IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.256 OF 2013

Yashwant Sahakari Bank Ltd, Petitioner
Miraj.

Vs

Shri Hamid Hajratasheb Mutvalli .. Respondent

Mr. Manoj A. Patil, Advocate for Petitioner.
Ms. Susan Abraham, Advocate for Respondent.

CORAM : R.G.KETKAR,J.
RESERVED ON : 11/03/2015
PRONOUNCED ON : 19/03/2015

PC:

1. Heard Mr. Manoj Patil, learned counsel for the petitioner and Ms. Susan Abraham, learned counsel for the respondent at length.

2. Rule. Ms. Abraham waives service for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 24.9.2012 passed by the learned Member, Industrial Court, Maharashtra, Sangli (for short, “Tribunal”) in Complaint (ULP) No.56 of 2011. By that order, the Tribunal allowed the complaint instituted by the respondent, hereinafter referred to as “complainant', under section 28 read with Items 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and

Prevention of Unfair Labour Practices Act, 1971 (for short, "Act"). The parties shall, hereinafter, be referred to as per their status before the Tribunal. The relevant and material facts, giving rise to filing of the present petition, briefly stated, are as follows.

4. The complainant was appointed as a Clerk on 21.7.1972 by the respondent-Bank. He was promoted as Accountant in the year 1988. On 22.7.2009, the licence of the respondent-Bank was cancelled. On 29.7.2009, Board of Liquidators was appointed on the Bank. On 18.8.2009, charge was taken. On 30.11.2009 the complainant, while working as I/C Chief Executive Officer, recommended to the Board of Liquidators to pay legal dues of the employees in view of the Bank going under liquidation. However, as per the instructions of the Board of Liquidators, the employees will have to be paid three months wages for every year as and by way of compensation having regard to number of years of service put in by the concerned employee as also his remaining period of service, whichever is less. The recommendations were accepted. On 1.12.2009, the Bank obtained approval to the policy decision taken by the Board of Liquidators for payment of compensation from Commissioner of Co-operation. The services of the complainant were terminated by order dated 12.4.2010 with effect from 15.5.2010. The complainant was paid Rs.36,054/- having regard to his monthly salary of Rs.12,618/- (including HRA of Rs.600/-).

5. On 16.7.2010, the complainant caused to issue notice through Advocate calling upon the Bank to pay his dues of Rs.6,62,822/-. This was replied by the Bank on 26.7.2010. The complaint under section 28 read with Items 9 and 10 of the Act was instituted on 12.9.2011 after obtaining permission on 3.8.2011 under section 107 of the Maharashtra Cooperative Societies Act, 1960 alleging commission of unfair labour practices by the Bank under Items 9 and 10 of Schedule IV of the Act as also direction to pay Rs.2,53,864/- to the complainant.

6. The Bank resisted the complaint by filing reply dated 30.1.2012, inter alia, contending that the complainant is not an employee within the meaning of Section 3(13) of the Maharashtra Industrial Relations Act. It was further contended that on the basis of recommendations made by the complainant himself, the amount of compensation of three months for every completed year was paid. The complainant is estopped from claiming any amount from the Bank.

7. On the basis of the pleadings of the parties, the Tribunal framed the necessary Issues. The parties led evidence. After considering the evidence on record, the Tribunal allowed the complaint, as indicated earlier. It is against that order, the Bank has instituted the present petition.

8. In support of this petition, Mr Patil reiterated the submissions that were advanced before the Tribunal. He

submitted that the complainant is not an “employee” as defined in section 3(13) of the Maharashtra Industrial Relations Act. In any case, the complainant himself had recommended on 30.11.2009 and fixed the amount of compensation. The said recommendations were accepted by the Board of Liquidators and, in fact, necessary approval of the Commissioner of Cooperation was taken on 1.12.2009. The services of the complainant were terminated by order dated 12.4.2010 with effect from 15.5.2010. The complainant accepted the said amount without any protest. The complainant is, therefore, estopped from raising any dispute as also from raising any claim against the Bank. The complainant had waived his right. In support of his submissions, he relied upon the following decisions:-

(i) Krishna Bahadur Vs. M/s Purna Theatre, 2004 (5) ALL MR 1088 (SC);

(ii) Shehammal Vs. Hasan Khani Rawther, AIR 2011 SC 3609;

(iii) Adivasi Vikas eklavya Amrut Sanjivani Samajik Sanstha Vs.State of Maharashtra, 2008 (1) ALL MR 91

(iv) H.N.Baswaraj (dead) by L.Rs & Anr. Vs. Canara Bank , 2010 (XII) SCC 458

(v) Om Prakash Vs. Maharashtra State Electricity Board, 2012 (2) ALL MR 472.

