

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7153 OF 2007

The Commissioner
Nashik Municipal Corporation .. Petitioner
Vs.
Satish Hari Wagh 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. 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. 78 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 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 was temporarily appointed as a Tree Mukadam (Class IV) by the then, Nashik Municipal Council on 06/12/1979. He was appointed on regular basis as a Tree Mukadam on 18/03/1980. He was thereafter promoted as a Junior Clerk (Class III) with effect from 01/09/1984. On 13/08/1992, the Standing Committee and on 17/09/1992, the General Body of the Corporation passed resolutions giving deemed date of appointment to the Complainant as a Junior Clerk with effect from 06/12/1979. On that basis, the Municipal Commissioner issued order on 06/11/1992. After considering the application made by the Complainant, the Municipal Commissioner issued order dated 05/03/1993 giving him deemed date with effect from 01/08/1978.

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 30/07/2001 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 06/08/2001. After taking into consideration all the circumstances, the Municipal Commissioner issued order on 26/06/2002 and cancelled the deemed date of promotion and directed to fix the pay scale of the Complainant. In pursuance thereof, the Deputy Municipal Commissioner (Administration) issued order on 23/04/2004 and fixed the pay scale of the Complainant and further directed to recover excess salary paid to the Complainant.

5. The Complainant instituted Complaint (ULP) No. 78 of 2004 before the Tribunal challenging the orders dated 26/06/2002 and 23/04/2004. 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 held that the Corporation has committed unfair labour practices under Item 9 of Schedule IV of the Act. 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 resolutions dated 13/08/1992 and 17/09/1992 passed by the

Standing Committee and General Body respectively as also the order of the Municipal Commissioner dated 06/11/1992 giving deemed date of promotion to the Complainant as a Junior Clerk with effect from 06/12/1979 (instead of 01/09/1984) 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 the Municipal Commissioner rightly passed order dated 26/06/2002 cancelling the deemed date. The order dated 23/04/2004 passed by the Deputy Municipal Commissioner (Administration) is also legal and valid. 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 supported the impugned order. He reiterated the submissions that were advanced before the

Tribunal. He invited my attention to the affidavit-in-reply dated 22/02/2010 made by respondent No.1 opposing the petition. Mr.Kode submitted that when the Complainant was appointed as a Clerk in the erstwhile Nashik Municipal Council. At that time, he had passed B.Com. He was in continuous service as a Clerk from 01/08/1978 or similar post equivalent to the post of Clerk. As such, the Complainant was entitled to promotion on the basis of his appointment on 01/08/1978. He submitted that S/Shri B.S.Khandwe and S.R.Joshi were given deemed date of 01/08/1978. He, therefore, made requests to the authorities of the Corporation from time to time. By order dated 29/05/1993, he was given a deemed date of promotion as a Junior Clerk with effect from 01/08/1978. By order dated 07/02/1996, he was promoted as a Senior Clerk. He submitted that the Standing Committee passed resolutions on 21/02/2003 and 03/07/2003 thereby cancelling show cause notice dated 30/07/2001 issued by the Municipal Commissioner. He submitted that the resolutions dated 13/08/1992 and 17/09/1992 passed by the Standing Committee and the General Body respectively prevail over the orders dated 26/06/2002 and 23/04/2004 passed by the Municipal Commissioner and the Deputy Municipal Commissioner (Administration) respectively. That apart, the appointment of the Complainant 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 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.

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 temporarily appointed as a Tree Mukadam (Class IV) by the then Municipal Council on 06/12/1979. He was appointed on regular basis as a Tree Mukadam on 18/03/1980. He was thereafter promoted as a Junior Clerk (Class III) with effect from 01/09/1984. On 13/08/1992 and on 17/09/1992, the Standing Committee and the General Body passed resolutions giving deemed date to the Complainant as a Junior Clerk with effect from 06/12/1979. On that basis, the Municipal Commissioner passed order on 06/11/1992. By subsequent order dated 05/03/1993, the Municipal Commissioner gave deemed date to the Complainant as a Junior Clerk with effect from 01/08/1978. The moot question is whether the Complainant can be given deemed dates of appointment as a Junior Clerk with effect from 06/12/1979 and 01/08/1978. Mr. Patil submitted that the resolutions passed by the Standing Committee and the General Body 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 deemed dates either effect from 06/12/1979 or 01/08/1978. In other words, without actually working between 01/08/1978 / 06/12/1979 and 01/09/1984, the Complainant was given deemed dates 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. 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. 78 of 2004 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.)

ingale