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SHARAD

V.

STATE OF MAHARASHTRA & ANR.

Civil Appeal No.937 Of 2009

FEBRUARY 12, 2009

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[S.B. SINHA AND DR. MUKUNDAKAM SHARMA, JJ.]

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Service Law – Seniority – Failure to clear departmental examination – Consequence of – Appellant, District Transport Officer, failed to pass departmental examination within prescribed time limit and chances – Respondent-employer enforced the Rules against the appellant and placed him below those who passed the examination prior to him – Justification of – Held: Justified – The Rules were statutory in nature and required to be followed by all concerned – Rule relating to appearance at the examination and failure to pass the same entailed the consequences laid down in the rule – There was no act of arbitrariness or otherwise on the part of respondent-employer – District Transport Officers (Motor Vehicle Department) Department Examination Rules, 1984 – rr. 3,4,5 and 6.

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Appellant was appointed as a District Transport Officer in 1984. He failed to pass the departmental examination in terms of the District Transport Officers (Motor Vehicle Department) Department Examination Rules, 1984 within the time limit and chances, as prescribed. Employees who were junior to appellant were purportedly promoted to the post of the Deputy Regional Transport Officer, on which appellant filed an application before the Administrative Tribunal. The Tribunal dismissed the application in view of r.5(3) holding that as the appellant had not passed the departmental examination within the stipulated time limit and chances, he was bound to lose seniority for purpose of promotion. The writ petition filed by

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STATE OF MAHARASHTRA & ANR.

appellant was dismissed by the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD:1. The relevant rules must be construed having regard to the purport and object they seek to achieve. Rule 3 of the District Transport Officers (Motor Vehicle Department) Department Examination Rules, 1984 in no uncertain terms provided for the necessity of passing the examination. As the appellant was appointed on probation and he could not pass the departmental examination within the stipulated period of two years upon availing three chances, his services could have been terminated. In fact, at the intervention of the State as also in view of an interim order passed by the Tribunal, he was allowed to continue. [Paras 15, 16] [68-B, C, D, E]

2. The submission that the appellant had been granted exemption from appearance may not be correct. Appellant in fact had appeared in January 1987 examination. Therefore, there is no reason as to why he could have been granted any exemption from appearance. Also there is no provision for grant of exemption in respect of 'attempt' which is purported to have been done in respect of the examination held in July 1987. It, furthermore, does not appear from the order passed by the Tribunal as also by the High Court that even such a contention had ever been raised before the said forums. Furthermore, the power to grant exemption is contained in Rule 6 of the Rules. It is not a well settled principle of law that in the event the power of exemption are hedged with conditions, those conditions must be satisfied before an order of exemption is passed. Conditions for grant of exemption so far as the appellant is concerned also do not appear to have been fulfilled. It is not a case where for unavoidable reasons, the employee could not appear in the examina-

A tion and it was permissible for the authorities concerned to grant an exemption in those contingencies. [Paras 18, 19, 22] [69-D, E, F, G]

B 3. It is also not a case where the rules framed were in violation of a Parliamentary Act. The Rules are statutory in nature. They were required to be followed by all concerned. The rule relating to appearance at the examination and the consequent failure to pass the same would entail the consequences which have been laid down in the rule. Therefore, no illegality has been committed by C the respondents in placing the appellant below those who had passed the examination prior to him. Appearance at the examination being mandatory in nature, there was no act of arbitrariness or otherwise on the part of the respondents in enforcing the statutory rules against the appellant. [Paras 20, 21, 22, 23] [69-H; 70-A, B, C, D, E, F]

Punjab National Bank By Chairman & Anr. v. Astamija Dash (2008) 7 SCALE 726 – distinguished.

E **Case Law Reference**

(2008) 7 SCALE 726 distinguished Para 22

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 937 of 2009

From the final Judgement and Order dated 22.10.2002 of the High Court of Judicature at Bombay, Bench at Nagpur in Writ Petition No. 2184 of 2002.

G Ashok Shrivastav, Satyajit A. Desai, Anagha S. Desai (for Venkateswara Rao Anumolu), with him for the Appellant.

Sanjay V. Kharde (for Asha Gopalan Nair) and Mukesh K. Giri, for the Respondents.

H The Judgement of the Court was delivered by

S.B. SINHA, J.

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1. Leave granted.

2. Consequences of failure to clear a departmental examination in terms of the Rules known as District Transport Officers (Motor Vehicle Department) Department Examination Rules, 1984 (for short, 'the Rules') is in question in this appeal which arises out of a judgment and order dated 22.10.2002 passed by a Division Bench of the High Court of Bombay, Bench at Nagpur whereby and whereunder a writ petition filed by the appellant herein against the judgment and order dated 15.3.2002 passed by the Maharashtra Administrative Tribunal dismissing the Transfer Application No.300 of 1992, was dismissed.

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3. The basic fact of the matter is not in dispute. Appellant was appointed in the post of District Transport Officer on probation on or about 30.11.1984. He joined the services in January 1985. Indisputably, he was put on probation for a period of two years.

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4. The relevant Examination Rules applicable to the case read as under :

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"Rule 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.

