

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10254 OF 2019

Brihan Mumbai Electric Supply)
and Transport Undertaking)
through its General Manager,)
Having office at BEST Bhavan.)
BEST Marg, Mumbai – 400 001.) ...Petitioner

Versus

1. Sadashiv Dnyandeo Gaikwad)
Adult Indian Inhabitant residing at)
Room No:-C-201, Shantikunj,)
CHS Ltd, Plot No.14-D, Sector 12,)
Kharghar, Navi Mumbai – 410 001.)
2. Commissioner and Competent)
Authority, Welfare of Persons)
With Disabilities, having its office)
At 3 Churchroad, Pune,)
Maharashtra 411 001.)
3. The Director,)
All India Institute of Physical)
Medicine & Rehabilitation, K.K. Marg,))
LL Udyan, Haji Ali, Mahalakshami)
Mumbai – 400 034.)
4. The Standing Medical Board)
Sir J.J. Group of Hospitals, Byculla.)
Mumbai – 400 008.) ...Respondents

.....
WITH
CIVIL APPLICATION NO.2166 OF 2019
IN
WRIT PETITION NO.10254 OF 2019

Shri. Sadashiv Dnyandeo Gaikwad)
 Adult Indian Inhabitant, residing at)
 Room No.C-201, Shantikunj CHS Ltd.,)
 Plot No.14-D, Sector 12, Kharghar,)
 Navi Mumbai – 410 001.) ...Applicant
 (Orig. Respondent No.1)

IN THE MATTER BETWEEN

Brihan Mumbai Electric Supply)
 and Transport Undertaking)
 through its General Manager,)
 Having office at BEST Bhavan.)
 BEST Marg, Mumbai – 400 001.) ...
 (Orig. Petitioner)

Versus

Sadashiv Dnyandeo Gaikwad)
 Adult Indian Inhabitant residing at)
 Room No:-C-201, Shantikunj,)
 CHS Ltd, Plot No.14-D, Sector 12,)
 Kharghar, Navi Mumbai – 410 001 & Ors.) ...
 (Orig. Respondents)

Mr. Aseem Naphade a/w. Kavita Anchan and Mr. Arsh Mishra
 i/b. M.V. Kini and Co. for Petitioner.

Mr. J.P. Kharge, Advocate for Respondent No.1 / Applicant in
 C.A. No.2166 of 2019.

Mr. A.B. Kadam, A.G.P. for Respondent No.2 – State.

CORAM : MILIND N. JADHAV, J.

RESERVED ON : 25th February, 2020.

PRONOUNCED ON : 12th August, 2020.

JUDGMENT:

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

2. This petition has been filed by the petitioner under Articles 226 and 227 of the Constitution of India to challenge the validity and propriety of the judgment and order dated 08.10.2018 (though the order has been signed and dated as on 11.10.2018) passed by the Commissioner and Competent Authority, Welfare of Persons with Disabilities in Appeal No.5 of 2016 under the provisions of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the '**said Act**'). The petitioner (employer) is a statutory undertaking of the Mumbai Municipal Corporation of Greater Mumbai and a public utility service.

3. Respondent No.1 (employee) has filed Civil Application No.2166 of 2019 for seeking various reliefs in compliance with the impugned order dated 08.10.2018.

4. Briefly, the facts pertaining to the case are as under:
- (a) Respondent No.1 was appointed as bus conductor on 11.09.1993 at Malvani Bus Depot, Mumbai and had since then been working with Brihan Mumbai Electric Supply and Transport Undertaking (herein after referred to as "**BEST**").
 - (b) On 03.05.2011, respondent No.1 met with an accident with his motor cycle while travelling to his native place in Pune resulting in serious injury to his left knee / leg. Respondent No.1 was initially admitted to Bhagali Hopsital at Pune and operated upon in the said hospital. Three metal plates were implanted in his left leg knee. Later on, two more operations were conducted on his left knee / leg at the same hospital.
 - (c) Thereafter respondent No.1 went to resume his duties at Malwani Bus Depot whereupon he was

initially referred to the doctors at Mumbai Central Bus Depot, Mumbai and thereafter further referred to KEM Hospital, Parel, Mumbai for further medical examination / treatment and guidance.

