

(2006) 09 GUJ CK 0014

In the Gujarat High Court

Case No : Special Civil Application No. 20092 of 2006

Transport Manager and Another

APPELLANT

Vs

Maheshwarsinh Karansinh Jadhav

RESPONDENT

Date of Decision : 21-09-2006

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 38

Constitution of India, 1950 — Article 227

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 47, 47(1), 47(2), 72

Citation : (2007) 1 GLR 659

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Saurabh Mehta, for Nanavati and Nanavati, for Petitioners 1 - 2, for the Appellant; None, for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard the learned Advocate, Mr. Saurabh Mehta, for Nanavati & Nanavati on behalf of the petitioners.

2. According to petitioners, the respondent was working as a daily wager with the petitioners from 1.7.1995 and his service was regularized w.e.f. 1.7.2000 in the post of driver in the Traffic Department. On 30.4.2005, when respondent visited his residence, he met with an accident and lost his 100% eyesight. Due to this, respondent has not reported for duty or not produced any fitness certificate upto 30.4.2006. The respondent filed an application before the Commissioner under Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Act of 1995). The petitioners filed reply before the Commissioner on 28.3.2006. The Commissioner, after hearing both the sides, passed an order on 23.5.2006 in Case No. 202 of 2006, wherein, the Commissioner directed to the petitioners u/s 47 of the Act of 1995 to pay the respondent full back wages of interim period and further directed to the petitioners to give proper work during the day time considering

the disability of the respondent.

3. Learned Advocate, Mr. Mehta, has relied upon Ground (d) of the petition and raised the contention that petitioner is declared as essential transport service for the city of Ahmedabad. There are different departments in the petitioner Transport Service such as Traffic Department, Workshop etc. It is the first and fundamental requirement of every employee that he is completely physically fit for duties in different departments of the petitioner Transport Service. The respondent herein was serving as Driver with the petitioner Transport service. It is impossible for the petitioner to appoint the respondent on the same post and it is also not possible for the petitioner to provide any light duty since the respondent herein has lost eye-sight totally and has become totally blind. If the petitioner provides any light duty to the respondent and since the respondent met with accident and has become totally blind and if he receives any further injury due to blindness, the petitioner is liable to pay compensation to the respondent under Workmen Compensation Act, 1923 and in the case of the respondent herein, there are all possibilities to give rise to the litigation under Workmen Compensation Act, 1923. Therefore, according to the petitioner, it is not possible for the petitioner transport service to provide any light duty to the respondent. Therefore, this order is bad. Except that, no other submission is made by learned Advocate, Mr. Mehta.

4. Before dealing with the order in question, it is necessary to consider the relevant Section 47 which is mandatory in nature. Section 47 of the Act is quoted 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 no 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. It is not the case of the petitioner that notification is in existence which has been exempted the petitioner establishment from the provisions of this Section. Learned Advocate, Mr. Mehta, submitted that when the respondent met with an

accident, he was not on duty. Such contention was not raised before the Commissioner when Advocate of the petitioner was remained present and apart from that, the respondent while completing the work returned to the home, meanwhile the accident was occurred. Therefore, applying the notional extension theory in case of such injury benefit of provisions of Workmen Compensation Act, 1923, the respondent is entitled the benefit u/s 47 of the Act. Section 47 of the Act is a mandatory in nature. The disability is required to be acquired during his service and not during the duty. The section provides that. "employee who acquires a disability during his service" meaning thereby it is not necessary that disability should have to be acquired during the course of duty. Therefore, contention raised by learned Advocate, Mr. Mehta, subsequently is also rejected.

