

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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WP (C) NO.23602/2005

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Date of decision: 16th March, 2010

DELHI TRANSPORT CORPORATION

....Petitioner

Through: Mr. J.S. Bhasin and Ms. Rashmi Priya,
Advocates

Versus

OM PARKASH

..... Respondent

Through: Mr. Anil Mittal, Advocate

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

RAJIV SAHAI ENDLAW, J.

1. The petitioner DTC seeks quashing / setting aside of the award dated 23rd March, 2005 of Industrial Tribunal on the following reference:-

“Whether Sh. Om Parkash S/o Sh. Mangal Ram is entitled to the arrears in the pay scale of driver, if so what directions are necessary in this respect?”

in favour of the respondent and against the petitioner DTC. The award directs the petitioner DTC to pay to the respondent the pay scale of a driver w.e.f. 1st February, 1996 and out of which amount 50% has been directed to be paid to the respondent and the balance 50% directed to be deposited in his provident fund account. This Court vide ex parte order dated 16th December, 2005 while issuing

the notice of the writ petition stayed the operation of the award. The said order, vide order dated 8th August, 2007, was confirmed till the disposal of this petition.

2. The respondent, on 23rd May, 1977 was appointed as and started working as a driver with the petitioner DTC. During the course of his employment, he was sent for medical examination by the petitioner DTC; the medical board declared the respondent unfit for the post of driver. The petitioner DTC thereafter vide order dated 31st March, 1980 prematurely retired the respondent from service of the petitioner DTC with immediate effect. The respondent on 9th April, 1980 applied to the petitioner DTC for absorbing him in the cadre of store attendant on compassionate grounds. The respondent was vide letter dated 21st July, 1980 of the petitioner DTC informed that his request had been acceded to and offered the job of a store attendance on the terms and conditions contained therein. The said terms inter alia were that the respondent would be re-designated to the post of store attendant and his pay would be fixed at Rs.206/- in the pay scale of 200-03-212-04-232 EB-240. The respondent communicated his consent to the aforesaid offer of the petitioner DTC and the petitioner DTC vide order dated 1st August, 1980 re-designated the respondent as store attendant w.e.f. 2nd August, 1980 and on other terms and conditions including as to pay scale of a store attendant contained therein.

3. It is the case of the respondent workman that he had accepted the pay scale of a store attendant under protest and had demanded the pay scale of a driver which he was getting at the time of his premature retirement. It is further his case that the management of the petitioner DTC had assured him that since a number of employees had already filed writ petitions before this Court on similar facts and for protection of their pay scale, in the event of the said writ petitioners succeeding, the

respondent would also be entitled to the pay scale of a driver and the additional amounts would be reimbursed to him. I may however notice that there is no document to the said effect. It is further the case of the respondent that this Court while deciding the various writ petitions similar to the case of the respondent, directed the petitioner DTC to protect the pay scale of employees whose ranks were reduced due to disability during the course of employment; however, contrary to the assurances meted out to him, he was not given the pay scale of a driver. The petitioner thereafter raised a dispute on which the reference aforesaid was made on 26th March, 2004. The petitioner DTC resisted the claim of the respondent on the ground of:-

- (i) Delay.
- (ii) Denying that the respondent had protested against the scale of store attendant or had demanded the scale of a driver or was assured the said scale in the event of petitions filed by others similarly situated as the respondent succeeding.

4. The Labour Court held, on the basis of several judgments of this Court in which the last drawn salary of a person under disability had been protected, that the respondent was entitled to the relief claimed. However owing to the respondent DTC having raised the dispute after 23 years of joining as a store attendant, the respondent was held not entitled to the salary as a driver w.e.f. 2nd August, 1980 but only w.e.f. 1st February, 1996 being the date of coming in force of the Persons with Disability (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995.

