and by Gujarat Mineral Research and Development

Society due to which very less work is left which is also carried out by outsourcing. Drilling staff is more than requirement so letter official letter was written to accommodate this drilling staff vide letter No. CGM-ADM-TANTRIC-STAFF-FAJAL-2012-5966 dated 30-10-2012 to Finance Department of the Government of Gujarat. A copy of the letter dated 30-10-2012 is annexed herewith and marked as ANNEXURE-R-III to this affidavit-in-reply. Due to non-availability of the work relating to the driving for the 8 younger most drivers as per the seniority basis, this office has represented to the Finance Department dated 19-10-2012 to include these drivers in other department on the basis of Loan Services. A copy of letter dated 19-10-2012 is annexed herewith and marked as ANNEXURE-R-IV to this affidavit-in-reply.

5. It is respectfully submitted that, Shri K.K. Rathva's financial situation is good as out of his two sons one is holding qualification of B.E. Mechanical and discharging his services in L. & T. Co., whereas other son is having bright chances of getting an employment as he is holding B.Com degree. If he will sign on pension case paper then his disability pension will be approved soon, therefore, there is no question of not having any income for living.

3. Mr. Lakhani, learned Advocate has appeared for the petitioner. During his submissions, he reiterated the factual details which are mentioned in the memo of petition and he also relied on the Annexure to the petitioner. Learned Advocate for the petitioner submitted that after being discharged from the hospital and upon being fit to resume the duties, when the petitioner reported for duty, he was not allowed to resume his duties/work by respondent No. 1. Thereafter, the petitioner continuously remained present at the office on all working days, however, he was not being allowed to resume his duties. Therefore, he addressed letters/requests to respondent No. 1 as well as Human Rights Commission and other authorities. Mr. Lakhani, learned Advocate for the petitioner also submitted that when the respondents asked the petitioner to report for physical fitness test at Civil Hospital, he appeared before the Surgeon at Civil Hospital also and after the physical fitness test, medical certificate/fitness certificate was granted and he was issued by the doctor who certified that the petitioner was able to perform any other work/duty except the work of Driver and that, therefore, the respondents should have assigned any other work/duty to the petitioner. Mr. Lakhani, learned Advocate for the petitioner also submitted that instead of assigning any other work/duty to the petitioner, the respondents terminated his service by way of compulsory retirement, even after failing to establish the allegations made in the show-cause notice. Mr. Lakhani, learned Advocate for the petitioner submitted that the respondents served show-cause notice to the petitioner which was replied by him and thereafter the respondents resorted to the power of terminating service by way of compulsory retirement. Mr. Lakhani, learned Advocate for the petitioner further submitted that the impugned order dated 30-7-2011 is illegal, arbitrary and unjust. He also claimed that the impugned order is without application of mind to the relevant facts and circumstances and it has been passed by disregarding Sec. 47 of the Act.

According to the petitioner, the impugned order deserves to be quashed.

3.1. Mr. Soni, learned A.G.P. has opposed the petition. Learned A.G.P. reiterated the details mentioned in the reply-affidavit. Learned A.G.P. emphasised the fact that several activities and work related to different posts have been outsourced and in view of the decision taken by the competent authority to outsource such activity/work, and that therefore, it was not possible for the respondents to assign him any other work. Learned A.G.P. further submitted that the competent authority considered the certificate issued by the Civil Surgeon, Godhra and after taking into consideration the opinion of the Surgeon that the petitioner was not able to perform the duties as Driver, considered it appropriate to pass order under Rule 64 of the Gujarat Civil Services (Pension) Rules, 2002, a compulsory retirement and having regard to the facts and circumstances of the case, the said decision and order passed by the competent authority cannot be said to be illegal, unjust or arbitrary or mala fide, as alleged by the petitioner. According to learned A.G.P., the decision and order of the competent authority do not warrant any interference and the petition deserves to be rejected.

4. I have heard learned Counsel for the petitioner and learned A.G.P. for respondent and I have also considered the material on record.

5. It has emerged from the reply-affidavit filed by Mr. Barot, Assistant Geologist that the petitioner has not submitted medical certificate for the period from 15-10-2009 to 14-11-2009 and that the petitioner is not physically fit to perform duty as Driver.

