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HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No.7696/2010 & CM 19998/2010

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Date of Decision: March 7, 2011

Delhi Transport Corporation

...Petitioner

Through Ms.Avnish Ahlawat with Ms.Latika
Chaudhary, Advocates

Versus

Sh.Manmohan

.... Respondent

Through Mr.Som Dutt Kaushik, Advocate

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether reporters of Local papers may be allowed to see the judgment? No
2. *To be referred to the reporter or not? Yes*
3. Whether the judgment should be reported in the Digest? Yes

VEENA BIRBAL, J.

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1. By way of this petition under Article 226 read with 227 of the Constitution of India petitioner-DTC has challenged the impugned order dated 18th May, 2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') in T.A.No.843/2009 wherein the order dated 27th June, 1997 passed by the petitioner retiring the respondent prematurely on medical grounds and asking him to collect the cheque of

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compensation, is set aside. By the impugned order, the Tribunal has directed the petitioner to continue the respondent on deemed basis on a supernumerary post in an equivalent grade of Conductor protecting his pay till he attains the age of retirement and the superannuation may be personal to him. The Tribunal has further directed the petitioner that if the respondent is reinstated in service on deemed basis, he would be entitled to all the consequential benefits including back wages from 27.6.1997 till date which would be paid to him within a period of three months.

2. Briefly the facts relevant for disposal of present petition are as under:

Respondent was employed as a conductor with the petitioner in May, 1982. On 7th January, 1991, the respondent met with an accident while he was on duty and was taken to hospital where he was admitted upto 7th June, 1991. On 8th June, 1991, the respondent joined his duties after getting a medical fitness certificate and was posted in the ticketing section where he worked upto 25th January, 1992. It is alleged that the respondent was not performing his duties properly as he was not fit to do the same and was sent to the DTC medical board for examination. The DTC medical board declared him medically 'unfit'. Against the order of the DTC medical board, the respondent filed an appeal before the CMD for having him

medically examined from another Board. Petitioner was again examined by the DTC medical board and vide its report dated 16th July, 1992 the Board declared him permanently unfit for the post of Conductor. It is alleged that thereafter the petitioner asked the respondent to give his consent for re-designation in Class IV or a lower post vide memo dated 22nd August, 1992 but he did not reply to the same. Thereafter, the respondent filed a WP(C) No.3113/1992 before this court praying for issuance of appropriate directions restraining the petitioner from terminating the services of the respondent or forcing the respondent to retire voluntarily and also allowing the respondent to perform light duties.

In the said writ petition, this court ordered for a medical examination of the petitioner by the Medical Board of the petitioner in order to see whether he was fit to perform his duty as a conductor or not. The Medical Board as per its report dated 23rd May, 1995 declared the respondent unfit for the post of Conductor permanently. This court vide order dated 16th October, 1996 disposed of the said writ petition directing the petitioner that as the respondent was unfit for the conductor's post, in case there was any other equivalent or lower post on which the respondent could be accommodated, the petitioner would examine the respondent's case and provide such employment to him protecting his salary, failing which the

petitioner's case will be duly considered and examined under the Scheme which has been formulated by the petitioner for providing compensation to any of the employees who are medically found unfit for performing their jobs and for whom no alternative jobs are available. As no alternative job was available, the Competent Authority of petitioner approved a compensation amount of Rs. 39,278.40 but the same was not collected by the respondent. Respondent had filed a contempt petition alleging therein non-compliance of order of this court dated 16.10.1996 which was disposed of by the learned Single Judge of this court vide order dated 20th April, 2004 with the direction that since the respondent had been found unfit for any equivalent or lower post and if he was aggrieved by the said decision, it would give rise to a fresh cause of action and it was open for him to challenge the said decision in accordance with the law. Thereafter, the respondent filed another writ petition being W.P.(C) No.5393/2005 praying for quashing the order dated 27th June, 1997 declaring the respondent unfit for the post or any other lower post and was asked to collect the compensation for his premature retirement.

3. On account of change of jurisdiction, the said writ petition was transferred to the Tribunal and was renumbered as T.A. No.843/2009.

4. Before the Tribunal, the petitioner had contended that the case of the respondent was considered for an adjustment to Class IV post as no post was available and as per the staffing norms the respondent did not fulfil the requisite qualifications, an order was passed on 3rd April, 1997 prematurely retiring him and offering compensation which he had not taken.

5. The stand of the respondent before the Tribunal was that his case was covered under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the Act'), as he incurred disability during the service, as such, as per the aforesaid Act even if an alternate employment was not available, the employee could be continued on a supernumerary post till an attainment of age of retirement. As this has not been done in his case, the same is in violation of Section 47 of the aforesaid Act which has an overriding effect on all the Schemes, law etc. on the subject.

