

Madras High Court

Durairaj vs The General Manager on 8 April, 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08/04/2010

CORAM

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

W.P.(MD) No.2967 of 2010

Durairaj .. Petitioner

Vs

The General Manager,  
Tamil Nadu State Transport Corporation Ltd.,  
Pillaithaneerpandal,  
Thirumayam Road,  
Pudukottai-622 001. .. Respondent

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus to call for the entire file relating to the order passed in TNSTC/D1/352 dated 17.08.2001 and quash the same as illegal, arbitrary and capricious and also direct the respondent to reinstate the petitioner with continuance of service and backwages with attendant benefit or provide alternate employment as per the provisions of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

!For Petitioner ... Mr.P.Ganapathi Subramanian

^For Respondent ... Mr.P.Thilakkumar

:ORDER

The writ petitioner was selected as a Conductor in the respondent- Corporation in the year 1999 and his services were confirmed on 24.04.2000.

2. It is the case of the petitioner that at the time when he was appointed, he has undergone all the medical fitness test and having satisfied about the fitness, the petitioner was appointed. It is stated that he had appeared before the Medical Board on 13.11.2000 and 20.11.2000 and he was certified

that there was hearing loss for which an explanation was called for. The petitioner requested for an alternate employment even though the petitioner was not fit for continuing in the post of Conductor. It is stated that the respondent-Corporation has terminated the services of the petitioner by the impugned order dated 17.08.2001 on the basis of the Medical Report to the effect that he has become medically unfit since he has hearing defect up to 90%. It is the case of the petitioner that after termination, which was on 17.08.2001, he sent a representation to the Chief Minister Cell on 21.08.2007 and that was forwarded to the respondent-Corporation, for which the respondent-Corporation replied to the petitioner on 11.09.2007 that there is no alternate job available in the office of the respondent-Corporation. The petitioner's case is that he is aged 43 years, having 15 years more service and by the impugned order of termination, he has lost his only source of livelihood and therefore, the present writ petition has been filed challenging the said order of the respondent-Corporation dated 17.08.2001 on the ground that the order is opposed to the provisions of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("Act" in short). Section 2 of the Act which defines about the disability, also includes in Sub-Clause

(i)(iv), "hearing impairment", as one of the disabilities. The term "hearing impairment" has been defined in Section 2(l) of the Act, as to mean "loss of sixty decibels or more in the better year in the conversational range of frequencies". The term "person with disability" has been defined in Section 2(t) of the Act, to mean "a person suffering from not less than forty per cent of any disability as certified by a medical authority". On the facts of the present case, it is clear that the petitioner is suffering from hearing impairment to the extent of 90% and therefore, as per the terms of the said Act, the person comes within the ambit of the term "disability and disabled persons".

3. Section 47 of the Act, which relates to non-discrimination in Government Employment, 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:

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."

4. It is clear from the above that no establishment shall dispense with the services of an employee who acquired a disability during his service. The said provision has been framed with specific

reference to Article 41 of the Constitution of India. It makes further clear that even in special cases, a person who has acquired disability and is not suitable for the post he was holding, he should be shifted to some other post with the same scale of pay and service benefits. The provision further contemplates that even in cases where such person could not be shifted to some other job, he must be kept on a supernumerary post either, until a suitable post is available or until the age of superannuation, whichever is earlier. Therefore, a combined reading of Section 47 of the Act with the above definition clauses, show the protection given to a person who is physically disabled, is to the protection of his services to the fullest possible extent, which is needed in respect of protecting the rights of disabled persons, which are also treated as coming within the ambit Article 21 of the Constitution of India. Therefore even the physically disabled persons have a right to live like other persons, who is of normal physical nature. The ambit of the provision came to be analysed by the Supreme Court in *Kunal Singh v. Union of India* and another reported in (2003) 4 Supreme Court Cases 524. The Supreme Court, in that case, considered the ambit of the Act with particular reference to Section 47 of the Act, in the context of pension payable to a Central Government Employee under CCS (Pension) Rules, by raising the issue as a question of law, and has also held that a person does not acquire or suffer disability by choice. The employee who acquired disability during the course of his service, is sought to be protected by Section 47 of the Act and therefore it was held that Section 47 casts a statutory obligation on the employer to protect the employee acquiring disability during service. The Supreme Court has further traced the object of the said legislation to the meeting called "Meet to Launch the Asian and Pacific Decades of Disabled Persons" held in Beijing in December 1992. The Supreme Court ultimately held that the Act provides some sort of succour to the disabled persons. Shivaraj V.Patil, J., (His Lordship as he then was) while discussing about the need to a comprehensive legislation which has been achieved by the present Act, has observed as follows:-