9. Lastly, Mr. Patil submitted that the Tribunal relied upon the calculations made by the complainant towards compensation. He submitted that the Tribunal did not independently fix the amount of compensation and merely accepted ipse dixit of the complaint.

10. On the other hand, Ms. Abraham supported the impugned order. She submitted that the claim raised by the complainant is a claim based on the legal effect of Section 25-F of the Industrial Disputes Act, 1947 (for short, "Act"). It is settled position in law that there can be no estoppel against the law. In support of this proposition, she relied upon the decision of the Apex Court in the case of M/s Elson Machines Pvt Ltd Vs. Collector of Central Excise, AIR 1989 SC 617. She further submitted that for the purpose of computation of "15 days wages" by a monthly rated employee under sub-section (2) of Section 4, the monthly wages last drawn by him should be treated as wages for 26 working days and his daily rate of wages should be ascertained on that basis and not by taking the wages for a month of 30 days. In support of this submission, she relied upon the following decisions:

(i) Trade-Wings Limited, I CLR 480;
(ii) DBH International Ltd Vs. Their Workmen, 2005 (4) Bom.C.R.732.

She further submitted that the complainant was getting basic salary of Rs.6000-6500. He was drawing salary for more than

Rs.6500/-. He was 'employee' within the meaning of Section 3(13) of the Maharashtra Industrial Relations Act.

11. I have considered the rival submission made by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the complainant joined the services of the Bank on 21.7.1972 as a clerk. In 1988, he was promoted as Accountant. It is also evident from the record that the licence of the Bank was cancelled on 22.7.2009. On 29.7.2009, Board of Liquidators was appointed and the charge of the Bank was taken on 18.8.2009. On 30.11.2009, the complainant, at the relevant time working as In-charge Chief Executive Officer, recommended to the Board of Liquidators to pay legal dues of the employees. However, as per the instructions of the Board of Liquidators, the employees will have to be paid three months wages for every year as and by way of compensation having regard to number of years of service put in by the concerned employee as also his remaining period of service, whichever is less, among other benefits. Perusal of that recommendations shows that in paragraph 1, it was set out that the employees will have to be paid compensation as per the provisions of the Act as of 23.7.2009 when the Bank was placed under liquidation. It is also evident that the recommendations made by the complainant were accepted by the Board of Liquidators. On 1.12.2009, approval to that policy decision was

taken by the Board of Liquidators from Commissioner of Co-operation. By order dated 12.4.2010, the services of the complainant were terminated with effect from 15.5.2010 and he was paid three months salary of Rs.36,054/- (Rs.12018/- x 3) as and by way of compensation.

12. Mr. Patil submitted that the complainant accepted that amount without any protest. He submitted that the complainant is, therefore, estopped from raising claim against the Bank. It also amounts to waiver on his part. In support of this submission, he relied upon the decision of Krishna Bahadur (supra). In that case, the appellant was appointed in the post of Messenger-cum-Bearer in the establishment of the respondent on 31.3.1978. He was subsequently confirmed on the said post. A disciplinary proceeding was initiated against him, wherein he was found guilty. He was dismissed from services. The order of dismissal was the subject matter of an industrial dispute. The Tribunal set aside the order of dismissal and ordered reinstatement with full back wages. The appellant was permitted to join duties on 1.5.1991. He was, however, not paid back wages. He was retrenched from services within one month from his joining, ie. 30.5.1991. He was paid Rs.9030/- as retrenchment compensation which the appellant was said to have received under protest. An Industrial dispute as regards his retrenchment on the ground of payment of insufficient amount of compensation in terms of

Section 25-F(b) was raised before the Assistant Labour Commissioner. The conciliation proceedings failed, whereupon the Tribunal was approached by the appellant. In the meantime, the appellant had also initiated a proceeding under Section 33-C(2) of the Act which ended in an amicable settlement in terms whereof the appellant allegedly agreed to receive a sum of Rs.39,000/- as full and final settlement. He had accepted a cheque for Rs.9030/- issued by the management allegedly as part payment of his compensation of Rs. 39,000/-. By order dated 28.12.1995 the Tribunal held that the retrenchment was illegal and he was deemed to be in continuous service with all benefits. The petition instituted by the respondent before the High Court was dismissed by the learned Single Judge on 25.9.1996.

