

(1986) 06 BOM CK 0019
In the Bombay High Court
Case No : Writ Petition No. 572 of 1982

Maharashtra State Road Transport Corporation	APPELLANT
Vs	
R.D. Toplewar, Ex-Conductor and Another	RESPONDENT

Date of Decision : 26-06-1986

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 85
Constitution of India, 1950 — Article 14, 227
Labour Practices Act, 1971 — Section 44

Citation : (1986) 3 BomCR 689 : (1987) MhLj 85

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : S.C. Mehadia, for the Appellant; B.M. Khan, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This is a writ petition arising out of the proceedings under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short "the Act"). Briefly, the facts are that the respondent No. 1 was working as conductor in the petitioner-Corporation during the relevant time. On 8-5-1973, he was the conductor of the bus going from Nagpur to Pusad. The said bus was checked in front of the Office of the Maharashtra State Electricity Board, Digra. When the said bus was checked, the checking party found that there were 30 passengers in the bus, out of whom 27 were having tickets and three were without tickets. According to the checking party, the passengers who were without tickets were going from Nagpur to Pusad, and that they had paid the necessary fare to the conductor of the bus, i.e. the respondent No. 1, but no tickets were issued to them by the conductor. Further, according to the checking party, when the bus was approaching the checking point and as the conductor noticed the checking party, he torn three tickets from his tray of Rs. 1.20 denomination each which were found thrown in the bus.

2. At the spot, the checking party recorded the statement of the conductor and the two passengers who were travelling without tickets in the bus. A charge sheet was thereafter issued to the respondent-conductor and a domestic enquiry was held against him by the Depot Manager initially and after his transfer by the Divisional Traffic Superintendent (for short "the D.T.S."). The D.T.S. who is the competent authority to impose punishment upon the conductor, came to the conclusion that the petitioner-corporation in the departmental enquiry did not clarify the lacuna that according to the conductor 30 tickets were issued to the passengers during the trip in question before it was checked, whereas the case of the Department was that at the time the bus was checked there were 27 passengers with tickets and three without tickets. However, inspite of this lacuna, the D.T.S. held that there were three passengers, without tickets in the bus. He, therefore, held that no serious action can be taken against the conductor by way of his dismissal in view of the lacuna in the evidence produced by the Department. Accordingly, he imposed the punishment of stoppage of increment for six months for the irregularity in overwriting the personal amount in the way bill, without cumulative effect.

3. It may be seen that as per Schedule "C" to the Discipline and Appeal Procedure applicable to the Maharashtra State Road Transport Corporation Employees and which governs the departmental action to be taken against the conductor-respondent No. 1 in the instant case, the Divisional Controller is the appellate authority against the order passed by the D.T.S. It may also be seen that the Divisional Controller is also the appointing authority in so far as the post of conductor is concerned. The Divisional Controller, after recording the reasons, issued a show cause notice to the respondent-conductor intimidating him that the punishment of stoppage of increment was inadequate in the facts and circumstances of his case and that the only punishment which could be imposed upon him was the punishment of dismissal from service. For the reasons recorded by him, he took up the matter in review, which is a power conferred upon the appellate authority under Clause 9 of the Discipline and Appeal Procedure. In the said review proceedings, apart from giving show cause notice, the Divisional Controller examined the conductor again and thereafter, by his order dated 10-11-1975 held that the mis-conduct for which the respondent-conductor was charge -sheeted was proved and that he was liable to be dismissed from service for the said mis-conduct. Accordingly the respondent-conductor was dismissed from service with effect from 11-11-1975.

4. Being aggrieved the respondent-conductor challenged the order of his dismissal from service by filling a complaint case under sections 28 and 30 of the Act before the Labour Court, Akola. The petitioner-Corporation resisted the case by filling its written statement. The learned Labour Court held that the domestic enquiry made in the instant case was legal and proper. He also held that the Divisional Controller was entitled to review the Order passed by the D.T.S. He ultimately upheld the dismissal Order and, therefore, dismissed the complaint case filed by the respondent-conductor by his order dated 17-3-1977.

