

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.3032 OF 2014

Ashok s/o Laxman Zate,
Age-41 years, Occu-Service,
R/o At Post : Ukhali, Tq.Aundha,
Dist.Hingoli.

PETITIONER

VERSUS

Maharashtra State Road Transport
Corporation,
Through : Divisional Controller,
Parbhani Division (In capacity of
First Appellate Authority and Administrative
Head of the respondent), office situated at
Parbhani, Tq. and Dist. Parbhani

RESPONDENT

Mr.Prashant P.Deshpande, Advocate for the petitioner.
Mr.A.D.Wange, Advocate for the respondent.

(CORAM : RAVINDRA V. GHUGE, J.)
DATE : 08/09/2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the impugned judgment and order dated 08/04/2013 delivered by the Industrial Court in Complaint (ULP) No.57/2011. The undisputed factors emerging from these proceedings as under :-

- (a) The petitioner had joined the respondent as a Bus Conductor.
- (b) He was charge sheeted for having committed acts of misappropriation. After concluding the enquiry, the disciplinary authority imposed the punishment of dismissal from service by which the petitioner was dismissed from service w.e.f. 22/02/2002.
- (c) The petitioner preferred a first appeal before the Appellate Authority seeking reconsideration of the punishment of dismissal imposed upon him.
- (d) By order dated 13/03/2002, the petitioner was granted fresh appointment on the basis of which, his past service was wiped out.
- (e) The petitioner excepted the decision and joined duties as a freshly appointed "Bus Conductor" on 16/04/2002, without lodging any protest.
- (f) The petitioner then preferred a second appeal on 24/04/2002, which was rejected on 28/11/2002.
- (g) The petitioner lodged a complaint before the Industrial Court in 2005.
- (h) The delay of about 3 years and more was not condoned by the Industrial Court and subsequently this Court had condoned the delay.
- (i) Complaint (ULP) No.57/2011 was registered on 07/06/2011.
- (j) By the impugned judgment and order dated 08/04/2013, the Industrial Court has dismissed the said complaint.

3. Contention of the petitioner is that because he has preferred the second appeal on 24/04/2002, it needs to be presumed that he

had not joined duties as a fresh appointee on 16/04/2002, voluntarily. It is further submitted that the punishment of a fresh appointment cannot be imposed upon the petitioner since the minor and major punishments prescribed under the Discipline and Appeal Rules of the respondent / Corporation, do not prescribe such a punishment.

4. Mr.Deshpande has, therefore, strenuously contended that the impugned judgment of the Industrial Court deserves to be quashed and set aside and the complaint deserves to be remitted for a fresh decision.

5. The petitioner has placed reliance upon the judgment of the Apex Court in the case of State Bank of India and others Vs. T.J.Paul, [AIR 1999 SC 1994] and the judgment of this Court in the matter of MSRTC Vs. Hamid Ishaq Mirza, 2010 (suppl.) Bom.C.R. 67.

6. The learned Advocate for the respondent / Corporation has opposed the petition. It is submitted that the Apex Court in the case of State of Punjab Vs. Krishan Niwas, [AIR 1997 SC 2349] has concluded that once an employee accepts a fresh appointment, he cannot thereafter question the legality of the said order.

7. He further relies upon the judgment of this Court in the case of MSRTC Mumbai Vs. Prakash Tulshiram Pardeshi, W.P. No.1858/2003 dated 22/04/2008.

8. He, therefore, submits that having accepted a fresh appointment, the petitioner cannot be permitted to challenge the same by continuing in service, discharging duties and accepting all service benefits, which are pursuant to the fresh appointment awarded to him. He, therefore, submits that the Industrial Court has rightly dismissed the petition.

9. I have considered the submissions of the learned Advocates as have been recorded hereinabove. The dates in this matter and the conduct of the petitioner is material. The petitioner was dismissed from service on 22/02/2002. His First Appeal was partly allowed on 30/03/2002. He did not promptly prefer a second appeal. He chose to accept his fresh appointment without any protest and joined duties on 16/04/2002 without reserving any right to challenge the decision of the First Appellate Authority.

10. The petitioner, after joining duties, filed a second appeal on 24/04/2002, which was rejected on 28/11/2002. For 3 years

thereafter, he continued in service and was regularized. In 2005, he chose to file Complaint (ULP) No.57/2011, which was registered after the delay was condoned.

