

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO. 7014 OF 2007
WITH
CIVIL APPLICATION NO.148 OF 2015**

The Commissioner
Nashik Municipal Corporation .. Petitioner
Vs.
Haribhau Keruji Kedar and another .. Respondents

Mr.M.L.Patil, Advocate for Petitioner.
Ms Seema Sarnaik, Advocate for Respondent No.1.

**CORAM : R. G. KETKAR, J.
RESERVED ON : 26th FEBRUARY, 2015
Pronounced on : 26th MARCH, 2015**

P.C. :

. Heard Mr.M.L.Patil, learned Counsel for the petitioner and Ms Seema Sarnaik, learned Counsel for respondent No. 1 at length.

2. By this petition under Article 226 of the Constitution of India, the petitioner, hereinafter referred to as 'Corporation', has challenged the judgment and order dated 17/08/2006 passed by the learned Member, Industrial Court, Nashik (for short 'Tribunal') in Complaint (ULP) No. 43 of 2004. By that order, the Tribunal allowed the complaint instituted by respondent No.1, hereinafter referred to as 'Complainant', under section 28 read with Items No. 5, 9 & 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short 'Act') and declared that the Corporation by changing the

deemed date and ordering recovery of salary on the basis of the audit report amounted to commission of unfair labour practices under Item 9 of Schedule IV of the Act. The Corporation was directed not to change the deem date given to the Complainant as well as not to make the proposed recovery. The order issued to that effect to the Complainant was set aside. The relevant and material facts, giving rise to filing of the petition, briefly stated, are as under.

3. It is the case of the Corporation that on 01/06/1978, the Complainant was appointed as a Road Mukadam by the then Nashik Municipal Council. On 06/12/1979, he was promoted as a Vaccination Clerk on temporary basis. On 07.11.1982, the Municipal Corporation of City of Nashik was constituted upon amalgamation of - (i) Nashik Municipal Council, (ii) Nashik Road Devlali Municipal Council, (iii) Satpur Municipal Council and some villages. The appointment of the Complainant was regularized on 31/08/1984. In the year 1985, the Complainant obtained the Degree of LL.B. and Diploma in Labour Law and Labour Welfare (DLL & LW). On 02/09/1989, the Complainant was promoted as Labour Welfare Inspector. On 14/03/1990, he was promoted as Labour Welfare Officer, which is a Class II post. On 13/07/1995, he made application for giving him deemed date of promotion as a Labour Welfare Officer with effect from 01/12/1985. By order dated

02/04/1997, he was given a deemed date of promotion with effect from 18/01/1988.

4. On 24/01/2001, the Chief Auditor submitted a report to the Municipal Commissioner pointing out therein that the deemed date of promotion given to the Complainant was illegal and could not be accepted. In view thereof, the Municipal Commissioner issued a show cause notice on 27/07/2001 enclosing therewith the copy of report dated 24/01/2001 as to why the deemed date given him be not cancelled and recovery be not made from him. The Complainant gave reply to the show cause notice on 08/08/2001. After taking into consideration all the circumstances, the Municipal Commissioner issued order on 04/02/2004 cancelling the deemed date of promotion of 18/01/1988 and also directed to fix the pay-scale.

5. The Complainant instituted Complaint (ULP) No. 43 of 2004 before the Tribunal challenging the order dated 04/02/2004 passed by the Municipal Commissioner. The Corporation resisted the complaint by filing written statement. On the basis of the pleadings of the parties, the Tribunal framed the necessary issues. The parties led evidence. After considering the material on record, by the impugned order, the Tribunal allowed the complaint as indicated

hereinabove. It is against this order, the Corporation has instituted the present petition under Article 226 of the Constitution of India.

6. In support of this petition, Mr.Patil submitted that the order of the Municipal Commissioner dated 04/02/2004 is legal and valid. Municipal Commissioner was justified in cancelling the deemed date of 18/01/1988 as a Labour Welfare Officer. The order dated 02/04/1997 passed by the Municipal Commissioner giving deemed date of promotion with effect from 18/01/1988 amounted to creation of imaginary post and making appointment of the Complainant in that post with retrospective effect. This has resulted in severe financial burden on the Corporation. He submitted that by the impugned order, the Tribunal disposed of several complaints instituted by the employees of the Corporation raising identical grievances. This Court (Coram : Abhay S. Oka, J.) has allowed the Writ Petition No. 4091 of 2007 on 20/12/2007 by holding that there is no allegation in the complaint regarding the failure on the part of the Corporation to implement any award, settlement or agreement and therefore, Item 9 of Schedule IV of the Act is not attracted. The Tribunal has held that Items 5 & 10 of Schedule IV of the Act are not attracted. For all these reasons, he submitted that the impugned order deserves to be quashed and set aside, thereby allowing the Writ Petition.

7. On the other hand, Ms Sarnaik reiterated the submissions that were advanced before the Tribunal. She submitted that on 18/01/1988, the Corporation interviewed 16 candidates including the Complainant for the post of Labour Welfare Officer. The Complainant was first on the Select List. For the reasons best known to the Corporation, no appointment was made. The Complainant was constrained to institute Complaint (ULP) No.508 of 1988 before the Tribunal. The Complainant was assured that he would be given post of Labour Welfare Officer immediately on the basis of the Select List. Accordingly, he withdrew the complaint on 02/08/1989. On 02/09/1989, he was however promoted to the post of Labour Welfare Inspector. On 14/03/1990, he was promoted as a Labour Welfare Officer. By order dated 02/04/1997, the Municipal Commissioner gave deemed date of appointment as a Labour Welfare Officer with effect from 18/01/1988. However, the arrears in wages were not paid to the Complainant. She submitted that the Complainant challenged the order dated 04/02/2004 passed by the Municipal Commissioner by instituting Complaint (ULP) No.43 of 2004. Prior thereto, the Standing Committee passed resolution on 21/02/2003 noting therein that the Audit Department cancelled the deemed date without considering the background of individual case and the action taken in pursuance of the auditor's report was causing injustice to the employees. The Standing Committee accordingly