5. Although the complaint case was dismissed on 17-3-1977, respondent conductor preferred a revision against the said Order after a long time thereafter on 6-4-1979, u/s 44 of the Act. Since there was a delay in filing the revision, the respondent filed an application for condonation of delay in filing the same. In reply to the said application, the petitioner alleged that there was a limitation of 90 days for preferring the revision u/s 44 of the Act and that since there was inordinate delay, which was not at all satisfactorily explained by the conductor, revision should be dismissed. The learned Industrial Court, by its Order dated 7-4-1981 held that no limitation was prescribed for filing a revision u/s 44 of the Act and, hence, there was no question of condonation of delay in the instant case. He therefore, directed that the application for condonation of delay should be held. The learned Industrial Court thereafter heard the arguments of both the parties on merits and by his Order dated 30-9-1981, he partly allowed the revision filed by the respondent-conductor. He set aside the Order of dismissal of the respondent-conductor holding that the petitioner has committed an unfair labour practice falling under Item No. 1(g) of Schedule IV of the Act. He, therefore, directed that the respondent-conductor should be reinstated in service with full back wages with effect from 11-11-1975 and with continuity of service. He, however, maintained the order of the D.T.S. of stoppage of increment. Being aggrieved by the aforesaid Order of the learned Industrial Court, the petitioner-Corporation preferred the instant writ petition in this Court.

6. At the outset, the learned Counsel for the petitioner-Corporation has urged before me that section 44 of the Act, providing revisional jurisdiction in the Industrial Court, should be struck down being arbitrary, discriminatory and violative of the fundamental right guarantee under Article 14 of the Constitution of India. The submission in this regard is that no period of limitation is provided for a revision u/s 44 of the Act which causes great hardship and injustice to those in whose favour the Orders are passed by the Labour Court, because in the absence of a period of limitation, the Orders passed by the Labour Court can be reopened by the Industrial Court at any time in future. The further submission is that when a period of limitation of 90 days is provided for the original application to be filed under sections 28 and 30 of the Act, it is really unjust why there should be no period of limitation in revising the order passed upon the said application by the Labour Court.

7. In considering the above submissions made on behalf of the petitioner, it is first necessary to understand the true nature of the proceedings contemplated by section 44 of the Act. It may be seen that section 44 of the Act does not in terms provide for a remedy of "revision" against the Order passed by the Labour Court, as the expression "revision" is known and understood in law. Although the proceedings u/s 44 of the Act are described as "revisional proceedings" a perusal of section 44 would show that a power of superintendence is conferred upon the Industrial Court over all the Labour Courts. The phraseology used in section 44 of the Act is similar to the phraseology of section 85 of the Bombay Industrial Relations Act and also of Article 227 of the Constitution of India. In regard to the

proceedings under Article 227 of the Constitution of India as well as in regard to the proceedings u/s 85 of the Bombay Industrial Relations Act, the power of superintendence conferred upon the Industrial Court includes judicial power of superintendence and, therefore, the applications which are described as revisions against the orders passed by Labour Courts are entertained by the Industrial Court u/s 44 of the Act. The concepts of the power of superintendence is well settled by various decisions under Article 227 of the Constitution of India. The exercise of power of superintendence is always discretionary and since it is an equitable power conferred upon the Court, it has to be exercised upon equitable considerations. It is, therefore, necessary that when a power of superintendence of the Industrial Court is invoked, the party invoking such a power must act diligently and expeditiously, and it would be open to the Industrial Court to dismiss the applications filed u/s 44 of the Act in its discretionary jurisdiction if it finds that there is an inordinate delay in filing the said applications. Even after entertaining the said applications u/s 44 of the Act, it is open to the Industrial Court to modulate the relief in such a manner so as to avoid any hardship or injustice being caused to the opposite party by reason of the delay in invoking its jurisdiction.

8. Bearing in mind the above nature of the proceedings u/s 44 of the Act, it can be seen that the very apprehension entertained by the petitioner that hardship and injustice would be cause because of the inordinate delay, would lose its basis, because although there may not be a period of limitation prescribed for entertaining the proceedings u/s 44 of the Act, it is open to the Industrial Court not to entertain a proceeding thereunder on the ground of inordinate delay. The learned Counsel for the petitioner-corporation has also not been able to show to me that prescribing a period of limitation is obligatory upon the statute-making authority when a remedy is provided under a statute. The above contention on behalf of the petitioner that the provisions of section 44 of the Act should be struck down because they are arbitrary and unjust and, are, therefore, violative of Article 14 of the Constitution of India, is rejected.