11. The Apex Court in the case of State of Punjab (supra) has held in paragraph Nos. 2 to 5 as under :-

- “2. *This appeal, by special leave, arises from the judgment of the Punjab & Haryana High Court made on March 7, 1996 in Second Appeal No.2662/95.*

3. *The admitted facts are that the respondent was charged for an offence under Section 302 I.P.C. He was convicted and sentenced to undergo imprisonment for life. Thereafter, proceedings were initiated against him under Article 311(2) of the Constitution and he was removed from service. Appeal against his conviction under Section 302 I.P.C. was allowed by the High Court. Punishment of conviction under Section 302 IPC was modified to one under Section 325 IPC and he was directed to undergo rigorous imprisonment for 1-1/2 years. After undergoing the imprisonment, the respondent filed an appeal before the appellate authority. The appellate authority by order dated March 1, 1989 reduced the punishment of removal from service to lower scale of pay drawn by him and directed that he was not entitled to back-wages. The respondent accepted it and joined duty on June 5, 1989.*

Subsequently, he filed a civil suit for declaration that his dismissal from the service and reduction of rank and also the direction that he is not entitled to pay the arrears of wages, were illegal. The Trial Court dismissed the suit. On appeal; the Addl. District Judge reversed the judgment of the trial Court and decreed the suit. In the second appeal, the High Court has confirmed the same. Thus this appeal, by special leave.

4. *Learned counsel for the respondent contends that the offence with which he was sentenced under Section 325 IPC does not involve his moral turpitude and, therefore, the imposition of punishment of reduction of his scale of pay and also denial of back wages, is clearly illegal and that the appellants are not entitled to challenge the order. We find no force in the contention. The respondent having accepted the order of the appellate authority and joined the post on June 5, 1989, it was not open to him to challenge the order subsequently. By his conduct he has accepted the correctness of the order and then acted upon it. Under these circumstances, the civil Court would not have gone into the merits and decided the matter against the appellants.*

5. *Accordingly, the appeal is allowed. The orders of the High Court and the appellate Court stand set aside and that of the trial Court stands confirmed. No costs."*

12. In the case of MSRTC Mumbai (supra), this Court by relying upon the judgment of the Apex Court in the case of State of Punjab, has arrived at the following conclusions :-

“Counsel appearing on behalf of the Petitioner submitted that under clause 14 of the Discipline and Appeal Procedure the authority to which an appeal lies, is empowered to pass such order as it thinks fit. Hence, it was submitted that the Appellate Authority was justified in directing that an order of fresh appointment can be offered to the Respondent. Moreover, it was urged that in fact the Respondent was estopped from filing a complaint of unfair labour practices.

The charges against the Respondent were of a serious nature and character. A disciplinary enquiry was convened to enquire into the allegation that the Respondent while discharging his duties as conductor had collected the fare from two passengers on the bus, but to whom tickets had not been issued. The money bag of the Respondent also showed an excess fare collection. The charge against the Respondent was, therefore, that he had misappropriated the funds of the Corporation and had been guilty of a dereliction of duties by not issuing tickets to passengers for the journey. Such an act of misconduct having been found to be duly established, had to be taken seriously both by the disciplinary authority and by the Labour Court. Upon holding the charge to be established, the Respondent was dismissed from service. The first Appellate Authority, as a matter of fact, came to the

conclusion that the charge was established, that it was of a serious nature and that the service record of the Respondent was not satisfactory and he was penalised in the past under the service rules. The final order of the Appellate Authority clearly suggests that the Appellate Authority was inclined to dismiss the appellant from service. However, it was the Respondent who had stated that he would not commit such a mistake in the future and it was on his request that the Appellate Authority eventually decided to make a fresh offer of appointment so as to enable the Respondent to have some opportunity to improve upon himself. The Respondent accepted the order of the Appellate Authority and joined service with effect from 10th December 1994. Once that was done and having taken the benefit of the order, it was clearly not open to the Respondent to turn back and complain of an unfair labour practice. The Respondent is clearly estopped from doing so. The principle of estoppel must apply in such a case and the Labour Court ought to have rejected the complaint on this ground alone. Counsel appearing on behalf of the Petitioner urged that the powers of the Appellate Authority are wide enough to include an offer of the fresh appointment to the workman. For the purposes of these proceedings, it is not necessary for this Court to enter any final judgment on whether the Appellate Authority in the course of modifying the order of dismissal can pass an order of fresh appointment. But in the facts of the present case, it needs emphasis that the order of the Appellate Authority properly construed, wasnd an offer for a fresh appointment

which was duly accepted by the Respondent. If the Respondent believed that the Appellate Authority had no authority to impose such a direction upon him, he could have challenged the order in its entirety. Having taken the benefit of the order, the Respondent was estopped from challenging the order by which he was given fresh appointment. The Appellate Authority while justifying its own finding, confirmed the order of dismissal. The Respondent was, however, offered re-employment on humanitarian grounds, particularly in the light of the fact that he accepted his mistake and stated that he would not commit such a mistake in future. The interference of the Labour Court in the proceedings, was therefore, clearly not warranted. The principle that estoppel must apply in a situation such as this is consistent with the judgment of the Supreme Court in the State of Punjab vs. Krishan Niwas, 1997 1 CLR 855. The same view has been taken by the Division Bench of the Gujarat High court in Union of India vs. N. M. Dhobi, 2006 1 CLR 587.

