

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 934 OF 2004

The Associated Cement Companies Ltd.,)
Having its registered office at Cement House)
Churchgate, MUMBAI-400 020.)Petitioner

V/s.

1. Ms. Nirmal Laxmikant Mhatre)
Of Mumbai, Indian Inhabitant residing at)
4, Matrusmriti, 13th Road, Khar (West))
MUMBAI-400 051.)
2. Shri. P.P. Patil)
Member, Industrial Court, Mumbai,)
Having his office at New Administrative Bldg)
Near Chetana College, Bandra (East))
MUMBAI- 400 051.)
3. A.C.C. Sports Club,)
Cement House, M.K. Road,)
Mumbai-400 020.)
4. Shri. R.N. Nadkarni)
Chairman, A.C.C. Sports Club)
Cement House, M.K.Road,)
MUMBAI- 400 020)
5. Shri. V.S. Khanolkar)
Vice-Chairman, A.C.C. Sports Club,)
Cement House, M.K. Road)
Mumbai-400 020.)
6. Shri. B.B. Arote,)
A.C.C.C. Ltd., Operations Division)
Cement House, M.K. Road,)

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WP-934-2004
WP-2672-2006
16th April, 2015

MUMBAI-400 020)

7. The Associated Cement Staff Union)
Cement House, M.K. Road)
Mumbai-400 020.)

ALONGWITH
WRIT PETITION NO. 2672 OF 2006

Nirmal Laxmikant Mhatre)
Of Mumbai, Indian Inhabitant,)
Redsiding at "Vidhi" General)
Jagannathrao Bhosle Marg,)
Mumbai-400 020)Petitioner

V/S.

The Associated Cement Companies Ltd.,)
Having its registered office at Cement House)
Churchgate, MUMBAI-400 020.)Respondents

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Mr. R.S. Pai a/w. Mr. Hemant Telkar i/by. Haresh Mehta & Co.,
Advocate for the petitioner in WP-934-2004 and for respondent in
WP-2672-2006.

Mr. P.M. Patel, Advocate for the petitioner in WP-2672-2006 and for
respondent in WP-934-2004.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

16th April, 2015.

JUDGMENT :-

1). The above two petitions, one by the employer and the other by the employee challenge the same order i.e. the order dated 13th February, 2004 passed by the Industrial Tribunal in Complaint (ULP) No. 159 of 1992 filed under Section 28 read with Items-5 and 9 of Schedule-IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act ("MRTU & PULP Act"). Writ Petition No. 934 of 2004 is by the employer and Writ Petition No. 2672 of 2006 is by the employee.

2). The facts alleged in the complaint stated in brief are as under :

. The employee joined the services of the employer in August, 1978 as a Clerk in Grade-X. After he cleared his graduation examination, he was promoted as Grade-IX Clerk w.e.f. 1st November, 1978 to work as I.O. Checker in EPD Department. From there, he was transferred to the Finance Department. He completed his post-graduation in the year 1981 and became entitled to special increment as a matter of policy. Special increment was released to him in August, 1998. The further promotional avenues available to the employee were from Grade-IX to Grade-VIII, from Grade-VIII to

Grade-VII and from Grade-VII to M.S.I. Grade i.e. Officers Grade.

3). On 21st January, 1992 the employee filed complaint alleging that the employer had engaged in unfair labour practice under Items-5 and 9 of Schedule-IV of the MRTU & PULP Act by denying promotion to him from Grade-IX to Grade-VIII in September, 1991 on completion of 12 years of service in Grade-IX. He further alleged that, the employer had favoured respondent no.6 to the higher grade. According to the employer, since he was recruited in the category of “sportsmen” on the recommendation of the Chairman of the sportsclub of the employer, he ought to have been promoted in the sports category.

