

IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED: 22.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.Nos.7483 & 17042 of 2003

1.The Management of
Tamil Nadu State Transport Corporation Ltd.,
(Salem Division I),
Ramakrishna Road,
Salem-7. ... Petitioner in W.P.No.7483 of 2003
& R2 in W.P.No.17402 of 2003

Vs.

1.The Presiding Officer,
Labour Court,
Salem. ... R1 in both W.Ps.

2.N.Duraisamy ... R2 in W.P.No.7483 of 2003
& Petitioner in W.P.No.17402 of 2003

PRAYER in W.P.No.7483 of 2003: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records relating to ID No.825 of 1998 dated 10.07.2002 on the file of the first respondent and to quash the same.

PRAYER in W.P.No.17402 of 2003: Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Manadamus, calling for the records relating to the award of the first respondent in ID No.825 of 1998 dated 10.07.2002 and to quash the portion of the award denying the petitioner continuity of service and back-wages and to direct the second respondent to reinstate the petitioner with continuity of service, back-wages and other attendant benefits, award costs.

For Petitioner/ : Mr.V.Ajoy Khose
(Driver)

For Respondent/ : Mrs.Rajeni Ramadoss
(Corporation) Standing counsel for TNSTC

COMMON ORDER

As against the Award of the Labour Court, Salem dated 10.07.2002 in I.D.No.825 of 1998, directing the Transport Corporation to provide the workman an alternate employment as a fresh entrant without any monetary or service benefits. The driver had challenged the award in W.P.No.17402 of 2003 insofar as the denial of the benefits are concerned and the Transport Corporation had preferred a Writ Petition in W.P.No.7483 of 2003, questioning the reinstatement of the driver. Since both the Writ Petitions arises out of the same award, a common order is passed in these Writ Petitions. For the sake of convenience, the parties herein are referred to as the 'driver' and the 'Corporation' respectively.

2. Heard Mr.V.Ajay Khose, learned counsel for the petitioner/driver and Mrs.Rajeni Ramadoss, learned Standing counsel for the Transport Corporation.

3. The brief facts of the case are as follows:-

3.1) The driver, while in the services of the Corporation met with an accident on 27.07.1995, owing to which he became unfit for the post, due to disc prolapse. When the Medical Board certified that he was unfit to continue as a driver in the post, the Corporation had issued a show cause notice dated 16.11.1995, proposing to discharge him from the services on medical ground. The driver had requested the Corporation to provide him light duty or alternate employment through his reply dated 22.11.1995. However, by an order dated 04.12.1995, the driver was discharged from the services on medical ground. Immediately thereafter, the driver had made several representations seeking for alternate employment and since such requests were kept pending, he had raised an industrial dispute in I.D.No.825 of 1998, before the Labour Court, Salem against his medical discharge.

3.2) By an award dated 10.07.2002, the Labour Court, Salem, had directed the Corporation to provide him alternate employment as a fresh entrant without continuity of service, back-wages or attendant benefits. The present Writ Petitions are directed against this award by both the driver, as well as the Corporation.

4. In the Writ Petition filed by the Corporation in W.P.No.7483 of 2003, this Court by way of an interim order dated 10.03.2003, had directed the Corporation to pay wages under Section 17-B of the Industrial Dispute Act to the petitioner every month pending disposal of the Writ Petition. In lieu of

such a direction, the Corporation had chosen to provide alternate employment to the driver, as a fresh entrant by an order dated 16.07.2003 and ever since the driver has been working in the Corporation. In view of such reinstatement, the prayer sought for by the Corporation in W.P.No.7483 of 2003 has become infructuous.

5. The issue to be decided in the Writ Petition filed by the driver in W.P.No.17402 of 2003 is as to whether the Labour Court, Salem was justified in ordering alternate employment for the driver as a fresh entrant and whether the denial of service and monetary benefits can be sustained in view of the protection given to him under Section 47(1) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 [hereinafter referred to as 'the Persons with Disabilities Act'].

6. The learned counsel for the driver submitted that when a Government employee suffers from any disability, he would still continue to be entitled for pay protection, as his right to livelihood is protected under Article 21 of the Constitution of India. It is his further submission that under Section 47(1) r/w. Section 72 of the Persons with Disabilities Act, the driver, after his disability, should be shifted to some other posts with pay protection and service benefits.

7. Countering the stand taken by the Corporation by their reliance on G.O.Ms.No.746, Transport Department, dated 02.07.1981, the learned counsel submitted that the Government Order cannot override the statutory provisions. In support of the learned counsel's contentions placed reliance on various decisions which I shall deal with later.

8. The learned Standing counsel for the respondent/Corporation, on the other hand submitted that, the driver's request for alternate employment was kept in abeyance due to administrative reasons. In view of G.O.Ms.No.746, Transport Department, dated 02.07.1981, the workers in the State Transport Corporation, who are declared unfit for continuance on medical ground, are required to be discharged on medical grounds and that their subsequent absorption with alternate employment can be done only as a fresh entrant. Since the Corporation is bound by the Government Order, the present action of the Corporation in providing alternate employment as a fresh entrant pursuant to the interim order of this Court in W.P.No.7483 of 2003 does not suffers from any infirmity.

