
(2014) 08 BOM CK 0171
In the Bombay High Court
Case No : Writ Petition No. 819 of 2014

Patel Suleman Gaibi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-08-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 34, 36, 38

Citation : (2014) 6 ABR 715 : (2015) 2 ALLMR 867 : (2015) 3 MhLj 855

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sonak, J

Bench : Division Bench

Advocate : Uday Warunjikar, Advocate for the Appellant; P.G. Sawant, "B" Panel Counsel, Advocate for the Respondent

Judgement

1. Rule With consent, Rule is being disposed of finally.
2. By an advertisement dated 24 September 2011, the Irrigation Department, State of Maharashtra (respondents) invited applications for the posts of peons. Certain posts were reserved for persons with disabilities, including those afflicted with "low vision". Clause 4.4 of the advertisement stated that the percentage of disability has to be minimum 40% in order that an applicant be considered against the reserved post. Obviously, the circumstance that said advertisements came to be issued, 1 of 23 establishes that the post of peon was identified as post suitable to be offered to applicants with disabilities. Such identification relates to the provisions of Section 32 of "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995" hereafter referred to as "said Act".
3. The petitioner, armed with certificate issued by prescribed authorities, certifying that the percentage of his visual disability was 100% applied for appointment to the post of peon, in response to the aforesaid advertisement dated 24 September 2011. Upon due consideration of the petitioner's

candidature, the petitioner was offered appointment to the post of peon, vide order dated 31 October 2012. Clauses 3 and 4 of the offer of appointment provide that the appointment shall be initially for a term of one year and on temporary basis. At the end of one year, the appointee shall have to be medically examined and on the basis of the medical reports, further decisions in the matter of extension of services would be taken. Clause 4 provides that appointee shall have to undergo medical examination within a period of six months from the date of appointment, and in case the appointee is found to be unfit, then his services shall stand terminated automatically. In the affidavit in reply filed by Dr. Sanjeevani Ambekar, Professor and Head of Department of Ophthalmology at the B. J. Government Medical College and Sassoon General Hospital, Pune, it is stated that clauses 3 and 4 of the offer of appointment are consistent with the provisions of Maharashtra Civil Services (General Conditions of Service) Rules 1981.

4. Upon acceptance of the offer, the petitioner was appointed to the reserved post of peon, with effect from the date of his joining i.e. 6 November 2012 in the prescribed pay scale. By order dated 22 April 2013, the petitioner's pay scale was revised to Rs.4440 -7440. At the stage of appointment, the petitioner had already been referred to Sassoon General Hospital for medical examination. The Board of Referees of the said hospital had issued certificate dated 21 August 2012 declaring the petitioner to be "temporary fit" to perform the duties of Peon Cl -IV (Disability category), in the office of Irrigation, Sangli. The certificate bears the endorsement to the effect "Review after one year".

5. In November 2013, by which time the petitioner had completed over one year's service in the Irrigation Department, the petitioner's case was once again referred to the Board of Referees, Sassoons General Hospital, Pune. On this occasion, the Board of Referees, by their certificate dated 26 November 2013 declared the petitioner "unfit" to perform the duties of peon in the office of the Superintendent Engineer, Irrigation Department. Based upon such certificate, the respondents, by order dated 16 January 2014, terminated the petitioner's services with effect from 26 November 2013 i.e. the date of the medical certificate.

6. By this petition under Article 226 of the Constitution of India, the petitioner questions the order dated 16 January 2014 (impugned order) which terminates his services, inter alia on the grounds that it breaches the provisions of the said Act as also the provisions contained in Articles 14 and 16 of the Constitution of India. We have heard Mr. Warunjikar, learned counsel for the petitioner and Mr. P. G. Sawant "B" Panel Counsel for the respondents.

