

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9236 OF 2015

Savita Vijay Choudhari,
Age: 30 Years, Occ: Nil,
R/o. Indronil Housing Society,
Plot No.23, Gut No.106, Khote Nagar,
Jalgaon, Dist. Jalgaon

PETITIONER

VERSUS

- 1] The State of Maharashtra
Through its Secretary
General Administration Department,
Mantralaya, Mumbai
- 2] The Divisional Controller,
Maharashtra State Road Transport
Corporation, Jalgaon Division,
Jalgaon
- 3] Managing Director,
M.S.R.T.C. Wahatuk Bhawan,
Dr. Anand Nayar Marg.,
Mumbai

RESPONDENTS

...

Mr. Anandsing Bayas, Advocate for the Petitioner
Mr. U.H.Bhogle, AGP for the Respondent / State
Mr. M.K.Goyanka, Advocate for the Respondent Nos.2 & 3

...

**CORAM: S.S.SHINDE &
P.R.BORA, JJ.**

Reserved on : 12.01.2016
Pronounced on: 05.02.2016

JUDGMENT: [Per S.S.Shinde, J.]:

- 1] Heard.

2] Rule. Rule made returnable forthwith with the consent of the parties.

3] By way of filing this Writ Petition under Article 226 of the Constitution of India, the petitioner seeks direction to respondent No.2 to forthwith consider the claim of the petitioner for appointment on compassionate ground to the suitable post according to her qualification. In the alternative, the petitioner further seeks direction to the respondents to forthwith decide the application dated 28th August, 2014, submitted by the petitioner for appointment on compassionate ground within stipulated period. The petitioner further seeks declaration that, the petitioner is entitled to get all monetary, financial and other admissible benefits to her, from the date of the accident of the husband of the petitioner, in view of Section 47 of the Persons with Disability Act, 1995.

4] It is the case of the petitioner that, the petitioner is wife of one Shri Vijay Triyambak Choudhari, who was employed and working with the Maharashtra State Road Transport Corporation [in short 'MSRTC'] on the post of Driver. The petitioner, out of wedlock with Vijay Choudhari, has given birth to two daughters namely Mitali

and Dhanshri, who are of 11 and 8 years of age. It is further the case of the petitioner that, her husband Vijay Choudhari was appointed on the post of Driver in MSRTC at Jalgaon Depot, initially on probation basis, by an order dated 21st April, 2006, and thereafter, his services were converted into regular establishment by order dated 29th January, 2007. The petitioner has placed on record copy of appointment order of Shri Vijay Choudhari, dated 21st April, 2006. Said Vijay Choudhari has rendered uninterrupted continuous service till the unfortunate incident of accident on 5th February, 2011. His service record is unblemished, without there being any accident while driving the bus. The husband of the petitioner namely Vijay Choudhari has received spinal cord injury, while he was shifted to the Government Medical Hospital at Jalgaon, thereafter to private Hospital at Jalgaon in Critical Care Centre. The husband of the petitioner was admitted in ICU for about one month.

5] It is further the case of the petitioner that, as the husband of the petitioner has received spinal cord injury, and thereafter, even after surgery, he could not recover and his lower part of body became paralytic, and

there was no chance for further recovery, the Doctors asked her to take him at home. Accordingly, the husband of the petitioner was discharged from the Hospital with 100% disability. The petitioner has annexed the copy of certificate showing 100% disability along with memo of Petition. It is further the case of the petitioner that, from the date of the accident, the respondent MSRTC has not given any support to the petitioner and her husband. The family of the petitioner was required to meet with the huge expenses of Hospital and Medicine. The petitioner was required to obtain hand loans from private sector. Even the valuable Articles including gold and other household articles were sold so as to meet the expenses of the treatment of her husband.

6] It is further the case of the petitioner that, since the husband of petitioner received permanent disability and was declared 100% disabled, he has been considered as unfit to hold the post of Driver.

7] The petitioner having requisite qualification applied for appointment on compassionate ground, vide letter / application dated 23rd May, 2012. However, her request has been turned down by the respondent on the

ground that, such request cannot be considered as the same could be considered only in case of relatives of the dead employees. Thereafter also, she submitted application on 2nd March, 2013, to the Managing Director of MSRTC, Mumbai, requesting to consider her claim for appointment on compassionate ground. The husband of the petitioner died on 18th July, 2013. He was remained under treatment for more than 2 years and for his treatment the petitioner has to spend all earnings, ornaments and household articles. There are two daughters dependent upon the petitioner. In the aforesaid changed circumstance, after death of the husband of the petitioner, the petitioner filed application on 28th August, 2014, for appointment on compassionate ground. It is the case of the petitioner that, the said application is not yet decided and the same is still pending with the respondent. According to the petitioner, husband of the petitioner was the permanent employee and lost his life due to the accident occurred while on duty, and therefore, his services ought not to have been terminated on account of disability received to him due to the accident while on duty, in view of 'Persons With Disabilities [Equal Opportunities, Protection of Rights and Full Participation] Act, 1995, [in short 'Act of 1995'] and the Rules of 1996

framed thereunder, more particularly Section 47 of the Act. Hence this Petition.

8] The learned counsel appearing for the petitioner during the course of arguments invited our attention to the grounds taken in the Petition, the provisions of Section 47 of the Act of 1995, and all other relevant provisions enabling the petitioner to file application for appointment on compassionate ground in view of death of husband of the petitioner during the course of employment of the respondents.

