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

WRIT PETITION NO. 7488 OF 2023

Malhari Jibhau Tambde } ...Petitioner
V/S.
The State of Maharashtra & Ors. } ...Respondents

**WITH
WRIT PETITION NO. 7489 OF 2023**

Parmeshwar Govind Survase } ...Petitioner
V/S.
The State of Maharashtra & Ors. } ...Respondents

Mr. Jayendra D. Khairnar, *for the Petitioners.*

Mrs. V.S. Nimbalkar, *AGP for State-Respondent No.1.*

Mr. Nitesh Bhutekar *a/w. Mr. Aniket Nangare, for Respondent Nos.2 to 4.*

**NEETA
SHAILESH
SAWANT**

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CORAM : SANDEEP V. MARNE, J.

Dated : 1 April 2024.

P.C. :

1) **Rule.** Rule made returnable forthwith. With the consent of the learned counsel appearing for parties, Petitions are taken up for hearing and disposal.

2) By these petitions, Petitioners assail Awards dated 20 October 2022 passed by the Presiding Officer, Third Labour Court, Thane in Reference (IDA) Nos. 176 of 2018 and 175 of 2018.

3) The References involved adjudication of disputes relating to termination of services of Petitioners by the Respondent-State Road Transport Corporation vide Orders dated 31 July 2017, by which both Petitioners were terminated from service on 19 October 2016 which is the date on which they were declared unfit to perform duties of Driver on account of their colour blindness.

4) The issue involved in the petitions is no more *res-integra* and is squarely covered by the Division Bench Judgment of this Court in **Vikas Khanderao Keng Vs. The State of Maharashtra & Ors.** (Writ Petition No. 9762 of 2019) decided on 16 July 2020. In its judgment, the Division Bench has disapproved the action of the Maharashtra State Road and Transport Corporation in terminating the services of Drivers who are declared medically unfit and has held that such Drivers are required to be provided with alternate job under the provisions of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (**1995 Act**) and the Rights of Persons with Disabilities Act, 2016 (**2016 Act**). This Court held in paras-14 to 24 as under :

14. After having considered the provisions of the 1995 Act and the 2016 Act in detail, we are of the considered view that the language of Section 20 is plain and certain, and casts statutory

obligations on the employer to protect an employee acquiring disability during service.

15. Keeping in line with this construction of a beneficial legislation and also keeping in mind the unequivocal and express provisions of Section 20 of the 2016 Act, we deem it only legal, humane and just that the Petitioners be granted alternate jobs as also back wages from the date their services were discontinued.

16. In so far as Clause 11 of the Impugned Circular is concerned, as stated hereinabove, Clause 11 provides that after an employee is diagnosed with a disability, the matter would be examined and until such examination is complete and a decision is taken about the fitness of the employee or his alternate employment, the period would be treated as leave without pay and the earned leave on the earlier job would be carried forward to the new job. We find that this imposition is unjust and violates the Petitioners' fundamental rights on various levels. Firstly, it is clearly arbitrary and violative of Article 14 of the Constitution, in as much as the Act mandates the State establishments to shift the employee acquiring the disability during service to another suitable post, if he cannot be continued in the post originally held by him; the Act does not envisage any time lag for shifting him to such other post ; and in any event, if the employer establishment takes time to decide on such alternative employment, the employee cannot be made to suffer. Clause 11 of the Impugned Circular leaves it to the employer establishment i.e. MSRTC to decide on the alternative employment at its own sweet will and at its own leisure, leaving the employee to suffer deprivation of wages for no fault of his.

17. Further, this arbitrary imposition under Clause 11 is in the teeth of the provisos to Sub Section (4) of Section 20 of the 2016 Act which read as under :

“Provided that, if an employee after acquiring disability is not suitable for the post he was holding, shall 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.”

18. *The above provisos mandate that the Petitioners ought to be shifted to an alternative post with MSRTC with the same pay scale and service benefits and if it is not possible for MSRTC to adjust the Petitioners against any post immediately, they have to be kept on supernumerary posts until suitable posts are available or they attain the age of superannuation, whichever is earlier. This is a mandate under the 2016 Act and a statutory right granted to the Petitioners. This right cannot be violated by Clause 11 of the Impugned Circular. MSRTC has no right and is in fact prohibited from treating the intervening period between the medical examination and a decision thereon as leave without pay. The very idea of restoring an employee to a position with the same pay scale and service benefits which he or she held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the action of termination taken by the employer.*