7. Mr. Warunjikar, learned counsel for the petitioner submitted that the termination of petitioner's services was in gross breach of the provisions of the said Act, as also the provisions contained in Articles 14 and 16 of the Constitution of India. Further, Mr. Warunjikar placed reliance upon G.R. dated 3 August 2010, which provides that the medical authorities, when examining

candidates for appointment against posts reserved for persons with disabilities should only determine the percentage of disability and not whether such candidates are suitable to discharge the duties of the reserved post. Based upon such examination, the medical authorities should issue certificates as to the fitness or otherwise. Mr. Warunjikar submitted that in the present case, the Board of Referees, Sassoon Hospital have acted in breach of the G.R. dated 3 August 2010. For all these reasons, Mr. Warunjikar submitted that the impugned order of termination is liable to be set aside and the petitioner be reinstated with all consequential benefits and continuity of service.

8. Mr. Warunjikar further submitted that the returns filed by the respondents suggest that there was some deterioration in the condition of the petitioner after his appointment as a peon with effect from 6 November 2012. Assuming that this is so, then the provisions of Section 47 of the said Act, which provides that no establishment shall dispense with an employee who acquires disability during his service, are clearly attracted. In such a situation, the respondents could never have terminated the petitioner's services, but at the highest shifted him to some other post with the same pay scale and service benefits. Further, if it is not possible to adjust the petitioner against any post, he is liable to be kept in a supernumerary post till such post is identified or till he attains the age of superannuation, whichever is earlier.

9. Mr. P. G. Sawant, learned counsel for the respondents defended impugned order by adverting to the provisions contained in Maharashtra Civil Service (General Conditions of Service) Rules 1981 (1981 Rules). Mr. Sawant took us through the affidavit in reply filed by Dr. Sanjeevani Ambekar for and on behalf of respondent no. 1 which suggests that the position of petitioner's vision deteriorated since the issuance of medical certificate dated 21 August 2012, in which the petitioner had been declared to be temporarily fit to discharge the duties of peon. At the time when the petitioner's condition was reviewed on 26 November 2013, the vision of the petitioner had worsened and deteriorated. On such basis and consistent with the 1981 Rules, the Board of Referees were constrained to declare the petitioner as "medically unfit" to discharge the duties of peon as against post reserved for persons with disabilities in the Irrigation Department.

10. Mr. Sawant, learned counsel for the respondents made particular reference to paragraph 5 (i) of the affidavit in reply filed by Dr. Sanjeevani Ambekar, in which the deponent has stated that the petitioner is an "innocent person" and that the deponent as a Chairman and all the Members of the Board of Referees "deeply sympathies with the condition of the Petitioner as human beings but they cannot ignore the fact that the Petitioner is now medically unfit for the said post of Peon."

11. In short, Mr. Sawant expressed inability of the respondents to continue with the services of the petitioner relying upon the medical certificate dated 26 November 2013 and the 1981 Rules .

12. The rival contentions, now fall for our determination.

13. The said Act has its genesis in the Economic and Social Commission for Asian and Pacific Region convened meet at Beijing in December 1992 in order to launch the Asian and Pacific Decade of Disabled persons 1993-2002. In that meeting, the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and the Pacific Region came to be adopted. India being a signatory to the Proclamation, was obliged to enact a suitable legislation to provide for persons with disabilities, equal opportunities, protection of rights and full participation. Accordingly, the Parliament enacted the said Act which came into force on 7 February 1996.

14. The Statement of Objects and Reasons to the said Act, after a brief reference to the genesis makes particular reference to the obligation undertaken by India to enact legislation to provide for the following :-

(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-?-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.

