

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

WRIT PETITION No.22780 OF 2014

ORDER:

This writ petition is filed to declare the proceedings No.P3/255(1)/2012-RMN, dated 01.03.2012 for not counting the seniority put in the post of driver, in the post of Record Tracer including period of unfit i.e. from 07.11.2010 till the petitioner was allowed to work as on duty i.e. on 07.03.2012 as Record Tracer in the 4th respondent Depot as arbitrary, unjust, discriminatory violative of Articles 14 and 21 of the Constitution of India read with Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, 'the Act').

02. The petitioner was appointed as Driver on 22.11.1989 through a regular process of selection and regularized his services with effect from 01.10.1992. Since the date of appointment he worked continuously, but he was declared as unfit for the post of Driver on medical examination by the Medical Officer, APSRTC Hospital, Nalgonda, on 07.11.2010 as a periodical medical examination. The petitioner made a request to the respondents, to provide suitable alternative employment, but the same was dodged on one ground or the other. Such action of the respondents is in violation of Section 47 of the Act 1995. Again the petitioner was examined by the Medical Board, on appeal, on 31.05.2011 and declared him as unfit as a driver confirming the earlier declaration. Therefore, the petitioner is entitled to claim alternative suitable employment right from the date of declaring him as unfit i.e. from 07.11.2010 and entitled for same salary, as he was suffering. But the second respondent issued proceedings dated 01.03.2012 providing employment as Record Tracer from the date of reporting duty at the 4th respondent Depot and that his scale of pay would be arranged which is meant for the Record Tracer. Thus,

the action of the respondents is illegal, arbitrary and in violation of Section 47 of the Act. Hence, prayed to grant aforesaid relief.

03. The respondents filed counter admitting that the petitioner was declared as unfit as a driver on 07.11.2010 and making representations for re-examination by Medical Board, but during the first medical examination, and, on the appeal, examination by the Medical Board, he was found unfit due to defective vision of both eyes by letter bearing No.SP2/19(254)/II-TH dated 31.05.2011. Thereupon the petitioner was provided with employment as Shramik, to work in Nalgonda Depot, vide office order No.P3/255(1)/11-RMN dated 18.07.2011 based on the representation of the petitioner. The petitioner refused to work as Shramik and failed to report to duty as he is qualified to work as Record Tracer since he passed intermediate. Thereupon, on the representation of the petitioner, he was posted as Record Tracer and posted to work in Suryapet Depot vide office Order No.P3/255(1)/2012-RMN dated 01.03.2012 and accordingly the petitioner reported to duty as Record Tracer on 07.03.2012.

04. It is specifically contended that the petitioner was posted as a Record Tracer since he is not willing to work as a Shramik and therefore, the respondents are not liable for payment of wages during the period of medical unfit in terms of Section 47 of the Act. Even according to the service regulations, the seniority list for all categories of posts will be prepared and the same cannot be reopened. Therefore the petitioner is not entitled to claim seniority in the cadre of Driver having accepted the post of Record tracer. In terms of service regulations, pay protection was provided to the petitioner in the post of Record Tracer and thereby he was not put to financial loss on account of posting as Record Tracer. Thus, the petitioner was provided alternative employment, strictly in terms of Section 47 of the Act, duly providing pay protection by carry forward which were provided in the

post of driver and his name was continuing in the seniority list of driver till next promotion in the category of Record Tracer to Routine Clerk (RC). As such, the respondents did not deny the seniority. It is finally contended that the petitioner is not entitled to claim salary for the period from the date of declaration as unfit as Driver till he reported to duty as Record Tracer i.e. from 18.07.2011 to 07.03.2012 and prayed to dismiss the writ petition.

05. During hearing, Sri V.Narsimha Goud, learned counsel for the petitioner, contended that the petitioner is entitled to suitable employment not any employment, besides entitlement to claim pay protection and other benefits as Driver in terms of Section 47 of the Act. Even the petitioner made a representation to appoint him as Record Tracer in his first representation instead of providing suitable employment, the respondent provided employment as Shramik, but the petitioner did not report to duty as he is not in a position to work as Shramik due to his qualification and his previous employment and the disability pointed out in the medical certificate, and further it is not suitable post to the person who worked as Driver having passed intermediate. Therefore, providing alternative employment as Shramik is violation of second Proviso to Section 47 of the Act. He placed reliance on the Judgment of this Court in W.P. No.36337 of 2013 and Batch and also on the Judgment reported in **Sudarshan Rajpoot v. Uttar Pradesh State Road Transport Corporation**^[1], in support of his contention. In **Sudarshan Rajpoot** referred supra the Apex Court held as follows:

“A finding of fact has been recorded by the Workmen’s Compensation Commissioner while determining the claim under the Workmen’s Compensation Act, that the appellant sustained grievous injuries to his legs which is an employment injury suffered during the course of employment in the respondent Corporation. The respondent Corporation is statutorily obliged under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 to provide an alternate equivalent job

to the appellant workman in place of the post of driver. The respondent is also directed to reinstate the appellant workman with 50% back wages from the date of termination till the date of the award of the Labour Court and further award 100% back wages from the date of award of the Labour Court till the date of reinstatement with all consequential reliefs and other monetary benefits including the continuity of service in an alternative equal job with the same pay scale as that of a driver.”

