

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

WRIT PETITION NO.4915 OF 2024

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

....Petitioner

V/S

Kishor Gulab Salve
F/16, Wadala BEST Kamgar Vasahat
Tilak Road Extension, Wadala,
Mumbai – 400 031.

....Respondent

Mr. Arsh Misra *for Petitioners.*
Mr. R.D. Bhat *for Respondent.*

Mr. V.K. Patil, Legal Advisor, BEST-Undertaking present in Court.

CORAM: SANDEEP V. MARNE, J.
RESERVED ON : 01 AUGUST 2024.
PRONOUNCED ON : 09 AUGUST 2024.

JUDGMENT

1 Petitioner-Brihan Mumbai Electric Supply and Transport Undertaking
(BEST) has filed this Petition challenging the judgment and order dated 5
November 2022 passed by Industrial Court, Mumbai, in Appeal (IC) Nos. 3
of 2022 and 5 of 2022. The Industrial Court has allowed Appeal (IC) No.3 of

2022 filed by the Respondent-employee and has set aside the order of the Labour Court on preliminary issue of perversity dated 27 January 2022. Appeal (IC) No.5 of 2022 filed by the Respondent-employee is allowed by setting aside Labour Court's order dated 23 March 2022. The Industrial Court has allowed Application (BIR-R) No.10 of 2019, the Industrial Court has directed that the orders passed by the Enquiry Officer and by Appellate Authorities are set aside and the Respondent-employee is directed to be reinstated in service with full backwages and continuity and other consequential benefits from 24 July 2018.

2 Petitioner-BEST is a statutory undertaking of Municipal Corporation of Greater Mumbai constituted under the provisions of Mumbai Municipal Corporation Act, 1888. It is a public utility which distributes and supplies electricity in the island city of Mumbai as well as provides mass public transportation through its buses in Mumbai city and its vicinity. Respondent-employee was appointed in the service of Petitioner-Undertaking on 28 December 2009 on the post of Bus Conductor. On 18 February 2010, Respondent-employee suffered injury in an accident and after medical evaluation and treatment, he was issued with disability certificate dated 15 September 2010 indicating 45% disability by Sir JJ Group of Hospital, Mumbai. Considering the disability acquired by him, an order was passed for grant of suitable alternate employment in any department/depot/workshop of the Petitioner-Undertaking subject to exigencies of service by protecting his salary of post of Junior Bus Conductor. His designation as Junior Bus Conductor was however continued. It appears that Respondent-employee was given clerical job in Mumbai Central Depot with effect from 10 March 2011.

3 On 26 July 2016, a complaint was made by one Mr. Suhas Samant, a political leader and member of BEST Committee complaining about Respondent's faking his disability and requesting for conducting his fresh medical examination. On 25 November 2016, Deputy Manager of Santacruz Bus Depot filed a confidential report stating that Respondent-employee was seen riding two-wheeler and was also seen not using crutches or lumbar-belt. On account of the said confidential report, Respondent-employee was referred to Sir JJ Group of Hospitals for issuance of computerized disability certificate. Sir JJ Group of Hospitals issued medical certificate dated 24 July 2017 certifying 69% disability. On 7 September 2017, Petitioner-Undertaking called upon Respondent to report to Medical Department for evaluation. Based on the said medical evaluation, Petitioner-Undertaking passed order dated 22 November 2017 declaring Respondent eligible to work as Bus Conductor with effect from 11 October 2017 on condition of re-medical examination after expiry of three months. His alternate job as Clerk was immediately withdrawn.

4 According to Petitioner-Undertaking, Respondent-employee remained unauthorizedly absent from 24 November 2017 to 11 December 2017 and from 12 December 2017 to 31 December 2017 without sanction of leave. Accordingly, Petitioner-Undertaking initiated domestic enquiry against Respondent-employee vide charge-sheet dated 8 May 2018 alleging unauthorized absence and alleging misconduct under Standing Orders Nos. 20(f), 20(k) and 20(ze). Departmental Enquiry was conducted into the alleged misconduct. The Enquiry Officer submitted his report holding the charge to be proved. Petitioner-Undertaking proceeded to impose the penalty

of dismissal from service on Respondent-employee vide order dated 24 July 2018. His First Appeal was rejected by order dated 6 September 2018. His Second Appeal was also rejected by order dated 5 December 2018.

