

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO.6881 OF 2007
WITH
CIVIL APPLICATION NO.151 OF 2015**

The Commissioner
Nashik Municipal Corporation .. Petitioner
Vs.
Haribhau Dhondiram Phadol 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. 1at 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. 92 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 deemed 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 the Complainant was appointed as an Octroi Inspector on 10/12/1981 by the then Satpur Municipal Council in the pay-scale of 335-680. At that time, he had passed S.S.C. On 24/12/1988, in the meeting of Departmental Promotion Committee (for short 'D.P.C.'), the Complainant was not found suitable for promotion to the post of Assistant Superintendent as he had not passed Local Self Government Diploma (for short 'L.S.G.D.') examination. The Complainant was, therefore, not promoted. In December 1990, the Complainant passed L.S.G.D. examination. On 13/08/1992, the Standing Committee and on 17/09/1992, the General Body passed resolutions giving deemed date to the Complainant as Assistant Superintendent with effect from 11/01/1989. On 21/11/1992, the Municipal Commissioner issued order giving deemed date of promotion as Assistant Superintendent

with effect from 11/01/1989. On 29/01/1996, he was promoted as Superintendent.

4. On 24/01/2001, the Chief Auditor submitted a report to the Municipal Commissioner pointing out therein that deemed date of appointment given to the Complainant was illegal. After receiving the report of the Auditor, the Municipal Commissioner issued a show cause notice on 30/07/2001 to the Complainant. The Complainant gave reply to the show cause notice on 06/08/2001. On 18/10/2003, the Municipal Commissioner passed order cancelling the deemed date of appointment of the Complainant as a Assistant Superintendent with effect from 11/01/1989 and directed to fix the pay scale. On 29/01/2004, the Deputy Municipal Commissioner (Administration) issued order and fixed the pay-scale of the Complainant and further directed to recover excess salary paid to the Complainant.

5. The Complainant thereafter instituted Complaint (ULP) No. 92 of 2004 before the Tribunal challenging the orders dated 18/10/2003 and 29/01/2004. The Complainant also alleged that the Corporation has indulged in unfair labour practices. The Corporation resisted the complaint by filing written statement. On the basis of the pleadings of the parties, the Tribunal framed

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 present petition under Article 226 of the Constitution of India.

6. In support of this petition, Mr.Patil strenuously contended that basically the resolutions passed by the Standing Committee and the General Body on 13/08/1992 and 17/09/1992 respectively, and on that basis, giving deemed date of promotion to the Complainant as Assistant Superintendent with effect from 11/01/1989 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, Mr.Kode reiterated the submissions that were advanced before the Tribunal. He submitted that the resolutions passed by the Standing Committee and the General Body prevail over the orders dated 18/10/2003 and 29/01/2004 passed by the Municipal Commissioner and the Deputy Municipal Commissioner (Administration) respectively. This amounts to commission of unfair labour practices under Item 9 of Schedule IV of the Act. He submitted that appointment of the Complainant with the Corporation itself is a contract and/or an agreement and therefore, failure to implement the said contract/agreement amounts to commission of unfair labour practices under Item 9 of the Act. The Tribunal rightly held that the act of the Corporation in withdrawing the deemed date and benefits given to the employees amounts to the commission of unfair labour practices. He further submitted that the petition is also hopelessly barred by delay and laches. He, therefore, submitted that no case is made out for invocation of powers under Article 226 of the Constitution of India. For all these reasons, he submitted that the impugned order deserves to be quashed and set aside.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Complainant was appointed as an Octroi Inspector by the then Satpur Municipal Council on 10/12/1981. In the meeting of the D.P.C. held on 24/12/1988 while considering promotions to the post of Assistant Superintendent, the Complainant was not found qualified as he had not till then passed L.S.G.D. examination. The Complainant passed the said examination in 1990. The Complainant was given deemed date of promotion as an Assistant Superintendent with effect from 11/01/1989 on the basis of the Resolutions passed by the Standing Committee and General Body as also Municipal Commissioner's order dated 21/11/1992. The moot question is whether the Complainant can be given a deemed date of promotion as an Assistant Superintendent with effect from 11/01/1989. Mr.Patil submitted that the resolutions passed by the Standing Committee and the General Body as also the order of the Municipal Commissioner dated 21/11/1992 amounted to creation of imaginary post and making appointment of the Complainant in that post with retrospective effect. I find merit in the submissions of Mr.Patil. In my opinion, the Complainant could not have been given deemed date as an Assistant Superintendent with effect from 11/01/1989, particularly when he had not passed L.S.G.D. examination as also he was not found qualified in the

meeting of D.P.C. held on 24/12/1988. In other words, without actually working on the post of Assistant Superintendent from 11/01/1989, the Complainant was given deemed date as also benefits flowing therefrom.

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. 92 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 Writ Petition, nothing survives in Civil Application No.151 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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