

(2004) 09 AHC CK 0182

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 45249 of 2002

Zameel Ahmad

APPELLANT

Vs

Regional Manager, U.P.S.R.T.C. and Others

RESPONDENT

Date of Decision : 03-09-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21
Industrial Disputes Act, 1947 — Section 6N
Uttar Pradesh State Road Transport Corporation Employees (Other than Officers)
Service Regulations, 1981 — Regulation 17, 17(2), 17(3)

Citation : (2005) 1 ESC 338 : (2005) 1 UPLBEC 22

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Advocate : Ajay Bhanot and S.K. Pandey, for the Appellant; M.M. Sahai and S.C., for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard Sri Ajay Bhanot and Sri S.K. Pandey for the petitioner, and Sri M. M. Sahai for U.P.State Road Transport Corporation Ltd.

2. The U.P.State Road Transport Corporation established and incorporated under the U.P.Road Transport Corporation Act, is wholly owned and controlled by the State Government and is an instrumentality of the State. It falls within the meaning of State under Article 12 of the Constitution of India. The service conditions of the employees of the Corporation are regulated by the U.P.Road Transport Corporation (Employees other than Officers) Service Regulations, 1981.

3. The petitioner was appointed as a Driver in the Corporation in the year 1990. After serving for a long period he fell ill and proceeded on medical leave. On medical examination he was found to be suffering from "Carcinoma Urinary Bladder", and could not attend duties for a long period of time. The Medical Board chaired by Divisional Medical Board/Additional Director, Medical, Health and Family Welfare, Agra Division, Agra carried out medical examination. The

Board certified him on 28.7.2000 to be unfit for carrying out duties as a Driver.

4. On a request made by the petitioner, the General Manager (Personnel) by his order dated 18.12.2000 directed that the petitioner may be taken off the active duties as Driver and that his services should be utilised on any other post for which he was suitable. The petitioner was assigned duties at the enquiry counter. The Regional Manager of the Corporation, Etawah by his notice dated 23.9.2002, challenged in this writ petition, terminated his services under Regulations 17(2) and (3) of the U.P.State Road Transport Corporation (Employees other than Officers) Service Regulations, 1981, w.e.f. 22.10.2002, i.e. one month from the letter/notice and made him entitled to a sum of Rs. 31,540/-as retrenchment compensation u/s 6-N (b) of the U.P. Industrial Disputes Act, 1947.

5. In this Writ Petition on 24.1.2002 a direction was issued by this Court to the competent authority to consider and pass appropriate reasoned orders to allow the petitioner to continue in service on any alternative employment. His representation was considered and rejected by the respondents. Sri Ajay Bhanot, Counsel for petitioner submits that in the given circumstances the Regulations 17(2) and (3) of the Regulations of 1981 provide for a suitable alternate employment. These Regulations are quoted as belows :

"17. (2) A person appointed to the post of driver will be required to undergo medical test, particularly vision test, every year or at such intervals as may be prescribed by the General Manager from time to time.

(3) The service of a person who fails to pass the fitness test, referred to in the sub-regulation (2), may be dispensed with :

Provided that the persons, whose services are so dispensed with may, in the discretion of the Corporation, be offered alternative job."

6. Sri Ajay Bhanot submits that the respondents rightly exercised their discretion and allowed the petitioner to be engaged as Enquiry Clerk to perform duties for which he was physically suitable. The petitioner underwent surgery and has recovered from the illness. His medical condition, however, does not allow him to perform active duties as Driver. The Corporation has acted illegally and arbitrarily in terminating petitioner's services. The reason given in the counter affidavit of Sri Ashok Kumar Awasthi for terminating the services is absolutely to the petitioner's case and is irrelevant arbitrary and illegal. The Circular issued by the Corporation dated 8.4.2002 relates to permanent disabilities. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (in short Act of 1995) provides for alternative employment for those persons, who acquire such disabilities as defined in the Act of 1995 during the employment. The same Circular provides that the services of the persons not covered by the Act of 1995, be terminated under Regulations 17(2) and (3) of the Regulations of 1991 after following the provisions of Section 6-N of the U.P. Industrial Dispute Act, 1947. Sri Ajay Bhanot states that there is a distinction between disabilities as defined in the Act of 1995, and a disability to perform the

