
(2015) 09 BOM CK 0011
In the Bombay High Court
Case No : Writ Petition No. 5947 of 2014

Chandrakant

APPELLANT

Vs

Divisional Controller, Maharashtra State Road Transport Corporation

RESPONDENT

Date of Decision : 14-09-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)
Penal Code, 1860 (IPC) — Section 302, 325

Citation : (2016) 2 ABR 182 : (2016) 2 ALLMR 347

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : P.L. Shahane, for the Appellant; R.N. Jain h/f D.S. Bagul, Advocates for the Respondent

Final Decision : Dismissed

Judgement

R.V. Ghuge, J—Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner is aggrieved by the judgment of the Industrial Court dated 26/03/2014 in Complaint (ULP) No. 38/2011, by which the said complaint preferred by the petitioner has been dismissed.

3. The submissions of Mr. Shahane, learned Advocate for the petitioner can be summarized as follows :-

(a) The petitioner joined as a Bus Conductor in regular time scale on 01/01/1979.

(b) On 17/12/2001, the bus on which the petitioner was on duty on the Hyderabad-Osmanabad Route, was subjected to a surprise check.

(c) Two passengers were found travelling ticketless and the petitioner was said to have collected an amount of Rs. 22/-.

(d) Charge sheet-cum-show cause notice dated 28/12/2001 was issued.

- (e) The petitioner submitted his reply dated 14/01/2002.
- (f) A departmental enquiry was conducted and the petitioner was proposed with the punishment of reduction in basic salary in three stages with cumulative effect.
- (g) A show cause notice dated 20/02/2003 was issued to the petitioner proposing the punishment of dismissal.
- (h) The petitioner preferred Complaint (ULP) NO.16/2003 before the Labour Court, which granted interim relief on 13/03/2003.
- (i) The petitioner was directed to file a reply to the show cause notice.
- (j) After considering the reply of the petitioner, he was dismissed from service by order dated 02/04/2004.
- (k) The petitioner preferred Complaint (ULP) No. 241/2004 for challenging the order issued by the Reviewing Authority, by which he was dismissed from employment.
- (l) A circular dated 03/12/2005 was introduced by which two mis-conducts of mis-appropriation were sought to be pardoned. For the said purpose, Clause 7(1) (a),(b) and (c) alongwith few other clauses set out in the circular dated 03/12/2005 were introduced.
- (m) By the said circular, the first mis-conduct of mis-appropriation was to be condoned by imposing a fine equal to 50 times of the amount mis-appropriated or Rs. 5,000/- whichever is more.
- (n) For the second mis-conduct, the fine to be imposed was 75 times of the amount mis-appropriated or Rs. 10,000/- whichever is more.
- (o) Based on the said circular, the Discipline and Appeal Procedure was amended by the Corporation.
- (p) The said circular was withdrawn on 22/01/2006.
- (q) The petitioner was given the benefit of the said circular by permitting him to deposit the amount of Rs. 5,000/- on 28/12/2006.
- (r) Before the order dated 28/12/2006 was passed, the petitioner deposited the amount of Rs. 5,000/- on 02/01/2006.
- (s) The petitioner withdrew Complaint (ULP) No. 241/2004, "Unconditionally" on 04/01/2007.
- (t) The petitioner was issued with a fresh appointment order dated 06/03/2007 which he has accepted.
- (u) The petitioner joined duties pursuant thereto and superannuated on 30/04/2011.
- (v) Prior to his retirement, the petitioner has preferred Complaint (ULP) No.

38/2011 on 04/03/2011 seeking reconsideration of the wage scale and a direction to fix his basic wages, grant dearness allowance and other allowances including annual increments etc. on the basis that he is deemed to have continued in employment as he had deposited Rs. 5,000/- under the said circular.

(w) By the impugned judgment dated 26/03/2014, the complaint was dismissed.

4. Mr. Shahane submits that once he had deposited Rs. 5,000/- as per the circular dated 03/12/2005, it was incumbent upon the respondent Corporation to continue him in employment by pardoning his act of mis-appropriation. Consequentially, the petitioner was entitled for all benefits incidental and consequential to his continuance in employment. He, therefore makes a grievance that the Industrial Court has failed to consider this fact situation and has erroneously dismissed the complaint.

5. Mr. Bagul, learned Advocate for the Corporation has supported the impugned judgment. He relies upon the following judgments :-

[1] State of Punjab Vs. Krishan Niwas, 1997(1) CLR 855,

[2] Union of India (UOI) and Another Vs. N.M. Dhobi ,

and an unreported judgment of this Court dated 10/04/2008 in WP No. 9339/2007 and 4117/2007.

