

Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 293 OF 2020

Maharashtra State Road
Transport Corporation,
through its Divisional
Controller, Nashik Division.

...PETITIONER

VERSUS

Shri. Mukesh Jagannath Lote
Swami Samarth Nagar,
Golibar Maidan, Varachi Peth,
Taluka-Igatpuri & Dist. Nashik.

...RESPONDENT

Mr. Rakesh Singh a/w Ms. Heena Shaikh i/b M. V. Kini and
Co., for Petitioner.

Mr. Sanjeev Kumar Bapu Deore, for Respondent.

CORAM:- N. J. JAMADAR, J.

RESERVED ON:- 17th APRIL, 2023

PRONOUNCED ON:- 3rd JULY, 2023.

JUDGMENT:-

1) Rule. Rule made returnable forthwith and, with the
consent of the learned Counsel for the parties, heard finally.

2) The petitioner - State Road Transport Corporation takes exception to a judgment and order dated 12th December, 2017, passed by the learned Member, Industrial court at Nashik in complaint (ULP) No. 523 of 2012, filed by the respondent-complainant, whereby the learned Member was persuaded to allow the complaint, declare that the petitioner-employer has engaged in unfair labour practice under Items 9 and 10 of Schedule-IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labor Practices Act, 1971 ("the Act, 1971"), command to cease and desist from engaging in unfair labour practice and further direct the petitioner to consider and fix the scale and basic pay of the complainant at the time of the reappointment, which the complainant was drawing at the date of the termination and also to pay further wages and arrears within three months thereof and in case of default, to pay interest at the rate of 6% p.a. on the said amount till realisation.

3) The Petition arises in the backdrop of the following facts:-

(a) The complainant was appointed as a Conductor with the petitioner-Corporation in the year 1994 at its Igatpuri Depot. The complainant proceeded on an unauthorised leave from 1st July, 2010 to 31st July, 2010. A charge-sheet was served on the complainant. Even after the service of the first charge-sheet, the

complainant again remained absent from duty without prior permission from 1st October, 2010 to 15th October, 2010. A second charge-sheet was served for the said absenteeism. Yet, the complainant did not report to duty during the period of 16th October, 2010 to 21st November, 2010. A third charge-sheet came to be served on 25th November, 2010.

(b) Eventually in the disciplinary proceedings which was conducted against the complainant, in adherence to the prescribed procedure and the principles of natural justice, the complainant was found guilty of misconduct and, thus, by an order dated 25th March, 2011, the complainant was dismissed from service.

(c) In accordance with the governing discipline and appeal procedure, the complainant preferred an Appeal before the Competent First Appellate Authority. The said Appeal, having been preferred belatedly, came to be dismissed by the First Appellate Authority on 31st July, 2012. Thereupon, the complainant preferred Appeal before the Second Appellate Authority.

(d) By an order dated 15th September, 2012, the Second Appellate Authority was persuaded to take a sympathetic view of the circumstances in which the complainant did not attend his

duty. It was, *inter alia*, found that the complainant was suffering from Tuberculosis. The Second Appellate Authority thus condoned the delay of seven months in preferring the First Appeal and also arrived at a conclusion that the penalty of dismissal from service was disproportionate to the gravity of the charge and directed the petitioner-Corporation to reappoint the complainant, upon the complainant furnishing a fitness certificate.

(e) The complainant, according to the petitioner, after having acquiesced in, in the said order dated 15th September, 2012, filed a complaint of unfair labour practice under Items 9 and 10 of Schedule - IV of the Act, 1971. The complainant took an unjustifiable stand that he ought to have been reinstated in service with full benefits and not given a fresh appointment at the minimum scale.

(f) The petitioner resisted the complaint by filing written statement. The petitioner contended that the order passed by the Second Appellate Authority was clear and explicit and the authority had plainly directed that the complainant be given fresh appointment. Having accepted the said decision, according to the petitioner, it was not open for the complainant to agitate the said issue in a complaint under the Act, 1971.

