

Madras High Court

G. Kandasamy vs Tamil Nadu State Transport ... on 9 July, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 9-7-2010

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

W.P.No.271 of 2006

G. Kandasamy

... Petitioner

Vs.

1. Tamil Nadu State Transport Corporation
(Villupuram) Ltd.,
(Formerly Thanthai Periyar Transport Corporation)
rep.by its Managing Director,
Villupuram 605 602.

2. Government of Tamil Nadu,
rep.by its Secretary,
Transport Department,
Fort St.George,
Chennai 600 009.

... Respondents

The prayer in the writ petition is to issue a writ of declaration, declaring that the

For Petitioner : Mr.S.Vaidyanathan

For 1st Respondent : Ms.Kala Ramesh

For 2nd Respondent : Mr.R.Murali,
Government Advocate

O R D E R

The prayer in the writ petition is to declare that the order of the first respondent dated 15.5.2000 in discharging the petitioner with effect 14.6.2000 by not protecting the petitioner in his post as illegal, contrary to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995, arbitrary & violative of Article 14, 16, 21 & 300A of the Constitution of India and consequently direct the first respondent to treat the services of the petitioner as

continuous one without any break in service and grant all the benefits that the petitioner is entitled to but for medical de-categorisation on 14.6.2000, grant the petitioner all the consequential, monetary and other attendant benefits with effect from the date of medical de-categorisation on par with his junior V.Kaliyamoorthy, Driver, Staff No.1768.

2. The case of the petitioner is that the petitioner joined as Driver in the first respondent Transport Corporation on daily wage basis on 15.11.1986 and he was posted at Kalpakkam branch. Petitioner was confirmed in service as Driver by order dated 3.6.1993 and he was promoted as Senior Driver with effect from 1.5.1993. While the petitioner was serving as Senior Driver, on 21.10.1999, the petitioner was directed to appear before the Medical Board for eye sight test. The Chairman, Medical Board, by order dated 27.10.1999 gave a report to the effect that the petitioner is unfit for four-wheeler driving as he is an old case of 'BE with masclar degeneration'. On 19.11.1999 the petitioner was directed to submit his explanation as to why he should not be discharged from service. Petitioner submitted his reply on 26.11.1999 and requested the management to provide alternate employment. On 15.5.2000 without considering the request of the petitioner he was discharged from service with effect from 14.6.2000.

3. On 9.10.2000, the petitioner was directed to appear before the Assistant Manager (Personnel). The petitioner appeared before the said Officer and on 10.4.2001 the petitioner was given appointment as Helper afresh with basic pay of Rs.3,420/-, though he was receiving the basic pay of Rs.4,385/- at the time of his discharge. The petitioner's pay protection was not given even though he was medically invalidated. The said action of the Transport Corporation being contrary to Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995, (hereinafter called 'the Act') petitioner has filed this writ petition and prayed for the above declaration and for consequential reliefs in terms of Section 47 of the Act.

4. The first respondent Transport Corporation has filed counter affidavit by contending that there is unreasonable delay of more than five years in filing the writ petition and hence the writ petition is to be dismissed on the ground of laches. On merits it is contended that the petitioner was granted relief of appointment afresh in terms of G.O.Ms.No.746 Transport Department dated 2.7.1981 and the petitioner having accepted the same and joined duty as Helper, he is not entitled to maintain this writ petition seeking relief under the Act.

5. Petitioner has filed additional affidavit on 13.6.2010 by stating that for the five years delay in filing this writ petition he is willing to forego his backwages from the date of discharge till the date of filing of the writ petition and prayed for continuity of service and other consequential attendant benefits.

6. The learned counsel for the petitioner submitted that the action of the respondents in discharging the petitioner from service on the ground of medical invalidation by order dated 15.5.2000 with effect from 14.6.2000 is a statutory violation. The learned counsel argued that denying the statutory benefit conferred under section 47 of the Act is illegal and violative of Article 21 of the Constitution of India and merely because the petitioner was offered the post of Helper afresh with reduced pay, without continuity of service, the statutory right given to the petitioner under the Act cannot be

denied as there cannot be any estoppel against the statute. The learned counsel also cited several decisions in support of his contentions.

