

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

WRIT PETITION NO. 959 OF 2021

Union of India and Anr.	}	Petitioners
Versus		
Abhay S. Dighe	}	Respondent

Mr.Suresh Kumar for the petitioners.
Mr.Sandeep V. Marne for the respondents.

**CORAM :- DIPANKAR DATTA, CJ &
G. S. KULKARNI, J.**

DATE :- AUGUST 4, 2021

PC :-

1. Original Application No. 823 of 2000, on the file of the Central Administrative Tribunal, Mumbai Bench, Mumbai (hereafter "the Tribunal" for short) has been allowed by a judgment and order dated 31st January 2020, the operative part whereof reads as follows: -

"13. The applicant shall be regularized at par with rest of his colleagues for whom orders have been passed by the respondents and he shall be entitled to counting of service for the purpose of grant of pension under the old pension scheme. The respondents, accordingly, shall pass necessary orders in this regard and accord him the consequential benefits which arise in his favour.

14. The aforesaid exercise shall be completed by the respondents as expeditiously as possible and in any case within three months from the date of receipt of certified copy of this order."

2. The respondents in the original application are aggrieved by the judgment and order dated 31st January 2020 and have, accordingly, presented this writ petition dated 21st October 2020 seeking, *inter alia*, a writ/order/direction for quashing the same.

3. At the outset, what surprised us is that it had taken almost two decades for the original application, filed by the respondent, to be finally decided by the Tribunal. However, in course of hearing, we have been able to gather that the original application was dismissed by the Tribunal on 12th October 2001, whereupon, the respondent had invoked the writ jurisdiction of this court by instituting Writ Petition No.1597 of 2002 and it was ultimately disposed of on 2nd February 2018 ordering a remand; therefore, the Tribunal has not been at fault for delayed decision on the original application, which now stands allowed, on remand, by reason of the judgment and order under challenge.

4. A brief narration of the facts and circumstances that drove the respondent to approach the Tribunal as a prologue to our decision, would be apt.

5. On 5th March 1986, the respondent was employed by the Railway Men's Co-operative Consumer Society (hereafter "the said society", for short) as a Coupons Selling Clerk at Lonawala, along with 14 other employees. In October, 1990, the said society was taken over by the Central Railway. The respondent initially had approached the Tribunal by filing Original Application No. 1137 of 1998 with a prayer for

regularization of his service in terms of the directive of the Supreme Court in its decision in **M.M.R. Khan vs. Union of India and Ors.**, reported in 1990 Supp. SCC 191, with effect from 1st April 1990. By an order dated 27th June 2000, the Tribunal disposed of the original application with a direction for reconsideration of the respondent's claim for regularization of his service considering all facts, Government instructions and the ratio of the decision in **M.M.R. Khan** (supra). The Tribunal also granted the respondent an opportunity to file a fresh representation, which was directed to be considered and disposed of in accordance with law within 5 (five) months. The prayer of the respondent was spurned on the ground that he was not an employee of a Railway canteen. Such order was made on 7th November 2000, which was the subject matter of challenge in Original Application No. 823 of 2000.

6. During the pendency of Writ Petition No. 1597 of 2002 before this Court, the petitioners had considered the respondent for regularization as suitable for appointment in Group 'D' category (Rs. 2550-3200) along with other employees of quasi administrative offices/organizations, vide order dated 20th January 2004. Unfortunately, upon medical examination of the respondent, he was declared unfit by the medical officer on 4th March 2004. It was recorded in a note prepared by such officer that the respondent was found "unfit for all categories". The petitioners claimed that after being declared unfit, the respondent never reported back to the office of the relevant officer, who had sent him for medical examination.

7. The claim of the respondent was that while he was working in the said society, his service was orally terminated on 15th September 2002. He further claimed that at or about the same time, his vision suffered a setback and by 29th December 2006, he became completely blind. It is also claimed that it was because of this visual impairment, he was not found fit on medical examination.

8. The Tribunal heard the parties. Upon consideration of the materials on record, the Tribunal held that the verbal termination order communicated in the year 2002 (treated as 15th September 2002) was *non est*; a direction followed for reinstatement of the respondent in a suitable supernumerary post in consonance with the provisions of section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereafter "the Disabilities Act" for short"). The Tribunal also held that the respondent was required to be considered and declared as regular employee with effect from 1st April 1990 when similarly placed persons were declared as regular employees. The intervening period was directed to be treated as period spent on duty for all practical purposes, including pension, increments, etc., in accordance with the provisions of the Disabilities Act and having regard to the facts and circumstances of the case. These were followed by the operative part of the order, extracted supra.

9. Mr.Kumar, learned advocate representing the petitioners, has assailed the impugned judgment and order of the Tribunal

by referring to the decision of the Supreme Court in **Union of India (Railway Board) and Ors. vs. J.V.Subhaiah and Ors.**, reported in (1996) 2 SCC 258. According to him, the decision in **M.M.R. Khan** (supra) is no longer good law in view of the discussions appearing in **J.V.Subhaiah** (supra). It is Mr.Kumar's further contention that the respondent was never employed by the said society in a canteen, but was employed in the stores; therefore, he was not entitled to regularization of service with effect from 1st April 1990. It is also the contention of Mr.Kumar that since the respondent was not found fit on medical examination, he could not even be appointed in a Group 'D' category post in terms of the order dated 20th January 2004.