15. There can therefore be no doubt that the provisions of the said Act shall have to be interpreted and construed in the light of the genesis aforesaid as well as the objects and reasons which prompted the enactment of such legislation. The said Act seeks not merely to protect the rights of the disabled or rather differently abled, but further was enacted to provide for equal opportunities and full participation to such members of the society. The theory of equal opportunity is premised on the basis that people of equal need and ability, desirous of a scarce resources not available to every one, should have an equal opportunity to obtain it. The expression "Equality of opportunity", means far more than an absence of direct and indirect discrimination. Even if all forms of discrimination were completely eliminated, gross inequalities of opportunity might persist, both as a result of the accumulation of disadvantage due to past discrimination and as a result of continuing differences in patterns of education and training and in aspirations among relevant sections of the community¹. The objective of "equality of opportunity" is to provide a basis for a wide range of measures,

which go beyond the elimination of discrimination². Similarly, some meaning shall have to be ascribed to the expression "full participation" included in the title to the said Act. The theory of substantive equality also includes within its ambit the concept of social inclusion. This concept of equality incorporates the premise that all persons, inspite of their differences, are entitled to be considered and respected as equals and have rights to inclusion and to participate equally in the social and economic life of the society. Participation, denotes full and active participation within the community or social inclusion. Participation is an important means of overcoming marginalization and social exclusion. The participation of affected groups such as persons with disabilities increases the likelihood that strategies will succeed as well as democratizing the very process of achieving equality. According to Fredmen, equality ought to encompass four central aims. First, it should break the cycle of disadvantage associated with people with disability. This means that it cannot be symmetrical. Treatment, which imposes a detriment on a disadvantaged group, is qualitatively different from treatment that imposes a detriment on an advantaged group with the aim of redressing disadvantage. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation, and violence because of membership of a disadvantaged group. Third, it should entail positive affirmation and celebration of identity within the community. Finally and closest to the goals expressed by the universalist approach is the stress on promoting full participation in society³.

16. In the interpretation of the provisions of the said Act the concept of "reasonable accommodation" shall have to be imported. The significance of the concept of reasonable accommodation is that it is a way of moving beyond respecting difference to actually accommodating the difference. In fact the requirement of accommodation of differences has been recognized as an integral part of the concept of equality under Article 14 by the Supreme Court in the case of Ashok Kumar Gupta and Another Vs. State of U.P. and Others, This concept promotes the dignity of every individual, which again has been accepted as one of the concomitants of Article 21 of the Constitution of India. The recognition of the value of human dignity serves as a powerful reminder that people with disabilities have a stake in and a claim on society that must be honoured quite apart from any considerations of social or economic utility. They are ends in themselves and not means to the ends of others. This view militates strongly against the contrary social impulse to rank people in terms of their usefulness and to screen out those with significant differences⁴.

17. In the context of "employment" Section 32 of the said Act requires the appropriate Governments to identify the posts in the establishments, which can be reserved for the persons with disability. At periodical intervals, not exceeding three years, the appropriate Government is required to review the list of posts so identified and update the list taking into consideration the developments in technology. Section 33 of the said Act requires every appropriate Government to reserve in every establishment, such percentage of vacancies not less than 3%

of persons or class of persons with disability, of which 1% each shall be reserved for persons suffering from blindness or low vision, hearing impairment, locomotor disability or cerebral palsy, in the posts identified for each disability. The proviso to the Section permits appropriate Government, having regard to the type of work carried out in any department or establishment by notification and subject to such conditions, if any, as may be specified in such notification, to exempt any establishment from the provisions of reservation. Section 34 deals with provision for special employment exchanges. Section 36 provides for carry forward of vacancies reserved for persons with disabilities. Section 38 provides for formulation of Schemes for ensuring employment of persons with disabilities and Section 41 urges the appropriate Government and the Local Authorities, within limits of their economic capacity and development, to provide for incentives to employers, both in public and private sectors to ensure that at least 5% of their work force is composed of persons with disabilities.

18. Thus, the Legislature, consistent with its constitutional as well as treaty obligations, has enacted the said Act in order to protect rights, afford equal opportunities and promote full participation of persons with disabilities, so that they too can obtain their legitimate share of common resources and are eventually assimilated in the national mainstream, with both a sense of dignity and purpose of life. However, when it comes to implementation of the provisions of the said Act, much ground needs to be covered.

