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

WRIT PETITION NO.10661 OF 2017

Gorakshanath s/o Vithoba Nehe,
Age: 52 years, Occ: Nil,
R/o. Samnapur, Tq. Sangamner,
Dist. Ahmednagar.

..PETITIONER

VERSUS

1. The State of Maharashtra,
Through it's the Principle
Secretary Maharashtra State
Transport Department,
Mantralaya, Mumbai-32.
2. The State of Maharashtra,
Road and Transport Corporation
Maharashtra Wahatuk Bhavan,
Dr. Anandrao Nair Marg,
Mumbai-44008.
3. The General Manager (Avedan),
State Transport Regional Office,
Pune, Tq. & Dist. Pune.
4. The Divisional Controller,
State Transport Corporation,
Ahmednagar,
Tq. & Dist. Ahmednagar.
5. The Depot Manager,
State Transport Corporation,
Sangamner, Tq. Sangamner,
Dist. Ahmednagar.

..RESPONDENTS

Mr K.N. Shermale, Advocate for petitioner;
Smt G.L. Deshpande, A.G.P. for respondent Nos.1 &
2;
Mr B.S. Deshmukh, Advocate for respondent No. 4

(2)

**CORAM : PRASANNA B. VARALE
AND
MANGESH S. PATIL, JJ.**

DATE : 18th DECEMBER, 2018

ORAL ORDER :

Heard learned Counsel for the respective parties. With the consent of the parties, the petition is taken up for final disposal at admission stage.

2. Mr. Shermale, learned Counsel appearing for the petitioner vehemently submitted that the order impugned in the petition dated 4th April, 2017 passed by the respondents-authorities and more particularly respondent Nos. 3,4 and 5 is unsustainable on more than one grounds and needs to be quashed and set aside. He then submitted that though the petitioner has raised a challenge to the Circular dated 29th July, 2016, he is not insisting on that challenge but it is the submission of learned Counsel that in view of peculiar facts

(3)

which are brought on record and not disputed by the respondents, the order dated 7th April, 2017 is unsustainable.

3. Learned Counsel for the petitioner then submitted that the petitioner was appointed in the service of Maharashtra State Road Transport Corporation (hereinafter referred to as 'Corporation', for the sake of brevity) in the year 1989 as a driver. The copy of the order is also placed on record at Exhibit-A. Learned Counsel further submitted that though initially the petitioner was appointed as a temporary employee, subsequently he was granted status of permanent employee of the Corporation and copies of orders to that effect are also placed on record. He then submitted that till 2016 the petitioner served with the Corporation for more than 15 years and his service record is clean and unblemished. He further submitted that in the long span of more than 15 years, at no point of time, the petitioner faced with any adverse order and in the year 2016, as a

(4)

routine course, he was subjected to medical examination including vision test. The petitioner initially was referred to a private hospital. A document i.e. certificate issued by the private hospital, namely, Rajuskar Hospital, Sangamner is placed on record. The certificate is dated 8th August, 2016 and opinion of Ophthalmologist is, evaluate for suspected DM changes in retina.

4. Learned Counsel for the petitioner then submitted that on 17th October, 2016, again the petitioner was referred to the Government Hospital, namely, J.J. Hospital, Mumbai for his further medical examination along with reference to a certificate issued by the private hospital. This communication is dated 17th October, 2016. The Ophthalmologist attached to J.J. Hospital, after conducting the vision test of the petitioner recorded the vision report and summary : Diagnosis of type of colour deficiency : Mild Deuteranomalous trichromatism (with small range) and normal HRR test. Only one error on lantern test (green called yellow).

(5)

5. On receiving this information, the Divisional Controller, Ahmednagar i.e. respondent No.4 passed the order, copy of which is placed on record at Exhibit-F. The order reads that, the petitioner has been declared unfit for the post of Driver in M.S.R.T.C. by the Board of Referees, J.J. Hospital, Mumbai due to 'green blind'. It further reads that, the petitioner has become incapable for performing the duties of driver and then ultimate action is of terminating his services w.e.f. 07.12.2016.

6. Notice was issued by this Court on 6th September, 2017. In response to the notice, affidavit in reply is filed on behalf of respondent No.4 through Popat s/o Nathu Ghadge, working as Divisional Personal Officer, M.S.R.T.C. Ahmednagar Division, Ahmednagar. A heavy reliance is placed on the Circular issued by the Corporation dated 29th July, 2016.

(6)

7. It may not be out of place to mention that during pendency of the petition, a communication was brought to our notice. On the backdrop of the said communication, in the order dated 31st October, 2018, we observed thus :

“ Perusal of the communication shows that the grievance of the petitioner is submitted to the Managing Director for his consideration. Learned Counsel submits that the Managing Director may consider the grievance positively but as the Managing Director is out of station, he prays some time. At the request of learned Counsel, stand over to 22nd November, 2018.”

8. Learned Counsel for the petitioner, subsequently on instructions, submitted before us that the respondent-Corporation is unable to consider the case of the petitioner in view of the Circular dated 29th July, 2016. He then submitted that on one hand, the Act, namely, Rights of persons with Disabilities Act, 2016 came in force. With the aim and object that the persons facing

(7)

physical disabilities must have an opportunity to earn their livelihood by joining main stream and object is not to give discriminatory treatment to such persons facing disabilities but identifying their rights and opportunities to be provided to such persons and on the other hand, the insistence for mechanical application of the circular frustrates the object of the Act.