10. According to Mr.Kumar, the Tribunal fell in error by omitting to consider relevant materials and has passed an order not only for reinstatement of the respondent in service, but also with all consequential benefits, which would obviously include arrears of pay and other benefits, without the respondent having worked for a single day under the petitioners. He has, thus, prayed for quashing of the judgment and order of the Tribunal under challenge.

11. Per contra, Mr.Marne, learned advocate for the respondent, contended that the Tribunal was bound to consider the observations made in the judgment and order dated 2nd February 2018 of this Court while ordering a remand. According to Mr.Marne, the impugned judgment and order is in consonance with the observations of this Court. Mr.Marne further contended that the Almighty has not been

kind to the respondent who, because of the visual impairment, lost out on the opportunity to be appointed on a Group 'D' post and has since been surviving on the basis of charity of his friends and acquaintances. It is also contended that the respondent having been certified to be completely blind, the decision of the Tribunal has to be tested given the peculiarities of the case and the sufferings faced by the respondent over all these years since the time he approached the Tribunal for redress for the first time. A citizen like the respondent, according to Mr.Marne, deserves empathy and accordingly, he has appealed to the Court not to disturb the directions given by the Tribunal.

12. We have heard the learned advocates for the parties, perused the judgment and order of disposal of Writ Petition No. 1597 of 2002 dated 2nd February 2018 and the judgment and order under challenge, and considered the materials on record.

13. The Tribunal allowed the original application only on the ground that the petitioners had "opportunistically taken note of various other facts and denying the benefit of regularization to which he (sic, the original applicant) was entitled whereas persons similarly placed with him have been granted such a benefit". We have not found any other reasons in the judgment rendered by it. No finding appears to have been returned that the respondent was employed by the said society in a Railway canteen. The documents produced by the respondent including an audit report were referred to in certain paragraphs, without any discussion as to whether such

report suggested that the respondent was employed in a Railway canteen. By merely referring to the audit report, which bore the names of other employees who were regularized, the Tribunal accepted the same as conclusive proof of the respondent's case that he had been employed in a Railway canteen by the said society. Having regard to the nature of documents produced, it is doubtful as to whether the respondent was employed by the said society for rendering services connected with a Railway canteen or otherwise. Had it been conclusively proved so, the respondent could have been entitled to legitimately claim regularization with effect from 1st April 1990. The finding returned by the Tribunal that the respondent was entitled to be regularized with effect from 1st April 1990 is, practically, based on no legal evidence and hence unsustainable. Even otherwise, the decision in **J.V.Subhaiah** (supra) does not approve the decision in **M.M.R. Khan** (supra) and, therefore, it is difficult to support the finding that the respondent was entitled to be regularized in service in terms of such decision with effect from 1st April 1990.

14. However, we find that the respondent was considered suitable for appointment in a Group 'D' post, subject to being found medically fit. The note dated 4th March 2004 recorded that the respondent was unfit for all categories. There is no specific observation as regards the respondent's deficiency. It could be so, as contended by Mr.Marne, that the respondent was suffering degeneration in his eyes, leading to the note that he was medically unfit for appointment. Be that as it

may, sight cannot be lost of the fact that the petitioners had made a genuine endeavor to offer employment to the respondent despite his initial appointment by the said society. If it is the rule that an employee of the Railway prior to appointment must be medically fit and any appointment is made in breach of such rule, the appointment would be contrary to law. We, therefore, do not fault the petitioners for not having appointed the respondent owing to his failure to succeed in the medical examination.

15. We are now tasked to examine whether the writ petition ought to be allowed based on our aforesaid conclusions, or, the respondent is entitled to any protection bearing in mind the provisions of the Rights of Persons with Disabilities Act, 2016, which has been introduced by the Parliament repealing the Disabilities Act (the 1995 Act). In keeping with our preambular promises, evident from the Preamble to the Constitution and read with the Directive Principles of State Policy, as well as the objective sought to be achieved by the aforesaid Central enactments, the Court ought not to deny relief to a person with disability merely on the ground that there is some deficiency in the physical/ medical standards prescribed for obtaining public employment. It has been noticed that the Tribunal directed creation of a supernumerary post for the respondent. This was obviously directed keeping in view his physical disability arising out of visual impairment. We do not see reason to interfere with such direction for creation of supernumerary post for accommodating the respondent, but the same must be with effect from 20th

January 2004 when the respondent was considered suitable for appointment on a Group 'D' post. We also do not propose to interfere with the direction of the Tribunal that the period from 20th January 2004 till 31st January 2020, i.e., the date of decision of the Tribunal, should be treated as a period spent on duty. However, such period shall be treated as period spent on duty only for the purpose of calculation of pension to the respondent, according to the old scheme. We are also of the view that interest of justice would be sufficiently served if the respondent is held entitled to payment of 25% back-wages to him. Let the quantum be calculated and paid to the respondent within four months. The petitioners are directed to allocate such light job that the respondent would be able to perform in the remaining couple of years before he attains the age of superannuation of 60 years. The respondent may be allowed to join on the relevant post by the beginning of next month. Since it has been submitted before us by Mr.Marne that the respondent has no other family member to look after him, question of payment of family pension would also not arise to anyone.

16. With the aforesaid modification of the judgment and order under challenge, we dispose of this writ petition at the admission stage. There shall be no order as to costs.

SALUNKE
J V

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by SALUNKE J V
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(G. S. KULKARNI, J.)

(CHIEF JUSTICE)