4). The employer filed its written statement denying exercise of any unfair labour practice. It pointed out that there is no settlement/agreement or award of which any breach could be alleged by the employee. Further, promotion of respondent no.6 was in accordance with the promotion policy prevailing in the Company which was of interviewing the candidates, assessing them on point rating system and promoting the candidates scoring highest points. Respondent no.6 was promoted from Grade-IX to Grade-VIII on 1st November, 1986 from Grade-VIII to Grade-VII w.e.f. 1st January, 1987 and from Grade-VII to Officers Grade w.e.f. 1st May, 1989. The

employer also contended that, promotion is a managerial function and no Court can interfere with the management's rights to promote or not to promote any person, in the absence of *mala-fides*. The employer also alleged that, the complaint filed by the employee was barred by limitation . It was the case of the employer that, he had become entitled for promotion from Grade-IX to Grade-VIII in September, 1990 on completion of 12 years in Grade-IX. Therefore, the complaint filed on 21st January, 1992 was barred by limitation provided under Section 28 of the MRTU & PULP Act.

5). The parties led evidence in support of their respective claims. The Industrial Court, on appreciation of the evidence held that, the employee has established that the employer had engaged in unfair labour practice under Items-5 and 9 of Schedule-IV of MRTU & PULP Act and that the complaint filed was within the period of limitation. It directed the employer to consider the employee for promotion from Grade-IX to Grade-VIII on 1st November, 1991 and from Grade-VIII to Grade-VII on 1st July, 2000 and pay him the consequential arrears of wages and extend the benefits accordingly.

6). The first writ petition filed by the employer is to challenge all the findings of the Industrial Court and the direction given for promoting the employee in service. In addition, the

employer also challenges the order dated 13th February, 2003 by which the employee was permitted to amend his statement of claim. The challenge to the same Award by the employee is to contend that, he ought to have been directed to be considered for promotion from Grade-VIII to Grade-VII w.e.f. November, 1991 as according to him Grade-VIII is transitional and after completion of one year service in Grade-VIII, if the work is found satisfactory, the employee is entitled to promotion to Grade-VII. Since there was no complaint at any point of time either as regards the work performed by the employee or his conduct, he became eligible for promotion to Grade-VII in the year 1991 itself.

7). As regards the challenge of the employer to the order dated 13th February, 2003 passed by the Industrial Tribunal permitting the employee to amend his statement of claim, in my considered opinion there can be no merit in the same. The cause for the amendment was the understanding arrived at between the employer and respondent no.7, the Union of the employees on 27th January, 1993 as regards the policy for promotion. The clauses relevant for the employee were clauses-4 and 5 under which after putting in 12 years of service in Grade-IX, a staff member becomes eligible for promotion to Grade-VIII on the available vacancy, unless

he is promoted earlier in regular course to fill up a vacancy. Such employee becomes eligible for next promotion to Grade-VII after he puts in a minimum service of eight years in Grade-VIII. The promotions under the Clause are subject to condition that the work and conduct of the employee is satisfactory. This was in addition to the existing practice of selection for promotion by the points rating system and conducting interviews. This arrangement is obviously upgradation in service of the employee rather than his promotion on merit. After the settlement, the employee had filed an application for amendment of his complaint to bring the settlement on record. It being a subsequent event which was relevant for the subject matter of the dispute under the complaint, there can be no infirmity in the order allowing the amendment.

8). The challenge of the employer to the impugned order is twofold. It is submitted by Mr. Pai that there is no material whatsoever on record for holding that the employer has resorted to unfair labour practice under Items-5 and 9 of Schedule-IV of MRTU & PULP Act. The other objection is to the direction to the employer to promote the employee to Grade-VIII and Grade-VII from 1st November, 1991 and 1st July, 2000 respectively and pay him consequential arrears of wages and the benefits. Mr. Pai, submits that

the learned Judge had failed to notice the evidence on record of the witnesses of the employer which clearly indicated that there was no discrimination or favouritism whatsoever exercised by the employer. The promotion of respondent no.6 and the promotion of Mr. Kapadia after the Memorandum of Understanding with the Union was done by following the regular process for promotion in accordance with the policy of the employer. At the relevant time, the employee was not in the zone of consideration for promotion considering his seniority in service.

