

Madras High Court

P. Thangamarimuthu vs Tamil Nadu State Transport ... on 13 December, 2005

Equivalent citations: (2006) ILLJ 208 Mad, (2006) 1 MLJ 452

Author: D Murugesan

Bench: D Murugesan

ORDER D. Murugesan, J.

1. The Petitioner was appointed as Conductor in the Tamil Nadu State Transport Corporation Madurai (Division-I) on 22.11.93. While he was on duty on 11.9.2003 in the bus belonging to the Corporation with Regn. No. TN-58-N-0423 from Papanasam to Madurai, it met with an accident and rammmed into a stationary lorry. The petitioner was seriously injured in the accident and both of his legs were crushed, resulting in amputation. He was sent for examination before a Medical Board on 30.12.2003, and the Medical Board certified as follows:

Thiru P. Thangamarimuthu, Conductor, CR08603, Pudukulam Branch, TNSTC, Madurai appeared before the Medical Board on 30.12.2003 and was examined and found that he was previously admitted and treated at Meenakshi Mission Hospital, Madurai and above knee Amputation for both lower limb done for the same. As per the work requirements described by the Managing Director, TNSTC, Madurai Division, he is considered as medically unfit to the job of Conductor.

Thereafter, a show cause notice dated 9.1.2004 was issued calling upon the petitioner to submit his explanation as to why he should not be discharged from service on medical grounds. The petitioner submitted his explanation on 27.1.2004 stating that he was medically unfit only to serve as Conductor and, therefore, he may be considered for alternate employment. He also relied upon the provisions of the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the Act"). However, the petitioner was discharged from service by the impugned order dated 16.7.2004. The petitioner has questioned the said order on the ground that by virtue of the provisions of Section 47 of the Act, no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service and even after acquiring disability, if an employee is not found suitable for the post he was holding, he could be shifted to some other post with the same pay scale and service benefits.

2. I heard Mr. T.S.R. Venkatramana, the learned Counsel for the petitioner and Mr. R. Siva Manogaran, the learned counsel for the respondent-Corporation.

3. Mr. T.S.R. Venkatramana, the learned Counsel for the petitioner has submitted that as the petitioner has suffered loss of both the legs, by virtue of Section 47 of the Act, he is entitled to the alternate employment with continuity of service and other benefits. He would also submit that the right to alternate employment though is not a fundamental right under the Constitution of India, but is a right conferred under the Central enactment and such a right cannot be dispensed with in the manner as has been done in the case of the petitioner.

4. Learned Counsel for the respondent-Corporation submitted that as the petitioner was declared medically unfit, he is not entitled to any alternate post. The learned Counsel would further submit that the Government has issued G.O. Ms. No. 746, Transport Department dated 2.7.81, directing that the workers in the State Transport undertakings who are declared unfit for the continuance in the same post, by Doctors, while in service because of the eye defect or any other ailments, be discharged on medical grounds and their service benefits settled, and they shall be subsequently provided with alternative employment in the post of "Helpers" depending upon the suitability for the new post. The learned Counsel also would submit that by virtue of Section 72 of the Act, the above Government Order shall prevail and no employee can claim alternative employment as a matter of right in terms of Section 47 of the Act. The learned Counsel finally would submit that the disability of the petitioner cannot be brought under Section 2(i)(v), as the definition of "locomotor disability" under Section 2(o), does not cover the disability, which the petitioner had acquired.

5. For the disposal of the writ petition, the relevant provisions of the Act could be extracted as follows:

Section 2(i) defines "disability" as meaning: (i) blindness; (ii) low vision; (iii) leprosy-cured; (iv) hearing impairment; (v) locomotor disability; (vi) mental retardation; (viii) mental illness.

Section 2(o) defines "locomotor disability" as meaning, disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy.

Section 47: Non-discrimination in Government employment.-- (1) No establishment shall dispense with, or reduce in rank, an employee who acquires 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, whether 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.

Section 72: Act to be in addition to and not in derogation of any other law.-- The provisions of this Act, or the rules made thereunder 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 or issued for the benefits of persons with disabilities.

6. The main contention of the learned Counsel for the respondent is that in view of the fact that both the legs are amputated, the definition under "locomotor disability" is not applicable to the petitioner. According to the learned Counsel, "locomotor disability" means, disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy. To bring a disability under the above definition, it must be only partial. Inasmuch as the petitioner has lost both the legs, it is a permanent disability and, therefore, such disability does not mean a locomotor disability. His further contention is that in the absence of applicability of the provisions, the petitioner is not entitled to the relief. In my opinion, the above submission is on total misreading of the provision. The definition must be read and understood keeping in mind the context of the object and reasons. The definition though relates to the disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy, in my opinion, when an employee has lost both the legs, it would amount to a disability as defined under Sub-section (o) of Section 2 and thereby entitled to the benefit of Section 47 of the Act. In this context, the medical certificate issued by the Board on 30.12.2003 is also referable. In the certificate, it is specifically stated that the petitioner is considered as medically unfit to the job of conductor. As a necessary corollary, it shall mean that the petitioner would be otherwise fit for some other alternate and suitable post. In view of the above, I am unable to accept the contention of the petitioner that the disability sustained by the petitioner cannot be brought under Section 2(o) of the Act.

