

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4761 OF 2001

Shantaram s/o Yashwant Mahale
age: 57 Yrs., occu. Service,
R/o 327, Bhuigalli, Joshipeth,
Jalgaon, Dist. Jalgaon. = **PETITIONER**

VERSUS

The Divisional Controller,
Maharashtra State Road Transport
Corporation, Jalgaon Division,
Jalgaon. = **RESPONDENT**

Mr. V.Y.Patil, Advocate for Petitioner;

Mr. Manoj Shinde, Adv. h/for Mr. M.K.Goyanka, Adv. for
Respondent

CORAM : P.R.BORA, J.

DATE OF RESERVING JUDGMENT : 10th June, 2016

DATE OF PRONOUNCING JUDGMENT : 15th JULY, 2016

JUDGMENT:

1) Heard the learned Counsel appearing for
the respective parties.

2) The present writ petition has been
preferred against the Judgment and Order dated
12th January 2001 passed by the Industrial Court
at Jalgaon in Revision (ULP) No.199/1999 (Old No.

147/1995), whereby the Industrial Court had quashed and set aside the order dated 29th April, 1995 passed by the Labour Court, in Complaint (ULP) No. 106/1990.

3) The facts, which are relevant for decision of the present petition, in brief, are thus, -

a) The petitioner was appointed as a Driver in Maharashtra State Road Transport Corporation (for short, S.T. Corporation) in its Jalgaon division in the year 1971. In the year 1985, the petitioner was issued with a charge sheet on the allegation that he had consumed liquor while performing his duty. On the basis of the charge so levelled against the petitioner, a departmental enquiry was held wherein the petitioner was held guilty and by way of punishment, he was dismissed from the services of the Respondent/corporation.

b) Against the aforesaid order of the disciplinary authority, the petitioner preferred a first departmental appeal on 29.5.1985, which was partly allowed and the first Appellate authority set aside the punishment of dismissal and instead, directed a fresh appointment of the petitioner as driver without giving any relief of back wages as well as past services. The petitioner accordingly resumed his duty as a fresh appointee.

c) Thereafter, the petitioner preferred second appeal and it was dismissed by the Second Appellate authority on 21st September, 1988. The petitioner subsequently filed a Complaint of unfair labour practice bearing Complaint (ULP) No.106/1990 before the Labour Court at Jalgaon along with an application for condonation of delay.

d) The Labour Court, vide its Judgment and order dated 19th April, 1995 allowed the complaint

filed by the petitioner and granted him relief of reinstatement and continuity of services with full back wages except the period of delay during the period from 21.5.1985 to 9.8.1989.

e) Aggrieved by the order passed by the Labour Court, the Respondent corporation preferred Revision (ULP) No.199/1999 (old No. 147/1995) before the Industrial Court at Jalgaon and the Industrial court at Jalgaon allowed the said revision vide the impugned order. Aggrieved thereby the petitioner has preferred the present writ petition.

4) The Industrial Court has set aside the order passed by the Labour court on the ground that the complaint itself was not maintainable. As has been observed by the Industrial court, the order of dismissal dated 21.5.1985, which the petitioner has challenged before the Labour court by filing a complaint alleging unfair labour practice on the part of the respondent under Item

1(a)(b)(d) and (f) of Schedule-IV of MRTU and PULP Act (for short, the Act) was not in existence when such complaint was filed by the petitioner. As has been further observed by the Industrial Court on the date of filing the complaint by the petitioner before the Labour court, he was in employment of the repondent and was thus not a dismissed or discharged employee so as to invoke Section 28 of the Act and to file a complaint alleging unfair labour practice as enumerated in Item 1 of Schedule-IV.