"8. The need for a comprehensive legislation for safeguarding the rights of persons with disabilities and enabling them to enjoy equal opportunities and to help them to fully participate in national life was felt for a long time. To realize the objective that people with disabilities should have equal opportunities and keeping their hopes and aspirations in view a meeting called the "Meet to Launch the Asian and Pacific Decades of Disabled Persons" was held in Beijing in the first week of December 1992 by the Asian and Pacific countries to ensure "full participation and equality of people with disabilities in the Asian and Pacific regions". This meeting was held by the Economic and Social Commission for Asia and Pacific. A proclamation was adopted in the said meeting. India was a signatory to the said proclamation and agreed to give effect to the same. Pursuant thereto this Act was enacted, which came into force on 1-1-1996. The Act provides some sort of succour to the disabled persons.

9. Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of "disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be remembered that a person does not acquire or suffer disability by choice. 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 the section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a 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 evident 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 a 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 purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service."

5. Therefore the protection of the service condition of a disabled person has become a mandate on the part of the establishment as employer. The term "establishment" has been defined in Section 2(k) of the Act, within which ambit, the respondent-Corporation is clearly covered. Section 2(k) reads as follows:-

"(2)(k) "establishment" means a corporation established by or under a Central Provincial or State Act, or an authority or a body 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;"

6. The dictum laid down by the Supreme Court in the Kunal Singh's case has been consistently followed by the Supreme Court, as it is seen in its latest judgment in Bhagwan Dass & Anr. v. Punjab State Electricity Board, reported in 2008(1) Supreme 75. In that case, the concerned employee who became totally blind during the course of his employment has sought for protection under the Act. In fact, the Hon'ble Apex Court has taken note of the fact that the poor employee against whom a charge sheet was framed in the year 1994 on the basis that he has failed to report for duty the reason of which was came to be ascertained after many years that he became blind and where the employer raised an issue that the employee has kept quiet for many years, and came down heavily against the employer stating that it was the duty on the part of the superior officer of the employer to explain to the employee about the correct legal position and his legal rights. In spite of not informing him about the legal rights, disciplinary proceedings were initiated against the employee, as if the workman has abstained from his duty. The Supreme Court has also held that such conduct of the employer is deprecable, as the law has provided a statutory right to such employee who acquires disability during the course of his employment. The relevant paragraph of the judgment of the Supreme Court reads as under:-

"12. Appellant No.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 concerned officers of the Board, to our mind, was deprecable."

7. The enforcement of the said Act and the acquisition of benefits therein is in addition to other benefits availed of by such employee, under other laws like Workmen Compensation Act. In fact for the purpose of having the statutory obligation under Section 47 of the Act, it is not necessary that disability should have been acquired due to the nature of employment undergone by a worker. What is required for the benefit to be given under the Act is that, such an employee should have acquired the disability within the meaning of the terms under the Act, immaterial as to whether such disability was acquired due to the nature of employment or otherwise. Therefore, even in cases where due to the nature of employment, such disability is acquired, in which case, the workman would be entitled for the benefit under the Workmen Compensation Act and what is provided under Section 47 of the Act, is certainly in addition to whatever benefits he would have acquired under the Workmen Compensation Act. This view has been expressed by a Division Bench of this Court in G.Muthu v. The Management of Tamil Nadu State Transport Corporation (Madurai) Ltd., reported in 2007-1-L.W.146. That was a case where, on the ground of colour blindness, an employee of the Corporation was refused to be given alternate employment. While explaining about the term "acquired disability" the Division Bench has observed as follows:-

