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

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.2900 OF 2017**

The General Manager of B.E.S.T. Undertaking ...Petitioner

vs

Mohammad Ramjan M. Shahaban And Anr. ...Respondents

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Mr. Aseem Naphade, a/w. Ms. Hetal Master, i/b. Ashwin Ankhad & Associates, for the Petitioner.

Mr. A.L. Patki, Additional G.P., for Respondent No.2.

Mr. Syed Asif Abbas Naqvi, for Respondent No.1.

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**CORAM : S.C. GUPTE, J.**

**DATED : 27 MARCH, 2018**

**ORAL JUDGMENT :**

. This petition challenges an order passed by the Commissioner, Handicapped Welfare, Maharashtra State. By the impugned order, the Commissioner directed the Petitioner herein to engage Respondent No.1, who was working as a driver with the Petitioner Undertaking and who acquired disability during his service (30% loss of sight in the left eye), in some other post with same pay scale and service benefits.

2. Respondent No.1 was a bus driver working with the Petitioner Undertaking, attached to Shivaji Nagar Depot in Mumbai. On

4 October 2014, Respondent No.1, after parking his bus in the depot and whilst returning home, met with an accident, when a stone thrown by an unknown boy accidentally hit him in the left eye. The injury caused to Respondent No.1 as a result, which was considered as a disability, was referred by the Petitioner to the Board of Referees, Sir J.J. Group of Hospitals. By a certificate dated 1 July 2015, the Board of Referees declared Respondent No.1 to be unfit to perform the duties of a driver due to impairment of vision. Respondent No.1, thereafter, was sent for another medical examination to B.Y.L. Nair Hospital. Even this hospital declared him unfit for a driver's job, certifying his disability upto 30% for eye disease (left eye full thickness macular hole). Respondent No.1 was thereafter, once again, referred to the Disability Board of the Petitioner Undertaking, who also issued a certificate dated 2 February 2016, declaring him to be permanently unfit for a driver's job. Thereafter, the Petitioner, by its letter dated 7 July 2016 addressed to Respondent No.1, informed the latter about the management's decision to discontinue his services with effect from 2 January 2016, as he was unfit for a driver's job and also since his disease did not fall within the purview of Sections 2(i) and (t) of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act"). Respondent No.1, for his part, addressed an application dated 25 July 2016 to the Petitioner Undertaking, requesting for an alternative employment, since there was no other disability on his part except the eye injury which rendered him unfit for driving. At that stage, the Petitioner Undertaking issued an invalidity certificate holding Respondent No.1 to be completely and permanently incapacitated for further service. Being aggrieved by the termination order issued to him

on 7 July 2016, Respondent No.1 filed a writ petition before this Court. A Division Bench of this Court heard that petition on 3 October 2016. The Division Bench was of the view that, in the light of Sections 60 and 62 of the Disabilities Act, the Petitioner could approach the authority under the Act, who would enquire into his disability by taking into account all facts. The writ petition was, accordingly, disposed of with liberty to the Petitioner to approach the appropriate authority under the Disabilities Act. The Petitioner, thereafter, approached the authority, namely, the Commissioner, Handicapped Welfare, who is appointed under sub-section (1) of Section 60 of the Disabilities Act and is a competent authority for the purposes of complaints with respect of deprivations of rights of persons with disabilities and for exercising powers under Section 61 and 62 of the Act. The Commissioner, by his impugned order dated 18 April 2017, allowed the first Respondent's application and directed the Petitioner Undertaking to accommodate him in some other post in the organization with the same pay scale and service benefits.

3. The basis of challenge to the impugned order in the present petition is two-fold. Firstly, it is submitted that the Commissioner has no power under Section 62, whilst looking into any complaint relating to deprivation of rights of persons with disabilities, to pass a mandatory direction of the nature of the impugned order. It is submitted that all that the Commissioner can do under Section 62 of the Disabilities Act is to take up the matter with the appropriate authority, namely, in this case, the employer (i.e. the Petitioner). Secondly, it is submitted that the first Respondent's application for issue of a disability certificate for

the purposes of claiming benefits of a person with disability has been rejected by the medical authority. Learned Counsel for the Petitioner submits that an intimation of rejection of his application for disability certificate in Form V (under Rule 4) was communicated to Respondent No.1 by the medical authority. A certificate issued by the Dean, Member Secretary and Member of Social Justice and Special Assistance Department, Public Health Department, Directorate of Medical Education and Research is referred to in this behalf by learned Counsel. It is submitted that his application for a disability certificate, thus, being rejected by the medical authority, Respondent No.1 is not entitled to be reckoned as a person with disability and the Commissioner, accordingly, has no power to enquire into his complaint.

