

HON'BLE SRI JUSTICE R. KANTHA RAO

W.P.No.26843 of 2015

ORDER:

This writ petition is filed seeking to declare the action of the respondents in not paying salary from 21.08.2009 to 13.08.2010 to the petitioner and not fixing his pay in the post of Driver, as illegal and arbitrary.

The petitioner was appointed as Driver in the respondent-Corporation in 1997, on regular basis. While he was working as such, the 3rd respondent- Depot Manager *vide* letter dated 20.07.2009 directed him to appear before the Medical Officer for periodical examination in Class A1 Service. Accordingly, he appeared and underwent periodical examination and *vide* medical certificate dated 21.08.2009 he was declared unfit for the post of Driver in A1 category due to defective distant vision. Feeling aggrieved, he preferred an appeal before the Medical board. The Medical Board also declared him unfit for the post of Driver in A1 category due to defective distant vision. Thereafter, he preferred review petition. The petitioner was again examined by another Medical Officer, who also opined that the petitioner was unfit for the post

of Driver in A1 Category as per the Medical Standards of APSRTC due to defective distant vision, but, however, opined that he was fit for alternative employment *vide* proceedings dated 8.4.2010. On 16.05.2010, the petitioner submitted an application to the respondents seeking to provide him alternative employment. In pursuance thereof, *vide* proceedings dated 13.08.2010, the petitioner was appointed as Record Tracer by fixing his salary in the scale of Record Tracer instead of Driver.

The respondent-Corporation filed counter-affidavit

inter alia contending that after the petitioner was declared unfit to the post of Driver in A1 category, alternative employment of Conductor Grade-II was provided to him *vide* proceedings dated 20.5.2010, but, the petitioner did not report to duty in the said post and requested to provide him alternative employment of Record Tracer. The respondent-Corporation considered his case and has given him the posting as Record Tracer *vide* order dated 21.07.2010 and he reported to duty on 16.08.2010.

It is the version of the respondents that the delay was caused due to the conduct of the petitioner in not joining in the alternative post of Conductor, which was initially provided to him and

therefore, he is not entitled for the salary from the date on which he was provided with alternative post of Conductor till he was appointed as Record Tracer on 16.08.2010.

Sri K.Srinivas Rao, learned counsel appearing for the petitioner would submit that since the petitioner was not fit to discharge the duties as Conductor, he made a request to provide him alternative job of Record Tracer and his request was considered and therefore, the respondents are not justified in denying the salary during the aforesaid period. He further submits that the petitioner is entitled for the salary during the period commencing from the date on which he was declared unfit till he was appointed as Record Tracer i.e., from 21.8.2009 to 13.08.2010, but the respondents have not paid the full salary and have also not fixed his pay in the cadre of Driver.

On the other hand, learned Standing Counsel appearing for the respondents contends that since the petitioner did not join the duty in the alternative post of Conductor, he cannot take advantage of the situation and therefore, no direction can be given to the respondents to pay the salary for the aforesaid disputed period. Learned counsel further contends

that the proceedings providing him the alternative employment of Conductor were issued on 20.05.2010, and the present writ petition is filed in 2015, i.e., with a delay of five years, without any proper explanation and that therefore, the petitioner is not entitled to any relief as prayed for in the writ petition on account of delay and laches. It is also contended that the petitioner did not report to duty and was paid salary for the period by adjusting his leaves which were available in his credit and therefore, he is not entitled for the salary during the period from 21.8.2009 to 13.08.2010 i.e., from the date on which he was declared unfit till he joined duty in the alternative post of Record Tracer. In support of his contention, learned counsel placed reliance on the Full Bench Judgment of this Court in *P.V.Narayana and others v. A.P. State Road Transport Corporation*^[1].

Now, the question that arises for determination is as to whether the petitioner is entitled to seek a direction to the respondents to pay him salary for the interregnum period i.e., from 21.8.2009 to 13.08.2010 and to fix his pay scale in the cadre of Driver in A1 category.

I would like to address the issue of laches in

the first instance.

It is true that proceedings appointing the petitioner as Record Tracer were issued on 16.08.2010 and the present writ petition is filed in 2015 and there is a delay of nearly five years on the part of the petitioner in approaching the Court by invoking the jurisdiction under Article 226 of the Constitution of India.

In *P.V.Narayana and others v. A.P. State Road Transport Corporation* (referred to supra), the Full Bench of this Court dealt with similar issue and took the following view.