6. I have perused the order passed by the Commissioner in Application No. 202 of 2006. The Commissioner has considered the factual aspect about the accident occurred on 30.4.2004 during the period of service. Thereafter, on 26.8.2004 he obtained medical treatment from the Government hospital and thereafter, on 29.11.2005, by Government Medical Board has declared him 100% disability to loss eye sight and issued the certificate in favour of respondent. This certificate was produced by the respondent before the Commissioner. According to respondent, along with said certificate, he had reported for work with the petitioner but petitioner has refused to allow to resume the duty and thereafter, the petitioner has not subsequently called the respondent to resume the duty. In the family of the respondent, no other earning member is available and considering this hard reality, the whole family is without food and remaining in starving condition. This aspect has been taken into account by the Commissioner. The petitioner has raised contention that provisions of I.D. Act, 1947 has been applicable to the petitioner, therefore, this Act of 1995 is not applicable but, no notification has been placed on record by the petitioner before the Commissioner in support of this contention. Therefore, ultimately the Commissioner has considered that w.e.f. 1.7.1995, the respondent was joined the duty as a driver with the petitioner. Because of his work found to be satisfactory, he was made permanent with 1.7.2000. Due to accident occurred on 30.4.2004, 100% disability has been certified by medical board. The petitioner has not allowed to the respondent to resume the duty, therefore, family of the respondent is in starving condition. Therefore, ultimately the Commissioner while considering the mandatory provisions of Section 47 of the Act of 1995, directed to the petitioner to grant all the benefits which are available to the respondent u/s 47 of the Act of 1995 with the salary from the date of accident till the date of resuming the duties and to give any other work which has been suitable to the respondent and also to adjust the place of work which will be near to the residence of the respondent. The directions issued by the Commissioner to implement the order within 45 days from the date of receiving such order from the Commissioner. The order of the Commissioner is dated 23.5.2006. More than 45 days are over but, till date, this order is not implemented by the petitioner.

7. This question has been examined by this Court in case of Gujarat State Road

Transport Corporation v. Gopal Motambhaia Patel reported in (2003) 1 GHJ 975 against which L.P.A. Filed by Transport Corporation is also rejected, and considered the provisions of Section 47 of the Act and observed in Para.10, 11 to 13 as under:

10... However, the Corporation has not kept in mind the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation), Act, 1995 which has been enacted by the Parliament and which is applicable also to the corporation. Section 47 of the said Act provides a mandate to the Corporation in respect of non-discrimination in the Government employment. Section 47(1) thereof provides that 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.

Section 47(2) thereof provides that no promotion shall be denied to a person merely on the ground of his disability.

Proviso to Section 47(2) provides 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.

11. Therefore, considering the provisions of the said Act as aforesaid, I am of the opinion that Section 47 of the said Act is also applicable to the Corporation and these are the mandatory provisions enacted by the Parliament to give protection to such persons who have acquired disability, who are suffering from disability during the course of employment. I am of the opinion that the case of the workman herein is squarely covered by the provisions of Section 47 of the said Act. This aspect has been examined by the Hon'ble Apex Court in case of *Kunalsing v. Union of India and Ors.* reported in 2003 AIR SCW page 1013. Relevant observations made by the Hon'ble Supreme Court in para 9, 10, 11 and 12 which are relevant in the facts of the present case are reproduced as under:

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 VII deals with an employee who is already in service and acquires a disability during his service. It must be borne in mind that Section 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 person does not acquire or suffer

disability by choice. An employee who acquires disability during his service, is sought to be protected u/s 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. The very opening part of 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 may 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 section (2) of Section 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. On 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 the service.

10. The argument of the learned Counsel for the respondent on the basis of definition given in Section 2(t) of the Act 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.

11. We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS (Pension) Rules. The Act is a special legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full partition to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act. Further, Section 72 of the Act also supports the case of the appellant, which reads:

72. Act to be in addition to and not in derogation of any other law.- The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities.

12. Merely because under Rule 38 of CCS (Pension) Rules, 1972, the appellant got invalidity pension is no ground to deny the protection, mandatory made available to the appellant u/s 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. It appears no such efforts were made by the respondents. They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provision of Section 47 of the Act.

