

Delhi High Court

Delhi Transports Corporation & ... vs Sunil Kumar on 16 March, 2017

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 10th November, 2016
Date of Decision: 16th March, 2017

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+ W.P.(C) 9513/2015

DELHI TRANSPORTS CORPORATION & OTHERS.... Petitioners
Through Ms. Latika Chaudhury, Advocate for
Ms. Avnish Ahlawat, Advocate

Versus

SUNIL KUMAR Respondent
Through Mr. Anil Mittal & Ms. Komal
Aggarwal, Advocate

WITH

+ W.P.(C) 9885/2015

SUNIL KUMAR Petitioner
Through Mr. Anil Mittal & Ms. Komal
Aggarwal, Advocate

Versus

DELHI TRANSPORTS CORPORATION Respondent
Through Ms. Latika Chaudhury, Advocate for
Ms. Avnish Ahlawat, Advocate

AND

+ W.P.(C) 11452/2015

DELHI TRANSPORTS CORPORATION Petitioners
Through Ms. Latika Chaudhury, Advocate for
Ms. Avnish Ahlawat, Advocate

W.P.(C) Nos. 9513, 9885 & 11452 of 2015
Versus

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AMRISH KUMAR Respondent
Through Mr. G. S. Charya, Advocate

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

The above mentioned writ petitions involve identical questions of law and facts, and are, therefore, being decided by way of this common order and judgment so as to avoid repetition.

2. The facts relevant to W.P.(C) No. 9513/2015 and W.P. (C) No.9885/2015 are stated below. Sunil Kumar- the respondent in W.P.(C) No. 9513/2015 and the petitioner in W.P.(C) No. 9885/2015, was appointed as a driver with the Delhi Transport Corporation (DTC, for short) with effect from 11.02.2011, and was on probation for a period of two years which was further extended by 6 months. On 22.09.2012, Sunil Kumar was diagnosed with a tumor on the left side of his brain on radiological examination by the Action Medical Institute. Consequently, Sunil Kumar had made an application dated 03.12.2012 for advance payment of Rs. 1,47,460/- for the treatment. The DTC wrote a letter dated 07.12.2012 asking Sunil Kumar to be present before the Chief Medical Officer of the Medical Board with all the relevant documents. This was followed by a reminder dated 18.12.2012. The Medical Board, vide report dated 02.01.2013 advised three months rest to Sunil Kumar which was further extended by a month on 03.04.2013. Sunil Kumar was operated on 11.03.2013 at Shri Balaji Action Medical Institute and was discharged on 14.03.2013. He was advised an additional three months rest by the Medical Board on 01.05.2013. On 17.07.2013, Delhi Transport Corporation Medical Board examined Sunil Kumar and declared him medically unfit for the post of driver. However, Sunil Kumar was certified medically fit for duty by the doctor from the Neurology Department of the All India Institute of Medical Sciences.

3. On 19.07.2013, services of Sunil Kumar was terminated with effect from 17.07.2013 under Clause 9 (a)(i) of the DRTA (Conditions of Appointment and Service) Regulations 1952 (1952 Regulations, for short). The appeal dated 23.07.2013 filed by Sunil Kumar was also rejected by the competent authority on 31.10.2013.

4. Sunil Kumar then filed OA No. 3243/2013 before the Central Administrative Tribunal to set aside the order dated 19.07.2013 and sought reinstatement as a driver. The said OA has partly been allowed by the Tribunal vide the impugned order dated 28.04.2015. The Tribunal, taking note of the contention of the DTC that Sunil Kumar was not medically fit enough to drive a bus, rejected the main prayer of quashing the order of termination and reinstatement of Sunil Kumar to the post of a driver, as the terms of appointment had stipulated that his services could be terminated without notice during the period of probation. However, conscious of the facts and on humanitarian grounds, the Tribunal directed the DTC to consider Sunil Kumar for appointment against another post where his services could be utilized whenever such vacancy was made available.