6. The Tribunal relying on the judgment of the Supreme Court in **Kunal Singh Vs. Union of India 2003 SCC (L&S) 482**, vide order dated 18th May, 2010 had allowed the petition of the respondent by holding that the case of respondent was covered under the aforesaid Act and quashed the order of premature retirement and directed the petitioner to reinstate the respondent in service on a deemed basis

with all consequential benefits as is stated above.

7. Aggrieved with the same, the present writ petition has been filed by the petitioner/DTC.

8. Learned counsel for the petitioner has contended that the dispute raised before the Tribunal has already been decided in the earlier writ petition being W.P.(C) 3113/1992 filed by respondent and is covered vide order of this court dated 16th October, 1996, which was not challenged by the respondent and had become final. It is further contended that the Tribunal has decided the matter on the basis of applicability of Section 47 of the Act. It is contended that such a stand was never raised in the TA nor the same was argued, as such petitioner did not have any occasion to deal with the same, as such respondent is not entitled to any further relief.

9. On the other hand, learned counsel for the respondent has argued that the matter has been decided by the Tribunal on the basis of contentions raised before it. It is contended that whether Section 47 of the Act is applicable or not is a legal issue and even if the same was not stated in the T.A. filed before the Tribunal, there was no bar for raising the same at the time of arguments before the Tribunal. It is further contended that respondent never accepted the amount of compensation of Rs. 39,278.40 as was offered to him.

10. It is not the case of the petitioner that the “disability” of

respondent does not fall within the meaning of the Act nor any such stand is taken before this court.

It is also an admitted position that after the accident and after having suffered the disability, the respondent had rejoined the duty on 08.07.1991 in Ticketing Section where he had worked upto 25.01.1992. Even in August, 1992, the petitioner had offered the post of Class IV to respondent and thereafter he was put off duty as a result of which respondent had approached this court by filing C.W. No. 3113/1992 with the following prayer:-

“It is, therefore, prayed that an appropriate writ be issued to the respondents restraining them from terminating the services of the petitioner or forcing the petitioner to retire voluntarily. A writ of prohibition be also issued, restraining the respondents from not allowing to perform light duty as the petitioner is doing now. To issue appropriate writ or writs directing the respondents to allow the petitioner to change his cadre from Conductor to Ancillary worker and such order or orders be passed as the Hon’ble Court deem fit and proper.”

The aforesaid writ petition was disposed of on 16.10.1996 wherein the following order was passed:-

“16.10.96

Present : Mr. Pradeep Gupta for the petitioner.

Mr. Jayant Tripathi for the respondent.

CW.3113/92

The petitioner had come to the Court at the stage when it was proposed by the respondent to terminate his services since he was found unfit for

performing the duties of conductor. After filing of petition, on petitioner's application an interim order was passed on 10.9.1992 for maintaining status quo. By a further order passed on 21.2.1995, it was directed that the petitioner be got examined by a Medical Board of the respondent in order to know whether he is fit to perform his duties as a conductor. The petitioner appeared before the Medical Board on 23.5.1995 and as per the affidavit of Shri Taranjeet Singh, Secretary D.T.C. I.P. Estate, New Delhi the Medical Board has opined :-

“Examined Shri Manmohan, Conductor Badge No. 15805 on May, 1995. He is an old case of crush injury Left upper limb with non-united and mal-united fractures of shaft of humerus (L) and shaft of ulna and radius of left side with shortening of upper limb, left elbow joint movement restricted. Board opines that he is unfit for conductor's post permanently w.e.f. 23.5.95.”

As per the above opinion of the Medical Board the petitioner is unfit for conductor's post permanently w.e.f. 23.5.95.

In the facts and circumstances that the petitioner is unfit for conductor's post, in case there is any other equivalent or lower post on which the petitioner can be accommodated, the respondents will examine the petitioner's case and provide such employment to him protecting his salary, failing which the petitioner's case will be duly considered and examined under the Scheme, which has been formulated by the respondents for providing compensation to such of the employee, who are medical found unfit for performing their jobs and for whom no alternative jobs are available. The writ petition with these directions stands disposed of.”

11. When the petitioner did not comply with the aforesaid order, respondent had to file a contempt petition on 16.09.1997 being

Contempt Petition No. 314/1997 alleging therein that the petitioner had not complied with the order of this court dated 16.10.1996 and as such had committed contempt of court. The directions were sought from this court to direct the petitioner to strictly comply with order dated 16.10.1996 passed by this court in aforesaid writ petition.

