

Bombay High Court

Edward Swalin D'Cunha vs Commissioner For Persons on 18 March, 2010

Bench: Ranjana Desai, A.A. Sayed

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 716 OF 2008

Edward Swalin D'Cunha)
Adult, Indian Inhabitant,)
residing at 16/7, Green Crest,)
Amritvan, Goregaon (East),)

Bombay - 400 063. ...)

..... Petitioner

Versus

1) Commissioner for Persons)

with Disabilities,)
Having their office at)

Commissionerate for)
Persons with Disabilities,)
Maharashtra State, Pune -)
411 001.)

2) Shipping Corporation of)
India, Through its)
Chairman, having his office)
at Shipping House, 245,)

Madam Cama Road,)
Bombay - 400 021.)

..... Respondents.

Mr. P. M. Havnur for the Petitioner.
Mrs M.P. Thakur, AGP for respondent No.1
Ms Srivastava i/b M/s Consulta Juris for the Respondent No.2.

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CORAM : SMT. RANJANA DESAI, and

A. A. SAYED, JJ.

RESERVED ON : 25TH SEPTEMBER, 2009.

PRONOUNCED ON : 18TH MARCH, 2010.
(AT 2.40 P.M. IN CHAMBER)

JUDGMENT (Per A.A.Sayed, J.)

:

1. Rule. By consent, rule made returnable forthwith and heard finally.

2. By the above petition, the petitioner, who is a person suffering from disability, has called in question the legality and validity of the order dated 30th December, 2006 passed by respondent No.1 - Commissioner of Persons with Disability, Maharashtra State, Pune. By the impugned order, respondent No.1-Commissioner rejected the Complaint filed by the petitioner against his employer respondent No.2 - Shipping Corporation of India (for short "SCI"). The Complaint was filed under Section 62 of the Persons with Disabilities (Equal Opportunity, Protection and Rights and Full Participation) Act, 1995 (for short "the Disabilities Act") alleging discrimination in employment practiced by SCI and alleging contravention of provisions of the Disabilities Act. The petitioner has also prayed for directions to SCI to pay to the petitioner all back wages with appropriate promotions and to hold that the petitioner is in continuous service.

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3. The petitioner joined SCI on 11th June, 1993 on being selected as a Trainee Nautical Officer Cadre (TNO). The petitioner was confirmed in the rank of 3rd Officer after completion of the training period of 5 years and after securing a Second Mate (FG) Certificate. Sometime in the year 1997, when the petitioner was on duty in SCI vessel MT Major Somnath Sharma (PVC), he had to sign off as he fell sick. He was admitted in a nursing home at Vishakhapatnam by SCI. The petitioner has relied on the letter dated 6th June, 1997 addressed by Capt. Domir, Master of the said MT Major Somnath Sharma (PVC) of SCI to M/s. AVBGPR & Company, Agent (SCI), Vizag, copy of which is annexed as Exhibit "C" to the petition. In the said letter Captain Domir has stated that the petitioner be referred to the Company's (SCI's) Medical Doctor as he has been suffering from mental confusion for last one month and his state was aggravating progressively and he was getting bouts of nausea. It was requested by the said letter that the petitioner may be kept ashore for further investigation and on being fit he may be sent to Head Office for further instructions.

4. After a few months of treatment, the petitioner resumed and worked for about six months on vessel MT Sarojini Naidu. The petitioner submitted his Second Mates (FG) Certificate of competency on 27th March, 1998, after being declared fit for sea service by the Chief Medical ::: Downloaded on - 09/06/2013 15:43:46 ::: 4 Officer of SCI. The petitioner was thereafter posted on vessel MV Kabirdas at Mangalore. However, he again fell sick on account of mental illness and signed off on 17th April, 1998. After recovery, the petitioner joined MT Bankimchandra Chatterjee on 29th September, 1998 and signed off on 30th September, 1998 on account of mental illness. On 6th November, 1998 he joined MV Harkishan and signed off on 3rd January, 1999 due to mental illness. The petitioner also served on vessels MT Homi Bhabha and MT Rajendra Prasad.

5. On 27th April, 2000, the petitioner was posted on vessel MT CHM Piru Singh and signed off from the said vessel at Chennai on 11th May, 2000 on account of mental illness. That was the last vessel he sailed.

6. It is the case of the petitioner that on 10th June, 2000 he went to submit the medical certificate dated 20th May, 2000 of his doctor, Dr. Rajan S. Prabhu, M.D. (Psychiatrist) (Exhibit "D" to the petition), with a request to grant him 3 months leave on account of his illness as stated in the certificate. However, Capt. S. D. Kundhari, coerced him to resign taking advantage of his illness by

promising him that he would be considered for onshore job if he submits his resignation. On 13th August, 2001, Mr. Mohan Ajgaonkar of SCI made him write another letter by representing to him that his earlier resignation dated 10th June, 2000 was :::: Downloaded on - 09/06/2013 15:43:46 :::: 5 missing. On 23rd October, 2001, Dr. Rajan S. Prabhu, M.D. (Psychiatrist) certified the petitioner to be fit for shore job. The said certificate is annexed as Exhibit "E" to the petition. On 5th November, 2001, Capt. C. P.

Athaide, Dy. General Manager of SCI addressed a letter to the petitioner calling upon him to fill up exit interview form.

7. According to the petitioner, he and his father, who is his guardian, were not aware of his rights under the Disabilities Act and therefore submitted letter of resignation on 10th June, 2000, as also the letter of 13th August, 2001.

