

(2006) 01 BOM CK 0067
Bombay High Court (Nagpur Bench)
Case No: Writ Petition No. 166 of 1995

Divisional Controller,
Maharashtra State Road
Transport Corporation

APPELLANT

Vs

Bhimrao Anandrao Dube

RESPONDENT

Date of Decision: Jan. 19, 2006

Acts Referred:

- Constitution of India, 1950 - Article 14
- General Standing Order - Rule 10, 32, 67

Citation: (2006) 3 ALLMR 504 : (2006) 4 BomCR 906 : (2006) 3 MhLj 363 : (2006) 2 MhLj 363

Hon'ble Judges: B.P. Dharmadhikari, J

Bench: Single Bench

Advocate: V.G. Wankhede, for the Appellant; M.V. Mohokar, for the Respondent

Judgement

B.P. Dharmadhikari, J.

By this writ petition, the petitioner-employer has challenged the order dated 26-10-1994 passed by the Industrial Court in complaint (ULPN) No. 784 of 1993, directing the petitioner employer to confirm the respondent in the post of Traffic Controller with effect from 28-4-1993 with all other consequential benefits of permanency. This Court has admitted writ petition on 23-1-1995 and on 18-10-1995 directed the parties to maintain status quo. With the result, the respondent continues to work as Conductor even today.

2. The respondent was initially appointed as Conductor in 1972 and thereafter was confirmed in 1974. The next promotional post for him was that of Traffic Controller and as per service rules, he was required to pass departmental examination for that post. Said departmental examination was conducted in the year 1983 and the present respondent succeeded in it. The said examination was challenged by other employees/Union by filing complaints ULPA No. 130 of 1983 and 143 of 1983 before

the Industrial Court. During the pendency of these complaints, and as the post was available, on 9-12-1984, the petitioner promoted the respondent as Traffic Controller against the vacancy reserved for direct sector. The said promotion was in purely temporary capacity and without prejudice to the seniority, continuity or preference etc. It appears that the said order was thereafter modified on 9-2-1988 and the respondent was temporarily promoted on said post but it was clarified that it was not against vacancies reserved for direct sector. The respondent was thereafter orally directed not to work as Traffic Controller and to work as Conductor. He challenged this oral direction by filing complaint (ULPN) No. 324 of 1988 and his reversion was stayed by the Industrial Court. This complaint was disposed of on 28-4-1983 by the learned Member of Industrial Court by directing the present petitioner to consider the case of respondent in the light of provisions of Rules 32(a) and 67(b) of General Standing Order by deciding the representation made by the respondent to it. The respondent contended that said decision was not taken and on 5-6-1993, he was communicated that as he failed in Departmental Examination, his representation for promotion to the post of Traffic Controller could not be considered and his promotion stood cancelled. He was advised to join on his original post of Conductor from 6-6-1993. By other order of same date, he was also communicated his fixation in the pay scale of post of Conductor. The respondent challenged these communications by filing complaint (ULPN) No. 784 of 1993 before the Industrial Court. He contended that his case was not considered as per earlier directions of Industrial Court dated 28-4-1993. He further contended that there was no question of respondent passing departmental examination because he was promoted against direct sector. The learned Member of Industrial Court considered his prayer for grant of interim relief and by order dated 22-10-1993 passed below Exh. 2, said prayer was rejected. The respondent thereafter approached this Court in Writ Petition No. 1205 of 1994 and on 7-7-1994, this Court expedited the proceedings in ULP complaint filed by him before the Industrial Court. Accordingly, the Industrial Court decided the complaint finally by impugned order dated 26-10-1994.

3. The Industrial Court found that the petitioner-employer did not consider the case of respondent as directed by it by its earlier order dated 28-4-1993 and the defence of employer that respondent did not pass departmental examination was totally irrelevant in view of provisions of Rule 32(a) which require said examination to be passed only if promotion was given to the departmental candidate against departmental quota. This order forms subject-matter of challenge in present writ petition.

