

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO. 7141 OF 2007
WITH
CIVIL APPLICATION NO.152 OF 2015**

The Commissioner
Nashik Municipal Corporation .. Petitioner
Vs.
Sadashiv Sakahhari Mhaske and another .. Respondents

Mr.M.L.Patil, Advocate for Petitioner.
Mr. Pratap Patil, 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.
Pratap Patil , 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. 36 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 on 02/03/1982 as a Sanitary Mukadam by the then Nashik Road Devlali Municipal Council in the pay-scale of 205-355. 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 01/07/1983, the Complainant was temporarily promoted as a Junior Clerk for 3 months without affecting his seniority. On 01/10/1983, he was appointed as a Sanitary Mukadam and was confirmed on that post on 23/11/1984. On 16/02/1990, the Complainant was promoted as a Junior Clerk. However, the Complainant continued to draw the salary of a Junior Clerk from 01/10/1983. On 06/07/1990, an order was passed to recover the excess salary paid to the Complainant.

The Complainant instituted Complaint (ULP) No.448 of 1990 before the Tribunal. The order for recovery of excess salary was stayed on 25/07/1996 and the said order was confirmed till disposal of the complaint. On 29/08/1992, Deputy Municipal Commissioner (Administration) addressed a letter to the Complainant calling upon him to withdraw the complaint instituted before the Tribunal. On 01/03/1993, the Complainant filed Purshis exhibit U-1 setting out therein that the Corporation had assured the Complainant that it accepted the claim made by him in the complaint. On the same day, the Tribunal permitted withdrawal of the complaint. In pursuance thereof, on 05/03/1993, the Deputy Municipal Commissioner (Administration) passed order giving a deemed date of promotion as a Junior Clerk with effect from 01/07/1983.

4. On 23/10/2003, 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 (Administration) issued a show cause notice on 24/12/2003 enclosing therewith the copy of report dated 24/01/2001 as to why the deemed date given him be not cancelled and recovery be not made from him. The Complainant gave reply to the show cause notice on 30/12/2003. After taking into consideration all the

circumstances, the Municipal Commissioner issued order on 30/01/2004 and cancelled the deemed date of promotion and fixed the date of appointment as a Sanitary Mukadam with effect from 05/11/1984 and Junior Clerk with effect from 06/11/1984.

5. The Complainant instituted Complaint (ULP) No. 36 of 2004 before the Tribunal challenging the order dated 30/01/2004 passed by the Municipal Commissioner. 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. M. L. Patil strenuously contended that the Complainant was promoted as a Junior Clerk with effect from 16/02/1990. However, he continued to draw salary of a Junior Clerk from 01/10/1983 without actually working on that post. On 06/07/1990, the order was passed for recovery of excess salary paid to him. He instituted Complaint (ULP) No.448 of 1990 before the Tribunal. The said complaint was withdrawn on 05/03/1993, as the Corporation agreed to give deemed date of

promotion as a Junior Clerk w.e.f. 01/07/1983. He submitted that the order dated 05/03/1993 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. Pratap Patil supported the impugned order. He submitted that the Complainant had instituted complaint challenging the order dated 06/07/1990 passed for recovery of the excess salary paid to the Complainant. On 29/08/1992, Deputy Municipal Commissioner (Administration) addressed a letter to the Complainant calling upon him to withdraw the complaint instituted before the Tribunal. On 01/03/1993, the Complainant filed Purshis

for withdrawal of the complaint. On 05/03/1993, the Deputy Municipal Commissioner (Administration) passed order giving a deemed date of promotion to the Complainant as a Clerk with effect from 01/07/1983. He, therefore, submitted that the authorities of the Corporation cannot now cancel the deemed date of promotion as also fix date of appointment as a Sanitary Mukadam with effect from 05/11/1984 and Junior Clerk with effect from 06/11/1984. He, therefore, submitted that the Tribunal was justified in allowing the complaint.

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 with effect from 16/02/1990. On 06/07/1990, the order was passed for recovery of excess salary paid to the Complainant as he continued to draw salary of a Junior Clerk from 01/10/1983 without actually working on that post. The complaint instituted by him was withdrawn on 05/03/1993 as the Corporation agreed to give a deemed date of promotion as a Junior Clerk with effect from 01/07/1983. Accordingly, on 05/03/1993, the Deputy Municipal Commissioner (Administration) passed order giving a deemed date of promotion as a Junior Clerk with effect from 01/07/1983. Perusal of the impugned order shows that the Tribunal

disposed of the complainants filed by several employees by a common judgment. However, these aspects are not considered by the Tribunal. The Tribunal ought to have considered whether the order passed by the Deputy Municipal Commissioner (Administration) on 05/03/1993 is legal and valid. If the Tribunal comes to the conclusion that the said order was not valid, whether the Complaint (ULP) No.448 of 1990 deserves to be restored to the file of the Tribunal. If the Tribunal holds that the order dated 05/03/1993 is legal and valid then obviously, question of restoration of Complaint (ULP) No.448 of 1990 will not arise. The Tribunal has recorded that the petitioners have committed unfair labour practice under Item 9 of Schedule IV of the Act.

9. Mr. M. L. 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. The impugned order dated 17/08/2006 in Complaint (ULP) No.36 of 2004 is quashed and set aside and the complaint is restored to the file of the Tribunal. The Tribunal shall decide the complaint afresh in the light of the observations made herein. All the contentions on merits are expressly kept open. Rule is made absolute in the aforesaid terms. In the circumstances of the case, there shall be no order as to costs.

13. In view of the disposal of the Petition, nothing survives in Civil Application No.152 of 2015 for stay of the impugned judgment and order and the same is disposed of accordingly.

(R. G. KETKAR, J.)

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