7. The learned counsel for the first respondent on the other hand submitted that the writ petition is liable to be dismissed on the ground of laches and also on the ground of estoppel as the petitioner having accepted the employment as Helper afresh, is continuously working all these years and therefore the discretionary jurisdiction under Article 226 of the Constitution of India need not be exercised in favour of the petitioner on the facts of this case. The learned counsel also cited an unreported decision of this Court made in W.A.No.475 of 2000 dated 7.2.2005 and contended that in similar circumstances this Court declined to exercise its jurisdiction under Article 226 of the Constitution of India while an identical relief was sought for by one P.Ellappan.

8. I have considered the rival submissions made by the learned counsel for the petitioner, the learned standing counsel for the first respondent Transport Corporation, and the learned Government Advocate for the second respondent.

9. The issues to be decided in this writ petition are as follows:

(1) Whether the petitioner is entitled to get alternate employment in terms of section 47 of the Act, as he is found medically unfit to drive the Transport Corporation Bus ?

(2) Whether the petitioner is estopped from filing this writ petition after joining in the post of Helper afresh ?

(3) Whether the writ petition is to be dismissed on the ground of laches ?

Issue No.1: Whether the petitioner is entitled to get alternate employment as he is found medically unfit to drive the Transport Corporation Bus in terms of section 47 of the Act ?

10. Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995 (Act 1 of 1996) reads as follows:

"Sec.47. Non-Discrimination of 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 super-annuation, 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. From the above referred section it is beyond doubt that there is a statutory prohibition in discharging a person on the ground of medical disability. The said section not only prohibits discharging a disabled person from the service, but also mandates the establishment to shift the said person to some other post with the same scale of pay and service benefits. If there is no other post, he is directed to be kept in a supernumerary post until a suitable post is available or till he attains the age of superannuation, whichever is earlier. Section 47(2) states that no disabled person shall be denied promotion on the ground that he is disabled and the appropriate Government is vested with discretion to exempt the applicability of the act by issuing a notification to any particular type of work in an establishment. It is not the case of the first respondent that the second respondent, which is the appropriate Government, has issued any notification granting exemption for not implementing section 47 of the Act.

11. In the decision reported in (2009) 9 SCC 92 (Vijay Narayan Thatte v. State of Maharashtra) in paragraph 4 it is held that when a statute is couched in negative language, it is ordinarily regarded as pre-emptory and mandatory in nature.

12. The Transport Corporations are bound to provide alternate employment to its employees, who sustain disability during the course of the employment is already decided by this Court in a number of writ petitions. I had an occasion to consider identical issue in W.P.No.30081 of 2003 dated 26.4.2006 and ordered alternate employment with pay protection, continuity of service and backwages to a driver, who lost his right leg in an accident while on duty, who was discharged by the very same first respondent viz., Tamil Nadu State Transport Corporation (Villupuram) Ltd. The said order was upheld by the Division Bench of this Court in the case of Management of Tamil Nadu State Transport Corporation Vs B.Gnanasekaran (2007 (5) MLJ 1). In that case the Division Bench considered the benevolent provisions contained in the the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the interpretation given by the Supreme Court by extending the provisions and whether the disability should be to an extent of 40% for getting alternate employment and whether awarding compensation under the Motor Accident Claims Tribunal will be a bar for seeking alternate employment. The Division Bench in paragraph 17 held as follows with regard to the percentage of disability, which reads as follows:

"17. In the instant case, the respondent workman became unfit for the duty of the driver as he lost knee movement and there is no possibility of regaining his normal movement. It is not disputed before us that the workman is suffering from locomotor disability within the meaning of Section 2(o) of the Disabilities Act. In view of the Supreme Court's decision in Kunal Singh v. Union of India and Another (supra) it is clear that the acquisition of disability is not the same as a person with disability and it was not necessary for the workman to establish that he suffer more than 40% disability. In our considered opinion the decision of the Division Bench in General Manager, Tamil Nadu State Transport corporation v. A.Sengaan (supra) does not lay down the correct law."

