

(2016) 08 BOM CK 0077
In the Bombay High Court
Case No : Writ Petition No. 103 of 2005

Prakash s/o Motiram Rathod

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 26-08-2016

Acts Referred:

Constitution of India, 1950 — Article 16, 226

Citation : (2016) 5 AIRBomR 821

Hon'ble Judges : B.P. Dharmadhikari and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Mr. P.S. Khubalkar, Advocate, for the Petitioners; Ms. S.Z. Haider, Asstt. Govt. Pleader, for the Respondents

Final Decision : Partly Allowed

Judgement

B.P. Dharmadhikari, J.—By this petition filed under Articles 226 and 227 of the Constitution of India, the legal heirs of deceased petitioner question the order dated 17.09.2004, passed by the Maharashtra Administrative Tribunal in Original Application No. 39/2003, dismissing the demand of deceased petitioner for releasing his pensionary benefits and other terminal benefits, by accepting that he has retired on medical grounds on 31.03.2000. Deceased petitioner was born on 06.12.1958 and therefore, could have continued till reaching age of 58 years i.e. upto 31.12.2016. He was retired on medical grounds on 31.03.2000, and expired during pendency of the Writ Petition. His legal heirs are accordingly brought on record.

2. We have heard Shri P.S. Khubalkar, learned Counsel for the petitioners and Ms. S.Z. Haider, learned A.G.P. for respondents.

3. Facts are not much in dispute. Deceased petitioner was appointed as Pharmacist at Rural Hospital on 29.11.1982. In the year 2000 he was posted at Rural Hospital, Pusad. On 09.03.2000, he appeared before the Medical Board (respondent No. 5) and Board directed him to appear before the Medical

Superintendent i.e. respondent No. 2. As per communication dated 30.03.2000, he appeared before respondent No. 2 on 31.03.2000 when respondent No. 2 examined him and issued medical certificate declaring him unfit for service. He was also given a communication by which he was relieved from duties on the very same day.

4. Deceased petitioner thereafter started making efforts for his pension and other retirement benefits. On 22.03.2001, respondent No. 2 served upon him a communication to remain present before respondent No. 5 Board. On 31.03.2001, deceased petitioner was sent to respondent No. 2 Board with copy of letter dated 30.03.2001. By said communication he was informed that if he did not get himself examined through Medical Board, Medical Board would not be in a position to take decision on his health condition. Deceased petitioner claims that thereafter, he contacted respondent No. 2 and asked him to allow him to resume his duties with retrospective effect and arrears of salary. According to the deceased petitioner all facts are noted in letter dated 29.09.2001 sent by respondent no. 2. Deceased petitioner thereafter sent another representation dated 20.06.2002 and made inquiries. He pointed out that if his retirement order stood cancelled, he needed to be permitted to resume his duties. On 23.07.2002, he served a legal notice through his Advocate upon respondent no. 2. As he did not get any response, he filed Original Application No. 39/2003 and by an interlocutory order dated 25.03.2006 passed therein, petitioner was asked to appear before the Competent Board for getting himself examined. Because of this direction, he appeared before the competent Board on 09.09.2003. He was examined, but, no certificate was given to him. Deceased petitioner asked for that certificate by moving a Civil Application before the Maharashtra Administrative Tribunal. The Tribunal then directed respondents to take decision upon status of the applicant and either to allow him to join duties or then to sanction him pensionary benefits. Deceased petitioner received letter dated 11.02.2004, which informed him that on 09.09.2003 the medical board found him fit for service. Thereafter he filed Civil Application No. 24/2004 before the Maharashtra Administrative Tribunal seeking a direction to his employer to take decision upon his existing status. He filed another Application vide Civil Application No. 138/2004 and showed his readiness and willingness to accept the decision, but, this application was opposed. It is in this background that the Maharashtra Administrative Tribunal finally heard the matter and on 17.09.2004 dismissed the Original Application. It did not decide pending Civil Application Nos. 24/2004 and 138/2004.

5. Shri Khubalkar, learned Counsel in this background submits that when respondent No. 2 had relieved the petitioner, there was no question of he being again subjected to any medical test to find out his fitness or otherwise. Communication dated 29.09.2001 sent by respondent No. 2 shows that even in past he had followed the same practise and employees relieved by him were treated as retired on medical grounds by the State Government. No exception therefore, could have been made in case of the petitioner. If petitioner was not

treated as retired employee, he ought to have been reinstated back and communication asking him to join back on his post should have been issued. Thereafter only he could have been subjected to any further medical test.

