IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7140 OF 2007
WITH
CIVIL APPLICATION NO.161 OF 2015

The Commissioner
Nashik Municipal Corporation .. Petitioner
Vs.
Laxman Ramchandra Thormise and another .. Respondents

Mr.M.L.Patil, Advocate for Petitioner.
Ms Seema Sarnaik, 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 Ms Seema Sarnaik, 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. 18 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 that on 18/09/1967 was appointed as a Junior Clerk (Octroi Clerk) by the then Nashik Road Devlali Municipal Council in the pay-scale of 115-215. In October 1975, he passed Local Self Government Diploma (L.S.G.D.) examination. On 30/08/1976, he was transferred as Accounts Clerk in the pay scale of 260-495 (as per Bhole Commission). On 16/10/1981, he was promoted as Assistant Accountant in the pay scale of 335-680. As per the letter dated 15/10/1980 of the Collector, the educational qualification for appointment to the post of Assistant Accountant was S.S.C., L.S.G.D. and **6 years experience in the Accounts Department**. As the Complainant was working in the Accounts Department from 30/08/1976, he did not qualify for that post, and therefore, he could not have been promoted. In the audit of Council conducted for

1980, 1981 and 1982, an objection to that effect was raised. The Government did not give any relaxation while promoting the Complainant to the post of Assistant Accountant. It is the case of the Corporation that in the seniority list of the Accountants and Auditors dated 07/11/1982, the day on which the Municipal Corporation of City of Nashik was constituted, there were 4 employees in the pay-scale of 335-680. The Complainant was the junior most. The Complainant was absorbed as Deputy Accountant in the scale of 395-800 as per the Resolution No.10 dated 28/04/1988 and establishment order dated 04/05/1988. The reason given was that the work and responsibilities of Deputy Accountant working in the erstwhile Nashik Municipal Council and the Assistant Accountant working in Nashik Road Devlali Municipal Council were same and hence the Complainant was being absorbed in the pay-scale of 395-800 with effect from 01/03/1984. While passing the Resolution, the fact that there were office objections to the promotion of the Complainant and that he was not qualified for promotion as Assistant Accountant was ignored. Qualification for the post of Deputy Accountant in the erstwhile Municipal Council was S.S.C. passed and 10 years experience in the Accounts Department. After constitution of the Corporation, the qualification for the post of Deputy Accountant is Commerce Graduate, L.S.G.D. and 5 years experience in the Accounts Department. In the seniority list, there were 3 employees senior to the Complainant and they were all Commerce Graduates. Considering the seniority, qualification and experience in the scale of 335-680, the said 3 employees were senior to the Complainant and were qualified for promotion in the scale of 395-800. However, those seniors remained in the scale of 335-680.

4. It is the case of the Corporation that on 03/06/1996, the Complainant was given a deemed date of promotion as Superintendent with effect from 30/11/1990 which was the date of promotion of S/Sh. U. G. Gadekar and B. G. Devare. All the three were in the erstwhile Nashik Road Devlali Municipal Council and S/Sh. Gadekar and Devare were senior to the Complainant. Mr. Gadekar was appointed as a Junior Clerk on 01/02/1963. He was promoted as a Senior Clerk / Octroi Inspector on 11/05/1972. Mr. Devare was appointed on 20/03/1965 as a Compounder, which post is equivalent to the post of Junior Clerk. On 20/03/1969, he was transferred as a Junior Clerk and was promoted as a Senior Clerk / Octroi Inspector on 10/07/1974. Though the Complainant was promoted as Deputy Accountant on 16/10/1981, he was not qualified and was also junior to S/Sh. Gadekar and Devare. The Complainant got scale of 395-800 with effect from 01/03/1984 as Deputy Accountant and though S/Sh. Gadekar and Devare were senior to him, they were placed in the scale of 365-760. On

30/11/1990, at the time of promotion to the post of Superintendent, the Complainant was in the scale of 395-800 to which he was not entitled and qualified. It is the case of the Corporation that on 14/12/1991, a circular inviting options from the employees who wished to be transferred to audit department was issued. The Complainant gave option to be transferred to the Audit Department stating that his services in the Audit Department be taken with effect from 01/03/1984. Thus, the Complainant could not be given deemed date of 30/11/1990 in the post of Superintendent which is the date of promotion of S/Sh. Gadekar and Devare.