8. The petitioner thereafter by his advocate's letter dated 27th November, 2001 called upon SCI to give him onshore task and pointed out that the letter of resignation was given by the petitioner believing that he would be entrusted onshore job considering his mental health condition, as was assured to him by the officers of SCI. By the said letter dated 27th November, 2001, SCI was called upon to restore the petitioner on duty, else, the petitioner would file appropriate proceedings for being discriminated against, under the provisions of the Disabilities Act.

However, SCI by its letter dated 10th December, 2001 replied to the aforesaid legal notice stating that the resignation was given by the petitioner on his own free will on 10th June, 2000 and that SCI had no :::: Downloaded on - 09/06/2013 15:43:46 :::: 6 policy to offer shore cadre posting to floating staff officers.

9. It is the further case of the petitioner that he had not filled his Exit Interview Form as the resignation was not tendered of his own free will and was obtained by taking undue advantage of his mental illness. The petitioner, therefore, filed a Complaint dated 6th February, 2001 against Respondent No.2-SCI under Section 62 of the Disabilities Act before the respondent No.1 - Commissioner for Persons with Disabilities, Pune.

10. On filing of the Complaint, respondent No.1-Commissioner called upon the petitioner to submit Medical Certificate of his disability. The petitioner furnished a Medical Certificate issued on 4th April, 2002 by Dr. Y. A. Matcheswalla, M.D.(Psy.), J.J. Government Hospital, certifying the petitioner to be fit for Office (shore) duties and to avoid sailing duty. It appears that since the said Certificate was not issued by the Medical Board as required under the rules framed under the Disabilities Act, the respondent No.1-Commissioner upon the request of father of petitioner, by his letter dated 3rd July, 2003, requested the Civil Surgeon, J. J. Group of Hospitals (Medical Board), Mumbai that the petitioner be medically examined by the Medical Board as constituted under the Disabilities Act and to issue an appropriate Medical Certificate in respect of his disability.

Pursuant to the said letter, the Standing Medical Board, Sir J. J. Group of :::: Downloaded on - 09/06/2013 15:43:46 :::: 7 Hospitals, vide their letter dated 4th April, 2004 addressed to the

Commissioner, after medically examining the petitioner, forwarded the Disability Certificate to the respondent No.1 - Commissioner, certifying that the petitioner was suffering from disability and his diagnosis was described as - "Schizophrenia is partial remission. Psy. Disability is seventy per cent". The said Disability Certificate is signed by the Chairman and two other Standing Medical Board Members of Sir J. J. Group of Hospitals (Exhibit "P" to the petition). The petitioner, in his petition, has made a grievance that the entire process of getting himself examined by the Medical Board and the issuance of the Disability Certificate took him altogether 9 months and involved innumerable visits to Sir J. J. Group of Hospitals at Mumbai. The petitioner has also annexed to the petition, a copy of Disabled Persons Identity Card dated 30th August, 2004 issued to him by the Directorate of Social Welfare, Maharashtra State.

11. During the pendency of the Complaint before respondent No.1-

Commissioner, SCI vide their letter dated 26th April, 2004 addressed to the petitioner, forwarded the full and final settlement receipt along with full and final account and called upon the petitioner to return the said full and final receipt duly filled in and informed the petitioner that the cheque towards the full and final settlement will be released only on receiving the receipt from the petitioner.

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12. According to the petitioner, time and again his father reminded the respondent No.1-Commissioner to pass orders in the pending dispute concerning the petitioner. Ultimately, his father on 13th November, 2006 applied under the Right to Information Act, to inquire about the fate of the petitioner's pending case. Since no information was furnished, the petitioner filed an appeal under Section 91 of the Right to Information Act on 18th December, 2006 inquiring about the status of his case pending with respondent No.1-Commissioner. Thereafter, petitioner's father also filed a Second Appeal on 12th February, 2007 before the State Commissioner. It is stated that after a period of 4½ years, the respondent No.1-Commissioner has passed the impugned order of 30th December, 2006 which appears to be backdated, rejecting the Complaint of the petitioner, on the ground that the petitioner had given his resignation voluntarily and that he had not produced any Disability Certificate issued by the Medical Board while filing the complaint. The petitioner has stated that it was only on 3rd November, 2007 that he received a copy of the impugned order dated 30th December, 2006. The petitioner has therefore, filed the present writ petition on 6th December, 2007, inter alia claiming protection of his service under the provisions of Section 47(1) the Disabilities Act.

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13. Reply is filed on behalf of respondent No.1-Commissioner stating that the petitioner had resigned from his job voluntarily on 10th June, 2000 and the petitioner had himself applied for settlement of monetary claim on 13th August, 2001. It is further stated that the petitioner had not produced any Disability Certificate issued by the Competent Authority to prove his disability at the time of filing of his Complaint. It is also stated that on 4th March, 2004 a Certificate of Disability of

even date, viz., 4th March, 2004 was received by the office of the Respondent No.1-

Commissioner issued by the Medical Board, Sir J. J. Group of Hospitals showing the diagnosis of the petitioner as - "Schizophrenia is partial remission. Psy. Disability is seventy per cent". It is further stated that Section 47(1) of the Disabilities Act is applicable to those individuals who acquire disability during service and as the petitioner had resigned on 10th June, 2000, the benefit of Section 47(1) of the Disabilities Act of shifting the petitioner to some other post with the same pay scale and service benefit could not be provided to the petitioner. Insofar as the delay in passing the impugned order is concerned, it is stated that respondent No. 1- Commissioner has to perform all administrative functions under the Disabilities Act and also required to implement various schemes, orders and directions issued by the State Government from time to time and also further required to attend the High Court at Bombay, Nagpur and :: Downloaded on - 09/06/2013 15:43:46 ::: 10 Aurangabad as also the other Courts. It is stated that the petitioner was heard from time to time, not less than 15 times, and there was no intentional delay on the part of respondent No.1-Commissioner in passing the impugned order.