06. Whereas, Sri A. Ravi Babu, learned Standing Counsel for the respondents, would contend that failure to report duty as Shramik was the fault of the petitioner and from the date of his appointment as Shramik till the date of reporting to duty as a Record Tracer, the petitioner is not entitled to claim any salary. He also further contended that the second respondent provided alternative employment as per the first proviso to Section 47 of the Act and thereby, seniority of the petitioner will be counted from the date of joining as per the service regulation.

07. Considering the rival contentions, perusing the material available on record, the point for consideration is,

Whether the petitioner is entitled to claim suitable employment in terms of second proviso to Section 47 of the Act, 1995 in case the second respondent failed to provide suitable employment, is the petitioner entitled to claim salary for the period from 18.07.2011 to 06.03.2012 and consequential benefits of seniority in the cadre of Driver?

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POINT:

08. Undisputedly, the petitioner joined in service as Driver and later his services were regularized, thereafter during medical examination, he was declared as unfit to discharge his duties as Driver, and the same was confirmed, on appeal, by the medical Board. Therefore, in terms of Section 47 of the Act, the petitioner is entitled to claim alternative suitable employment.

09. According to Section 47 of the Act, 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 and 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 till he attains the age of superannuation, whichever is earlier.

10. Therefore, it is an obligation of the employer to provide suitable alternative employment to the petitioner who was declared as unfit as Driver under Section 47 of the Act. But the contention of the counsel for the respondents is that, it is the obligation of the respondents to provide alternative employment, but not suitable employment. Therefore, posting the petitioner as Shramik to work in Nalgonda Depot is sufficient to discharge their obligation. But this contention is not susceptible in view of the judgment of this Court in W.P. No.36337 of 2013 (unreported). At paragraph 57 of the said judgment, a similar question came up for consideration and this Court held that a person who acquired disability while in employment and declared as unfit to work as driver and capable of doing any other job with equal competence cannot be denied right to work with dignity, honor and self respect. He cannot be denied at least protection of pay he was drawing though post offered to him is lower than he was holding.

In the matter of the rights and protection of the Workman, in

Bhagwan Dass v. Punjab SEB ^[2] held as follows:

“4... It may further be noted that the import of Section 47 of the Act was considered by this Court in Kunal Singh v. Union of India {(2003) 4 SCC 524} and in paragraph 9 of the decision it was observed and held as follows:

‘9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. 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 a 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 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 employee shall not dispense with or reduce in rank an employee who acquires a disability during the service.* In construing a provision of a 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.”

11. This court reviewed the entire law on the subject and concluded that the employer has to provide suitable alternative employment to work with dignity and self respect. The post of Shramik is lowest cadre in the RTC i.e. helper to mechanic in the Depot. When the petitioner was found unfit to work as Driver on account of defective vision, it is equally difficult for him to discharge his duties as Shramik due to the same vision problem. Therefore, posting the petitioner as Shramik is contrary to Section 47 of the Act, as such refuse to report duty as Shramik is justifiable since such appointment is against

fundamental right guaranteed under Article 21 of Constitution of India for the reason that right to life includes with dignity.

12. Thus, it is clear from the second proviso to sub-Section (1) of Section 47 of the Act that the employer is under obligation to provide suitable post and even if no suitable post is available, supernumerary post has to be created and continue him till suitable post is available or he attains the age of superannuation. In view of second proviso to sub-Section (1) of Section 47 of the Act, the petitioner is entitled suitable employment. Therefore, he requested the employer to provide employment as Record Tracer, which is equivalent to post of Driver, and he is qualified to the post of Record Tracer. Therefore, providing post of Shramik, which is lower post in the RTC, is not sufficient to discharge the obligation of the respondents-employer, strictly adhering to Section 47 of the Act. On close analysis of the said proviso, it is the obligation of the employer to provide suitable employment; if it is not available, a supernumerary post is created to place him in the said post till availability of the suitable post. But the respondents did not provide such suitable alternative employment as per second proviso to sub-Section (1) of Section 47 of the Act, but provided alternative employment of Shramik.

13. No doubt, the petitioner did not report to duty as Shramik on his appointment, since it is not equivalent or suitable post to the post of Driver and it is against the purport of second proviso to sub-Section (1) of Section 47 of the Act. Therefore, failure to report to duty as Shramik is not a ground to deny the salary for the period from 18.07.2011 to 06.03.2012 when the petitioner provided suitable alternative employment as Record Tracer. Therefore denial of the salary for the period from 18.07.2011 to 06.03.2012 is arbitrary and illegal.

14. In the order of appointment, it is specifically mentioned that his seniority will be maintained in the post of Record Tracer from the date of reporting for duty at the 4th respondent, but in the counter the

respondents admitted that his seniority is continuing in the post of Driver. Therefore, there is no controversy about seniority and pay protection also and other financial benefits for which the petitioner is entitled earlier in the post of Driver.

15. Considering the facts and circumstances of the case, I find that it is fit case that to direct the second respondent-employer to pay salary for the period from 18.07.2011 to 06.03.2012 with pay protection and extend all other benefits to the petitioner during the said period as 'on duty', since the delay was on account of the second respondent-employer, in providing suitable employment.

16. In the result, the writ petition is allowed declaring the action of the respondents as illegal and arbitrary, directing the respondents to pay salary for the period from 18.07.2011 to 06.03.2012 with all consequential benefits and pay protection to the petitioner within three months from today. No costs.

17. Miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 22.04.2016

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[\[1\]](#) (2015) 2 SCC 317

[\[2\]](#) (2008) 1 SCC 579