

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

WRIT PETITION NO. 10307 OF 2015

The Shipping Corporation of India

... Petitioner

V/s.

Shri. Haripada Shaileshwar Chaterjee

... Respondent

Dr. Abhinav Chandrachud with Kunal Chheda i/b M.V. Kini & Co. for
the Petitioner.

Mr. Prosper D'Souza for the Respondent.

CORAM : K. K. TATED, J.

DATED : 18/08/2016

PC.:

. Heard learned Counsel for the parties.

2 By consent of both the parties, matter is taken on board for final hearing at the time of admission itself.

3 Though the name of Respondent is shown in cause title of Writ Petition as “Shrihari Pada Shaileshwar Chaterjee”, his correct name as per documents on record is “Haripada Shaileshwar Chaterjee”.

3 By this petition under Article 227 of Constitution of India, the Petitioner is challenging the order dated 17.10.2012 passed by the Commissioner for Persons with Disabilities, Maharashtra State, Pune holding that termination order passed by the Petitioner dated 04.12.2010 of Respondent's services as null and void and directing the petitioner to reinstate the Respondent in service within 90 days and pay him his all benefits.

4 A few facts of the present matter are as under:

a) The Respondent was appointed by the Petitioner as Petty Officer on 15.02.1984. He was on paid leave from 24.09.2008 to 26.11.2008. His medical fitness certificate was valid till 23.06.2009. During the leave, the Respondent met with an accident and broke his left leg and was operated. He reported for duty and medical officer declared him permanent unfit on 03.12.2010 due to fracture neck of (L) femur (operated). Thereafter, by letter dated 04.12.2010 his services were terminated. In view of certificate issued by Medical Officer, the Respondent as per Clause 26 of Agreement dated 15.02.2008 was eligible to severance compensation. Hence, the Petitioner calculated his compensation to the extent of Rs.9,36,192/- and the same was paid to the Respondent.

b) Thereafter, the Respondent filed complaint/application under The Persons with Disabilities(Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter will be referred as 'the said Act') for setting aside termination order dated 04.12.2010 and directing the Petitioner to reinstate him with full back wages and benefits. That application was decided by learned Commissioner by order dated 17.10.2012, setting aside the termination order issued by the Petitioner and directed the Petitioner to reinstate Respondent in service with full back wages. Hence, the present Petition.

5 The learned Counsel for the Petitioner submits that the learned Commissioner erred in coming to the conclusion that Respondent made out case for setting aside the termination letter dated 04.12.2010 and

for direction to reinstate him in service. He submits that due to accident, the Medical Officer certified to the Respondent permanently unfit for service. He submits that as per agreement dated 15.02.2008 particularly clause 26, the Petitioner paid sum of Rs.9,36,192/- as severance compensation to the Respondent. He submits that learned Commissioner exceeded his jurisdiction at the time of passing the impugned order dated 17.10.2012.

6 The learned Counsel for the Petitioner submits that Respondent filed complaint under Sections 62 & 63 of the said Act before the Commissioner for following reliefs.

“1 The complaint may kindly be allowed.

2 The order of termination dated 04.12.2010 issued by the respondent company may kindly be declared as null and void and pleased be set aside and quashed.

3 The respondent company may kindly be directed to reinstate the complainant on his earlier post on same pay scale and service benefits as per section 47 of the PWD Act 1995.

4 The respondent company may kindly be directed not to call for further medical examination and only to rely on the opinion of Kolkata Government Medical College and Hospital.

5 Any other just and equitable orders in the interest of justice may kindly be passed.”

7 The learned Counsel for the Petitioner submits that as per Section 62 of the said Act, the Commissioner has to look after the complaint with respect to the matters relating to deprivation of rights of the persons with disabilities. If the Commissioner satisfied, then only he can take up the matter with appropriate Authorities. He

submits that the Commissioner has no power to direct particular person to do particular act in particular way. He has to take up the matter with Competent Authority only. In support of this contention, the learned Counsel for the Petitioner relies on the Judgment of the Apex Court in the matter of ***State Bank of Patiala & Ors. V/s. Vinesh Kumar Bhasin, reported in (2010)4 Supreme Court Cases 368***. In this authority, the Apex Court held that the Commissioner has no power or jurisdiction to issue direction to the employer not to retire an employee. He relies on paragraph 18, which read thus:

“18. It is evident from the said provisions, that neither the Chief Commissioner nor any Commissioner functioning under the Disabilities Act has power to issue any mandatory or prohibitory injunction or other interim directions. The fact that the Disabilities Act clothes them with certain powers of a civil court for discharge of their functions (which include power to look into complaints), does not enable them to assume the other powers of a civil court which are not vested in them by the provisions of the Disabilities Act. In All India Indian Overseas Bank SC and ST Employees' Welfare Association v. Union of India this Court, dealing with Article [338\(8\)](#) of the Constitution of India (similar to Section [63](#) of the Disabilities Act), observed as follows:

It can be seen from a plain reading of Clause (8) that the Commission has the power of the civil court for the purpose of conducting an investigation contemplated in Sub-clause (a) and an inquiry into a complaint referred to in Sub-clause (b) of Clause (5) of Article [338](#) of the Constitution.... All the procedural powers of a civil court are given to the Commission for the purpose of

investigating and inquiring into these matters and that too for that limited purpose only. The powers of a civil court of granting injunctions, temporary or permanent, do not inhere in the Commission nor can such a power be inferred or derived from a reading of Clause (8) of Article 338 of the Constitution.

8 The learned Counsel for the petitioner also relies on judgment of the Apex Court in the matter of ***Bhabani Prasad Jena V/s. Convenor Secretary, Orissa State Commission for Women and Anr, reported in (2010) 8 Supreme Court Cases 633***. In this authority also the Apex Court held that the Commissioner is not Tribunal discharging the functions of judicial character or a Court. He relies on paragraph 13, which reads thus:

“13 It is clear to us that the Legislature has not gone so far as to give jurisdiction to the State Commission to make an order such as the one that has been made. From whatever angle we may examine the validity of the directions given by the State Commission in its order dated May 11, 2009, it appears to us that the said order was outside the jurisdiction, power or competence of the State Commission. It was an order which the State Commission had no competence to make and, therefore, a void order. The High Court instead of correcting that order went a step further and directed that DNA of the child as well as the appellant shall be conducted.”

9 The learned Counsel for the petitioner relies on the Judgment of Delhi High Court in the matter of ***Baljeet Singh v/s. Delhi Transport Corporation reported in 2000 (1) L.L.N. 564***. He submits that in this matter, Delhi High Court held that there is no power with the Chief Commissioner or the Commissioner to hold order of termination of an employee or reduction in rank to be invalid and to enforce such an

order or to pass order of a prohibitive nature or to compel an establishment to take back the employee whose services have been terminated illegally and in contravention of the mandatory provision. He relies on paragraph 22, which reads thus:

“22. Thus, there is no power with the Chief Commissioner or the Commissioner to hold order of termination of service or dispensing the service of an employee or reduction in rank to the invalid and to enforce such an order or to pass order of a prohibitive nature or to compel an establishment to take back the employee whose services have been terminated illegally and in contravention of the mandatory provisions of Section 47 of the Act of 1995. Even if it is presumed that there is such a power with the Chief Commissioner under section 59 of the Act, existence of alternate remedy is not an absolute bar for exercising jurisdiction under Article 226 of the Constitution of India. This is only a self-imposed restriction and in a given case the Court can direct the party to avail alternate remedy rather than approach the High Court under Article 226 of the Constitution of India. The existence of alternate remedy is not always a sufficient reason for refusing a party quick relief by filing a writ or order. In the present case it is still doubtful as to whether Chief Commissioner had any such power to hold voluntary retirement order passed by the respondent as illegal and direct the DTC to take these petitioners back in service. Moreover, as noticed above, there is a breach of the mandatory provision of Section 47 of the Act. For these reasons, I am not inclined to accept this statement of the respondent about the non maintainability of these writ petitions on the ground of alleged alternate remedy alternative remedy.”

10 On the basis of these submissions and the authorities, the learned Counsel for the Petitioner submits that the impugned order passed by the Commissioner is beyond his jurisdiction. He submits that bare reading of Section 62 of the said Act, show that after holding inquiry,

the Commissioner has to take up the matter with the appropriate authorities. Instead of doing so, the learned Commissioner by impugned order dated 17.10.2012 set aside termination order passed by the Petitioner and also directed the Petitioner to reinstate the Respondent with full back wages and other benefits. He submits that the said order is contrary to the provision of the said Act.

