

(Reportable)

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

WRIT PETITION NO.12597 OF 2018

The Divisional Controller,
Maharashtra State Road Transport
Corporation, Division Office,
Ambejogai Road, Latur.

...PETITIONER

-VERSUS-

Dhananjay Sudhakari Dixit,
Age : 40 years, Occupation : Nil,
R/o Near Kalika Mandir,
Ausa Road, Latur,
Taluka and District Latur.

...RESPONDENT

...

Advocate for the Petitioner : Smt.Reddy Ranjana D..
Advocate for the Respondent : Ms.Bodke Patil Poonam V..

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 07th January, 2019

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2 The Petitioner/ Maharashtra State Road Transport Corporation is aggrieved by the judgment of the Labour Court dated 22.08.2017 by which, Complaint (ULP) No.49/2016 filed by the Respondent/ Employee challenging his termination dated 17.04.2012,

made effective retrospectively from 31.07.2009, was allowed. The Petitioner is also aggrieved by the judgment of the Industrial Court dated 18.07.2018 by which, Revision (ULP) No.23/2017 filed by the Petitioner/ Corporation, has been rejected.

3 The contention of the Petitioner/ Corporation is that the Respondent/ employee suffered an accident on 20.04.2008 when he was discharging his duties as a conductor on the MSRTC Bus traveling from Latur to Hyderabad. From the date of the accident till 30.06.2009, the Respondent was under treatment. His two legs below the knees suffered multiple fractures. On 31.07.2009, the Civil Surgeon issued the medical certificate declaring that the Respondent was not fit for performing the job of a conductor as he could not stand on his two legs for longer durations. The Petitioner Corporation issued an order of termination dated 17.04.2012 and terminated the services of the Respondent with retrospective effect from 31.07.2009.

4 The Respondent approached the Labour Court by filing Complaint (ULP) No.49/2016 under Section 28(1) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, after more than three years. Since he had approached the Labour Court belatedly, an application for condonation of delay was filed. It is an admitted position that the said application was allowed and by condoning the delay, the complaint was registered. It is also an admitted

position that the Petitioner Corporation did not challenge the order condoning the delay and as such, the said order has attained finality.

5 The Petitioner raises three grounds for challenging the impugned judgments, which are as follows :-

- (a) Disability of the Respondent was not 40% or more as per Section 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which defines "person with disability".
- (b) The Labour Court did not grant a sufficient opportunity to the Petitioner Corporation to file its written statement and delivered an ex-parte judgment. The Industrial Court has also lost sight of this aspect and hence, the judgment of the Industrial Court is also unsustainable.
- (c) Even if the order of termination is given a retrospective effect, the Petitioner Corporation is supported by the judgment of the Patna High Court in the matter of ***Union of India vs. Om Prakash Roy, Letters Patent Appeal No.1190/2015 in Civil Writ Jurisdiction Case No.7390/2014 decided on 27.02.2018*** by which, it was concluded that the termination could be effective from the date on which the order has been issued.

6 The learned counsel for the Respondent/ employee submits

that the Petitioner Corporation has inhumanly treated the Respondent. He suffered an accident that has occurred out of and in the course of his employment. He could have preferred an application for compensation under the Workmen's Compensation Act, 1923 (presently, the Employees' Compensation Act). He was under treatment for a long duration. Fortunately, his two legs were not required to be amputated and he can presently walk with the assistance of crutches or support. It is true that he is not able to perform the duties as a conductor since he can not stand on his feet. But, he can surely perform other duties in the Corporation by occupying a chair provided he is allocated a soft job.

7 It appears from the record that the Petitioner was aware of the complaint since the application for condonation of delay was entertained by the Labour Court. After condoning the delay, naturally the ULP complaint had to be registered. The court notice at Exhibit O/2 was served upon the Petitioner and yet, the Petitioner did not respond and did not participate in the proceedings. The Labour Court, therefore, passed an order to proceed ex-parte on 10.06.2017. The Labour Court concluded that the accident was quite serious and about 70 to 80 passengers suffered injuries. The Respondent was an indoor patient from 20.04.2008 to 30.06.2009 and he approached the Petitioner Corporation for resumption of duties along with the medical certificate which certified that he could perform his work. The Petitioner Corporation referred him to the Civil

Surgeon seeking a fitness certificate. The Civil Surgeon informed vide his certificate that the Respondent would not be in a position to perform duties as a conductor. The Petitioner Corporation did not take any steps on this count and slept over the issue for almost three years.

8 I find that the agonies of the Respondent escalated in view of the conduct of the Petitioner Corporation. Neither did the Petitioner Corporation allow the Respondent/ employee to report for duties, did it pay him his monthly salaries, nor did it issue a specific order either allotting him an alternate work or any such work, which he could perform by reporting for duties.