6. I have considered the submissions of the learned Advocates as recorded above.

7. The petitioner has challenged his dismissal by filing complaint (ULP) No. 241/2004. Amount of Rs. 5,000/- is deposited on 02/01/2006. The petitioner has not indicated any order passed by the respondent/Corporation under the circular dated 03/12/2005 by which the petitioner can be said to have been permitted to deposit the amount of Rs. 5,000/- as an act of pardon under clause 7(1)(a) of the said circular. There is no explanation forth coming on this ground.

8. However, Mr. Shahane indicates that after about 11 months, the respondent passed an order dated 28/12/2006 on the basis of the petitioner's application dated 29/12/2005 permitting him to deposit the amount of Rs. 5,000/-. Nevertheless, it is noteworthy that the circular dated 03/12/2005 was withdrawn on 22/01/2006 and thereafter the said circular is not in existence. As such, the order dated 28/12/2006 was passed in the wake of the withdrawal of the circular on 22/01/2006.

9. It is undisputed that despite the above, the petitioner was not reinstated in service pursuant to his dismissal dated 02/04/2004. He withdrew Complaint (ULP) No. 241/2004 unconditionally on 04/01/2007 thereby withdrawing his challenge to the order of dismissal dated 02/04/2004. As such, the order of dismissal was restored.

10. By a communication dated 06/03/2007, the petitioner was issued with a fresh appointment letter, which has been accepted and on the strength of the

said order, the petitioner has continued in employment. On 04/03/2011, which is about 55 days prior to his retirement, the petitioner preferred Complaint (ULP) No. 38/2011. The prayers put forth by the petitioner read as under :-

"1. That, the complaint may kindly be allowed.

2. That, if may kindly be declared that, the respondent has engaged in unfair labour practice under Item 9 and 10 of Schedule IV of M.R.T.U. And P.U.L.P. Act, 1971. The respondent may kindly be directed to desist from unfair labour practice.

3. That, the respondent be directed reconsidered the wage scale of the complainant. The respondent be directed to fix the complainant his basic wages Rs. 7227/- and be directed D.A. and other allowances and including annual increments by treating the basic wage of Rs. 10227/-.

4. That, any other relief may kindly be granted in favour of complainant which are proper."

11. It is apparent that the petitioner has not challenged his fresh appointment dated 06/03/2007 and there is no prayer seeking quashing of the said order. I find that the petitioner has merely criticised his fresh appointment and has claimed that he is deemed to have continued in service and for which the prayer reproduced above have been put forth.

12. The Industrial Court, while dismissing the complaint, has concluded that the unconditional withdrawal of Complaint (ULP) no. 241/2004, by which the petitioner gave up his challenge to his dismissal order, has led to the restoration of the order of dismissal. Thereafter, he has accepted his fresh appointment and resumed duties on 08/03/2007 till his superannuation on 30/04/2011. The Industrial Court has, therefore, concluded that having accepted the fresh appointment and having worked for more than 4 years, the petitioner, without seeking the quashing of the fresh appointment, cannot pray for fixation of his pay scale on the presumption that he is deemed to be in continuous employment from 01/01/1979.

13. The Apex Court in the case of State of Punjab (supra) while dealing with a similar issue of acceptance of fresh appointment and posing a challenge after being in employment, has observed as under :-

"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 I.P.C. was modified to one under Section 325 I.P.C. 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 I.P.C. 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 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."

14. In the Union of India case (supra) the Apex Court has arrived at a similar conclusion, which reads thus :-

"16. Question raised before us is, whether applicant is entitled for condonation of break in service for period prior to date of his reappointment. Facts are to the effect that order of removal was not challenged by applicant before Tribunal. The Tribunal has not set aside order of removal and order of reappointment. Order of reappointment as a fresh entrant dated 13-4-1978 was also not challenged by applicant but said order was accepted by applicant and he resumed duties with effect from 18th April, 1978. We have perused original service sheet in which "S.C." is written below the name of the applicant and service-sheet bear signatures of the applicant. Railway Service (Disciplinary and Appeal) Rules, 1968, Rule 25 Part VI is relating to revision and review. The authority under Rule 25 can confirm, modify or set aside order or confirm, reduce, enhance or set aside penalty imposed by order or impose any penalty where no penalty has been imposed or remit case to the authority which made order or any other authority directing such authority to make such Fresh inquiry as it may consider proper in the circumstances of the case or pass such orders as it may deem fit. Therefore, revisional and reviewing authority has power to pass such orders as it may deem fit, therefore, contention raised by learned Advocate Mr. Shah that reappointment is not prescribed as punishment under Rules, therefore, order of reappointment is bad, cannot be accepted in light of provisions of Rule 25 of said Rules of 1968 which provides that revisional authority and reviewing authority has power to pass such orders as it may deem fit. Revisional and reviewing authority has not set aside order of removal, but with sympathetic approach, granted only reappointment as a fresh entrant. Said