6. Learned Counsel contends that as the Medical Board after directions of the Maharashtra Administrative Tribunal found him fit on 09.09.2003, failure to communicate that decision till 11.02.2004 is again an indication of victimisation. Even after 11.02.2004, petitioner was not permitted to join his duties. As respondents before the Maharashtra Administrative Tribunal denied status of petitioner as retired employee, did not permit him to join and ultimately on 09.09.2003, the Competent Medical Board declared him fit, Maharashtra Administrative Tribunal could not have refused relief to petitioner in the matter. His pending Civil Applications ought to have been allowed and directions to employer to reinstate petitioner in employment could have been issued.

7. The circumstances which weighed with the Maharashtra Administrative Tribunal i.e. registration of criminal cases against the petitioner are totally irrelevant and could not have been used by the employer to deny him permission to join. He submits that the alleged Criminal cases were filed because of business rivalry and had no bearing on the employment of the petitioner. If necessary, after permitting petitioner to join back, suitable action as per Discipline and Appeal Rules could have been initiated against him. But, act of not permitting him to join because of pending Criminal cases, is itself unsustainable. Petitioner had shown readiness to work and hence, wages for the period he was kept out of employment, must be allowed. As petitioner expired during the pendency of the Writ Petition before this Court, according to learned counsel, he should be treated as in employment till the date of his death and necessary arrears of salary and other consequential benefits should be released to his legal heirs. Petitioner No. 1 (a) Widow should be thereafter given family pension.

8. Our attention is also invited by Shri Khubalkar, learned counsel for the petitioners to Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the 1995 Act" for short). Judgement of Hon"ble Supreme Court reported as AIR 2003 SC 1623 (Kunal Singh v. Union of India and another) and Division Bench Judgement of this Court reported at 2005 (1) Mh.L.J. 382 (Devki Nandan v. Union of India and others), are also pressed into service by him.

9. Learned A.G.P. appearing for the respondents submits that the petitioner rendered only 18 years of service till 31.03.2000 and therefore, did not put in qualifying service of 20 years. She is relying upon the correspondence on record to urge that the deceased petitioner was making efforts to get himself relieved on medical grounds, and after respondent No. 2 relieved him, illegally on 31.03.2000, he did not take any steps for almost one year. He also did not file any claim for pension for almost one year. Reply filed before the Maharashtra Administrative Tribunal is pressed into service to urge that after 31.03.2000 on several occasions, petitioner was asked to appear before the Medical Board, but,

he deliberately declined and did not cooperate to see that process left incomplete is completed. She further submits that petitioner has not relied upon Section 47 of the 1995 Act before the Maharashtra Administrative Tribunal, and there is no such ground even in the present Writ Petition. She therefore, seeks time to obtain necessary instructions about the application of said provisions in this matter.

10. Fact that deceased petitioner had put in about 18 years of service is not in dispute. Record show that on 30.03.2000 deceased petitioner was asked to remain present before respondent No. 2 for his medical examination. This communication also records that petitioner had appeared before the medical board on 09.03.2000 and that board had directed him to appear before respondent No. 2 on 31.03.2000.

11. Order dated 31.03.2000 issued by respondent No. 2 is on the subject of relieving petitioner. It mentions that as per his application dated 30.03.2000, he was examined by the medical superintendent. He was found unfit and accordingly certificate was issued to him. As he was found unfit, he was relieved on 31.03.2000 after evening, after handing over complete charge to Smt. V.C. Rathod. Thus, this document along with a certificate of unfitness issued by respondent No. 2 supports contention of deceased petitioner.

12. Though learned A.G.P. has pointed out that petitioner was called upon by letters dated 24.10.2000, 11.12.2000 and 27.12.2000 to contact the medical board and to complete the medical examination to find out his health condition, petitioner denied these communications before the Maharashtra Administrative Tribunal by filing an affidavit. Respondents have not produced any communication or any acknowledgement to demonstrate that any of these three letters was served upon the petitioner.

13. Only communication available on record is dated 30.03.2001 i.e. exactly one year after deceased petitioner was relieved. The Civil Surgeon has by this communication directed respondent No. 2 to order petitioner working in respondent No. 2 to office to attend respondent No. 5 Board for medical examination. This communication also contains a warning that if petitioner failed to get himself examination, no decision would be possible about his health and respondent No. 5 Board would not be responsible for any delay.

14. Deceased petitioner thereafter sent a representation pointing out that if his retirement on medical ground was not proper, he should be allowed to join his duties. In fact he gave reference to communications dated 30.03.2000, 31.03.2000, 22.03.2001, 30.03.2000 and 03.04.2001. He has also thereafter sent on 20.06.2002 another representation by RPAD. In this communication he pointed out that in May, 2000 orders sanctioning him provisional pension were already issued, and he was to receive amount of Rs. 26,000/-, but, then it was withheld. On 23.07.2002, he has sent a legal notice through his Advocate.