5.1. According to medical certificate, the petitioner is suffering from HTN/CVA/ With Hemiplegia. However, what is more important is the fact, which is unfortunately but conveniently, ignored by the respondent authority that even according to the Surgeon's certificate (on which respondents have relied) the petitioner is fit to perform any other duty.

5.2. Another relevant and important fact is that the allegations made by the petitioner against Mr. Gadhvi, are not denied by the respondents, muchless by Mr. Gadhvi.

5.3. The deponent of the two affidavits, i.e. Mr. Barot, Assistant Geologist also has not denied the details mentioned by the petitioner with regard to the incident which allegedly occurred on 14-10-2009 when he was asked by Mr. Gadhvi, to drive the vehicle so as to reach Gandhinagar for attending the meeting. The incident in question allegedly occurred while returning from Gandhinagar.

5.4. The petitioner has described the incident in question in great detail in the memo of petition, particularly in Paragraph Nos. 3.3 and 3.4.

5.5. It is pertinent that the said allegations by the petitioner have not been denied by the respondent in two affidavits which have been filed by Mr. Barot, Assistant Geologist.

5.6. It is also pertinent that though specific allegations have been made against Mr. Gadhvi, i.e. respondent No. 1, said Mr. Gadhvi (i.e. respondent No. 1) has chosen not to file affidavit and has maintained convenient silence and has not come forward to deny or to even dispute the allegations made by the petitioner.

5.7. In the second reply-affidavit dated 16-4-2013, the respondents speaking through Mr. Barot, Assistant Geologist, have claimed that since "certain" activities of the office of respondent Nos. 1, 2 and 3 have been assigned to outside agency as part of outsourcing process, it is not possible to give alternative work to the petitioner.

5.8. Differently put, the respondent's explanation translates into the stand (of the respondent) that merely because the respondents have taken administrative decision to outsource some of their regular/permanent activities, they do not want to act as per the mandate contained in Sec. 47 of the Act.

5.9. The respondents have also maintained convenient silence as to the allegations levelled against the petitioner vide show-cause notice dated 29-4-2010 inasmuch as the respondent have not mentioned and have not clarified as to whether proper departmental proceedings (domestic inquiry) in accordance with the applicable rules and regulations were taken by the respondents pursuant to the show-cause notice and whether opportunity of hearing and defence was granted to the petitioner, or not.

5.10. The respondents have also not mentioned as to whether report " of the inquiry officer was called for or not. On this count also, the respondent have maintained convenient silence.

5.11. It appears that the respondents abruptly dropped the course of action which was initiated after issuance of show-cause notice, either as an afterthought or on legal advice and instead the respondent resorted to the exercise of power to compulsorily retire an employee.

5.12. Thus, only on the ground that certain activities have been assigned to outside agency and because of such outsourcing, there is no vacancy and consequently any other work/duty cannot be assigned to the petitioner, the petitioner's requests and claim is denied and is being resisted by the respondents.

5.13. It is noticed that after being discharged from the hospital and after recovery when the petitioner tried to resume his duties, he was not allowed to resume his duties and subsequently show-cause notice was issued against the petitioner. It is alleged by the petitioner that at the relevant time, said Mr. Gadhvi was superior officer and the said show-cause notice dated 29-4-2010 came to be issued on his insistence and at his behest. As mentioned earlier, Mr. Gadhvi has not come forward to deny or to even dispute the allegations made by the petitioner.

5.14. The petitioner submitted his reply to the said show-cause notice.

Thereafter, the impugned order came to be passed relieving the petitioner by way of compulsory retirement.

5.15. When the said order came to be passed, the medical certificate issued by the Surgeon at Civil Hospital was available before the concerned/ competent authority.

5.16. The Doctor certified that though the petitioner is not physically fit to discharge duties as Driver, he is fit to perform any other work/duty.

5.17. The petitioner, after fully recovering and with support of Doctor's certificate, requested the respondent employer to permit him to resume duties and assign him light duty.