19. In the facts and circumstances of the present case, once the post of peon came to be identified and reserved for the persons with disabilities, the question which arises, is whether the selected and appointed candidate, can be thrown out of service on the basis of medical certificate, issued after rendering service of over an year, declaring him to be unfit to perform the duties to the assigned post and in the assigned department?

20. In our judgment, considering the peculiar facts and circumstances of the present case, as also the tests to be applied in the interpretation of beneficial legislations, like the said Act, the answer to the posed question, has to necessarily be in the negative. At the stage of identification and reservation of the post of peon for persons with disabilities, it is reasonable to expect that some thought process has gone into the question, as to whether the duties assigned to such posts can be discharged with some reasonable degree of proficiency, by persons with disabilities. The petitioner, in the present case, had not suppressed any facts with regard to his disability. The Board of Medical Referees, which examined the petitioner in August, 2012, just before he was issued his appointment orders, certified that the petitioner was "temporary fit" to discharge the duties as a peon in the Irrigation Department. The Board, however, made an endorsement that there should be "review after one year" . This procedure and more particularly, the endorsement with regard to review after one year is sought to be justified by reference to the 1981 Rules. In matters of identification and reservation of posts, for persons with disabilities and the appointments

thereto, there is no question of adverting to the 1981 Rules. The said Act is a special legislation dealing with persons with disabilities so as to protect their rights, provide them with equal opportunities and promote their full participation in the mainstream. It being a special enactment, the doctrine of "generalalia specialibus non derogant" would apply. Any provisions in the 1981 Rules, to the extent they conflict with the provisions of the said Act would stand over - ridden. In the context of the Central Civil Services (Pension) Rules, 1972, the Supreme Court, by invoking the doctrine of generalalia specialibus non derogant has ruled that the provisions of the said Act will over - ride the provisions of the Pension Rules 19725.

21. Besides, the 1981 Rules concern, inter alia procedure to be adopted in respect of medical examinations of appointees to civil posts, in general. At the stage when the 1981 Rules were enacted, the said Act was not on the statute books and possibly no reservations were contemplated in favour of persons with disabilities. Obviously therefore, the 1981 Rules did not provide for any separate parameters for medical examinations of persons appointed against posts reserved for persons with disabilities. There is obviously some difference between medical examination of persons appointed against posts reserved for persons with disabilities and others. The Board of Medical Referees, when they examine appointees to posts reserved for persons with disabilities, are required to exhibit consciousness with regard to such difference. In fact the decisions of all concerned in this regard, are required to be informed, not with sympathy but with empathy. The decisions, are required to be consistent with the social purpose and the objective behind the enactment of the said Act. Thus viewed, there was no statutory requirement of a second medical examination, after the petitioner had satisfactorily discharged services as a peon for a period of over one year. In any case, the results of such second medical examination, could not have been made the basis for termination of the petitioner's services.

22. In making the impugned order terminating the petitioner's services, the relevant considerations have been ignored and irrelevant considerations taken into account. In the case of National Federation of Blind Vs. Union Public Service Commission and Others, The Supreme Court had noted that the visually challenged constitute a significant section of our society and as such it is necessary to encourage their participation in every walk of life. In the said case, the Supreme Court directed the Union of India and UPSC to permit visually disabled persons (persons who are blind, partially blind and with low vision) to compete and write civil service examinations, as some of the posts in the Indian Administration Services and other allied services, were identified by a committee, as suitable to be filled from amongst the visually challenged persons. In the case of Amita Vs. Union of India (UOI) and Another, the Supreme Court has held that only restriction which could be spelt out from the ratio of the decision in the case of National Federation of Blind (supra) was whether the post in respect whereof the petitioner sought consideration was "totally unsuitable for visually handicapped persons having regard to the nature of duties attached to the

office / post". In the present case, as noted earlier, the post of peon in the Irrigation Department had been identified and reserved as suitable for persons with disability, having regard to the nature of duties attached to the said post. This relevant consideration does not appear to have been taken into account by the respondents in issuing the impugned order and terminating the petitioner's services.