15. On 06.12.2000, respondent No. 2 has written to the Deputy Director of

Health Services, Akola pointing out that the petitioner had reported at Gramin Hospital, Pusad on 22.04.1999. He was remaining absent or was regularly proceeding on leave. This was having adverse effect on services to be rendered to patients. Because of this conduct, there was a telephonic conversation and personal talk between these two officers and the Deputy Director advised retiring the deceased petitioner on medical grounds. Accordingly he sent petitioner to medical board on 06.03.2000 and he himself accompanied the petitioner. This communication further discloses that instructions of Deputy Director of Health Services were about retiring the deceased petitioner on medical grounds. But, Chairman of Medical Board directed respondent No. 2 to examine the petitioner and issue certificate accordingly. Chairman told that he would counter sign such certificate. Because of these developments, on 31.03.2000 respondent No. 2 issued certificate declaring the petitioner unfit. This was informed to the office of the Deputy Director. Because of this vacancy, temporary appointments were made. During different periods, 4 persons worked in temporary capacity against the work load of deceased petitioner. Respondent No. 2 has mentioned letter dated 04.07.1988 which declared Medical Superintendent equivalent to Civil Surgeon in certain matters. Hence, respondent No. 2 after pointing all these facts reported that because of these instructions, he issued certificate of fitness and relieved petitioner. Respondent No. 2 adds that as deceased petitioner was Class-III employee, previous permission of Deputy Director should have been obtained. Inadvertently this was not obtained and therefore, ex-post facto sanction was sought from the Deputy Director. Respondent No. 2 also assured respondent no.4 Deputy Director that such mistake would not be repeated. He mentions that one Dr. Gove, Senior Accounts Officer working with the office of the Accountant General at Nagpur had called him at Nagpur. Shri Gove had cleared the pension cases of Class-III and Class-IV employees who retired on medical grounds similarly. Shri Gove told him that as per circular No. 1/1999 dated 04.07.1988, respondent No. 2 had same powers as that of Civil Surgeon. Respondent No. 2 therefore, requested respondent No. 4 to recognise his act of relieving deceased petitioner as valid and grant ex-post facto sanction to the same. On 11.02.2004, respondent No. 4 has informed petitioner about the outcome of the proceedings of medical board conducted on 09.09.2003 and then pointed out Crime Nos. 79/2001, 17/2002, 19/2002 and 03/2002 registered against the deceased petitioner at Police Station, City Kotwali, Akola ; Police Station, Pusad (City) ; Police Station, Pusad (Rural) and Police Station, Darathi, District Yavatmal. It is mentioned that the petitioner was in police custody for various durations, exceeding 48 hours, and as such it is not in public interest to permit him to join back the Government employment.

16. Perusal of the impugned order delivered by the Maharashtra Administrative Tribunal reveals that it has dealt with the controversy from paragraph No. 6 onwards. In nutshell, it found that medical examination of petitioner was not complete and hence, there was no retirement on medical grounds on 31.03.2000. It has therefore, in paragraph No. 7 set aside that order. It found

that fault was with the petitioner, as he did not appear thereafter before respondent No. 5 medical Board. Therefore, denial by petitioner that he did not receive alleged communications dated 24.10.2000, 11.02.2004 and 27.12.2000 is, not looked into. The Maharashtra Administrative Tribunal found that petitioner attempted to obtain disadvantage of the fact that respondent No. 2 had attempted to make out some excuse to overcome the error at his hands. It concluded that the petitioner was never examined by the medical board and hence, he could not have been retired on medical grounds.

17. Thus, the Maharashtra Administrative Tribunal has overlooked the fact that respondent No. 5 Medical Board directed respondent No. 2 to examine petitioner and to issue certificate. Respondent No. 2 accordingly issued that certificate and also relieved the deceased petitioner. Respondent No. 2 had also gone to the medical board with the petitioner and he had instructions from respondent No. 4 to retire petitioner on medical grounds. Deceased Petitioner also appeared to be interested in such retirement. Hence, in absence of any order of retirement on medical grounds, he remained satisfied with the act of respondent No. 2 relieving him on 31.03.2000. He did not demand any terminal benefits or pension etc. for quite some time.

18. Though petitioner was not medically retired after following proper procedure, respondent nos. 2 to 5 did not immediately initiate any steps to procure his presence in the office. It appears that the deceased petitioner was even otherwise keeping away from his duties and hence, respondent no.2 remained satisfied after relieving him.