- (d) On 18.01.2012, the doctors at KEM Hospital, Mumbai conducted surgery / operation on his left knee and removed one implanted steel plate. Thereafter on 22.02.2012, the second implanted steel plate was also removed by conducting another surgery / operation.
- (e) On 12.06.2012, respondent No.1 had to undergo a third surgery / operation at KEM Hospital whereby titanium screws were fitted into his left leg knee on a permanent basis. Respondent No.1 was kept under observation in KEM Hospital, Parel, Mumbai and was discharged on 05.07.2012.
- (f) The Medical Officer - Incharge of KEM Hospital, Parel,

Mumbai issued medical certificate dated 12.10.2012, inter alia, stating that respondent No.1 was having multi ligament tear of knee and hence 41% total permanent disability. It was opined by the doctors that respondent No.1 was unfit for conductor's job permanently but fit for sedentary / office job only.

(g) After the aforesaid trauma and surgeries, armed with the disability certificate issued by KEM Hospital, Parel, Mumbai, respondent No.1 reported back to Malwani Bus Depot, Mumbai but was once again referred to the doctors at Mumbai Central Bus Depot and thereafter to undergo further medical examination, treatment and guidance at Lokmanya Tilak Memorial Hospital, Sion, Mumbai.

(h) On 12.01.2012, the doctors at Lokmanya Tilak Memorial Hospital, Sion, Mumbai examined respondent No.1. Respondent No.1 was thereafter repeatedly called to Lokmanya Tilak Memorial

Hospital, Sion, Mumbai for physical check up but no medical test or medical treatment was given or conducted by the said Hospital. On 03.12.2012, the doctors of Lokmanya Tilak Memorial Hospital, Sion, Mumbai issued certificate dated 03.12.2012, inter alia, certifying that respondent No.1 was suffering from left leg knee multi ligament injury and it was stated that he was permanently unfit for the job of conductor and fit for sedentary / office job only.

- (i) Thereafter respondent No. 1 reported to Malwani Bus Depot, Mumbai but was again referred to the doctors at Mumbai Central Bus Depot and thereafter to respondent No.3 i.e. All India Institute of Physical Medicine and Rehabilitation at Mahalaxmi, Mumbai for further medical check up, treatment and guidance. After conducting various examinations, physiotherapy and physical therapies between 19.12.2012 and 12.04.2013, the respondent No.3 i.e. All India Institute of Physical Medicine and

Rehabilitation at Mahalaxmi, Mumbai issued a detailed report to Respondent No.1 about his condition, therapies conducted and being medically unfit.

- (j) Thereafter, respondent No.1 was referred by the doctors at Mumbai Central Bus Depot to report to the respondent No.4 i.e. Standing Medical Board of Sir J.J. Group of Hospitals for further treatment and advice on 27.07.2013. The doctors of the Standing Medical Board of Sir. J.J. Group of Hospitals checked the respondent No.1 externally over a period of about five months and carried out pathological tests i.e urine test, blood test, eye test, chest test, HIV test etc. and issued medical disability certificate dated 19.12.2013 to respondent No.1, inter alia, opining 17% disability and stating that respondent No.1 was unfit for conductor's job but fit for light duty.

- (k) On 03.03.2014, respondent No.1 was referred to

Respondent No.3 i.e. All India Institute of Physical Medicine & Rehabilitation for issuance of disability certificate i.e. percentage of permanent disability as per Government Circular dated 31.12.2012.