7. The right of the petitioner to continue in employment shall be considered with reference to his right to livelihood. Article 21 of the Constitution of India reads as follows:

Article 21: Protection of life and personal liberty.-- No person shall be deprived of his life or personal liberty except according to procedure established by law.

8. Article 21 protects "the right to livelihood as an integral facet of right to life". Such right includes the right to live with human dignity. Such human dignity could be achieved only if there is a protection to the employment, of course, subject to disciplinary proceedings.

9. The Supreme Court, while considering the absorption of an employee who was physically incapacitated due to the disease during his service, in Narendra Kumar Chandla v. State of Haryana and Ors., has held 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 posts 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 a clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the respondent Board to relax his passing of typing test and to appoint him as LDC. Admittedly, on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs. 1400-2300. Necessarily, therefore, his last drawn pay has to be

protected. Since he has been rehabilitated in the post of LDC we direct the respondent to appoint him to the post of LDC protecting his scale of pay of Rs. 1400-2300 and direct to pay all the arrears of salary.

10. Keeping the disability sustained by the employee while in service and the possibility of the employee losing his livelihood in mind, the Legislature enacted the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Act has been enacted, as the Preamble of the Act indicates, to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. In a 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, which was held at Beijing on 1st to 5th December 1992, a Proclamation was adopted on the Full Participation and Equality of People with Disabilities in the Asia and the Pacific Region. Our country is a signatory to the said Proclamation was on the following lines:

- (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 equalisation of opportunities for persons with disabilities; and
- (vi) to make special provision of the integration of persons with disabilities into the social maintenance.

11. It is a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. Even when two interpretations are possible, in a definition clause, the Court shall prefer that which advances the remedy and suppresses the mischief of the Legislature envisioned. The Court should adopt an object oriented approach keeping in mind the principle that legislative futility is to be ruled out so long as interpretative possibility remains. The only restriction could be that the approach cannot be carried to the extent of doing violence to the plain language used by rewriting the Section or substituting words in place of the actual words used by the Legislature.

12. Section 47(1) is clear in terms that "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service. The proviso to Section 47(1) in fact confers a

right on an employee who acquired disability and was declared unsuitable for the post he was holding for being shifted to some other post with the same pay scale and service benefits. By that proviso, not only the alternate employment but also the pay scale and the service benefits are also protected. In fact, under Section 47(2) there is a right conferred to a person who sustained disablement even for promotion and no establishment shall deny promotion to a person merely on the ground of his disability. In fact, the scope of Section 47 came up for consideration before the Supreme Court in *Kunal Singh v. Union of India* 2003 AIR SCW 1013, wherein the Supreme Court has held as follows:

An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires disability during his service". The Section further provides 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; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evidence from Sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purposes of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during services.

13. The right to livelihood which is an integral facet of right to life as guaranteed under Article 21 coupled with the protection under Section 47 of the Act, entitles an employee who was incapacitated during service for continuance of service in a suitable alternative post with same scale of pay drawn by him and service benefits. "Life" in Article 21 is not merely the physical act of breathing. Right to life includes the right to live with dignity and honour. A right to life means a right to service. A right to service or employment has been recognised by the Legislature in view of the enactment of the Act in favour of such of those persons who acquired disability during the course of employment. Hence, the contention of the learned Counsel for petitioner that a right conferred on the petitioner under Section 47 of the Act cannot be dispensed with in the manner that has been done in this case merits acceptance.

14. Coming to the second submission, the Government Order relied upon by the respondent-Corporation reads as under:

GOVERNMENT OF TAMIL NADU ABSTRACT State Transport Undertakings-Employees invalidated on Medical grounds due to eye defect or any other ailment - Provision of alternative

employment - Orders - issued.

TRANSPORT DEPARTMENT G.O. Ms. No. 746 Dated : 2.7.1981 Tharumathi, Aani-18 Thiruvalluvar Andu-2012 ORDER During the budget session, held on 27.4.1981, the Minister (Transport) announced inter alia in the Legislative Assembly that the workers who are declared unfit for continuance in the same posts by Doctors, while in service, because of eye defect or any other ailments, will be provided with alternative employment in the posts like "Helpers", afresh depending upon their qualifications, experience and suitability for the new post, after settling their service benefits.

2. The Government accordingly direct that the workers in the State Transport Undertakings who are declared unfit for the continuance in the same posts, by Doctors, while in service because of the eye defect or any other ailments, be discharged on medical grounds and their service benefits settled. They should be subsequently provided with alternative employment in posts like "Helpers" depending upon their qualification and experience and suitability for the new posts, without consulting Employment Exchange. They should be appointed as fresh entrants only in the scale of pay or consolidated pay admissible to the new posts and their services terminated on the date on which they attain the age of superannuation.