nature of duties for which the person has been detailed, on account of ill health, or a disability qua the duties and responsibilities of a particular post due to illness or a medical condition even after recovery from such illness. Where the person has acquired a medical condition, which does not permit him to perform the duties for which he is appointed, the Public Sector Corporation as an employer in a Welfare State must act fairly and reasonably and that rights of equality guaranteed under Articles 14: 16 and 21 of the Constitution of India mandate that such person, with his physical handicap must be seconded to a post of which the duties are in conformity with his medical condition. The services of such a person cannot be terminated on the ground that he has not able to perform the duties of the post for which he was appointed. The order terminating the petitioner's services is thus violative of Articles 14: 16 and 21 of the Constitution of India.

7. Sri M.M. Sahai appearing for the Corporation, submits that after petitioner's illness the Medical Board declared him unfit for duties as Driver. The petitioner was granted 283 days medical leave as against his entitlement of 120 days. The petitioner also availed 135 days earned leave. Taking into account the staff strength of the Etawah Region there was no alternative employment, available for the petitioner, commensurate with his medical condition and thus in terms of the Circular letter dated 8.4.2002 the petitioner's services were terminated in accordance with Regulations 17(2) and (3) of the Regulations of 1981 after complying with the pre-conditions of Section 6-N of the U.P. Industrial Disputes Act, 1947.

8. I have considered the submissions and find that the respondents have acted illegal and arbitrarily in terminating petitioner's services on the only ground that his medical condition did not permit him to do the job of a driver. The Circular letter dated 8.4.2002 was not applicable to the present case. The petitioner is not a disabled person. He has not acquired any physical disability as defined under the Act of 1995. He suffered from cancer, and has recovered after surgical procedure. His medical condition does not permit him to discharge duties as a driver. This condition by itself did not authorise the Corporation to terminate his services. The proviso to Regulation 17, required the Corporation to accommodate him on any of the alternative job as he had not lost his utility to the nature of any of the employment available in the Corporation.

9. The petitioner was permitted to join, and thereafter the General Manager (Personnel) of the Corporation took a decision to re-employ him on any departmental work for which he was suitable. The petitioner was allowed to function as Enquiry Clerk. There was no change in the circumstances to exercise the discretion under Regulations 17(2) and (3) except the issuance of Circular dated 8.4.2002. In the counter affidavit of Sri Ashok Kumar Awasthi, it is stated in Paras 7 and 8 that alternative job was offered to the petitioner but after the issuance of the Circular it was not possible to adjust the petitioner. Paras 7 and 8 of the counter affidavit filed by Sri Ashok Kumar Awasthi are quoted as below :

"7. That the contents of Paragraphs 6 to 9 of the writ petition needs no comment being the matter of record. It is stated that prior to 8.4.2002 the position was different but after that date the Circular dated 8.4.2002 which clearly mandate that which decease would be treated to be disability since the petitioner is a Driver and is suffering due to carcinoma urinary bladder as such in view of the circular aforesaid he is not covered under the circular and cannot be given any adjustment/ alternative appointment.

8. That the contents of Paragraphs 10 to 18 of the writ petition are not admitted in view of the reply given to the earlier Paragraph no further comments are called for. It is however stated that prior to circular dated 8.4.2002 the alternative job was being offered to the disable Driver but after the circular now it is not possible to adjust the petitioner as such the order impugned do not call for any interference and the writ petition is liable to be dismissed with cost."

10. I do not find any such directions in the Circular dated 8.4.2002 that the services of persons, who were earlier offered alternate employment on account of the medical conditions, were required to be dispensed with. The policy of the Corporation had not undergone any change, except that the persons covered with disabilities under the Act, 1995, were required to be given an alternative employment. The Regional Manager of the Corporation wrongly interpreted the circular and the provisions of the Act of 1995. A person in active service may acquire any of the disabilities as defined in the Act of 1995, or he may suffer incapacity on account of illness to perform the duties of a particular job requiring higher degree of physical fitness. These two categories are entirely different, and the exercise of discretion for these two categories is also different. The petitioner suffering from cancer was thus discriminated with other handicapped persons defined in the Act of 1995, such as blind, deaf, and persons with locomotor disabilities or cerebral palsy.

