

(2004) 03 KL CK 0032

In the High Court Of Kerala

Case No : W.A. No's. 2095 and 2096 of 2003

The F.A.C.T. Ltd. and Another

APPELLANT

Vs

A. Gopinatha Panicker

RESPONDENT

Date of Decision : 26-03-2004

Acts Referred:

Companies Act, 1956 — Section 617
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 47

Citation : (2004) 3 ACC 32 : (2004) 2 ILR (Ker) 327 : (2004) 2 KLJ 49 : (2004) 2 KLT 455 : (2004) 3 LLJ 470

Hon'ble Judges : N.K. Sodhi, Acting C.J.; K.K. Denesan, J

Bench : Division Bench

Advocate : M. Sasindran, T.P. Eldho, K.P. Harish, A.K. Jayasankar Nambiar, Priya Mahesh and Priya Manjooran, for the Appellant; P.V. Asha, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Sodhi, A.C.J.

1. This order will dispose of two Writ Appeal Nos. 2095 and 2096 of 2003 in which common questions of law and fact arise and are directed against the same judgment of the learned single Judge disposing of the two Writ Petitions filed by the respondents in these appeals. For the sake of convenience facts are being taken from W.A. No. 2096 of 2003. The respondent was an employee of the Fertilizers and Chemicals Travancore Limited (for short "the Company") which is a Government Company within the meaning of Section 617 of the Companies Act, 1956. On 26.12.2001 when he was proceeding from his home to the Company on his motorbike he met with an accident and sustained severe injuries on his head. He was taken to the hospital and on the following day he underwent surgery for temporo-parietal acute extramural haematoma and was discharged from the hospital on 17.04.2002. Thereafter he underwent physiotherapy for three months. He was using crutches to walk. While he was under treatment with

the hope that he would be able to join duty, the Company directed him to appear before its medical board on 4.5.2003. He appeared before the board and thereafter by order dated 9.6.2003 he was informed that the board found him medically unfit to perform the assigned duties and, therefore, he was being discharged from the service of the Company with effect from 9.6.2003. A cheque towards one month's notice pay was enclosed. Feeling aggrieved by the order of discharge he filed W.P. No. 20361 of 2003 in this Court. Similarly, the respondent in W.A. No. 2095 of 2003 who was an employee of the Company had met with an accident in which the wheels of a bus ran over his legs causing severe injuries and fractures. He too was admitted in a hospital and was able to walk only with crutches. He was also directed by the Company to appear before the medical board and on being found unfit he was discharged from service 9.6.2003 by a similar order. This order was also challenged in W.P. No. 20634 of 2003.

2. Both the Writ Petitions came up for hearing before a learned single Judge on 3.11.2003 and these were allowed with liberty to the Company to take steps for getting the respondents examined by a medical board constituted by the Government in accordance with the certified standing orders. It is against this common order of the learned Single Judge that the Company has filed the present Writ Appeals. The learned single Judge took note of sub-clause (c) of clause 4 of the certified standing orders applicable to the employees of the Company and came to the conclusion that the workmen who are found medically unfit to perform their duties could be discharged from the service of the Company only after obtaining the opinion of a medical board consisting of three doctors constituted by the Government. Since the medical board had not been constituted by the Government, the learned single Judge held that the respondents had not been examined by a properly constituted medical board and on this ground alone the order of discharge was set aside leaving it open to the Company to have the respondents examined by a medical board constituted by the Government. It was also argued on behalf of the respondents that in terms of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter called "the Act") their services could not be terminated. Since the learned single Judge found that they had not been examined by a properly constituted medical board, he did not examine this contention and left the issue open.

3. We have heard the learned counsel for the parties and are of the view that the Writ Appeals deserve to be dismissed. As already observed, the learned single Judge relied upon sub-clause (c) of clause 4 of the certified standing orders. It is common case of the parties that the Company has two divisions - Udyogamandal division and Petro-Chemical division and that the respondents in these appeals were the employees in the Udyogamandal division, it is also not in dispute that the two divisions have separate sets of certified standing orders applicable to their respective employees. The learned counsel for the parties conceded before us that the learned single Judge by mistake relied upon the certified standing orders applicable to the employees of the Petro Chemical division whereas the

respondents were the employees of the Udyogamandal division and therefore, clause 4(c) of the standing orders relied upon was not applicable to them. There was another employee from the Petro-Chemical division whose services had also been discharged on account of medical unfitness and he too had filed W.P. No. 18316 of 2003 in this Court which was heard along with the Writ Petitions filed by the two respondents in these appeals. The learned single Judge through oversight referred to the certified standing orders of the Petro-Chemical division and disposed of the cases of the respondents as well. Since the respondents belonged to the Udyogamandal division and were governed by separate certified standing orders, the judgment under appeal cannot be sustained against them. Counsel for the parties further agreed that the respondents were governed by clause 2(m) of the standing order applicable to the Udyogamandal division of the Company which provides that "any workman who during the course of his employment is found to be medically unfit for work in the factory by the Company medical officer, shall be liable to be discharged." Thus, in view of this standing order the respondents could be discharged from service. The question that now arises is whether Section 47 of the act debars the Company from dispensing with the services of the respondents and whether it will override the provisions of the certified standing orders.

