

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7146 OF 2007

The Commissioner
Nashik Municipal Corporation

.. Petitioner

Vs.

Ashok Anaji Walwe ... Since deceased
1(a). Smt.Suman Ashok Walve and others

.. Respondents

Mr.M.L.Patil, Advocate for Petitioner.

Mr. Himanshu Kode, Advocate for Respondents No. 1 (a) & 1(b).

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 respondents No. 1 (a) & 1(b) 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. 22 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 appointed as an Octroi Clerk by the then Satpur Municipal Council for a period of 5 ½ months or till selection of the candidate by the Selection Board. The services of the Complainant were terminated by Satpur Municipal Council on 10/07/1982. On 07/11/1982, the Corporation was constituted upon amalgamation of erstwhile (i) Nashik Municipal Council (ii) Nashik Road Devlali Municipal Council (iii) Satpur Municipal Council and some villages. The Complainant had earlier instituted Complaint (ULP) No. 10 of 1985 before the Industrial Court. In the said complaint, there was compromise between the Corporation and the Complainant whereunder he was appointed afresh as a Junior Clerk with effect from 03/02/1986. On 13/08/1992, the Standing Committee and on 17/09/1992, the General Body of the Corporation passed resolutions giving deemed date to the Complainant as a Junior Clerk with effect from

01/10/1981. On that basis, the Complainant was subsequently given deemed date of the post of a Senior Clerk with effect from 29/09/1989 and as a Assistant Superintendent with effect from 07/02/1996 by order dated 01/08/1996. On 24/01/2001, the Chief Auditor submitted a report wherein objection to the action of the Corporation giving deemed date to the Complainant as a Junior Clerk with effect from 01/10/1981 was raised. After receiving report of the Auditor, the Municipal Commissioner issued a show cause notice on 27/07/2001 to the Complainant. The Complainant gave reply on 03/08/2001. The Municipal Commissioner thereafter passed order on 26/06/2002 cancelling the deemed date given to the Complainant as a Junior Clerk and restoring date of appointment as a Junior Clerk with effect from 03/02/1986 and accordingly, directed to fix pay scale and recover excess salary paid.

4. The Complainant thereafter instituted Complaint (ULP) No. 22 of 2004 challenging the order dated 26/06/2002 as also alleging commission of 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.

5. In support of this petition, Mr.Patil strenuously contended that basically, the resolutions passed by the Standing Committee and General Body on 13/08/1992 & 17/09/1992 respectively and on that basis, giving deemed date of promotion to the Complainant as a Junior Clerk with effect from 01/10/1981 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.

6. On the other hand, Mr.Kode reiterated the submissions that were advanced before the Tribunal. He invited my attention to affidavit made by Ms.Suman Ashok Walwe – widow of the

Complainant and submitted that the resolutions passed by the Standing Committee and the General Body prevail over the order dated 26/06/2002 passed by the Municipal Commissioner. This amounts to commission of unfair labour practices under Item 9 of Schedule IV of the Act. He submitted that appointment of the Complainant with the Corporation is itself 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.

7. 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 as a Junior Clerk with effect from 03/02/1986. The Standing Committee passed resolution on 13/08/1992 and the General Body passed resolution on 17/09/1992 giving deemed date of appointment to the Complainant as a Junior Clerk with effect from

01/10/1981. The moot question is whether the Complainant can be given a deemed date of appointment as a Junior Clerk with effect from 10/01/1981. Mr.Patil submitted that by passing resolutions by the Standing Committee and 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 date with effect from 10/01/1981 particularly when he was appointed as a Junior Clerk afresh with effect from 03/02/1986. In other words, without actually working between 01/10/1981 and 03/02/1986, the Complainant was given deemed date of appointment as a Junior Clerk with effect from 01/10/1981 as also benefits flowing therefrom.

8. 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.

9. 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.

10. 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. 22 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.)

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