

(2019) 10 BOM CK 0115
In the Bombay High Court
Case No : Writ Petition No. 6939 Of 2017

Shaikh Salim Shaikh Amir

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 01-10-2019

Acts Referred:

Person With Disabilities (Equal Opportunities, Protection Of Rights And Full Participation) Act, 1995 — Section 2(i), 2(i)(viii), 47, 47(1)
Central Civil Services (Pension) Rules, 1972 — Rule 38
Constitution Of India, 1950 — Article 226

Citation : (2019) 10 BOM CK 0115

Hon'ble Judges : Sunil P. Deshmukh, J; S.M. Gavhane, J

Bench : Division Bench

Advocate : Anandsingh S. Bayas, G.O. Wattamwar, D.S. Bagul

Final Decision : Allowed

Judgement

S.M. Gavhane, J

1. Rule. Rule made returnable forthwith, heard finally with the consent of the parties.

2. By this petition under Article 226 of the Constitution of India the petitioner has prayed to quash and set aside order dated 05-06-2010 passed by respondent No. 3-Divisional Controller Osmanabad division terminating the services of the petitioner and removing his name from muster from 18-05-2010, to declare that said order is illegal, incorrect and in violation of section 47 of The Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short 'The Disabilities Act, 1995) and contrary to the notification dated 12-04-2006 issued by Maharashtra State Road Transport Corporation Department and to issue appropriate writ or directions to respondents No. 2 and 3 to give all consequential, financial, monetary, pensionary and other admissible benefits to the petitioner by considering continue service till date of his retirement on superannuation.

3. Case of the petitioner is that he was appointed on 09-04-1980 on the post of Driver in the department of respondent No. 3 and till the impugned order on 05-06-2010 he has performed his duty properly and was awarded with the service excellence. The petitioner has suffered serious Spondylosis problem due to driving of bus for continues 32 years on the bad road of rural area and therefore he was unable to drive the bus due to pain in the back. Therefore, he requested to give him alternate work such as peon, security guard or cleaner by application dated 08-03-2010. Thereafter, immediately respondent asked him to visit Dr. Shahapurkar who medically examined him on 19-03-2010 and submitted report that the petitioner is having gap in his spaniel cord due to which he should not be given the work of driving. Doctor also suggested that petitioner is physically unfit to perform the work as a driver and that he could be given alternate employment. However, respondent No. 3 on 01-04-2010 again asked the petitioner to appear before District Health Officer for medical examination. Accordingly he appeared before the District Health Officer. Said officer submitted report dated 13-04-2010 to respondent No. 3 stating that petitioner is unfit to perform as a driver and suggested that he could be given alternate work. However, surprisingly the respondent terminated the services of the petitioner by the impugned order dated 05-06-2010 on the ground that, he is unfit to perform as a driver and he has not been given alternate employment. The impugned order is illegal. Immediately after the impugned order petitioner approached respondent No. 3 and requested to give him alternate employment. However, respondent No. 3 again asked petitioner to appear before Medical board, Solapur. He appeared before the said board and the board submitted report to respondent No. 3 stating that the petitioner can perform the light work. In spite of all the medical reports suggesting that petitioner could be given light work respondent No. 3 did not give alternate employment to the petitioner. Therefore, he approached labour court by filing U.L.P. No. 41/2012 which was pending for about four years. Therefore, he withdrawn the said complaint with liberty to file writ petition and therefore the present writ petition.

4. The respondents have not filed reply.

5. Mr. Bayas, learned counsel for the petitioner submitted that the petitioner has worked as a driver for about 32 years. He was permanent in service. Due to ill health due to gap in his spaniel cord he was unable to perform duty as a driver. Therefore, he requested respondent No. 3 to give him light work instead the work of driving, but without giving him alternate or the light work respondent No.3 terminated the services of the petitioner on the ground that he is unfit to perform as a driver by the impugned order which is illegal and in violation of section 47 of The Disabilities Act, 1995. Prior to terminating the services of the petitioner he was not given an opportunity of hearing. Thus, the learned counsel has prayed to allow the writ petition.

6. Mr. Bayas learned counsel for the petitioner to support his submission that as the petitioner was unable to perform his duty as a driver due to ill health the

respondent should have given alternate or light duty has relied upon the decision of the Hon'ble Supreme Court in the case of Narendra Kumar Chandla Vs. State of Haryana and others, AIR 1995 Supreme Court 519 and particularly on paragraph No. 7 of the said decision. The learned counsel in support of his submission that impugned order is violative of section 47 of The Disabilities Act, 1995 has relied upon the decision of the Hon'ble Supreme Court in the case of Kunal Singh Vs. Union of India and another, AIR 2003 Supreme Court 1623 and on the decision of this court at Principal Seat in the case of Shivaji S/o Vishwanath Dongre Vs. State of Maharashtra and others 2006(1) Mh.L.J. 417 to support his submission that the petition is maintainable.

6.1 In the case of Kunal Singh (Supra) it was held that, an employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. It 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 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 Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service. The plea that benefit of Section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee, who has acquired 'disability' within the meaning of Section 2(i) of the Act and not a person with disability.

Further merely because under Rule 38 of CCS Pension Rules, 1972 the appellant got invalidity pension is no ground to deny the protection, mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier.