5. On 24/01/2001, the Chief Auditor submitted a report to the Municipal Commissioner setting out therein that the promotion of the Complainant as a Deputy Accountant was under objection, the deemed date as Superintendent was illegal and that on the deemed date, no post of Superintendent was available. In view thereof, the Municipal Commissioner issued a show cause notice on 27/07/2001 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 13/08/2001. After taking into consideration all the circumstances, the Municipal Commissioner issued order on 26/06/2002 and cancelled the deemed date of promotion of

30/11/1990 for the post of Superintendent as well as converted the same to the post of Senior Auditor / Accountant.

6. The Complainant instituted Complaint (ULP) No. 18 of 2004 before the Tribunal challenging the order dated 26/06/2002 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.

7. In support of this petition, Mr.Patil submitted that the order of the Municipal Commissioner dated 26/06/2002 is legal and valid. Municipal Commissioner was justified in cancelling the deemed date of 30/11/1990 for the post of Superintendent as well as converting the same to the post of Senior Auditor / Accountant. He submitted that the post of Superintendent was not even available when the deemed date of 30/11/1990 was given to the Complainant. Having regard to the seniority, qualifications as also experience, the Complainant could not have been given deemed date of promotion as Superintendent with effect from 30/11/1990. The order dated

03/06/1996 by which the Complainant was given deemed date of the post of Superintendent with effect from 30/11/1990 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, Ms Sarnaik reiterated the submissions that were advanced before the Tribunal. She submitted that the Complainant was appointed as Octroi Clerk on 18/07/1967 by the then Nashik Road Deolali Municipal Council. On 27/08/1976, he was promoted as Accounts Clerk. On 16/10/1981, he was promoted as Deputy Accountant. She submitted that the posts / grades as well

as pay-scales were taken into consideration and the Complainant was given pay-scale of 395-800 as Deputy Accountant with effect from 01/03/1984. Having worked as Deputy Accountant in the scale of 395-800, he was promoted to the post of Superintendent / Senior Accountant in the pay-scale of 500-900. As Mr. Devare who was working in pay-scale of 365-780 as Inspector was promoted on 30/11/1990, being superseded and aggrieved, the Complainant filed various complaints. By order dated 03/06/1996, the Corporation gave as a deemed date of promotion of 30/11/1990 of Superintendent in the revised scale of 2000-3200. As the pay-scale of Superintendent and Senior Accountant was same, he was transferred as Senior Accountant with effect from 06/11/1991 as the post of Senior Accountant was vacant. It was further directed to fix seniority and pay fixation with effect from 30/11/1990 being the deemed date. The Complainant was however denied difference in wages from 30/11/1990 to 03/06/1996.

9. Ms Sarnaik further submitted that by order dated 10/09/2001, the Complainant was appointed as Deputy Chief Accountant with effect from 03/09/2001 for a period of 6 months. The Complainant was required to carry on duties of Senior Accountant as well as Deputy Chief Accountant and for that, he was to be given allowances for additional work. By various orders, the Complainant was