14. Reply has also been filed by respondent No.2-SCI, wherein it is stated that the petitioner had no documentary evidence to support his claim nor any Disability Certificate issued by Medical Board constituted by the Government Authority in terms of the guidelines for evaluation and assessment of disability claim under the Disabilities Act at the time of filing of the Complaint and hence the petitioner was not entitled to apply for facilities, concessions and benefits admissible under any of the schemes under the Disabilities Act. It is stated that the petitioner on his own free will submitted his resignation on 10th June, 2000 and has by his letter dated 13th August, 2001 confirmed his resignation from service with effect from 10th June, 2000 and also reminded SCI for settlement of his dues at the earliest and his resignation was accepted. It is contended that the petitioner did not fall under Section 2(i) (vii) or any other provisions of the Disabilities Act at the time of his resignation. It is stated that the petitioner was employed exclusively as a member of the floating staff in the rank of 3rd Officer and SCI does not have any policy to offer shore cadre posting to floating staff officers at the level of 3rd Officer. It is :: Downloaded on - 09/06/2013 15:43:46 ::: 11 further stated that when the petitioner approached respondent No.1-

Commissioner on 6th February, 2002, no Medical Certificate for disability was submitted along with the application. It is further averred that in the letters dated 10th June, 2000 and 13th August, 2001 the petitioner has nowhere mentioned about his mental illness, which would show that the petitioner had resigned on his own. It is further contended that the petitioner remained absent without applying for leave after he signed off from vessel CHM Piru Singh on 11th May, 2000 and that he had not acquired any disability during his service tenure.

15. Rejoinder to the affidavits has been filed by the petitioner reiterating the facts stated in the petition. Pertinently, in the rejoinder of the petitioner to the affidavit in reply filed by respondent No.2-SCI, a reference is made by the petitioner to a telegram received by him from SCI on 9th August, 2002 asking him to join his employment.

16. Learned Counsel for the petitioner at the outset took us through the relevant provisions of the Disabilities Act including the definitions of "disability" and "mental illness". He submitted that the employment of the petitioner is required to be protected under Section 47(1) of the Disabilities Act. He submitted that as per Section 47(1), the petitioner ought to have been offered a suitable job onshore considering his mental illness. Learned Counsel contended that the alleged resignation given by the petitioner was taken by force and coercion and that the same was not given on the petitioner's own free will. Learned Counsel submitted that the officers of SCI, taking advantage of the mental illness of the petitioner, took his signature on a typed resignation letter, when in fact the petitioner had on 10th June, 2000, sought to submit his medical certificate issued by Dr. Rajan S. Prabhu, M.D. (Psychiatrist), dated 20th May, 2000 and had requested for 3 months leave as reflected in the Medical Certificate.

Therefore, there was no intention on part of the petitioner to resign from the SCI. It is further submitted that the petitioner did not fill the Exit Interview Form as desired by the SCI and the petitioner continued to remain in service of SCI. The learned Counsel submitted that the petitioner became aware of his rights under the Disabilities Act only at a later date from his well wishers and from an NGO. Learned Counsel submitted that the impugned order is passed without considering the facts of the case and without considering the provisions of the Disabilities Act and urged that the same be set aside and it be declared that the petitioner has continued in service and he be granted all arrears of salary and benefits of promotion and the Respondent No.2 - SCI be directed to provide suitable onshore job to the petitioner.

17. In support of his contention regarding force and coercion the learned Counsel for the petitioner relied upon the case of Subhash Chandra Das Mushib V/s Ganga Prasad Das Mushib and Ors., reported in (1967) 1 SCR 331. In support of his contention relating to protection of employment of the petitioner under the Disabilities Act, the learned Counsel has placed reliance upon the following cases: (1) Kunal Singh V/s Union of India & Anr., reported in (2003) 4 SCC 524; (2) Unreported judgment of the Division Bench of this Court in Writ Petition No. 3545 of 2005 (Ashwini Ashok Desai V/s Chattrapati Shivaji Maharaj General Hospital) decided on 5th August, 2005.

18. Learned Assistant Government Pleader appearing on behalf of respondent No.1- Commissioner supported the impugned order.

19. Learned Counsel for respondent No.2-SCI, also supported the impugned order and submitted that the petitioner had on his own free will tendered his resignation on 10th June, 2000 which was confirmed by his letter dated 13th August, 2001 and therefore Section 47 of the Disabilities Act was not attracted. She further submitted that in any event there was no policy of SCI to offer shore cadre posting to floating staff officer at the level of 3rd Officer. The learned Counsel contended that no disability certificate, as required under the provisions of the Disabilities Act, was submitted by the petitioner to SCI.

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20. We have heard the learned Counsel appearing for the respective parties and perused the material on record including the impugned order.

The two questions, though interlinked in the facts of the present case, which arise for our consideration, are as under:-

(1) Whether the resignation tendered by the petitioner can be said to be a voluntary resignation?

(2) Whether the petitioner is entitled to protection of employment under Section 47 of the Disabilities Act?

