

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO.7144 OF 2007
WITH
CIVIL APPLICATION NO.146 OF 2015**

The Commissioner
Nashik Municipal Corporation .. Petitioner
Vs.
Nivruti Eknath Dhikale 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. 42 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 Road Mukadam on 03/05/1978 by the then Nashik Municipal Council. He was then appointed as a Peon on 01/06/1978. He was thereafter promoted as a Junior Clerk with effect from 06/12/1979. On 07/11/1982, upon amalgamation of erstwhile (i) Nashik Municipal Council, (ii) Nashik Road Devlali Municipal Council, (iii) Satpur Municipal Council and some villages, the Municipal Corporation of the City of Nashik was constituted. He was promoted as a Senior Clerk on 29/09/1989. On 21/06/1994, the Complainant made application to the Municipal Commissioner that he be given deemed date of promotion as a Junior Clerk with effect from 10/10/1974 (as against 06/12/1979). By order dated 30/03/1994, the then Municipal Commissioner gave deemed date of promotion to the Complainant with effect from 01/04/1978.

Accordingly, his pay-scale was revised and he was receiving salary. The Complainant was thereafter promoted as Assistant Superintendent on 01/11/1998.

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 did not give any reply to the show cause notice. On 04/02/2004, the Municipal Commissioner passed order cancelling the deemed date of promotion as a Junior Clerk with effect from 06/12/1979 and directed to fix seniority on the basis of his appointment as a Junior Clerk with effect from 06/12/1979, Senior Clerk with effect from 29/09/1989 and Assistant Superintendent with effect from 01/11/1998.

5. The Complainant thereafter instituted Complaint (ULP) No. 42 of 2004 before the Tribunal challenging the order dated 04/02/2004. 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 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 present petition under Article 226 of the Constitution of India.

6. In support of this petition, Mr.Patil strenuously contended that basically the order dated 30/03/1994 passed by the Municipal Commissioner giving deemed date of promotion to the Complainant as a Junior Clerk with effect from 01/04/1978 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 appointment of the Complainant with 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 promoted as a Junior Clerk on 06/12/1979. He was promoted as a Senior Clerk on 29/09/1989. By order dated 30/03/1994, the Municipal Commissioner gave deemed date of promotion as a Junior Clerk with effect from 01/04/1978 to the Complainant. The moot question is whether the Complainant can be given a deemed date of promotion as a Junior Clerk with effect from 01/04/1978. Mr.Patil submitted

that the order passed by the Municipal Commissioner on 30/03/1994 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 a Junior Clerk with effect from 01/04/1978, particularly when, he was promoted on that post on 06/12/1979. In other words, without actually working on the post of Junior Clerk between 01/04/1978 and 06/12/1979, the Complainant was given a deemed date of promotion as a Junior Clerk 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 the 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. 42 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.146 of 2015 filed by the Corporation for the stay of the impugned judgment and order and the same is disposed of accordingly.

(R. G. KETKAR, J.)

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