

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO. 7145 OF 2007
WITH
CIVIL APPLICATION NO.145 OF 2015**

The Commissioner
Nashik Municipal Corporation .. Petitioner
Vs.
Achyut Bhaskarrao Gaikwad 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. 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. 71 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 temporarily appointed as a Tree Mukadam (Class IV) by the then Nashik Municipal Council in the pay-scale of 80-110. On 10/11/1981, he was regularly appointed as a Tree Mukadam in the scale of 205-355. On 19/07/1982, he was promoted as a Junior Clerk (Class III). On 07.11.1982, the Municipal Corporation of City of Nashik was constituted upon amalgamation of - (i) Nashik Municipal Council, (ii) Nashik Road Devlali Municipal Council, (iii) Satpur Municipal Council and some villages. On 29/09/1989, he was promoted as a Senior Clerk. On 06/11/1992, the Municipal Commissioner issued order giving deemed date of promotion to the Complainant as a Junior Clerk with effect from 06/12/1979 (as against 19/07/1982). On 01/11/1998, he was promoted as a Assistant Superintendent.

4. On 24/01/2001, the Chief Auditor submitted a report to the Municipal Commissioner pointing out therein that the deemed date of promotion given to the Complainant was illegal and could not be accepted. In view thereof, the Municipal Commissioner issued a show cause notice on 27/07/2001 enclosing therewith the copy of 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 to the show cause notice on 09/08/2001. After taking into consideration all the circumstances, the Municipal Commissioner issued order on 26/06/2002 cancelling the deemed date of promotion of 06/12/1979 and also directed fixation of his pay-scale and recovery of the excess payment made to him. On 16/03/2004, Deputy Municipal Commissioner (Administration) passed order fixing pay scale of the Complainant and further directed recovery of excess salary.

5. The Complainant instituted Complaint (ULP) No. 17 of 2004 before the Tribunal challenging the orders dated 26/06/2002 and 16/03/2004 passed by the Municipal Commissioner and Deputy Municipal Commissioner (Administration) respectively. The Corporation resisted the complaint 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.

6. In support of this petition, Mr.Patil submitted that the order of the Municipal Commissioner dated 26/06/2002 is legal and valid. Municipal Corporation was justified in cancelling the deemed date of 06/12/1979 for the post of Junior Clerk. The order dated 06/11/1992 by which the Complainant was given deemed date of promotion as a Junior Clerk with effect from 06/12/1979 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. My attention was invited to the reply dated 19/03/2009 filed by the respondent No.1. It was contended that the order dated 06/11/1992 passed by the Municipal Commissioner is legal and valid. On the basis of the deemed date of 06/12/1979 as a Junior Clerk, the Complainant was given various promotions and monetary benefits. The order was passed by the Municipal Commissioner on the basis of the resolutions passed by the Standing Committee and General Body. Promotion as well as monetary benefits were given to the Complainant by the authorities of the Corporation and it was not fault of the Complainant. The said benefits, therefore, cannot be withdrawn. The resolutions passed by the Standing Committee and General Body prevail over the order dated 26/06/2002 passed by the Municipal Commissioner. The appointment of the Complainant with the Corporation itself is a contract and / or an agreement, and therefore, failure to implement that agreement / contract amounts to commission of unfair labour practices under Item 9 of Schedule IV of the Act. 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 submission made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Complainant was promoted as a Junior Clerk on 19/07/1982. On 29/09/1989, he was promoted as a Senior Clerk. By order dated 06/11/1992, the Complainant was given deemed date of promotion as a Junior Clerk with effect from 06/12/1979. The moot question is whether the Complainant is entitled to the deemed date of promotion as a Junior Clerk with effect from 06/12/1979 and whether the order dated 06/11/1992 passed by the Municipal Commissioner is legal and valid.

9. Mr. Patil submitted that the order dated 06/11/1992 passed by the Municipal Commissioner amounted to creation of an imaginary post and making appointment of a Complainant in that post with retrospective effect. I find merits in the submission of Mr. Patil. The Complainant was appointed as a Tree Mukadam on 06/12/1979 and was promoted as a Junior Clerk on 19/07/1982. In other words, between 06/12/1979 and 19/07/1982, the Complainant was not working on the post of Junior Clerk. If that be so, he could not have

been given deemed date of promotion as a Junior Clerk with effect from 06/12/1979. In my opinion, the order passed by the Municipal Commissioner on 06/11/1992 is patently illegal. In view thereof, the order dated 26/06/2002 passed by the Municipal Commissioner cannot be said to be illegal and bad in law. Without actually working as a Junior Clerk between 06/12/1979 and 19/07/1982, by order dated 06/11/1992, the Complainant was given deemed date of 06/12/1979 and the benefits flowing therefrom.

10. 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.

11. 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.

12. In the light of the aforesaid discussion, petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (b) of the petition and Complaint (ULP) No. 71 of 2004 instituted by the

respondent stands dismissed. In the circumstances of the case, however, there shall be no order as to costs.

12. In view of the disposal of the Petition, nothing survives in Civil Application No.145 of 2015 filed by the Complainant for the stay of the impugned Judgment and order and the same is disposed of accordingly.

(R. G. KETKAR, J.)

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