12. In the said contempt petition, the petitioner had taken a stand that in compliance of order of this court dated 16.10.1996, compensation had been offered to the petitioner and a letter dated 27.06.1997 had been issued to him wherein the respondent was informed that he was at liberty to collect the cheque of compensation on account of premature retirement on medical grounds on any working day during office hours. It is the respondent who did not come to collect the cheque as such no contempt was committed by it. The said contempt petition was disposed of on 26.04.2004. The relevant portion of the said order is reproduced below:-

“.....A perusal of the Order of the Division Bench shows that in terms thereof the respondent in its wisdom has found the petitioner unfit for an equivalent or a lower post. If the petitioner is aggrieved by the decision, it would give rise to a fresh cause of action and it is open to the petitioner to impugn the said decision in accordance with law.

Needless to say, if the petitioner is satisfied with the consideration of his case under the scheme, it is open to him to go and collect the compensation.

The contempt petition stands disposed of with the aforesaid liberty and the contempt notices stand discharged.”

13. By the aforesaid order, liberty was granted to the respondent that if he was aggrieved by the decision of petitioner as was stated in the contempt proceedings, it would give rise to a fresh cause of action and it was open for him to challenge the said decision in accordance with law. In terms thereof respondent had availed the liberty granted and had filed WP(C) 5393/2005 on the basis of fresh cause of action which had accrued in not providing him equivalent or lower post. The said petition was ultimately transferred to the Tribunal wherein the impugned order dated 18th May, 2010 has been passed.

Further, vide order dated 16.10.1996 of this court, the directions were given to the petitioner to examine the case of the respondent for any other equivalent or lower post protecting his salary as he was unfit for conductor's post, failing which his case was to be considered under the relevant Scheme formulated by petitioner in this regard. The above order does not mean that respondent could not have agitated the outcome of said decision of petitioner any further as is contended. Thus, the contention of the petitioner that the issue involved was already decided in Civil Writ No.3113/1992 and the petitioner could not have been permitted to W.P.(C) No. 7696/2010

raise the same again has no force and is rejected.

It may also be noted that the letter dated 27.06.1997, by which his case has been rejected, holding that any other equivalent lower post could not be given to respondent, does not give any cogent or rational reasons. The said letter only mentions that on account of premature retirement, he is requested to collect the cheque of compensation. Further, when the directions were passed by this court for consideration of the case of the respondent on 16.10.1996, the Act had already come into force. Section 47 of the Act casts statutory obligation on the employer to protect employee acquiring disability during service. Petitioner ought to have considered the case of respondent under the aforesaid Act. No reasons are given as to why the case of the respondent was not considered under Section 47 of the Act which provides that:-

“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.”

As regards not taking specific plea about the applicability of Section 47 of the Act in the application before the Tribunal, it may be mentioned that the basic issue raised by the respondent before the Tribunal was not to prematurely retire him but to give him a job on account of disability suffered. The Tribunal in its wisdom has permitted the respondent to raise the contention in this regard under Section 47 of the Act which is dealt at length in the impugned order. The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner. Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its own the case of the respondent under Section 47 of the Act. The Tribunal relying upon the provisions of Section 47 of the Act as well as judgment of the Supreme Court in **Kunal Singh v. Union of India (supra)** has allowed the petition of the respondent and has granted relief to him as has been stated above.

14. In **Kunal Singh v. Union of India (supra)**, it has been held by the Apex court that a person acquiring disability during service is

15. The Act had come into force on 07.02.1996 but even prior to the said Act the Courts have been passing appropriate orders for rehabilitation of such employees who suffered disabilities during the course of employment. In Special Leave Petition (Civil) No. 1575 of 1991 entitled Shri Vedi Prakash Singh, Conductor Vs. DTC and Others, Supreme Court gave directions vide order dated 5th August, 1991 to the effect that he should be posted against an equivalent post and be also paid salary for the intervening period. Similarly, in the case of State of Haryana Vs. Narendra Kumar Chawla MANU/SC/0106/1995 : [1994] 1 SCR 657 the Apex Court held that in case of employees rendered physically handicapped due to disease, the court has the power to give directions regarding the absorption of such employee carrying a pay scale equal to that of his original post. Even essential requirement for appointment to that post can also be relaxed. It is further observed in that judgment that such an employee has right to protection of pay. Even when he is absorbed in a lower post, he is entitled to protection of the pay scale of his original post in view of Article 21 of the Constitution of India.

16. In view of above discussion, no illegality or irrationality is seen in the order of the Tribunal which calls for interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

17. The writ petition stands dismissed.

In the facts and circumstances of the case, the parties are left to bear their own costs.

VEENA BIRBAL, J.

ANIL KUMAR, J.

March 7, 2011
ssb/kks