12. Similarly, this question has also been examined by the Delhi High Court in case of *Shri Kuldeep Singh Vs. Delhi Transport Corporation, I.P. Estate, New Delhi*, Relevant paragraphs 1,2 and 3 are quoted as under:

A short controversy emerges in this writ petition as to whether in view of the payment made by the respondent on account of compensation to the petitioner who has rendered medically unfit and was retired prematurely on medical ground, the petitioner is not entitled to reinstatement u/s 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Hereinafter called "the Act"). Learned Counsel for the respondent has contended that the petitioner was paid a sum of Rs. 33,125.00 as compensation under the scheme and a sum of Rs. 70,941.60 was paid as compensation under Workmen's Compensation Act in lieu of alternative employment. It was contended before me that respondents have formulated the scheme in view of directive given by Supreme Court in *Anand Biharai and Ors. v. Rajasthan State Road Transport Corporation* and Anr. 1998 III LLJ 1209. The scheme was formulated by the respondent and the amount of compensation was paid. Mr. Vibhu Shankar has further contended that the respondent was not obliged to reinstate the petitioner. However, learned Counsel for the petitioner has contended that the amount of Rs. 33,1125.00 was paid towards medical charges. She has further contended that this amount as well as compensation under the Workmen's Compensation Act was paid prior to coming into force of Section 47 of the Act and there is no escape for the respondent but to employ the petitioner in view of judgment of Supreme Court in *Kunwar Pal Singh v. Delhi Transport Corporation* and Ors. Civil Appeal No. 1864/2000 arising out of SLP (C) 7997/1999 where the Supreme Court held as follows:

Special Leave granted.

Learned Counsel for the appellant has brought to our attention Section 47 of the Persons with Disabilities (Equal Opportunities etc.) Act, 1995. Having heard the learned Counsel for the parties, we are of the opinion that it is the duty of respondent No. 1 to employ the appellant in a Class IV post. If no such post exists, then, by virtue of Section 47 of the Act, a supernumerary post shall be created within eight weeks from today and employment given to the appellant with such relief as the appellant may be entitled to.

The appeal stands disposed of accordingly.

Sd/- BN Kirpal J Sd/- Syed Shah Mohammed Quadri, J.

2. In view of the decision of the Supreme Court it is no more open for the respondent to contend that as the workman has been paid compensation under the scheme and compensation under the Workmen's Compensation Act, the petitioner is not entitled to reinstatement in view of the specific provision of Section 47 of the Act. Counsel for the petitioner has contended that the sum of Rs. 33,125.00 was paid towards medical expenses and not towards the scheme. Even if the said amount was paid under the scheme, the petitioner would have been entitled for reinstatement in view of the specific orders and directions passed by the Supreme Court in a similar case. There is no denial of the fact that the industry sustained by the petitioner was during the course of employment. That being so, the ratio of Kunwar Pal Singh case (supra) squarely applies to the facts of the present case. 3. I, therefore, direct respondent to reinstate the petitioner in Class IV post with protection of pay as contemplated u/s 47 of the Act. If other is no post available the respondent would create a supernumerary post within eight weeks to accommodate the petitioner.

Similar aspect has also been examined by the Division Bench of the Delhi High Court in case of Delhi Transport Corporation Vs. Rajbir Singh and Sadh Ram, recently. Relevant paragraphs 13, 14, 15 and 18, 19 are reproduced as under:

13. History of legislation as noticed herebefore clearly shows that said Act was enacted in conformity with the proclamation on the full participation and equality of the People with Disabilities in the Asian and Pacific Region. It is not in dispute that the Act is beneficent in nature. It is also not in dispute that by reason of the said Act provisions have been made so that the persons with disability feel themselves as a part of the society which eventually may lead to his full participation of the work place. Nobody suffers from disability by choice. Disability comes as a result of an accident or disease.