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(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:

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Provided that if he is not able to pass the examination

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A 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.

B (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 of chances availed of by him under the
existing rules:
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Provided that a period promoted or appointed
by nomination who is on probation or extended
probation as District Transport Officer belonging to
Schedule Caste, Scheduled Caste converts to
D 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
E (2).

F (4) Notwithstanding anything contained in sub-rule (1)
or sub rule (2), the Government may, having regard
to the performance of District Transport Officer in the
examination in respect of earlier chances already
G 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.

Rule 5 : Consequences of failure to pass the examination:

H (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. A
- (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. B
- (3) If a District Transport Officer fails to pass the examination within the time limit and chances laid down in sub-rule (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 Officer, who pass or are exempted from passing the examination before him and also below all those who are senior to such District Transport Officer below whom he is placed and who may pass the examination after him but within the period and chances laid down in Rule 4. C
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- (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 post shall where necessary, be made according to the seniority and suitability. However, subject to the provision of Rules 6, the District Transport Officers so appointed 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 the seniority in the cadre of District Transport Officer in the manner provided in sub-rule (3). E
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Rule 6: Exemption :

A District Transport Officer whether appointed before or after the appointed date shall be exempted from passing the Examination, if he has attained the age

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A of forty-five years on the appointed day or attains that age on any date thereafter :

Provided that the seniority lost by him in accordance with the provisions of sub-rule (3) of rule 5 shall not be restored to him on account of such exemption.

B Rule 7 : Examination when to be held :

C 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 that examination in any particular year:

D Provided that, if for any reason, 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."

5. Appellant passed the said examination in July 1988.

E 6. Indisputably, after his appointment, the Departmental Examination prescribed in terms of the aforementioned Rules, had been held as under :

July 1985

F January 1986

July 1986

January 1987

G July 1987

January 1988

July 1988

H 7. Concededly, the appellant did not appear in the exami-

nations held in July 1985 and January 1986. He appeared in A
the said examination for the first time in July 1986. Out of six
papers prescribed, he passed in four papers and failed in two.
In the examination held in January 1987, he appeared but failed.

8. He was confirmed in services w.e.f. 13.7.1988 by an B
office order dated 17th July, 1995 which reads as under :

"With reference to the letter of the Commissioner of C
Transport Maharashtra State Bombay No.
Probationary/24 2493/Off-8(2) 13836 dated 23
October, 1993 it is informed that Shri S.G. Jickhar
had been appointed to the post of Assistant Regional
Transport Officer (Class-2) in the Department of
Motor Vehicle through Government Order No.M.V.O.
1184/8 (1)-6 dated 30.11.84. It is certified that he
completed his probationary period satisfactorily on D
the date mentioned before his name.

Name	Date of Appointment	Date of completing the probationary Period
S.G. Jickhar	3.11985	Dt.13.7.1988"

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9. Inter alia on the premise that those employees who were F
junior to him and/or passed the examination at a later date were
promoted to the post of Deputy Regional Transport Officer, he
filed an original application before the Maharashtra Adminis-
trative Tribunal. The said original application was dismissed by
the Tribunal, holding :

"The above-mentioned Rule 5(3) makes abundantly G
clear that the officers who failed to pass the
examination within the time limit prescribed under
Rule 4, shall loose the seniority for the purpose of
promotion to the higher post, and he shall be ranked
below all the District Transport Officers, who pass or
are exempted from passing the examination before H

A him and also below all those who are senior to such
District Transport Officers below whom he is placed
and who may have passed the examination laid down in
rule 4. As observed earlier, the applicant failed to
pass the examination within the prescribed time limit
B and chances and therefore, he is bound to lose his
seniority for the purpose of higher promotion. It is
true that the Government – respondent No.1 had
issued a memorandum dated 17.7.1995, clarifying
that the applicant has completed the probation period
C satisfactorily on 31.7.88. However, the fact remains
that the applicant did not pass the examination
within the time limit and chances, as prescribed under
the Departmental Examination Rules, and therefore,
D he is bound to suffer the consequences thereof. The
respondent, therefore, has rightly held that the
applicant has lost seniority for the purpose of
promotion to the higher post. However, the prayer of
the applicant to promote him as Deputy Regional
Transport Officer along with those officers promoted
E on 13.9.95 cannot be accepted.”

10. A writ petition filed by him was dismissed by reason of
the impugned judgment by the High Court.

11. Mr. Ashok Shrivastava, learned senior counsel appearing
F on behalf of the appellant, would submit:

- (a) Although the validity of Rule 5(3) of the Rules was
questioned both in the original application as also
the writ petition, neither the Tribunal nor the High
Court passed any order thereupon.
- G (b). As the appellant started appearing in the examination
from July 1986 having been sent for training, the total
number of chances prescribed in the Rules, namely,
three, must be held to have expired in July 1987 and
not prior thereto.