5. We would now record the facts pertaining to W.P.(C) No. 11452/2015. The respondent-Amrish Kumar joined the DTC as a driver on 28.12.2008 on probation for a period of two years. In the character verification report, it was found that Amrish Kumar was involved in two criminal cases (FIR No. 154/1997 under Section 307/392 of IPC & FIR No. 08/02) the particulars of which had been concealed by him while filling up the verification form. Before any action could be taken, Amrish Kumar stopped reporting for duty. On 01.04.2010, Amrish Kumar passed on telephonic information to the DTC that he had met with an accident on 30.03.2010, and was admitted in Anand Hospital, Meerut. Amrish Kumar had not taken prior permission from his employer before leaving Delhi. He did not submit any leave application with a medical certificate or FIR as proof of

the accident. Amrish Kumar was discharged from Anand Hospital on 26.04.2010 and was advised one month bed rest, a period which, as is gathered from the letters on record, was subsequently extended. On 20.10.2011, the DTC issued a letter asking Amrish Kumar to join duty, and in case he was sick, to appear before the DTC Medical Board. Amrish Kumar appeared before the Medical Board on 23.11.2011 and was declared medically unfit for the post of driver. Vide order dated 08.12.2011, service of Amrish Kumar was terminated by the DTC under clause 9 (a)(i) of the 1952 Regulations with effect from 23.11.2011. Amrish Kumar consequently filed OA No. 1389/2012 before the Central Administrative Tribunal for setting aside the termination order dated 08.12.2011.

6. The Tribunal in the impugned order dated 12.03.2015 allowing the OA has relied upon the decision dated 16.01.2015 in Shri Pawan Kumars Vs. Delhi Transport Corporation, 2015 (1) LLJ 644 Delhi and held that the impugned order of termination dated 08.12.2011 being legally unsustainable, should be quashed and set aside. The DTC was directed to reinstate Amrish Kumar on probation as per the applicable rules, on an alternative post in terms of the provisions of Section 47 (1) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Persons with Disabilities Act, 1995, for short). In the absence of any suitable alternative employment, a supernumerary post would be provided to him until such time that a suitable post was not available, or till his superannuation, whichever was earlier. Since Amrish Kumar had remained out of employment from the date of disability, he would not be entitled to 100% back wages but was entitled to 50% back wages with due increments. These directions were to be implemented within ten weeks from the date of receipt of a copy of the order and delay, if any, in complying with the same would entitle Amrish Kumar to interest @ 9% on the outstanding payable amount till the date of payment.

7. We have heard the contentions of both the sides and would first adjudicate upon the dispute in the case of Sunil Kumar. He has challenged the impugned order dated 28.04.2015 on the ground that he ought to have been granted relief in terms of the decision in Pawan Kumar (Supra) as well as the in terms of the decision of the Tribunal in OA No. 1389/2015 filed by Amrish Kumar.

8. Learned counsel for the DTC, on the other hand, submitted that Sunil Kumar would not be entitled to the benefit of Section 47(1) of the Persons with Disabilities Act, 1995. As per the terms and condition of the letter of appointment, Sunil Kumar's services could be terminated without notice during the period of probation.

9. The impugned order of the Tribunal dated 28.04.2015 in the case of Sunil Kumar reads as under:-

"Sh. Sunil Kumar s/o Sh. Chand Singh Driver, B.No. 25361, Pay T.No.67363 was directed to DTC Medical Board I.P. Depot Dispensary vide this memo No.:RD-3/PFC(D)/2013/2324 dated 12.07.2013 for medical examination. The DTC Medical Board examined him and declared UNFIT for the post of driver w.e.f. 17.07.2013 vide No.:MB/2012/2238F dt. 17.07.2013. Therefore, his services are hereby terminated with immediate effect under clause 9(a)(i) of the DRTA Condition of his appointment and service regulation 1952 as per terms & conditions of his appointment."

Therefore, the termination is on account of lack of medical fitness as certified by the Medical Board. Rule 9(a)(i) of the Regulations, 1952 provides as under:-

9. Termination of Service:- (a) Except as otherwise specified in the appointment orders, the services of an employee of the Authority may be terminated without any notice or pay in lieu of notice:-

(i) During the period of probation and without assigning any reasons thereof." "

10. Section 47 of the Persons with Disabilities Act, 1995 stipulates:-

"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.

A reading of section 47(1) of the Persons with Disabilities Act, 1995 quoted above would show that an establishment is not authorised to reduce the rank of an employee or dispense with his services, solely on account of a disability acquired by the said employee during the course of service. The provisos to the section further stipulate that if owing to the disability, an employee is found unsuitable for the post he was holding, he would have to be shifted to another post with the same pay-scale and benefits. If that is not possible, a supernumerary post is to be created till a regular post is available or till the date of superannuation of the employee concerned, whichever is earlier.

11. The scope and ambit of section 47 of the Persons with Disabilities Act, 1995 was elucidated upon by the Supreme Court in Kunal Singh Vs. Union of India and Anr. (2003) 4 SCC 524 in the following words:-

"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."

In view of the aforesaid reasoning and ratio, Sunil Kumar would be entitled to benefit of Section 47 of the Persons with Disabilities Act, 1995.