5 Respondent-employee filed Application (BIR-R) No.10 of 2019 before Labour Court challenging the orders dated 24 July 2018, 6 September 2018 and 5 December 2018. The Application was resisted by Petitioner-Undertaking by filing written statement. By Part-I Award dated 27 January 2022, Labour Court held that enquiry conducted by Petitioner was fair and proper and that the findings were not perverse. By judgment and order dated 23 March 2022, Labour Court proceeded to dismiss Application (BIR-R) No.10 of 2019 by way of Part II Award.

6 Respondent-employee preferred Appeals under section 84 of the Bombay Industrial Relations Act, 1946, bearing Appeal (IC) No. 3 of 2022 challenging Part-I Award dated 27 January 2022, He also filed Appeal (IC) No.5 of 2022 challenging Part II Award dated 23 March 2022. Industrial Court delivered common judgment and order dated 5 November 2005 partly allowing Appeal (IC) No.3 of 2022 and setting aside the order of the Labour Court dated 27 January 2022 on the point of perversity. Appeal (IC) No.5 of 2022 is fully allowed by setting aside final Award dated 23 March 2022. The Industrial Court has proceeded to allow Application (BIR-R) No.10 of 2019 and has set aside orders of the Enquiry Officer as well as the orders of the Appellate Authorities with further direction to the Petitioner-Undertaking to reinstate Respondent-employee in service with full backwages, continuity and consequential benefits with effect from 24 July 2018.

7 Mr. Arsh Misra, the learned counsel appearing on behalf of Petitioner-Undertaking would submit that the Industrial Court has erred in reversing well-reasoned Part I and Part II Awards passed by Labour Court. That the Labour Court had rightly held the enquiry to be fair and proper and that the findings of Enquiry Officer as not perverse. It had thereafter dismissed Complaint (BIR-R) No.10 of 2019 by Part-II Award dated 23 March 2022. That however the Industrial Court has virtually interfered with both Part I and Part II Awards for directing reinstatement of Respondent-employee with continuity and full backwages.

8 Mr. Misra would submit that the charge in the disciplinary enquiry was restricted to unauthorized absence of Respondent-employee without any valid cause and in absence of sanctioned leave. That instead of restricting itself to the charge levelled in the enquiry, the Industrial Court has erroneously gone into aspect withdrawal of alternate employment offered to Respondent-employee and his disability certificate. That the said issues are totally far end the domestic enquiry. He would submit that the Industrial Court has erroneously recorded finding of victimization by unnecessarily establishing the connection between domestic enquiry and disability of Respondent-employee. That the service record of Respondent-employee is tainted with similar past misconducts, which was correctly appreciated by the Labour Court. That the unauthorized absence of the Respondent-employee was aimed at frustrating the order dated 22 November 2017 posting him as Bus Conductor. That he wanted to avoid performance of duties as Bus Conductor and deliberately whiled away time for getting his badge cancelled from RTO, so that he is not ask to perform duties of Bus Conductor. That Respondent-

employee has faked his disability and he has been seen using two wheeler as per confidential report submitted by the Depot Manager of Santacruz Bus Depot on 25 November 2016 which also reflects that he never attended BEST Medical Dispensary. Mr. Misra would rely upon judgment of this Court in *Brihan Mumbai Municipal Corporation vs. The General Secretary, Best Workers Union and others*¹ and of Allahabad High Court in *M/s. Banaras Electric Light and Power Co. Ltd. vs. The Labour Court II, Lucknow and others*,².