4. Heard Shri Wankhede, learned Counsel for the petitioner and Shri Mohokar, learned Counsel for the respondent.

5. Shri Wankhede, learned Counsel has contended that the finding of Industrial Court that respondent has been promoted against vacancy reserved for direct

sector recruitment is itself incorrect. He invites attention of the Court to subsequent order dated 19-2-1988 to substantiate his contention. He also points out that this order is duly exhibited by learned Member of Industrial Court and it has been found by the learned Member of Industrial Court that the petitioner could not have illegally and arbitrarily altered the position to the prejudice of present respondent. He contends that this order and finding of Industrial Court is totally illegal because there is no such challenge by the respondent before it. He further states that even for promotion against vacancies reserved for direct quota, departmental examination is required to be passed. He states that the reasoning put forth by the learned Member of Industrial Court is totally incorrect and shows total non-application of mind. In support he invites attention of this Court to Rule 32(a) and Rule 10 of G.S.O. 503 and also to relevant recruitment rules laying down qualifications for such recruitment.

6. Shri Mohokar, learned Counsel for the respondent contended that no such material has been pressed into service before the Industrial Court. He states that Industrial Court has considered provisions of Rule 32(a) of G.S.O. 503 and has correctly recorded that passing of departmental examination is not required for respondent. He argues that there was the only said reason contained in the order of reversion and Industrial Court having found it to be illegal passed order directing the petitioner to grant said post of Traffic Controller to present respondent. He further states that reliance upon the order dated 19-2-1988 is totally misconceived because such order was never served upon present respondent at any point of time. He states that all the while i.e.. till his reversion, respondent continued to work against a vacancy reserved for direct sector. He also invites attention to General Standing Orders relating to Recruitment Rules and educational qualifications. He states that in any case the present respondent satisfies the requirements laid down for such direct recruitment.

7. The perusal of order dated 28-4-1993 passed by the Industrial Court reveals that some application was moved by present respondent in complaint (ULPN) No. 324 of 1998 and in it he mentioned that he has passed departmental examination held in the year 1990. The said fact is denied by present petitioner. In view of this fact of passing of departmental examination mentioned by him in this application, the respondent contended that as he had been working on the post of Traffic Controller for more than eight years and said post was reserved for direct sector and it was not filled in, his case ought to be considered as per Rules 32(a) and 67(b) of G.S.O. 503. The learned Member of Industrial Court found that his case can be considered by present petitioner in the light of said provisions and accordingly directed the present petitioner to consider his case. The petitioner has thereafter on 5-6-2003 communicated to him that as he has failed in departmental examination, his representation for giving him promotion to the post of Traffic Controller cannot be entertained and his temporary promotion on that post was cancelled. This order is passed by specifically mentioning the orders dated 28-4-1993 passed by the

Industrial Court above and also by mentioning respondent's representation dated 30-4-1993. The Industrial Court has not found that the contention of present petitioner in said communication that the respondent has failed in departmental examination conducted by it for the post of Traffic Controller is false. In view of this, the Industrial Court ought to have found out whether the present respondent satisfied the other requirements imposed by Rule 32(a) or other relevant rules or provisions contained in Service Regulation or General Standing Order governing the respondent. It cannot be forgotten that the employment with petitioner is public employment and is therefore regulated by Article 14 of Constitution of India.

8. The provisions of Rule 32(a) read as under:

32(a). When a suitable candidate is not available for direct recruitment to a post reserved for direct recruitment, a suitable departmental candidate may be given a purely temporary promotion lasting up to such time as a suitable direct recruit is available for appointment. A fresh attempt shall be made to get a suitable direct recruit by re-advertising the post. If, after one year from the date of the temporary appointment of the departmental candidate and even after making a fresh attempt no suitable direct recruitment is available, the Competent Authority may consider the question of making the appointment of the departmental candidate substantive.

Thus, it is apparent that post of Traffic Controller can be filled in through two sources i.e. through direct recruitment or through suitable departmental candidate. If suitable candidate is not available, vacancy in direct sector can be filled in through departmental candidate in purely temporary capacity. It further postulates that a fresh attempt shall be made to get a suitable direct recruit by re-advertising the post. If, after one year from the date of temporary appointment of the departmental candidate and after making a fresh attempt no suitable direct recruit candidate is available, the Competent Authority may consider the question of appointing such departmental candidate in substantive capacity. Thus, there has to be temporary promotion against a post reserved for direct recruitment only if direct recruit candidate was not available and then a fresh attempt to seek such direct recruitment has to be made by re-advertising the post and if suitable candidate is not available, and the candidate has completed one year of his temporary promotion, the authority can consider him for substantive appointment in the facts of present case, the Industrial Court has overlooked these requirements of Rule 32(a). It has not observed anywhere in its order that before or after temporary promotion given to the present respondent, there was fresh advertisement and fresh attempt was made by the petitioner and they failed to secure suitable candidate from direct sector in it and hence they continued present respondent in temporary capacity. The learned Member of Industrial Court, therefore, was not justified in directing the petitioner to give post of Traffic Controller to present respondent only because it found that passing of departmental examination was not necessary in view of provisions of Rule 32(a).