4. The argument that the Commissioner simply has to take up the matter with the appropriate authority, whatever that means, and can pass no direction, has no substance. If all that is meant to be done by the Commissioner for persons of disabilities under Section 62 of the Disabilities Act, is to correspond or take up the issue with the appropriate authority, that is to say, the employer as in this case, he is an authority with no effective role or purpose. It is difficult to understand in that case the reason for conferring extensive powers of the civil court on the Commissioner for the purposes of discharging his functions under Section 61 and 62 of the Act. If at the end of the day, all that he is expected to do is to correspond or enquire with the authority, there is no need to confer such elaborate procedural powers on him. The only reasonable meaning that can be ascribed to the expression “take up the matter with the appropriate authorities” is that, in an appropriate case,

the Commissioner can issue suitable instructions to the concerned authorities, that is to say, in case of an employment related dispute to the employer, for redressing the grievance of the employee who may be a person with disability or who may have acquired disability during service. The power may be to “take up the matter with the appropriate authority”, but then the matter itself must be taken up with a view to redress the grievance and do so effectively. If such redressal involves implementation of any particular measure, or taking any particular step provided in the Disabilities Act, the authority, in an appropriate case, can certainly be asked to follow the mandate of the statute or take the particular step as may be required thereunder.

5. The Supreme Court in the case of **Geetaben Ratilal Patel vs. District Primary Education Officer**<sup>1</sup> considered the scope of, and proper exercise of, the power of the Commissioner to look into complaints with respect to matters relating to deprivation of rights of disabled persons. That was a case where the appellant before the court had acquired during her service a mental illness, which was certified as between 40% to 70%. The appellant was dismissed from service. She thereafter filed an application before the Commissioner under Section 62 of the Disabilities Act. The Commissioner set aside the order of dismissal holding the same to be void, since the appellant was suffering from 40% to 70% mental disability at the time of her dismissal and had to be accommodated in a suitable alternative post as per Section 47 of the Act. The Commissioner directed the employer to accommodate her in an appropriate post to be created for her. In a challenge to the Commissioner's order, a learned Single Judge of Gujarat High Court held

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<sup>1</sup> (2013) 7 Supreme Court Cases 182

the dismissal to be justified. This order was affirmed by a Division Bench of that Court. The appellant challenged the orders before the Supreme Court. The employer argued before the Supreme Court that under Section 62 of the Disabilities Act, the Commissioner was not competent to declare the order of dismissal as void. The Court negated this contention holding as follows :

“20. The provisions of Sections 47 and 62 of the Act, when read together, empower the Commissioner, to look into the complaint with respect to the matters relating to deprivation of rights of persons with disabilities and non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions issued by the appropriate Governments or local authorities and to take up the matter with the appropriate authorities for the welfare and protection of rights of persons with disabilities including matter relating to dispensation with service or reduction in rank. The power of the Commissioner "to look into the complaints with respect to the matters relating to deprivation of rights" as provided under Section 62 of the Act is not an empty formality and the Commissioner is required to apply his mind on the question raised by the complainant to find out the truth behind the complaint. If so necessary, the Commissioner may suo motu inquire into the matter and/or after giving notice, hearing the parties concerned and going through the records may decide the complaint. If it comes to the notice of the Commissioner that a person with disability has been deprived of his rights or that the authorities have flouted any law, rule, guideline, instruction, etc. issued by the appropriate Government or local authorities, the Commissioner is required to take up the matter with the appropriate authority to ensure restoration of rights of such disabled person and/or to implement the law, rule, guideline, instruction if not followed. A complaint may be made by any disabled person himself or any person on behalf of disabled persons or by any person in the interest of disabled

persons. Thus the issue as involved is decided affirmatively in favour of the appellant and against the respondent.”