The eligibility to receive the benefits, after receipt of compensation from the Motor Accident Claims Tribunal, was also considered by the Division Bench. In paragraph 13 it is held as follows:

"13. In Tamil Nadu State Transport Corporation (Villupuram Division-I) Limited v. R.Jayakumar (Writ Appeal No.610 of 2007) decided on 13.4.2007, a Division Bench expressly rejected the argument that since the workman has been awarded compensation under the Motor Vehicles Act in a claim petition filed by him before the Motor Accidents Claims Tribunal, including compensation towards loss of earning, he is not entitled to the benefit of Section 47 of the Disabilities Act. It was held that Section 47 of the Act casts a mandatory duty on the part of the employer to provide an alternative employment to an employee who has suffered disability during the course of his employment, and the fact that such an employee has received some compensation under the Motor Vehicles Act is no ground to deny him the alternative employment, to which he is otherwise entitled under the Disabilities Act. It was held that if it is the case of the Transport Corporation that the compensation awarded towards loss of earning is on the higher side, the Corporation is free to agitate this point in the appeal filed against the award of compensation."

13. Earlier, in the case of G.Muthu v. Management of T.N.State Transport Corporation (Madurai) Ltd. (2006 (4) MLJ 1669) also the very same issue was considered by a Division Bench. In paragraphs 22 and 26, it is held thus, "22. Welfare legislations are meant to ensure benefits to the needy. They should be interpreted in such a way so that the purpose of the legislation is allowed to be achieved. Even assuming that there is any ambiguity in the provisions of the Act, in view of the object underlying the Act, it requires a reasonable interpretation of Section 2(i) of the said Act so as to make it applicable to the case on hand. The legislative purpose must be noted and the statute must be read as a whole.

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26. After analysing the entire provisions of the Act and also various decisions cited above, we feel that the Courts cannot shut its eyes if a person knocks at its door claiming relief under the Act. In a welfare State like India, benefits of benevolent legislation cannot be denied on the ground of mere hyper-technicalities. When the law makers have conferred certain privileges on a class of persons, like in this case to a disabled person, the duty is cast upon the judiciary to oversee that the authorities or the persons to whom such a power is conferred, enforce the same in letter and spirit for which such enactment has been made. In the present case on hand, the appellant has been discharged on the ground of 'colour blindness' without providing alternative job as per Section 47 of the Act, which is unjustified and unreasonable. Hence, the order of the respondent dated 26.3.2002 discharging the appellant on medical grounds has no leg to stand. The appellant is entitled to the protection under Section 47 of the Act. He should have been given a suitable alternative employment with pay protection, instead of discharging him from service on the ground of 'colour blindness'. Viewed from any angle, the order of the learned single Judge dismissing the writ petition

on the mere ground of laches without considering the claim of the appellant on merits is liable to be set aside."

The special leave petition filed against the said decision was dismissed by the Supreme Court. Same is the view taken by the Division Bench of this Court in the case of State Vs K.Mohammed Mustafa (2007 (II) LLJ 407); Honourable Mr.Justice D.Murugesan in the case of P.Thangamarimuthu Vs Tamil Nadu State Transport Corporation, Madurai (2006 (1) MLJ 452); and in the decision of mine in the case of K.Selvaraj Vs State Express Transport Corporation (2007 (II) LLJ 300).

15. The question as to how the officers should change their mind set and extend the benefit to the disabled persons as per Section 47 of the Act 1 of 1996 was considered by the Supreme Court in the decision in the case of Bhagwan Dass and another Vs. Punjab State Electricity Board (2008 (1) SCC 579). In paragraph 19, it is held thus:

"19. We understand that the concerned officers were acting in what they believed to be the best interests of the Board. Still under the old mind-set 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 largess but their right as equal citizens of the country."

