

Madras High Court

M.S.Sivasubramani vs The Managing Director on 25 April, 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.04.2012

CORAM

THE HON'BLE Mr. JUSTICE N. PAUL VASANTHAKUMAR

Writ Petition No.10533 of 2012
and M.P.No.1 of 2012

M.S.Sivasubramani

... Petitioner

Vs.

1.The Managing Director,
Tamil Nadu State Transport Corporation
(Salem) Ltd.,
Salem- 636 007.

2.The General Manager,
Tamil Nadu State Transport Corporation,
(Salem) Ltd.
Salem-636 007.

... Respondents

Writ petition filed under Article 226 of the Constitution of India to issue a writ of C

For Petitioner : Mr.J.Muthukumaran

For Respondents : Mr.R.K. Gandhi

O R D E R

The prayer in the writ petition is to quash the orders dated 28.6.1993, 13.10.1993 and 17.12.2011 and direct the respondents to grant benefits of continuity of service, pay protection and attendant benefits to the petitioner from the date of discharge from duty as Conductor on 28.6.1993 to the

date of re-appointment as Office Attender on 13.10.1993 in the light of provisions of Section 47 of the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act 1995.

2. The case of the petitioner is that he was appointed as Trainee Conductor in the respondents Transport Corporation on 15.2.1984 and he was absorbed as regular conductor with time scale of pay with effect from 01.09.1985. While so, based on the report of the Medical Board dated 27.4.1993, the petitioner was discharged from service on medical grounds that he was unfit to discharge his duty as Conductor by proceedings dated 28.6.1993 and he was relieved from duty on 01.07.1993. The petitioner submitted a representation dated 27.7.1993 seeking alternative employment. By proceedings dated 13.10.1993, he was appointed as Office Attender as a fresh entrant on a fresh scale of pay and he joined the duty as Office Attender. Thereafter, he made repeated representations to the respondents to consider his case for continuity of service with pay protection in terms of Section 47 of Persons with Disabilities (Equal Opportunities Protection of Right and full Participation) Act 1995. Based on his latest representation dated 23.11.2011, the second respondent passed an order dated 17.12.2011 rejecting his claim for continuity of service and others benefits stating that since the said Act came into force only with effect from 1996 and the petitioner made the representation after the lapse of 18 years, the petitioner is not entitled to get the benefits under the said Act. Hence, the petitioner has come forward with the present writ petition.

3. The learned counsel for the petitioner submitted that alternate employment shall be given to the employees who sustained disability even though the disability has occurred prior to Act 1 of 1996 and the said issue was considered by me in the decision reported in (2008) 8 MLJ 1079, (R.Mani v. Labour Court, Trichy and Another) which was also confirmed in W.A.No.482 of 2009, by order dated 18.03.2010. The learned counsel for the petitioner further submitted that in W.P.No.19928 of 2005, by order dated 24.3.2008 I had ordered alternate employment with salary protection and other benefits to the similarly placed person. The said order was also confirmed by the First Bench of this Court in W.A.No.2073 of 2010 by order dated 25.10.2010.

4. The learned Standing Counsel for the respondent took notice on 19.04.2012 and prayed for time to verify and report whether the issue raised in this writ petition is covered by earlier orders. The learned counsel for the Transport Corporation submitted that the petitioner having accepted the appointment given to him as Office Attender as a fresh entrant with scale of pay on 13.10.1993 and serving all these years without challenging the said order, is not entitled to get any benefit. The learned counsel further submitted that even assuming that the petitioner is entitled to get benefit under Section 47 of the Disabilities Act, the petitioner is not entitled to get any back wages as the petitioner is approaching this Court by filing this Writ Petition after 17 years of the original order and this Court in the above referred order denied backwages, difference in wages. In reply to the said submission, the learned counsel for the petitioner submitted that the petitioner may be denied back wages, difference in wages and he may be given alternate employment with pay protection and other benefits from the date of discharge, as it was ordered to be given in other cases. The said submission made by the learned counsel for the petitioner is recorded. The appointment of the petitioner as regular conductor from 01.09.1985 and he sustained disability while he is in service are not in dispute.

5. In the decision of mine reported in (2008) 8 MLJ 1079, (R.Mani v. Labour Court, Trichy and Another), in paragraphs 10 to 15 it is held as follows:

"10. The enactment of Act 1 of 1996, was made for giving effect to the proclamation of full participation and equality of people with disabilities in the Asian Pacific region held in Beijing in the first week of 1992 to which the Government of India is a signatory. Even prior to the enactment of Act 1 of 1996, similar issue came up before the Supreme Court in the decision Anand Bihari v. R.S.R.T. Corporation AIR 1991 SC 1003 : (1991) 1 SCC 731 : wherein it is held that in case of the employees acquiring disability during employment, the employer should provide for adequate safeguards to remedy the situation by giving them alternate job or by compensating them in some form for the around loss they suffered for no fault of theirs. In that case, the drivers of the roadways buses of the respondent Corporation who have put in long years of service, during their routine medical examination were found to have developed defective eyesight and did not have the required vision for driving heavy motor vehicles like buses. The Corporation terminated their services since their eyesight was not of the standard required to drive buses. The Honourable Supreme Court held that the action of the Corporation was not proper and equitable and directed the Corporation to offer them alternative employment or grant compensatory relief for the loss they suffered on account of the premature retirement necessitated by their unfitness to work as drivers. The Court observed that the workmen are not denizens of an animal farm to be eliminated ruthlessly the moment they become useless to the establishment. They have not only to live for the rest of their lives, but also to maintain the members of their family and other dependents, and to educate and bring up their children. Their liability in this respect at the advanced stage at which they are thus retired stands multiplied. They may no longer be of use to the Corporation for the job for which they were employed, but the need of their patronage to others intensifies with the growth in their family responsibilities. In the circumstances of the case, the Court proposed a scheme to give relief to the workmen involved in that case.

11. Again in the decision Narendra Kumar Chandla v. State of Haryana AIR 1995 SC 519 : (1994) 4 SCC 460 i.e., prior to the enactment of the Disabilities Act, the Supreme Court considered similar issue and ordered to give alternate employment taking note of the fundamental right guaranteed under Article 21 of the Constitution of India. The operative portion of the order reads as follows:

"Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the post he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since, he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For Clerk, typing generally is not a must. Therefore, the State Electricity Board should relax his passing of the typing test and appoint him as an LDC. Since, on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs.1,400-2,300, his last drawn pay and scale of pay have to be protected. He will also be entitled to arrears of salary."

The said judgment is having binding force in terms of Article 141 of the Constitution of India.

12. In A.Subramani v. Management of Tamil Nadu State Transport Corporation (Coimbatore Division-I) Limited, Udthagamandalam and Another (2007) 6 MLJ 225 : 2007 (5) CTC 386 Division Bench of this Court held that even if a workman received compensation under the Workmens Compensation Act, 1923, still he is entitled to get benefit envisages under Section 47 of the Act 1 of 1996 and in fact the order of the single Judge directing the workman to refund the compensation received for getting the benefit under Section 47 of the Act was set aside.

13. The decision relied on by the learned counsel for the second respondent State, rep. by the General Manager, T.N.S.Transport Corporation, Madurai Division-IV, Dindigul v. K.Mohammed Mustafa 2008 (1) LLN 871 to support his contention that the petitioner is eligible to get benefit only under G.O.Ms.No.746, Transport Department, dated 2.7.1981 cannot be sustained since the above referred Supreme Court decisions Anand Bihari v. R.S.R.T. Corporation (supra) and Narendra Kumar Chandla v. State of Haryana (supra) were not brought to the notice of the Division Bench while deciding the said case.

14. Act 1 of 1996, even though came into force from February, 1996, the principles contained in the said Act can be applied to this case since the petitioner's right guaranteed under Article 21 of the Constitution of India has been violated and by enactment of the said Act, the pre-existing right available as fundamental right as well as human right was reiterated in the said Act. The petitioner is having a fundamental right to demand alternate employment even without reference to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Similar issue was considered by the Honourable Supreme Court in the decision M.Nagaraj and Others v. Union of India and Others AIR 2007 SC 71 : (2006) 8 SCC 212 and in paragraph 20, the Supreme Court held as follows:

"20. This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. Every right has a content. Every foundational value is put in Part III as a fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value..."

In the said judgment it is held that the enactment of the Constitution of India, particularly Part-III confirms the existing rights and the same cannot be treated as new rights to the citizens. Similarly, Act 1 of 1996 has not created any new right and it only recognised the pre-existing right.

15. Thus, the contention of the learned counsel for the second respondent that the petitioner having sustained disability prior to Act 1 of 1996 is not entitled to seek alternate employment, is

unsustainable."

The said findings was confirmed in W.A.No.482 of 2009 dated 18.03.2010. In paragraph 8, it is held as follows:

"8. We have considered the rival submissions as well as the law on this aspect. The rights of the disabled have been spelt out in the Disabilities Act which is only an expansion of the rights enshrined in Article 21 of the Constitution of India. Our Country has also signed the UN Convention on the Rights of Persons with Disabilities. Therefore, a person who had suffered disability is entitled to be employed without any loss financially and in fact, the Act provides that ad hoc posts must even be created so that he is not kept out of employment. When this is the legal position, the appellant Corporation ought to have come-forward to calculate the amount that is due to him, had he been employed right from the day of his accident. They could have excluded the period when he has been on leave. They should have given him a lighter job, a desk job which he could have discharged on receiving the Certificate from the Medical Board. This was their duty under the Act. Therefore, the order of the learned Single Judge with regard to the direction for giving alternate employment with seniority and pay protection is confirmed. Even with regard to the direction to pay 75% of backwages, we are accepting here to the request made to the learned counsel, only because he pleads financial inability and that to ask them to pay the entire amount would impose a burden on them. We are really reluctant to interfere with the discretion exercised by the learned Single Judge in reducing the backwages to only 75%. But considering the appellant's plea, we modify the award of 75% of backwages to a lumpsum of Rs.12,00,000/-. This shall be paid within a period of twelve weeks from the date of receipt of a copy of this order in the following manner:

Rs.4,00,000/- should be paid within four weeks (15-04-2010) and the next four lakhs within the next four weeks (13-05-2010) and the remaining four lakhs on 10-06-2010. If this amount is not paid as per this direction the appellant is bound to pay interest on Rs.12,00,000/- at the rate of 12% till the full payment is made.

9. The appeal is partly allowed as above."

6. In the present case, even though the petitioner was discharged from 01.07.1993. the petitioner has not chosen to challenge the same all these years and there is a delay of more than 17 years. The petitioner is also given the post of Office Attender as a fresh entrant from 13.10.1993 and the petitioner is serving and receiving salary as Office Attender all these years. The petitioner having been allowed to serve as Office Attender, he is not entitled to get any backwages/ difference in wages. However, the period of discharge i.e. From 01.07,1993 is to be counted for the purpose of notional increment and all other benefits other than backwages.

7. Following the above referred judgments, the impugned orders are set aside and the respondents are directed to give alternative employment to the petitioner in any one of the post in which he is eligible to be fit in with pay protection within two weeks from the date of receipt of the copy of this order. The petitioner is also entitled to get all promotional and other benefits. It is made clear that except the claim of backwages, difference in wages from 01.07.1993 till fresh orders is passed, all

other rights are to be given to the petitioner. This order is passed taking note of the employment given to the petitioner as Office Attender as new entrant from 13.10.1993 and the delay on the part of the petitioner in challenging the order dated 28.6.1993 etc.,

8. The writ petition is allowed on the above terms. No costs. Consequently, connected miscellaneous Petition is closed.

kb To

1.The Managing Director, Tamil Nadu State Transport Corporation (Salem) Ltd., Salem- 636 007.

2.The General Manager, Tamil Nadu State Transport Corporation, (Salem) Ltd.

Salem 636 007