

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO. 3846 OF 1995

1. Dept. Manager (G),  
M.S.R.T. Corporation,  
Dept No.2, Aurangabad  
Division, Aurangabad.

2. Divisional Controller,  
M.S.R.T. Corporation,  
Aurangabad Division,  
Aurangabad.

3. Capt. V.K. Bhosle,  
Officer on Spl. Duty (Appeals)  
Member, Appellate Committee,  
MSRT Corporation, Aurangabad.

4. Capt. C.G. Navale,  
Officer on Spl. Duty (Appeals)  
Member, Appellate Committee,  
MSRT Corporation, Aurangabad.

..Petitioners

Versus

Ahmedkhan Hussainkhan  
Age 46 years, Occ. Service  
R/o Standard Silk Mill  
Colony, H.No.25,  
Paithan Road, Aurangabad.

..Respondent

...  
Advocate for Petitioner : Smt. Reddy Ranjana

...

CORAM : RAVINDRA V. GHUGE, J.  
Dated: August 25, 2016

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ORAL JUDGMENT :-

1. The petitioner / Corporation is aggrieved by the judgment and order dated 27.9.1994, by which, Complaint (ULP) No. 52 of 1989 has been allowed.

2. Learned Advocate for the petitioner submits that the respondent, who was an employee of the petitioner, was absent without leave from 13.3.1987 upto 30.3.1987. A charge sheet, dated 1.4.1987, was issued. Since the respondent boycotted the enquiry, the same was concluded ex-parte and finally the order of dismissal dated 11.6.1987 was passed.

3. The respondent approached the petitioner on 19.6.1987 and preferred the first department appeal against the order of dismissal dated 11.6.1987. By order dated 3.7.1987, the respondent was given a fresh appointment order and was allowed to report for duties. His second department appeal was dismissed on 8.11.1988. The respondent thereafter joined the duties and challenged his fresh appointment in Complaint (ULP) No.52 of 1989. By the impugned judgment, the Complaint was allowed by the Industrial Court and the respondent was granted continuity in service with all incidental and consequential benefits.

4. I have gone through the petition paper book in the light of the submissions of the learned Advocate for the petitioner. None appears for the respondent.

5. The only issue involved in this matter is as to what would be the effect of the order of the appellate authority, when it concludes

that the employee deserves to be granted fresh employment. The Industrial Court in the impugned judgment concludes that because the order of the first appellate authority mentions that the order of dismissal is set aside while granting fresh appointment, it would mean that the employee would be entitled for continuous service as there would not be any dismissal in the eyes of law.

6. This issue is no longer *res integra*. The Honourable Supreme Court in the matter of State of Punjab and others Vs. Krishan Niwas [AIR 1997 SC 2349], has concluded that once the employee accepts the order of the appellate authority and joins service as a fresh employee, he is estopped from challenging the issuance of the fresh appointment. This Court in the matter of Maharashtra State Road Transport Corporation Vs. Prakash Tulshiram Pardeshi [2008 (4) Mh.L.J. 940], has also concluded by relying upon the judgment of the Honourable Apex Court in the case of State of Punjab (supra) that an employee is estopped from challenging his fresh appointment after he has accepted and joined the duties.

7. This Court dealt with an identical situation in Writ Petition No.6677 of 2007 in the matter of Anil Vaijnath Arbad Vs. Divisional Traffic Superintendent, MSRTC, by its judgment dated 21.1.2016. In the said case, after the dismissal of Anil on 12.8.2000, he preferred first department appeal, which was dismissed. In the second department appeal, his order of dismissal was set aside and the fresh

appointment order was issued. A complaint was preferred before the Industrial Court under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (“the said Act ”) challenging the fresh appointment.