9. I have given careful consideration to the submissions made by the respective counsels.

10. The only justification which the Corporation had attempted to put forth before this Court is in view of G.O.Ms.No.746 dated 02.07.1981, their action in providing an alternate employment to the driver as a fresh entrant is legal. This Court is not in agreement with such a proposition submitted by the Corporation.

11. Section 47 of the Persons with Disabilities Act, 1995 clearly holds that there shall not be any discrimination in Government employment to a person, who acquires disability during his service. The Hon'ble Apex Court in a decision reported in the case of Kunal Singh Vs. Union of India and another [2003 (4) SCC 524], had held that though Rule 38 of the Central Civil Services (Pension) Rules, 1972, provides for medical invalidation and medical invalidation pension, the Rules cannot override the statutory protection given under Section 47 (1) r/w. Section 72 of the Persons with Disabilities Act, when the employee has acquired disability through service and that he should be shifted to some other employment with pay protection and benefits. When the ratio laid down therein, stating that the Act will override the CCS Pension Rules, the reliance placed by the respondent Corporation herein on Government Order, which is in pari materia with the CCS Pension Rules, cannot be sustained. The relevant portions of the Hon'ble Apex Court in Kunal Singh (supra) reads as follows:

"4. For proper appreciation of the rival submissions of the learned counsel for the parties, it is useful and necessary to notice few definitions as contained in Section 2 and Section 47 of the Act.

"2. Definitions In this Act, unless the context otherwise requires, -

(a) to (d).....

(e) "Cerebral palsy" means a group of non-progressive conditions of a person characterized by abnormal motor control posture resulting from brain insult or injuries occurring in the pre-natal, peri-natal or infant period of development;

(f) to (h).....

(i) "disability" means-

(i) to (iv).....

(v) locomotor disability;

(vi) to (vii).....

(j)

(k) "establishment" means a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as defined in section 617 of the Companies Act 1956 (1 of 1956) and includes Departments of a Government;

(l) to (n).....

(o) "locomotor disability" means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy."

(p) to (s).....

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

(u) to (v).....

(w) "rehabilitation" refers to a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric or social functional levels;

"47. Non-discrimination in Government employments - (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."

The Hon'ble Apex Court after extracting the relevant provisions of the Persons with Disabilities Act, held as follows:

"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 47](#) 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. We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pensions 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 benefits of persons with disabilities."

12. Merely because under Rule 38 of 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."

12. In the case of Narendra Kumar Chandla Vs. State of Haryana reported in 1994 (4) SCC 460, the Hon'ble Apex Court had held that the right to livelihood is protected under Article 21 of the Constitution of India and hence if an employee suffers from any disability during his services, his rank and salary cannot be reduced and that the employee therein would be

entitled to pay protection. The said observations reads as follows:-

"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 LDC. For LDC, 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 LDC. 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 LDC we direct the respondent to appoint him to the post of LDC protecting his scale of pay of Rs 1400-2300 and direct to pay all the arrears of salary."

13. The respondent Corporation's reliance on G.O.Ms.746 dated 02.07.1981 has been clarified and established by two Division Benches of this Court in the following decisions:

a) In 2007 Writ L.R. 256 [The State rep. by the General Manager, Tamil Nadu State Transport Corporation, Madurai Division-IV, Dindigul 624 004 V. K.Mohammed Mustafa, Senior Grade Conductor, Tamil Nadu State Transport Corporation, Madurai, Division-IV, Dindigul 624 004. The relevant portion of the said decision reads as follows:

"6. After having considered the contention raised by the learned counsel for the appellant, we are unable to accept the submission made by the appellant to the effect that giving all benefits under Section 47 would in any way derogate from the earlier Government Order passed by the Government. The main intention of the Government Order was to give employment to the person under disabilities. However, the question

as to whether he should be paid at a particular scale cannot be considered as the essential aspect of the Government Order. The benefit envisaged under Section 47 can be considered in addition to the benefits contemplated under the Government Order. If any additional benefits or higher benefits are contemplated under the Act as compared to the rights conferred under G.O.Ms.No.746 dated 2.7.1981 and if such provisions of the Act are made applicable, it cannot be said that such action in any way derogates from the provisions incorporated in G.O.Ms.No.746 dated 2.7.1981. On the other hand, the same can be said to be additional provisions and a person is entitled to more beneficial provision available either under the Act or under the Government Order. In other words, if in a given case, the provisions contained in the G.O. are more beneficial notwithstanding any provision contained in the Act, such beneficial provision of the G.O. can be made applicable and similarly if the provisions contained in the Act are more beneficial as compared to the provisions contained in the G.O., benefit of such Act can be made available.

b) Likewise, in 2008 (5) MLJ 787 [K.Ganesan V. Managing Director, Metropolitan Transport Corporation Chennai Limited, Chennai]. The Hon'ble Division Bench has held as follows:-

"14. So far as G.O.Ms.No.746, Transport Department, dated 2.7.1981, is concerned, it was enacted much prior to the Disabilities Act, 1995. The respondent-Transport Corporation cannot derive any advantage of the said G.O. after the enactment of the Disabilities Act, 1995.