9. The next contention which is raised on behalf of the petitioner is that, the revision application filed by the respondent-conductor should have been dismissed by the learned Industrial Court on the ground of inordinate delay which has not been properly explained by the respondent. It may be seen that no such specific contention was realised by the petitioner before the learned Industrial Court. It is clear from the reply filed by the petitioner to the application for condonation of delay filed by the respondent-conductor before the Industrial Court that, according to the petitioner, there was a period of limitation of 90 days for filing a revision u/s 44 of the Act and since the revision in the instant case was filed after an inordinate delay of about two years which was not explained satisfactorily the instant revision should be dismissed as barred by time. Since this was the only contention raised before the learned Industrial Court, the learned Industrial Court rejected the same on the ground that no limitation is prescribed for a revision u/s 44 of the Act and, therefore, no question of

condonation of delay would arise. The learned Industrial Court, therefore, entertained the revision and, after hearing the parties, pressed the Order on merits.

10. The question, therefore, to be considered in the instant writ petition would be whether the revision which was entertained by the learned Industrial Court should now be rejected on the ground of inordinate delay as urged on behalf of the petitioner-Corporation. The learned Counsel for the respondent-conductor has urged before me that a satisfactory explanation for filing the revision after a period of about two years from the date of the impugned Order, was given by him in his application for condonation of delay. A perusal of the said application shows that according to the respondent-conductor he was not aware of the date on which the Order was passed by the Labour Court, because on the date his representative appeared in the Labour Court, he was informed that the Order would be passed afterwards, and for which no specific date was given.

11. I have perused the Order-sheets of the complaint case in the Labour Court, which to say the least, disclosed unsatisfactory working of the Said Court in the said proceedings. After the order-sheet dated 21-2-1976, on which date the case was adjourned for evidence on 31-3-1976, there are no order-sheets till 17-3-1977, on which date, the order-sheet mentioned that the worker and the employer were absent and that the Order was passed. In this state of affairs of the proceedings before the Labour Court, it is not possible altogether to reject the contention raised on behalf of the respondent-conductor that he was not aware of the date when the Order was passed by the learned Labour Court in the instant case. However, that cannot absolve him wholly why he should not have taken diligent steps to ensure and make himself aware of the Order instead of warranting the same for a long period of about two years.

12. In so far as the question of entertaining the revision is concerned, in my view, for two reasons effect cannot be given to the said contention raised on behalf of the petitioner-corporation that the revision should be dismissed on the ground of inordinate delay. My first reason is that when the revision was already entertained and when at the threshold no such plea was raised in the exercise of my discretion under Article 227 of the Constitution of India I should now set at naught the act of entertaining the revision on merits by the Industrial Court. Secondly, as pointed out above, it cannot be said that the reason given by the respondent-conductor for not filing the revision application in proper time is wholly unfounded because the record of the Labour Court in this regard is totally unsatisfactory. However, since the respondent had not acted diligently in making himself aware of the order of the learned Labour Court, the period of delay can be taken into consideration in considering his claim about back wages if ultimately it is held that the dismissal of the respondent-conductor was illegal and that he was entitled to reinstatement and back wages. The said submission which is alternatively urged on behalf of the petitioner-Corporation would, therefore, be taken into consideration if and when I come to the conclusion that

the impugned order of the Industrial Court holding that the dismissal of the respondent-conductor is liable to be set aside is correct.

13. Proceeding now to the merits of the controversy, the first question which arises for consideration is the scope of review proceedings under Clause-9 of the Discipline and Appeal Procedure. The scheme of the said Discipline and Appeal Procedure would show that Clause-7 provides for punishments to be meted out for the mis-conduct committed by the employees. It also provides whether the orders imposing punishment are appealable or not. Clause-8 enables an employee to file an appeal to the Appellate Authority prescribed in Schedule "C" or "D" of the said Discipline and Appeal Procedure. In cases of dismissal, discharge, termination of services, reduction to lower posts, withholding of increment for a specific period and suspension by way of punishment, a second appeal is also provided. The scope of appellate powers is laid down under Clauses 10, 14 and 15 of the said Discipline and Appeal Procedure.

14. Clause-9 of the Discipline and Appeal Procedure provides that the Appellate Authority may, suo motu, call for the enquiry papers and review the decision in any case as it may deem fit. It is this provision which calls for interpretation in this case. The learned Counsel for the petitioner has urged that the expression "review the decision in any case as it may deem fit", would show that the whole case is open before the Appellate Authority in review and after re-appreciating the whole evidence on record by itself it can come to its own conclusion and impose any punishment higher or lower, other than the punishment imposed by the competent authority. The submission in other words is that the whole matter is open before the Appellate Authority as in the case of appeal. The further submission, referring to the sub-clause (c) of Clause-10 of the Discipline and Appeal Procedure, is that when the appellate authority can consider whether the punishment is inadequate or inadequate and when he is empowered thereunder to pass such Order as he thinks proper, it is open to the appellate authority to enhance the punishment in appeal.