9). The witnesses of the petitioner had deposed that, respondent no.6 was recommended for promotion because he was found to be a very diligent, dedicated and efficient worker. During his course of service, he was willing to take higher responsibility. As regards Mr. M.S. Kapadia, the evidence of the witness of the employer is that the nature of work done by him was entirely different from the nature of the work done by any other clerk in the department. The work done by Mr. Kapadia was of a confidential nature. It was also a highly responsible job as the Board of Directors were required to give him power of attorney to deal with the Consulates and other Authorities such as, Protectorate of Emigrants etc. The witness recommending Mr. Kapadia for promotion, had personally observed

and supervised his work and found him to be competent and dedicated to his job. The other witness of the employer, Head of its H.R. Department deposed about the promotion policy of the employer. He stated that the promotions were given as per the vacancies available and that neither the sports club nor the office bearers of the sports club were concerned with the promotion policy.

10). Perusal of the impugned order shows that, the same does not discuss the evidence of the employer and has based the order entirely on the settlement dated 27th January, 1993 which was arrived at after filing of the complaint. Perusal of the record shows that the evidence of the first witness of the employer Mr. N. Raghu, the Senior Manager has been accepted by the employee because there is no cross-examination whatsoever on the, reasons for recommendations and the performances by the two employees. The other witness of the employer is Vice-President of Human Resources Department. He deposed that, the policy for promotion of the employer was reflected in Exhibit-C-20. Again there is no cross-examination of the witness, on the promotion policy. As per Exhibit-C-20, all vacancies in a particular division are filled up by promotion from within the Division. The promotions are processed through the Staff Promotion Committee. A statement is prepared by the Personnel Division of all

the eligible candidates (clerical staff) based on a point rating system which has been evolved in consultation with respondent no.7. The eligible candidates are short listed for being interviewed on the basis of the points secured by them in the point rating system and number of vacancies to be filled up. The number of employees to be called for interview before the Staff Promotion Committee is in relation to the number of vacancies. Under the point rating system, candidates are given points on the basis of their educational qualifications, length of service, number of years of service in the present grade, performance, appraisal based on the last three years report and promotion potential. The witness stated that, the promotions had taken place strictly in accordance with the promotion policy and no recommendation had been received from the immediate superior officers of the employee in respect of giving him promotion. Secondly, the employee was not fit for promotion as per the promotional policy. It is his specific evidence that, neither the sports club nor office bearers of the sports club are concerned with the promotion policy. This witness was subjected to cross-examination as regards consideration of sports performance as one of the criteria for promotion. He stated in cross-examination that, sports performance was never looked into while promoting the staff of the employer.

There may be a recommendation of sportsmen from the sports club for promotion but promotions cannot be made only the basis of such recommendations. He stated that, the promotions are given as per the vacancies available. If any employee working for 12 years in a particular Grade, upto Grade-IX and 8 years from Grade-VIII onwards and if his performance and conduct are satisfactory, he can be considered for promotion. The employee has not brought in any evidence to establish that, sports performance is one of the criteria for promotion or any promotions have taken place solely on the basis of recommendations of office bearers of the sports club.

11). The Tribunal at paras-13 and 14 has discussed the contents of Exhibit-C-20 and the minutes of understanding between the employer and union dated 27th January, 1993 and has observed that, even as per Clause-4 of Exhibit-C-20, the employee should have been considered for promotion after 12 years i.e. after 1990 and therefore there was substance in the grievance of employee that the employer has deliberately not considered him for promotion from Grade-VIII to Grade VII in the year 2000. It further records that the relief of promotion sought by the employee is on two grounds. Firstly on the basis of recommendations of sports club committee being a sportsman and representing the employer in the sport of cricket every

time and secondly as per Exhibit-C-20 i.e. time bound promotion. Considering, the evidence of the witnesses of the employer who are seen to be reliable witnesses, the Tribunal could not have considered the claim of the employee for promotion based on his sports performance. As regards promotion as per the policy reflected in Exhibit-C-20, the learned Judge lost sight of the requirement thereunder of a recommendation as regards the performance in work and the conduct, in addition to completion of the mandatory years of service at the particular post.

