

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

**WRIT PETITION NO. 2112 OF 2006
WITH
CIVIL APPLICATION NO. 15594 OF 2010
AND
CIVIL APPLICATION NO. 14210 OF 2015**

Laxmikant Jalindar Mule
Age : 38 yrs, occ : service
R/o Wadgaon Siddeshwar,
Taluka & District Osmanabad.

Petitioner.

Versus

- 1 The State of Maharashtra
(Through the Principal Secretary,
Home Department (Transport),
Mantralaya, Mumbai).
- 2 The Commissioner,
Persons with Disabilities,
Maharashtra State, Pune.
- 3 The Maharashtra State Road
Transport Corporation
(Through its Divisional Controller,
Osmanabad).

Respondents.

Mr. Y.R. Barhate, Advocate for the petitioner.

Mr. B.A. Shinde, A.G.P for respondent Nos.1 and 2.

Mr. A.B. Dhongade, Advocate for respondent No.3.

CORAM : RAVINDRA V. GHUGE
AND
SUNIL K. KOTWAL, JJ.

Dated : 10-11-2017.

ORAL JUDGMENT (PER RAVINDRA V. GHUGE) :-

1. By this petition, the petitioner has challenged his dis-engagement from 28.05.2002 and prayed for his absorption in employment alongwith arrears of salary and pay fixation. Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 has been invoked. During the pendency of this Petition, the petitioner has been appointed as a fresh employee on the post of a Peon w.e.f. 08.12.2004. Consequentially, the petitioner is not pressing prayer Clause 24-A.

2. We have considered the strenuous submissions of the learned Advocates for the petitioner, respondent No.3 and the learned A.G.P. for respondent Nos.1 and 2.

3. Shri Dhongade, learned Advocate for the respondent Maharashtra State Road Transport Corporation has strenuously opposed this Petition. He has placed reliance upon the affidavit-in-reply dated 26.02.2007 and submits that this Petition be dismissed.

4. There is no dispute with regard to the petitioner having been appointed as a Driver on 17.04.2001 and he having suffered an

accident on 24.02.2002 out of and in the course of his employment with respondent No.3. He has lost one eye owing to the stone pelting incident that occurred while he was on duty. He has been paid Rs. 1,50,000/- as compensation in the course of his claim for compensation under the Motor Vehicles Act.

5. The issue before us is that after the petitioner was appointed as a fresh employee on 08.12.2004, his pay fixation has been done taking into account his date of appointment as being 08.12.2004. His earlier service from 17.04.2001 till 24.02.2002 has not been considered and consequentially the period from 25.02.2002 till 07.12.2004 has been ignored, due to which he has practically lost three years of employment in so far as his length of service is concerned.

6. Though the learned Counsel for respondent No.3 has opposed this Petition, the provisions of 1995 Act cannot be ignored. Section 47 of the Act reads as under :-

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.

7. The Hon'ble Apex Court in the matter of **Narendra Kumar Chandia Vs. State of Haryana and others, AIR 1995 Supreme Court 519**, while dealing with physical disablement has concluded that when a person loses his earning capacity in unfortunate circumstances of having suffered physical disablement or on account of an illness or an injury, the employer has to endeavour to rehabilitate such an employee and allot him such work which he can physically perform notwithstanding the physical disability that he has suffered. If it is a case of total permanent disablement, then the situation would be otherwise.

8. The Hon'ble Apex Court, in paragraph No.7 of the **Narendrakumar judgment** (supra), has observed as under :-

7. Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the posts he was

holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since he is a matriculate, he is eligible for the post of L.D.C. for L.D.C., apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For a Clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the respondent Board to relax his passing of typing test and to appoint him as an L.D.C. Admittedly on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs 1400-2300. Necessarily, therefore, his last drawn pay has to be protected. Since he has been rehabilitated in the post of L.D.C. we direct the respondent to appoint him to the post of L.D.C. protecting his scale of pay of Rs 1400-2300 and direct to pay all the arrears of salary.