5) According to Shri V.Y.Patil, learned Counsel appearing for the petitioner, the order passed by the Industrial Court is erroneous and unsustainable in view of the law laid down by this Court in the case of Maharashtra State Road Transport Corporation Vs. Alfred James Gamare – 2009 (4) All MR 31. The learned Counsel submitted that the similar facts as of the present case were involved in the aforesaid case and as such, the decision in the said judgment rendered by

this Court, would squarely apply to the facts of the present case. The learned Counsel pointed out that the following two questions were for consideration before this Court in the aforesaid case, -

i) Whether the Labour Court has jurisdiction to entertain the Complaint filed by Respondent/Complainant since he was in the service when the said Complaint was filed?

ii) Whether the Respondent was estopped from approaching the Labour Court alleging unfair labour practices when he accepted the appointment as fresh conductor and joined the services?

The learned Counsel pointed out that both the aforesaid issues were answered in affirmative by this Court.

6) The learned Counsel submitted that in another judgment in the case of Maharashtra State Road Corporation Vs. Tryambak Pandurang Gandale and Ors. delivered by this Court reported at 2011.

(1) Mah.L.J. 723, it has been held that even if an employee would have accepted the fresh appointment in pursuance of the order passed by the departmental appellate authority, the employee concerned cannot be prevented from raising a dispute before the Industrial Court regarding the original order of dismissal passed by the Disciplinary authority. The learned Counsel, therefore, prayed for setting aside the order passed by the Industrial court impugned in the present petition and to confirm the order passed by the labour Court in Complaint (ULP) No.106/1996.

7) Shri Manoj Shinde, learned Counsel holding for Shri M.Y.Goyanka, learned Counsel appearing for the respondent, vehemently opposed the submissions made on behalf of the petitioner. The learned Counsel submitted that the judgments relied upon by the learned Counsel for the petitioner would not apply to the facts of the present case.

. Relying on the judgment of the Hon'ble Supreme Court in the case of State of Punjab and Ors. Vs. Krishan Niwas – 1997 SC 2349, and two judgments of this Court, first in the case of Maharashtra State Road Transport Corporation Vs. Prakash Tulshiram Pardeshi – 2008 (4) Mah. L.J. 940 and the other in the case of MSRTC, Jalgaon Vs. Pandurang Trimbak Dusane – 2016 (2) Mah.L.J. 228, the learned Counsel submitted that after taking benefit of the order passed by the first appellate authority, whereby the punishment of dismissal of services awarded by the disciplinary authority was reduced by the said authority and the petitioner was directed to be taken in services of the Corporation as a fresh employee, the petitioner was estopped from challenging the order of dismissal passed by the disciplinary authority. The learned Counsel, therefore, prayed for dismissal of the writ petition.

8) Material on record reveal that the charge was levelled against the petitioner in the

year 1985 that he had consumed liquor while performing his duties. On the basis of the said charge, a departmental enquiry was conducted against the petitioner wherein he was held guilty for the charge levelled against him. It is further not in dispute that the punishment of dismissal from service was awarded to the petitioner by the disciplinary authority. It is further not in dispute that against the order of punishment so passed by the disciplinary authority, the petitioner had preferred disciplinary appeal before the first appellate authority and the first Appellate authority allowed the appeal so filed by the petitioner and while setting aside the order of dismissal passed by the disciplinary authority, directed fresh appointment of the petitioner as a driver. The petitioner admittedly resumed his duties in pursuance of the said order as fresh appointee. Though the second appeal was also preferred by the petitioner before the second appellate authority, the same was dismissed. It is a

matter of record that the petitioner thereafter filed a Complaint under the provisions of MRTU and PULP Act before the Labour Court, challenging the order of his dismissal passed by the disciplinary authority and prayed for setting aside the said order and his reinstatement in service with continuity of service and back wages.

9) Identical facts were there in the case of Maharashtra State Road Transport corporation Vs. Alfred James Gamare 2009 (4) ALL MR 31. and the same issues which were raised in the said matter, have been raised in the present petition. The only difference is that in the aforesaid case, the Industrial court has confirmed the order passed by the Labour court by dismissing the revision application filed by the S.T. Corporation and the S.T. Corporation had, therefore, filed the aforesaid writ petition; whereas in the present matter, the Industrial court has allowed the revision application filed

by the S.T. Corporation and has thereby set aside the order passed by the Labour court and has thus impliedly dismissed the complaint filed by the present petitioner and, therefore, the employee has filed the present petition.