11 On the basis of these submissions, the learned Counsel for the petitioner submits that this Hon'ble Court be pleased to set aside the impugned order dated 17.10.2012 and dismissed the complaint filed by the Respondent under Section 62 & 63 of the said Act. He submits that if the said order is not set aside, irreparable loss will be caused to the Petitioner.

12 On the other hand, the learned Counsel for the Respondent original complainant vehemently opposed the present Writ Petition. He submits that under Sections 62 & 63 r/w Section 47 of the Said Act, the Commissioner has power to set aside termination order dated 04.12.2010 issued by the Petitioner and also has power to direct the petitioner to reinstate the Respondent in his own position. He submits that in view of pendency of the present Petition, it was not possible for Respondent to join the service of the Petitioner. He submits that his superannuation date was 05.02.2016. He submits that the Petitioner without considering Section 47 of the said Act passed termination order without following due process of law. He submits that Section 47 of the said Act is very clear where it is specifically stated that no establishment shall dispense with or refuse in rank of employee who

acquired disability during his service. He submits that in the present proceeding, the respondent met with an accident when he was on duty.

13 The learned Counsel for the Respondent submits that the Authorities relied by the Petitioner are not applicable in the facts and circumstances of the present case. He submits that in the case in hand, the petitioner ought to have appointed the Respondent in their establishment in any other department as per provisions of Section 47 of the said Act. Considering this fact, the learned Commissioner rightly passed an impugned order. He submits that the said order is not complied by the Petitioner till today.

14 On the basis of these submissions, the learned Counsel for the Respondent submits that there is no substance in the present Writ Petition and same is required to be rejected with cost.

15 I heard both the sides at length. The issue involved in the present proceeding is whether the Commissioner under provision of the said Act can set aside the termination letter dated 04.12.2010 issued by the Petitioner and can direct the petitioner to reinstate the Respondent in service with full back wages. Bare reading of Section 62 of the said Act shows that Commissioner has power to investigate and take up the matter with the appropriate Authorities. The said Act do not permit the Commissioner to pass an order in the form of mandatory direction.

16 In the present proceeding, after following due process of law, the petitioner terminated the Respondent's service by letter dated

04.12.2010 and paid him entire compensation to the tune of Rs.9,36,192/- as per clause 26 of the agreement dated 15.02.2008. Even the Apex Court in the matter of State Bank of Patiala & Ors (supra), in the matter of Bhabani Prasad Jena (supra) and Delhi High Court in the matter of Baljeet Singh (supra) categorically held that the Commissioner has no right to pass a mandatory orders.

17 It is to be noted that the issue involved in the present proceeding is fully covered by the decision of the Division Bench of this Court in the matter of ***Vaishali Walmik Bagul V/s. Secretary, Prerna Trust, Aurangabad reported in 2013 (5) Mh. L. J. 221***. Paragraph 24, reads thus:

“24. Aforesaid provisions of the Disabilities Act refer to taking up the matter/complaint with the appropriate government by the Commissioner, Handicap Welfare. The provisions of the Disabilities Act as are quoted do not appear to confer power to issue directions on the Commissioner i.e. competent authority. His role is to take up the matter with appropriate authority. Thus, the direction issued under order dated 10-8-2009 exceeds the functions under the provisions of sections [61](#) and [62](#) of the Disabilities Act.”

18 In the present proceeding, the Commissioner set aside the termination letter issued by the Petitioner and also directed the petitioner to reinstate the Respondent which is contrary to the provision of the said Act. Hence, the same is required to be set aside. As the order passed by the learned Commissioner is beyond his jurisdiction and same is required to be set aside, it is necessary in the interest of justice, an opportunity is required to be granted to the Respondent to take appropriate steps according to law, if it is available

to protect his interest.

19 In view of the above mentioned facts, the following order is passed:

- a) Writ Petition is allowed.
- b) The impugned order passed by the Commissioner for Persons with disabilities, Maharashtra State, Pune in complaint under Sections 62 & 63 of the said Act dated 17.10.2012 is set aside.
- c) Liberty granted to the Respondent to take appropriate steps according to law, if it is available to protect his interest.
- d) No order as to costs.

(K.K.TATED, J.)