continued as Deputy Chief Accountant for 6 months period from time to time till 31/12/2003 (till he retired). She further submitted that the Complainant was working in the pay-scale of Rs.2000-3200 and as per the 5th Pay Commission, Rs.6500-10500. The Complainant was entitled to be fixed in pay-scale of Rs. 9700/- from 30/11/2003 as detailed in paragraph 3 of the Complaint. He was entitled to receive superannuation benefits on 31/12/2003 accordingly. However, instead of giving him that benefit, by order dated 26/06/2002, the Commissioner cancelled the deemed date of superannuation of 30/11/1990 and further ordered the recovery of wages. She submitted that during the pendency of the Complaint, General Body passed Resolution No.615 on 03/01/2004. The General Body gave approval for the promotion of the Complainant to the post of the Deputy Chief Accountant with effect from 03/09/2001. The Standing Committee vide Resolution No.740 passed on 27/10/2005 reiterated the Resolution of the General Body dated 03/01/2004. In view of the subsequent resolutions, the authorities of the Corporation cannot act upon the order dated 26/06/2002 passed by the Municipal Commissioner. She submitted that the Tribunal rightly allowed the Complaint and no case is made out for invocation of powers under Article 226 of the Constitution of India.

10. 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 appointed as a Junior Clerk by the then Nashik Road Devlali Municipal Council on 18/09/1967. On 30/08/1976, he was transferred as Accounts Clerk in the scale of 260-495. On 16/10/1981, he was promoted as Assistant Accountant and was given scale of 335-680. It is evident from record that by letter dated 15/10/1980, the Collector had prescribed qualifications for the post of the Assistant Accountant namely, S.S.C., L.S.G.D. and 6 years experience in the Accounts Department. The Complainant admittedly possesses qualification of S.S.C. and L.S.G.D. However, he did not possess 6 years experience in the Accounts Department. The Complainant was absorbed as Deputy Accountant as per Resolution No.10 dated 28/04/1988 and establishment order dated 04/05/1988 in the scale of 395-800. After constitution of the Corporation, the qualification for the post of Deputy Accountant is Commerce Graduate, L.S.G.D. and 5 years experience in the Accounts Department. The Complainant did not possess the qualification of Commerce Graduate. That apart, even in the seniority list, there were 3 employees senior to the Complainant and all were Commerce graduates. In fact, they were qualified for promotion in the scale of 395-800. However, they remained in the scale of 335-680. On 03/06/1996, the Complainant was given a

deemed date for the post of Superintendent with effect from 30/11/1990 which was the date of promotion of S/Sh. Gadekar and Devare. The moot question is whether the Complainant is entitled to a deemed date for promotion to the post of Superintendent with effect from 30/11/1990. By order dated 26/06/2002, the Municipal Commissioner set aside the deemed date of 30/11/1990. Mr. Patil submitted that the order dated 03/06/1996 amounted to creation of an imaginary post and making appointment of a Complainant in that post with retrospective effect.

11. Perusal of the record indicates that on 03/06/1996, the Complainant was given a deemed date of promotion as a Superintendent with effect from 30/11/1990. On that date, S/Sh. U. G. Gadekar and B. G. Devare were promoted. It is evident that S/Sh. Gadekar and Devare were senior to the Complainant. Mr. Gadekar was appointed as a Junior Clerk on 01/02/1963. He was promoted as a Senior Clerk / Octroi Inspector on 11/05/1972. Mr. Devare was appointed on 20/03/1965 as a Compounder which post is equivalent to the post of Junior Clerk. On 20/03/1969, he was transferred as a Junior Clerk and was promoted as a Senior Clerk / Octroi Inspector on 10/07/1974. Though the Complainant was promoted as a Deputy Accountant on 16/10/1981, he was not qualified and also junior to S/Sh. Gadekar and Devare. From the material on record, it

is further evident that the Complainant did not work as a Superintendent from 30/11/1990. In other words, without actually working on the post of Superintendent from 30/11/1990, by order dated 03/06/1996, the Complainant was given deemed date of promotion as a Superintendent with effect from 30/11/1990. I find merits in the submission of Mr. Patil. In my opinion, the complainant could not have been given deemed date of promotion as a Superintendent with effect from 30/11/1990.

12. 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:
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>> "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.

13. 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.

14. In the light of the aforesaid discussion, petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (b) of the petition and the Complaint (ULP) No. 18 of 2004 instituted by the

Complainant stands dismissed. In the circumstances of the case, however, there shall be no order as to costs.

15. In view of the disposal of the Petition, nothing survives in Civil Application No.161 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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