4) The learned Member, Industrial Court after appraisal of the evidence and material on record and construing order passed by the Second Appellate Authority and the reappointment order dated 21st November, 2012, came to the conclusion that the petitioner-Corporation misconstrued the order passed by the Second Appellate Authority especially the term “re-appointment” (पुनर्नेमणुक) to mean a “fresh appointment” (नवीन नेमणुक). Resultantly, the complainant came to be appointed at the initial basic pay of Rs.4,350/-, while the complainant was drawing the basic pay of Rs.6,650/-, at the time of his dismissal from service; which came to be set aside by the Second Appellate Authority.

5) Holding thus, the learned Member directed the petitioner to fix the basic pay of the complainant at the same stage, which he was drawing on the date of termination and pay the wages and arrears.

6) Being aggrieved the petitioner-Corporation has invoked the writ jurisdiction.

7) I have heard Mr. Rakesh Singh, the learned Counsel for the petitioner, and Mr. Sanjeev Kumar Bapu Deore, the learned Counsel for the respondent, at some length. With the assistance of the learned Counsel for the parties, I have also perused the

material on record including the orders passed by the First and Second Appellate Authority and the impugned order.

8) Mr. Singh strenuously submitted that the learned Member, Industrial Court committed a grave error in law in equating the term, “re-appointment” to “re-instatement”. In the face of the clear and unambiguous order of the Second Appellate Authority that the complainant be given ‘re-appointment’, the learned Member could not have arrived at the conclusion that the petitioner indulged in unfair labour practice. Emphasis was laid by Mr. Singh on the fact that the Second Appellate Authority had taken a sympathetic view of the matter and condoned the absenteeism on the part of the complainant and, therefore, directed re-appointment and not reinstatement. The learned Member, Industrial Court, according to Mr. Singh, lost sight of the fact that the past conduct of the complainant, which included multiple proved misconducts on the part of the complainant.

9) Mr. Singh placed reliance on a decision of this Court in the case of **Maharashtra State Road Transport Corporation, Bombay, Vs. Prakash Tulshiram Pardeshi**¹ wherein, this Court had held that when the employee was offered re-employment on humanitarian grounds, upon the employee having accepted his

1 2009 (1) Bom. C. R. 359

mistake and assured that he would not commit such mistake in future, the principle of estoppel comes into play and the employee can not turn around and challenge the order by which he was given fresh appointment.

10) Mr. Deore countered the aforesaid submissions. It was urged that the Second Appellate Authority had not directed the reappointment of the complainant in service on humanitarian grounds, as is sought to be urged on behalf of the petitioner. Taking the Court through the order passed by the Second Appellate Authority, Mr. Deore strenuously submitted that the Appellate Authority had set aside the findings of the Competent Authority that the complainant was guilty of misconduct. It was, in terms, observed that there was a justifiable reason for absence from duty as the complainant was suffering from TB. The Appellate Authority nowhere indicated that pay and allowances of the complainant be scaled down. By misconstruing the term 're-appointment', the complainant was given a fresh appointment and thereby deprived of the benefits of 18 years of past service and that clearly amounted to unfair labour practice. Therefore, according to Mr. Deore, the impugned order does not warrant any interference in exercise of extraordinary writ jurisdiction.

11) I have given anxious consideration to the aforesaid submissions. The charge against the complainant was that of absenteeism. The Second Appellate Authority, in the backdrop of the charge of misconduct of absenteeism for 39 days found the penalty of dismissal from service, grossly disproportionate and directed that the complainant be given re-appointment. Whether the said order was in the nature of substitution of the penalty of dismissal from service with that of a fresh appointment is the core question that crops up for consideration ?

12) The petitioner's case proceeds on the premise that the Second Appellate Authority took a humanitarian view of the matter and directed the re-appointment of the complainant. This did not constitute, "reinstatement in service with the consequential benefits" as claimed by the complainant. The question as to whether the import of the order of the Second Appellate Authority was that of substituting the penalty of dismissal by a lessor one or allowing the Appeal itself can not, in my considered view, be decided on the semantics of the words, "re-appointment", or, "reinstatement". Instead the reasons which weighed with the Second Appellate Authority, as spelled out by the observations in the order dated 15th September, 2012, are

required to be appraised to correctly appreciate the import of the said order.