- (l) Respondent No.3 issued Intimation of Rejection of Application for Disability Certificate in Form V on examination by the Board on 11.07.2014 stating that it was not possible to issue Disability Certificate as disability is < 40%.
- (m) Respondent No.1 thereafter, by his application requested the petitioner to give him light duty as there was no source of income for him and he was facing hardship. In the meanwhile, the Deputy Medical Officer of the petitioner vide letter dated 09.04.2014 awarded light duty to the respondent No.1 for a period of sixteen months i.e upto 08.05.2015 on the pass counter to issue travellers' passes to passengers.

(n) On 01.09.2015, the Deputy Chief Manager, Traffic rejected respondent No.1's further application for light duty and issued termination letter, thereby permanently terminating the services of respondent No.1.

(o) Being aggrieved, respondent No.1 filed Civil Writ Petition No.10601 of 2015 in this Court wherein the following order came to be passed:

"1. Writ Petition is disposed of opining that this Court is not entertaining the matter, invoking its writ jurisdiction under Article 226 of the Constitution of India since there is an Authority to consider the cause raised in this Writ Petition i.e. Commissioner. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (for short, the said Act) under section 62 provides for the same. The Petitioner is at liberty to approach the Commissioner, the authority who can look into the grievances raised in the Writ Petition by the Writ Petitioner and the same shall be disposed of in accordance with procedure, within three months from today."

(p) Thereafter respondent No.1 filed Statutory Appeal No.5/2016 before the Appropriate Authority. The

Appropriate Authority by order dated 17.04.2017 partly allowed the appeal of respondent No.1 and directed the petitioner to reinstate respondent No.1 forthwith along with back wages and allowances. Respondent No.1 thereafter repeatedly made several requests by addressing letters to the petitioner to comply with and implement the order but the petitioner did not take any action.

- (q) The petitioner, thereafter, belatedly filed Writ Petition No.4454 of 2018 in this Court to challenge the order dated 17.04.2017. The said petition came to be disposed of on 11.04.2018 with the following directions, *inter alia*, remanding the case of respondent No.1 to the respondent No.2 i.e. Commissioner and Competent Authority, Welfare of Persons with Disabilities Act:-

"Learned counsel for the respondent No. 1 states that his client has no objection if the impugned order passed by the respondent No. 2 is set aside and if the matter is remanded back to the learned Commissioner and Competent Authority, Welfare of Persons with Disabilities for hearing and

final disposal and for passing a fresh order in accordance with law in the proceedings in Appeal 5 of 2016. Statement is accepted.

2. *I therefore pass the following order :-*

- (i) The impugned order dated 17th April 2017 is accordingly set aside.*
 - (ii) The complaint filed by the respondent No. 1 is restored before the authority. The said proceedings in Appeal 5 of 2016 shall be decided without being influenced by the observations made and conclusion drawn in the impugned order dated 17th April 2017.*
 - (iii) The question as to whether the parties will be governed by the provisions of the Persons with Disabilities Act, 1995 or whether the Rights of Persons with Disabilities Act, 2016 is kept open. Such issue shall be decided by the authority.*
 - (iv) The complaint shall be disposed of expeditiously and not later than four months from the date of the next meeting.*
 - (v) Parties to appear before the authority on 25th April 2018 at 3.00 p.m.*
 - (vi) Writ petition is disposed of in aforesaid terms.*
 - (vii) There shall be no order as to costs.*
 - (viii) Parties as well as the authority to act on the authenticated copy of this order.*
- (r) After according an opportunity of hearing, respondent No.2, Competent authority passed order dated 08.10.2018 partly allowing the appeal of respondent No.1 and directing the petitioner to reinstate

respondent No.1 along with back wages and allowances.

