

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1420 OF 2015

Shri S.B.Sahasrabudhe,	]	
Joint Commissioner of Transport,	]	
Office of the Commissioner of	]	
Transport, 4 th Floor, Admn.Bldg.,	]	
Bandra (E), Mumbai-400 051.	]	PETITIONER.

Versus

01) Prasad Vasant Mahajan,	]	
Dy.Transport Commissioner,	]	
(Higher Grade), in the office	]	
of the Transport Commissioner,	]	
M.S.Mumbai,	]	
Residing at B-4/102, Vikas	]	
Complex, Castle Mill,	]	
Thane (W)-400 601.	]	
02) The State of Maharashtra,	]	
through the Secretary,	]	
Home Department (Transport),	]	
Mantralaya, Mumbai.	]	
03) The Commissioner of Transport,	]	
Maharashtra State, 4 th Floor,	]	
Admn. Bldg., Opp.Dr.Ambedkar	]	
Udyan, Bandra (East),	]	
Mumbai - 400 051.	]	RESPONDENTS.

Mr.A.A.Kumbhakoni, Senior Counsel with Mr.Akshay Shinde,
Advocate i/by Mr.Subhash Lolage, Advocate for the Petitioner.
Mr.A.V.Anturkar, Senior Counsel i/by Miss Swati P.
Manchekar, Advocate for Respondent No.1.
Mr.N.C.Walimbe, A.G.P. for Respondents No.2 & 3.

**CORAM : R.M.BORDE &
A.S.GADKARI, JJ.
Reserved on : 18th January, 2017
Pronounced on : 16th February, 2017.**

JUDGMENT (PER R.M.BORDE, J.):

1) Heard. Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2) The petitioner - original Respondent No.3 in Original Application No.1201 of 2010 presented by Respondent No.1 - Original Applicant, is objecting to the order passed by the Maharashtra Administrative Tribunal at Mumbai, allowing the application partly by an order dated 01.12.2014.

3) Respondent No.1 herein, in the Original Application presented by him bearing O.A. No.1201 of 2010 before the Maharashtra Administrative Tribunal at Mumbai, challenged placement of the petitioner above him in the final seniority list as on 01.01.2001 published by the department for the cadre of Assistant Regional Transport Officer - Group B. The seniority list has been published by the Department on 24.03.2009. The aforesaid seniority list was a matter of challenge in Original Application Nos. 264 of 2010 and 409 of 2010 before the Maharashtra Administrative Tribunal and the seniority list has been quashed and set aside by an order dated 07.11.2014.

In spite of quashing of the seniority list, which was a matter of challenge in the Original Application presented by Respondent No.1, the Tribunal proceeded to consider the aspect of *inter se* seniority between the petitioner and Respondent No.1 and directed the State authorities to place Respondent No.1 above the petitioner in the seniority list, as prayed for by him.

4) The petitioner contends that, in fact, it was not necessary for the Maharashtra Administrative Tribunal to consider the issue of *inter se* seniority between the petitioner and Respondent No.1 since the seniority list itself was quashed and set aside. However, since the Tribunal has considered the issue and directed the Respondents to place Respondent No.1 – Original Applicant above the petitioner in the final seniority list, that would be published by the department, the question, that has been determined by the Tribunal with reference to the Departmental Examination Rules, needs to be gone into.

5) The petitioner herein was appointed as a District Transport Officer (now Assistant Regional Transport Officer) on 05.02.1984. In terms of the Rules which were operative at the time of induction of the petitioner in employment, it was essential for him to pass the departmental examination within a period of two years from the date of his appointment i.e. 05.02.1984. With the approval of Hon'ble Governor of Maharashtra, in exercise of powers conferred on him under the proviso to Article 309 of the Constitution of India and in supersession of all earlier Rules, the District Transport Officers

(Motor Vehicles Department) Departmental Examination Rules, 1984 (hereinafter referred to as “the Rules of 1984”) have been prepared and published. The Rules have been enforced since 18.09.1984, which shall be construed as an appointed date. In view of the Rules of 1984, every District Transport Officer working on the appointed date and who has not passed the prescribed Departmental Examination and has not been exempted from passing it, shall be governed by the Rules of 1984 and is required to pass the examination in accordance with provisions of the said Rules of 1984.

6) Rule 4 of the Rules of 1984 reads thus:

4. Period within which Examination is to be passed:- (1) Every District Transport Officer appointed by promotion after the appointed date shall be required to pass the Examination within the period of two years from the date of the appointment and within three chances.