15. In considering the scope of Clause-9, it is relevant to see that a right of appeal under Clause-8 is conferred upon the delinquent employee aggrieved by the order of punishment against him. No right of appeal is provided to the department if the delinquent employee is acquitted in the departmental proceedings. In this context, the reason for enactment of Clause 9 of Discipline and Appeal Procedure is clear. Since no appeal is provided to the department, a power of review to the Appellate Authority is provided under Clause-9. But it would not follow from the same that the power of review can be equated to the power of appeal. A proper reading of Clause 9 would show that although the word "review" is used, in fact, it is the power in the nature of a revision as normally understood in law which has a different scope from the appellate power.

16. Normally, the expression "review" is used when the same authority is empowered to reopen its own order. However, under Clause 9, the power of review is conferred upon a different and a higher authority. Further, the language

used in Clause 9, namely, "the Appellate Authority may, suo motu, call for the enquiry papers" would show that the power intended to be conferred upon the appellate authority is in the nature of a revision power. It may be seen that the competent authority to take disciplinary action against the employees of the petitioner Corporation is well conversant with the rules and procedure in the Corporation and it is, therefore, understandable that when, after considering the material before him, the competent authority comes to a conclusion that the delinquent employee should be acquitted, such an order of acquittal should be reopened by the higher departmental authorities in rare cases such as when the procedure followed by the competent authority or the Enquiry Officer is not proper or is against the principles of natural justice or when some material evidence or circumstances are not taken into consideration or when there is material irregularities committed by the competent authority in arriving at his decision. It is, therefore, that a power of review which, as discussed above, is a revision power is conferred upon the appellate authority.

17. In regard to the appellate authority, Clause 14 of the Discipline and Appeal Procedure shows that the said authority can pass Orders on the appeal as it thinks fit, after verifying whether the prescribed procedure has been followed by the Enquiry Officer and whether there was any material irregularity likely to vitiate the decision of the Competent Authority. In my view, considering all the above circumstances, the power conferred under Clause 9 of the Discipline and Appeal Procedure cannot be equated with the power in appeal under the said Discipline and Appeal Procedure. Even treating it as a review as is mentioned in the said Clause 9, on the identical phraseology used in the Rent Control Order, this Court in the case of *Tukaram Nathuji Sonkusare v. Dayalnath Dudhanath Mishra*, reported in 1985 Mh.L.J. 37, has laid down that in review proceedings it is not open to the Court to re-appreciate the evidence on record and to interfere with the order under review only because some other view is possible on the basis of the material on record. In this view of the matter also, the jurisdiction of the reviewing authority under Clause 9 of the Discipline and Appeal Procedure is limited and cannot be equated with the appellate jurisdiction. Since I am holding in the facts and circumstances of the instant case that the appellate authority was in error in interfering in his review jurisdiction under the aforesaid Clause 9, I do not think it necessary to consider the question whether or not in appeal or in review it is open to the appellate authorities to impose higher punishment upon the delinquent employee.

18. Turning now to the merits of the controversy in the instant writ petition, it may be seen that in the original order passed by the D.T.S. as the competent authority in this case he has observed that the way-bill of the conductor in the instant case showed that there were 30 passengers in the bus for which the sale of tickets were shown in the said way-bill. However, according to the checking staff there were 27 passengers with tickets and three passengers without tickets. This lacuna i.e. the difference between the way-bill and the report of the checking staff, according to the D.T.S. was not explained or clarified properly

during the course of the enquiry in the instant case. The question, therefore, to be considered for the purpose of Clause 9 of the Discipline and Appeal Procedure would be whether the view taken by the D.T.S. was a possible view on the basis of the material on record in the instant case.

19. The learned Counsel for both the parties have brought to my notice the way-bill filed in the instant case. Both the parties admit that the way-bill shown that 33 tickets were issued to the passengers travelling to various destinations. In fact, the said total appears in red ink in the handwriting of one of the checking staff. In this context, the evidence of one of the checking staff Mr. Gadge is also brought to my notice, in which he stated that as per the way-bill, there were 33 passengers with tickets in the said bus. He however, insisted in the evidence that, at the time when the bus was checked, there were only 30 passengers.

