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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7005 OF 2007

The Commissioner
Nashik Municipal Corporation .. Petitioner

Vs.

Chandrabhan Kashinath Mate and another .. Respondents

Mr.M.L.Patil, Advocate for Petitioner.
Mr. Himanshu Kode, Advocate for Respondents No. 1.

CORAM : R. G. KETKAR, J.
RESERVED ON : 26th FEBRUARY 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. 114 of 2002. 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 07/11/1982, the Municipal Corporation of the city of Nashik was constituted upon amalgamation of i) erstwhile Nashik Municipal Council ii) Nashik Road Devlali Municipal Council iii) Satpur Municipal Council and some villages. On 01/05/1984, the Complainant was appointed as a Peon (Class IV) in the pay scale of 200-280/-. The Complainant was promoted as a Junior Clerk with effect from 17/02/1990. The Complainant demanded that he be granted a deemed date of appointment in the post of a Junior Clerk with effect from 01/05/1984. The Deputy Municipal Commissioner (Administration) issued an order on 17/10/1996 giving him a deemed date of appointment in the post of a Junior Clerk with effect from 01/05/1984. 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. On

30/07/2001, the Municipal Commissioner issued a show cause notice enclosing therewith the copy of the Chief Auditor's report as to why the deemed date given to him be not cancelled and recovery be not made from him. The Complainant gave reply on 02/08/2001. On 26/06/2002, the Municipal Commissioner cancelled the deemed date and directed fixation of pay scale. On 23/09/2003, the Deputy Municipal Commissioner (Administration) issued an order fixing the pay scale as also directing the recovery of excess salary.

4. The Complainant instituted Complaint (ULP) No. 114 of 2002 challenging the orders dated 26/06/2002 and 23/09/2003. The petitioner 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 earlier. It is against this decision, the Corporation has instituted the present petition under Article 226 of the Constitution of India.

5. In support of this petition, Mr.Patil strenuously contended that the order dated 17/10/1996 passed by the Deputy Municipal Commissioner (Administration) 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.

6. On the other hand, Mr.Kode reiterated the submissions that were advanced before the Tribunal. He submitted that the Complainant was initially appointed as a Peon (Class IV) on 01/05/1984 in the pay scale of 200-280/- in the then Satpur Municipal Council. On 07/11/1982, after formation of the Corporation, he was absorbed. Though he was given work of a Clerk, the Corporation had shown him that he was absorbed as a Peon. All along, he was working as a Clerk and not as a Peon. He relied upon the certificate dated 27/10/1983 issued by the Assistant Municipal Commissioner. He was promoted as a Junior Clerk with effect from 17/02/1990. By order dated 17/10/1986, the Deputy Municipal Commissioner gave him a deemed date of promotion/appointment as a Junior Clerk with effect from

01/05/1984 on the basis of various applications made by him. He further submitted that earlier he had instituted Complaint (ULP) No. 570 of 1991 in the Tribunal. During the pendency of that complaint, he made various applications requesting to give deemed date. After obtaining legal opinion dated 13/09/1996 from the Legal Advisor, his request for a deemed date of appointment/promotion was accepted. He was requested to withdraw the complaint. Accordingly, on 24/10/1996, he withdrew the complaint. As per the order dated 17/10/1996 passed by the Deputy Municipal Commissioner, he was given a deemed date of promotion/appointment as a Junior Clerk with effect from 01/05/1984. He was, however, not given difference in pay scale between 01/05/1984 and 17/10/1996. The Corporation had thereafter given various promotions and monetary benefits to him. He further submitted that by withdrawing the deemed date of appointment and monetary benefits amounted to indulging into unfair labour practices covered by Item 9 of Schedule IV of the Act. The appointment with the Corporation itself is a 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. He invited my attention to order dated 17/10/1996 passed by the Deputy Municipal Commissioner (Administration) wherein reference is made to Complaint (ULP) No. 570 of 1991 as also the opinion dated

13/09/1996 given by the Legal Advisor of the Corporation. For all these reasons, he submitted that no interference is called for in exercising powers under Article 226 of the Constitution of India.

7. 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 initially appointed as a Peon on 01/05/1984 which is a Class IV post. He was promoted as a Junior Clerk with effect from 17/02/1990. By the order dated 17/10/1996, the Deputy Municipal Commissioner (Administration) gave him a deemed date of appointment in the post of Junior Clerk with effect of 01/05/1984. The moot question is whether the Complainant can be given a deemed date of appointment as a Junior Clerk with effect from 01/05/1984.

8. Mr.Patil submitted that the order dated 17/10/1996 passed by the Deputy 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 a deemed date with effect from 01/05/1984 as a Junior Clerk when in fact he was appointed as a Peon on 01/05/1984. The Complainant was promoted as a Junior Clerk on 17/02/1990. In other words, without actually working between 01/05/1984 and 17/02/1990 on the post of a Junior Clerk, the Complainant was

given a deemed date as a Junior Clerk with effect from 01/05/1984 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. Mr. Kode relied upon the proceedings of Complaint (ULP) No. 570 of 1991 and the correspondence exchanged between the parties thereafter. He submitted that Legal Advisor gave opinion on 13/09/1996. He was requested to withdraw the complaint.

Accordingly, he withdrew that complaint on 24/10/1996 as by order dated 17/10/1996, the Deputy Municipal Commissioner (Administration) gave him the deemed date. I have perused the order dated 17/10/1996 of the Deputy Municipal Commissioner (Administration). In that order, reference is made to the Complainant (ULP) No. 570 of 1991 filed by the Complainant as also the opinion dated 13/09/1996 of the Legal Advisor. After considering the opinion, the Complainant was given deemed date. Mr.Kode was unable to point out any provision of law, any judgment in support of order dated 17/10/1996. The opinion dated 13/09/1996 of the Legal Advisor is the basis of order dated 17/10/1996. The said opinion, is not placed on record. That apart, I have already held that the Complainant did not actually work as a Junior Clerk between 01/05/1984 and 17/02/1990. I, therefore, do not find any merit in the submission of Mr.Kode based upon opinion dated 13/09/1996 and order dated 17/10/1996.

12. 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. 114 of 2002 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.)