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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.7363 OF 2004
WITH
CIVIL APPLICATION NO.2667 OF 2006
WITH
CIVIL APPLICATION NO.3534 OF 2005

The Divisional Controller,
Maharashtra State Road Transport
Corporation, Parbhani Division,
Parbhani.

...PETITIONER

-VERSUS-

Syed Hamidali s/o Syed Vazeerali,
Age : 45 years, Occ : Service,
R/o Gangakhed, Tq.Gangakhed,
Dist.Parbhani.

...RESPONDENT

WITH
CIVIL APPLICATION NO.6536 OF 2015
IN
WRIT PETITION NO.7363 OF 2005
(Syed Hamidali Syed Vazeerali v/s MSRTC).

WITH
WRIT PETITION NO.7180 OF 2011

Syed Hamidali s/o Syed Vazeerali,
Age : 50 years, Occ : Driver,
R/o Gangakhed, Tq.Gangakhed,
Dist.Parbhani.

...PETITIONER

-VERSUS-

The Divisional Controller,
Maharashtra State Road Transport
Corporation, Parbhani.

...RESPONDENT

...

Advocate for Employer/ MSRTC : Shri A.D.Wange.

Advocate for Employee : Shri P.R.Katneshwarkar h/f Shri Syed G R.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 28th August, 2015

Oral Judgment:

1 By the first petition, the Petitioner/ MSRTC seeks to challenge the judgment and order dated 09.07.2004 delivered by the Industrial Court in Complaint (ULP) No.33/2002 by which the complaint was partly allowed.

2 The Petitioner/ MSRTC submits that the Respondent/ Employee was subjected to the disciplinary proceedings by following the due procedure of law. The charge levelled upon him was of collecting money from co-workers at the work premises. He was a Bus Driver who was appointed on 18.01.1979 and is due for retirement within a short period.

3 The Petitioner/ MSRTC submits that the Disciplinary Authority came to a conclusion that the Respondent/ Employee deserves to be dismissed for misconduct proved against him. Accordingly, the order dated 25.05.2001, thereby dismissing the services of the Respondent was passed.

4 The Respondent/ Employee preferred a First Appeal before the First Appellate Authority immediately on 01.06.2001. The said appeal was partly allowed by the order dated 25.08.2001. By maintaining the dismissal, the first Appellate Authority granted a fresh appointment to the Respondent by way of scaling down the punishment. The Respondent, therefore, joined duties on 29.08.2001.

5 The Petitioner/ MSRTC submits that the Respondent/ Employee filed Complaint (ULP) No.33/2002 before the Industrial Court at Jalna on 27.03.2002. By the impugned judgment and order dated 09.07.2004, the complaint was partly allowed and the Industrial Court held that the order passed by the First Appellate Authority dated 25.08.2001 was unsustainable as the said punishment of dismissal from service coupled with reappointment as a fresh employee was not prescribed under the Discipline and Appeal Rules of the Petitioner/ MSRTC. The Industrial Court permitted the first Appellate Authority to award any punishment as may be prescribed by the Rules.

6 The first Writ Petition was admitted by this Court on 13.12.2004. The Respondent in the first petition is the Employee. He preferred the second Writ Petition challenging the same judgment dated 09.07.2004 delivered by the Industrial Court. The said petition is yet to be

admitted. Hence, Rule. Rule made returnable forthwith and heard finally along with the first petition, by the consent of the parties.

7 The contention of Shri Katneshwarkar, learned Advocate appearing on behalf of the Employee is that once the decision of the first Appellate Authority was delivered, the Employee had the option of resorting to the second appeal. He has, therefore, preferred the Second Appeal before the second Appellate Authority.

8 Ultimately, on account of loss of employment and the family suffering from starvation, the Employee preferred to join duties on 29.08.2001 only to sustain himself and his family. It cannot be construed that he gave up his challenge to the cause of action which had arisen out of his dismissal and allowing of the first appeal granting a fresh appointment. He contested the second appeal and finally, the Second Appellate Authority dismissed the second appeal on 21.02.2002. Immediately pursuant thereto, he preferred Complaint (ULP) No.33/2002 which was filed on 27.03.2002. Therefore, there is a continuity in the actions of the Employee in pursuing his challenge to the order of fresh appointment.