(2) Every District Transport Officer recruited by nomination on or after the appointed date shall be required to pass the Examination within the period of probation of two years or within the extended period of probation, as the case may be, and within three chances:

Provided that if he is not able to pass the Examination within the regular period of probation of two years he shall be liable to the same consequences as provided under sub-rule (3) of rule 5.

(3) Every District Transport Officer, working as such on the appointed date and who has not

passed the Examination or has not been exempted from passing it, under the existing rules, shall be required to pass the Examination within a period of two years from the appointed date and within three chances, including any chance or chances availed of by him under the existing rules:

Provided that a person promoted or appointed by nomination who is on probation or extended probation as District Transport Officer belonging to Scheduled Caste, Scheduled Caste converts to Buddhism, Scheduled Tribe, Denotified Tribe or Nomadic Tribe, shall be given one more chance and one more year to pass the Examination than otherwise admissible to him under sub-rule (1) or (2).

(4) Notwithstanding anything contained in sub-rule (1) or sub-rule (2) the Government may, having regard to the performance of the District Transport Officer in the examinations in respect of earlier chances already availed of by him and to any other facts and circumstances of the case, grant not more than two additional chances to a District Transport Officer to appear for the Examination. For this purpose, the period of two years' probation of a District Transport Officer appointed by nomination may be extended by a period not exceeding one year.

7) Sub-rule (1) of Rule 4 prescribes the period within which every District Transport Officer appointed by promotion after the appointed date has to pass the examination; whereas, sub-rule (2) of Rule 4 prescribes the period within which every District Transport Officer appointed by nomination on or after

the appointed date has to pass the examination. Sub-rule (3) prescribes the period within which every District Transport Officer, working as such on the appointed date and who has not passed the examination and has not been exempted from passing it, has to pass it.

8) For the purposes of considering the controversy involved in this petition, sub-rule (3) of Rule 4 is relevant for consideration. The rule prescribes that the District Transport Officer, working as such, on the appointed date and who has not passed the examination or has not been exempted from passing it under the existing Rules, shall be required to pass the examination within the period of two years from the appointed date and within three chances including any chance or chances availed of by him under the existing rules.

9) So far as petitioner is concerned, he was appointed on 05.02.1994 before the Rules of 1984 were enforced, there was an examination held in July 1984. The petitioner did not apply and did not appear in the said examination. In January 1985, the examination was held, the petitioner appeared, however, failed. This was the first chance availed of by the petitioner. In July 1985, the departmental examination was held, however, the petitioner did not apply, and did not appear for the examination. In January 1986, the examination was held, petitioner also appeared, but failed. This was the second chance availed of by him, but he was unsuccessful. Thereafter in July 1986, when the examination was held, the petitioner

cleared examination and according to the petitioner, it was the third chance availed of by him.

10) It is also worthy to note that on 11.05.1992, the petitioner was promoted as Deputy Regional Transport Officer. On 01.02.1997, he was promoted as Regional Transport Officer. On 27.05.1999, he was promoted as Deputy Transport Commissioner, whereas on 08.12.2008, he was promoted as Joint Transport Commissioner. The last promotion was awarded on 18.04.2013 and the petitioner was promoted as Additional Transport Commissioner. The petitioner, at present, is functioning as Additional Transport Commissioner. Respondent No.1 has primarily raised an objection in respect of placement of the petitioner in the final seniority list above him, relying upon Rule 5 of the Rules of 1984. Rule 5 of the Rule reads thus:

5. Consequences of failure to pass the Examination :- (1) A District Transport Officer who is appointed by nomination or by promotion fails to pass the Examination within the time limit and chances laid down in rule 4, shall be liable to be discharged from service or reverted, as the case may be.

(2) No District Transport Officer, who is required to pass the Examination under these rules, shall be promoted to a higher post, unless he passes the Examination or is exempted from passing the Examination.

(3) If a District Transport Officer fails to pass the Examination within the time limit and chances laid down in Sub-rules (1), (2)

and (3) of rule 4 above, he shall lose seniority for the purpose of promotion to the higher post, that is to say, he shall be ranked below, all the District Transport Officers, who pass or are exempted from passing the Examination before him and also below all those who are senior to such District Transport Officers below whom he is placed and who may pass the Examination after him but within the period and chances laid down in rule 4.

(4) During the interim period from the appointed date to the date on which the result of the first Examination held under these rules is declared, promotion to the higher posts shall where necessary, be made according to the seniority and suitability. However, subject to the provisions of rule 6, the District Transport Officer so promoted shall have to pass the Examination under these rules within the period and chances laid down in rule 4 failing which they shall be reverted and shall lose seniority in the cadre of District Transport Officer in the manner provided in sub-rule (3).