5.18. In this context, it is relevant to note and mention that provisions under the Act, more particularly Sec. 47 of the Act, impose such obligation on the employer who comes within purview and in ambit of Sec. 2(j) of the Act.

5.19. On this count, it is relevant to note that so far as present respondent is concerned, it is not in dispute that the respondent is petitioner's employer and is also an "employer" within the meaning of the said term as defined under Sec. 2(j) of the Act. The said Sec. 2(j) of the Act reads thus:

2(j) "employer" means,-

(i) in relation to a Government, the authority notified by the Head of the Department in this behalf or where no such authority is notified, the Head of the Department; and

(ii) in relation to an establishment, the Chief Executive Officer of that establishment.

5.20. The provisions of the Act are applicable to the office of respondent No. 1, i.e. establishment that the petitioner was employed. The office of respondent No. 1, i.e. office where the petitioner was employed, is part of department of the State Government, i.e. Geology and Minerals Department and therefore, it would fall within the purview of the term "establishment" defined under Sec. 2(k) of the Act, which reads thus:

2(k) "establishment" means a Corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in Sec. 617 of the Companies Act, 1956 (1 of 1956) and includes Departments of a Government.

5.21. The provision which imposes such obligation and within Sec. 2(j) of the "Establishment" (Sec. 2(k) of the Act) is Sec. 47 of the Act. The said Section reads thus:

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.

5.22. Thus, the said provision obliges the "employer":-

(a) not to dispense with, or reduce in rank, an employee who acquires a disability during his service;

(b) in the event the concerned employee, upon acquiring the disability, is not suitable to hold the same post which he was holding prior to acquiring disability, then the employer is obliged to shift him to other post, but the employer should not dispense with or reduce in rank the concerned employee (who acquires disability during his service) merely because of his disability;

(c) when the concerned employee is shifted to some other post (when found to be not suitable to hold the post which he was holding prior to acquiring disability), then the employer is further obliged to ensure that the post to which the concerned employee is shifted, is a post with same pay-scale and service benefits, i.e. the pay-scale and service benefits of the concerned employee should be maintained and that should not be altered to his disadvantage merely because of such disability;

(d) however, in the event it is not possible to adjust the concerned employee against any post then, instead of dispensing with such employee or instead of reducing such employee in rank, the concerned employee must be kept on a supernumerary post until a suitable post is available or until he attains the age of superannuation, whichever is earlier;

(e) in regular course of service, the concerned employee (who acquired disability during his service and is continued in service in view of provisions of Sec. 47) should not be denied promotion merely on the ground of his disability.

In present case, it is not in dispute that the respondent establishment is not an establishment exempted under proviso of sub-sec. (2) of Sec. 47. Under the circumstances, the respondent employer was under statutory obligation not to

dispense with the petitioner when he acquired the disability.

5.23. Despite the provision under Sec. 47 of the Act and in spite of the Doctor's certificate which certified that the petitioner is not fit for Driver's work but he is fit for other work/duty, the respondent did not shift the petitioner to other post/work. Instead, the respondent employer dispensed with petitioner and his service.

6. The said Act is welfare legislation, and that therefore, the provisions under the Act and more particularly provision in nature of Sec. 47 of the Act are required to be construed keeping in focus the nature and objective of the Act. It is also pertinent that the said Sec. 47 opens with the words "no establishment shall....." Thus, the provision imposes a statutory obligation on the employer of the establishment covered within the purview of the Act to comply with the said obligation. Under the circumstances, the respondent, who is supposed to be model employer, should have been alive to the obligation and should have taken such steps which would carry out the object of the Act as well as the obligation cast on the employer.

7. From the material available on record and the submissions advanced by the learned Advocate for the petitioner and the respondents, it has also emerged that there is no dispute as regards the fact that the petitioner incurred the disability or physical handicap, during and while in service. This is also evident from the fact that at the time of entry in employment, the petitioner had no such disability and even during the tenure of his past service also he did not have such disability. The petitioner, thus, was not a person "with" disability, but he acquired the "disability" after his entry in service and during and while in service. It is also not even the case of the respondent that the petitioner was a person "with" disability. Even if it is assumed, only for the sake of examining the respondents' claim and allegation that the petitioner did not acquire the disability in question on account of the alleged incident, then also the fact remains that he acquired the disability during and while in service. This aspect is neither disputed nor denied by the respondent employer.