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(c) In any event, the appellant having been exempted from appearing in certain examinations by the competent authority, the Tribunal and consequently the High Court committed a serious error in ignoring the same. A

12. Mr. Sanjay V. Kharde, learned counsel appearing on behalf of the State, however, would support the impugned judgment. B

13. Before advertng to the contentions raised by the appellant, we may notice that although he questioned the constitutionality of the aforementioned provision of Rule 5(3) of the Rules, the only contention which appears to have been raised was that in the Finance Department of Respondent No.1 where also the similar departmental examination Rules were in force, the officers, who passed their examinations after the completion of the stipulated period, have been given the seniority from the date of their initial appointment. Even in the writ petition only that contention has been raised and none other. On the basis of such a contention, the appellant, in our opinion, could not have prayed for declaration of the said Rule as unconstitutional. C
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14. Mr. Shrivastav, however, would argue that although the first part of sub-rule (3) of Rule 5 is constitutional, the second part is not, as in terms thereof those employees who had passed the examination even after the officer concerned would be deemed to be senior. Such a contention had never been raised either before the Tribunal or before the High Court and, thus, we cannot permit the appellant to raise such a contention for the first time before us. We may, however, notice that the second part of sub-rule (3) of Rule 5 postulates two situations, namely, (1) the officer concerned shall be placed below all those who were senior to such Transport Officers below whom he had been placed; and (2) who may pass examination after him but within the period and chances laid down in Rule 4. F
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Appellant has not been able to establish as to whether H

A any person who was confirmed after him and passed examination after him had been declared his senior. In that view of the matter too, it is not necessary for us to consider the aforementioned submission of the learned Senior Counsel, being only academic in nature.

B 15. Relevant rules as noticed hereinbefore must be construed having regard to the purport and object they seek to achieve. Rule 3 of the Rules in no uncertain terms provided for the necessity of passing the examination. Sub-rule (1) of Rule 4 provides for the period during which the examination is to be passed, namely, within a period of two years from the date of the appointment and within three chances. Appellant, thus, having been appointed on 30.11.1984 was required to pass the examination within a period of two years therefrom, wherefor he could avail only three chances. Sub-Rule (3) of Rule 4, however, provides for grant of two additional chances wherefor the period of probation is required to be extended by one year.

E 16. As the appellant was appointed on probation and he could not pass the departmental examination within the stipulated period of two years upon availing three chances, his services could have been terminated. In fact, such an order had been but later on at the intervention of the State as also in view of an interim order passed by the Tribunal, he was allowed to continue and the order of termination was recalled.

F 17. Submission of the learned counsel that the appellant had been granted exemption from appearance may not be correct.

G Office of Commissioner of Transport had issued a letter dated 21.7.1988, wherein it is stated :

H "Through the above reference letter, the Maharashtra Public Service Commission Bombay have permitted the below mentioned Assistant Regional Transport Officers to appear for the Department exam. Kindly inform the concerned authorities.

S. No.	Name of Place the officer	Term	Desirous of Which papers are availing the exempted with benefit of month and year exemption from paper	A B C
1.	S.J. Jichkar	Regional 4 th Assistant Transport Officer, Yeotmal	Yes July 86 paper No.2, 4 Jan. 87. July 87 attempt Exempted."	C

18. We fail to understand as to what was the occasion for grant of such purported exemption. Appellant in fact had appeared in January 1987 examination. We, therefore, did not find any reason as to why he could have been granted any exemption from appearance. It is also conceded that there is no provision for grant of exemption in respect of 'attempt' which is purported to have been done in respect of the examination held in July 1987. It, furthermore, does not appear from the order passed by the learned Tribunal as also by the High Court that even such a contention had ever been raised before the said forums. Furthermore, the power to grant exemption is contained in Rule 6 of the Rules. It is not a well settled principle of law that in the event the power of exemption are hedged with conditions, those conditions must be satisfied before an order of exemption is passed.

19. The power of exemption are confined to such cases where the employee concerned had attained the age of 45 years on the appointed date or at any date thereafter.

Conditions for grant of exemption so far as the appellant is concerned, thus, also do not appear to have been fulfilled.

20. 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.

A The Rules are statutory in nature. They were required to be followed by all concerned. No reason has been assigned as to why 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.

21. The consequence of not passing the departmental examination, in, that he would lose his seniority and would be placed before all those who had passed or exempted from passing the examination before him. The rule relating to appearance at the examination and the consequent failure to pass the same would entail the consequences which have been laid down in the rule. We, therefore, do not find that any illegality has been committed by the respondents in placing the appellant below those who had passed the examination prior to him.

22. It is not a case where for unavoidable reasons, the employee could not appear in the examination and it was permissible for the authorities concerned to grant an exemption in those contingencies. It is also not a case where the rules framed were in violation of a Parliamentary Act as was in the case of Punjab National Bank By Chairman & Anr. v. Astamija Dash [2008 (7) SCALE 726].

23. Appearance at such an examination being mandatory in nature, we do not find that any act of arbitrariness or otherwise on the part of the respondents in enforcing the statutory rules against the appellant.

24. For the reasons aforementioned, there is no merit in this appeal. It is dismissed accordingly. In the facts and circumstances of this case, however, there shall be no order as to costs.

B.B.B.

Appeal dismissed.