9 The Petition is opposed by Mr. Bhat, the learned counsel appearing for Respondent-employee. He would submit that the Industrial Court has rightly appreciated the background in which Respondent-employee was forced to remain absent. That under provisions of Section 20 of the Motor Vehicles Act, (MV Act) a Conductor is required to possess license issued by Regional Transport Authority (RTA) and therefore Respondent-employee was required to avail leave with a view to secure license from RTA. That the earlier badge issued to him had automatically expired under provisions of section 20 of the MV Act and it was necessary for him to renew the same. He would rely upon leave applications specifically informing Petitioner-Undertaking that leave was availed for securing badge. He would submit that on 24 November 2017 hearing was conducted at RTA and decision was taken on 11 December 2017 to cancel the badge already issued to Respondent-employee. That the next stint of leave from 12 December 2017 to 31 December 2017 was on account of ill-health of Respondent's wife, which is well documented by necessary

1 1998 SCC OnLine Bom 849

2 (1974) 3 SCC103

medical papers. That therefore no misconduct was committed by him and he has been illegally punished by way of victimization.

10 Mr. Bhat would submit that Respondent was deputed to undergo medical test before Sir JJ Group of Hospital acting on false and motivated Complaint of Mr. Sawant and after his medical evaluation, he was still issued disability certificate indicating 69% disability by Sir JJ Group of Hospital. That the Complaint was thus found to be false. Petitioner-Undertaking thereafter illegally subjected him to internal medical evaluation for the purpose of withdrawal of alternate employment granted to him. That under the provisions of Rights of Persons with Disability Act, 2016 (**Act of 2016**) Sir JJ Group of Hospital is a certifying authority under section 53 and that the certificate issued by it is considered valid throughout India under Section 58(3). That only Appellate Authority under section 59 is empowered to tinker with the certificate issued by the certifying authority. That Medical Officer of BEST-Undertaking is not competent under section 59 to overrule or ignore the medical disability certificate. Mr. Bhat would therefore submit that a clear case of victimization is made out. He would rely upon judgment of this Court in *Municipal Corporation of Greater Mumbai vs. Shrirang Anandrao Jadhav*³ in support of his contention that the dismissal of Respondent's service is against the spirit of the Act of 2016. He would pray for dismissal of the Petition.

11 Rival contentions of parties now fall for my consideration.

12 Few facts which are not under dispute are that – Respondent was initially appointed on the post of Bus Conductor on 28 December 2009. He suffered accident on 18 February 2010 while being duty and owing two injuries suffered by him, a disability certificate came to be issued to him by Medical Board of Sir J.J. Group of Hospitals on 15 September 2010 indicating 45% disability. Consequent to acquisition of disability, Petitioner Undertaking offered alternate clerical job to him while protecting his salary on the post of Junior Bus Conductor. It appears that he came to be posted as Clerk after acquisition of disability.

13 Petitioner-Undertaking unnecessarily acted on a Complaint dated 26 July 2016 made by Mr. Suhas Sawant, who was apparently wearing twin hats of being Deputy Leader of a political party and also nominated Member of BEST Committee. He expressed doubt that the disability certificate of Respondent-employee might be fraudulent and that in fact he is physically fit. Mr. Sawant therefore demanded his fresh medical examination. In my view, there was absolutely no reason for Petitioner-Undertaking to act on such baseless complaint of Mr. Sawant when disability certificate under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was issued by the Competent Certifying Authority on 15 September 2010. Petitioner-Undertaking however erroneously acted on Complaint of Mr. Sawant dated 26 July 2016 and unnecessarily directed Respondent-employee to appear before Medical Board of Sir JJ Group of Hospitals. By letter dated 11 April 2017, Chief Medical Officer of Petitioner-Undertaking wrote to the Dean of Sir JJ Group of

