

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6878 OF 2007

The Commissioner
Nashik Municipal Corporation .. Petitioner

Vs.

Ashok Shivram Vidhate ... Since deceased
1(a). Rajashri Ashok Vidhate and others .. Respondents

Mr.M.L.Patil, Advocate for Petitioner.
Mr. Himanshu Kode, Advocate for Respondents No. 1 (a) to 1(d).

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 respondents No. 1 (a) to 1(d) 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. 337 of 2005. By that order, the Tribunal allowed the complaint instituted by original 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 30/08/1977 and 02/02/1978, the Complainant was appointed purely on temporary basis in the sanctioned vacant post on account of suspension of one Mr.Natkar. Mr.Natkar joined the duties on 31/03/1978 after revocation of suspension. There is no record of any service rendered by the Complainant from 01/04/1978 to 07/01/1979. On 08/01/1979, the Complainant was temporarily appointed by the then Nashik Municipal Council as an 'Octroi Clerk'. In the service book, the qualifications of the Complainant are shown as S.S.C. On 29/09/1989, he was promoted as a Senior Clerk on the condition of passing Local Self Government Diploma (for short 'L.S.G.D.') examination. In January 1992, the Complainant passed L.S.G.D. examination. 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 07/11/1982. 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 appointment to the Complainant as a Junior Clerk with effect from 10/01/1978. On the basis of these resolutions, the Municipal Commissioner issued order on 06/11/1992 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, on 27/07/2001, 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 06/08/2001. After taking into consideration all the circumstances, the Municipal Commissioner issued order on 01/09/2005 and cancelled the deemed date of promotion as a Junior Clerk with effect from 10/01/1978 and directed to fix the pay scale

of the Complainant. The Complainant's deemed date of appointment as a Junior Clerk with effect from 10/01/1978 was cancelled and re-fixed as 08/01/1979. Pursuant thereto, the Deputy Municipal Commissioner (Administration) issued order on 08/12/2005 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. 337 of 2005 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. The complaint was resisted by the Corporation by filing written statement. On the basis of pleadings of the parties, necessary issues were framed. 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 06/11/1992 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 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. He also invited my attention to affidavit-in-reply filed by respondent No.1(a), Ms.Rajashri Ashok Vidhate – widow of the Complainant. He submitted that the Municipal Commissioner has issued order on 06/11/1992 giving deemed date of promotion/appointment as a Junior Clerk to the Complainant with effect from 10/01/1978. On the basis of such deemed date, from Junior Clerk, the Complainant was promoted as a Senior Clerk and thereafter, Inspector and consequently, he was given monetary benefits. He submitted that

granting of deemed date as also monetary benefits was not on account of any fault of the Complainant. The grant of deemed date and consequently, monetary benefits cannot be withdrawn as also no recovery can be made. The Tribunal rightly held that the resolutions passed by the Standing Committee and the General Body prevail over the order of the Municipal Commissioner withdrawing the deemed date. It also amounts to indulging into unfair labour practices under Item 9 of Schedule IV of the Act. He, therefore, 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 30/08/1977 and 02/02/1978, the Complainant was appointed purely on temporary basis in the sanctioned vacant post on account of suspension of one Mr.Natkar. Mr.Natkar joined the duties on 31/03/1978 after revocation of suspension. Mr.Patil submitted that there is no record of any service rendered by the Complainant from 01/04/1978 to 07/01/1979. On 08/01/1979, the Complainant was temporarily appointed by the then Nashik Municipal Council as an 'Octroi Clerk'. The Standing Committee passed resolution on 13/08/1992 and the General Body passed resolution on 17/09/1992 giving deemed date of appointment to the Complainant as Junior Clerk with effect from

10/01/1978. In pursuance thereof, Municipal Commissioner passed order on 06/11/1992. The moot question is whether the Complainant can be given a deemed date of appointment as a Junior Clerk with effect from 10/01/1978, when he was temporarily appointed on 08/01/1979 as an Octroi Clerk. As noted earlier, the Complainant was appointed in leave vacancy on 30/08/1977 and 02/02/1978 purely on temporary basis in the sanctioned vacant post on account of suspension of one Mr.Natkar. Mr.Natkar joined his duties on 31/03/1978 after revocation of suspension. The Complainant, therefore, cannot claim any benefit on the basis of his appointment on leave vacancy post. In other words, the services of the Complainant can be computed only from 08/01/1979 when he was temporarily appointed as an Octroi Clerk by Nashik Municipal Council. 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 appointment to the Complainant as a Junior Clerk with effect from 10/01/1978.

10. Mr.Patil submitted that passing of resolutions and order dated 06/11/1992 of 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 10/01/1978 when his services

as a Junior Clerk commenced with the Corporation from 08/01/1979. In other words, without actually working between 10/01/1978 and 07/01/1979, the Complainant was given deemed date as also 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 decision, 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 Corporation 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 Complaint (ULP) No. 337 of 2005 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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