19. He was called upon to appear before the medical board again after almost one year i.e. 31.03.2001. This communication shows that the department was not treating the deceased petitioner as a retired employee. In this situation, deceased petitioner could have been permitted to join back. If he was not joining back, if he was not working satisfactorily at Pusad or constantly remaining absent, appropriate disciplinary action could have been taken against him.

20. Crimes/Offences mentioned supra are of the year 2001 and 2002. The offences committed while in employment at the most can result in interim suspension. Those offences could not have been used to deny permission to petitioner to join back. These offences therefore, appear to be used by way of an after thought on 11.02.2004, while declining him permission to join back. If he was found not suitable and hence, declined permission to join back, he should have been placed under interim suspension. In that event he would have received subsistence allowance.

21. Section 47 of the 1995 Act is pressed into service during oral arguments and for the first time in this Court. There is no pleading based upon it either before this Court or before the Maharashtra Administrative Tribunal. The Hon'ble Supreme Court has in case of Kunal Singh v. Union of India and another (supra), looked into this provision in paragraph no. 9 and observed that a person with

disability is protected and if he is not so protected, not only he, but all his dependents also suffer. Section 47 is found to be mandatory in nature. If after such disability, employee is not suitable for the post, he was holding, he needs to be shifted to some other post with same pay scale and service benefits. If there is no such post, he needs to be kept on supernumerary post, till that post becomes available.. If such post does not become available till his superannuation, he needs to be continued till his superannuation. The Hon''ble Supreme Court in paragraphs No. 11 and 12 rejected defence of employer Union of India based upon Rule 38 of the Central Civil Services (Pension) Rules. It has held that 1995 Act is a Special Legislation dealing with persons with disabilities and provision for grant of invalidity pension is not a ground to deny protection of Section 47 of the 1995 Act.

22. Division Bench of this Court in case of Devki Nandan (Dr) v. Union of India (supra), has in paragraph No. 6 considered section 47 and also above mentioned Judgement of Hon''ble Supreme Court. It found Dr. Devki entitled to benefits of Section 47 of 1995 Act.

23. In present matter, except for grievance of department that the deceased petitioner was not available at Rural Hospital at Pusad for performing his duties, there is nothing on record to show that the petitioner himself was instrumental in procuring the relieving order from respondent no.2 on 31.03.2000. In this situation, though act of relieving petitioner may be found to be defective, the Maharashtra Administrative Tribunal could not have denied him appropriate relief. He made efforts to join and therefore, only Maharashtra Administrative Tribunal directed his medical examination which was conducted on 09.09.2003. Though he was declared fit, again he was not permitted to join back because of criminal cases.

24. Criminal Case No. 79/2001 was under Sections 420, 467, 471 read with Section 34 of Indian Penal Code. Deceased petitioner was in lockup from 18.03.2002 to 20.03.2002 and thereafter from 21.03.2002 to 03.04.2002 in Magisterial custody. Crime No. 17/2002 is under Sections 420, 467 and 471 of the Indian Penal Code. Crime No. 19/2002 was for offences under Sections 420, 506 of Indian Penal Code. Crime No. 3/2002 was also under Sections 420, 467 and 471 of the Indian Penal Code. Deceased petitioner was arrested on 28.03.2002 and thereafter it appears that he was released on bail on 13.05.2002.

25. These crimes or detention of petitioner therefor is not in dispute. In pleadings in memo of Writ Petition before this Court, petitioner has submitted in ground No. H that he was falsely implicated in criminal cases because of his business rivalry. He claimed that various cases were lodged with oblique motive.

26. These facts therefore show that the petitioner was involved in some business and he had also a rival therein. Section under which offences are committed also throw light on nature of his business. Deceased petitioner was keeping away from his work place, was not interested in services and was happy with his

retirement on medical grounds. His efforts to join back are only because of subsequent decision of employer that his medical examination was incomplete & after he was directed to report to the medical board. As per orders of MAT, he was examined and medial board declaring him fit for duties. In his representation, after learning that his relieving on 31.03.2000 was not being accepted, he had demanded arrears of salary.

27. All these events therefore, show that he could not have been asked to join back and his relieving on 31.03.2000 should have been treated as legal and valid one in present matter. MAT could not have on one hand quashed order dated 31.3.2000 relieving him & on the other hand, denied him other relief to join back. Result of setting aside the relieving order was deemed continuation in employment. In this situation, we set aside the order of the Maharashtra Administrative Tribunal dated 17.09.2004 and direct that the deceased petitioner should be treated to have retired on medical grounds on 31.03.2000. Accordingly dues payable to him should be worked out within next 6 months as per law. The same should be made over to his legal heirs.

28. Writ Petition is, thus, partly allowed. Rule is made absolute in the aforesaid terms with no order as to costs.