Hospitals giving brief details about the patient and his disability certificate issued by Sir JJ Group of Hospital. The said Chief Medical Officer made a baseless allegation in his letter dated 11 April 2017 that “*Patient was issued the above disability certificate without any specialized test and without offering specialized treatment like surgical intervention/occupational therapy/physiotherapy*”. In my view, it was beyond jurisdiction of the Chief Medical Officer of Petitioner-Undertaking to question opinion of Medical Board issuing disability certificate to Respondent. Be that as it may. The said Chief Medical Officer referred Petitioner-Undertaking for reassessment for issuance of ‘Computerized Disability Certificate’ as per 2001 guidelines for calculation of physical disability under RPWD Act. As a matter of fact, it was not at all necessary for Respondent-employee to act on such illegal reference of Chief Medical Officer dated 11 April 2017. Nonetheless Respondent presented himself for evaluation by Medical Board of Sir JJ Group of Hospital. After conducting his evaluation, Sir JJ Group of Hospitals issued Disability Certificate in Form-IV certifying that Respondent-employee possesses 69% disability, further stating that his condition was “*permanent, non-progressive and not likely improve*”. The certificate was signed by Assistant Professor Orthopedics as Member, Medical Superintendent as Member Secretary and Dean as President. This is how ‘computerized disability certificate’ as expected by the Chief Medical Officer of Petitioner-Undertaking was issued by Sir JJ Group of Hospital.

14. Here it would be appropriate to make a quick reference to the provisions under section 57 of the of RPWD Act, under which the appropriate

Government can designate persons having requisite qualifications and experience as ‘certifying authorities’ who become competent to issue the certificate of disability. Section 57 of the RPWD Act reads thus:

“57. Designation of certifying authorities.- (1) The appropriate Government shall designate persons, having requisite qualifications and experience, as certifying authorities, who shall be competent to issue the certificate of disability.

(2) The appropriate Government shall also notify the jurisdiction within which and the terms and conditions subject to which, the certifying authority shall perform its certification functions.”

15 The Disability Certificate is then issued by the Certifying Officer by following the procedure for certification under section 58 of the RPWD Act, which reads thus:

“58. Procedure for certification.- (1) Any person with specified disability, may apply, in such manner as may be prescribed by the Central Government, to a certifying authority having jurisdiction, for issuing of a certificate of disability.

(2) On receipt of an application under sub-section (1), the certifying authority shall assess the disability of the concerned person in accordance with relevant guidelines notified under section 56, and shall, after such assessment, as the case may be, -

(a) issue a certificate of disability to such person, in such form as may be prescribed by the Central Government;

(b) inform him in writing that he has no specified disability.

(3) The certificate of disability issued under this section shall be valid across the country.”

16 Thus the certifying authority issues certificate of disability after following the relevant guidelines notified under section 56 of the RPWD Act. Sub-section (3) of Section 58 RPWD Act provides that the certificate of disability issued under section 58 is valid across the country. Section 59 of the

RPWD Act provides for appeal against the decision of certifying authority. Only an Appellate Authority designated by the State Government can upset a certificate of disability issued by the Certifying Authority.

17 In the present case, it appears that when Respondent-employee produced 'computerized disability certificate' as expected by the Chief Medical Officer, he was directed to appear before the General Physician of Petitioner-Undertaking, who is not the Appellate Authority under section 59 of the RPWD Act. On 10 November 2017, the General Physician initially doubted the fresh disability certificate dated 24 July 2017 questioning as to whether the Medical Board of Sir JJ Hospital had conducted MRI or not. Respondent has produced on record at Exhibit-C to his Affidavit-in-Reply MIR test report dated 10 July 2017 conducted by Sir JJ Group of Hospitals. Despite this, the General Physician made unwarranted remarks on the relevant medical papers. On 11 October 2017 the General Physician remarked on the relevant medical papers as under:

“Fit for Conductor job for three months.”

18 The above remark made by General Physician of Petitioner-Undertaking has led to issuance of order dated 22 November 2017 by which Respondent-employee was held eligible to work as Conductor for three months on condition of fresh medical examination after three months. The alternate job of Clerk, which was being performed by him since the year 2011, was suddenly withdrawn.

