

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

WRIT PETITION NO. 7174 OF 2004

The Divisional Controller,
Maharashtra State Road
Transport Corporation,
Division Dhule, District Dhule.

...PETITIONER

-VERSUS-

Pralhad Rajdhar Patil,
Age : Major, Occupation : Service,
R/o Raver, Post Dahyane,
Taluka Dhule,
District Dhule.

...RESPONDENT

...

Advocate for Petitioner : Shri U.B.Shriram h/f Shri D.S.Bagul.

Advocate for Respondent : Shri Patil Shrikant S..

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 02nd February, 2017

Oral Judgment :

1 The Petitioner/ MSRTC is aggrieved by the judgment of the
Industrial Court dated 02.08.2004 by which Complaint (ULP) No.24/2004
(old No.574/1997) has been partly allowed.

2 While admitting this petition, this Court had refused interim

relief to the Petitioner on 07.12.2004.

3 I have heard the strenuous submissions of the learned Advocates for the respective sides.

4 Shri Patil, learned Advocate for the Respondent/ Employee, though has supported the impugned judgment, has submitted in the alternative, now that the Respondent has already suffered the punishment of stoppage of one increment as imposed by the Industrial Court, this Court may not interfere with the impugned judgment. The absence of 37 days was met with an order of dismissal at the hands of the Petitioner and the same has been modified by the Industrial Court.

5 From the submissions of the learned Advocates and from the record available, the following undisputed factors emerge:-

- (a) The Respondent joined the service of the Petitioner/ MSRTC some where around 1977.
- (b) He was absent for 37 days from 27.07.1994 till 01.09.1994.
- (c) There are six minor misconducts in his past record.
- (d) A full fledged departmental enquiry was conducted.
- (e) The order of dismissal dated 05.05.1995 was issued and the Respondent was punished with dismissal.

- (f) His first department appeal was decided on 09.09.1995 and the Appellate Authority granted a fresh appointment to the Respondent.
- (g) He joined as per the new appointment order on 11.09.1995.
- (h) His second appeal was rejected by the Appellate Authority on 17.10.1995.
- (i) In 1997, he preferred his ULP complaint challenging the imposition of punishment of new appointment/ fresh appointment.
- (j) By the impugned judgment, the complaint was partly allowed and the Industrial Court quashed and set aside the order of the first Appellate Authority dated 09.09.1995 and modified the punishment to stoppage of one increment.

6 An identical issue has been dealt with by this Court (Coram : R.V.Ghuge, J.) in the matter of *Anil Vaijnath Arbad vs. Divisional Traffic Superintendent, MSRTC*, **2016(1) LLJ 613 : 2016(5) ALL MR 502.**

7 In the *Anil Arbad case* (supra), this Court concluded that a fresh or new appointment is possible only when the earlier tenure of service is brought to an end. Once the service is brought to an end by order of dismissal, grant of new appointment would presuppose that the

dismissal order is sustained and the employer has travelled a step forward in showing sympathy and on sympathetic grounds, a fresh appointment has been issued. The said fresh appointment is not in the form of a punishment and such option is not provided for in the Discipline and Appeal Rules of the Petitioner/ MSRTC.

8 In Anil Arbad case (supra), this Court further concluded that if an employee challenges the grant of fresh appointment and if the Industrial Court sets aside the fresh appointment order on the ground that it is not a punishment, the order of the first appellate authority, therefore, stands set aside. This would restore the employee to the earlier position of dismissal from service. The cause of action as against the dismissal from service, therefore, cannot be entertained by the Industrial Court considering its jurisdiction under Section 5 of the MRTU & PULP Act, 1971 r/w the law laid down by the Honourable Supreme Court in the matter of *Hindustan Lever v/s Ashok Vishnu Kate*, **1995(6) SCC 326**.

9 In Anil Arbad judgment (supra), this Court also placed reliance upon the judgment of the Honourable Supreme Court in *State of Punjab vs. Krishan Niwas*, **AIR 1997 SC 2349**, wherein the Honourable Supreme Court has concluded that after accepting the fresh appointment,

joining duties and thereafter, challenging the issuance of the fresh appointment order, such a grievance cannot be entertained and an employee cannot be permitted to resort to the said remedy.

10 The conclusions of this Court in Anil Arbad judgment (supra) from paragraphs 12 to 22 read as under:-

"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.

6 *Labour Court*

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."*

11 Considering the above, the Industrial Court could not have exercised the jurisdiction beyond the challenge to the order passed by the first appellate authority. If the Industrial Court found that the order of the first appellate authority issuing a fresh appointment order to the employee was unsustainable, while exercising jurisdiction under Section 5 r/w Item (9) of Schedule IV of the MRTU & PULP Act, 1971, it could have, at best allowed the complaint only to the extent of setting aside the order of the first appellate authority dated 09.09.1995. Thereafter, the Respondent would have been restored to the position prior to the filing of the first appeal which was the order of dismissal dated 05.05.1995. His grievance as against the order of dismissal could have then been entertained only by

the Labour Court under Item (1) of Schedule IV of the MRTU & PULP Act, 1971 or in a reference matter under Section 2-A of the Industrial Disputes Act, 1947. The Industrial Court, therefore, could not have ventured into ignoring the order of dismissal, as if the said order was not in existence. It could not have modified the order into stoppage of one increment. When jurisdiction not vested in it by law is exercised, the said order is rendered non-est.

12 Considering the above legal position, this Writ Petition is allowed. Keeping in view the law laid down by the Honourable Supreme Court in the matter of State of Punjab (supra), the Respondent was precluded from challenging the decision of the first appellate authority after accepting the fresh appointment order, after joining duties on 11.09.1995 and then challenging the said decision after two years. Complaint (ULP) No.24/2004 (old No.574/1997) was, therefore, untenable in law and stands dismissed. Rule is made absolute accordingly.

13 It is informed that the Petitioner/ MSRTC has paid the entire gratuity amount to the Respondent/ Employee computing his entire service tenure from the first date of joining duties till 30.06.2013 when he superannuated. The order of dismissal dated 05.05.1995 was ignored by the Petitioner/ MSRTC and the entire gratuity was paid to the Respondent.

Considering the same, I deem it proper to observe that the Petitioner/MSRTC shall now be precluded from recovering any excess amount/gratuity paid to the Respondent.

14 Insofar as the request of Shri Patil is concerned that this Court may exercise its jurisdiction to conclude that the punishment awarded is shockingly disproportionate, I am unable to accept the said request for the reason that when the Industrial Court did not have jurisdiction over the order of dismissal, this Court within its supervisory jurisdiction, cannot legalize the view taken by the Industrial Court de-hors jurisdiction.

15 Consequentially, the withdrawal of Rs.1,52,252/- with accrued interest by the Respondent from this Court pursuant to the depositing of the amount by the Petitioner, has been rightly adjusted against the gratuity amount paid by the Petitioner. The amount of stoppage of increment would, therefore, stand adjusted against the gratuity that has already been paid to the Respondent.