13. The respondent preferred Appeal before the Division Bench of Calcutta High Court. Before the learned Single Judge on behalf of the respondent, the plea of waiver on the part of the appellant was not raised. The Apex Court considered the distinction between principle of estoppel and principle of waiver. In paragraphs 8 to 12, it was observed thus:

> "8. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.
>
> 9. A right can be waived by the party for whose benefit

certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

10. In Bank of India and Others etc. v. O.P. Swarnakar and Ors. Etc._ (2003) I LLJ 819 SC , it was noticed :

"115.The Scheme is contractual in nature. The contractual right derived by the employees concerned, therefore, could be waived. The employees concerned having accepted a part of the benefit could not be permitted to approbate and reprobate nor can they be permitted to resile from their earlier stand."

11. It is neither in doubt nor in dispute that the provision of Section 25F(b) is imperative in character. The provision postulates the fulfillment of the following three conditions :

(i) One month's notice in writing indicating the reasons for retrenchment or wages in lieu of such notice;

(ii) Payment of compensation equivalent to fifteen days, average pay for every completed year of continuous service or any part thereof in excess of six months; and

(iii) Notice to the appropriate Government in the prescribed manner.

12. The requirement to comply with the provision of Section 25F(b) has been held to be mandatory before retrenchment of a workman is given effect to. In the event of any contravention of the said mandatory requirement, the retrenchment would be rendered void ab initio."

14. The Tribunal held that the retrenchment of the appellant was bad for noncompliance of provisions of Section 25-F(b) of the Act as also for contravention of Rule 77A of the West Bengal Industrial Disputes Rules. The learned Single Judge negatived the said contention and dismissed the petition on 25.9.1996.

Perusal of the above extracted paragraphs shows that the plea of waiver has to be pleaded and proved. In the present case, the Bank did not set up plea of waiver and contended that by accepting the amount of compensation of Rs.36,000/- without any protest, the complainant is estopped from raising any claim and/or dispute against the Bank. Mr. Patil submitted that the Bank has specifically raised plea of estoppel as also the conduct of the complainant in accepting the amount of Rs.36,054/- without any protest clearly shows that the complainant is estopped from raising any dispute/claim against the Bank.

15. Mr. Patil also relied upon the decision of the Apex Court in the case of Shehammal (supra). In that case, the parties were governed by Mohammedan law. In 1986 Meeralaya Rawther died leaving behind him surviving three sons and three daughters, as his legal heirs. At the time of his death he possessed 1.70 acres of land in Survey No.133/1B of Thodupuzha village which he had acquired on the basis of a partition effected in the family of deceased Meeralava Rawther in 1953. Meeralavaa Rawther and his family members being Mohammedans, they are entitled to succeed to the estate of the deceased in specific shares as tenants in common. Since Meeralava Rawther had three sons and three daughters, the sons were entitled to a 2/9th share in the estate of the deceased, while the daughters were each entitled to a 1/9th share thereof in the

estate of the deceased. It was a specific case of the parties that Meeralava Rawther helped all his children to settle down in life. The youngest son, Hassan Khani Rawther, respondent no.12, was a Government employee and was staying with him even after his marriage, while all the other children moved out from the family house, either at the time of marriage, or soon, thereafter.

16. Respondent no.1 came out with the case that when each of his children left the family house, Merralava Rawther used to get them to execute Deeds of Relinquishment, whereby, on the receipt of some consideration, each of them relinquished their respective claim to the properties belonging to Meeralaya Rawther. Respondent no.1, Hassan Khani Rawther, was the only one of Meeralava Rawther's legal heirs who was not required by his father to execute such a deed. In paragraph 15, the Apex Court reproduced three questions that were required to be decided:

> (i) Whether in view of the doctrine of spes successionis, as embodied in Section 6 of the Transfer of Property Act, 1882, and in paragraph 54 of Mulla's "Principles of Mahomedan Law", a Deed of Relinquishment executed by an expectant heir could operate as stopple to a claim that may be set up by the Executor of such Deed after inheritance opens on the death of the owner of the property?
>
> (ii) Whether on execution of a Deed of Relinquishment after having received remuneration for such future share, the expectant heir could be stopped from claiming a share in the inheritance?
>
> (iii) Can a Mohammedan by means of a Family

> Settlement relinquish his right of spes successionis when he had still not acquired a right in the property?