6.2 In the case of Shivaji Dongre (Supra) it was observed in paragraphs No. 6, 9 and 10 thus;

"6. We may first deal with the contention of the respondents that the petition cannot be entertained as other efficacious remedy is available to the petitioner. It may be pointed out that the petitioner has not approached this Court on the ground that his conditions of service have been violated. Petitioner has come to the Court with the contention that the respondents have failed to comply with the mandatory requirement of section 47 of the Disabilities Act. Even otherwise,

having regard to the decision taken by the respondents while rejecting the representation of the petitioner, it can be seen that the petitioner is entitled to invoke extra-ordinary writ jurisdiction of this court for implementation of the provisions of the Disabilities Act. Therefore, the contention of the learned counsel for respondent Nos. 2 and 3 that the petition is not maintainable, cannot be sustained.

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

10. The petitioner is, therefore, entitled to be reinstated in service with full backwages. In the light of this, petition is allowed. Rule is made absolute in terms of prayer clause (B). However, in the circumstances, of the present case, there shall be no orders as to costs."

7. Learned counsel for the petitioner invited our attention to the provision under section 47 of The Disabilities Act, 1995 which 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."

8. Mr. Wattamwar, learned AGP appearing for respondent No.1 and Mr. Bagul, learned counsel appearing for respondent No. 3 have not disputed the fact that the petitioner was suffering from Cervical Spondylosis with degenerative disc C5

C6 and as such he was unable to perform duty as a driver. They submitted that the petitioner has availed alternate remedy by filing the ULP before the labour court and therefore, the petition is not maintainable. To this argument learned counsel for the petitioner has submitted that the petitioner has withdrawn the ULP filed in the labour court and then approached this court.

9. We have carefully considered the submissions made by the learned counsel appearing for the parties and perused the impugned order and the documents placed on record by the petitioner.

10. Considering the submissions made by the learned counsel appearing for the parties, contentions of the petitioner and the documents on record it is clear that the petitioner was appointed as a driver on 09-04-1980 in the Maharashtra State Road Transport Corporation, Osmanabad division and he has worked till the impugned order i.e. on 05-06-2010. Thus, he has served continuously for more than 30 years. Due to pain in the back he was unable to drive the bus. Therefore, he requested by application (Exh.'B') dated 08-03-2010 to respondent No. 3 that he is unable to work as a driver and he may be given alternate work of peon, watchman or sweeper so that he would complete his remaining service of six years. Alongwith the said application he had enclosed copies of medical certificates. It appears that after receipt of application of the petitioner he was asked to appear before the medical officer of State Transport at Osmanabad, namely, Dr. Shahapurkar by letter dated 18-03-2010. Accordingly, he appeared before the said doctor and doctor by letter dated 19-03-2010 (Exh.'D') informed respondent No. 3 that the petitioner is suffering from Cervical Spondylosis as well as Meneir's Syrdrome and there is likelihood of less supply to his brain due to high blood pressure and such person is unable to perform duty as a driver and consequently there is likely dangour to the passenger in the bus. So also, there is a letter dated 13-04-2010 (Exh.'F') of the Civil Surgeon, Osmanabad addressed to respondent No. 3 in response to the letter dated 01-04-2010 of said respondent and it states that the petitioner was examined on 09-04-2010 in the civil hospital, Osmanabad and after going through the certificate issued by Dr. Shahapurkar it was found that the petitioner was unfit to work as a driver and therefore he should be given alternate work equivalent to the post of driver. It appears that instead of giving alternate work to the petitioner respondent No. 3 by impugned order terminated the services of the petitioner and removed his name from muster from 18-05-2010. In the impugned order reference of letter of Civil Surgeon (Exh.'F') is given. It appears that thereafter by letter dated 22-07-2010 (Exh.'I') respondent No. 3 was directed to ask the petitioner to appear before medical board of Chatrapati Shivaji Maharaj Sarvopchar Rugnalaya, Solapur and accordingly in the said hospital petitioner was examined and the board of said hospital also issued medical certificate stating that petitioner was fit for further service of a less laborious character than that which he has been doing of any kind and is completely and permanently incapacitated for further service in department of which he belongs as driver. It also states that his incapacity appears to have been cervical spondylosis with degenerative disc

C5 C6 and that he may be given light job. Said board also appears to have issued certificate (Exh.'L') dated 03-10-2011 stating that petitioner has 10% physical disability i.e. cervical spondylosis with degenerative disc C5 C6. It appears that thereafter petitioner made correspondence on 24-09-2012 with the President of MSRTC, Mumbai camp at Osmanabad to give him alternate job, but it was not considered.

11. The proviso to section 47 of The Disabilities Act 1995 referred earlier says 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. The certificate of disability issued by the board in the Solapur hospital as referred earlier shows that petitioner suffered 10% physical disability. Considering said disability and the fact that he was unable to work as a driver and as suggested by the Civil Surgeon, Osmanabad and the board at Solapur he was required to be given other posts or other work in the light of proviso to section 47 of The Disabilities Act, 1995, but instead respondent No. 3 terminated services of the petitioner by the impugned order without considering his request to provide him alternate work made in his application (Exh.'B') dated 08-03-2010 and without hearing him or without any enquiry. Thus, termination of the petitioner was without any fault on his part. Therefore, we hold that the impugned order is not sustainable being in violation of section 47 of The Disabilities Act, 1995. Thus, as the termination of the petitioner is illegal and is liable to be set aside, he is entitled to financial/ monetary benefits of his termination period i.e. from the date of his termination till the date of his retirement on superannuation as well as retiral benefits including pension.

12. In view of the above we set aside the impugned order terminating the services of the petitioner and direct the respondents No. 2 and 3 to treat service of the petitioner as a continuous service till date of his retirement on superannuation and to give him aforesaid all consequential admissible financial and retiral benefits.

13. Rule is accordingly made absolute in above said terms. The petition is allowed accordingly. No order as to costs.