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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7017 OF 2007

The Commissioner
Nashik Municipal Corporation .. Petitioner

Vs.

Subhash Shivramm Kalamkar 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 MARCH, 2015
PRONOUNCED ON : 26th MARCH, 2015

P.C. :

. Heard Mr.M.L.Patil, the 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. 316 of 2005. 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 the Complainant was appointed as a Junior Clerk with effect 07/08/1973 by the then Nashik Municipal Council. He had passed S.S.C. and Local Self Government Diploma (for short 'L.S.G.D.') examination. On 07/11/1982, the Municipal Corporation of city of Nashik was constituted upon amalgamation of erstwhile i) Nashik Municipal Council ii) Nashik Road Devlali Municipal Council iii) Satpur Municipal Council and some villages. On 29/09/1989, the Complainant was considered for promotion to the post of a Senior Clerk by Departmental Promotion Committee (for short 'D.P.C.'). The D.P.C. denied the promotion as his service record was not good. On 29/03/1990, the Complainant was promoted as a Senior Clerk. On 13/08/1992, the Standing Committee and on 17/09/1992, the General Body passed resolutions giving a deemed date of promotion to the Complainant as a Senior Clerk with effect from 29/09/1989.

On 06/11/1992, the Municipal Commissioner passed order giving a deemed date of 29/09/1989 to the Complainant as a Senior Clerk. On 01/11/1998, the Complainant was promoted as an Assistant Superintendent.

4. On 24/01/2001, the Chief Auditor submitted a report to the Municipal Commissioner pointing out therein that the deemed date given to the Complainant was illegal and cannot be accepted in audit. In view thereof, the Municipal Commissioner issued a show cause notice to the Complainant on 30/07/2001 enclosing therewith a copy of the report as to why deemed date given to him be not cancelled and recovery be not made from him. The Complainant gave reply on 04/08/2001. On 10/11/2003, the Municipal Commissioner restored 07/08/1973 being date of appointment as a Junior Clerk and 29/03/1990 being date of appointment as a Senior Clerk and 01/11/1998 being date of appointment of Assistant Superintendent and cancelled deemed date of a Senior Clerk with effect from 29/09/1989. On 06/10/2005, the Municipal Commissioner also directed recovery of excess salary in 40 equal installments.

5. The Complainant instituted Complaint (ULP) No. 316 of 2005 challenging the order dated 06/10/2005. The Corporation filed written statement opposing the complaint. 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 strenuously contended that the resolutions dated 13/08/1992 and 17/09/1992 passed by the Standing Committee and the General Body and order of the Municipal Commissioner dated 06/11/1992 amounted to creation of imaginary post and making appointment of the Complainant in that post with retrospective effect. He submitted that the Complainant was considered for promotion to the post of a Senior Clerk on 29/09/1989 by D.P.C. He was not found suitable. He was subsequently promoted as a Senior Clerk on 29/03/1990. He, therefore, could not have been given a deemed date of promotion as a Senior Clerk with effect from 29/09/1989. 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 will prevail over the orders dated 10/11/2003 and 06/10/2005 passed by the Municipal Commissioner. He further submitted that the appointment with the Corporation itself is the contract and/or agreement and therefore, failure to implement agreement/contract amounts to commission of unfair labour practices under Item 9 of Schedule IV of the Act.

8. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. The Complainant was appointed as a Junior Clerk by the then Nashik Municipal Council on 07/08/1973. On 29/09/1989, he was considered for promotion to the post of a Senior Clerk by D.P.C. He was not found suitable and on 29/03/1990, he was promoted as a Senior Clerk. The Standing Committee passed resolution on 13/08/1992 and the General Body passed resolution on 17/09/1992 and the Municipal Commissioner passed order on

06/11/1992 giving deemed date of promotion as a Senior Clerk with effect from 29/09/1989. The moot question is whether the Complainant is entitled to that deemed date. I find merits in the submissions of Mr.Patil that the resolutions passed by the Standing Committee and the General Body and order dated 06/11/1992 passed by the Municipal Commissioner amounted to creation of imaginary post and making appointment of the Complainant in that post with retrospective effect. In my opinion, the Complainant could not have been given a deemed date of promotion as a Senior Clerk with effect from 29/09/1989, more so when he was considered by D.P.C. and was denied the promotion. In my opinion, the Municipal Commissioner rightly passed order on 10/11/2003 thereby cancelling deemed date and restoring the date of 07/08/1973 as a Junior Clerk and 29/03/1990 as a Senior Clerk. The Complainant without actually working between 29/09/1989 and 29/03/1990 was given a deemed date of promotion as a Senior Clerk with effect from 29/09/1989 and the 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. 316 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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