order has been accepted by the applicant and requested the authority to condone break in service. Representation dated 17th July, 1989 after rejection of representation dated 11th November, 1982 by order dated 14th March, 1984 suggests that applicant has accepted order of reappointment and then made request to the General Manager, Western Railways to condone break in service. In such circumstances, when order of reappointment is accepted which does not include benefit of continuity of service impliedly or expressly, therefore, applicant is not entitled for condonation of break in service. Applicant is not having any legal right to receive benefit of continuity of service. It is not impliedly included in case of reappointment. In case of reappointment, employee would lose his past service for all purposes. Order of reappointment is not punishment but result of sympathetic approach made by concerned authority. Tribunal has not given any reason on what basis, it has granted benefit of continuity of service or condonation of break for purpose of pension and other retirement benefits.

18. Tribunal has not discussed on what basis applicant is entitled for said benefit. No reasons have been recorded by Tribunal. Tribunal granted benefits in favour of the applicant by merely relying upon decision of Apex Court in U.P. Awas Evam Vikas Parishad and Ors. v. Rajendra Bahadur Srivastava (supra). The order of C.A.T. is not legal but based on sympathy and sentiment. According to us, this is nothing but clear case of non-application of mind by Tribunal. In case of reappointment which does not include continuity of service, benefit of past service cannot be granted by condoning break when order of reappointment has been accepted by applicant-employee. Once order of reappointment has been accepted by applicant and resumed duties without any protest and enjoyed benefits flowing from said order, then, applicant is estopped from claiming benefit of past service and other consequential benefits. Apex Court has examined the issue that once reinstatement order passed by Labour Court denying back wages for intervening period and then employer ordered for reinstatement and accepted by the employee, then, subsequent challenge against denial of back wages by filing of petition is not maintainable and it was not entertained by Apex Court on ground that the reinstatement without back wages has been accepted by employee, then, to challenge back wages part, subsequently, is not maintainable. (See : State of Punjab and others Vs. Krishan Niwas, AIR 1997 SC 2349 : (1997) 4 JT 213 : (1997) 3 SCALE 338 : (1997) 9 SCC 31 : (1997) SCC(L&S) 998 : (1997) 2 SCR 1135 : (1997) AIRSCW 2238 : (1997) 3 Supreme 551

19. In view of above discussion, according to our opinion, applicant is not entitled to benefit of condonation of break in service and on that basis, pensionary and retirement benefits, therefore, order passed by C.A.T. in O.A. No. 305 of 1991 dated August 20, 1999 is hereby set aside. Said O.A. No. 305 of 1991 is hereby dismissed. Consequently, Special Civil Application No. 8722 of 1999 is allowed and Rule is made absolute. Special Civil Application No. 11258 of 2002 is hereby dismissed and Rule is discharged. No order as to costs. Petition is dismissed"

15. This Court, in the matter of MSRTC Vs. Prakash Tulsiram Pardeshi has concluded that the rule of estoppel must apply in such a case and the Labour Court ought to have rejected the complaint on this ground alone. It would be apposite to reproduce the said observations as under :-

"4. The charges against the respondent were of a serious nature and character. A disciplinary enquiry was convened to enquire into the allegation that the respondent while discharging his duties as conductor had collected the fare from two passengers on the bus, but to whom tickets had not been issued. The money bag of the respondent also showed an excess fare collection. The charge against the respondent was, therefore, that he had misappropriated the funds of the Corporation and had been guilty of a dereliction of duties by not issuing tickets to passengers for the journey. Such an act of misconduct having been found to be duly established, had to be taken seriously both by the disciplinary authority and by the Labour Court. Upon holding the charge to be established, the respondent was dismissed from service. The first Appellate Authority, as a matter of fact, came to the conclusion that the charge was established, that it was of a serious nature and that the service record of the respondent was not satisfactory and he was penalised in the past under the service rules. The final order of the Appellate Authority clearly suggests that the Appellate Authority was inclined to dismiss the appellant from service.