11. By an amendment to the writ petition the petitioner has also prayed for setting aside order dated 27.11.2002, by which his representation in terms of directions of this Court dated 24.10.2002 was dismissed by the Regional Manager on 27.11.2002.

12. The Counsel for the petitioner has placed reliance on the decisions in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, , in which the Supreme Court dealing with eviction of pavement dwellers included the right of livelihood in Article 21, and harmonized this right with the obligation of the State to secure to the citizens an adequate means of livelihood; and *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, , in which the Supreme Court by majority view struck down Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952, providing for termination of services of employee, without giving him any notice, during probation, or on misconduct or after expiry of the period for which he was appointed, on contract for a specified period, or after one months notice due to reduction in establishment. The Supreme Court termed Clause 9(i) as "Henry

VIII clause" and following Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , held it to be conscionable, opposed to public policy, void u/s 23 of Indian Contract Act, 1872 and Article 14 of the Constitution of India. Paras 202 and 203 of the majority view recorded by Justice B. C. Ray are quoted as below :

"202. This has been referred to and relied upon in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and a similar Rule 9(I) was termed as "Henry VIII clause" as it confers arbitrary and absolute power upon the Corporation to terminate the service of a permanent employee by simply issuing a notice or pay in lieu thereof without recording any reason in the order and without giving any opportunity of hearing to the employee. Thus, the Rule 9(I) of the Services Discipline and Appeal Rules, 1979 was held void u/s 23 of the Indian Contract Act, 1872, as being opposed to public policy and is also ultra vires of Article 14 of the Constitution to the extent that it confers upon the Corporation the right to terminate the employment of a permanent employee by giving him three months" notice in writing or by paying him the equivalent of three months" basic pay and dearness allowance in lieu of such notice. 203. Regulation 9(b) of the impugned Regulation framed under the Delhi Transport Corporation Act which is in part materta with the said Rule 9(1) is void u/s 23 of the Contract Act as being opposed to public policy and is also ultra vires Article 14 of the Constitution."

13. In this case, Regulations 17(2) and (3) do not suffer from the same vice. A person has to undergo medical test particularly vision test, every year or at such intervals as may be prescribed, and services of those persons, who failed to pass the fitness test, may be dispensed with. The proviso, with the persons whose services are so dispensed with, may in the discretion of the Corporation, be offered alternative job, saves Regulations 17(2) and (3) from the voice of being opposed to public policy and ultra vires Article 14 of the Constitution, The discretion in the proviso, however, must be exercised fairly and reasonably. The appointing authority must consider the medical condition of the driver, with an object to provide an alternate job, unless the physical condition, as such, in which he cannot perform the duties of any job available in the Corporation. In the present case, the discretion was rightly exercised by the General Manager by his order dated 18.12.2000. The Regional Manager, however, acted illegally in applying the circular letter dated 8.4.2002 to the petitioner and terminated his services in accordance with the Regulations 17(2) and (3) of the Regulations of 1981. There is nothing in the counter affidavit to show that the job at enquiry counter, to which he was detailed, was no longer available to the petitioner.

14. For the aforesaid reasons, I find that the respondents have wrongly applied the circular dated 8.4.2002 in the case of petitioner and have discriminated the petitioner with other handicapped and physically challenged persons, defined under the Act of 1995. The writ petition is consequently allowed. The order dated 23.9.2002 terminating petitioner"s services and order dated 7.11.2002 rejecting

his representation are aside. The petitioner shall be reinstated in service and shall be allowed to work as enquiry clerk, the post on which he was offered and was working before termination of his services. The petitioner shall also be entitled to back wages and all consequential benefits in services and shall be entitled to the costs of these proceedings.