19 It is but natural for a disabled person like Respondent-employee to feel shocked on account of arbitrary actions of Petitioner-Undertaking as noted above. The Industrial Court has rightly considered the above background while dealing with the allegation of unauthorized absence for the period from 24 November 2017 to 11 December 2017 and from 12 December 2017 to 31 December 2017. I am fully in agreement with the findings recorded by the Industrial Court that there has been victimization and discrimination on the part of Petitioner-Undertaking while dealing with Respondent's case, who is a disabled employee, repeatedly certified to be disabled by the competent certifying authorities. The Doctors in the Medical Department of Petitioner-Undertaking have exceeded their jurisdiction by questioning correctness of disability certificate issued by the competent Certifying Authority being Sir JJ Group of Hospitals. They had no authority to do so. In that view of the matter, the findings recorded by the Industrial Court about victimization and discrimination do not warrant any interference at the hands of this Court.

20 Reliance by Mr. Misra on judgments of the Apex Court in *M/s. Banaras Electric Light and Power Co. Ltd.* (supra) and of this Court in *Brihan Mumbai Municipal Corporation* (supra) is misplaced as the said decisions have no application to the facts and circumstances of the present case. This is not a chronic case of absenteeism as was the case in *Brihan Mumbai Municipal Corporation* (supra). In *M/s. Banaras Electric Light and Power Co. Ltd.* (supra) the Apex Court rejected the allegation of victimization on the ground that no complaint of victimization was made nor any ground taken before the Labour Court and even evidence was not produced in support of allegation of

victimization. The Apex Court therefore disapproved the approach of Labour Court and High Court in going into the issue of victimization. In the present case the facts of the case as noted above clearly make out a case of victimization against the Respondent.

21 The judgment of this Court in *Municipal Corporation of Greater Mumbai (supra)* relied upon by Mr. Bhat appears to be apposite. In case before this Court, the Respondent therein was employed as Bus Driver and had sustained injuries while driving the bus on account of stone pelting by the mob and acquired disability. While he was allotted duties as a Sports Maker for few days, he was ultimately terminated. This Court referred to provisions of section 47 of the PWD Act, 1995 and held in paragraph 18 as under:

“18. The Persons with Disabilities Act, 1995 creates valuable rights which are intended to protect employees of public bodies, in a welfare state, who acquire a disability while in service. The protection which is conferred by Section 47 cannot be violated or abrogated by taking recourse to disingenuous methods which would defeat the rights which Parliament has conferred upon persons with disability. The Persons with Disabilities Act, 1995, is a Parliamentary recognition of the special needs of persons with disabilities, of the affirmative action that is required to protect their life and liberty under Article 21 of the Constitution and to ensure them a right of dignified existence. In cases governed by the Persons with Disabilities Act, 1995, the Court has viewed an abrogation of the mandate of Section 47 in strict terms. The general principles which are applicable to the grant of backwages in a situation of termination governed by the Industrial Disputes Act, 1947 would need to be modulated where there is a breach by a public employer of the rights which are conferred by Section 47 of the Persons with Disabilities Act, 1995. A case governed by Section 47 cannot be treated at par with cases where the services of an employee have been dispensed with as a result of an act of misconduct, or for that matter as a result of volition on the part of the employee. In a case where the employer has been in breach of the mandatory obligation under Section 47, it would not be permissible to deprive the employee of consequential benefits when the Court sets aside an

illegal action. An employer in the public sector must be held to strict compliance with the Persons with Disabilities Act, 1995 and any dereliction of the obligation mandated by Section 47 will have to be visited with the grant of consequential benefits. As a matter of fact, the Supreme Court in *Bhagwandas v. Punjab State Electricity Board*, (2008) 1 SCC 579 came to the conclusion that the termination of the services of a disabled employee in that case was illegal and in view of the provisions of Section 47 of the Act, the Appellant must be deemed to be in service and would be entitled to all service benefits including annual increment and promotion etc till his retirement. The same grant of consequential benefits has also been adopted in a judgment of the Division Bench of the Madras High Court to which a reference has been made earlier.”