11) Sub-rule (3) of Rule 5 prescribes that if a District Transport Officer fails to pass the examination within the time limit and the chances laid down in sub-rules (1), (2) and (3) of Rule 4, he shall lose seniority for the purposes of promotion to the higher post, that is to say, he shall be ranked below, all the District Transport Officers, who pass or are exempted from passing the examination before him and also below all those who are senior to such District Transport Officers below whom he is placed and who may pass the Examination after him but within the period and chances laid down in rule 4.

12) It is contended that the petitioner has failed to pass the departmental examination in three chances within a period of two years from the appointed date. It is the contention of Respondent No.1 that in July 1985, though the petitioner has not appeared for the examination, the examination held in July 1985 shall be considered as a chance available by the petitioner and shall have to be computed while construing sub-rule (3) of Rule 4 of the Rules of 1984. It is the contention of Respondent No.1 that after appointment of the petitioner on 05.02.1984, though the examination was held in July 1984, in view of the provision of sub-rule (3) of Rule 4, since the petitioner did not avail of the said chance under the existing rules, i.e. rules operating at the time of appointment of the petitioner, said chance is not liable to be computed. However, the petitioner had an opportunity to appear for the examination on four occasions after enforcement of Rules of 1984 and the petitioner shall be deemed to have availed of the four chances and it shall have to be concluded that there were four chances available to the petitioner during the period of two years and he has cleared the examination in fourth chance i.e. July 1986. In nutshell, it is the contention of Respondent No.1 that though the petitioner did not appear for the departmental examination held in July 1985, failure of the petitioner to appear for the said examination is attributable to him, and he could not take advantage of his own wrong and the examination held in July 1985 shall have to be construed as a chance available to him and shall be computed.

13) If the contention raised by Respondent No.1 is to be accepted, it will have to be concluded that the petitioner has passed departmental examination in fourth chance. Respondent No.1 contends that the meaning attributable to the word “chance” as per the Black's Law Dictionary, is “*Opportunity; hope.*” The word, “attempt” has been defined in Black's Law Dictionary, as “*The act or an instance of making an effort to accomplish something, especially without success*”. It is, thus, contended that there was an opportunity for the petitioner to appear for July 1985 examination, which he has not utilised and for his failure to appear for the said examination, he has to suffer the consequences.

14) On the contrary, it is the contention of the petitioner that failure of the petitioner to appear for July 1985 examination is of no consequence and what is to be considered is passing of departmental examination within three chances. The petitioner contends that the chance “avail of by him” is liable to be computed and merely because the examination was held and the petitioner did not appear for the said examination cannot be construed as a chance to attract the consequences provided under Rule 5 of the Rules of 1984.

15) Respondent No.1 has placed heavy reliance on the judgment in the matter of **Sharad Vs. State of Maharashtra**, reported in 2009 (3) SCC 673. The matter before the Hon'ble Supreme was in respect of interpretation of

Rule 4(3) of the Rules of 1984 and according to Respondent No.1, the judgment of the Hon'ble Supreme Court, referred to above, clinches the issue and the consequences enumerated in Rule 5 of Rules of 1984 stand attracted in the case of the petitioner.

16) In the reported matter, the employee was appointed in January 1985 and was put on probation for a period of two years. In terms of the Rules, the departmental examinations were held in July 1985, January 1986, July 1986, January 1987, July 1987, January 1988, July, 1988 and January 1989. The appellant before the Supreme Court did not appear for the examination held in July 1985 and January 1986. He appeared for the examination for the first time in July 1986 and passed in four subjects and failed in two subjects. In the examination held in January 1987, he appeared, but failed. It is noticed, on perusal of the judgment of the Maharashtra Administrative Tribunal in the matter of **Sharad**, that in subsequent examination held in July 1987, he filled in the examination form, however, remained absent on the ground of his illness. There was a request made by him to exempt him from appearing in the said examination and not to count as a chance and said request was accepted. He again appeared in January 1987 examination, however, he failed and ultimately he passed the examination in January 1989. Thus, the petitioner, before the Hon'ble Supreme Court, took five chances and passed the departmental examination within three years. In the aforesaid background, the Tribunal held that the

consequences, as provided under rule 5 are attracted and he shall lose the seniority. The judgment of the Tribunal was confirmed by this Court in W.P. No.2184 of 2002. The Hon'ble Supreme Court also confirmed the judgment of the Courts below. While dismissing the Special Leave Petition, in para 19 of the judgment, delivered by the Hon'ble Supreme Court, it is observed thus:

“19 It is also, in our opinion, incorrect to contend that five chances must be counted from July 1986. The Rules do not put an embargo on appearance at the examination by a trainee. The Rules are statutory in nature. They were required to be followed by all concerned. No reason has been assigned as to why the appellant as a trainee could not appear at the examination held in July 1985 and January 1986. The requirements to pass the examination within a period of two years in three chances must, therefore, be counted from July 1985 and not from July 1986.”