8. It would be apposite to reproduce the observations of this Court from paragraph Nos.6 to 22 of the Anil's judgment (supra), which reads as under:-

*“6 The contention of the Petitioner is that the Industrial Court has wrongly dismissed the complaint. The power to go into the legality and validity of the decision of the second Appellate Authority was not exercised. When a fresh appointment was not prescribed under the Rules to be a punishment to be imposed on an Employee, the Industrial Court could not have dismissed the complaint since the MSRTC was unable to point out its source of power to issue a fresh appointment order by way of punishment.*

*7 The Petitioner relies upon the judgment of the Apex Court in the case of Subhash vs. the Divisional Controller, MSRTC, AIR 2010 SC 2484. The contention is that the Apex Court modified the order passed by the departmental authorities and has granted reinstatement with continuity of service to the employee without back-wages. He, therefore, submits that the judgment delivered by the Apex Court in the case of the State*

of *Punjab vs. Krishan Niwas*, AIR 1997 SC 2349 would not be applicable.

8           The learned Advocate for the Respondent/ MSRTC has supported the impugned judgment. Submission is that the order of dismissal could have been sustained by the second Appellate Authority. It was purely out of sympathy that the Appellate Authority decided to issue a fresh order of appointment to the Petitioner. The punishment of dismissal from service was in fact upheld and it was only after inflicting the punishment of dismissal that the Employer-Employee relationship was severed and hence, a fresh appointment was issued.

9           He, therefore, contends that grant of a fresh appointment is not a punishment imposed, but the order of dismissal is the punishment that has been brought into effect. He places reliance on the judgment of this Court dated 02.07.2015 in the matter of *MSRTC vs. Pandurang Trimbak Dusane*, Writ Petition No.2139/1997, which places reliance upon the judgment of the Apex Court in the case of *State of Punjab* (supra).

10          I have considered the submissions of the learned Advocates as have been recorded herein above.

11          Shri Bora, learned Advocate for the Petitioner, has vehemently contended that the judgment of the Apex Court in the case of *Subhash vs. The Divisional Controller, MSRTC* (supra) is

*virtually a tailor made judgment covering this case.*

12           *I do not find any merit in his submission for the reason that the issue, whether, grant of a fresh appointment was a mode of punishment awarded to the employee by the MSRTC, was not raised at all before the Apex Court in the said case. Paragraphs 4 to 12 of the judgment read as under:-*

“4       *The appellant responded to the charge-sheet and denied the allegations made therein. His defence was that the accident occurred due to mechanical failure and breakage of rear spring.*

5       *The Inquiry Officer, after conclusions of the enquiry, held that the charges were proved against the appellant. The disciplinary authority, upon receipt of the inquiry report, issued notice to the appellant to show cause as to why he should not be dismissed from service and after getting the response from the appellant, vide order dated April 16, 2001, dismissed the appellant from service.*

6       *The appellant challenged the order of dismissal by filling departmental appeal before the First Appellate*

*Authority. The First Appellate Authority decided the appeal on May 21, 2001 whereby he set aside the order dismissing the appellant from service and directed that the appellant be appointed afresh without any monetary benefits for the past service.*

- 7 The appellant, consequent upon the order of the First Appellate Authority, joined his duties on June 4, 2001 reserving his right to challenge that order denying him reinstatement with continuity of service and back wages.*
- 8 On June 16, 2001, the appellant preferred appeal before 2nd Appellate Authority. The departmental 2nd appeal was dismissed on March 20, 2002.*
- 9 The appellant then filed a complaint under Section 28 r/w item Nos. 5 and 9 of Schedule IV of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 (for short, 'Act, 1971') before the Industrial Court, Aurangabad. The said complaint was dismissed by Industrial Court on October 15, 2005, inter alia, holding that the order of First Appellate*

*Authority warranted no interference.*

- 10 *The appellant challenged the order of the Industrial Court in a writ petition before the High Court of Judicature at Bombay, Bench at Aurangabad. The Single Judge did not find any merit in the writ petition and dismissed the same on October 15, 2007.*
- 11 *That there was negligence on the part of the the appellant in driving the bus on September 28, 2000 on Beed - Dharur route and as a result of which the bus ramped on the railing of the bridge resulting in damage to the bus is not in dispute. Thus, the appellant's misconduct to that extent is amply established. As a matter of fact, there is no challenge to the said finding on behalf of the appellant. It also appears from the impugned order that during his service tenure of about 21 years, the appellant has been punished twice. However, that fact of the matter is that the First Appellate Authority, after noticing that in the accident none of the passengers was injured and considering the past record of the appellant held that it was appropriate to set aside the order of dismissal from service. He, accordingly, set aside the order of*

