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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7154 OF 2007

The Commissioner

Nashik Municipal Corporation

.. Petitioner

Vs.

Shrihari Sakhahari Pawar 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, 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. 187 of 2003. 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 passed S.S.C. in the year 1977, H.S.C in 1980 and Local Self Government Diploma (for short L.S.G.D'.') examination in 1985. The Complainant was appointed as a Helper by the then Nashik Municipal Council on 06/01/1978 on daily wages of Rs.10/-. The Complainant was working on daily wages between 01/08/1978 and 30/06/1979. He was thereafter appointed as a Helper (Class IV) from 21/07/1980 in the pay scale of 200-280/-.

4. On 07/11/1982, the Municipal Corporation of 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. After considering his seniority in Class IV category as a Helper, the Complainant was promoted as a Junior Clerk with effect from 01/09/1984 in pay scale of 260-495/-. On 24/02/1992, the General Body passed resolution thereby giving a deemed date of appointment to the Complainant as

a Junior Clerk with effect from 08/01/1979. In pursuance thereof, on the same day i.e. 24/02/1992, Municipal Commissioner passed order giving deemed date. By subsequent order dated 16/03/1993 passed by the Deputy Municipal Commissioner (Administration), the Complainant was given a deemed date of the appointment as a Junior Clerk with effect from 01/08/1978.

5. On 24/01/2001, the Chief Auditor raised objection as regards giving deemed dates of promotion as a Junior Clerk to the Complainant from 08/01/1979 and 01/08/1978. On 27/07/2001, the Municipal Commissioner issued a show cause notice enclosing therewith copy of the report. The Complainant gave reply on 01/08/2001. On 10/10/2003, the Municipal Commissioner issued order cancelling deemed dates of appointment with effect from 08/01/1979 and 01/08/1978 and restoring the date of 01/09/1984 when the Complainant was accordingly promoted as a Junior Clerk.

6. The Complainant instituted Complaint (ULP) No. 187 of 2003 before the Tribunal challenging the order dated 10/10/2003. The Corporation opposed 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 hereinbove. It is against this order, the Corporation has instituted the present petition under Article 226 of

the Constitution of India.

7. In support of this petition, Mr.Patil strenuously contended that basically the resolution of the General Body dated 24/02/1992 and orders dated 24/02/1992 and 16/03/1993 passed by the Municipal Commissioner and Deputy Municipal Commissioner (Administration) respectively giving deemed dates as Junior Clerk with effect from 08/01/1979 and 01/08/1978 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.

8. On the other hand, Mr.Kode reiterated the submissions that were advanced before the Tribunal. He submitted that the

Complainant was appointed as a Revision Clerk (acting Accounts Clerk) in the pay scale of 80-200/- (un-revised) from 01/08/1978. Even though he was employed for performing a regular nature of work, he was given appointment letter for two months and some time for 3 days. He submitted that earlier the Complainant had instituted Complaint (ULP) No. 196 of 1989 for giving him deemed date of appointment with effect from 01/08/1978 and pay all the arrears of wages on that basis. During the pendency of that complaint, the Corporation issued letter dated 24/02/1992 giving a deemed date of appointment as a Junior Clerk with effect from 08/01/1979. By order dated 16/03/1993, the Deputy Municipal Commissioner (Administration) gave him deemed date of appointment as a Junior Clerk with effect from 01/08/1978 and requested him to withdraw the complaint by letter dated 27/08/1992. In view thereof, he withdrew the complaint. He submitted that by letters dated 24/02/1992 and 16/03/1993, the Corporation accepted the claim made by the Complainant. The acceptance of claim made by the Complainant became agreement between the parties and breach of the said agreement by the Corporation amounts to commission of unfair labour practices under Item 9 of Schedule IV of the Act. He further submitted that on the basis of a deemed date of promotion given to him, the Corporation had given various promotions and monetary benefits. He further

submitted that the resolution of the General Body dated 24/02/1992 will prevail over order dated 10/10/2003 passed by the Municipal Commissioner. Apart from that appointment with the Corporation itself is a contract and/or agreement and failure to implement the agreement/ contract amounts to commissioner of unfair labour practices under Item 9 of Schedule IV of the Act. He, therefore, submitted that the Tribunal rightly allowed the complaint. He submitted that no case is made out for invocation of powers under Article 226 of the Constitution of India.

9. 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 appointed on 06/01/1978 as a Helper which is Class IV post by the then Nashik Municipal Council. On 21/07/1980, he was appointed as a Helper in the pay scale of 200-280/-. On 01/09/1984, he was promoted as a Junior Clerk in the pay scale of 260-495/-. On 24/02/1992, the General Body passed resolution giving deemed date to the Complainant as a Junior Clerk with effect from 08/01/1979. On the same day, the Municipal Commissioner passed order giving him deemed date as a Junior Clerk with effect from 08/01/1979. By letter dated 27/08/1992, the Deputy Municipal Commissioner called upon the Complainant to withdraw the complaint as his demand of giving deemed date and promotion was acceded to. On 16/03/1993,

the Deputy Municipal Commissioner (Administration) gave him deemed date as a Junior Clerk with effect from 01/08/1978.

10. Perusal of the impugned order shows that the Tribunal disposed of the complaint filed by the several employees by the common judgment. However, these aspects were not considered by the Tribunal. The Tribunal ought to have considered whether the resolution dated 24/02/1992, order of the Municipal Commissioner dated 24/02/1992 and the order of the Deputy Municipal Commissioner (Administration) dated 16/03/1993 were legal and valid. If the Tribunal comes to the conclusion that the said orders were not valid, it has to consider whether the Complainant (ULP) No.196 of 1989 deserves to be restored to the file of the Tribunal. If the Tribunal holds that the resolution and orders referred hereinabove are legal and valid then obviously, the question of restoration of the complaint will not arise.

11. 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.

12. 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.

13. In the light of the aforesaid discussion, petition succeeds and is allowed. The impugned order dated 17/08/2006 passed in Complaint (ULP) No.187 of 2003 is quashed and set aside and the complaint is restored to the file of the Tribunal. All the contentions of the parties are expressly kept open. Rule is made absolute in the aforesaid terms. In the circumstances of the case, however, there shall be no order as to costs.

(R. G. KETKAR, J.)

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