12. The second ground on which the claim of Sunil Kumar has been controverted by the DTC is that he was not entitled to the benefit under section 47 of the Persons with Disabilities Act, 1995 as he was not a regular employee and was on probation at the time of acquiring the disability. This issue had come up before this Court in Pawan Kumar (Supra) wherein it has been held as under:-

"11....However, Section 47 does not make any distinction between the nature of services it protects. Relief cannot be denied to the petitioner on the ground that he was still undergoing the probation period at the time of acquisition of the disability. In this regard, the Bombay High Court in Union of India Vs. Pramod Sadashiv Thakre, 2012 (2) ALLMR 468, upheld this view in the following terms:

"It was, however, urged by Mr. Sundaram, learned counsel for the petitioners, that the respondent's services cannot be protected by Section 47 of the Act since the respondent was a temporary employee on probation. Section 47 of the Act, reproduced above, protects the services of an employee and makes no distinction between the nature of the services it protects. The purpose and intention of the provisions is to protect an employee from unemployment on the ground that he has incurred disability. Parliament has in its wisdom accommodated the possibility that an employee may not be able to discharge the duties of office prescribed for him and to that effect a provision has been made that an employee shall be employed in some other post with same benefits."

"12. Moreover, it is immaterial as to whether the injury was caused to the petitioner in the course of his employment as a driver or otherwise. This Court in the case of Shri. Sunil Kumar v. Delhi Transport Corporation & Anr., 120 (2005) DLT 499, made the following observations:

"...decisions of Courts have held that it is wholly immaterial where the injury is caused while on duty or at any other time. The Disabilities Act is a beneficial enactment. No person will welcome an injury to his person..."

In light of the aforesaid decision, the contention of the DTC that protection and benefit under Section 47(1) of the Persons with Disabilities Act, 1995 would not be available to Sunil Kumar cannot be accepted. Rule 9(a)(i) of the 1952 Regulations has to be interpreted in a reasonable manner and not as conferring absolute and unguided discretion to the authorities to terminate the services of an employee. Grant of absolute and unchecked discretionary power is an anathema to the Rule of Law. Pertinently, the termination in the present case was made for a reason, the reason being medical unfitness of the employee as concluded by the DTC Medical Board. It is in this context that we have to examine whether the order of termination dated 19.07.2013 violates Articles 14, 16, and 21 of the Constitution.

13. In view of the aforesaid, the impugned order of termination dated 19.07.2013 terminating Sunil Kumar being untenable in law is quashed and set aside. Accordingly, we allow W.P.(C) No. 9885/2015 filed by Sunil Kumar with the direction that he would be given alternative employment

in a suitable post. On the question of payment of back wages, the DTC is directed to pay 50% back wages to Sunil Kumar but the period between termination and reinstatement would not be treated as a break in service, and the salary on re-employment would include the increments that he would have earned. Compliance with the aforesaid directions will be made within 10 weeks from the date of this judgment and delay, if any, would entitle Sunil Kumar to interest at the rate of 9% on the amount payable till date of payment.

14. We will now deal with W.P. (C) 11452/2015. The Tribunal vide the impugned order dated 12.03.2015 has allowed OA No. 1389/2015 relying on Section 47 of the Persons with Disabilities Act, 1995 and the decision in Pawan Kumar (supra). The said judgment affirmatively, as noted above, holds that an officer on probation will also be entitled to benefit of Section 47 of the Persons with Disabilities Act, 1995. In view of the aforesaid facts and findings recorded in W.P.(C) No.9513/2015 and W.P.(C) No.9885/2015, we do not find any flaw or infirmity in the order passed by the Tribunal in OA No. 1389/2015. We clarify that this order would not operate as a bar for the DTC to initiate disciplinary proceedings against Amrish Kumar for concealment of facts pertaining to his involvement in criminal cases in the character verification report. Further, in the event that disciplinary action is taken and Amrish Kumar is removed in accordance with law, he would not be entitled to payment of 50% back wages.

15. Accordingly, W.P.(C) No. 9885/2015 titled Sunil Kumar Vs. Delhi Transport Corporation is allowed, in the above terms. W.P. (C) No. 9513/2015 titled Delhi Transport Corporation Vs. Sunil Kumar is dismissed. W.P. (C) 11452/2015, Delhi Transport Corporation v. Amrish Kumar is disposed of with the above clarification. No orders as to costs.

(CHANDER SHEKHAR) JUDGE (SANJIV KHANNA) JUDGE MARCH 16, 2017/b