9 The Employer/ Corporation, by placing reliance upon the

judgment of this Court in the matter of *MSRTC, Jalgaon v/s Pandurang Trimbak Dusane*, Writ Petition No.2139/1997 dated 02.07.2015 (Aurangabad Bench), has contended that this Court has concluded that once the Employee accepts a fresh employment and joins duties, he thereafter, cannot question the order of a fresh appointment. It is further indicated that this Court had placed reliance upon the judgment of the Apex Court in the case of *State of Punjab v/s Krishan Niwas*, AIR 1997 SC 2349.

10 Shri Wange, learned Advocate appearing for the Employer/ Corporation, submits that in the instant case, the Employee is estopped from filing a complaint before the Industrial Court after having accepted the fresh appointment and having joined duties as like in the case of MSRTC v/s Pandurang Trimbak Dusane (supra).

11 Per contra, Shri Katneshwarkar submits that in Pandurang Trimbak Dusane's case (supra), the said Employee was successful in the Second Appeal after the first appeal was rejected on 18.10.1989. When the second appeal was partly allowed on 21.08.1990 and the Employee was directed a fresh appointment without continuity, he accepted the order on 21.08.1990 and reported for duties on the same day. He continued in his employment and thereafter, filed Complaint (ULP)

No.97/1991 challenging his dismissal and fresh appointment. It was in this backdrop that the ratio laid down by the Apex Court in the State of Punjab (supra) was applicable.

12 Shri Katneshwarkar relies upon the judgment of this Court in the matter of *MSRTC v/s Triyambak Pandurang Gandale*, **2011 (1) Mh.L.J. 723 : 2010 (3) CLR 170**. He submits that this Court has come to a conclusion that the second Appellate Authority could have only substituted the order of dismissal, either with any penalty or could also have imposed a light punishment. The direction to grant fresh employment was not one of the penalty envisaged. By issuing a fresh appointment, the doctrine of estoppel would not be applicable. It was, thus, held that the Industrial Court had rightly concluded that the Employee should be reinstated in service with continuity and full back-wages.

13 The observations of this Court in Triyambak Pandurang Gandale's case (supra) in paragraphs 5, 8 and 9 read as under:-

“5. *In my opinion, the Industrial Court has rightly observed that when the second appellate authority had absolved the respondent from all the charges levelled against him as they were not proved in the departmental enquiry. The question of granting the respondent fresh reemployment does not arise. The*

fact that the charges were not established is no longer in doubt. In fact, the petitioners chose to withdraw the prosecution launched by them against the respondent. In these circumstances, in my opinion, the question of reappointing the respondent in service does not arise. He would be entitled to reinstatement in service with continuity and full back-wages as according to the appellate authority the charges against the respondent have not been established before the enquiry officer.

8. *The facts in the present case are different. The second appellate authority has held in no uncertain terms that the charges levelled against the respondent have not been proved. Therefore, the question of offering the respondent fresh employment did not arise. The doctrine of estoppel also would not be applicable in the present case as admittedly the respondent was absolved of all the charges levelled against him. There is nothing on record to suggest that these observations of the second appellate authority were made only because of an indulgence shown to the workman or because the workman had apologised or because the workman sought the mercy of the petitioners to give him fresh employment. The judgement in the aforesaid case has no application to the facts in the present matter.*
9. *In any event, the complaint in the aforesaid case was filed under Item 9 of Schedule IV as what was challenged before the Industrial Court was the reappointment in service as a fresh employee, despite the appellate authority having concluded that the respondent was not guilty of the misconduct alleged against him. It is in these circumstances that the Industrial Court concluded that the appellate authority could have only substituted the order of dismissal with either a penalty or could have revoked it. A direction to issue a fresh employment order was not one of the penalties envisaged.”*

14 Shri Katneshwarkar has then relied upon the judgment of this Court in the matter of *MSRTC, Ahmednagar v/s Alfred James Gamare, 2009 (2) CLR 582 : 2009 (4) ALL MR 31*. He submits that the Employee in the said case succeeded in the second appeal on 25.04.1991 and he was reappointed as a fresh Bus Conductor without giving him any benefit of his past service. The said Employee joined duties as a fresh Conductor and then, lodged the complaint before the Labour Court challenging his dismissal and his fresh appointment. Shri Katneshwarkar, therefore, submits that the Labour Court having granted reinstatement to the said Employee and the revision petition having been dismissed by the Revisional Court, prompted the MSRTC to prefer a challenge before this Court.