20. It is true that in his examination-in-chief, the said witness Mr. Gadge stated that there were 30 passengers in the bus out of whom 27 passengers showed their tickets but three did not. From the above statement of one of the checking staff, it cannot be said with certainty that because the three passengers did not show the tickets they had no tickets particularly in view of the way-bill which showed that there were 33 passengers in the Bus with tickets. Reliance was placed upon the spot statement, in which the conductor himself admitted that there were 27 passengers with tickets and three passengers without tickets when the bus was checked. In his explanation to the charge-sheet as well as in the deposition, he had explained that the said statement in his spot statement by him under pressure. It may also be seen that the conductor has examined one of the passengers whose spot statement was recorded by the checking staff. It may be seen that in his evidence in the departmental enquiry he has gone back upon his own spot statement.

21. In the above state of evidence before him in the departmental enquiry, in my view, it cannot be said that the view taken by the D.T.S. was not a possible view. The burden of proving the mis-conduct was upon the Department and it was, therefore, necessary for the Department to explain the material discrepancy between the way-bill and the actual situation which existed on the spot when the Bus was checked. There is no material placed on record to show that the way-bill was in any way altered or there were any erasures or that it was a suspicious document. It may be seen that the entries in the way-bill are to be made as soon as the tickets are issued to the passengers. It is only on the basis of the three tickets of Rs. 1.20 denomination each torn from the tray and which were found lying in the bus, that an inference is sought to be drawn that on seeing the checking party, these tickets were sought to be issued by the conductor and, therefore, it is sought to be urged that the charge that no tickets were issued to the said three passengers were proved. In my view, looking to the above facts and circumstances, it is difficult to draw such an inference, particularly when the discrepancy in the way-bill is not explained properly by the Department. Thus, the view taken by the D.T.S. is a possible view and it was not, therefore, open to

the Divisional Controller to review the same in his review jurisdiction under Clause 9 of the Discipline and Appeal Procedure.

22. The learned Counsel for the respondent-conductor has also urged before me that the Divisional Controller acted in breach of the principles of natural justice when in review he himself questioned the respondent-conductor to get some admissions from him, particularly when the respondent-conductor stated that he has nothing else to state except what he has stated earlier in the departmental enquiry. He has also urged that if, after recording the statement he were to come to the conclusion that the punishment of dismissal should be imposed, he should have given a show-cause notice as required by Clause 5(1) of the Discipline and Appeal Procedure. In my view there is substance in the above submissions on behalf of the respondent-conductor. The learned reviewing authority should have acted only on the basis of the material on record which was available in the instant case. The very language of Clause 9 shows that appellate authority can call for the enquiry papers and review the decision as it may deem fit. It was not, therefore, open to the reviewing authority to record the statement of the respondent-conductor, which would show that it was done only to get some admissions from him although he had said that he had nothing else to say except what he had already stated. No case for reopening the enquiry was made out by the reviewing authority because, even assuming that it is open for the reviewing authority to reopen the case, in my view, it can be done only in exceptional circumstances upon certain substantial considerations. Further, if the case were to be reopened, it would be necessary to afford due opportunity to the delinquent employee to cross-examine the departmental witnesses and to lead additional evidence to establish his innocence. The procedure followed by the reviewing authority was, therefore, contrary to the principles of natural justice and on this ground also the Order passed by the reviewing authority is illegal and is liable to be set aside.

23. Coming to the question of relief, it is well settled that when the dismissal order is set aside, the normal relief is of reinstatement and back wages. So far as the reinstatement is concerned, there is no dispute. However, as regards the question of back wages, the submission on behalf of the petitioner is that in view of the inordinate delay in preferring the revision, the respondent-conductor should be deprived of the whole of his back wages in the instant case. In my view, depriving the respondent-conductor of the whole of the back wages would be unjust and disproportionate. However, in the facts and circumstances of this case and looking particularly to the delay in filing the revision for which the responsibility to a certain extent can be fastened upon the respondent-conductor, I feel that the respondent-conductor should be granted only 50 per cent of his back wages in the instant case. The relief as regards the back wages granted by the Industrial Court shall, therefore, stand modified to that extent.

24. Subject to the above modification, the instant writ petition fails and shall be dismissed. However, in the circumstances of the case, there would be no order as

to costs.