resolved to confirm the deemed date. This was followed by resolution 03/07/2003 passed by the Standing Committee. The Tribunal considered the Resolutions dated 21/02/2003 and 03/07/2003 in paragraph 7 of the impugned order. She, therefore, submitted that the action of the Commissioner in passing order dated 04/02/2004 was not in consonance with the resolutions passed by the Standing Committee. She, therefore, submitted that the Tribunal rightly allowed the Complaint and no case is made out for invocation of powers under Article 226 of the Constitution of India.

8. I have considered the rival submission made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Complainant was promoted as a Labour Welfare Inspector on 02/09/1989. On 14/03/1990, he was promoted as a Labour Welfare Officer. By order dated 02/04/1997, the Complainant was given deemed date of promotion as a Labour Welfare Officer with effect from 18/01/1988. By order dated 04/02/2004, the Municipal Commissioner cancelled the deemed date and restored the date of 02/09/1989 being the date on which the Complainant was promoted as a Labour Welfare Inspector and 14/03/1990 being the date on which he was promoted as a Labour Welfare Officer. The moot question is whether the said order is legal and valid. Mr. Patil submitted that the order dated 02/04/1997

passed by the Municipal Commissioner amounted to creation of imaginary post and making appointment of the Complainant in that post with retrospective effect. I find merits in the submission of Mr. Patil. The Complainant was promoted on the post of Labour Welfare Officer on 14/03/1990. By order dated 02/04/1997, he was given deemed date of promotion as 18/01/1988. The Complainant was not working on the post of Labour Welfare Officer between 18/01/1988 and 14/03/1990. In other words, without actually working on that post, he was given deemed date of promotion as 18/01/1988. In my opinion, the complainant could not have been given deemed date of promotion as a Labour Welfare Officer with effect from 18/01/1988. Ms Sarnaik relied upon the resolutions dated 21/02/2003 and 03/07/2003 passed by the Standing Committee. I do not find any merit in this submission as basically, Complainant did not work as a Labour Welfare Officer between 18/01/1988 and 14/03/1990. If that be so, the Complainant cannot be given deemed date even by passing resolutions by the Standing Committee.

9. Mr.Patil further relied upon decision of this Court in Writ Petition No. 4091 of 2007 dated 20/12/2007. He submitted that for the reasons set out therein, the impugned order deserves to be set aside. In paragraphs 10 &11 of that judgment, this Court observed

thus :

10. The learned Member of the Industrial Tribunal has held that Items 5 and 10 of Schedule IV of the said Act of 1971 are not attracted and only item which is attracted is Item 9 of Schedule IV. Therefore, the only question to be decided is whether item 9 of Schedule IV is attracted. In the present case it is obvious that there is no allegation in the complaint regarding the failure on the part of the Petitioner to implement any award, settlement or agreement. The learned Counsel for the Petitioner has relied upon a decision of this Court in the case of Divisional Manager v/s. Chimna Arjun Jadhav (2001 (4) Mah.L.J. 97). In paragraph 14 the learned Judge held thus:

"To attract item 9 of Schedule IV of the Act it was incumbent upon the complainants to establish that there was any award, settlement or agreement between the parties. In the absence of such evidence, it is not possible to conclude that the petition corporation had engaged in any unfair labour practice within the meaning of item 9 of Schedule IV of the Act".

11. Reliance has been placed by the learned Counsel for the Respondent on four different decisions of this Court, viz.:

1. 1996 (II) CLR 102 (Hindustan Lever Ltd. v/s. Hindustan Lever Mazdoor Sabha & others)
2. 1981 Mah.L.J. 316. (Petroleum Employees Union v/s. Industrial Court, Maharashtra, Bombay & anr.)
3. 2001 (4) Mah.L.J. 919. (Crest Communication Ltd. Mumbai & others V/s. Ms.Sheetal Shenoy.)
4. 2001 (4) Bom.C.R. 713. (Ceat Limited (Electronics Division) v/s. Anand Aba Saheb Hawaldar & others.)

Her submission based on aforesaid decisions is that an agreement between the parties will have to be inferred. It is very difficult to come to the conclusion that there existed any agreement between the parties which provided that the employment of the Respondent will be regularised right from the year 1976. In fact in paragraph 6 of the impugned Judgment and order, the learned Member has observed that the law does not provide for regularisation. In fact there is no finding recorded by the learned Member regarding existence of any agreement or settlement. The learned Judge has not drawn any inference regarding existence of any Agreement.

11. It is thus apparent that Item 9 of Schedule IV is not at all attracted. In the result the impugned order will have to be quashed and set aside.

10. Perusal of the complaint shows that there is no allegation as regards failure on the part of the petitioner to implement any award, settlement or agreement as contemplated by Item 9 of Schedule IV of the Act. In view thereof, I find that the decision in Writ Petition No. 4091 of 2007 squarely applies even to the facts of the present case.

11. In the light of the aforesaid discussion, petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (b) and the Complaint (ULP) No. 43 of 2004 instituted by the Complainant stands dismissed. In the circumstances of the case, however, there shall be no order as to costs.

12. In view of the disposal of the Petition, nothing survives in Civil Application No.148 of 2015 filed by the Corporation for stay of the impugned judgment and order and the same is disposed of accordingly.

(R. G. KETKAR, J.)

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