16. The Act 1 of 1996 is a beneficial enactment and as per Section 47 of the Act the petitioner is entitled to get alternate employment with pay protection and other monetary benefits and he cannot be discharged at all. Admittedly the Government Order issued in G.O.Ms.No.746, Transport Department, dated 2.7.1981 cannot override the provisions of Section 47 of the Act 1 of 1996, which was specifically dealt with in the decision reported in 2006 (1) MLJ 452 (cited supra).

17. In some of the identical matters I granted relief to the disabled workmen of the Transport Corporation.

(a) W.P.No.36552 of 2004 by order dated 26.4.2006. The appeal filed against the said order in W.A.No.861 of 2007 was dismissed by Division Bench of this Court on 25.7.2007. The Transport Corporation took the matter before the Supreme Court in S.L.P.(C)No.19933 of 2007, which was also dismissed by order dated 6.2.2009;

(b) W.P.No.12923 of 2005, by order dated 20.4.2006;

(c) W.P(MD)No.4122& 4123 of 2006, by order dated 28.8.2006;

(d) W.P(MD)No.10106 of 2006, by order dated 13.11.2006;

- (e) W.P(MD)No.7212 of 2006, by order dated 22.11.2006;
- (f) W.P(MD)No.9730 of 2006, by order dated 23.11.2006;
- (g) W.P.No.19250 of 2004, by order dated 11.1.2007;
- (h) W.P.No.18930 of 2004, by order dated 5.2.2007;
- (i) W.P.No.1834 of 2006, by order dated 16.3.2007;
- (j) W.P(MD)No.10031 of 2007, by order dated 6.12.2007;
- (k) W.P(MD)No.9582&9518 of 2007, by order dated 17.12.2007;
- (l) W.P.No.27964 of 2007, by order dated 28.1.2008 (reported in 2008 (1) CTC 743);
- (m) W.P.No.625 of 2008, by order dated 29.1.2008;
- (n) W.P.No.32298 of 2004, by order dated 15.2.2008;
- (o) W.P.No.23551 of 2004, by order dated 20.2.2008;
- (p) W.P.No.3367 of 2001, by order dated 25.2.2008;
- (q) W.P.No.36331 of 2003, by order dated 18.3.2008, confirmed by the Division Bench in W.A.No.1073 of 2008 dated 8.12.2008;
- (r) W.P.No.18132 of 2008, by order dated 29.7.2008;
- (s) W.P.No.18053 of 2008, by order dated 26.8.2008;
- (t) W.P.No.21358 of 2008, by order dated 4.9.2008;
- (u) W.P.No.23790 of 2008, by order dated 29.9.2008;
- (v) W.P.No.960 of 2004, by order dated 7.11.2008 (reported in (2008) 8 MLJ 1079);
- (w) W.P.No.8791 of 2001, by order dated 3.7.2009; and
- (x) W.P.No.19268 of 2004, by order dated 23.12.2009.

Similar is the view taken by this Court in the following decisions:

(i) 2007 (5) CTC 386 (A.Subramani v. The Management of Tamil Nadu State Transport Corporation, (Coimbatore Division-I) Limited) (DB);

(ii) 2009 (1) CTC 668 (S. Raghuraman v. Union of India)(DB);

(iii) 2006 (1) CTC 124 (P. Thangamarimuthu v. Tamil Nadu State Transport Corporation, Madurai (Division-I) Ltd.);

(iv) 2007 (4) CTC 478 (V. Palanishanmugavel v. The General Manager, T.N.State Transport Corporation (Madurai) Ltd.);

(v) W.P.No.34025 of 2002 dated 16.9.2008 (MJJ); and

(vi) W.P.No.15413 of 2003 dated 2.11.2009 (VDPJ).

18. The Division Bench Judgment in W.A.No.475 of 2000 dated 7.2.2005 relied on by the learned counsel for the first respondent cannot be cited as a precedent as the Division Bench refused to exercise its discretion on the facts of the said case. As stated supra, subsequently the Division Benches of this Court in very many decisions held that even if a person is appointed afresh as Helper in terms of G.O.Ms.No.746 dated 2.7.1981, the benefits available under Section 47 of the Act cannot be denied. The SLP filed against some of the judgments of the Division Bench are also dismissed by the Supreme Court. Hence I am not in a position to follow the order passed in W.A.No.475 of 2000 dated 7.2.2005 in this case.