17. The Apex Court considered Section 6 of the Transfer of Property Act, 1882 as also paragraph 54 of Mulla's Principles of Mohammedan Law and Section 15 of the Indian Evidence Act, 1872. In paragraphs 19 and 21 it was observed thus :

> "19. The Mohammedan Law enjoins in clear and unequivocal terms that a chance of a Mohammedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release. Section 6(a) of the Transfer of Property Act was enacted in deference to the customary law and law of inheritance prevailing among Mohammedans.
>
> 20. As opposed to the above, are the general principles of stopple as contained in Section 115 of the Evidence Act and the doctrine of relinquishment in respect of a future share in property. Both the said principles contemplated a situation where an expectant heir conducts himself and/or performs certain acts which makes the two aforesaid principles applicable inspite of the clear concept of relinquishment as far as Mohammedan Law is concerned, as incorporated in Section 54 of Mulla's "Principles of Mahomedan Law". Great reliance has been placed by both the parties on the decision in Gulam Abbas's case (supra). While dealing with a similar situation, this Court watered down the concept that the chance of a Mohammedan heir apparent succeeding to an estate cannot be the subject of a valid transfer on lease and held that renunciation of an expectancy in respect of a future share in a property in a case where the concerned party himself chose to depart from the earlier views, was not only possible, but legally valid. Referring to various authorities, including Ameer Ali's "Mohammedan Law", this Court observed that "renunciation implies the yielding up of a right already vested". It was observed in the facts of that case that during the lifetime of the mother, the daughters had no right of inheritance. Citing the decision in the case of Mt. Khannum Jan v. Mt. Jan Bibi it was held that renunciation implies the yielding up of a right already vested. Accordingly, renunciation during the mother's lifetime of the daughters' shares would be null

> and void on the ground that an inchoate right is not capable of being transferred as such right was yet to crystallise. This Court also held that "under the Muslim Law an expectant heir may, nevertheless, be part of a course of conduct which may create an stopple against claiming the right at a time when the right of inheritance has accrued". It was observed by the learned Judges that the Contract Act and the Evidence Act would not strictly apply since they did not involve questions arising out of Mohammedan Law. This Court accordingly held that the renunciation of a supposed right, based upon an expectancy, could not, by any test be considered "prohibited".
>
> 21. This Court ultimately held that the binding force of the renunciation of a supposed right, would depend upon the attendant circumstances and the whole course of conduct of which it formed a part. In other words, the principle of an equitable stopple far from being opposed to any principle of Mohammedan Law, is really in complete harmony with it."

18. Perusal of paragraph 21 extracted herein above shows that the Apex Court held that "under the Muslim law, an expectant heir may, nevertheless, be part of a course of conduct which may create an estoppel against claiming the right at a time when the right of inheritance has accrued". It was ultimately held that the binding force of the renunciation of a supposed right, would depend upon the attendant circumstances and the whole course of conduct of which it formed a part.

19. Mr. Patil relied upon the decision of this Court in the case of Omprakash Puri (supra) and in particular paragraph 12 thereof, He relied upon the decision of the Apex Court in the case of H.N.Basavaraj (supra) to contend that estoppel is a substantive

rule of law and not just a rule of evidence. He also relied upon the decision of this Court in the case Adivasi Vikas Eklavya Amrut Sanjivani Samajik Sanstha (supra) and in particular paragraph 15 to contend that on the basis of promise made by the complainant in his recommendations dated 30.11.2009, the Bank acted upon it. The promise made by the complainant is, therefore, binding on him and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have been taken place between the parties.

20. I do not find that the decisions relied by Mr.Patil is of any assistance. In the case of Krishna Bahadur (supra), the Apex Court held that a right can be waived by the party for whose benefit certain requirements and conditions have been provided for by a statute subject to condition that no public interest is involved therein. It was further observed that **whenever waiver** is pleaded, it is for the party pleading the same to show that an agreement waiving the right in consideration of some promise came into being. In the present case, the respondent has neither pleaded waiver and consequently nor has proved that plea.

21. Since the plea of estoppel is concerned, in paragraph 12 the Apex Court held that the requirement to comply with the provisions of Section 25-F(b) has been held to be mandatory before retrenchment of a workmen is given effect to. In the **event of any contravention of the said mandatory**

requirement, the retrenchment would be rendered void ab initio.

(emphasis supplied)

22. In the case of Shehammal (supra), the Apex Court held that under the Muslim Law an expectant heir may, nevertheless, be part of a course of conduct which may create an estoppel against claiming the right at a time when the right of inheritance has accrued. It was ultimately held that the binding force of the renunciation of a supposed right, would depend upon the attendant circumstances and the whole course of conduct of which it formed a part. In the present case, the plea of estoppel cannot be pressed into service as neither the attendant circumstances nor the whole course of conduct supports the said plea.