15 It is apparent in this case that the Employee approached the Industrial Court for challenging his fresh appointment. The Industrial Court quashed and set aside the said order of fresh appointment and permitted the second Appellate Authority to award any punishment deemed fit.

16 I find that the order of the Industrial Court setting aside the fresh appointment, would relegate the Employee to the stage prior to the said order passed by the Appellate Authority and which is the order of

dismissal. The Employee, therefore, would stand relegated to the position at which the order of dismissal was passed thereby, leading to his dismissal.

17 It would have been an altogether different situation, had the Employee approached the Labour Court and challenged his fresh appointment which was an effect of his dismissal from service. It was, therefore, incumbent upon the Employee to challenge his dismissal as well as fresh appointment if he was aggrieved by the fresh appointment which was a consequence of his dismissal. The basis of fresh appointment is, therefore, his dismissal which has not been questioned.

18 I find from the impugned judgment of the Industrial Court that the issue of proportionality has also been considered. It is undisputed that the Employee was not charged with misappropriation or any such act which could be said to have caused damage to the property of the Petitioner or loss to the Petitioner. The Respondent had explained that contribution was being collected from certain members/ co-workers who were party to the court case with an intention of collecting money to be paid to the concerned lawyer dealing with the case on behalf of the Employees. I am, therefore, in agreement with the view taken by the Industrial Court that the punishment of termination and fresh

appointment was unsustainable.

19 Taking into account the above recorded facts, I find that the impugned judgment of the Industrial Court cannot be termed as being perverse or erroneous. In the light of the law laid down by the Apex Court in the matters of *Syed Yakoob v/s K.S.Radhakrishnan*, **AIR 1964 SC 477** and *Surya Dev Rai v/s Ram Chander Rai*, **AIR 2003 SC 3044**, the impugned order does not amount to causing grave injustice to the Petitioner.

20 Considering the facts as recorded above and the fact that the Employee has been in employment from 29.08.2001 and is likely to retire in coming six months, I deem it proper to sustain the judgment of the Industrial Court only to the extent of setting aside the fresh appointment and relegating the Employee to the Second Appellate Authority, for the following reasons:-

- (a) The Employee had never given up his challenge to the order of dismissal, despite fresh appointment.
- (b) The Employee joined duties on 29.08.2001, despite the second appeal being pending with a hope that the second Appellate Authority would take cognizance of his grievance.
- (c) Unfortunately and probably under an incorrect advice, the

Employee approached the Industrial Court for challenging the fresh appointment which was necessarily a result of the order of dismissal issued to him and hence, the said order of dismissal was required to be challenged not before the Industrial Court, but before the Labour Court.

- (d) Since the Employee is in employment and considering the fact that the charge levelled upon him was neither of having caused an accident nor misappropriation, but purely of collecting contribution from co-workers to be paid to the lawyer, that I find it proper to indicate to the second Appellate Authority that it may pass any order by way of punishment, barring the order of dismissal from service.

21 Since the Employee is said to be attaining the age of superannuation by June, 2016, the second Appellate Authority of the Petitioner/ Corporation shall decide the second appeal afresh on or before 31.12.2015. He may also cause a personal hearing in the matter so as to enable the Employee to address his mind.

22 Nevertheless, the second Appellate Authority shall keep in mind that the charge levelled upon the Employee is of a minor character and hence, any punishment other than dismissal, after hearing the

Employee, be awarded which would be commensurate to the gravity and seriousness of the misconduct. As such, there would be continuity of service of the Employee.

23 In the light of the above, the second Appellate Authority shall deprive the Employee of the back-wages from the date of his termination 25.05.2001 till the date of his joining 29.08.2001.

24 In addition thereto, in the event, the punishment of stoppage of increment or increments is awarded to the Employee by the second Appellate Authority, the difference in wages by deducting the increment amounts being stopped by punishment, shall be calculated and the second Appellate Authority shall, accordingly, pass an appropriate order.

25 With the above observations, the petition filed by the Corporation is disposed of. Rule is discharged. The petition filed by the Employee, is partly allowed in the above terms/ directions to the second Appellate Authority. Rule is hence made partly absolute.

26 The pending Civil Applications do not survive and the same are also disposed of.

(RAVINDRA V. GHUGE, J.)