4. The learned counsel for the respondents reiterated the contention which they had urged before the learned single Judge and which had been left undecided. It is contended that since the respondents acquired a disability during their service, the provisions of Section 47 of the Act became applicable to them and it was not open to the Company to terminate their services and that it was obliged to shift them to some other posts with the same pay scale and service benefits and if that was not possible they should have been kept on a supernumerary post until a suitable post was available for them or till they attained the age of superannuation. We find merit in this contention of the learned counsel for the respondents. A meeting to launch the Asian and Pacific Decade of the disabled persons convened by the Economic and Social Commission for Asian and Pacific Region held at Beijing in December 1992 adopted the proclamation on the full participation and equality of people with disabilities in the Asia and Pacific region. India being a signatory to the proclamation the Parliament enacted the Act for the benefit of persons with disabilities. It provides that the appropriate governments and local authorities shall take steps to prevent the occurrence of disabilities and also for their early detection. The Act also makes a provision for the appropriate governments and local authorities to ensure that children with disability have access to free education and they are enjoined to make schemes and programmes in this regard. Chapter VI of the Act requires the appropriate governments to identify posts in the establishment which could be reserved for persons with disabilities. It also requires the appropriate governments to reserve some posts for them. Chapter VII deals with the affirmative action which the appropriate governments are required to take in regard to persons with disabilities. Chapter VIII deals with the removal of discrimination against persons

with disabilities in sharing the development benefits vis-a-vis non-disabled persons. Section 47 falls in this Chapter and as the heading suggests it deals with nondiscrimination in government employment. This Section reads as under:

47. Non-discrimination in Government employment; - (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.

A reading of the aforesaid Section makes it abundantly clear that no establishment shall dispense with or reduce in rank an employee who acquires disability during his service. If an employee acquires a disability after joining service and is found not suitable for the post he was holding, it is open to the employer to shift him to some other post with the same pay scale and service benefits and if it is not possible to adjust the employee against any post, then he may be kept in a supernumerary post until a suitable post is available for him or he attains the age of superannuation, whichever is earlier. The heading of the Section and the Chapter in which it falls and the fact that it starts with a negative mandate leaves no room for doubt that the provision is mandatory in nature. The use of the word "may" in the context in which it appears in the second proviso to Section 47 has to be read as "shall" because it appears in an ameliorative piece of legislation meant to benefit persons with disabilities and intended to give them equal opportunities, protection of rights and full participation. It will, therefore, be no answer for any establishment to say that no suitable post is available for a person who acquired a disability during his service. Thus, where an employee after joining the service incurs a disability has to be dealt with in accordance with the provisions of Section 47 of the Act and his services cannot be dispensed with merely because he has suffered a disability resulting in his incapacity to work. This provision came up for consideration before the Apex Court in *Kunal Singh Vs. Union of India (UOI) and Another*, and it was observed by their Lordships that the language of Section 47 was plain and casts a statutory obligation on the employer to protect an employee acquiring disability during service. The provision was held to be mandatory.

5. In the case before us the respondent joined service of the Company on 29-07-1997 and he met with an accident on 26-12-2001 when he was in service. Similarly the respondent in W.A. No. 2095 of 2003 joined service in May 1967 and he met with an accident on 16.09.2000 while he was in service. The Company is an establishment within the meaning of clause (k) of Section 2 of the Act and is, therefore, obliged to comply with the provisions of Section 47 of the Act in the case of the respondents. The respondents in their Writ Petitions had averred that they were covered by the provisions of the Act and that the employer could not terminate their services in view of the provisions of Section 47 of the Act. In reply to these averments the Company in its counter affidavit had merely stated that the disability incurred by the respondent was not attributed to his employment nor did it occur during his employment. It was further averred that the accident which resulted in the physical disability occurred outside the premises of the Company and was not an accident during his employment. We are unable to accept the stand taken by the Company. It is not the requirement of Section 47 that the accident resulting in the disability should have arisen out of or in the course of his employment. It is enough if an employee acquires disability "during his service". The words "during his service" would obviously mean after he has joined the service and before the same is terminated. It is also not necessary that the accident should have taken place within the premises of the Company. In this view of the matter we are satisfied that the case of the respondents is squarely covered by the provisions of Section 47 of the Act and that the Company could not dispense with their services merely because they had acquired a disability during their service. It is not the case of the Company that the respondent has not suffered any "disability" or that the respondent is not a "person with disability". Rather the Company itself got the respondent examined through a Board of doctors and found that they were unable to perform the assigned duties on account of the disabilities acquired by them during their service. It cannot be disputed that the Company is an establishment within the meaning of clause (k) of Section 2 of the Act being a government company as defined in Section 617 of the Companies Act and was, therefore, bound to comply with the provisions of Section 47 of the Act. The only question that now remains to be examined is whether the provisions of Section 47 of the Act would override clause 2(m) of the certified standing orders which enables the company to discharge an employee if he is found to be medically unfit for the work in the factory by the Company medical officer. The answer to this question, in our opinion, has to be in the affirmative. The certified standing orders no doubt govern the company and its employees but these are general provisions pertaining to all industrial employees including persons acquiring a disability during service. The Act, on the other hand, is a special piece of legislation enacted primarily for the benefit of disabled persons and persons who acquired disabilities during their service. It being a special enactment would apply and override the standing orders. The Company was, therefore, not justified in dispensing with the services of the respondents merely because they had acquired a disability during their services. If it found that they were not

suitable for the post they were holding they could be shifted to some other posts with the same pay scale and service benefits. In case that is not possible the Company should keep them on a supernumerary post until a suitable post is available for them or they attain the age of superannuation.

In the result, the appeals fail and they stand dismissed with no order as to costs.