- (s) Respondent No.1 sought his reinstatement by letter dated 07.03.2019 but the petitioner did not reinstate respondent No.1 and instead credited the amount of Rs.4,32,903/- in the bank account of respondent No.1. Respondent No.1 immediately issued a cheque of Rs.4,32,903/- in the name of BEST Undertaking to return the aforesaid amount but the petitioner did not accept the same and returned the same back to respondent No.1.
- (t) Thereafter, petitioner filed the present petition on 13.06.2019 i.e after a period of eight months in this Court to challenge the validity and legality of the order dated 08.10.2018 passed by respondent No.2 i.e. Commissioner and Competent Authority, Welfare of Persons with Disabilities (Respondent No. 2).

5. Respondent No.1 has taken out Civil Application No. 2166 of 2019 in the present writ petition for the following reliefs:-

- "(a) Pending the hearing and final disposal of this Writ Petition that this Hon'ble Court be pleased to direct the respondents / Org. petitioners herein above to award a Light Duty to the applicant / orig. as the applicant / orig. respondent No. 1 is ready and willing to do job; or direct the respondents / orig. petitioners herein above to start the monthly salary to the applicant / orig. respondent No. 1;*
- (b) that interim and / or ad-interim reliefs in terms of prayer clause (a) may be granted;*
- (c) that the Writ Petition filed by the respondents / Orig. petitioners herein above deserves to be dismissed with cost in the interest of justice;*
- (d) Any other and further reliefs as the nature and circumstances of the present case may require be granted in the interest of justice."*

6. Mr. Naphade, learned counsel for the petitioner submitted that the core issue relating to the *lis* between the parties is the degree of disability of respondent No.1 in order to be eligible and entitled for any concession or benefits under the said Act. He submitted that on 01.06.2001, Union of India through the Ministry of Social Justice and Empowerment issued notification containing guidelines for evaluation of various

disabilities. He submitted that under the said guidelines, the minimum degree of disability should be 40% for the purpose of seeking entitlement and benefit under the said Act. He defended the order dated 11.07.2014 passed by respondent No.3 and termination letter dated 01.09.2015 in as much as the same had been passed after due consideration of the fact that the disability of respondent No.1 was less than 40% and in accordance with the aforesaid guidelines. Mr. Naphade relied upon the administrative order bearing No.317 dated 02.02.2005 issued by the petitioner, *inter alia*, for the purpose of strict implementation of the provisions of the said Act for the purpose of providing alternate employment to traffic / outdoor staff i.e bus conductors / bus drivers. He submitted that for the purpose of availing alternate employment under the aforesaid administrative order, the employee was required to suffer a disability of 40% or more. He submitted that respondent No. 1 was awarded light duty in the interregnum to enable him to produce the disability certificate which he was not able to produce. Mr. Naphade further relied upon departmental circular dated 19.10.2016 which stated that the petitioner undertaking

had decided to pay compensation to employees whose services were terminated. He submitted that Section 2(t) of the said Act, defined a person with disability as a person suffering from disability of not less than 40% and thus, if a person is to be categorized as disabled, a minimum of 40% disability as mandated by the said Act had to be there. He emphasized on the medical report dated 19.12.2013 issued by respondent No.4 which stated that respondent No. 1 suffered from 17% disability and therefore contended that he was not entitled to any benefit under the said Act.

7. Mr. Naphade next submitted that the provisions of Section 80(b) of the Rights of Persons with Disabilities Act, 2016 did not empower the respondent No.2 i.e. the Commissioner to grant reinstatement and therefore the impugned order was incorrect to that extent. He submitted that the impugned order failed to consider the fact that Sections 80 and 82 of the above Act were only recommendatory in nature and did not confer any power upon the Commissioner to pass binding orders. He submitted that respondent No.2 i.e. the Commissioner while

passing the impugned order exceeded his jurisdiction as conferred upon him by the aforesaid provisions. Mr. Naphade has also fairly argued and invited my attention to the Medical history, reports and certificates issued by KEM Hospital and Lokmanya Tilak Memorial Hospital certifying the status and disability percentage of respondent No.1.