10) It is true that in the case of Alfred James (cited supra), a specific point was framed by the learned Single Judge - "whether the court has jurisdiction to entertain the complaint filed by respondent/complainant since he was in the service when the said complaint was filed?" According to the learned counsel for the petitioner, the aforesaid issue has been answered by the learned Single Judge in favour the employee, who was respondent therein. In view of the finding recorded by this Court in the aforesaid judgment, it is the contention of the learned Counsel, that the judgment and order passed by the Industrial court cannot sustain and deserves to be quashed and set aside.

11) I am, however, not convinced with the argument so advanced. Though it is true that the issue as aforesaid was framed in the aforesaid matter, the learned Single Judge has not answered the said issue on merits. The facts of the said case reveal that the S.T. Corporation had raised an objection before the Labour court about the maintainability of the complaint contending that since the employee was in service, the provisions of item No.1 of Schedule IV of the Act were not attracted. The said objection was turned down by the Labour court. The order so passed by the Labour court was challenged by the S.T. Corporation before the Industrial Court by preferring a revision application. However, the said revision was also dismissed. Admittedly, the S.T. Corporation did not challenge the said order in any higher court. In this background, the learned Single Judge has observed that since the Corporation did not prefer any further proceeding against the judgment and order passed by the Industrial Court, the said issue rested

there itself. It is thus evident that the learned Single Judge did not decide the aforesaid objection on merits. The aforesaid controversy, therefore, needs to be looked into in the present petition.

12) Section 28 of the MRTU and PULP Act prescribes the procedure for dealing with the complaints relating to unfair labour practices, the relevant portion of which is reproduced herein below, -

"28. PROCEDURE FOR DEALING WITH COMPLAINTS RELATING TO UNFAIR LABOUR PRACTICES. -

(1) Where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint before the Court competent to deal with such complaint either under section 5, or as the case may be, under section 7 of this Act :

Provided that, the Court may entertain a complaint after the period of ninety days from the date of the alleged occurrence, if good and sufficient reasons are shown by the complainant for the late filing of the complaint.”

13) Section 5 of the Act prescribes the duties of the Industrial court whereas Section 7 prescribes the duties of Labour court. As provided under Section 7, it shall be the duty of the Labour court to decide the complaints relating to unfair labour practices described in item 1 of Schedule-IV and to try offenses punishable under this Act. The petitioner had admittedly filed the complaint before the Labour court alleging unfair labour practices described in item 1 of Schedule-IV of the Act. Item 1 of Schedule-IV reads thus, -

**“ General Unfair Labour Practices on
the part of employers**

1. To discharge or dismiss
employees -

- (a) by way of victimisation;
- (b) not in good faith, but in colourable exercise of the employer's rights;
- (c) by falsely implicating an employee in a criminal case on false evidence or on concocted evidence;
- (d) for patently false reasons;
- (e) on untrue or trumped up allegation of absence without leave;
- (f) in utter disregard of the principles of natural justice in the conduct of domestic enquiry or with undue haste;
- (g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the employee, so as to amount to a shockingly disproportionate punishment"

14) Reading of Item 1 of Schedule-IV leaves no doubt that a complaint under the aforesaid provision can only be filed by a person, who has been discharged or dismissed or apprehends his discharge or dismissal from the services. In other words, on the date of filing such complaint, the order of discharge or dismissal or the apprehension of discharge or dismissal must

be subsisting.