19. *The financial, emotional and mental injuries suffered by the bus drivers before us today cannot simply be measured in terms of money. As a result of the discontinuance of their services by MSRTC, the Petitioners’ lost their source of income with immediate effect. As a result, not only have the Petitioners suffered economically but so have their respective families, who have been deprived of their source of sustenance. This would include deprivation of nutritious food, education as also general advancement in life. These sufferings will continue till the date MSRTC provides the Petitioners with alternative positions. In our opinion, the Petitioners’ reinstatement by MSRTC entitles the Petitioners to claim back wages in their entirety. The denial of back wages to the Petitioners who have suffered due to their disability would amount to indirectly punishing the Petitioners concerned and rewarding MSRTC by relieving them of their obligation to pay back wages. This would be wholly inequitable and unjust. This would be in contravention of the 2016 Act, as also in contravention of the Constitution of India. As a result, we are of the considered opinion that Clause 11 of the Impugned Circular is ultra vires the 2016 Act,*

as also violative of Article 14 of the Constitution of India. Therefore, we hereby quash and set-aside Clause 11 of the Impugned Circular.

20. Keeping in line with the mandate of Section 20 of the 2016 Act, we order and direct MSRTC to provide each one of the Petitioners with alternative posts having the same pay scale and service benefits as their earlier position. This exercise must be completed within a period of 4 weeks from the date of this Order.

21. As a result of the aforesaid decision, we order and direct MSRTC to pay back wages to each of the Petitioners from the date that their respective services were discontinued until the date that they have been provided with an alternative position in compliance with Section 20 of the 2016 Act. These wages must be credited to the Petitioners' accounts within a period of 6 weeks from the date of pronouncement and uploading of this Order. However, whilst computing the amount of back wages to be paid to the Petitioners, we grant liberty to MSRTC to ascertain whether or not any of the Petitioners were otherwise employed during this intervening period and if so, MSRTC would be at liberty to deduct the amount of wages that the Petitioners may have earned from their alternative employment whilst paying out the back wages. In the event MSRTC wishes to undertake this exercise, such exercise should be completed within a period of 4 weeks from the date of pronouncement and uploading of this order.

22. The Writ Petitions are disposed of accordingly. We appreciate the assistance rendered by Dr. Sathe as Amicus Curiae in the matter.

23. Whilst parting, we anticipate that the Impugned Circular albeit in the absence of Clause 11 which we have struck down hereinabove, may still give rise to grievances suffered by various other persons employed by MSRTC who may be diagnosed with disabilities in the future. In order to prevent their suffering, we propose the following measures which could be taken into consideration when MSRTC implements the Impugned Circular:

- i. Upon an employee acquiring a disability, the medical examination and disability certification ought to be completed within a period of 4 weeks of such disability coming to the notice of MSRTC;*
- ii. Within 4 weeks from the aforesaid medical examination and disability certification, the employee shall be provided with an*

alternative position with MSRTC in accordance with Section 20 of the 2016 Act;

iii. The time elapsed in conducting the medical examination, certifying the disability and providing an alternative position shall be treated as part of the persons' employment and the employee shall be paid back wages for this entire period expeditiously;

iv. MSRTC will be at liberty to test the veracity or otherwise of disability certificates that may be furnished. However, this exercise of ascertaining the truthfulness of these disability certificates must in any event be completed within a period of 2 weeks from the date of submission of such disability certificates. In the event that MSRTC fails to find any fault with the said disability certificates, the principles enumerated hereinabove ought to apply.

24. MSRTC will have to implement these guidelines in their entirety, keeping in mind the intent, objective and spirit of the 2016 Act.

5) The judgment of this Court in **Vikas Khanderao Keng** (supra), was challenged by the Respondents therein before the Apex Court by filing Civil Appeal Nos. 3607-3620 of 2020. By Order dated 3 November 2020, the Apex Court has made only two modifications in the operative directions issued by this Court in **Vikas Khanderao Keng**. The Apex Court shifted the burden of proving lack of gainful employment on the concerned employees by directing them to file Affidavits in that regard. The Apex Court has also held that this Court erred in setting aside Clause-11 of the impugned Circular and held that alternate employment will have to be located within a period of three months as set out in Clause-9 of the Circular. The Order passed by the Apex Court on 3 November 2022 reads thus:

Leave granted.

Learned counsel for the respondents/caveator accepts notice.

We have heard learned counsel for parties.

We are broadly in agreement with the view taken by the Bombay High Court in the impugned order except on two aspects which we enumerate as under :

1) The first aspect is as discussed in paragraph 21 of the impugned judgment requiring the appellants to pay the respondents the back wages within six weeks from the pronouncement and the uploading of the order. Liberty has been granted to the appellants to ascertain whether or not any of the respondents who were otherwise employed during the intervening period for that period deduction of the amount of wages was held as permissible.