9 Insofar as the termination with retrospective effect is concerned, the learned Division Bench of this Court has delivered a judgment in the matter of *Assaram Raibhah Dhage vs. Executive Engineer, Sub Divisional, Mula*, 1988 (4) Bom. C.R. 158 : 1987 (2) CLR 231 wherein, the said employee was terminated w.e.f. 01.03.1986 by the termination order dated 11.03.1986. The learned Division Bench has observed in paragraphs 1, 2 and 3, which reads as under :-

- "1. The services of an employee, be he permanent or temporary, cannot be terminated with retrospective effect. Such is the ratio of this judgment.
2. On June, 7 1980 the petitioner, a project displaced person, was appointed as a Mustering Assistant in the Work Charge Establishment at a monthly salary of Rs.200/-. Thereafter he worked continuously without break in service till March, 1986, when by a letter of

termination dated March 11, 1986 his services were retrospectively terminated with effect from March 1, 1986. Hence this writ petition.

3. *The petitioner's learned counsel Miss Purohit is perfectly justified in making a grievance that it is unthinkable that an employee's services can be terminated with retrospective effect, as done in the present case. We join learned counsel in her astonishment. For that matter, one of the conditions in the letter of appointment is that if the petitioner desired to resign he was liable to pay one month's salary or give one month's notice. It is therefore ironical that on the other hand, the petitioner's services were terminated with retrospective effect."*

10 The case in hand is quite gross in view of the factors recorded above. Considering the law laid down by the learned Division Bench of this Court in ***Assaram Raibhah Dhage (supra)***, I am not inclined to rely upon the view taken by the Patna High Court in ***Om Prakash Roy (supra)***. Consequentially, the termination of the Respondent cannot be sustained.

11 The Petitioner has strenuously canvassed that as the written statement was not filed, it could not take a specific stand. It is, however, conceded that the contentions which the Petitioner would have raised in the written statement, have now been raised in this writ petition. In my view, when the termination with retrospective effect is unsustainable in law, no different outcome could be expected if the complaint is remitted to the Labour Court for allowing the Petitioner to file the written statement. No different conclusion could be drawn as the Petitioner

Corporation is firm on the stand that it has rightly terminated the services of the Respondent with retrospective effect.

12 The request for remand can be refused for yet another reason. The Petitioner claims that the Respondent had not suffered such disability which could be termed as being more than 40% so as to render the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the Act of 1995") applicable in view of Section 2(t) which reads as under :-

"(t) *"person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority.*"

13 I find that the Petitioner has adopted a self defeating stand. The termination of the Respondent is admittedly on account of he being completely disabled for performing his duties as a conductor. The Petitioner now takes a stand that the Respondent has suffered such disability, which is less than 40% and hence, the Act of 1995 would not be applicable. This virtually pulls the carpet below the feet of the Petitioner Corporation since it's specific stand that the Respondent is completely disabled and cannot work as a conductor, is defeated by the stand that he has not suffered the disability which is 40% or more. This leads to the conclusion that the reason for termination of the Respondent would be rendered unsustainable.

14 The learned Division Bench of this Court, in the matter of *Ramnagina Thug vs. Chief Personnel MGR., Chandrapur Area, Western Coal Fields Ltd., 2007 CLR (2) 302 : 2007 LLJ (3) 530*, has held that under the Act of 1995, though an employee does not get an absolute right of employment, the employer has to identify the post on which an opportunity of employment can be given to the person having such physical challenge. The cases of persons with disabilities can be considered by the employer against such posts.

15 In the matter of *Kunal Singh vs. Union of India and another, (2003) 4 SCC 524*, the effect of Sections 47 and 72 of the Act of 1995 was considered. Sections 47 and 72 read 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."

"72. Act to be in addition to and not in derogation of any other law.

The provisions of this Act, or the rules made there under 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 there under, enacted or issued for the benefit of persons with disabilities."

16 It was concluded in paragraphs 5 to 10 in **Kunal Singh** (*supra*) as under :-

- "5. According to the learned counsel for the appellant, his disability falls under Section 2(i)(v), namely locomotor disability. What is meant by locomotor disability is stated in Section 2(o). There is no dispute that the Act applies to the establishment of the respondents and this establishment is not exempted under any notification issued under Section 47 of the Act. "Persons with disability" means a person suffering from not less than 40% of any disability as certified by a medical authority as per the definition given under Section 2(t).
6. Short question that arises for consideration in this appeal is whether the appellant is entitled to the benefit of Section 47 of the Act.
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 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 they 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 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."