7.1. Moreover, Sec. 47 of the Act does not postulate that the disability should be due to (i.e. on account of) any accident/injury.

7.2. The provision contemplates a situation, wherein the employee "acquires" disability (which need not be as a result of accident/injury) which could be due to diverse reasons and not necessarily only as a consequence of accident/injury.

7.3. The Legislature has not qualified the word "disability" and/or the word "acquired" with the expression "on account of accident".

7.4. The Legislature has also not employed the expression "during the course of employment" and/or the words "while on duty". Thus, all that is contemplated under and required by the provision is that the employee gets afflicted by i.e. "acquires" a disability or a handicap specified under the Act.

7.5. Even otherwise, in present case, it is pertinent that while the petitioner was

recruited and appointed, he was not physically handicapped and did not have the disability in question and even during the service of about 21 years, the petitioner was not afflicted by the said disability, which fact also establishes that the petitioner acquired the disability during and while in service. Actually, there is no denial or dispute on this count. In this view of the matter, the petitioner's case stands covered under provisions of the Act and he would be entitled to the protection under Sec. 47 of the Act.

7.6. It is pertinent that in view of the certificate by the Civil Surgeon, the respondents themselves have treated and considered the petitioner as a person with disability and unable to perform his duties, and that therefore, the respondents have rightly not raised any dispute against the petitioner's claim that his case stands covered under the provisions of the Act and/or about the applicability of the provisions of the Act to the case of the petitioner at the time of hearing, hence, any further discussion is not required for the purpose of present order.

8. In such circumstances, it was an obligation and duty of the respondents to act in consonance with the provision under Sec. 47 of the Act and not to disregard the obligations imposed by Sec. 47 of the Act.

8.1. However, from the facts of present case and even from the respondents' own admission in the reply-affidavit, it emerges that the respondents did not take any step contemplated under and required by the provision under Sec. 47 of the Act.

8.2. Actually, on careful consideration of the two reply affidavits by the respondents coupled with the fact that the respondents did not take any step in consonance with said provision, this Court is of considered view that the respondents have flouted and disobeyed the mandate of Sec. 47 of the Act.

9. Even if the reply and explanation, which; as such, appears untenable and unpalatable, is believed then also, in view of provisions under Sec. 47 of the Act, the petitioner should have been continued on supernumerary post instead of dispensing with his service and his pay-scale and service conditions ought to have been maintained and protected, in accordance with Sec. 47 of the Act, until suitable post became available or until the petitioner attained age of superannuation.

10. Unfortunately, the respondent employer in present case not only disregarded the said obligation under Sec. 47 of the Act and did not take any step to comply the requirements prescribed by Sec. 47 of the Act, but has vehemently defended the impugned action (of terminating the petitioner and dispensing with his service).

11. The respondents have surprisingly come out with very curious and unpalatable defence viz. that office of respondent No. 1 has assigned several duties to outside agency as part of the decision to outsource the work, and that

therefore, the petitioner has not been assigned any other duty/work.

11.1. In face of such clear statutory obligation, the explanation is not only unsustainable but provides strong reason to the Court to doubt bona fide of respondents' decision and action in passing the impugned order dated 30-7-2011 and not assigning other duty/work to the petitioner and/or not continuing him on supernumerary post, despite clear mandate of Sec. 47 of the Act.

11.2. It is also pertinent to note that when the impugned order dated 30-7-2011 is examined, it emerges that the competent authority has merely taken into account only one part of the certificate (viz. that the petitioner is not fit for Driver's post/work) issued by the Civil Surgeon and the other part of the certificate (i.e. petitioner is fit for any other duty - work) is conveniently ignored and the petitioner's request to assign any light work/ duty other than the duty of Driver has been rejected and his service sd dispensed with merely on the ground that he is not fit for Driver's duty/ work.