It has been rightly pointed out by the learned counsel for the appellants that this burden cannot be shifted on to the appellants and the information would be within the knowledge of the respondents. Learned counsel for the respondents cannot seriously dispute the aforesaid position.

We thus, direct that the respondents will file the relevant material along with their affidavits before the appellants within two weeks from today and the appellants can verify the position within a period of six weeks thereafter. Subject to the aforesaid verification, we grant four weeks' time thereafter to credit the account of the respondents dependent on the fate of the verification and the right of the appellants to deduct the amount in case the respondents are found having alternatively employed.

2) The second aspect arises from the observations towards the end of para 19 whereby Clause (11) of the impugned circular has been struck down. The said Clause reads as under:

“11. The period which elapses after the employee’s disability is advanced and he is promoted to alternative posts should be considered as normal unpaid leaves. Also the leaves in credit to his account should be carried forwarded to his alternate position.”

Learned counsel for the appellants has also drawn our attention to Clause (9) of the same Circular which reads as follows:

“9. After obtaining the certificate of disability and completing other matters, it will be appropriate to try to resolve the issue of alternative employment within three months so that the question of payment of previous service will not arise. As per the provisions of The Persons with Disabilities (Equal

Opportunities, Protection of Rights and Full Participation) Act, 1995, it will be necessary to comply with the previous salary protection, continuity of service & promotion.”

We are of the view that the learned counsel for the appellant is correct in contending that a conjoint reading of the two Clauses does not make it an open-ended exercise for the appellants and the issue of an alternative employment has to be resolved within a span of three months. We are thus, of the view that it would not be appropriate to quash the Clause (11) in this behalf. It appears that what weighed with the learned Judges while passing the impugned order was the fact that this Circular having come on 23rd January, 2020, it may be used to deprive the respondents of their back wages. That issue is taken care of by the order which we are passing now and upholding the back wages for the respondents as directed in the impugned order.

We thus, strike out the sentence in the impugned order setting aside the Circular which will hold good. The import of this for the other employees will be that the alternative employment would have to be located within the period of three months as set out in Clause (9) of the Circular.

The appeals are allowed to the limited extent in the aforesaid terms, leaving the parties to bear their own costs.

6) In view of judgment of this Court in **Vikas Khanderao Keng** as modified by the Apex Court by its order passed on 3 November 2020, the impugned Award of the Labour Court cannot be sustained. The Respondent-Transport Corporation was under obligation to provide alternate employment to Petitioners, consequent to them being found medically unfit on account of colour blindness. Their services could not have been terminated. The Labour Court has erred in answering the References in the negative.

7) Having held that the termination of services of the Petitioners is unlawful, the next issue is about the nature of relief that can be granted to them. Under the Scheme of the Act of 2016, the

Respondent is under legal obligation to provide alternate employment to Petitioners. Mr. Bhutekar, the learned counsel appearing for the Respondents, would fairly submit that the Respondent-Corporation shall make necessary efforts for locating alternate employments for the Petitioners within 8 weeks.

8) The next issue to be decided is about payment of backwages during the intervening period. This Court in ***Vikas Khanderrao Keng*** directed payment of full backwages during the intervening period. Payment of backwages was however subject to the condition of the individual employee proving before the employer that he was not gainfully employed during the intervening period. In the present case, the intervening period is little long. Payment of full backwages would put huge financial burden on Respondent-Corporation. Petitioners were terminated w.e.f. 19 October 2016 and by now period of about 8 long years has elapsed. In my view, considering the peculiar facts and circumstances of the present case, 50% backwages can be directed to be paid to the Petitioners during the intervening period from 19 October 2016 till the date of their actual reinstatement.

9) I accordingly proceed to pass the following order :

(i) Award dated 20 October 2022 passed by the Presiding Officer, Third Labour Court, Thane in Reference (IDA) Nos.175/2018 and 176/2018 are set aside.

(ii) Respondent Nos.2 to 4 shall reinstate Petitioners in service by offering them alternate employment suitable to their medical condition within a period of 8 weeks from today.

(iii) The Petitioners shall be entitled to 50% backwages from the date of their termination till the date of their reinstatement. The amount of backwages shall be paid to them within a period of 8 weeks of their reinstatement.

10) With the above directions, the Writ Petitions are **allowed**.
Rule is made absolute in both petitions.

SANDEEP V. MARNE, J.