14. The said Act was enacted by the Parliament to give some sort of succour to the disabled persons. By reason of Section 47 of the said Act which is beneficent in nature, the employer had been saddled with certain liabilities towards the disabled persons. Section 47 of the Act we may notice does not contemplate that despite disability, a person must be kept in the same post where he had been working. Once he is not found suitable for the post he was holding, he can be shifted to some other post but his pay and other service benefits needs to be protected. The second proviso, appended to Section 47 of the Act in no uncertain terms, state 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. The said Act provides for social security for the disabled persons and if for the said purpose a statutory liability has been thrust upon the employer, the same cannot be held to be arbitrary.

15. Yet, again a, this Bench in *Social Jurist v. Union of India* (CWP 1283 of 2002, decided on August 13, 2002) observed:

It is common experience of several persons with disabilities that they are unable to lead a full life due to societal barriers and discrimination faced by them in employment, access to public places, transportation, etc. Persons with disability are most neglected lot not only in the society but also in the family. More often they are an object of pity. There are hardly any meaningful attempts to assimilate them in the mainstream of the nation's life. The apathy towards their problems, is so pervasive that even the number of disabled persons existing in the country is not well documented.

2. T.R. DYE Policy Analyst, in his Book UNDERSTANDING PUBLIC POLICY says;

Conditions in society which are not defined as a problem and for which alternative are never proposed, never become policy issues. Government does nothing and conditions remain the same.

3. This statement amply applies in the case of the disabled. At least this was the position till few years ago. The condition of the disabled in the society was not defined as a problem, and, therefore, it did not become public issue. It is not that this problem was not addressed. Various , Authors, Human Rights Groups have been focusing on this problem from time to time and for quite some time. But it was not defined as a problem which could become public issue. Until the realization dawned on the Government and the policy makers that the right of the disabled was also human right issue.

It was further observed;

Unless the mindset of the public changes, unless the attitude of the persons, and officials who are given the duty of implementation of this Act changes, whatever rights are granted to the disabled under the Act would remain on paper.

xxx 18. Grant of some relief to the disabled person had been in the mind of all concerned for a long time.

19. As indicated hereinbefore, 1995 Act came into force only after India became signatory to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. The said Act, therefore, must be read in the context of the said proclamation.

(see: (1) Shri Dilbagh Singh Vs. Delhi Transport Corporation, Delhi (2) Avinash Anant Vaidya Vs. The Regional Provident Fund Commissioner and Others, Bombay and (3) Amita v. Union of India and Anr. 2006 SCC 1507.

8. In view of the above observations made by this Court and considering the decision of the Apex Court, according to my opinion, the order passed by the Commissioner dated 23.5.2006 is legal and valid and no error has been committed by the Commissioner while passing such order. The power of judicial review is very limited under Article 227 of the Constitution of India. This Court cannot reappreciate the factual aspect which has been appreciated by the Commissioner. Considering the facts on record which was almost undisputed

facts, the provision of the Act of 1995 is applicable to the case of the respondent and no notification has been brought to the notice of the Commissioner which gives exemption to the petitioner u/s 47 of the Act, 1995. Therefore, the Act of 1995 is applicable and it is an legal obligation of the petitioner to comply the mandatory provisions of Section 47 if disability is acquired by employee during the service period and, therefore, according to my opinion, the Commissioner has rightly examined the issue and pass proper order. For that, the Commissioner has not committed any error which requires any interference by this Court under Article 227 of the Constitution of India. In view of the above, there is no substance in the present petition. Accordingly, present petition is dismissed.

9. However, considering the special facts and circumstances of the case, normally in the petition challenging the order in question, the Court should not pass any order against the petitioner to implement the order in question but, looking to the facts that respondent employee who remained without wages, family of the respondent is in starving condition, therefore, it is directed to the petitioner to implement the order passed by the Commissioner which is challenged before this Court, within a period of 15 days from the date of receiving the copy of this order.