17) It is the contention of Respondent No.1, based upon the observations appearing in para 19, that the Hon'ble Supreme Court has in fact proceeded to compute the chances not availed of by appellant **Sharad** while construing the Rules. The contention appears to be erroneous which can be gathered from the facts narrated in detail in the judgment of the MAT. It is noted in para 8 of the judgment of Tribunal that appellant Sharad availed of six chances to clear the examination beyond the extended period of probation. He did not appear for the examination conducted in July 1985 and January 1986.

During the subsequent two examinations - July 1986 and January 1987, he did appear but failed. In the next two examinations i.e. July 1987 and January 1988, he did not appear. He again appeared for the examination in January 1988, but failed. He ultimately passed the examination in July 1988 in five chances. In July 1987, though appellant Sharad filled in the form, but remained absent on the ground of sickness, however, same is computed as a chance availed of by him and rightly so. In this context, it would be appropriate to refer to Rules 7, 10 and 11 of the Rules of 1984, which read thus:

7. Examination when to be held:-

The Examination shall ordinarily be held twice in a year in the months of January and July unless the Commission is of the opinion that for any valid reason, it is unnecessary to hold the Examination in any particular year:

Provided that, if so for any reasons, the Examination is not held in any year, or any District Transport Officer is not allowed by the Commissioner to appear for any particular Examination, that year or that chance shall be excluded in computing the number of years or the chances laid down in rule 4.

10 Application for appearing at Examination:- (1) Every District Transport Officer who desires to appear for the Examination, shall apply to the Commissioner in writing in the form in Appendix 'B' hereto stating his intention

of appearing at such Examination. Such application shall be made before the 1st April or 1st October, as the case may be, for appearing in the Examination to be held in July or January, respectively, of a year according to rule 7.

(2) The applicant shall also clearly state the previous chances, if any, availed of by him and the year and the months in which they were availed of.

(3) On the basis of the applications received, the Commissioner shall draw up a list of the candidates and forward it to the Commission, so as to reach them before the end of May or November of each year as the case may be

11 Candidates not to withdraw their names from the list:- No District Transport Officer, whose name has been included in the list of candidates for the Examination, shall be permitted to withdraw his name, except for valid reasons acceptable to the Commissioner.

18) The examination is required to be held twice in a year in the months of January and July and it is not disputed in the instant matter that the examinations have been held during the period of two years on four occasions. Rule 10 requires that the District Transport Officer, who desires to appear for examination, shall have to apply to the Commissioner in writing in the form in Appendix 'B'. The period for tendering the application is prescribed in rule 10(1). He is also required to state number of chances availed of by

him.

19) Rule 11 puts an embargo on the candidate from withdrawing the name from the list after inclusion of his name in the list of candidates for the examination, except for valid reason acceptable to the Commissioner.

20) Perusal of Rules 10 and 11 make it abundantly clear that the candidate, who is desirous to appear for the examination, shall have to file the application in writing, shall have to state chances availed of by him; and he is not entitled to withdraw his candidature at the examination. Harmonious reading of rules 10 and 11 along with rule 4(3) leads to a conclusion that what is required to be computed is chances **availed of** by a candidate and not merely to compute number of examinations held during a particular year. Sub-rule (3) of Rule 4 prescribes two conditions - (i) the District Transport Officer shall pass the examination within two years; and (ii) within three chances. Rule 7 mandates conduct of examination twice in a year. Thus, the District Transport Officer, in fact, has opportunity to appear for four examinations during the period of two years and has to pass the examination within three chances. The later part of the rule, refers to “chances” availed of by him and not merely the opportunity provided under rule 7.

21) There is a definite intention of the rule makers in

prescribing twin conditions (i) the duration of two years; and (ii) number of chances limited to three. In order to avoid the consequences under rule 5, the District Transport Officer has to fulfill both the conditions i.e. passing the departmental examination within two years and in three chances. The breach of any of the condition would automatically invite consequences provided under sub rule(3) of rule 5.