15) In the instant case, the petitioner has admittedly filed the complaint before the Labour court alleging unfair labour practice on the part of the respondent under Item 1 of Schedule-IV of the Act. On the date of filing of the Complaint as aforesaid, the petitioner was indisputably in service of the S.T. Corporation and the order of dismissal dated 21.5.1985, which was challenged by the petitioner in the aforesaid Complaint (ULP) was also not in existence. Against the order of dismissal dated 21.5.1985, the petitioner had preferred an appeal before the first Appellate Authority and the first Appellate Authority had set aside the said order and substituted it with the order of fresh appointment to the petitioner on the post of driver. In pursuance of the said order, the petitioner had resumed the services with the S.T. Corporation as a fresh appointee in the year 1985 itself. It is also not the case of the petitioner

that he was apprehending his discharge or dismissal.

16) The facts as aforesaid clearly evince that on the date of filing the complaint by the petitioner in the Labour court, the order of dismissal dated 21st May, 1985, on the basis of which the complaint was filed by the petitioner, was not in existence. From the facts on record, it is further clear that on the date of filing of the complaint, the complainant was very well in the employment of the respondent and was thus not falling in the category of a 'discharged' or 'dismissed' employee so as to invoke the remedy of filing a complaint of unfair labour practice under Item 1 of Schedule IV of the Act. Secondly, when it was undisputed that the petitioner was there in service of the respondent, may be as a fresh appointee, it is not understood as to how the order of reinstatement could have been passed by the Labour court. The order of reinstatement can be

passed only in favour of an employee, who is not there in service because an order of discharge or dismissal or retrenchment against him. It appears that all these aspects were lost sight of by the Labour court.

17) The Industrial Court, in its order passed on 12.1.2001, which has been impugned in the present petition, has rightly observed that the very order passed by the labour court was without jurisdiction and hence unsustainable. The Industrial Court has further rightly held that the order dated 21st May, 1985, which was the base for the petitioner for alleging unfair labour practice on part of the respondent was not in existence and was admittedly set aside by the Appellate Authority much before on the date of filing of complaint by the petitioner.

18) Though the learned Counsel appearing for the petitioner has relied upon the judgment of learned Single Judge of this court in the case of

Alfred James (cited supra), I have already observed that while deciding the said complaint, the learned Single Judge has not decided on merits the issue, - "whether the labour court possesses any jurisdiction to entertain the complaint filed by an employee, who is in service on the date of filing the complainant?"

19) The judgment of this Court in the case of MSRTC, Jalgaon Vs. Trimbak Pandurang Gandale - 2011 (1) Mah.L.J. 723, was also relied upon by the petitioner. In the aforesaid case Complaint was filed under Item 9 of Schedule-IV and what was challenged before the Industrial Court was re-appointment in service as a fresh employee despite the appellate authority, having concluded that the respondent therein was not guilty of the misconduct alleged against him. It was in those circumstances, the Industrial Court had concluded that the appellate authority could have only substituted the order of dismissal with either a penalty or could have revoked it because

direction to issue a fresh employment order was not one of the penalties envisaged. The order so passed by the Industrial court was confirmed by the High Court.

20) The facts of the present case are quite distinguishable. In the instant case, the petitioner has filed the complaint under Item 1 of Schedule-IV and what was challenged by him before the Labour court was his original order of dismissal when the appellate authority had already set aside the said order and directed the petitioner to be appointed as a fresh appointee and accordingly the petitioner had acted upon the said order.

21) As against the judgments relied upon by the petitioner, it appears to me that the judgment cited by the respondent in the case of 2016 (2) Mah.L.J. 228, would perfectly apply to the facts of the present case. The facts of the said case were thus -