15. The case of Narendra Kumar Chandla vs. State of Haryana, reported in 1994 (4) SCC 460, is a judgment before the enactment of the Disabilities Act, 1995. In the said case, the employee had to undergo surgical operation, but after such operation, he was found physically unfit by a Medical Board, as in the case of the present writ petitioner. Having found the employee able to write, the Medical Board suggested him to be considered for any clerical or non-technical post. But it was not accepted by

the employer. The Supreme Court, while allowing the appeal, held as follows:

" 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 post 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 LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For Clerk, typing generally is not a must. Therefore, the State Electricity Board should relax his passing of the typing test and appoint him as an LDC. Since, on the date when he had unfortunate operation, he was drawing the salary in the pay scale of 1400-2300, his last drawn pay and scale of pay have to be protected. He will also be entitled to arrears of salary."

16. Even if the said G.O.Ms.No.746, dated 2.7.1981, is taken into consideration, it does not prohibit continuance in service, but the only difference is that it suggested discharge from service and thereafter, fresh appointment, in the place of shifting to other post without termination as prescribed under Section 47 of the Disabilities Act, 1995.

17. In view of our findings as recorded above, we are of the view that the respondent-Transport Corporation, instead of removing the appellant/writ petitioner from service, should have shifted him to other equivalent post, such as Helper, as per Section 47 of the Disabilities Act, 1995 and thereby, they should have granted the benefit of Section 47 of the Disabilities Act, 1995 in favour of the appellant-writ petitioner.

18. For the reasons aforesaid, we set aside the order of discharge from service, passed by the respondent-Transport Corporation, dated 31.3.2001; the order of rejection of alternative employment, passed by the respondent-Transport Corporation, dated 23.8.2001 and the impugned order passed by the learned single Judge, in W.P.No.23532 of 2001, dated 14.12.2005.

The appellant-writ petitioner is reinstated into service and the respondent-Transport Corporation is directed to post the appellant-writ petitioner against the equivalent post of Driver for which he is otherwise eligible, such as Helper, within 15 days from the date of receipt or production of a copy of this judgment."

14. From the above observations, it is very clear that the action of the Corporation in providing alternate employment to the driver as a fresh entrant cannot be sustained since the driver's right to livelihood is protected under Article 21 of the Constitution of India, as well as under Section 47(1) of the Persons with Disabilities Act, 1995. It is well established law that G.O.Ms. No.746 dated 02.07.1981, cannot override the provisions of the Persons with Disabilities Act. Consequently, the driver would be entitled for protection of his services, as well as all monetary benefits, without reference to his discharge of services.

15. Since this Court has found that the driver is now entitled for back-wages for the period from 15.12.1995 to 28.02.2019, it would be appropriate to direct the driver to refund the gratuity already received by him, along with the Employers Contribution of Provident Fund, together with interest, which amount could be adjusted from and out of the back-wages to be paid to the driver.

16. At this juncture, the learned Standing counsel for the Corporation produced a calculation memo whereby, the employer contribution towards Provident Fund along with interest from December 1995 to March 2019, is Rs.1,17,979/- and the gratuity received by the driver, together with interest @ 10% works out to Rs.39,629/-.

17. The driver shall repay the Provident Fund contributed by the Corporation along with gratuity and cumulative interest,

which works out to Rs.2,13,608/-. The respondent Corporation shall adjust the sum of Rs.2,13,608/- from out of the back-wages to be paid to the driver.

18. In the result, the Writ Petition filed by the Management of Tamil Nadu State Transport Corporation Limited, Salem Division-I, Salem in W.P.No.7483 of 2003 is dismissed as infructuous. The Writ Petition filed by the driver in W.P.No.17402 of 2003 stands allowed, whereby the Award of the Labour Court, Salem in I.D.No.825 of 1998, insofar as the denial of back-wages and benefits are set aside. Consequently, the Corporation is directed to pay the entire back-wages from 05.12.1995 to 28.02.2019 to the driver which works out to Rs.14,44,482/-. The Corporation shall endeavour to release the back-wages to the driver at the earliest, in any event, within a period of 8 weeks from the date of receipt of a copy of this order.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The Presiding Officer,
Labour Court,
Salem.

+1 cc to M/s.V.Ajay Khose, Advocate Sr.No. 28236

AKM/31.10.19/13P-3C /

W.P.Nos.7483 & 17042 of 2003

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