22) In view of above, the contention of Respondent No.1, based upon the interpretation of sub-rule (3) of rule 5 is not acceptable. The judgment of the Supreme Court in **Sharad's** matter (*cited supra*) has to be read in the facts stated in detail in the judgment delivered by the Tribunal. Otherwise, there is every likelihood of misinterpreting the judgment of the Hon'ble Apex Court.

23) Respondent No.1 has placed reliance on the judgment delivered by the Division Bench of this Court in the matter of **Harsha Gadekar Vs. State of Maharashtra & another** (Writ Petition No.8766 of 2016, decided on **August 9, 2016**) The word "attempt", appearing in the relevant rule, was a matter of interpretation before the Division Bench. The Division Bench of this Court, placing reliance on the judgment of the Hon'ble Supreme Court in the matter of **Dr.Rajkumar Shantilal Gandhi Vs. State of Maharashtra & others**, reported in 1988 Mh.L.J. 1022,; as well as in the matter of **Lata Prabhuappa Warad Vs. State of Maharashtra and others**, reported in 1994 Mh.L.J. 68,

Bharat Sharad Kulkarni Vs. State of Maharashtra and others, reported in 2000 (4) Mh.L.J. 684; and **Ansari Vs. M.G.V.S.P.H. College of Pharmacy**, reported in 2010 (5) Mh.L.J. 165, proceeded on the basis of judgment of the Hon'ble Supreme Court. In the matter of **Dr.Rajkumar Gandhi**, the Hon'ble Supreme Court concluded that the petitioner therein, who failed to appear at October 1984 examination, was required to be considered as an "attempt". The petitioner before the Supreme Court could not appear for examination in October 1984 because of his ailments and he passed the examination in May 1985. However, the Hon'ble Supreme Court proceeded to hold that failure of the petitioner to appear for the examination held in October 1984 has to be considered as an attempt and the consequences followed.

24) In the instant matter, the word, that appears in the rule, is "**chance**" and not "**attempt**". The word "**attempt**" as defined in the Black's English Dictionary, is *the act or instance of making effort to accomplish something especially without success*. The "attempt" is something more than a "chance". The judgments in the matter of **Harsha Gadekar** (*supra*) and **Dr.Rajkumar Gandhi** (*supra*) are not helpful to Respondent No.1 to substantiate his contention.

25) In the instant matter, the petitioner did not appear for July 1985 examination and as such, it cannot be construed as a 'chance' availed of by him. If the petitioner would have forwarded the application form with an intention to appear for

the examination and thereafter proceeded to withdraw his candidature, in that circumstances, it would have been plausible to construe it as a 'chance' availed of by him. It is not a matter of controversy that the petitioner did not tender an application for appearing for the examination nor did appear. Thus, the petitioner did not act in terms of rule 10 and as such there was no occasion to attract rule 11. Since the petitioner did not appear for the examination held in July 1985, did not tender an application for the examination with an intention to appear for the examination, the examination held in July 1985 cannot be construed as a 'chance availed of' by him. In this context, a reference can be made to a judgment of Karnataka High Court in the matter of **National Board of Examinations and others Vs. Ganpati Bhat**, reported in ILR 2008 Karnataka Series 1178, and judgment of the Madras High Court in the matter of **S. Rajesh Kumar Vs. State Bank of India**, II L.L.N. 1990 342.

26) On consideration of text of rule 4(3) as well as rules 10 and 11 of the Rules of 1984, it has to be construed that what is relevant for consideration in order to attract consequences of rule 5 is that a candidate shall have failed to fulfill the twin conditions, recorded in the rule i.e. (i) to pass the departmental examination within two years from the appointed date; and (ii) in three chances. For computing the three chances, what is required to be considered is three chances **availed of** by the candidate including any chance or chances availed of by him under the existing rules. The rules are required to be

interpreted considering the text of the context. Textual construction that matches the contextual is known to be best interpretation. It would be appropriate to refer to the observations made by the Hon'ble Supreme Court in the matter of **RBI Vs. Peerless General Finance and Investment Co.Ltd.**, reported in (1987) 1 SCC 424. It is observed in paragraph 33 of the judgment, thus:

“33. Interpretation must depend *on the text and the context*. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”

by the Maharashtra Administrative Tribunal, Mumbai, dated 01.12.2014, in O.A. No.1201 of 2010 is unsustainable and deserves to be quashed and set aside and same is quashed and set aside.

28) Rule is made absolute. There shall be no order as to costs.

A.S.GADKARI
JUDGE

R.M.BORDE
JUDGE