5. However, it was the respondent who had stated that he would not commit such a mistake in the future and it was on his request that the Appellate Authority eventually decided to make a fresh offer of appointment so as to enable the respondent to have some opportunity to improve upon himself. The respondent accepted the order of the Appellate Authority and joined service with effect from 10th December, 1994. Once that was done and having taken the benefit of the order, it was clearly not open to the respondent to turn back and complain of an unfair labour practice. The respondent is clearly estopped from doing so. The principle of estoppel must apply in such a case and the Labour Court ought to have rejected the complaint on this ground alone. Counsel appearing on behalf of the petitioner urged that the powers of the Appellate Authority are wide enough to include an offer of the fresh appointment to the workman. For the purposes of these proceedings, it is not necessary for this Court to enter any final judgment on whether the Appellate Authority in the course of modifying the order of dismissal can pass an order of fresh appointment. But in the facts of the present case, it needs emphasis that the order of the Appellate Authority properly construed, was an offer for a fresh appointment which was duly accepted by the respondent. If the respondent believed that the Appellate Authority had no authority to impose such a direction upon him, he could have challenged the order in its entirety. Having taken the benefit of the order, the respondent was estopped from challenging the order by which he was given fresh appointment. The Appellate Authority while justifying its own finding, confirmed the order of dismissal. The respondent was, however, offered re-employment on humanitarian grounds, particularly in the light of the

fact that he accepted his mistake and stated that he would not commit such a mistake in future. The interference of the Labour Court in the proceedings, was therefore, clearly not warranted. The principle that estoppel must apply in a situation such as this is consistent with the judgment of the Supreme Court in the State of Punjab v. Krishan Niwas. The same view has been taken by the Division Bench of the Gujarat High Court in Union of India (UOI) and Another Vs. N.M. Dhobi "

16. This Court, in its judgment dated 10/04/2008, in the matter of MSRTC Vs. Ambadas Sadhiv Hingane has considered the claim of the concerned employee seeking benefits under the circular dated 03/12/2005. This Court has taken into account the fact that the said Bus Conductor had misappropriated the amount and was dismissed from service by way of punishment. It would be apposite to refer to the observations of this Court in paragraph No. 5 and 6 of the judgment in the case of Ambadas Sadhiv (supra) as under :-

"5. The order of the Industrial Court has been called into question, both by the workman and by the employer. It would be appropriate to take the challenge preferred by the workman to the order of the Industrial Court. On behalf of the workman, reliance has been placed on a scheme purported to have been floated by the then Vice President and Managing Director of the Maharashtra State Road Transport Corporation. A copy of the scheme is placed on the record. A circular was issued which states that in the event that any employee is found to have mis-appropriated the funds of the Corporation on account of the sale of tickets and it was the first act of misconduct at the time, the employee who has admitted his guilt would be liable to be taken back in service subject to his reimbursing 50% of the amount misappropriated or Rs. 5,000/-. For the second offence, the amount to be reimbursed would be 75% of the amount misappropriated or at least Rs. 10,000/-. Counsel appearing on behalf of the employer submitted that subsequently the circular had been withdrawn. However, it has been urged on behalf of the workman that at the material time the circular was in operation and the workman should be given the benefit thereof.

6. It is impossible for the Court in the exercise of the jurisdiction under Article 226 of the Constitution of India to do anything of the kind. The circular purports to condone acts of misappropriation. It is inconceivable that any public body can condone a misappropriation of its funds particularly in the light of the judgment of the Supreme Court taking a strict view of acts of misconduct on the part of the bus conductors and those vested with fiduciary duties in State Transport Undertaking. But, be that as it may, the circular cannot be read as conferring a vested right on any employee who has been found to be involved in a misappropriation of funds to reinstatement in service despite a penalty imposed in a disciplinary enquiry."

17. In the instant case, the respondent by issuing a fresh appointment to the petitioner has clearly indicated its disinclination to follow the circular. The order

dated 28/12/2006 has been passed by the respondent permitting the petitioner to deposit Rs. 5,000/-, when the circular dated 03/12/2005 was already withdrawn on 22/01/2006. Notwithstanding the same, the petitioner has accepted his fresh appointment in the face of his order of dismissal dated 02/04/2004 and challenge to which was withdrawn / given up after the petitioner withdrew Complaint (ULP) No. 241/2004 on 04/01/2007.

18. It, therefore, appears that he has accepted his fresh appointment dated 06/03/2007 with open eyes and after knowing its repercussions. Moreover, he kept silent and continued to work without raising any challenge to the fresh appointment for 4 years, which he did by lodging the complaint 55 days prior to his retirement. The principle of "Acceptance sub silentio" becomes applicable in this case and the petitioner, therefore, cannot be permitted to raise a challenge at the stroke of his retirement and after enjoying the benefits of the fresh employment.

19. The ratio laid down]by the Apex Court in the judgments cited above and the view of this Court expressed in paragraph Nos. 5 and 6 of the Ambadas Sadviv case (supra) would squarely apply to the case of the petitioner.

20. In these circumstances, I am unable to accept the contention of Mr. Shahane that the impugned judgment of the Industrial Court dated 26/03/2014 could be said to be perverse or erroneous.

21. This petition is, therefore, dismissed. Rule is discharged.