. An accident had occurred at the hands of the Respondent employee while on duty causing extensive damage to the vehicle. The damage was assessed at Rs.25,000/- and the charge sheet was issued, enquiry was conducted and the respondent was dismissed from service by way of punishment. The Respondent preferred an appeal before the first Appellate Authority, but the same was rejected. The Respondent preferred second appeal, which was partly allowed and the Respondent was granted a fresh appointment without continuity. The Respondent employee accepted the said order passed by the second appellate authority and reported for duties on the same day. Later on, the said employee filed a Complaint challenging his dismissal and prayed for reinstatement with continuity and full back wages before the Labour Court. The Labour Court allowed the Complaint, set aside his dismissal and granted him reinstatement with continuity of services and with full back wages. The Revision preferred by the petitioner corporation before

the Industrial Court was dismissed. The petitioner corporation, therefore, approached the High Court by filing writ petition. This Court allowed the said writ petition holding that once the decision of Appellate Authority, directing a fresh appointment, was accepted by the employee concerned and was also acted upon, the concerned employee was estopped from challenging the order of dismissal passed by the Disciplinary Authority.

. In the said case, the learned Single Judge has relied upon the judgment of the Hon'ble Apex court in the case of State of Punjab and Ors. Vs. Krishan Niwas – AIR 1997 SC 349. In the said case before the Hon'ble Apex Court, the Respondent employee was charged for an offence under Section 304 of Indian Penal Code. He was convicted and sentenced to undergo imprisonment for life. Thereafter departmental proceedings were initiated against him and he was removed from service. Appeal against his conviction under Section 302 of Indian Penal Code was

allowed by the High Court. Punishment of conviction under Section 302 of Indian Penal Code was modified to one under Section 325 of Indian Penal Code and he was directed to undergo rigorous imprisonment for 1 ½ years. After undergoing the punishment, the Respondent employee filed an appeal before the Appellate Authority and the Appellate Authority reduced the punishment of removal from service to lower scale of pay drawn by him but did not grant back wages. The Respondent employee accepted altered punishment and joined the duty. Subsequently, he filed a civil suit for declaration that the dismissal from service and reduction of rank and also the direction that he is not entitled for arrears of back wages were illegal. The Trial Court dismissed the suit. On appeal, the Additional District Judge reversed the judgment of the trial court and decreed the suit. In second appeal, the High Court confirmed the said order. Therefore, the petitioner approached the Hon'ble Apex Court by special leave petition.

While allowing the said SLP, the Hon'ble Apex Court held that, "the respondent employee having accepted the order of the Appellate authority and joined the post, it was not open to him to challenge the order subsequently". It is further observed that 'by his conduct the Respondent employee had accepted the correctness of the order passed by the Departmental appellate authority and acted upon it.' The Hon'ble Apex Court has further observed that 'in the circumstances, the civil court would not have gone into merits and decide the matter against the appellant. The Apex court accordingly set aside the order passed by the High Court and the first Appellate Court and confirmed the order passed by the trial court.'

22) In the light of the law as laid down, the Complaint (ULP) No.106/1990 preferred by the petitioner was liable to be dismissed by the Labour court as it was untenable. It is altogether different that an employee declines to

accept fresh appointment order issued by the first or second appellate authority and questions his dismissal. In the instant case, the petitioner accepted the decision of the first appellate authority, accepted the order of fresh appointment and joined the duties and thereafter filed the complaint. Thus, on the one hand he continued to enjoy the benefits of the order of first appellate authority and on the other hand, questioned propriety and validity of the original order, which was in fact not in existence. As has been observed by the learned Single Judge in the case of MSRTC Vs. Pandurang Trimbak Dusane (cited supra) had the present petitioner without accepting the order of first appellate authority challenged the same by filing a complaint under Item 9 of Schedule-IV before the Industrial Court, the said Court would have been in a position to consider the legality and validity of the order passed by the first appellate authority directing fresh appointment. Labour court, however, was not possessing jurisdiction to

entertain the said complaint.

23) After having considered the entire material on record, the relevant legal provisions and the precedents, it does not appear to me that any interference is required in the order passed by the learned Industrial court. The Writ Petition is devoid of any substance and deserves to be dismissed. It is accordingly dismissed. However, in the circumstances of the case, no order as to costs. Rule discharged.

sd/-

(P.R.BORA,J.)

bdv/ fldr 10.6.2016