

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6433 OF 2007

The Commissioner
Nashik Municipal Corporation

.. Petitioner

Vs.

Niranjan Punjaji Netavane and another

.. Respondents

Mr.M.L.Patil, Advocate for Petitioner.

Mr. Himanshu Kode, 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 Mr. Himanshu Kode, 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. 63 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 02/12/1980, the then Nashik Municipal Council appointed respondent No.1 as a Road Mukadam. On 07/11/1982, the Municipal Corporation of city of Nashik (for short 'Corporation') was constituted after amalgamation of i) Nashik Municipal Council ii) Nashik Road Devlali Municipal Council iii) Satpur Municipal Council and some villages. On 01/09/1984, the Complainant was promoted as a Junior Clerk. The first general elections to constitute the General Body were held in February 1992 and elected body took over management of the Corporation.

4. The Standing Committee passed resolution on 13/08/1992 and the General Body passed resolution on 17/09/1992 giving deemed date of promotion to the Complainant as a Junior Clerk with effect from 02/12/1979 (as against 01/09/1984). On the basis of these resolutions, the Municipal Commissioner issued order

on 23/03/1993 and also fixed the salary.

5. On 24/01/2001, Chief Auditor submitted a report to the Commissioner pointing out therein that deemed date given to the Complainant was illegal and could not be accepted in audit. In view thereof, the Municipal Commissioner issued a show cause notice to the Complainant enclosing therewith a copy of the report dated 24/01/2001 as to why the deemed date given to him be not cancelled and recovery be not made from him. The Complainant gave reply on 16/08/2001. After taking into consideration all the circumstances, the Municipal Commissioner issued order on 08/10/2003 and cancelled the deemed date of promotion as a Junior Clerk with effect from 02/12/1979 and directed to fix the pay scale of the Complainant. The Complainant's deemed date of appointment as a Junior Clerk with effect from 02/12/1979 was cancelled and re-fixed as 01/09/1984. Pursuant thereto, the Deputy Municipal Commissioner (Administration) issued order on 16/03/2004 and fixed the pay scale of the Complainant and further ordered recovery of excess salary paid to him.

6. The Complainant instituted Complaint (ULP) No. 63 of 2004 before the Tribunal inter alia contending that the Corporation has indulged into unfair labour practices covered by Items No. 5, 9 & 10 of Schedule IV of the Act by cancelling the deemed date of appointment as a Junior Clerk as also re-fixing his pay scale and

ordering recovery of excess salary as per orders dated 08/10/2003 and 16/03/2004. The complaint was resisted by the Corporation 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.

7. In support of this petition, Mr.Patil strenuously contended that basically, the resolutions passed by the Standing Committee on 13/08/1992 and General Body on 17/09/1992 and the order dated 23/03/1993 issued by the Municipal Commissioner 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.

8. On the other hand, Mr.Kode reiterated the submissions that were advanced before the Tribunal. The Complainant challenged the order dated 08/10/2003 passed by the Municipal Commissioner and order dated 16/03/2004 passed by the Deputy Municipal Commissioner (Administration). He submitted that the Complainant was appointed as a Road Mukadam in the year 1978. At that time, he was having qualification of S.S.C. The Corporation was constituted on 07/11/1982. Though the Complainant was appointed as a Road Mukadam, factually he was working on the post of a Clerk and he was discharging the duties of a Clerk. Though he was working on Class III post, he was paid salary of Class IV. The Complainant, though, was working on the post of a Clerk, he was promoted to the post of a Clerk with effect from 01/09/1984 by order dated 22/08/1984. The Complainant was making representation for giving deemed date as also pay scale of a clerical post. It is only after the Corporation found merit in the claim of the Complainant, deemed date was given by passing resolutions by the Standing Committee and the General Body. On the basis of those resolutions, the Municipal Commissioner issued order on 23/03/1993 and the Complainant was given deemed date of

promotion as a Junior Clerk with effect from 02/12/1979. From 1996, the Complainant is working as a Senior Clerk in the Health Department of the Corporation. The Complainant was not paid salary admissible to the Clerk between 1979 & 1984. He submitted that the orders dated 08/10/2003 and 16/03/2004 passed by the Municipal Commissioner and the Deputy Municipal Commissioner (Administration) respectively are illegal and without any authority of law. The Tribunal, therefore, rightly allowed the complaint. He submitted that no case is made out for invocation of powers under Article 226 of the Constitution of India.

9. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. It appears that on 02/12/1980, the Complainant was appointed as a Road Mukadam purely on temporary basis. The Standing Committee and the General Body passed resolutions on 13/08/1992 and on 17/09/1992 respectively giving deemed date of promotion to the Complainant as Junior Clerk with effect from 02/12/1979. The moot question is whether the Complainant can be given a deemed date of promotion as a Junior Clerk with effect from 02/12/1979. On 01/09/1984, he was promoted as a Junior Clerk when he was appointed on 02/12/1980 as a Road Mukadam. As the Complainant was appointed as a Road Mukadam, by the then Municipal Commissioner only on 02/12/1980, his services have to be

computed only from that date and not from 02/12/1979 when in fact he was not appointed. In view thereof, the Standing Committee and the General Body could not have passed resolutions on 13/08/1992 and 17/09/1992 respectively giving deemed date of the promotion to the Complainant as a Junior Clerk with effect from 02/12/1979 when his services commenced with the then Municipal Council on 02/12/1979.

10. Mr.Patil submitted that by passing resolutions and order dated 23/03/1993 issued 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 submissions of Mr.Patil. In my opinion, the Complainant could not have been given deemed date of 02/12/1979 when his services commenced with the Corporation from 02/12/1980. As noted earlier, the Complainant was promoted as a Junior Clerk on 01/09/1984. In other words, without actually working between 02/12/1979 and 01/09/1984 on the post of Junior Clerk, the Complainant was given benefit flowing therefrom.

11. 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.

12. 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.

13. 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. 63 of 2004 instituted by the Complainant stands dismissed. In the circumstances of the case, however, there shall be no order as to costs.

(R. G. KETKAR, J.)

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