9. Even provisions of Rule 10 of the General Standing Order 503 states that post intended to be filled in by direct recruitment are to be advertised and are to be filled in by inviting application through such advertisement. There cannot be any other mode as the employment with petitioner is a public employment.

10. Shri Mohokar, learned Counsel for the respondent has invited attention to recruitment, promotion, seniority and qualification procedure of present petitioner as modified upto 8-8-1985. He invites attention to Entry No. 142 in Schedule "D" appended to these rules and states that for the post of Traffic Controller, the candidate coming from direct sector has to pass SSC Examination and must possess experience of field work in relation to Traffic work and must possess capacity to do such field work and his age has to be upto 28 years. He states that as against this, a conductor is required to pass only SSC examination and he has to know reading and writing in regional language and must possess a badge issued by the Regional Transport Office. He should not be above 35 years and he should be competent to give security and has to satisfy physical standard mentioned in item 150 of this schedule. According to him, therefore, the petitioner could have considered the case of the respondent in this background and because of failure on the part of the petitioner to do so, the learned Member of Industrial Court was justified in ordering his promotion as Traffic Controller.

11. Shri Wankhede, learned Counsel for the petitioner, on the other hand, invites attention to modified requirements of said schedule and states that a candidate coming from direct sector for the post of Traffic Controller has to pass 12th Standard examination and has also to satisfy requirement of physical standards as mentioned in amended provision i.e. Item No. 14. He also states that the eligibility conditions in relation to Conductor are also modified later on. Shri Mohokar, learned Counsel states that the modified terms and conditions and eligibility norms will not apply to the case of present respondent.

12. As already stated above, the learned Member of Industrial Court has allowed the post of Traffic Controller to present respondent only after observing that a candidate coming from direct sector is not required to pass departmental examination. However, the question whether other eligibility norms prescribed in service regulations/General Standing Order for such direct recruitment will be applicable to respondent is not gone into by it. It has also ignored the fact that employment with present petitioner is public employment and therefore a candidate seeking employment with it has to comply with certain procedural formalities. Thus, I find that the Industrial Court has not exercised jurisdiction available to it in accordance with law. The status of respondent after 9-2-1988 is also not decided by it in view of its finding that petitioner could not have issued said order dated 9-2-1988. However, there is absolutely no discussion as to why petitioners could not have shifted respondent from vacancy in direct sector to vacancy in departmental sector as respondent did not prove any legal right to

occupy such promotional post.

13. Shri Mohokar, learned Counsel for the respondent argues that the burden to show that the present respondent did not satisfy these eligibility terms and conditions was upon the petitioner and as the petitioner failed to discharge it, the learned Member was justified in passing the impugned order. Shri Wankhede, learned Counsel, on the other hand, contends that as the present respondent approached the Industrial Court, it was necessary for him to show that he fulfilled the norms laid down for direct recruitment. I find that the employment with petitioner is public employment and is governed by Rules and Regulations and hence when the learned Member of Industrial Court ordered the post of Traffic Controller to be given to present respondent, it was obligatory for the learned Member of Industrial Court to find out whether rules of recruitment applicable to the appointment with the petitioner were satisfied or not? The impugned order of Industrial Court is thus incomplete not only on facts but also on law. Upon enquiry, it is learned that at present the respondent is about 52 years. In such circumstances, for the reasons mentioned above, while quashing the impugned order of Industrial Court, I direct the learned Member of Industrial Court to decide afresh complaint (ULPN) No. 784 of 1993 restored back to its file as early as possible and in any case within a period of four months from the date of receipt of this order, after giving opportunity to the parties to file relevant documents and to lead oral evidence, if any, on the points mentioned above. Both the learned Counsel seek leave to amend their pleas so as to place the exact factual position on record before the Industrial Court. Said leave is accordingly granted.

14. Writ Petition is thus allowed partially. Rule is made absolute in above terms. There shall be no order as to costs. Certified copy expedited.