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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.09.2021

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THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.43700 of 2016

WMP.No.37506 of 2016

The Management of Lawson Vasan Tea Division
(Then Lower Nirar Tea Division)
Tamil Nadu Tea Plantation Corporation Ltd.,
Valparai - 642 106.

..Petitioner

Vs.

1. Iysamma

2. The Presiding Officer,
Labour Court, Coimbatore.

..Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, praying to issue a Writ of Certiorari to call for the records of the 2nd respondent in ID.No.293 of 2009 dated 30.05.2016.

For Petitioner : Mr.S.Arumugham, Govt Counsel (Forest)

For respondents : R1 - No appearance.

R2- Court.

O R D E R

This Writ Petition is listed and taken up today through Video Conferencing.

2. The first respondent had joined the services of the Management, as a estate worker in the year 1996. On 23.02.2000, when she was employed in the Tea estate, she had met with an accident owing to which she became unfit for the regular course of employment. On 28.03.2000, the petitioner/management had insisted the first respondent to produce a fitness certificate,



for the purpose of allowing her to continue her employment. In the meantime, the first respondent herein had made a claim under the Workman Compensation Act in the year 2000, which came to be finally decided before this Court in an appeal in CMA.No.480 of 2000.

3. Thereafter, it is claimed that the first respondent herein had been consistently requesting the petitioner to permit her to join duty and since, the management had not acceded to her request, she had raised a dispute before the conciliation officer in the year 2008, which ended in failure. Consequently, the Labour Court had adjudicated the petitioner's industrial dispute in ID.No.293 of 2009 and had taken into account of the delay in raising the dispute and accordingly, while ordering for reinstatement, had reduced her backwages by 50%.

4. The learned Government Advocate appearing for the petitioner would predominantly stress upon the ground that the first respondent herein had raised the industrial dispute belatedly and therefore, the dispute itself ought to have been rejected on the ground of laches.

5. Per contra, the learned counsel Mr.V.Ajoy Khose, who assisted this Court on behalf of the first respondent, would place reliance on the decisions of this Court and submit that, in the absence of any limitation prescribed for raising an industrial dispute at that relevant point of time and that since, the petitioner is entitled for protection under the provision of the Persons with Disability Act, there is no infirmity in the findings of the Labour Court. It is also his submission that since the Labour Court had already taken into account the delay aspect and proportionately reduced the backwages, no interference is required in the award.

6. As rightly pointed out by Mr.Ajoy Khose, when the first respondent herein, had met with an accident and was rendered unfit to carryout her regular duties, there is duty cast on the management to provide alternate duty under the provisions of the Persons with Disability Act. This Court in the case of The Management of TNSTC Ltd., (Salem Division I) Ramakrishna Road, Salem -7 vs. The Presiding Officer and another (WP.Nos.7483 & 17042 of 2003) dated 22.03.2019 in support of such ratio had relied upon the decision of the Hon'ble Apex Court in the case of Kunal Singh V. Union of India and another reported in [2003 (4) SCC 524] and had substantiated such a ratio in the following manner:-



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(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:



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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



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possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The Section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service.

10. The argument of the learned counsel for the respondent on the basis of definition given in Section 2(t) of the Act that benefit of Section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted. Because, the appellant was an employee, who has acquired 'disability' within the meaning of Section 2 (i) of the Act and not a person with disability.

11. 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



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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



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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,



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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."

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7. Thus looking from the angle of the aforesaid proposition, this Court is of the view that there was no justification on the part of the management in insisting for a fitness certificate, as a precondition for continuing the first respondent's employment with them.

8. Insofar as the ground of delay and latches raised by the learned Government Advocate are concerned, it is held in various decisions of the Hon'ble Apex Court that such a delay in raising the dispute, particularly one under Section 2(A) of the Industrial Disputes Act, cannot be rendered as an impediment for entertaining a dispute.

9. In the case of Prabakar v. Joint Director, Sericulture Department and another reported in (2015) 15 SCC 1, it has been held that since there is no period of limitation prescribed under the Industrial Disputes Act, 1947. The workman has a right to raise the dispute even belatedly. Similar views have also been taken in various other decisions including the decisions, relied upon by Mr. Ajoy Khose in the case of Ajaib Singh v. Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another reported in (1999) 6 SCC 82.

10. In this background, when the award of the Labour Court was perused, it is seen that the first respondent herein had set forth the explanation rendered by the first respondent for the delay, by stating that initially she had made a claim under the Workman Compensation Act which was finally decided by the High Court in an appeal. Thereafter, she had been requesting the management to permit her to continue her employment and when such a request turned futile, she had raised the dispute. Applying the ratio laid down by the Hon'ble Apex Court in the Prabakar's case (supra), the delay as such would not be a total embargo to raise the dispute. Even otherwise, the first respondent had given some reasons for the delay, which seems acceptable. Above all, the Labour Court had given due consideration on the aspect of delay and proportionately reduced the backwages to which the first respondent would otherwise be entitled to. As such, I do not find any reasons to interfere with the award of the Labour Court on this ground.



12. For all the foregoing reasons, there are no merits in the writ petition. Accordingly, the writ petition stands dismissed. In view of the order of dismissal, the petitioner/Management shall disburse all the monetary benefits which are due to the first respondent accruing under the impugned award passed in ID.No.293 of 2009 dated 30.05.2016, within a period of four weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

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To

The Presiding Officer,
Labour Court, Coimbatore.

+1cc to the Special Government Pleader (Forest), High Court,
Madras, S.R.No.49555

W.P.No.43700 of 2016

JP-II (CO)
SU (26/10/2021)