22 In my view therefore Respondent-employee has been erroneously held guilty of charge leveled in the domestic enquiry. The officials of Petitioner-Undertaking themselves are responsible for his absence who suddenly asked a disabled person suffering from 69% physical impairment to work as Conductor in busy BEST buses. The punishment of dismissal from service imposed on the Respondent-employee is thus totally unsustainable and has rightly been set aside by the learned Member of the Industrial Court. The Industrial Court has therefore rightly directed Respondent’s reinstatement in service with continuity from 24 July 2018.

23. Facts of the case actually warrant imposition of exemplary costs of Petitioner-Undertaking. However there is one mitigating factor, which refrains me from imposing costs on Petitioner while dismissing the Petition. During the course of hearing of Petition, a query was raised with Mr. Misra as to whether upon reinstatement of Respondent, Petitioner-Undertaking would continue with its illegal order dated 22 November 2017 and drive Respondent-employee to another round of litigation for challenging the said order. After

taking instructions from Mr. V.K. Patil, the Legal Advisor of Petitioner-Undertaking, who is personally present before the Court Mr. Misra has made a statement that the order dated 22 November 2017 shall not be acted upon and Respondent-employee would be reinstated on the post of Clerk. Albeit belatedly, Petitioner-Undertaking has shown some fairness in the case, which is the only reason why this Court is not imposing any costs on the Petitioner-Undertaking.

24. What remains now is the issue of payment of full backwages to Respondent-employee. No doubt Respondent-employee has been illegally dismissed from service by way of victimization. However, his absence from duty during the period from 24 November 2017 to 11 December 2017 and from 12 December 2017 to 31 December 2017 is not disputed. No doubt, he must have been in a state of shock on account of sudden direction to work as Conductor by withdrawing alternate employment on the post of Clerk by order dated 22 November 2017. It appears that he submitted application on 7 December 2017 seeking leave for the period from 24 November 2017 to 11 December 2017. The reasons stated in the application for leave was “for securing badge”. It appears that the leave was rejected by the leave sanctioning authority. Respondent-employee did approach Regional Transport Authority, Mumbai, in connection with his license/badge. However, it is the contention of Petitioner-Undertaking that he was actually attempted to get his badge cancelled with a view to avoid performance of duties of Conductor and that the badge has been cancelled by RTA on Respondent’s own request. While it is sought to be alleged he was shying

away from duties under false pretext of securing license when in fact he was making efforts from cancellation thereof, it must also be appreciated that Respondent-employee, being a disabled employee and who was suddenly asked to work in crowded BEST buses as Conductor after gap of six long years, was merely making efforts for securing alternate sedentary job once again. At the same time, Respondent-employee submitted the application for leave belatedly on 7 December 2017 when he had remained absent from 24 November 2017. Similar is the position in respect of second stint of absence from 12 December 2017 to 31 December 2017, where the application was submitted by him on 18 December 2017. Thus, on both the occasions Respondent-employee did not proceed on leave after obtaining prior sanction for leave. Mr. Samant has contended that he had 95 days' of leave balance in his account. But at the same time, it is not for the employee to proceed on leave without seeking prior sanction therefor. Considering this conduct of Respondent-employee, in my view, payment of 100% backwages to him would not be appropriate. Therefore, the backwages payable to him need to be reduced to 50%.

25 I accordingly proceed to pass the following order:

ORDER

- (i) Judgment and order dated 5 November 2022 passed by Industrial Court, to the extent for direction for reinstatement, is upheld.
- (ii) However as agreed by Petitioner-Undertaking, Respondent shall be reinstated on the post of Clerk w.e.f. 24 July 2018 with continuity of service.

- (iii) Petitioner-Undertaking shall pay to Respondent 50% backwages from the date of dismissal till the date of reinstatement.
- (iv) The Petitioner-Undertaking shall issue an order for reinstatement of the Respondent-employee within a period of two weeks and shall pay the backwages as awarded above within a period of six weeks.

26 With the above directions, the Writ Petition is **disposed of**.

(SANDEEP V. MARNE, J.)

Digitally signed
by
SUDARSHAN
RAJALINGAM
KATKAM
Date:
2024.08.09
20:23:57 +0530