23. Further, there is yet another material consideration, which appears to have been glossed over by the respondents in making the impugned order. The petitioner has placed on record at least three certificates dated 3 December 2013, 7 December 2013 and 11 December 2013 emanating from his superiors, who have had the opportunity to witness the petitioner's work in the course of his one year services. The certificates, in no uncertain terms certify that the petitioner has discharged his duties as a peon with utmost sincerity and responsibility. The petitioner, each work morning, opens the office, cleans the tables of the officers / employees, stores and provides drinking water and in general discharges various duties as instructed by his superiors. Accordingly, the Branch officer, Irrigation Department Mandal, Sub Divisional Engineer, Irrigation Sub -Division, Miraj and Sub Executive Engineer, Sangli Irrigation Department, Sangli Irrigation Department, have all certified that the petitioner's work is satisfactory and his further continuance in services is recommended. Such relevant material, appears to have been ignored at the stage of making impugned order.

24. If we are to go by the affidavit of Dr. Ambekar, in that, the vision of the petitioner deteriorated after the issuance of medical certificate dated 21 August 2012, pursuant to which the petitioner came to be appointed as a peon, then the provisions of Section 47 of the said Act may, as well operate. The affidavit, in fact acknowledges that at the stage of issuance of medical certificate dated 21 August 2012 and the petitioner's consequent appointment as a peon with effect from 6 November 2012, the petitioner was at least temporarily fit to discharge the duties as a peon in the Irrigation Department. If, by 26 November 2013, i.e. after the petitioner having discharged the service for a period of over an year, the petitioner's vision worsened and deteriorated, then the respondents, consistent with the provisions of Section 47 of the said Act were obliged to shift the petitioner to some other post with the same pay scale and service benefits. If, even this was not possible, then the petitioner was required to be kept in a supernumerary post post until suitable post is available or he attains the age of superannuation, which ever is earlier. Such exercise, has not even been explored by the respondents. Instead, relying upon the very disability, on account of which the duly identified and reserved post of peon in the Irrigation Department was offered to the petitioner, the services of the petitioner have been summarily terminated. The very disability, which was the basis for reservation, cannot be set up as a disqualification for the purposes of continuance in the employment. If such a course is permitted, then the same would, to a great extent set at naught the very exercise of identification and reservation of posts for a persons with

disabilities.

25. There was not even any compliance with principles of natural justice and fair play, prior to the effect of such termination. As if, this were not sufficient, the termination, by means of the impugned order dated 16 January 2014, was made effective retrospectively i.e. with effect from 26 November 2013 (the date of the second medical certificate issued by the Board of Referees). This means that, even though the petitioner actually discharged his duties for the period between 26 November 2013 and 16 January 2014, the termination was given effect from 26 November 2013. In the facts and circumstances of the present case, such exercise on the part of the respondents, was clearly impermissible.

26. We therefore quash and set aside the impugned order dated 16 January 2014 and direct the respondents to reinstate the petitioner with continuity of service and full back -wages within a period of six weeks from the date of this Order.

27. Rule is made absolute to the aforesaid extent. In the facts and circumstances of the present case, there shall be no order as to costs.

1 Standing Advisory Commission on Human Rights, "Religious and Political Discrimination and Equality of Opportunity in Northern Ireland" (2nd Report her Majesty's Stationery Office 1990) p.7.10.

2 Bob Hepple, (1990) "Discrimination and Equality of Opportunity Northern Irish Lessons", Oxford Journal of Legal Studies, 10(3), p.408.

As quoted from "The Future of Disability Law in India by Jayna Kothari.

3 Fredman, Discrimination Law, (n 2)

4 G. Quinn and T. Degener, (2002), "The Moral Authority for Change : Human Rights Values and the Worldwide Process of Disability Reform" in Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability, G. Quinn and T. Degener (eds), Geneva : United Nations,

5 Kunal Singh Vs. Union of India (UOI) and Another,