9. Learned Counsel for the petitioner further submitted that the recourse to the Circular dated 29th July, 2016 is taken in affidavit in reply, whereas in the order impugned, there is nothing to show that the same order was passed on the basis of the circular. He then submitted that it was policy of the Corporation and same is reflected in the Circular dated 29th July, 2016 to provide an alternate job in the Corporation to the persons who have found visually impaired. Then by referring to clause-2 of the circular, learned Counsel for the petitioner submitted that the Corporation granted one opportunity to such persons who have been found

(8)

unfit on the ground of their visually impaired certificate who have been given an alternate job, to undergo medical examination at the Government hospital namely J.J. Hospital, Mumbai.

10. Learned Counsel for the petitioner then submitted that the Corporation in the very circular states that the action be initiated against those persons who have misled the Corporation by submitting the false and bogus medical certificates and in the very circular, the Corporation states that in cases of such employees who have been found suffering from colour blindness in the medical examination, the provision of alternate job of Cleaner is made for them. He then submitted that in case of the petitioner, the Corporation is insisting for clause-4 of the circular mechanically, that too, by way of ground raised in the affidavit in reply. He then submitted that it is consistent view of the Hon'ble the Apex Court as well as of this Court that the authority cannot substitute or supply the ground in the affidavit in

(9)

reply to support the action but such a ground must be available in the order itself. Thus, it was submission of learned Counsel for the petitioner that substitution of ground in the affidavit in reply cannot be taken recourse by the respondents – authorities either to dislodge the petitioner or to take an extreme action of termination of his services.

11. Per contra, learned Counsel for the Corporation relies on the circular in support of the impugned order.

12. On going through the material, we find considerable merit in the submission of learned Counsel for the petitioner. Learned Counsel for the petitioner was justified in submitting before us that in the long span of career of the petitioner for more than 15 years, there is nothing adverse against the petitioner and his service record was unblemished. Learned Counsel was also justified in submitting that after 15 years of service, the

(10)

petitioner was subjected to a medical examination as a routine course and certificate issued by J.J. Hospital refers to vision impairment in the nature of colour blindness and even if this aspect is considered on the back drop of Circular dated 29th July, 2016, the consistent approach of the Corporation was to provide alternate job to the employees of the Corporation who have suffered the vision disability while in service.

13. It may not be out of place to mention that the Circular dated 29th July, 2016 also refers to the vision impairment being suffered due to advanced age and it is specified in clause-2(c) of the Circular. Learned Counsel for the petitioner was also justified in submitting that many employees submitted the certificates showing that they are facing colour blindness and opted for alternate job, taking benefits of earlier circular and then Corporation was misled, as such, Circular dated 29th July, 2016 refers to initiation of the action against such employees. There is also merit

(11)

in the submission of learned Counsel for the petitioner that it is not the case of the Corporation that the petitioner has played some mischief and submitted false certificates showing that he is suffering some visual impairment but it was routine course of check up and in the medical examination, Ophthalmologist found that the petitioner was suffering colour blindness.

14. Though learned Counsel appearing for the respondent-Corporation insisted on clause-4 of the Circular, which reads that, hereinafter no alternate job be given to the employees who have been medically found unfit and their services be terminated on the ground of visually handicapped. If the Corporation granted alternate job in the nature of Cleaner to those drivers who have suffered visual impairment in the service period, there is no reason for not considering the petitioner for applying the same yardstick. Learned Counsel for the petitioner was justified in making submission that mechanical insistence on clause-4

(12)

is causing serious prejudice to the petitioner as without giving any opportunity to him, an ultimate order is passed terminating his services.

15. The other remarkable view which we find is, certificate issued by the J.J. Hospital, Mumbai through Ophthalmologist refers a summary report in the words, only one error on lantern test (green called yellow) and on this certificate, the Corporation authorities themselves arrived at a conclusion that the petitioner is unfit for post of driver. Now, such declaration that the petitioner is unfit for rendering his services as a driver in the Corporation is not issued by the medical authority or any medical expert but it is a conclusion drawn by the Corporation and then on this conclusion drawn by the Corporation itself, the Corporation passed the order terminating the services of the petitioner.

16. Another aspect of the matter is, in clause-2 of the Circular dated 29th July, 2016,

(13)

four categories of the vision disability are saved and it is stated that in case of such four categories, such employees be subjected to further medical examination and then by providing necessary training to them, they be again reinstated on the post of drivers.

17. Now, there is nothing on record to show that such a saved category of vision disability was assessed in case of the petitioner. Thus, it is the only conclusion drawn by Corporation authorities that the petitioner is medically unfit to serve in the Corporation as a driver. Without there being any such certificate issued by the medical expert, the extreme action taken by the Corporation against the petitioner certainly causes serious prejudice to him. The petitioner has immediately submitted the application/representation to the Corporation with a request to provide him alternate job in the Corporation. The first representation is of 9th April, 2017 and this representation was rejected on mechanical application of the Circular dated 29th July, 2016.

18. Considering all these facts, we are of the opinion that the order impugned in the petition is clearly unsustainable. Resultantly, we allow the petition partly by quashing and setting aside the order dated 7th April, 2017. We further direct the respondent-Corporation to consider the application/representation of the petitioner dated 9th April, 2017 afresh, without insisting mechanically on circular dated 29th July, 2016 and to assess fitness of the petitioner afresh and then to consider the case of the petitioner for providing alternate job in the Corporation and this exercise be undertaken by the Corporation as expeditiously as possible and not later than six weeks from the date of the order of this Court.

19. Learned Counsel for the petitioner submitted that though the order was passed by the Corporation on 7th April, 2017, salary of the petitioner was stopped from August, 2016. He then submits that the petitioner be permitted to submit

(15)

representation raising this grievance to the respondent-Corporation. If such representation is submitted by the petitioner within two weeks from today, the respondent-Corporation to take decision on the said representation on its merits as expeditiously as possible.

20. Writ Petition is disposed of in above terms.

(MANGESH S. PATIL)
JUDGE

(PRASANNA B. VARALE)
JUDGE

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