5. The counsel for the petitioner DTC has contended:

- (i) That the reference should have been answered against the respondent on the mere ground of delay of 23 years in raising the dispute. Reliance is placed on *Assistant Engineer, CAD, Kota Vs. Dhan Kunwar* 2006 SCC (L&S) 1142 where an unjustifiable delay of 8 years in raising the dispute was held to have disentitled the workman from relief and *U.P. State Road Transport Corporation Vs. Babu Ram* (2006) 5 SCC 433 holding that it is for the workman to place material to show that a dispute is raised within a reasonable time and/or that the workman is not responsible for the delay.
- (ii) Respondent as a driver would have retired at the age of 55 years if found medically unfit; the retirement age of the petitioner as a driver because of disability would have been 55 years; that the respondent because of occupying the post of a store attendant continued in the employment of the petitioner DTC till the age of 60 years being the age of superannuation of a store attendant. It is also informed that the respondent in fact attained the age of 55 years in the year 2003 itself and raised the dispute only thereafter. It is thus contended that the respondent cannot avail double benefit i.e. of drawing the scale of a driver while retiring at the age of 60 years inspite of being medically unfit as a driver.
- (iii) That prior to coming into force the Disability Act, the respondent had no right of protection of his last drawn salary as a driver. An additional affidavit has been filed in this regard to contend that at the contemporaneous time, the respondent workman was only entitled to be absorbed in an equivalent or lower post at the salary of the post where so absorbed.

6. Per contra, the counsel for the respondent has contended that the Disability Act is a beneficial provision and is to be interpreted liberally. He contends that

delay in raising a dispute is not always fatal. Reliance in this regard is placed on *Chief Medical Officer, Mandsaur vs. Narendra Singh* (2005) 12 SCC 403 *GM, Haryana Roadways Vs. Pawan Kumar*, (2005) 12 SCC 459 and *Shri Dilbagh Singh v. Delhi Transport Corporation* 2005 84 DRJ 208. He also contends that even prior to coming into force of the Disability Act, the Supreme Court in *Narendra Kumar Chandla Vs. State of Haryana* (1994) 4 SCC 460 had directed for protection of the last drawn salary.

7. In the opinion of this court, the respondent, in any case not be entitled to the emoluments as a driver after attaining the age of superannuation as a driver. The continuance by the respondent in the employment of the petitioner DTC after attaining the age of superannuation as a driver could only be as a store attendant. The Division Bench of this Court recently in *Delhi Transport Corporation Vs. Shri Dharam Pal* 160 (2009) DLT 555 has unequivocally held that a driver suffering disability and availing of the provisions of the Disability Act cannot seek to continue in employment beyond the age of superannuation as a driver. It was held that absorption of such drivers under disability in another post being by way of benefit extended to them does not ipso facto increase the age of their superannuation of 55 years as a driver. Thus the award in so far as holding the respondent entitled to the emoluments as a driver, with effect from the date of his superannuation as a driver till the date of retirement as a store attendant cannot thus be sustained and the award to that extent is set aside.

8. The question which falls for consideration is as to whether the respondent is entitled to the benefits / emoluments as a driver from 1st February, 1996 till attaining the age of 55 years of superannuation as a driver.

9. I will first examine the matter under the Disability Act. Another Division Bench of this Court recently in ***Delhi Transport Corporation Vs. Sh. Harpal Singh*** 156 (2009) DLT 481 after consideration of the entire gamut of case law, while holding that the provisions of Section 47 of the Disability Act cannot be given retrospective operation has held that in pending proceedings the benefit thereof can certainly be extended. This has been held to be the mandate of Article 41 of the Constitution of India. In the present case, no proceedings were pending on the date of coming into force of the Disability Act and thus the benefit of the Act cannot be extended to the respondent. It thus remains to be seen whether the respondent is entitled to the emoluments as a driver under the general law which was prevailing then.

10. The petitioner DTC has in the additional affidavit also stated that a scheme in this regard was formed by the Supreme Court in ***Anand Bihari Vs. Rajasthan State Road Transport Corporation*** AIR 1991 SC 1003. Under the said scheme also I do not find any provision for protection of the last drawn salary of the workman. The said scheme provided for payment of compensation and in the event of vacancy in alternative job absorption in the same. The said additional affidavit mentions several other orders/judgments of this court, some also upheld by the Supreme Court, of the time prior to the coming into force of the Disability Act and in which, in relation to such disabled employees, only provision for compensation or

absorption in equivalent or lower post was made, without preserving the pay scale. It is the contention of the petitioner that old settled cases as in the present case, should not be permitted to be reopened, as done in the impugned award; else all employees who were absorbed in lower posts at scales applicable to such posts will start making claims.

11. However, my research shows that in Special Leave Petition (C) No.1575/1991 titled *Shri Vedi Prakash Singh, Conductor Vs. DTC*, the Supreme Court vide order dated 5th August, 1991, (as reported in *Delhi Transport Corporation v. Presiding Officer, Labour Court IV* 105 (2003) DLT 208) held:

"Assuming that the Corporation is right that the appellant is now not fit to be a Conductor, there is another aspect which the authorities have failed to take into account. From annexure 'A' to the rejoinder affidavit, it appears that several posts are being treated equivalent to that of a Conductor, and having regard to the medical report, it cannot be suggested that the appellant is unfit for being entrusted with the duties of any of these posts. On the last date when the matter was heard in part, we had drawn the attention of the counsel for the respondents to this aspect and the case was adjourned for the respondents to consider the feasibility of appointing the appellant as a Junior Telephone Operation, Confidential Clerk, Counter or in any other equivalent post. The learned counsel for the appellant states today that the Corporation is not prepared to offer the appellant a post in Class III. The learned counsel however has not been able to suggest any acceptable reason in support of the stand of the respondents. While we find a policy being adopted in this country of taking measures to rehabilitate handicapped persons, the respondents are referring (sic; refusing) to accommodate the appellant in an equivalent post without any valid ground. Having considered all the relevant circumstances we therefore direct that appropriate orders shall be passed by the respondents within a period of three weeks from today offering a post, equivalent to the post of Conductor, to the appellant. His continuity of the service shall also be maintained. So far the back wages are concerned, the respondent shall allow the same for the intervening period at the rate payable for a Class IV job."

12. To the same effect is the judgment relied on in the award in *Narendra Kumar Chandla* (supra). Thus it appears that on case to case basis, the courts before the coming into force of the Disability Act were giving the benefit of protection of last drawn salary to the disabled workers and who had pressed their claims for the same, without however making it a general rule. The respondent herein did not press his claim even if any for protection of his last drawn pay scale. Rather the respondent accepted the order of his premature retirement owing to disability and applied for appointment to some other post on compassionate ground. The respondent unequivocally accepted the offer made by the petitioner DTC for employment as store attendant on the scale of store attendant. If the respondent had then not accepted the post as a store attendant and/or not given the acceptance to the offer made to him, the petitioner DTC would not have so engaged him. The respondent is now estopped from contending otherwise.

13. The counsel for the respondent has relied on *Tarlochan Singh Aujila Vs. DTC* (2005) V A.D. (Delhi) 607. However, in this case the driver was prematurely retired in December 1995 for the reason of disability and absorbed in a lower post. Upon dispute being raised by him, though a Single Judge of this court negated the plea of him being not entitled to protection of last drawn pay scale for the reason of retrospectivity, nevertheless gave option to either accept the scale of lower post and retire at the age of 60 years or protect last drawn pay scale and retire at the age of 55 years. The driver was not held entitled to both.

14. The respondent in the present case, though seeking benefits as of a driver and thus liable to retire at the age of 55 years, however continued in the employment of

the petitioner DTC till the age of 60 years. In fact the counsel for the petitioner sought to suggest that even if the respondent is found entitled by this Court to the awarded amount from 1st February, 1996 till the date of attaining age of 55 years, out of the said amount the emoluments received by the respondent for the next five years should be deducted. However, that would not be appropriate. The respondent has continued to work and the petitioner DTC has continued to avail the benefit of the services of the respondent for the said five years and thus the petitioner DTC cannot deduct the said amount inasmuch as it would tantamount to the petitioner DTC having availed the services of the respondent for free. The only impact of the respondent having continued to work for additional five years and having drawn wages therefor is to hold the respondent having disintitiled himself from claiming protection of last pay scale and in which case he would have retired at age of 55 years. The respondent is informed to have attained the age of superannuation as a store attendant on attaining age of 60 years in or about the year 2007. It is found that the respondent raised the dispute after crossing the age of 55 years and while continuing in employment as a store attendant for another five years. Had the respondent raised the dispute earlier, the petitioner DTC would have retired him at the age of 55 years. The respondent is held not entitled to relief on this ground alone.

15. Though the counsel for the respondent has contended that the relief from 1st February, 1996 till attaining the age of superannuation i.e. for about six years only ought not to be denied to the respondent but I have been unable to find any basis on which the said relief can be granted to the respondent.

16. The writ petition therefore succeeds. The award dated 23rd March, 2005 of the Labour Court is quashed / set aside.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

March 16th, 2010
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