17 It is, therefore, obvious that when an employee suffers disability while being in service of the employer, he would be entitled to the protection of Section 47. Section 47 has been held to be mandatory in nature in ***Kunal Singh (supra)***. The Honourable Supreme Court, therefore, concluded that by virtue of Section 47, if an employee has acquired the disability while being in employment and is not suitable for the post on which he was earlier performing duties, he could be shifted to some other post with the same pay scale and service benefits. The Honourable Supreme Court has further held that if this is not possible and the disabled employee cannot be accommodated on any post, he would be kept on a supernumerary post until the suitable post is available or till he attains the age of superannuation.

18 In ***Sudarshan Rajpoot vs. Uttar Pradesh State Road Transport Corporation, (2015) 2 SCC 317***, the Honourable Supreme Court noted that the workman had sustained grievous injuries in an accident, while on duty. The Uttar Pradesh State Road Transport Corporation held him unsuitable and unfit to continue as a driver with the Corporation. It was held by the Honourable Supreme Court that the Corporation is statutorily obliged under Section 47 of the Act of 1995 to provide an alternate equivalent job to the said disabled employee. These observations are found in paragraphs 33 and 34, which read as under :-

33. Since the order of termination is set aside, having regard to

the finding of fact recorded by the Workmen's Compensation Commissioner while determining the claim under the Workmen's Compensation Act, the appellant workman sustained grievous injuries to his legs which is an employment injury suffered during the course of employment in the respondent Corporation. In the matter of the rights and protection of the appellant workman we refer to the decision of this Court in Bhagwan Dass v. Punjab SEB, (2008) 1 SCC 579:

"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 : (SCC pp.529-30)

"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. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.”

34. Therefore, 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 alternate equivalent job to the appellant-workman in place of the post of driver. Therefore, we direct accordingly."

19 On the issue of full back wages to the employee, I find that the law laid down by the Honourable Supreme Court in **Sudarshan Rajpoot (supra)** would be squarely applicable. It is held in paragraph 32 as under :-

- "32. Further, it is important for us to examine another aspect of the case on hand with respect to reinstatement, back-wages and the other consequential benefits to be awarded in favour of the appellant-workman. In the case of *Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya*, [(2013) 10 SCC 324], after referring to three Judge Bench Judgments with regard to the principle to be followed by the Labour Courts/Industrial Tribunals to award back-wages if order of termination/dismissal is set aside, the law has been laid down in this regard by this Court as under: (SCC p.344, para 22)

“22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be

put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

Therefore, keeping in mind the principles laid down by this Court in the above case, we are of the opinion that the appellant workman should be paid full back-wages by the respondent Corporation."

around with the assistance of crutches or support. It is nobody's case that ever since the accident, the Respondent is confined to the bed and has not moved out of his bed. The learned Advocate for the Respondent submits that the Respondent would work with the Petitioner Corporation provided he is given an alternate job, which he can perform by occupying a chair. Any work to be performed as a desk work can be performed by the Respondent, is the contention.

21 In view of the above, accepting the request of the Petitioner for remand, would virtually amount to permitting the Petitioner to take advantage of its own wrong. As noted above, the conduct of the Petitioner Corporation is such that it would shock judicial conscience. The Respondent/ employee was left high and dry after he was discharged from the hospital. His salary was not being paid though he was in employment and not formally terminated. His miseries were increased by terminating him on 17.04.2012 only because he kept on reporting at the doorstep of the Corporation seeking allotment of work. Adding insult to injury is a phrase, which would not be enough to gauge the gross conduct of the Petitioner Corporation. I am constrained to observe that the Petitioner Corporation has behaved in an inhuman manner and for which, costs will have to be imposed.

22 Considering the above, this Writ Petition is dismissed by imposing costs of Rs.50,000/- (Rupees Fifty Thousand), which the

Petitioner Corporation shall pay to the Respondent/ Employee within a period of SIX WEEKS from today. Any default beyond SIX WEEKS, would make the Divisional Controller, MSRTC, Divisional Office, Ambajogai Road, Latur liable for paying interest on the amount of costs at the rate of 6% per annum from today till it's actual payment, which interest component shall be paid from his personal salary.

23 Needless to state, the Petitioner Corporation shall reinstate the Respondent/ employee in service and shall allocate him an alternate job akin to desk work which he would perform by sitting in a chair, by protecting his pay scale as on date which he would have earned had he continued in service as a conductor. The back wages from the date from which they have not been paid which is 31.07.2009, shall also be paid by the Petitioner Corporation to the Respondent within a period of EIGHT WEEKS from today. Failure to do so, would entail interest at the rate of 6% per annum from the date of the judgment of the Labour Court which is 22.08.2017 and the said interest shall be recovered from the personal salary of the Divisional Controller in a similar manner as noted above.

24 Rule is discharged.