3. This order issued with the concurrence of the Labour & Employment Department vide its U.O. No. 26648/N1/81-1, dt. 23.6.1981.

(BY ORDER OF THE GOVERNOR) COMMISSIONER & SECRETARY TO GOVERNMENT The above said Order issued by the Government was only executive instructions, which are in the nature of general guidelines. As per the said Government Order, it was directed that the workers, who acquired any eye defect or any other ailment while in service, will be provided with alternative employment in the posts like "Helpers", afresh depending upon their qualification, experience and suitability for the new post, after settling their service benefits and they should be appointed as fresh entrants only in the scale of pay or consolidated pay admissible to the new posts and their services terminated on the date on which they attain the age of superannuation.

15. Placing reliance on the Section 72 of the Act, the learned Counsel for the respondent-Corporation submitted that the provisions of the Act or the rules made thereunder shall be in addition to and not in derogation of any other law for the time being in force or any rules, order or instructions issued thereunder enacted or issued for the benefits of persons with disabilities. Inasmuch as the Act provides the application of the Government Order even after the enactment, the respondent-Corporation would be justified in applying the Government Order for consideration of an employee who acquired a disability during his service for alternative employment strictly in accordance with the guidelines contained in the said Government Order.

16. Scope of Section 47 came up for consideration in a case of a conductor employed in the Metropolitan Transport Corporation who acquired disability and was terminated. A Division Bench of this Court in Metropolitan Transport Corporation, rep. by its Managing Director, Division-I, Chennai v. The Presiding Officer, Principal Labour Court, Chennai and Anr. 2004 WLR 398, has

held that the Act is a beneficial enactment and the conductor was entitled to alternate employment and protected under Section 47 of the Act. It appears that the Government Order dated 2.7.81 was also relied upon and the Division Bench in paragraph 17 observed that "the order of the Government of the year 1981 on which the appellant relies being an order which is clearly inconsistent with the Act certainly cannot be given effect to and the Government is duty bound to implement the provisions of the Act.

17. A perusal of the Division Bench order shows that though a reference is made as to the Government Order, neither the provisions of Section 72 nor the applicability of the same was either advanced or discussed. Hence it is necessary for this Court to consider the applicability of the Government Order vis-a-vis the above provisions of the Act. It is well settled law that while enactments are made, repealing and saving clauses are introduced to either repeal or validate the action taken or to continue to give effect to the existing provisions. In this context, Section 72 of the Act should be considered. The said Section contemplates that the provisions of the Act or the rules made thereunder shall be in addition to and not in derogation of any other law for the time being in force or any rules or order or instructions issued thereunder. To press Section 72 into service, an order or instruction ought to have been made either under any law or the rules made thereunder which were in force on the date the Act came into force. The Government Order is only an executive instruction and is not made under any of the provisions of the Act or Rules. Though the Government Order was made in exercise of the executive powers by the State, still, such general executive instructions, made in the absence of Rules, could be enforced in certain circumstances, provided they do not conflict or override with the existing law or the law made thereafter.

18. A plain reading of Section 72 shows that the Act or Rules made thereunder shall be in addition to and not in derogation of the law for the time being in force or the Rules or Instructions issued for the benefits of persons with disabilities. By the words "for the benefits of persons with disabilities" employed under Section 72, the provisions of any Act or Rules or Orders or Instructions existed on the date of Central Act and which are beneficial to the disabled persons are alone saved. As a necessary corollary, any Act, Rule, Order or Instruction issued thereunder which are not beneficial to the disabled persons are not saved as they run contra to the object of the enactment. Section 47 contemplates that an employee who is found unsuitable for the post he was holding due to the disability acquired during his service could be shifted to some other suitable post with the same pay scale and service benefits. Such benefits conferred under Section 47 cannot be either deprived of or taken away by placing reliance on Section 72 of the Act and consequently the Government Order empowering the Corporation to make only fresh appointment with the scale of pay or consolidated pay cannot be pressed into service. In my opinion, Section 72 does not empower the Corporation to make fresh appointment only either with a new pay scale or consolidated pay by placing reliance on the Government Order. The Act is a beneficial legislation and the right to employment is protected as the right to livelihood which is an integral facet of right to life as guaranteed under Article 21 of the Constitution of India. The Act being a special enactment, doctrine of generalia specialibus non derogant would apply and the Government Order dated 2.7.81 cannot override the provisions of Section 47 of the Act.

19. For all the above reasons, I find that the impugned order is unsustainable and the same is liable to be quashed. Accordingly, the impugned order is quashed. The respondent-Corporation is directed to employ the petitioner in any suitable post with continuity of service with effect from 11.9.2003 with all other monetary and service benefits. The Writ Petition is allowed. No costs. Consequently, W.P.M.P. No. 255 of 2005 is closed.