12). Mr. Pai, the learned Advocate for the employer submits that, promotion from one category to the higher category can be done only as and when vacancies are available and such function is clearly a managerial function which cannot be discharged by the Labour Court. In this connection, he relies upon decision of the Apex Court between **U.P. State Sugar & Cane Development Corporation Ltd And Chini Mill Mazdoor Sangh and Others, reported in 2009-I LLJ-595 (S.C.)** wherein the Apex Court has considered the power of the labour Tribunals and the management to grant promotions. The Apex Court has quoted with approval its observations in a Constitution Bench in **Management of Brooke Bond India (P) Limited v. Workmen reported in 1966-I-LLJ 402 (SC)**, wherein while considering the power of the Labour Tribunals and the management to grant

promotions, it was observed :

“Generally speaking, promotion is a management function; but it may be recognized that there may be occasions when a Tribunal may have to interfere with promotions made by the management where it is felt that persons superseded have been so superseded on account of *mala fides* or victimization. Even so after a finding of *malafides* or victimization, it is not the function of a Tribunal to consider the merits of various employees itself and then decide whom to promote or whom not to promote. If any Industrial Tribunal finds that promotions have been made, which are unjustified on the ground of *malafides* or of victimization, the proper course for it to take is, to set aside the promotions and ask the management to consider the cases of superseded employees and decide for itself whom to promote, except of course the person whose promotion has been set aside by the Tribunal.”

. In view of the above decision, Mr. Pai submits that unless the Tribunal arrived at a clear finding of *malafides* on the part of the employer or of victimization of the employee, it could not have considered the claim of the employee to promotion.

13). Perusal of para-15 of the impugned judgment shows that, the Tribunal has merely considered the fact of requisite number of years of service by the employee and the fact of promotion of respondent no.6 and Mr. Kapadia to find that the employer has considered some of the employees for promotion from time to time but the case of the employee was not considered in correct perspective for promotion at the relevant time. The tribunal does not elaborate

upon the perspective to be adopted by the employer for promotion. It has held that, the respondent has engaged in unfair labour practice under Item-5 of Schedule-IV of MRTU & PULP Act. As regards Item-9 of Schedule IV of MRTU & PULP Act, according to it the employer has committed breach of Exhibit-C-20 in not considering the employee for promotion. This finding of the Tribunal, is perverse in as much as, it is contrary to the evidence led by the employer which evidence is not even considered by the Tribunal.

14). Mr. Pai, relying upon the decisions of the Apex Court between **Ceat Ltd And Anand Abasaheb Hawaldar and Others, reported in 2006-I-MLJ-1096 (SC)** submits that for establishing the act of favouritism or partiality by the employer, the mental element of bias must be established by cogent evidence. In the absence of establishment of the fact of bias, it cannot be said that there is unfair labour practice resorted to by the employer. It is his argument that not every kind of differential treatment can be taken to vitiate the act. It must be shown to be not founded on reason. The observations of the Apex Court, relied upon by Mr. Pai from paras-11 to 14 reads as follows :-

“11. In Item 5 of Schedule IV to the Act, the Legislature has consciously used the words ‘favouritism or partiality to one set of workers’ and not differential treatment. Thus, the mental element of bias was necessary to be established by

cogent evidence. No evidence in that regard was led. On the contrary, the approach of the Industrial Court and the High Court was different. One proceeded on the basis of breach of assurance and the other on the ground of discrimination. There was no evidence brought on as regards the pre-requisite i.e. favouritism or partiality. Favouritism means showing favour in the matter of selection on circumstances other than merit (per ADVANCED LAW LEXICON BY P. RAMANATHA AIYAR, 3rd Edition, 2005).

The expression 'favouritism' means partiality, bias. Partiality means inclination to favour a particular person or thing. Similarly, it has been sometimes equated with capricious, not guided by steady judgment, intent or purpose. Favouritism as per the WEBSTERS' ENCYCLOPAEDIC UNABRIDGED DICTIONARY means the favouring of one person or group over others having equal claims. Partiality is the state or character being a partial, favourable bias or prejudice.

12. According to OXFORD ENGLISH DICTIONARY "favouritism" means a disposition to show, or the practice of showing favour or partiality to an individual or class, to the neglect of others having equal or superior claims; under preference. Similarly, "partiality" means the quality or character of being partial, unequal state of judgment and favour of one above the other, without just reason. Prejudicial or undue favouring of one person or party or one side of a question; prejudice, unfairness, bias.

13. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially.

"If however, 'bias' and 'partiality' be defined to mean the total absence of pre-conceptions in the mind of the Judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with pre-dispositions and the processes of education, formal and informal, create attitudes

which precede reasoning in particular instances and which, therefore, by definition, are prejudices.”(per FRANK, J. in Linahan, Re., (1943) 138 F 2d 650, 652).”

14. It is not every kind of differential treatment which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest – whether pecuniary or personal.”

15). In the case on hand, there is no evidence whatsoever of mental element of bias on the part of the employer in the matter of promotion. Instead, the evidence shows that the employer has strictly followed its policy of promotion under Exhibit-C-20 and had promoted respondent no.6 and Mr. Kapadia. Their promotion was based on merit and not on account of any differential treatment. Hence, there was no unfair labour practice adopted by the employer under Item-5 of Schedule 4 of the MRTU & PULP Act.

16). Mr. Pai, next relies upon decision of Single Judge of our Court in **Balmer Lawrie & Co. Ltd. V/s. S.M. Limaye & another reported in 1992 LAB IC page 205**, in support of his argument on unfair labour practice under Item-9 of Schedule-IV of MRTU & PULP Act. Our High Court has held that, every case of non-implementation of settlement irrespective of facts and circumstances or reason must not necessarily be treated as failure so as to characterize it as unfair labour practice. Mr. Patel, for the employee

on the other hand, relies upon decision of Division Bench of this Court in **Kamani Tubes Limited And Kamani Employees Union and Ors. reported in 1995 III L.L.J. (supplement) page 345** by which the Division Bench has held that :-

“Item-9 makes the employers “failure to implement Award, settlement or agreement” an unfair labour practice. When an employer does not implement an award, settlement or agreement he fails to implement the award, settlement or agreement. There is then a failure on the part of the employer to implement an award, settlement or agreement and he is guilty of the unfair labour practice set out in Item-9. The phraseology of Item-9 affords no scope for the taking into account of motive or reason or cause for the failure. To read Item 9 in any manner other than as set out above would be to do violence to its language. To read Item 9 as suggesting that there would be no failure if there was inability to implement would be to read into it the words “without good cause”, and that would be impermissible. The Industrial Court was, therefore, justified in reading Item-9 in this manner.”

. It is the argument of Mr. Patel that, the decision of Division Bench, would be binding on this Court. He also points out that, the decision of the Division Bench was not cited before the learned Single Judge and hence not considered by the learned Single Judge.

17). Irrespective of the two decisions cited on Item-9, in the facts of the case on hand, it cannot be said that, there is breach of the promotion policy by the employer because under the policy three aspects to be considered for promotion are completion of service in the post for the requisite number of years, satisfactory work and

satisfactory conduct. Based on the satisfactory work and conduct, there are recommendations made by the superior officers of the employees. In case of the employee, no recommendation had been made. In the circumstances, it cannot be said that there was unfair labour practice adopted by the employer as described under Item-9 of Schedule-IV of MRTU & PULP Act.

18). In view of the above discussion, the declaration of the Tribunal as regards the unfair labour practice under Items-5 and 9 of Schedule-IV of MRTU & PULP Act, cannot be sustained. As regards the direction given to the employer for considering the employee for promotion for the two grades from the years mentioned, in my opinion, there is no need to disturb the same because as has been observed by the Tribunal, there is no adverse report or entry about the employee. In any case, the Tribunal has merely asked the employer to consider the case of the employee and not directed it to promote the employee.

19). The objection of the employee to the specific year of promotion cannot be sustained in view of the fact that the employee was put in Grade-IX in the year 1979. As such, his completion of 12 years in that Grade, would be in the year 1991.

20). For the above reasons, Writ Petition No. 934 is partly

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WP-934-2004
WP-2672-2006
16th April, 2015

allowed. The impugned order is modified by deleting the declaration at para-2 of the operative part of the order. Writ Petition No. 2672 of 2006 is dismissed.

(SMT. R.P. SONDURBALDOTA, J)