23. It is material to note that on 30.11.2009 the complainant recommended to the Board of Liquidators to pay legal dues of the employees. In other words, the complainant recommended to the Board of Directors to pay legal dues of the employees. However, the Board of Liquidators instructed payment of three months wages for every year as and by way of compensation having regard to number of years of service put in by the concerned employee as also his remaining period of service, whichever is less. To put in differently, the complainant did not make that recommendation and that was the instructions given

by the Board of Liquidators. The recommendations were accepted. It is admitted that the complainant had put in 37 years service. The complainant recommended to the Board of Liquidators to pay legal dues of the employees. Obviously, this would mean payment of compensation as per Section 25-F of the Act and not three months wages for remaining one year service of the complainant, i.e. Rs.36,054/-. However, admittedly, he was paid Rs.36,054/- which represents only three months salary. In view thereof, on facts also I do not find that the respondent can invoke principles of estoppel.

24. I, therefore, do not find any merit in the submissions of Mr Patil that in view of the principle of estoppel as also principle of waiver, the complainant is precluded from raising any claim against the respondent-Bank.

25. Mr. Patil submitted that the complainant is not an employee within the meaning of Section 3(13) of the Maharashtra Industrial Relations Act. Section 3(13) reads as under :

> "3. In this Act unless there is anything repugnant in the subject or context -
>
> (13) "employee" means any person employed to do any skilled or unskilled work for hire or reward in any industry, and includes -
>
> (a) a person employed by a contractor to do any work for him in the execution of a contract with an employer within the meaning of sub-clause (e) of clause (14);
>
> (b) a person who has been dismissed, discharged or retrenched or whose services have been terminated, from employment on account of any dispute relating to change in respect of which a notice is given or an application made

> under section 42 whether before or after his dismissal, discharge, retrenchment or, as the case may be, termination from employment;
>
> but does not include -
> (i) a person employed primarily in a managerial, administrative, supervisory or technical capacity drawing basic pay (excluding allowances) exceeding six thousand five hundred rupees per month;
>
> (ii) any other person or class of persons employed in the same capacity as those specified in clause (I) above irrespective of the amount of the pay drawn by such persons which the State government may, by notification in the Official Gazette, specify in this behalf;"

26. The Tribunal has considered this aspect in paragraph 10 of the impugned order. The Tribunal recorded a finding of fact that the complainant was not drawing basic pay (excluding allowances) exceeding Rs.6500/- per month. In view thereof, I do not find any merit in the submission of Mr. Patil that the complaint is not an employee within the meaning of Section 3(13) of the Maharashtra Industrial Relations Act.

27. Mr. Patil submitted that the Tribunal relied upon the calculations made by the complainant towards compensation. He submitted that the Tribunal did not independently fixed the amount of compensation and merely accepted ipsi dixit of the complainant. As against this, Ms Abraham relied upon the decision of the Apex Court in the case of M/s Elson Machines Pvt Ltd (supra) as also the decisions of this Court in Trade-Wings Limited (supra) and DBH International Ltd (supra). She submitted that for the purpose of computation of "15 days

wages” by a monthly rated employee under sub-section (2) of Section 4, the monthly wages last drawn by him should be treated as wages for 26 working days and his daily rate of wages should be ascertained on that basis and not by taking the wages for a month of 30 days. I find merit in the submission of Ms Abraham. I, therefore, do not find any merit in the submission of Mr Patil in that regard.

28. Ms. Abraham invited my attention to notice dated 16.7.2010 issued by the complainant through his Advocate as also paragraph 4(3) of the complaint. In that notice as also in the complaint, the complainant claimed compensation of Rs.2,89,900/- on the basis that he had completed 38 years service. As per Section 25F(a), in lieu of one month's notice the workman has to be paid wages for the period of notice.

29. In the present case, it is not in dispute that the complainant has completed 37 years of service. In view thereof, the complainant is entitled to amount of retrenchment compensation as follows.

15 days average page (12618/- x 15/26 = 7280.00)

For 37 years of service 7280/- x 37	=2,69,360.00
Notice Pay	= 12,618.00
Total	=2,81,978.00

The complainant was paid Rs.36,054/-. In view thereof, the complainant is entitled to Rs.2,45,924/- (Rs.2,81,978/- - 36,054/-).

In view thereof, the order passed by the Tribunal deserves to be modified by substituting the figure of Rs.2,53,864/- by Rs.2,45,924/-. The petition partly succeeds to this extent only. Rule is partly made absolute. In the circumstances, there shall be no order as to costs.

30. At this stage, Mr. Patil orally applies for stay of this order for a period of 6 weeks from today. Ms. Abraham opposes this application. Having regard to the fact that the petitioner intends to challenge this order in higher Court, I find that the request made by Mr. Patil is reasonable. Hence, notwithstanding dismissal of the Petition, this order shall remain stayed for the period of 6 weeks from today. Order accordingly.

(R.G.KETKAR,J.)