11.3. Furthermore, it also emerges from the order that the competent authority has relied on the remarks/opinion of respondent No. 1 who opined that the petitioner's request for any light work/duty other than duty of Driver need not be accepted and in view of the said remarks/opinion by respondent No. 1, the authorities passed the impugned order.

11.4. However, the respondents have failed to place any material on record to justify remarks/opinion of respondent No. 1 and/or any material on the basis of which respondent No. 1 had submitted such remarks/opinion. In view of the allegations by the petitioner against respondent No. 1, it was all the more necessary for the competent authority to look into the reasons and basis for the remarks/opinion of respondent No. 1.

11.5. Instead the competent authority mechanically accepted the remarks/opinion of respondent No. 1 and proceeded on that basis so as to reach the conclusion that the petitioner's request for light work (other than the duty of Driver) should not be accepted.

11.6. This is evident from the fact that in the impugned order, the competent authority has observed that since the Assistant Geologist, Godhra has reported and suggested, vide letter dated 4-11-2010, that the petitioner is not fit to work as Driver, his (i.e. the petitioner) request to assign him any other light duty is not accepted.

11.7. The said observation in the impugned order reflects that the competent authority has, without independent application of mind and without having regard to the provisions under Sec. 47 of the Act and the obligations cast on him by virtue of the said provisions, acted mechanically and passed the impugned order in mechanical manner.

11.8. The said error in the order is substantial and it goes to the root of the

matter in view of the facts of the case and vitiates the impugned order. This is, besides the fact that other observations in the impugned order also suggest and give out that the competent authority has, without justification and without following procedure, made remarks about alleged conduct of the petitioner.

12. It is relevant to mention that not only the respondents have ignored the provisions under Sec. 47 of the Act and have failed to act in accordance with the said provisions and have also failed to discharge the obligations cast on them by the said provisions, but the deponent in his affidavit dated 16-4-2013 has stated that:

Due to non-availability of the work relating to the driving for the 8 younger-most driver as per the seniority basis, this office has represented to the Finance Department dated 19-10-2012 to include these drivers in other department on the basis of Loan Services.

12.1. On this count, it is pertinent that despite the obligation imposed by virtue of Sec. 47 to ensure that the service of the employee who acquires disability during his service, is not dispensed with and he is not reduced in rank and instead he is shifted to another post with similar pay-scale and service benefits or continued on supernumerary post, the respondent employer made recommendation about 8 junior-most employees to continue them in other department but dispensed with the petitioner, i.e. an employee who was - even according to his (i.e. deponent's) own admission - senior than the said 8 persons (for whom the respondent employer made recommendation).

12.2. The bias and arbitrariness on the part of the respondent employer is writ large on the face of the impugned action and it also becomes clear from the observations made by the deponent in his affidavit.

12.3. The deponent has also averred in the affidavit dated 16-4-2013 that:

Shri K.K. Rathva's financial situation is good as to out of his two sons one is holding qualification of B.E. Mechanical and discharging his services in L. & T. Co., whereas other son is having bright chances of getting an employment as he is holding B.Com degree.

12.4. The criterion which the deponent has mentioned in the affidavit is irrelevant in the facts of the case and in view of the provision under Sec. 47 of the Act, such criterion could not have guided and/or influenced the respondent employer and their decision and the said aspect, in face of provision under Sec. 47, could not have been taken into consideration.

12.5. The deponent has proceeded to also state in the affidavit dated 16-4-2013 that:

It is respectfully submitted that, if Shri K.K. Rathva is not satisfied with this office order No. CGM-ADM-CON-NG-602-1164 dated 30-7-2011, then he could appeal in Medical Appeal Board.

12.6. In view of this Court, the averments and submissions made by the deponent in his affidavits dated 28-9-2012 and 16-4-2013 reflect and demonstrate that the respondent employer did not want to continue the petitioner in service and taking disadvantage of the unfortunate development (i.e. the petitioner acquiring the disability) the respondents seized the opportunity and dispensed with his service.