“An analysis of the case law discussed above would amply make it clear that issue of a writ of a mandamus or certiorari is largely a matter of sound discretion and will not be granted if there is negligence or omission on the part of the person to assert his right as, taken in conjunction with the lapse of time and other circumstances, it causes prejudice to the adverse party. Therefore, burden lies on the workman who has to establish that in spite of his best efforts and diligence he was prevented from approaching the authority within the period of limitation provided for or the Writ Court within a reasonable period of time. If the workman is not able to satisfactorily explain with cogent reasons for the delay he is not entitled to seek for condonation of the delay. “It is true that the punishment imposed cannot be sustained in law because of the illegality crept in it in not

conducting a prior enquiry. But, still the workman is under a statutory obligation to challenge the same within the time provided by the statutory rules or regulations or within a reasonable period of time before the Writ Court. If delay of 5 to 18 years is condoned, for no reason or fault on the part of the authority, the proceedings which had attained finality are to be set aside. Setting aside of such order at a belated stage and allowing of a stale claim, may, as rightly held by the Division Bench in Esa Ali's case (5 supra), inspire the workman to seek for consequential benefits of promotion as well, in which event, the rights of the third parties would adversely be affected for no fault of theirs. A workman who is tardy and not diligent for years in availing a statutory remedy or in approaching the Court of law, in our view, cannot be encouraged or permitted to contend that in view of the decision of the Supreme Court the punishment cannot be sustained in law, therefore, delay to any extent is to be condoned automatically, in exercise of the power conferred on the appellate or revisional authorities or by the writ courts in exercise of the discretionary powers under Article 226 of the Constitution of India. Courts can come to the aid of a person who is diligent and vigilant but unable to approach the authority or court of law for redressal of his grievance in spite of his best efforts and reasons beyond his control but not to a person who is tardy and negligent or slept over the matter in availing the statutory or legal remedies."

In the same decision, the Full Bench referred to some of the judgments of the Apex Court and

held as under:

“From the decisions of the Supreme Court, it is seen that no limitation is prescribed for filing a petition under Article 226 of the Constitution and there is no rule of universal application for condoning the delay. Though there is no period of limitation prescribed for filing a petition under Article 226, a person aggrieved should approach the Court without loss of time and if there is delay, then cogent explanation should be offered for the same. The line of decisions of the Supreme Court on the issue would be indicative that the Courts have evolved self-imposed restraints in enquiring into belated or stale claims.”

This is a case where the petitioner approached this Court seeking a direction to the respondents to fix his pay in the pay scale of Driver in which he has originally worked and to pay him the salaries for the interregnum period i.e., from the date on which he became unfit till he was provided with alternative employment of Record Tracer.

Section 47 of the Persons with Disabilities (Equal, Opportunities, Protection of Rights and Full Participation) Act, 1995 (For short ‘the Act’) lays down that whenever an employee becomes unfit to perform the job on account of sustaining any disability, the employer shall provide him suitable alternative employment. The provision further lays

down that if there is no alternative employment available at relevant time, supernumerary post has to be created by the employer and salary has to be paid to the employee. Here it is a case wherein the request of the employee for alternative appointment in the alternative post of Record Tracer was considered by the Corporation and he was given such post. Therefore, this Court has to necessarily draw an inference that the alternative employment of Conductor which was initially provided to the petitioner, was not suitable to him and therefore, accepting his request he was employed in the alternative post of Record Tracer in the later point of time. Thus, this Court is of the view that the petitioner cannot be denied the salary for the interregnum period.

It can be understood from the provisions of Section 47 of the Act, that even though the employee did not make any claim regarding the payment of wages for the interregnum period, the employer is bound to pay the salary for the said period.

As already stated, the employer is also under obligation to provide alternative employment. The jurisdiction of this Court is invoked by the petitioner under Article 226 of the Constitution of

India in relation to an issue where the employer did not fix his pay in the cadre of Driver and did not pay the salary for the interregnum period.

Indisputably, the law does not prescribe any limitation for filing a writ petition. The employee is still in service. Therefore, it cannot be said that the writ petition filed by the petitioner is not maintainable on account of laches on his part in approaching this Court.

As regards the other issue, after the petitioner was medically declared unfit to perform the duty of Driver, he was given alternative employment of Conductor. Thereafter, he made a request to the respondents to provide him the job of Record Tracer as he was not able to perform the job of Conductor and his request was considered and accordingly, he was given the alternative employment of Record Tracer.

As regards the last issue, though the petitioner was appointed in the post of Record Tracer, as per the provisions of Section 47 of the Act, his pay has to be protected and the same has to be fixed in the pay scale of Driver in A1 category, and the respondents are not supposed to fix the pay of the petitioner in the pay scale of Record Tracer.

Consequently, the Writ Petition succeeds and the same is allowed. The respondents are directed to pay salary to the petitioner for the interregnum period from 21.8.2009 to 13.08.2010 i.e., when he was initially declared as medically unfit by the Medical Officer of the respondent-Corporation till he was appointed as Record Tracer and fix his pay in the pay scale of the Driver and pay him all the attendant benefits, within a period of eight weeks from the date of receipt of a copy of this order. There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

JUSTICE R. KANTHA RAO

3rd September, 2015
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[\[1\]](#) 2013(3)ALT 711 (F.B)