6. Let us now examine what the Commissioner has done in the present case. It is an admitted position that Respondent No.1 acquired a disability during his service. It cannot possibly be suggested that Respondent No.1 became unfit for the service of a driver because of his disability, that is to say, impairment of his vision in the left eye, and yet he acquired no disability during his service. It is a contradiction in terms. If Respondent No.1 is unsuitable for the job of a driver on account of impairment of his vision in the left eye, it is but a forgone conclusion that he has acquired a disability and such disability is acquired during his service. If that is so, Section 47 of the Act mandates that the Petitioner, as employer of Respondent No.1, ought not to dispense with his service, but must shift him to some other post with the same pay scale and service benefits and, if it is not possible to adjust him against any such post, to keep him on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. The Petitioner establishment has done none of these. The hapless employee, in the premises, approached the Division Bench of this Court, which directed the Petitioner to approach the Commissioner of Disabilities for redressal of his grievance, only to be told now that all that the Commissioner could do was to get in touch with the Employer Undertaking. As I have explained above, the power to the Commissioner is to take up the matter with the authority for the purposes of redressal of the grievance of the disabled person, that is to say, for the restoration of the rights of such disabled person. There is no gainsaying that the clear mandate of Section 47 of the Disabilities Act is to shift the

employee to another post with same pay scale and service benefits, or to keep him on a supernumerary post until such other post is available or until he attains the age of superannuation, whichever is earlier. It is only this legal mandate that the Commissioner has asked the Petitioner Undertaking to follow and this, as we have seen above, can very well be done under Section 62 of the Disabilities Act.

7. Learned Counsel for the Petitioner relies on the case of **Vaishali Walmik Bagul vs. Secretary, Prerna Trust, Aurangabad**<sup>2</sup>. Relying on this case, learned Counsel submits that the provisions of the Disabilities Act do not confer power to issue directions on the Commissioner. The Division Bench in that case was concerned with the case of appointment of a person to a post. The person had applied to the post citing his disability as one of the reasons for commending himself for the appointment. The application was rejected, and instead, some other person was issued an appointment letter. This was challenged by the applicant before the Commissioner. The Commissioner, by his impugned order, directed the employer to appoint the applicant on the post advertised. It is in the context of these facts that the Division Bench held that the direction issued exceeded the functions of the Commissioner under the provisions of Section 61 and 62 of the Act. This decision of the Division Bench cannot be cited to thwart an action on the part of the Commissioner of directing the employer to comply with the mandate of Section 47 of the Act.

8. Learned Counsel for the Petitioner then relies on the case of **The Shipping Corporation of India vs. Shri. Haripada Shaileshwar**

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<sup>2</sup> 2013(5) Mh. L.J. 221

**Chaterjee**<sup>3</sup>. Relying on this judgment, learned Counsel submits that the Commissioner has no power to set aside an order of termination. In **Shipping Corporation of India's** case, the complainant, who worked with the Shipping Corporation as a pantry officer, was terminated on account of his permanent unfitness. He was awarded a severance package. This order was challenged by the complainant before the Commissioner under the Disabilities Act and, on that application, the Commissioner set aside the termination order and directed the Corporation to reinstate him with full back wages and benefits. A learned Single Judge of our Court held that the Commissioner had no such power. The learned Judge observed that a bare reading of Section 62 of the Act showed that the Commissioner had power to investigate and take up the matter with the appropriate authorities; the Act did not permit the Commissioner to pass an order in the form of a mandatory direction. The learned Judge, with utmost respect, failed to notice the law laid down by the Supreme Court in **Geetaben Ratilal Mehta's** case. The observations of the learned Judge that the Commissioner has no power to pass a mandatory direction under Section 62 of the Disabilities Act are, in the face of the law stated by the Supreme Court in that case, clearly *per incurium* and do not bind me.

9. The contention of the Petitioner that Respondent No.1 is not entitled to be shifted to another post or that the Commissioner had no power to pass such order for the reason that the first Respondent's application for disability certificate was rejected by the medical authority, also has no substance. In the first place, the so called certificate of the