19. Thus, it is evident that the action of the first respondent in discharging the petitioner by order dated 15.5.2000 on the basis of defective vision is contrary to Section 47 of Act 1 of 1996.

Issue No.2: Whether the petitioner is estopped from filing this writ petition after joining the post of Helper afresh ?

20. The Statute viz., Section 47 of the Act gives protection and positive direction to all establishments, unless exempted by the appropriate Government. The Transport Corporation being an establishment owned by the State of Tamil Nadu, is to give employment without affecting the pay scale, seniority and promotional benefits. The offer made by the Corporation, which was accepted by the petitioner, and his continuance in the work as Helper as fresh entrant from 10.4.2001 with pay reduction, cannot be put against the petitioner as it is a well settled proposition of law that there cannot be any estoppel against the statute. The said issue is settled by the following decisions of the Supreme Court.

(a) In (1999) 4 SCC 458 (Electronics Corporation of India Ltd. v. Secretary, Revenue Department) in paragraph 21 it is held that there can be no estoppel against a statute.

(b) In (2009) 6 SCC 194 (Sneh Gupta v. Devi Sarup) in para 45 the Supreme Court held that 'the question of estoppel and/or election as also the doctrine of approbate or reprobate, whereupon

reliance has been placed, has exceptions, one of them being that there is no estoppel against statute.' Issue No.(3) Whether the writ petition is to be dismissed on the ground of laches ?

21. For filing this writ petition after five years, the petitioner has filed an additional affidavit on 15.6.2010 stating that from the date of discharge till the date of filing of the writ petition, petitioner need not be given the difference in salary. The Honourable Supreme Court and this Court in Labour matters held that when the workmen approaches the Court with delay, backwages for the said period may be denied. Further the first respondent has violated the mandate of law viz., Section 47 of Act 1 of 1996. Hence for the sole ground of delay, petitioner cannot be denied his statutory right when he has chosen to assert the same in this writ petition. Even without his request, the first respondent is bound to extend the benefit under Section 47 of the Act, to the petitioner. Hence the issue regarding delay is answered by denying the petitioner salary from the date of discharge till the date of filing of the writ petition.

22. The first respondent, who was a party to several cases cited supra, is not justified in taking unreasonable stand before this Court, after implementing the earlier orders of this Court. As observed by the Honourable Supreme Court, the first respondent has to change its mindset. The Government of Tamil Nadu is now extending several benefits to the disabled persons. It is astonishing to note that the first respondent, which is a State Government Undertaking, is not changing its attitude even after 15 years of coming into force of Act 1 of 1996 (Central Act) towards disabled persons. It is the duty of the State Government to give appropriate directions to the first respondent to strictly follow the mandate of law, so that litigation of this type could be avoided.

23. For the reasons stated above, this writ petition is ordered with a direction to the first respondent to give alternate employment to the petitioner as Senior Driver or in an equivalent post from the date of discharge i.e, from 14.6.2000 with salary protection, seniority and promotional benefits. While calculating the difference in salary payable to the petitioner, petitioner is entitled to get difference in pay only from 2.1.2006 i.e., from the date of filing of the writ petition and he is not entitled to get difference in pay prior to the said date. First Respondent is directed to implement this order within a period of four weeks from the date of receipt of copy of this order. No costs.

Index : Yes

Internet : Yes

9-7-2010

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To

1. The Managing Director,
Tamil Nadu State Transport Corporation (Villupuram)Ltd.,
(Formerly Thanthai Periyar Transport Corporation)
Villupuram 605 602.
2. The Secretary, Government of Tamil Nadu,
Transport Department, Fort St.George,
Chennai 600 009.

N. PAUL VASANTHAKUMAR, J.

Vr

Pre-Delivery Order in

W.P.No.271 of 2006

9-7-2010