9] The respondent Nos.2 and 3 have filed affidavit-in-reply. It is admitted in the said affidavit-in-reply that, on 14th June, 2011, Mr. Vijay Chaudhari was referred to District Civil Surgeon for medical check up. The Civil Hospital, Jalgaon, issued the Medical Certificate No.112, dated 30th November, 2011, by which it is declared that, the deceased Vijay Chaudhary was 100% disabled and as well as the District Civil Surgeon, Jalgaon, also issued the Medical Certificate No.20324, bearing Outward No.930, dated 7th June, 2012 and in the said Certificate, he has specifically stated that, “.... is completely and permanently incapacitated for further services in Department of which

he / she belongs in consequences of traumatic paraplegia due to accident” and declared permanently unfit for the services. And as such due to the 100% unfit for the services the name of deceased employee Vijay Chaudhary was removed from daily attendance register and his services were stopped from 07.06.2012 through order dated 03.07.2012 passed by the Respondent No.2. The respondent No.2 has placed on record Medical Certificate dated 07.06.2012, and also order dated 3rd July, 2012, passed by the respondent No.2.

10] It is admitted in the said affidavit in reply that, the petitioner did file application for appointment on compassionate ground, however, the said application dated 24.05.2012 was rejected on the ground that, the legal heir of the employee of the MSRTC, who died during the services is only entitled to get the service on the basis of the compassionate ground in MSRTC. It is stated that, by order dated 3rd July, 2012 i.e. prior to 1 year and 15 days of his death and at the time of death, said Vijay Chaudhari was not in the services of the respondents and as such in view of the above in view of Circular No.17/2006, bearing No. राप/आस्था/486-ई/3537, dated 28th July, 2006, the petitioner

is not entitled for the appointment on compassionate ground.

11] We have heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondents. With their able assistance, perused the pleadings in the Petition, annexure thereto, affidavit-in-reply filed by the respondents with annexure, and the provisions of Section 47 of the Persons With Disabilities Equal Opportunities Protection of Rights and Full Participation] Act, 1995, and the Judgment cited by the learned counsel appearing for the petitioner across the bar. It is not in dispute that, on 14th June, 2011, the husband of the petitioner namely Mr. Vijay Chaudhari was referred to the District Civil Surgeon for medical check up and the said Hospital has issued Medical Certificate, by which it is declared that, the deceased Vijay Chaudhari was 100% disabled. It is also not in dispute that, the petitioner filed application for appointment on compassionate ground prior to the death of Vijay Chaudhari, however, those were turned down, relying upon the Circular No.17/2006. It is not stated by the respondents in the affidavit-in-reply about status of the petitioner's application dated 28th August, 2014, requesting for appointment on compassionate

ground is decided or not. The provisions of Section 47 of the Persons with Disabilities [Equal Opportunities, Protection of Rights and Full Participation] Act, 1995, reads thus:

47. Non-discrimination in Government employments.-

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 the 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.

[Underlines supplied]

12] Upon careful perusal of the provisions of Section 47 of the Act of 1995 referred herein above, it is abundantly clear that, no establishment shall dispense with, or reduce in rank an employee, who acquires disability during his service, and if such 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 the service benefit, and in case it is not possible to adjust the employee against any post, he may be kept on supernumerary post until suitable post is available or he attains the age of superannuation, whichever is earlier.

13] Keeping in view the afore-mentioned provisions of the said Act, we have serious doubt about the legality of the order of termination of services of the husband of the petitioner on 3rd July, 2012. The Hon'ble Supreme Court had occasion to consider the provisions of Section 47 in the case of *Kunal Singh Vs. Union of India and another*¹. On interpretation of the said provisions, the Supreme Court in para 9 to 12 held thus:

9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment.

1 AIR 2003 SC 1623

Section 47, which falls in Chapter VIII, 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 under Section 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 will 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. In 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 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 participation 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, mandatorily made available to the appellant under Section 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.

The Division Bench of the Bombay High Court, Bench at Aurangabad in the case of *Shivaji Vishwanath Dongre Vs. State of Maharashtra & others*² in the facts of that case, has taken a view that, termination order issued by the respondents is in breach of mandate of Section 47 of the Disability Act and the same is liable to be quashed and set aside. In that case also, the petitioner during the course of service developed an ailment and after medical examination, Civil Surgeon issued certificate certifying that the petitioner was suffering from mental sickness of 'Sickness of Resistant Major Depression' and was unable to

² 2006 [1] Mh.L.J. 417

work as a driver, but he was fit for discharging any other light work.

14] If the aforesaid exposition of the Supreme Court on interpretation of Section 47 of the Disabilities Act, 1995, is kept in view, as already observed, we have serious doubt about the sustainability of the order of termination of the services of husband of the petitioner at the relevant time, issued by the respondents. The respondents, in their affidavit-in-reply, have not stated anything about the application filed by the petitioner dated 28th August, 2014, requesting therein for appointment on compassionate ground.

15] Keeping in view the discussion in the foregoing paragraphs, and the pleadings in the Petition, prayers therein and the reply filed by the respondents, we are of the opinion that, the ends of justice would be met in case the respondents are directed to decide forthwith the application dated 28th August, 2014, submitted by the petitioner for appointment on compassionate ground within stipulated period from today, and also claim of other monetary benefits for which petitioner as a wife of

deceased Vijay is entitled for. In the light of the discussion herein above the following order:

ORDER

i] The respondents are directed to take decision on the application filed by the petitioner requesting for appointment on compassionate ground, dated 28th August, 2014, as expeditiously as possible, however, within 8 weeks from today.

ii] The respondents shall take decision about entitlement of the petitioner for monetary benefits from the respondents as wife of deceased Vijay, as per the entitlement keeping in view the relevant Rules / policy of the respondent No.3. In case the petitioner is found entitled for receiving monetary benefits, the same shall be disbursed within 3 months from today.

16] Petition is partly allowed. Rule made absolute on above terms. Parties to act upon authenticated copy of this Judgment.

Sd/-
[P.R.BORA]
JUDGE

Sd/-
[S.S.SHINDE]
JUDGE