13. In view of the facts of the case, it would be appropriate to refer to the observations by Hon''ble Apex Court in Paragraph No. 9 of the decision in case of Kunal Singh Vs. Union of India (UOI) and Another, which reads thus:

9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Sec. 2 of the Act has given distinct and different definitions of "disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Sec. 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 Sec. 47 clearly indicate its mandatory nature. The very opening part of the 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 a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-sec. (2) of Sec. 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of a social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Sec. 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.

14. Before passing the impugned order dated 30-7-2011, the respondent authorities should have considered the petitioner's case in light of Sec. 47 of the Act.

14.1. However, as mentioned above, when the impugned order is examined, it

emerges that the competent authority has completely disregarded the provision under Sec. 47 of the Act and has not taken the said aspect into account before passing the impugned order.

14.2. The impugned order dated 30-7-2011 is in total disregard to, and it violates the mandate of Sec. 47 of the Act. It is also unreasoned order and suffers from the vice of arbitrariness.

14.3. Even if it is assumed that respondent No. 1 was justified in submitting the remarks/opinion and the competent authority also was justified in proceeding on the basis of the remarks/opinion of respondent No. 1, then also the failure of the competent authority to consider the petitioner's request in light of the provision of Sec. 47 of the Act vitiates the impugned order and renders it unsustainable.

14.4. On overall consideration of the facts of the case, the impugned order is illegal and unsustainable and deserves to be set aside and is hereby quashed and set aside.

15. In view of this Court, the impugned action of the respondent cannot be sustained in view of the provision under Sec. 47 of the Act. Hence, the impugned order dated 30-7-2011 is hereby quashed and set aside.

16. So far as the petitioner's allegation against respondent No. 1 and the relief prayed for in Paragraph 6(f) is concerned, it is pertinent that though two reply-affidavits have been filed, the concerned officer against whom specific and direct allegations have been made by the petitioner, has maintained convenient silence.

16.1. Besides this, even the deponent who has filed two reply-affidavits, also has maintained convenient silence with reference to the allegations made by the petitioners against Mr. Gadhvi and actually there is absence of specific denial of the allegations including the allegation with reference to the incident in question which occurred while Mr. Gadhvi and the petitioner were returning from Gandhinagar.

16.2. In this view of the matter, there is no material on record to not believe and/or to not take into consideration the specific and direct allegations made by the petitioner against Mr. Gadhvi.

16.3. However, this Court cannot pass any order or direction against Mr. Gadhvi and it is for the competent authority to properly look into the matter and consider the petitioner's allegations against the said officer and take such action as is considered fit in the facts of the case and pass appropriate order.

17. So far as the petitioner's claim for salary of intervening period (i.e. period for which he is not paid salary) is concerned, it appears that to some extent, the defence and explanation of the respondents are justified.

17.1. The respondents have claimed that the petitioner has not submitted medical certificate. However, medical certificate for certain period does not appear to have been submitted by the petitioner, and that therefore, the action

of not paying salary for the period for which medical certificate is not submitted, cannot be faulted. At the same time, an opportunity to the petitioner to submit medical certificate should not be denied and one opportunity as a last chance should be granted to the petitioner.

17.2. Therefore, the Court considers it appropriate that the competent authority may allow one opportunity and reasonable time to the petitioner to submit medical certificate for the period for which he has not submitted the certificate. If such certificates are submitted within period allowed by the competent authority, then the competent authority will take the said certificate into consideration and process the petitioner's claim for salary and take appropriate decision in light of the said certificate, as regards the petitioner's claim for salary for the period in question.

18. If the respondents have not paid salary even for the period for which the medical certificate is already submitted by the petitioner, then appropriate action, in accordance with rules, will be taken by the respondents for payment of salary to the petitioner for the period for which the medical certificate is/are already submitted. Since, the impugned order dated 30-7-2011 is quashed and set aside, the petitioner is entitled to be reinstated with all consequential benefits from the date of the order till the date of actual reinstatement on such other suitable post or on supernumerary post, in consonance with Sec. 47 of the Act, provided the petitioner has not reached age of superannuation. In the event the petitioner has reached age of superannuation, the petitioner would be entitled to receive all benefits which he would have been entitled for if he were in service, until the date when he reached age of superannuation. The petition is accordingly partly allowed. Rule is made absolute to the above extent.