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3 2016 SCC OnLine Bom 9562

medical authority referred to by the Petitioner leaves much to be desired. According to the mandate of the Disability Rules and, particularly, Rules 4 and 5, what is expected of the medical authority in case of rejection of a certificate is “to explain ..... the reasons for rejection ..... and ..... convey the reasons ..... in writing.” Conveying of reasons for rejecting the application for disability certificate is the essence of this provision. The so called medical certificate does everything but this. It simply states that the application for a disability is rejected but leaves the reasons for such rejection blank. A certificate such as this has no merit and must be discarded outright. But a more fundamental point is that for claiming benefits of Section 47 a person does not have to be certified as a “person with disability” under Section 2(t) of the Disabilities Act. The argument of learned Counsel for the Petitioner is that under Section 2(t), a 'person with disability' is a person suffering from not less than forty percent of any liability as certified by a medical authority; Respondent No.1 did not suffer from forty per cent or more disability (he suffered from thirty per cent disability in the eye) and accordingly, did not have any certificate to that effect; Respondent No.1 could not, in the premises, claim the benefit of Section 47. The argument envisages that 'acquisition of disability' within the meaning of Section 47 of the Disabilities Act is the same as 'being a person with disability'. The expressions “disability” and “persons with disability” are separately defined. “Low vision” is a “disability” within the meaning of Section 2(i) of the Act (sub-clause (ii) of S.2(i)). If a person acquires a 'low vision', he acquires a 'disability'; he cannot by reason acquiring such disability during service be dispensed with or reduced in rank. If, however, after obtaining such disability he is found to be 'not suitable for the post he was holding', he could be shifted to

some other post with the same pay scale and service benefits and if that is not possible, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. That is the mandate of Section 47. There is nothing to suggest that for applying this mandate, the employee must be shown to be a 'person with disability' within the meaning of Section 2(t), that is to say, a person suffering from not less than forty per cent of any disability as certified by a medical authority. In fact, such interpretation would lead to an absurdity. One may in that case actually end up suggesting that an employee can be dispensed with, or reduced in rank, if he suffers from less than forty per cent of any disability, but not if he suffers from forty per cent or more disability. In other words, after acquiring less than forty per cent disability, if an employee is not found suitable for the post he is holding, he can be terminated and need not be shifted to other suitable post, but if he acquires more than forty per cent disability, he must be so shifted and cannot be terminated. That would be a travesty of justice and no sensible legislature could have ever intended such result.

10. The Supreme Court in the case of **Kunal Singh vs. Union of India**<sup>4</sup> was concerned with a case where an employee suffered from 'locomotor disability' falling within Section 2(i)(v), but did not have a certificate of a person with disability under Section 2(t). The Court in that case succinctly explained the difference between the expressions "disability" under Section 2 (i) and "Person with disability" under Section 2(t), particularly in the context of Section 47, in the following words:

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4 (0023) 4 Supreme Court Cases 524

“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.

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 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. These dicta clearly govern the facts of our case. What we have to see is whether Respondent No.1 acquired a disability within the meaning of [Section 2\(i\)](#) and if yes, whether for that reason he was being terminated from service rather than being shifted to any other suitable post, if he was held to be unsuitable for the job he was engaged in. If that is so, the mandate of [Section 47](#) is breached and corrective measures can be ordered under [Section 62](#). It is not necessary to further consider if he is a person with disability within the meaning of [Section 2\(t\)](#).

12. In the facts of this case, there is a clear disability; that disability is acquired during the course of the employee's service; and that disability has been certified by at least three authorities, including the Petitioner's own Medical Board. The Petitioner has accepted these medical certificates, and has proceeded to act on them by holding the Respondent to be unsuitable to work as a driver. The mandate of Section 47, in that case, must clearly apply. The Petitioner was bound to allow the Respondent's application for an alternative job. Such alternative job cannot be denied to him because there is no certificate of disability in his case.

13. There is, accordingly, no infirmity in the impugned order of the Commissioner.

14. For the reasons stated above, the petition is rejected. The Petitioner Undertaking shall pay the cost of this petition quantified at Rs.50,000/- to Respondent No.1.

15. Learned Counsel for the Petitioner makes an oral application for a certificate of fitness to appeal to the Supreme Court under Article 134 A of the Constitution of India. There is no substantial question of law either on the interpretation of the Constitution or any statute in the present case. The expression "to take up the matter with the appropriate authority" appearing in Section 47 of the Disabilities Act, which is interpreted by this Court, is plain and does not admit of any other meaning. The powers of the Commissioner in the context of that

expression have been fully explained by the Supreme Court. The decision of the Division Bench of our Court discussed above, was rendered in an altogether different set of facts and the law stated by the learned Single Judge in the case of **Shipping Corporation of India** (supra) is clearly *per incurium*. The application is rejected.

( S.C. GUPTE, J. )