In these circumstances the petition will have to be allowed and is accordingly allowed. Rule is made absolute in terms of prayer clause (a) and the impugned judgment and order of the Industrial Court dated 7th March 2002 shall stand quashed and set aside. Complaint (ULP) 438 of 1996 shall in the circumstances stand dismissed. In the circumstances, there shall be no order as to costs."

13. This Court, in the case of MSRTC Vs.Pandurang Trimbak Dusane, by judgment dated 02/07/2015 in WP No.2139/1997, has concluded in paragraph Nos.13 to 16 as under :-

“13 It is thus, evident that this Court has concluded that once the decision of the Appellate Authority directing a fresh appointment to the employee is accepted and acted upon, the principle of estoppel must apply in such situation since it is consistent with the view taken by the Apex Court in the case of State of Punjab (supra). The same view has also been taken by the Division Bench of the Gujarat High Court in Union of India v/s N.M.Dhobi reported in **2006(1) CLR 587.**

14 In the light of the law as is laid down, Complaint (ULP) No.97/1991 preferred by the Respondent herein was liable to be dismissed as it was untenable. It is altogether different that an employee declines to accept a fresh appointment order issued by the first or second appellate authority and questions his dismissal. In the instant case, the Respondent accepted the decision of the second Appellate Authority, accepted the order of fresh appointment and joined the duties pursuant to which the complaint is filed. Thus, on the one hand, he continued to enjoy the benefits of the order of the second Appellate Authority and on the other hand, questioned the propriety and validity of the same order.

15 Needless to state, this amounts to approbating

and reprobating at the same time. The Apex Court has, therefore, ruled that such complaints ought not to be entertained.

16 *Had the Respondent, without accepting the order of the second Appellate Authority challenged it, the competent authority would have been in a position to consider the legality and validity of the order of the second Appellate Authority directing fresh appointment, on the ground that such punishment of imposing the dismissal, causing break in service and then appointing as a fresh candidate, was not permitted by the Discipline and Appeal Rules of the Petitioner.”*

14. The petitioner has relied upon the judgment of the Apex Court in the case of State Bank of India (supra), wherein the Apex Court has considered that the order passed by the Disciplinary Authority in the form of a punishment, was in fact never prescribed as per the rules of the Bank.

15. The Apex Court held that it was not interfering in the punishment awarded by the employer on the ground that the punishment was disproportionate. The Apex Court caused an interference only because the punishment imposed was not prescribed in Law. The judgment of the Apex Court in the case of

State Bank of Punjab (supra) was delivered earlier and was not cited before the Apex Court in the case of State Bank of India.

16. Moreover, in the State Bank of India case (supra), issue was not of reinstating the employee by way of an alternate punishment in the nature of a fresh appointment. The punishment of dismissal was converted into a punishment of removal from service. The issue of accepting fresh appointment, continuing in service and then challenging the decision after 3 years was not the issue for determination before the Apex Court. For these reasons, the said judgment is not applicable as the facts are distinguishable.

17. The reliance of the petitioner in the case of MSRTC Vs. Hamid (supra) is of no assistance since the issue before this Court was with regard to setting aside the order of punishment and the aspect of challenge to the fresh appointment in the backdrop of the employee having preferred a second appeal. The judgment of the Apex Court in the case of State of Punjab (supra) was not cited before this Court wherein the Apex Court has discouraged the practice of accepting a fresh appointment and then challenging it while being in service, on the basis of the rule of estoppel.

18. The past service record of the petitioner is also placed before this Court. On 8 different occasions in a span of 9 years of service, the petitioner has been punished for acts of mis-appropriation.

19. Though the petitioner contends that the same cannot be termed as misappropriation, I am unable to accept the said contention for apparent reasons. The petitioner has been punished on the basis of having permitted passengers to travel ticket less, which can only be seen to be an act of misappropriation and causing monetary loss to the Corporation.

20. In the above backdrop and in the light of the ratio laid down by the Apex Court in the case of State of Punjab (supra), I do not find that the impugned judgment of the Industrial Court could be termed as being perverse or erroneous.

21. This petition is, therefore, dismissed. Rule is discharged.

(RAVINDRA V. GHUGE, J.)