21. At the outset, it needs to be stated that the most important and relevant aspect, which we find has remained to be brought to fore, is the tenor and purport of the letter of resignation dated 10 th June, 2000. Copy of this letter dated 10th June, 2000 has not been annexed to the petition as an Exhibit. This letter finds place as an annexure to the reply of respondent No.2-SCI in the proceedings before respondent No.1-

Commissioner for Persons with Disabilities, which reply is annexed as Exhibit "N" to this petition. The said resignation letter is, in our view, crucial for the purposes of determining whether or not the resignation of the petitioner was voluntary. The said letter dated 10th June 2000 is reproduced hereinbelow. It reads as under:

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"From:

E. S. D'Cunha, E.C.No. 540936, 2nd Officer, S.C.I., Mumbai-400 021.

10/06/2000 The Deputy General Manager, Fleet Personnel, Shipping Corporation of India, Madame Cama Road, Mumbai - 400 021.

Dear Sir, Sub : My resignation from service.

Due to stress at sea, I could not continue sailing for a long period. My request for a shore job was turned down, I have no alternative and but resign from your service as a 2 Officer .

Kindly arrange to settle my dues as early as possible. Thanking you, Yours faithfully, Sd/-

(E.S.D'Cunha) Address:

16/7, Green Crest, Amritvan, Goregaon (E), Mumbai - 400 063, Ph : 8403037."

(emphasis supplied) ::: Downloaded on - 09/06/2013 15:43:47 ::: 16

22. From a plain reading of the above letter dated 10th June, 2000, it is apparent that since the request of the petitioner for a shore job was turned down, he was left with no alternative but to resign from the employment of respondent No.2-SCI.

23. At this juncture, in the context of submission of letter of resignation, it would be necessary and advantageous to extract Section 47(1) of the Disabilities Act. It reads thus:

"(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."

Thus section 47(1) clearly lays down that if an employee acquires a disability during his service, his service cannot be dispensed with. He is required to be shifted to some other post with the same pay scale and service benefits. The section goes on to state 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. In light of the mandate of Section ::: Downloaded on - 09/06/2013 15:43:47 ::: 17 47(1), and considering the facts and circumstances of the instant case, we find that SCI was duty bound to offer an onshore post to the petitioner looking to the disability which the petitioner was suffering from, which they failed to do.

24. In a recent judgment delivered by the Hon'ble Supreme Court in the case of Bhagwan Dass and Anr. V/s Punjab State Electricity Board, reported in (2008) 1 SCC 579, (which we have also referred to later) the Apex Court was concerned with a somewhat similar issue. In that case the appellant before the Apex Court was an employee of the respondent Board who suffered visual impairment and became completely blind and he remained absent from duty from 1994 to 1997. Charge sheet was issued to him. The appellant vide his letter dated 17th July, 1996 explained his blindness and requested for his retirement with a further request that his wife may be provided a suitable job. The appellant subsequently wanted to withdraw his request for retirement when he came to know that he was entitled for protection under the Disabilities Act and he was not under any compulsion to seek retirement due to his blindness. His request for withdrawal of his resignation was however turned down. His Lordship Justice Aftab Alam, speaking on behalf of the Bench, in para 2 of the said judgment observed as follows:

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"2. This case highlights the highly insensitive and apathetic attitude harboured by some of us, living a normal healthy life, towards those unfortunate fellowmen who fell victim to some incapacitating disability. The facts of the case reveal that officers of the Punjab State Electricity Board were quite aware of the statutory rights of Appellant 1 and their corresponding obligation yet they denied him his lawful dues by means that can only be called disingenuous."

In para 17 of the said judgment, the Hon'ble Supreme Court observed that the letter was written by the appellant requesting retirement, but at the same time he asked that his wife should be given suitable job in his place.

The Apex Court while rejecting the contention of the respondent Board observed - "In our view it is impossible to read that letter as a voluntary offer for retirement".

In para 18 of the said judgment, the Apex Court observed as under:

"In those circumstances, it was the duty of the superior officers to explain to him the correct legal position and to tell him about his legal rights. Instead of doing that they threw him out of service by picking up a sentence from his letter, completely out of context. The action of the officers concerned of the Board, to our mind, was depreciable."

25. In the case before us also the circumstances under which the resignation came to be offered is clear from the resignation letter itself. It was the duty of the officers of respondent No.2-SCI to point out to the petitioner that his service was protected under Section 47 of the Disabilities Act, which they failed to do. Infact, it is specifically contended :: Downloaded on - 09/06/2013 15:43:47 ::: 19 by the learned Counsel for the petitioner that the Petitioner was not aware of his rights under the Disabilities Act and he came to know about his rights only at a later date from some well wishers and an NGO.

Respondent No.2-SCI were all along aware of the petitioner's disability right from 1997 when Capt. Domir, Master, M.T. Major Somnath Sharma PVC, (vessel of SCI) vide his letter dated 6th June, 1997 (annexed as Ex."C" to the petition) had referred the petitioner to the Medical Officer of SCI, and requested that the petitioner be kept ashore for further investigation and on fitness may be sent to Head Office for further instructions. It would be worthwhile to reproduce this letter. It reads as under:-

"The Shipping Corporation Of India Ltd.

(A GOVERNMENT OF INDIA ENTERPRISE) Regd. office Shipping House, 245, Madam Cama Road, Bombay-21 Phone No. 202668 Code TLX2371SHIPINDIA M.T. MAJOR SOMNATH SHARMA PVC MV.M.T AT : Vizag Date: 06.06.97 To M/s. A.V.B.G.P.R. & Co.

Agent (SCI) Vizag.

Dear Sir, Kindly arrange to refer Mr. E.S.D' Cunha (AKWO) P. C. NO.540936, to company's medical doctor, as he has been suffering in recent past with mental confusion for last one month and his state has been observed to be aggravating progressively.

He has been noticed to be getting bouts of nausea associated with above.

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On 4.6.97 at 1300 hrs while on duty, he reported severe disorientation of mind, and on asking to go and relax he confined himself to his cabin and refused to open his door inspite of all attempts.

He was referred to SCI medical officer at Haldia on 25.5.97 who prescribed following medicines. (1) REGLAN (2) TRIKA (0.25) (3) STEMETIL-5.

He may be kindly kept ashore for further investigation and on fitness may sent to HO for further instructions.

Thanking you, Yours faithfully, Sd/-

(Capt. S.R. Domir) Master c.c. SCI (FP) Mumbai ig M.T. MAJOR SOMNATH SHARMA PVC
c.c.Medical Officer (Vizag)"

26. Even thereafter on joining duty, the petitioner on several occasions had to sign off SCI's different vessels on account of his mental illness as mentioned by us hereinbefore. SCI in their reply to the petition have also admitted that in 1997 as well as when the petitioner last sailed on the SCI vessel CHM Piru Singh on 11th May, 2000, the petitioner had to sign off on medical grounds. We find that the officers of respondent No.2-SCI not only failed to offer a suitable onshore post to the petitioner as per the mandate of Section 47(1) of the Disabilities Act, but also failed in their duty to make the petitioner aware of his rights of protection of his employment under the Disabilities Act. It is only because of the failure of SCI to comply with their statutory obligation of offering a suitable onshore post to the petitioner, that the petitioner submitted his letter of resignation after his request for a shore post was turned down, apparently ::: Downloaded on - 09/06/2013 15:43:47 ::: 21 because SCI did not have any such policy. The wordings of the letter of resignation clearly demonstrate the fact that this resignation was given under duress emanating from the refusal of SCI to provide an alternate shore job to the petitioner. Thus the question that needs to be considered is - Would the petitioner have submitted his resignation, had the SCI offered him a suitable onshore job? Considering the mental illness suffered by the petitioner and faced with the fears and risk of having to sail again, we feel the petitioner was left with the option between the devil (resignation) and the deep sea (literally). The petitioner chose the former and submitted his letter of resignation dated 10th June, 2000. Can such letter be said to be a voluntary resignation? We think not!

27. For the reasons aforesaid, in our view, the letter dated 10th June, 2000 cannot be said to be voluntary resignation by the petitioner.

28. Apart from the above, we find that though the letter of resignation dated 10th June, 2000 was tendered by the petitioner to respondent No.2-

SCI, the same was not immediately accepted by respondent No.2-SCI. In fact, in the letter dated 5th November, 2001 of SCI (Exhibit "F" to the petition), it is stated by SCI that the petitioner went on unauthorized leave without applying for sanctioned leave and that he shall be informed as soon as his resignation is accepted. Alongwith the said letter SCI have :::: Downloaded on - 09/06/2013 15:43:47 :::: 22 also enclosed the Exit Interview Form which was to be filled and to be returned by the petitioner to the SCI, which the petitioner did not do.

Even as late as on 16th January, 2002, (Exhibit "I" to the petition) in reply to the letter written by the petitioner's advocate, SCI has specifically stated that they will proceed for further action and that they cannot, in any case, employ the petitioner on shore. Thus, it can be safely inferred that at least till 16th January, 2002, SCI had not accepted the resignation of the petitioner. The petitioner in the interregnum had addressed letters to SCI including letter dated 27th November, 2001 from his Advocate (Exhibit "H" to the petition) and ultimately filed the Complaint dated 6th February, 2002 before respondent No.1-Commissioner protesting the action of respondent No.2-SCI. Interestingly, the petitioner has also in his rejoinder to the affidavit of SCI referred to a telegram dated 9 th August, 2002 sent to him by SCI, whereby he was requested to join the employment. We note that SCI, though have stated in their reply that the petitioner had remained absent since 11th May, 2000 without applying for sanctioned leave, no disciplinary proceedings have been initiated by them against the petitioner. We also note that in the said reply, though it is stated in para 12 that the Petitioner himself has offered to resign and his request was accepted, it is silent as to when the resignation came to be accepted. From the abovestated facts it is clear that atleast till the filing of the Complaint by the petitioner on 6th February, 2002 before respondent :::: Downloaded on - 09/06/2013 15:43:47 :::: 23 No.1-Commissioner, respondent No.2-SCI had not accepted the resignation of the petitioner and it cannot be said that ties between the petitioner and SCI had severed.

29. We now come to the issue whether the petitioner is entitled to protection of his employment under Section 47 of the Disabilities Act.

Though we have cursorily dealt with Section 47 in the context of submission of resignation by the petitioner upon failure of respondent No. 2-SCI to offer him a suitable onshore job, we find it would be advantageous to call our attention to the backdrop under which the Disabilities Act came to be passed and to refer to the relevant provisions of the said Act and rules thereunder.

30. The Lok Sabha, on 26th August, 1995, introduced The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Bill, 1995, wherein, the Statement of Objects and Reasons are set out. The same reads thus:-

"STATEMENT OF OBJECTS AND REASONS The meeting to launch the Asian and Pacific Decade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific region, held at Beijing on 1st to 5th

December, 1992 adopted the Proclamation on the Full Participation and Equability of People with Disabilities in the Asia and the Pacific region. India is a signatory to the said proclamation and it is necessary to enact a suitable legislation to provide for the
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(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-a- 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."

31. Accordingly, the Disabilities Act came to be enacted and came into force on 7th February, 1996. Section 2 of the Disabilities Act deals with the definitions and sub-sections (i), (k), (q), (t) and (w) of Section 2, which are relevant for the purposes of this case, read thus:

"(i) "disability" means-

(i) to (vi)

(vii) mental illness;

.....

(k) "establishment" means a corporation established by or under

a Central, Provincial or State Act, or an authority or a body ::: Downloaded on - 09/06/2013 15:43:47 ::: 25 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;

.....

(q) "mental illness" means any mental disorder other than mental retardation;

.....

(t) "person with disability" means a person suffering from not less than forty per cent of any disability as certified by a medical authority;

.....

(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;"

32. Chapter VI of the Disabilities Act deals with "Employment". Section 32 in the said Chapter deals with identification of posts which are reserved for persons with disability. Section 33 deals with reservation of posts and provides for 3 percent reservation for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from, (i) blindness or low vision; (ii) hearing impairment and (iii) locomotor disability or cerebral palsy, in the posts identified for each disability. Section 36 lays down the manner in which the vacancies, which are not filled up, are to be carried forward. Section 38 deals with the formulation of schemes for ensuring employment of :::: Downloaded on - 09/06/2013 15:43:47 :::: 26 persons with disabilities. Section 41 provides for incentives to employers to ensure that five per cent of the work force is composed of persons with disabilities. Chapter VIII deals with "Non-Discrimination". Thus, Chapter VI essentially deals with pre-employment stage, while Chapter VIII deals with post appointment in employment. Section 47 of Chapter VIII, around which the present dispute revolves, deals with non-discrimination in Government employment.

33. Section 62 authorises the Commissioner for Persons with Disabilities to look into Complaints with respect to matters relating to deprivation of rights of persons with disabilities. Section 72 stipulates that this Act 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 for the benefit of persons with disabilities. The Rules of 1996, framed in exercise of powers conferred under the Disabilities Act, came into force on 31st December, 1996. Rule 4 provides that a Disability Certificate shall be issued by a Medical Board duly constituted by the Central and the State Government, which Board shall consists of at least three members.

34. Article 41 under part IV of the Constitution of India, which deals with Directive Principles of State Policy, also lays down that the State shall :::: Downloaded on - 09/06/2013 15:43:47 :::: 27 make effective provision for securing the right to work, inter-alia, in cases of disablement. Thus, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is a social legislation meant for the benefit of persons with disabilities and the entire scheme of the Act is aimed at protection of rights of persons with disabilities and interalia to rid of their deepening poverty and social marginalization. The National Sample Survey (NSS) for year 2002 estimates that 8.4 percent of rural households and 6.1 percent of urban households in India had a member with a disability.

35. In the present case, in our view, Section 47 of the Disabilities Act provides a complete answer to the grievance of the petitioner relating to his employment. It would therefore be beneficial to extract the said section here again in its entirety. It reads thus:

"47. Non-discrimination in Government employment.- (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 :: Downloaded on - 09/06/2013 15:43:47 :: 28 notification, exempt any establishment from the provisions of this section."

36. In the case of Kunal Singh v/s Union of India & Anr (supra) cited by the learned Counsel for the petitioner, the question which arose for consideration before the Apex Court was whether the appellant therein was entitled to the benefit of Section 47 of the Disabilities Act. The Hon'ble Supreme Court held that the language of Section 47 is plain and certain casting statutory obligation on the employer to protect the employee acquiring disability during service. While setting aside the impugned order which affirmed the order of termination of service of the appellant, the Apex Court held in para 12 as under:

"Merely because under Rule 38 of the 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."

37. The unreported judgment delivered by the Division Bench of this Court in Ashwini Ashok Desai v/s Chattrapati Shivaji Maharaj General Hospital (supra) cited by the learned Counsel for the petitioner, deals with a case where also the petitioner had developed mental illness :: Downloaded on - 09/06/2013 15:43:47 :: 29 Schizophrenia and the petitioner was made to retire from the

service on the ground of mental illness. This Court, relying on the judgment in the (supra) held in para 12 as under:

case of Kunal Singh v/s Union of India "12. In the result, the order of the Commissioner as well as the order terminating the service of the petitioner are quashed and set aside. The respondents are directed to identify a suitable post for the petitioner and in case no suitable post is available create a supernumerary post for the petitioner in accordance with section

47. The respondents are also directed to forthwith release the salary of the Petitioner for the period from 4th January, 2003 and continue to pay her salary as per section 47 of the Act."

38. We have in the earlier part of our judgment in the context of resignation alluded to the judgment of the Apex Court in the case of Bhagwan Dass v/s Punjab State Electricity Board (supra). Even at the cost of repetition we'd like here to extract paras 2, 17, 18 and 19 of the said judgment. They read as follows:

"2. This case highlights the highly insensitive and apathetic attitude harboured by some of us, living a normal healthy life, towards those unfortunate fellowmen who fell victim to some incapacitating disability. The facts of the case reveal that officers of the Punjab State Electricity Board were quite aware of the statutory rights of Appellant 1 and their corresponding obligation yet they denied him his lawful dues by means that can only be called disingenuous."

.....

"17. From the materials brought before the Court by none other than the respondent Board it is manifest that notwithstanding the clear and definite legislative mandate some officers of the Board took the view that it was not right to continue a blind, useless man on the Board's rolls and to pay him monthly salary in return of no service. They accordingly persuaded each other that the appellant :: Downloaded on - 09/06/2013 15:43:47 :: 30 had himself asked for retirement from service and therefore, he was not entitled to the protection of the Act. The only material on the basis of which the officers of the Board took the stand that the appellant had himself made a request for retirement on medical ground was his letter dated 17-7-1996. The letter was written when a charge-sheet was issued to him and in the letter he was trying to explain his absence from duty. In this letter he requested to be retired but at the same time asked that his wife should be given a suitable job in his place. In our view it is impossible to read that letter as a voluntary offer for retirement.

18. Appellant 1 was a Class IV employee, a lineman. He completely lost his vision. He was not aware of any protection that the law afforded him and apparently believed that the blindness would cause him to lose his job, the source of livelihood of his family. The enormous mental pressure under which he would have been at that time is not difficult to imagine. In those circumstances, it was the duty of the superior

officers to explain to him the correct legal position and to tell him about his legal rights. Instead of doing that they threw him out of service by picking up a sentence from his letter, completely out of context. The action of the officers concerned of the Board, to our mind, was depreciable.

19. We understand that the officers concerned were acting in what they believed to be the best interests of the Board. Still under the old mindset it would appear to them just not right that the Board should spend good money on someone who was no longer of any use. But they were quite wrong, seen from any angle.

From the narrow point of view the officers were duty bound to follow the law and it was not open to them to allow their bias to defeat the lawful rights of the disabled employee. From the larger point of view the officers failed to realise that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largesse but their right as equal citizens of the country."

In conclusion, the Apex Court held that in view of Section 47 of the Disabilities Act, the action of the Board was bad and illegal and the :::: Downloaded on - 09/06/2013 15:43:47 :::: 31 appellant was held to be deemed in service and entitled to all service benefits including annual increments and promotions, etc. till the date of his retirement.

39. In the case of Shivaji s/o Vishwanath Dongre V/s State of Maharashtra and Ors, reported in 2006 (1) Mah LJ 417, the petitioner therein had developed mental sickness during the course of his service and was unable to work as driver but he was fit for discharging any other light work. The Division Bench of this Court held that the termination order issued by the respondent was in breach of the mandate of Section 47 of the Disabilities Act and therefore quashed and set aside the same and further directed the respondents to adjust the petitioner by giving him some light work, if it is available and if no light work is available, he may be kept on a supernumerary post until a suitable post is available or he attains superannuation, whichever is earlier. The Division Bench further held that the petitioner was entitled to be reinstated in service with full back wages.

40. We may refer to another recent decision in which the present respondent No.2 SCI was the contesting party respondent. It is a judgment of learned Single Judge of Andhra Pradesh High Court in the case of K. B. K. Rao v/s. Chairman and Managing Director, Shipping :::: Downloaded on - 09/06/2013 15:43:47 :::: 32 Corporation of India Limited & Ors., reported in 2009 (6) ALT 130. In that case the petitioner was held unfit for sea service by the Medical Officer, SCI, Chennai, and his services came to be terminated by SCI.

Aggrieved by the same, the petitioner therein filed a writ petition calling in question the action of respondent SCI in terminating his services relying upon Section 47 of the Disabilities Act. The learned Single Judge held that the respondents are bound to comply the mandate under Section 47

of the Disabilities Act by providing an alternative employment to the petitioner.

41. In the case in hand, the petitioner was in the service of respondent No.2-SCI since 1993 and to the knowledge of SCI, the petitioner has suffered mental illness during the course of his employment as is evident from the fact that the petitioner had to be signed off repeatedly from various vessels of SCI and had to be referred to the Medical Doctor of SCI as stated hereinabove. The petitioner has also annexed a copy of his Disability Certificate issued by the Standing Medical Board, Sir J. J. Group of Hospitals, (Exhibit "P" to the petition) signed by three members of the Board including the Chairman which states that the Medical Board after examining the petitioner diagnosed the petitioner's disability as -

"Schizophrenia is partial remission. Psy. disability is seventy per cent." The petitioner has also annexed a copy of the Identity Card for disabled :::: Downloaded on - 09/06/2013 15:43:47 :::: 33 persons (Exhibit "R" to the petition) issued to him by the Directorate of Social Welfare, Maharashtra State. We find that the ailment of the petitioner is clearly covered by the definition of "disability" under Section 2(i)(vii) of the Disabilities Act, as also "mental illness" as defined under Section 2(q) of the Disabilities Act. It is also not in dispute that the establishment of respondent No.2-SCI is not exempted from the provisions of Section 47 of the Disabilities Act. As stated above, section 47 clearly lays down that no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service and that if the 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. It further provides 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. In our view, having held in the earlier part of our judgment, that the resignation of the petitioner was not voluntary, the case of the petitioner would squarely fall under Section 47 of the Disabilities Act and we have no hesitation in holding that the petitioner has been discriminated against and his services are entitled to be protected.

42. We find the alternative plea of respondent No.2-SCI rather curious :::: Downloaded on - 09/06/2013 15:43:47 :::: 34 that since SCI does not have any policy to offer shore cadre posting to floating staff at the level of 3rd level officer, the petitioner cannot be accommodated on a shore posting. Any such policy cannot override the statutory mandate of Section 47(1) of the Disabilities Act. Even otherwise, the respondent No.2-SCI is a huge organization of hundreds of employees and it is difficult for us to accept that the petitioner cannot be accommodated in any on-shore job due to its internal policy or otherwise.

The petitioner in his petition has given instances of onshore jobs which could be entrusted to him. The contention of SCI, that no Disability Certificate was produced by the petitioner at the relevant time needs to be stated only to be rejected as the respondent No.2-SCI were all along aware of the petitioner's disability and the petitioner has been also attended to/treated for his mental illness by the Medical Officers of SCI.

Significantly, SCI does not dispute the Disability Certificate issued to the petitioner which is annexed at Exhibit "P" to the petition. In any event, nothing prevented SCI to have the petitioner's

mental health condition evaluated by its own panel of Doctors or to refer him to the Medical Board for medical examination and issuance of Disability Certificate. We find that the approach of the respondent No. 2 has been indifferent and devoid of empathy. The role of Respondent No.2-SCI was, in the facts of this case, more fiduciary in nature and it was not only morally, but statutorily obliged to protect the employment of the petitioner by offering him a :: Downloaded on - 09/06/2013 15:43:47 :: 35 suitable shore post. At a time when Government is coming out with several schemes for persons with disabilities, we'd expect SCI, which is a Public Undertaking of the Central Government and which has been recently conferred the "Navratna" status, to lead by example. We find the stand taken by SCI unfortunate and feel that it ought to have acted in a reasonable and fair manner.

43. We now come to the impugned order. We note that though the Complaint of the petitioner under Section 62 of the Disabilities Act was filed as far back as on 6th February, 2002, the impugned order was passed only on 30th December, 2006 - that is a good 4 years and 10 months plus.

On perusal of the record, we find that respondent No.1-Commissioner had himself by his letter dated 3rd July, 2003 (Exhibit "O" to the petition) requested the Civil Surgeon, Sir J. J. Group of Hospitals, Mumbai, to get the petitioner examined by the Medical Board and issue an appropriate Medical Certificate in respect of his disability. The petitioner has stated that he had to pay innumerable visits to Sir J. J. Group of Hospitals to get himself examined and to obtain the Disability Certificate. Thereafter, on 4th March, 2004 the Disability Certificate came to be issued by the Medical Board and copy thereof was forwarded to respondent No.1-Commissioner by the Medical Board. Surprisingly though, in the impugned order of respondent No.1-Commissioner, there is no reference to this Disability :: Downloaded on - 09/06/2013 15:43:47 :: 36 Certificate. It abstrusely states - "He has also not produced any disability certificate issued by any Medical Board while filing the complaint."

Notably, in the reply filed on behalf of respondent No.1-Commissioner before this Court, it is admitted in para 4 that on 4th March, 2004 the Disability Certificate issued by Sir J. J. Group of Hospitals was received by the office of respondent No.1. Except to say that the disability certificate issued by any Medical Board was not produced by the petitioner while filing the complaint and that the Petitioner had voluntarily submitted his resignation on 10th June, 2000, the impugned order has not dealt with the circumstances under which the resignation of the petitioner came to be submitted nor has the Respondent No.1 - Commissioner even referred to Section 47 of the Disabilities Act in the impugned order, even while alluding to the contentions of the petitioner.

44. Furthermore, it is categorically averred by the petitioner that the petitioner's father had to make an application under the Right to Information Act, to find out the status of the petitioner's Complaint before respondent No.1-Commissioner. The said application under the Right to Information Act was made on 13th November, 2006. Thereafter, it appears that as there was no response, an appeal also came to be filed on 18th December, 2006 under the provisions of the Right to Information Act. A second appeal was also filed before the State Commissioner for :: Downloaded on - 09/06/2013 15:43:47 :: 37 Information on 12th February, 2007. From the above, it is clear that the impugned order was passed on 30th December, 2006 only after receipt of the

application dated 13th November, 2006 under the Right to Information Act, which application appears to have prompted the respondent No.1-

Commissioner to pass the impugned order in a haste and cryptic manner without considering the facts of the case as it ought to have been. We further find the reasons given in the reply of the Respondent No.1-

Commissioner for the inordinate delay in passing the impugned order are also not at all satisfactory.

45. Pertinently, even after the impugned order dated 30th December, 2006 was passed by respondent No.1-Commissioner, the same was not communicated to the petitioner. The impugned order was forwarded to the advocate of respondent No.2-SCI instead, wrongly describing them as advocate for the petitioner. The petitioner ultimately received the impugned order only on 3rd November, 2007 and the present petition came to be filed on 6th December, 2007. We find that right from his Advocate's letter dated 27th November, 2001, the petitioner has been corresponding with respondent No.2-SCI and thereafter has filed his Complaint dated 6th February, 2002 with Respondent No.1 - Commissioner whose office is situated in Pune, and the petitioner, who is a person with disability, was made to run from pillar to post to protect his employment.

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Despite the ordeal and misery faced by him, the petitioner has pursued his grievances diligently throughout. Respondent No.1-Commissioner, who is empowered under Section 62 of the Disabilities Act "of his own motion or on the application of any aggrieved person" to look into the complaint with respect to deprivation of rights of persons with disabilities and non-

implementation of laws, has failed to consider the material on record and not appreciated the case of the petitioner in its proper perspective while passing the impugned order. The Respondent No.1 - Commissioner, in our view, fell in error in rejecting the Complaint of the petitioner. The impugned order cannot be sustained and warrants interference.

46. In light of the aforesaid discussion, we set aside the impugned order dated 30th December, 2006 passed by respondent No.1- Commissioner and direct respondent No.2-SCI to continue the petitioner in their service with all consequential benefits including arrears of salary, annual increments and promotions, etc. Respondent No.2-SCI is directed to provide to the petitioner an appropriate light and suitable on-shore post. In the event, the SCI is unable to provide such on-shore post to the petitioner, the petitioner shall be kept on supernumerary post until a suitable post is made available to him or he attains the age of superannuation, whichever is earlier. The above exercise shall be carried out by SCI within a period of six weeks from today.

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47. Before parting, we may state that we did make an endeavour to have the matter settled amicably; that exercise however, did not bear fruit. We take the liberty to conclude with the quotation of the

Nobel Laureate Rabindranath Tagore - "The problem is not how to wipe out the differences but how to unite with the difference intact".

48. Rule made absolute in the above terms. The petition is accordingly allowed, with no order as to costs.

(SMT. RANJANA DESAI, J.) (A. A. SAYED, J.) ::: Downloaded on - 09/06/2013 15:43:47 :::