*dismissal and ordered that fresh appointment be given to the appellant but without giving any benefit for the past service. It is the later part of this order that requires little modification by us. In our judgment, looking to all relevant aspects and to render substantial justice, it is appropriate that the order of the First Appellate Authority directing fresh appointment of the appellant be modified by ordering his reinstatement with continuity of service but without back wages. This would be commensurate with the delinquency of the appellant. In the interest of justice and fair play, denial of back wages for the entire period from the date of dismissal until his rejoining the duties would be proper punishment.*

12     *The appeal is, accordingly, allowed in part to the extent indicated above. The order of the First Appellate Authority dated May 21, 2001 is modified and it is observed that appellant would be treated to have been reinstated with continuity in service but without back wages. The parties will bear their own costs.”*

13     *It is, therefore, apparent that the*

*Appellant before the Apex Court had challenged the denial of reinstatement, continuity of service and back-wages. The issue as to whether, the Appellate Authority has converted the dismissal into a fresh appointment or whether, a fresh appointment can be termed as being a mode of punishment or a form of punishment to be imposed on an employee, was not before the Apex Court for adjudication.*

14            *In paragraph 11 as reproduced above, the Apex Court concluded that the punishment of dismissal awarded was disproportionate and the Appellant could be granted continuity of service by setting aside the order of dismissal till his re-induction in service on a fresh appointment. It was in these circumstances that the Apex Court reinstated the Appellant with continuity in service from the date of dismissal till the date of fresh appointment, but without back-wages.*

15            *It is evident from the record in this case that the Petitioner had already been dismissed from service on 12.08.2000. The order of dismissal has in fact not been set aside by the Respondent/ MSRTC. It is only because of the imposition of the order of dismissal that the Petitioner was removed from service and in order to give him an opportunity to show improvement, he was*

*reappointed as a fresh Artisan-A employee. Without imposition of the order of dismissal, there cannot be an order of re-appointment. It would be abstruse to use the term “re-appointment”, by concluding that the order of dismissal was never executed and there was no dismissal of the Petitioner from employment.*

16            *I find that the Respondent dismissed the Petitioner from service on 12.08.2000 by way of punishment. Thereafter, it passed the following order:-*

*“..... Taking into consideration all merits and demerits of the case we have decided to give him one chance to redeem himself in the services of the Corporation and show improvement in his attitude only on humanitarian grounds and as such, we set aside the orders issued by the earlier authorities and order as under:-*

*He should be re-appointed as a fresh Art.A.”*

17            *It is in these circumstances that I conclude that the order of re-appointment cannot be termed as an order of punishment in the face of the fact that the punishment of dismissal was imposed and the service of*

*the Petitioner had been brought to an end.*

18            *The Apex Court in the case of State of Punjab (supra) has concluded in paragraphs 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.”

(Emphasis is supplied).

19 In the light of the ratio laid down by the Apex Court in the case of the State of Punjab (supra), the Petitioner would, therefore, be precluded from questioning the fairness of his fresh appointment once he has accepted it without any protest or murmur and has joined duties. If he was aggrieved with the order of fresh appointment and imposition of punishment of dismissal from service, he could have questioned his order of dismissal before the Labour Court. The Industrial Court did not have jurisdiction to deal with the order of dismissal in the light of the powers vested in it.