"15. Having regard to the special features contained in the said Section 47, providing for such a special benefit to an existing employee in an establishment when he acquires a 'disability' as held by us earlier, the application and implementation of the said provision will have to be ensured independent of various other benefits provided under the various other provisions falling under Chapters IV to VII of the Act which are meant for persons 'with disability'. Having regard to the said distinctive features contained in Section 47 of the Act, as compared to the other provisions, we are of the considered opinion that the context in which the benefit has been conferred under Section 47 stands apart from the context of all other provisions where various other benefits have been conferred. In other words, we are of the firm view that the opening set of expressions contained in the definition clause, namely Section 2, which denotes "unless the context otherwise requires" squarely gets attracted to Section 47 and therefore the definition of 'disability' as defined under Section 2(i) cannot be blindly applied to the term 'disability' which has been used in Section 47 of the Act. In other words, the term 'disability' used in Section 47 can draw support not only in respect of the defined 'disabilities' as contained in Section 2(i) of the Act but will also encompass such other 'disabilities' which would disable a person from performing the work which he held immediately prior to acquisition of such 'disability' and thereby entitle him to avail the benefits conferred under the said provision for having acquired such a 'disability'."

8. The established judicial dictum has been consistently followed by this Court in many other cases including in V.Palanishanmugavel v. The General Manager, Tamil Nadu State Transport Corporation (Madurai) Ltd., Tirunelveli, reported in 2007(4) CTC 478 in which I have decided the issue. Again in K.Kamatchi v. Managing Director, Tamil Nadu State Transport Corporation, Madurai, reported in (2006) 1 M.L.J. 394, it has been stated that the above Act has been consciously engaged in this country due to the reason that India has become one of the signatory of the proclamation in the meeting held in Beijing in the first week of December 1992 by the Asian and Pacific countries, and it is not only a social legislation but also a beneficial enactment implementing the directives under the Directive Principles of State Policy under the Constitution of India.

9. Inasmuch as the benefit conferred under the Act, which shows that it is the legal obligation and predominant duty of the employer to provide employment to the disabled employee, I am of the considered view that the case of the petitioner who had not chosen to knock the doors of the Court from the year 2001 till the date of filing of the writ petition, does not mean that he ceased to have the benefits under the Act, as opined by the Supreme Court in Bhagwan Dass & Anr. v. Punjab State Electricity Board, reported in 2008(1) Supreme 75. It is the duty of the employer, in such circumstances, to explain to the workman about the legal right available. As far as the respondent-Corporation is concerned, since it has suffered many orders in similar circumstances under the provisions of the Act, it cannot be heard from such Corporation that the petitioner has kept quiet for many years and therefore the benefits should not be conferred on him.

10. In such view of the matter, the impugned order of the respondent- Corporation in terminating the petitioner from the services is totally unsustainable and opposed to basic tenets of the Act (Act 1 of 1996). Accordingly, the impugned order stands set aside and the writ petition is allowed with a direction to the respondent-Corporation to continue the services of the petitioner under the respondent-Corporation since the date of the impugned order of termination i.e. 17.08.2001, with all monetary and other benefits as provided under the Act and it is open to the respondent-Corporation to provide alternate employment without impairing monetary and other benefits which the petitioner is entitled. Such exercise, with payment of all the monetary arrears to the petitioner, shall be carried out within a period of twelve weeks from the date of receipt of a copy of this order. Consequently, M.P.(MD)No.1 of 2010 is closed. No costs.

11. It is also made clear that even in the event of the respondent- Corporation experiencing difficulty in accommodating the petitioner in any one of the jobs, due to the nature of disability, the petitioner must be kept as a supernumerary employee with the same salary and other benefits till the date of retirement or till a suitable job is available under the respondent-Corporation, whichever is earlier.

KM To The General Manager, Tamil Nadu State Transport Corporation Ltd., Pillaithaneerpandal, Thirumayam Road, Pudukottai-622 001.