8. In support of his above submissions, Mr. Naphade has referred to and relied upon the following judgments:-

- (i) **Vaishali Walmik Bagul Vs. Secretary, Prerna Trust, Aurangabad & Ors.**
2013(5) Mh. L.J. 221;
- (ii) **State Bank of Patiala & Ors. Vs. Vinesh Kumar Bhasin.**
(2010) 4 SCC 368;
- (iii) **Asha T. Dongare Vs. T.S.K. Reddy & Anr.**
unreported judgment dated 12.2.2016 in Contempt
Petition
No. 264 of 2015;
- (iv) **Geetaben Ratilal Patel Vs. District Primary Education Officer.**
(2013) 7 SCC 182;
- (v) **The General Manager of BEST Undertaking Vs. Mohammad Ramjan M. Shahaban & Anr.**
Unreported judgment dated 27.3.2018 in OS Writ
Petition
No. 2900 of 2017;

(vi) **The Shipping Corporation of India Vs. Haripada Shaileshwar Chaterjee.**

2016 SCC OnLine Bom 9562;

(vii) **Collector, Bilaspur Vs. Ajit P. Jogi & Ors.**

(2011) 10 SCC 357.

9. **PER CONTRA**, Mr. J.P. Kharge, learned counsel appearing for respondent No.1 in the Writ Petition and Applicant in the Civil Application submitted that the disability of respondent No.1 as certified by the doctors at KEM Hospital, Parel and Lokmanya Tilak Memorial Hospital, Sion has been certified as being in excess of 40%. He, therefore, submitted that prima facie, if the disability of respondent No.1 was 41% permanent disability as certified, the applicability of the provisions, administrative order and notification issued by the petitioner undertaking will not apply to the respondent No.1's case. He submitted that the Medical Officers in-Charge of KEM Hospital, Parel, Mumbai have issued medical disability certificate in Form "A" under the Workmen's Compensation Act on 12.10.2012 certifying 41% total permanent disability. He submitted that Lokmanya Tilak Memorial Hospital, Sion has also issued certificate dated 05.08.2013, inter alia, certifying permanent disability of

respondent No.1. He submitted that both the aforesaid certificates were issued after following due process of law and after undergoing medical examination of respondent No.1 for a considerable period of time at the two hospitals on the recommendation of the petitioner. He submitted that both the hospitals / doctors were leading Municipal hospitals in the city of Mumbai in as much as respondent No.1 was examined by the panel of doctors from these hospitals and there was no reason to impugn or disbelieve or undermine the certificates and opinion issued by the aforesaid two hospitals. He submitted that as against the above status of respondent No.1, respondent No.3 i.e. All India Institute of Physical Medicine and Rehabilitation at Mahalaxmi, Mumbai has rejected the application for issuance of disability certificate on the ground that disability of respondent No.1 is less than 40% relying solely upon the certificate of disability issued by the respondent No.4 i.e. Medical Board of Sir J.J. Group of Hospitals which certified that the respondent No. 1 had 17% disability. He submitted that the certificate issued by the Medical Board of Sir J.J. Group of Hospitals did not assign any reason or details for certifying 17%

disability, nor were any tests conducted during the span of 5 months between July 2013 to December 2013, when respondent No. 1 was referred to the said Hospital for the third time by the petitioner. He supported the order dated 08.10.2018 and submitted that the same has been passed in accordance with law in the facts and circumstances of the respondent No.1's - case.

10. In support of his submissions, Mr. Kharge has referred to and relied on the following judgments:-

- (i) **Kunal Singh Vs. Union of India & Anr.**
(2003) 4 SCC 524;
- (ii) **Geetaben R. Patel Vs. District Primary Education Officer**
(2013) 7 SCC 182;
- (iii) **Sahebrao Baliram Ambhore Vs. The Chairman & Manager Bombay Electric Supply & Transport Undertaking & Ors.**
Order dated 14.8.2015 in Civil WP 6485 of 2015;
- (iv) **The General Manager of BEST Undertaking Vs. Mohammad Ramjan M. Shahaban & Anr**
unreported judgment dated 27.3.2018 in OS Writ Petition No. 2900 of 2017

11. At the outset, it is important to assimilate and note

the relevant provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as also its object and reasons.

12. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act was enacted in 1995 to meet the following object and reasons:

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;

(ii) to create barrier free environment for persons with disabilities;

iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-à-vis non-disabled persons;

iv) to counteract any situation of the abuse and the exploitation of persons with disabilities;

v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with

disabilities; and

vi) to make special provision of the integration of persons with disabilities into the social mainstream.

13. Section 47 of the said Act which deals with non-discrimination in Government employment reads as follows:

“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."

14. The appointment, function and duties of the Chief Commissioner and Commissioners for Persons with Disabilities have been laid down under Chapter XII of the Act.

(i) In Section 58(c) of the Act it is stated that the Chief Commissioner shall take steps to safeguard the rights and facilities made available to persons with disabilities.

(ii) The Commissioner is empowered under [Section 62](#) of the said Act to look into the complaints in respect to matters relating to deprivation of rights of persons with disabilities.

Section 62 reads thus:-

"62 - Commissioner to look into complaints with respect to matters relating to deprivation of rights of persons with disabilities.- Without prejudice to the provisions of section 61 the Commissioner may of his own motion or on the application of any aggrieved person or otherwise look into complaints with respect to matters relating to--

(a) deprivation of rights of persons with disabilities;

(b) non-implementation of laws, rules, bye-laws,

regulations, executive orders, guidelines or instructions made or issued by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities, and take up the matter with the appropriate authorities.”

15. The provisions of Sections 47 and 62 of the Act, when read together, empower the Commissioner, to look into complaints with respect to 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 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, hear the concerned parties and after 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.

16. In the present case, it is important to note that at the behest of the petitioner, respondent No.1 was made to run from pillar to post for an invariably long period of time to undergo medical examination / test for determining his suitability / disability quotient with three leading hospitals in Mumbai, viz; KEM Hospital, Lokmanya Tilak Memorial Hospital and Sir. J.J. Hospital. If one sees the amount of time which has been spent by respondent No.1 in under going the visits and medical tests physiotherapy, rehabilitation therapy etc. in these three

hospitals over a period of several years then the certificates issued by these hospitals will have to be scrutinised minutely and considered.

17. On perusal of the certificates issued by the first two hospitals i.e. KEM Hospital and Lokmanya Tilak Memorial Hospital, it is seen that the said certificates have been issued after a detailed analysis, scrutiny, quarantining and effective check up of respondent No.1 by the said Hospitals. Admittedly the entire medical history of injury, progress, operations carried out, rehabilitation therapy, physio therapy, disability quotient and remarks etc. pertaining to respondent No.1 have been placed on record by both the hospitals concluding and confirming that due to the disability of respondent No.1 he was unable and unfit to do the job of a Bus Conductor and fit for any other sedentary job. Incidentally, KEM Hospital has also operated upon the respondent No.1. It has issued a disability certificate certifying the disability of the respondent No.1 as being 41% disability with detailed reasons. Keeping that in mind alternative employment was offered to respondent No.1 for over

a period of 15 months in a sedentary position / job before his termination by petitioner. Therefore once the petitioner had come to this decision on the basis of the medical disability certificates issued by the aforesaid two leading hospitals, there was virtually no reason to recommend the petitioner for a third opinion to respondent No.4 i.e. Sir J.J. Group of Hospitals. It is further important to note that Sir J.J. Group of Hospitals did not conduct any specific medical test on respondent No.1 in order to ascertain his disability quotient in terms of and under the provisions of the said act. No specific tests to determine the disability quotient of respondent No.1 were carried out by respondent No.4 i.e. Sir J.J. Group of Hospitals. In this background the certificate issued by respondent No.4 i.e. Sir J.J. Group of Hospital is required to be examined carefully. The said certificate merely on the face of the certificate in '*hand writing*' states that the disability quotient of the respondent No. 1 is 17%. There is no analysis, scrutiny and above all no reasons given by the medical board to arrive at the above finding that disability of the respondent No.1 is 17%, especially when the said hospital had the benefit of the entire case history and