9. The Hon'ble Supreme Court in the matter of **Kunal Singh Vs. Union of India, AIR 2002 Supreme Court 1623** has again dealt with a similar situation of a person acquiring disability while in service. The 1995 Act by then was brought into effect and Section 47 was therefore considered. The observations of the Hon'ble Apex Court in paragraph Nos. 7 to 12 read as under :-

7. *From the facts, which are not in dispute, it is clear that the disability suffered by the appellant is covered by Section 2(i)(v) read with Section 2(o) of the Act. It is also not in dispute that this disability was acquired by the appellant during his service. Under Section 2 "disability" and "person with disability" are separately defined and they are distinct. We may also notice some provisions in Chapter VI of the Act relating to employment. Section 32 deals with identification of posts which can be reserved for persons with disabilities.*

Section 33 speaks of reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability of which 1% each shall be reserved for persons suffering from: (i) blindness or low vision; (ii) hearing impairment; and (iii) locomotor disability or cerebral palsy. Section 38 requires the appropriate Governments and local authorities to formulate schemes for ensuring employment of persons with disabilities. Section 47 is included in Chapter VIII of the Act. Chapter VI deals with employment relating to persons with disabilities including identification of posts and reservation of vacancies for such persons. Under this Chapter, reservation of vacancies for persons with disabilities is made for initial appointments. Section 47 in Chapter VIII deals with an employee of an establishment who acquires a disability during his service.

8. *The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. To realize the objective that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view a meeting called the “Meet to Launch the Asian and Pacific Decades of Disabled Persons” was held in Beijing in the first week of December 1992 by the Asian and Pacific countries to ensure “full participation and equality of people with disabilities in the Asian and Pacific regions”. This meeting was held by the Economic and Social Commission for Asia and Pacific. A proclamation was adopted in the said meeting. India was a signatory to the said proclamation and agreed to give effect to the same. Pursuant thereto this Act was enacted, which came into force on 1st January, 1996. The Act provides some sort of succor to the disabled persons.*

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 very opening part of the 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 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. 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 the 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 benefit of persons with disabilities.”

12. Merely because under rule 38 of the 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 provisions of section 47 of the Act.

10. In the case in hand, as the petitioner lost his one eye on account of a stone pelting incident on the bus that he was driving on

24.02.2002, his loss of one eye can be termed as being an injury that has occurred out of and in the course of his employment. He has been granted compensation for the loss of his earning capacity. However, we do not find that his case could have fallen within the ambit of total permanent disablement. Naturally respondent No.3 found it appropriate to re-induct the petitioner in employment by posting him as a Peon from 08.12.2004. The act of re-inducting the petitioner in employment is expected under Section 47 of the 1995 Act. However, whether the petitioner could be deprived of his earlier service on account of no fault on his part will have to be scrutinized under Section 47 of the 1995 Act. Keeping in view the judicial pronouncements of the Hon'ble Apex Court and various High Courts on Section 47, continuity of service cannot be deprived to the petitioner. The termination itself is unsustainable. As such, we find that the petitioner should not be held to be a fresh appointee from 08.12.2004 and by granting him the continuity, his service will have to be computed w.e.f. 17.04.2001 for his pay fixation as well as for his future retiral benefits.

11. The issue of back wages has been dealt with mutually by the petitioner and respondent No.3-M.S.R.T.C. Learned Counsel for the petitioner submits that he has voluntarily given up his wages for the period from 28.05.2002 till 07.12.2004. In this backdrop, the

issue of payment of back wages would not survive. The petitioner, therefore, does not press the prayers put-forth in clause 24-A, B, C and D.

12. In the light of the above, this Petition is partly allowed. The petitioner shall be deemed to be in continuous service from 17.04.2001 and his pay fixation that may have occurred earlier and which is likely to take place in future shall be done by respondent No.3-M.S.R.T.C. by computing his service from 17.04.2001.

13. It is expected that such pay fixation shall be done within a period of 12 weeks from today. Pursuant thereto, if the petitioner is entitled for arrears of benefits owing to the fresh pay fixation, respondent No.3 would calculate the same and make the payment within the period of 8 weeks after pay fixation, failing which the said amount shall carry interest @ Rs. 6% from the date of this order.

14. Rule is made absolute in the above terms.

15. The pending Civil Application does not survive and stands disposed of.

(SUNIL K. KOTWAL)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE