

Bombay High Court
Maharashtra State Road vs Deepak on 10 March, 2010
Bench: R. C. Chavan
WP 2102/2005

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.2102 OF 2005

1. Maharashtra State Road
Transport Corporation, through

its Divisional Controller,
Nagpur Division, Near Railway
Station, Nagpur.

2. Deputy General Manager (P.A. & I.R.),

Maharashtra State Road Transport
Corporation, Vahatuk Bhavan,
Dr. Ananadrao Nair Marg,
Mumbai - 400 008.

...
// VERSUS //

Deepak S/o. Shrikrishna Pandit,

aged about 48 years, Occu.: Service,
R/o. Plot No.88, Padma Jyoti Apartment,

Dharampeth Layout, Jaiprakash Nagar,
Nagpur.

Shri S.C.Mehadia, Advocate for Petitioners.
Shri S.N.Dandekar, Advocate for Respondent.

CORAM : R.C. CHAVAN, J.

DATED : MARCH 10, 2010.

ORAL JUDGMENT.

1. This petition is directed against order of the Industrial Court, Nagpur holding the petitioner guilty of unfair labour practice as defined in Items 5 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of ::: Downloaded on - 09/06/2013 15:41:50 ::: WP 2102/2005 2 Judgment Unfair Labour Practices Act ("MRTU & PULP Act" for short) and directing the petitioner to provide to the respondent alternate employment in the post of Traffic Controller by way of recategorisation or if that be not possible, to provide alternate employment to the respondent in any other suitable post including that of peon, by protecting the wages last drawn by the respondent as driver.

2. The facts, which are material for deciding this petition, are as under :

The respondent was admittedly serving with the petitioner as a driver.

On 03.12.1997 the respondent was beaten up at Ghatkopar, Mumbai by a motorcycle rider. He suffered severe injuries and therefore, was found unfit to serve as a driver. It cannot be disputed that the injury suffered was fracture of right upper arm. For few months the petitioner allowed the respondent to work as Traffic Controller. On 21st July, 1999 the petitioner asked the respondent to resume duties as driver. The respondent filed complaint before the Industrial Court, which, by an interim order, permitted the respondent to work as Traffic Controller. The respondent was declared medically unfit for the post of driver.

Therefore, by an order dated 31st May, 2002 the petitioner terminated the services of the respondent w.e.f. 14th February, 2002. On 7th June, 2002 the petitioner offered the post of peon to the respondent as alternate employment. Thereafter the Industrial Court passed the impugned order directing the petitioner to protect the wages last drawn by the respondent even if the respondent was appointed as a Peon.

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3. It is not in dispute that the minimum qualification for the post of Traffic Controller are XII Standard, whereas the respondent has not passed XII standard. The percentage of disability suffered by respondent has not been ascertained. Under the settlement in force for the period from 01.04.1996 to 31.03.2000 demand No.46 was accepted by the petitioner Corporation by agreeing to provide alternate employment to the employees who acquired physical disablement and are declared medically unfit while discharging their duties.

4. The learned counsel for the petitioners submitted that the petitioners had already offered to the respondent a post of peon as alternate employment in terms of the settlement on 7th June, 2002. He submitted that the settlement does not provide for any pay protection for appointment on a post of equal pay irrespective of eligibility of the employee to be appointed to such a post. He submitted that had the respondent possessed requisite qualification the petitioner would have certainly considered the question of appointing the respondent on appropriate post. Therefore, according to the learned counsel for the petitioners, the impugned order places a burden on the petitioner corporation to pay to the respondent wages for the post on which he is not working. He submitted that there is absolutely no warrant for paying wages of higher post if the respondent performs duties of lower post. He also submitted that a person who is not qualified to be appointed to a post could not be ordered to be accommodated ::: Downloaded on - 09/06/2013 15:41:50 ::: WP 2102/2005 4 Judgment even by re-categorisation by the Industrial Court. The learned counsel for the petitioner submitted that a similar question had arisen before this Court and by a judgment in Madanlal vs. M.S.R.T.C., reported at 2008(5) Mh.L.J. 616 this Court, in paragraph 4, observed as under :

"4. The question that arises for my consideration is whether the view taken by the Industrial Court that the petitioner was ineligible for being considered to be appointed on the post of Peon or Helper can be doubted. The answer is an emphatic 'no'. The relevant orders and resolutions clearly envisage that the person to be appointed to the post of Peon should have minimum qualification of IV standard passed and that to the post of Helper as VII standard passed. As the petitioner was qualified only up to II standard, was not eligible for being considered for appointment to any of the said posts."

The Court then dismissed the petition of the employee.

5. The learned counsel for the respondent submitted that this judgment cannot be of any help to the petitioner since it had not considered the provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which have been specifically referred to by the learned Member, Industrial Court in his impugned judgment. Section 47 of the Act reads as under :

"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;

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WP 2102/2005 5 Judgment 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 notification, exempt any establishment from the provisions of this section."

It may also be useful to reproduce here the relevant provisions in Section 2(i), (o) and (t) as also the provisions of Sections 32 and 33 of the Act, as under :

"2. Definitions : - In this Act, unless the context otherwise requires -

(a) to (h)

(i) "disability" means -

(i) blindness;

(ii) low vision;

(iii) leprosy-cured;

(iv) hearing impairment;

(v) locomotor disability;

(vi) mental retardation;

(vii) mental illness;

(j) to (n) ...

(o) "locomotor disability" means disability of the bones, joints or muscles leading to substantial restriction of the movements of the limbs or any form of cerebral palsy.

(p) to (s)

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

32. Identification of posts which can be reserved for persons with disabilities :-

Appropriate Governments shall -

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.

33. Reservation of posts :- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent, 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;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

6. The learned counsel for the petitioners submitted that in order to attract provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, the respondent was required to show that he has suffered 40% disability, which has admittedly

::: Downloaded on - 09/06/2013 15:41:50 ::: WP 2102/2005 7 Judgment not been done. The

learned counsel for the respondent submitted that since the respondent was declared unfit for the post of driver he had, in fact, suffered 100% loss of earnings since his services were terminated by the petitioners. As rightly pointed out by the learned counsel for the petitioners that loss of earning cannot be equated with disability. The person concerned may acquire disability and yet suffer no loss of his earning. On the contrary, the learned counsel states that a person may suffer loss in earning without there being any disability. Therefore, loss of earning cannot be a measure for ascertaining disability.

7. The learned counsel for the respondent submitted that requirement of 40% disability is only for the purpose of reservation in employment under Section 33 of the Act and has nothing to do with the provisions of Section 47 which mandate that an employee who acquires disability during his service has to be shifted to some other post with same pay scale and service benefits. For this purpose he relied on a judgment of the Supreme Court in *Kunal Singh v. Union of India*, reported at 2003 AIR SCW 1013 it has been followed up by Division Bench of Madras High Court in *G.M.T.N. Staff Transport Corpn. Ltd. vs. Uday Asuriyan*, reported at 2008 II CLR 705. In paragraph 7 of the judgment in *Kunal Singh*, the Supreme Court observed as under :

"7. From the facts, which are not in dispute, it is clear that the disability suffered by the appellant is covered by Section 2(i)(v) read with Section 2(c) of the Act. It is also not in dispute that this disability was acquired by the appellant during his service.

Under Section 2 "disability" and "person with disability" are separately defined and they are distinct. We may also notice :: Downloaded on - 09/06/2013 15:41:50 :: WP 2102/2005 8 Judgment some provisions in Chapter VI of the Act relating to employment. Section 32 deals with identification of posts which can be reserved for persons with disabilities. Section 33 speaks of reservation of such percentage of vacancies not less than 3% for persons or class of persons with disability of which 1% each shall be reserved for persons suffering from (i) blindness or low vision; (ii) hearing impairment, and (iii) locomotor disability or cerebral palsy. Section 38 requires the appropriate Governments and local authorities to formulate schemes for ensuring employment of persons with disabilities. Section 47 is included in Chapter VIII of the Act. Chapter VI deals with employment relating to persons with disabilities including identification of posts and reservation of vacancies for such persons. Under this Chapter, reservation of vacancies for persons with disabilities is made for initial appointments. Section 47 in Chapter VIII deals with an employee of an establishment who acquires a disability during is service."

Division Bench of Madras High Court while following this observation held as under in paragraph 6 of its judgment :

"6. We find absolutely no merit in the submission of the learned counsel for the appellant-Corporation. In the light of the decision in *Kunal Singh v. Union of India & Anr.* 2003 I CLR 786), it is clear that S.47 deals with an employee who has acquired disability during service and it is not necessary that he should have suffered 40% disability. The test is whether an employee, after acquiring disability, has become unsuitable for the post he was holding earlier, and it is provided by S. 47 that in such

a case, the employee could be shifted to some other post with the same pay-scale and service benefits, and if it is not possible to adjust the employee against any such post, he may be kept in a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. In a recent decision of the Division Bench of this Court in *G. Muthu v.*

Management of Tamil Nadu State Transport Corporation (Madurai) Ltd. (represented by its Managing Director), Madurai (2007 (1) LLN 246), it was held that the term disability used in S. 47 of the Disabilities Act would encompass not only those contained in S.2(i), but also those which disabled a person from performing a work which he held immediately prior to :::: Downloaded on - 09/06/2013 15:41:50 :::: WP 2102/2005 9 Judgment acquisition of such disability. In that case, the appellant driver was discharged from service on the ground that he had acquired colour blindness which rendered him unfit to work as driver. Rejecting the argument that colour blindness would not fall under S.2(i) of the Act, the Division Bench held that the term disability used in S.47 of the Disabilities Act would encompass not only those contained in S.2(i), but also those which disabled a person from performing a work which he held immediately prior to acquisition of such disability. It was held that the benefits of benevolent legislation could not be denied on the ground of mere hyper technicalities. The S.L.P. filed against the said judgment of the Division Bench was also dismissed by the Supreme Court."

8. The learned counsel for the respondent, therefore, submitted that all that the respondent was supposed to show that he had suffered disability as defined under Section 2(i) read with Section 2(o) of the Act. His disability was a locomotor disability which means disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs. There can be no doubt that the respondent has suffered substantial restriction of the movements of the hands, since otherwise which would not have been unfit to perform job of driver.

Therefore, according to the learned counsel for the respondent, since the respondent had established that he had suffered disability as defined under the Act, and since such disability had occurred during respondent's being in service, in view of the provisions of Section 47 the petitioner was liable to accommodate the respondent on any other post with the same pay scale and service benefits.

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9. The learned counsel for the petitioners submits that a Division Bench of this Court, to which I was a party, held in *R. Thug v. C.P. Manager, W.C.F. Ltd., Chandrapur*, reported at 2007(114) FLR 276 that the provisions of the Act, do not confer an absolute right of appointment and that the employer has to identify the post on which opportunity of employment can be given. He submitted that the judgment in *Kunal Singh* had also been noticed by this Court. I have carefully considered the observations in the said judgment. It cannot be said that in that case there was an adjudication or decision on the question which is involved in this case. For this purpose it may be useful to

reproduce paragraphs 5 to 8 of the judgment :

"5. This Court has already noted that the very fact that the petitioner has been certified to have handicap and, therefore, has not been permitted to join duty, by itself is not a ground of right of employment or absorption on any particular post. The employer, however, will have to undergo the exercise of identifying the post and thereafter in the class of those for whom the post can be reserved, the petitioner's candidature may be considered.

6. Learned Advocate Mr. Lahiri states that the petitioner is willing to make an application for absorption/ appointment of petitioner on a post, which the employer may identify, where the person with visual handicap can be accommodated, and all details in that regard be ascertained and notified by the respondents. According to learned Advocate Mr. Lahiri, the petitioner would make such application within fifteen days from today.

7. The candidature of the petitioner can be considered in due course after the exercise is complete.

8. We, therefore, direct the respondents to carry out the exercise required under the provisions of Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, :::: Downloaded on - 09/06/2013 15:41:50 :::: WP 2102/2005 11 Judgment 1995, within three months from the date of receipt of writ of this Court.

If the petitioner is found eligible, his application be considered in accordance with law on its own merits.

Rule is made absolute in terms of para 9 above.

Parties to bear own costs."

10. It may be seen, first, that the grievance in the said petition pertained to the employee not being allowed to join upon re-appointment. The employee had approached this Court for judicial review of administrative action. The present case arises out of complaint of unfair labour practice. Secondly, in the case of R.Thug v. Manager, W.C.F. Ltd. decided by Division Bench the petitioner had agreed to make an application for absorption on a post which the employer may identify. In view of this, the petition came to be disposed of. Thus, there was no decision on the applicability of Section 47 to a person who acquires disability while in service. Therefore, the judgment would be of no help.

11. The learned counsel for the petitioners submitted that the learned Member, Industrial Court could not at all have granted any reliefs in the case since services of the respondent had been terminated and therefore, respondent could have sought appropriate relief by filing complaint under Item I of Schedule IV of the MRTU & PULP Act. The learned counsel for the respondent rightly pointed out that the complaint was filed when the respondent was already in employment. He was

terminated when the complaint was pending and therefore, ::: Downloaded on - 09/06/2013 15:41:50 ::: WP 2102/2005 12 Judgment the learned Industrial Court, being in seisin of the matter, was entitled to examine whether there was unfair labour practice and issue appropriate orders.

12. To sum up, in view of the judgment of the Supreme Court in Kunal Singh followed by Division Bench of Madras High Court in G.M.T.N. Staff Transport Corpn Ltd., it has to be held that disability, for the purpose of Section 47 of the Act, cannot be equated to the percentage of disability required in the definition of clause (t) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act. Definition in clause (t) of Section 2 is relevant for the purpose of reservation of posts in employment under Section 33 of the said Act. Therefore, in view of the provisions of the Act, the petitioner would have had no option but to accommodate the respondent on a post carrying equal pay and if not so accommodated go on paying him pay of the post of driver on which the respondent was working before he acquired disability, though this may cause loss to the Corporation.

13. The learned counsel for the petitioners submitted that the order of the Industrial Court granting back wages from 15th February, 2002 is not sustainable in view of the fact that on 7th June, 2002 the petitioner had offered the post of peon to the respondent i.e. within six days of termination i.e. on 31st May, 2002.

He submitted that in view of this, the Industrial Court could not have ordered ::: Downloaded on - 09/06/2013 15:41:50 ::: WP 2102/2005 13 Judgment payment of back wages to the respondent.

14. The learned counsel for the respondent submitted that since the respondent's services came to be terminated without there being any warrant for such termination and in violation of the provisions of Section 47 of the Act, the learned Member, Industrial Court rightly ordered payment of back wages.

15. I have considered these submissions. The respondent should have accepted the appointment to the post of peon under protest since the respondent admittedly is not qualified to be appointed as Traffic Controller. In that case the respondent would have been entitled to difference of wages in view of the provisions of Section 47 of the Act. If he had not accepted the offer of employment, the petitioners cannot be burdened with the liability to pay entire wages for the period for which the respondent was out of employment. The petitioner would be liable to pay only difference of pay of peon & pay of post of driver to the respondent for the period from 31st May, 2002 till the respondent would actually reinstated as Traffic Controller as ordered by this Court.

16. The petition is, therefore, partly allowed. The impugned order, in so far as it directs the petitioner, to accommodate the respondent in a suitable post, by protecting his wages as driver is maintained. The order directing the petitioner to pay back wages is, however, modified and the respondent would be entitled ::: Downloaded on - 09/06/2013 15:41:50 ::: WP 2102/2005 14 Judgment only to the difference of wages of the post of driver to which he was entitled and the post of peon which he was offered from 31.05.2002 till he was actually reinstated as Traffic Controller.

In the circumstances of the case, there shall be no order as to costs.

JUDGE RR.

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