certificates issued by KEM Hospital and Lokmanya Tilak Memorial Hospital before itself. Based on the disability certified by respondent No.4 in its medical certificate the petitioner has taken the decision of terminating the employment of respondent No.1 as being not entitled for alternative employment since his disability was less than 40% and the respondent No.1 was unable to procure the disability certificate from respondent No.3. This on the face on record is highly arbitrary and is not supported by any material evidence coming from the analysis made by respondent No.4. From the documents on record I find that respondent No.1 was also operated by KEM Hospital and had undergone extensive rehabilitation therapy and physiotherapy in the said hospital. Further the entire medical case history of respondent No.1 has been placed on record before me and the same cannot be ignored and doubted. This medical history given by KEM hospital has ultimately resulted in the issuance of the disability certificate certifying the disability of respondent No.1 as 41%.

18. 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 in 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 respondent No.1's application for issuance of disability certificate for the purposes of claiming benefit by a person with disability has been rejected by respondent No.3. Petitioner has submitted that intimation of rejection of application seeking disability certificate in Form V (under Rule 4) was communicated to Respondent No.1 by the 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 the petitioner. It is submitted that application seeking disability certificate, thus,

being rejected by the authority, Respondent No.1 was not entitled to be reckoned as a person with disability and the Commissioner, accordingly, had no power to enquire into his complaint.

19. Firstly, 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 at all. If all that is meant to be done by the Commissioner for persons with disabilities under Section 62 of the Act is to correspond or take up the issue with the appropriate authority, i.e. to say, the employer as in this case, then 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 said 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, i.e. 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 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.

20. The Supreme Court in the case of *Geetaben Ratilal Patel vs. District Primary Education Officer (supra)* considered the scope, proper exercise and 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 the Gujarat High Court held the dismissal to be justified. This order was affirmed by a Division Bench of that Court. The appellant challenged both 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 negatived this contention and held as follows in paragraph No.20 of the judgment, which reads thus:-

"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."

21. Learned Counsel for the Petitioner relied on the case of *Vaishali Walmik Bagul vs. Secretary, Prerna Trust, Aurangabad (supra)*. Learned Counsel submitted that the provisions of the said 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 recommending himself for appointment. The application was rejected, and instead, some other person was issued appointment letter. This was challenged by the applicant before the Commissioner. The Commissioner, by his 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. Hence this judgment does not support the case and submissions advanced by the petitioner.

22. Learned Counsel for the Petitioner then relied on the case of *The Shipping Corporation of India vs. Shri. Haripada Shaileshwar Chaterjee (supra)*. Relying on this judgment, learned Counsel submitted that the Commissioner has no power to set aside an order of termination. In *Shipping Corporation of India's* case, the service of complainant, who worked with the Shipping Corporation as pantry officer, were terminated on account of his permanent unfitness and he was awarded a severance package. The order was challenged by the complainant before the Commissioner under the said 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 this 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 (*supra*). 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 laid down by the Supreme Court in that case is clearly per incurium and do not bind me.