20 The powers of the Labour Court and the Industrial Court are defined in Sections 4, 5, 6 and 7 of the MRTU & PULP Act, 1971, which read as under:-

“4. Industrial Court

- (1) *The State Government shall by notification in the Official Gazette, constitute an Industrial Court.*
- (2) *The Industrial Court shall consist of not less than three members, one of whom shall be the President.*
- (3) *Every member of the Industrial Court shall be a person who is not connected with the complaint referred to that Court, or with any industry directly affected by such complaint:*

*Provided that, every member shall be deemed to be connected with a complaint or with an industry by reason of his having shares in a company which is connected with, or likely to be affected by, such complaint, unless he discloses to the State Government the nature and extent of the shares held by him in such company and in the opinion of the State Government recorded in writing, such member is not connected with the complaint, or the industry.*

- (4) *Every member of the Industrial Court shall be a person who is or has been a Judge or a High Court or is eligible for being appointed a Judge of such Court :*

*Provided that, one member may be a person who is not so eligible, if he possesses in the opinion of the State*

*Government expert knowledge of labour or industrial matters.*

5. *Duties of Industrial Court.*

*It shall be the duty of the Industrial Court:-*

- (a) to decide an application by a union for grant of recognition to it;*
- (b) to decide an application by a union for grant of recognition to it in place of a union which has already been recognised under this Act;*
- (c) to decide an application from another union or an employer for withdrawal or cancellation of the recognition of a union;*
- (d) to decide complaints relating to unfair labour practices except unfair labour practices falling in Item 1 of Schedule IV;*
- (e) to assign work, and to give directions, to the Investigating Officers in matters of verification of membership of unions, and investigation of complaints relating to unfair labour practices;*
- (f) to decide references made to it on any point of law either by any civil or criminal court and*
- (g) to decide appeals under Section 42.*

*The State Government shall, by notification in the Official Gazette, constitute one or more Labour Courts, having jurisdiction in such local areas, as may be specified in such notification, and shall appoint persons having the prescribed qualifications to preside over such Courts;*

*Provided that, no person shall be so appointed, unless he possesses qualifications (other than the qualification of age), prescribed under Article 234 of the Constitution for being eligible to enter the judicial service of the State of Maharashtra; and is not more than sixty years of age.*

#### *7 Duties of Labour Court*

*It shall be the duty of the Labour Court to decide complaints relating to unfair labour practices described in Item I of Schedule IV and to try offences punishable under this Act.”*

*21 As such, even if it is presumed that the order of the Appellate Authority granting re-appointment/ fresh appointment is to be set aside, the Petitioner would be relegated back to the earlier order which is an order of dismissal. At best, the Industrial Court, if were to allow the complaint, could have set aside the order of the Appellate Authority thereby, relegating the Petitioner to the order passed by the first*

*Appellate Authority confirming the order of dismissal. In any case, if the order of fresh appointment is to be set aside, the Petitioner will have no option, but to challenge the order of dismissal which is a stage prior to the passing of the order by the second Appellate Authority.*

22           *In the light of the above and the law laid down by the Apex Court in the case of State of Punjab (supra), the Petitioner could not have questioned his fresh appointment after having accepted it and joined duties without any protest and without reserving a right to challenge the orders of the second Appellate Authority, the first Appellate Authority and the order of dismissal passed by the competent disciplinary authority and that too before the Industrial Court.”*

9. It thus settled that though the appellate authority of the Corporation has habitually used the term “Order of punishment is set aside”, whenever they uphold the dismissal and issue a fresh appointment order, it leads to a presumption that the order of fresh appointment could be issued only if the earlier dismissal is sustained. Unless the dismissal is set aside, there cannot be a break in service and as such, there cannot be a fresh appointment. It is, therefore, settled in the Anil's case (supra), that whenever the punishment of dismissal is converted into fresh appointment in service, it presupposes that the dismissal is in fact sustained and only after the removal of the employee that a fresh appointment order can be

issued.

10. In the light of the above, the impugned judgment of the Industrial Court dated 27.9.1994 is quashed and set aside being perverse and erroneous. Complaint (ULP) No.52 of 1989, therefore, stands dismissed. Nevertheless, the petitioner shall proceed to pay the retiral benefits to the respondent, who has retired on 30.6.2001, by calculating the same from the date of fresh employment. Learned Advocate for the petitioner submits that the said benefits, probably have been paid to the respondent. It need not be stated that the said benefits shall be paid by the petitioner, if not already paid.

11. Rule is made absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

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