13) From the perusal of the order passed by the Second Appellate Authority, it becomes abundantly clear that the authority adverted to the reasons ascribed by the complainant for absence from duty. The authority evaluated the material placed by the complainant in justification of the stated reason. Upon evaluation the authority found that the complainant had availed treatment from Rural Hospital, Igatpuri, Nashik. The medical record lent support to the claim of the complainant. The Second Appellate Authority recorded in explicit terms that it was established that the complainant could not attend duty as he was suffering from dreaded disease like Tuberculosis. Holding thus, the authority proceeded to opine that the penalty imposed by the Competent Authority was disproportionate to the charge of misconduct.

14) It is true the Second Appellate Authority has not, in terms, observed that the charge of misconduct was not proved. However, a finding that the complainant had succeeded in establishing that he could not attend the duty as he was suffering from Tuberculosis, in the backdrop of the allegation of absenteeism simplicitor, renders the finding of the Competent Authority that

the complainant was guilty of misconduct of absenteeism unsustainable.

15) Viewed through the aforesaid prism, the order passed by the Second Appellate Authority, if properly construed, was correctly appreciated by the learned Member, Industrial Court as one of exonerating the complainant from the charge of misconduct. Conversely, it is pertinent to note that, the Second Appellate Authority went on to set aside the order of dismissal and did not record that only the penalty was sought to be substituted by a lessor punishment. Therefore, the order passed by the Second Appellate Authority deserves to be construed as one of, “reinstatement” rather than a fresh appointment.

16) The submission of Mr. Singh that having accepted the fresh appointment pursuant to the order of Second Appellate Authority, the complainant could not have agitated the same issue as it operated as an estoppel, does not seem to be well founded. The facts in the case of **Prakash Tulshiram Pardeshi** (supra) on which reliance was placed by Mr. Singh are quite distinct. In the said case, the employee had accepted his mistake and assured not to commit mistake in future. Thereupon the employee therein was re-employed on humanitarian ground. These facts imply that the misconduct attributed to the employee

in the said case was proved and, yet, on humanitarian considerations, the employee was given re-employment. In that factual backdrop, this Court held that the employee was estopped from assailing the said order, having taken benefit thereunder.

17) The facts of the case at hand are materially different. As noted above, the Second Appellate Authority recorded a finding that the complainant established that he could not attend duty as he was suffering from Tuberculosis. This finding, in a sense, dismantles the edifice of misconduct of absenteeism. Had it been a case that the complainant accepted the appointment pursuant to the order of the Second Appellate Authority where there was a clear indication that only a lessor penalty was substituted for the major penalty of dismissal from service, different considerations would have come into play and the principle of estoppel might have operated. In the order passed by Second Appellate Authority, there is no indication that the Appellate Authority was simply substituting the penalty while upholding the finding of the Competent Authority holding the complainant guilty of misconduct. The complainant thus cannot be deprived of the benefits which otherwise flowed from the order of Second

Appellate Authority, for the reason that he had joined duty pursuant to the said order.

18) The conspectus of the aforesaid discussion is that the learned Member, Industrial Court has taken a justifiable view of the matter. The view is not such as to warrant interference in exercise of extraordinary writ jurisdiction. Resultantly, the Petition fails.

19) By an interim order dated 27th February, 2020, this Court had stayed the execution of the impugned order, including the proceedings taken out in contempt, till the hearing and final disposal of this Petition. With the dismissal of the Petition, the stay would stand vacated. However, to provide an opportunity to the petitioners to implement the order, the impugned order to the extent of payment of interest at the rate of 6% p.a. on the arrears deserves to be deferred and proceedings in contempt stayed for a period of three months from today

20) Hence, the following order.

ORDER

- i) The Petition stands dismissed.
- ii) The interim order dated 27th February, 2020, stands vacated.

iii) The impugned order be implemented within a period of three months from today. The proceedings taken out in contempt shall continue to remain stayed for the period of three months.

iv) In the event of default to implement the impugned order within the said period of three months, the amount shall carry interest at the rate of 6% p.a. from the month of accrual till payment and/or realisation.

v) In the circumstances of the case, there shall be no order as to costs.

vi) Subject to the aforesaid modification as to the liability to pay interest on the arrears, the rule stands discharged.

[N. J. JAMADAR, J.]