23. 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 respondent No.3, also has no substance and deserves to be rejected. In the first place, the so called disability certificate issued by respondent No.4 and relied upon by the petitioner leaves much to be desired. Further, it appears that merely based upon the above certificate, rejection of the application of respondent No.1 seeking disability certificate by respondent No.3 is incorrect and not justified. 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 to 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 issued by respondent No.4 and rejection letter by respondent No.3 does everything but this. The rejection letter states that the application for disability is rejected but leaves the reasons for such rejection blank. A certificate such as this has no merit and deserves to be discarded outrightly. But a more fundamental point is that for claiming benefit of Section 47 a person does not have to be certified as a “person with disability” under Section 2(t) of the said 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 disability as certified by a medical authority; respondent No.1 did not suffer from forty percent or more disability (he suffered from 17% disability as certified by respondent No.4) and therefore respondent No.1 could not, in the premises claim benefit of Section 47. This 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 two expressions "disability" and "person with disability" are separately defined. If, however, after obtaining such disability a person 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.

24. The Supreme Court in the case of *Kunal Singh vs. Union of India (supra)* 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 paragraph Nos.7, 9 and 10 of the judgment, which reads thus :-

"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."

25. In passing and while determining and concluding the

present case, I wish to state and record that the existing Act, namely, Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 has now been replaced and substituted by the Rights of Persons with Disabilities Act, 2016, a disability legislation passed by the Indian Parliament to fulfill its obligation to the United Nations Convention on the Rights of Persons with Disabilities, which India ratified in the year 2007. The scope of disabilities has been widened by the 2016 Act. In the remand order dated 11.04.2018 passed in the earlier Writ Petition No.4454 of 2018 concerning the petitioner this Hon'ble Court had held in clause (iii) as under :-

(iii) The question as to whether the parties will be governed by the provisions of the Persons with Disabilities Act, 1995 or whether the Rights of Persons with Disabilities Act, 2016 is kept open. Such issue shall be decided by the authority."

The respondent No.2 Competent Authority has dealt with the *parimateria* provisions of the 1995 Act and the 2016 Act and has given correct reasons in its decision while passing the order dated 08.10.2018 impugned in the petition.

26. In view of the aforesaid discussion and decisions namely the decision of the Apex Court in the case of *Geetaben R. Patel (supra)* which holds the field, it is clear that respondent No.1 has acquired disability during the course of his service and the same has been certified by two leading hospitals, viz; KEM Hospital and Lokmanya Tilak Memorial Hospital. The petitioner has accepted the certificates and reports of these hospitals and having acted upon them has also given alternate employment to the respondent No.1 only to be terminated thereafter. The disability quotient of the respondent No.1 in any case is proved on the basis of the certificates to be more than 40% i.e. as per the certificate issued by KEM Hospital, which needs to be accepted. There was no justification to refer the respondent No.1 for a third opinion to respondent No.4, when at the behest of the petitioner he was already referred to two leading hospitals and both the hospitals had submitted their detailed reports to the petitioner. The respondent No.1 and his family members have during the said references to the three hospitals have suffered immensely for a long period of time. Therefore,

there is no infirmity in the impugned order passed by the Commissioner and the findings recorded in clauses 1 to 11 of the impugned order are upheld.

27. For the reasons stated herein above, the following order is passed :

- (a) Writ petition No.10254 of 2019 is rejected;
- (b) The order dated 08.10.2018 (though signed and dated as on 11.10.2018) passed by the respondent No.2 i.e. Commissioner and Competent Authority under Sections 62 and 63 of the said Act is confirmed;
- (c) The directions given in clause (b) of the operative part of the impugned order after paragraph No.11, be implemented within a period of four months from the date of receipt of an authenticated copy of this judgment;
- (d) Petitioner is directed to pay costs of Rs.50,000/- to the respondent No.1 i.e. Sadashiv Dnyandeo Gaikwad

within a period of four weeks from the date of receipt of a copy of this judgment and file a copy of the receipt of payment with the Registry of this Court;

(e) Liberty granted to respondent No.1 to take appropriate steps in law, if available to protect his interest.

(f) Civil Application No.2166 of 2019 stands disposed of;

(g) Parties to act on an authenticated copy of this judgment.

(h) This judgment will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this judgment.

(MILIND N. JADHAV, J.)