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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.137 OF 2016

Maharashtra Jeevan Pradhikaran)
Near Annapurna Canteen,)
Central Building, Pune – 411 001) ...Petitioner

….Versus....

Mr.Adinath Devappa Magdum)
A-302, Chetan Heights,)
Sasanenagar, Hadapsar,)
Pune – 411 028.) ...Respondent

Ms.Neeta Karnik for the Petitioner.
Mr.Vikas H. Sekdar for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 7TH MARCH, 2016.

ORAL JUDGMENT :-

1. By this writ petition filed under under Articles 226 and 227 of the Constitution of India the petitioner has impugned the order dated 28th July, 2015 passed by the learned Member, Industrial Court, Pune thereby quashing and setting aside the impugned notice dated 30th November, 2012 and restraining the petitioner herein from making any recovery pursuant to the said impugned notice issued by the petitioner.

2. The respondent was appointed as a Tracer with the Kolhapur office of the petitioner by an order dated 4th September,

1985. It is the case of the petitioner that by an office order dated 2nd June, 1987, the respondent along with three other Tracers came to be exempted from passing the departmental examination of Tracers due to the *bona-fide* mistake on the part of the petitioner in applying Rule 8(C) and (D) of the Regulations applicable to the respondent. It is the case of the petitioner that on the basis of the said error alleged to have been committed by the petitioner, the respondent was promoted to the post of Civil Engineer Assistant w.e.f. 20th December, 2001 along with other three Tracers.

3. It is the case of the petitioner that on 18th December, 2012, the higher officer of the petitioner noticed the said mistake of granting exemption to the respondent and other three Tracers. The petitioner issued a show cause notice on 18th December, 2012 to the respondent as to why he should not be demoted and the recovery in the differential pay shall not be effected from the respondent.

4. The respondent filed a complaint under items 9 and 10 of Schedule-IV of The Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (for short "the said Act") *inter-alia* challenging the said show cause notice dated 30th November, 2012 issued by the petitioner proposing to withdraw the time bound promotion / accelerated career progression benefits given to the respondent about 25 years back. By an order dated 28th July,

2015, the learned Member, Industrial Court, Pune allowed the said complaint filed by the respondent and quashed and set aside the notice dated 30th November, 2012 and restrained the petitioner from making any recovery pursuant to the said notice.

5. Ms.Karnik, learned counsel appearing for the petitioner submits that the respondent admittedly had not joined the petitioner before the date of commencement of the Promotion Rules, 1976 and thus was not eligible for any exemption. She submits that the office of the petitioner however had erroneously granted exemption to the respondent and had promoted the respondent to the post of Civil Engineer Assistant with effect from 20th December, 2001 though the respondent had not passed the departmental examination of the Tracers. She submits that though the Industrial Court, Pune has rendered a finding in paragraph 13 of the impugned order that the exemption could be given to those employees, who have joined before the date of commencement of the Promotion Rules, 1976, the Industrial Court contrary to such finding, rendered in favour of the petitioner has set aside the impugned notice dated 30th November, 2012 and has restrained the petitioner from making any recovery pursuant to the impugned notice.

6. It is submitted by the learned counsel for the petitioner that even if there was any error on the part of the petitioner in granting

exemption to the respondent from appearing in the departmental examination before granting any promotion, such error on the part of the petitioner would not amount to committing any unfair labour practice by the petitioner upon the respondent and thus the complaint filed by the respondent under items 9 and 10 of Schedule-IV of the said Act was not even maintainable. She submits that similar notices have been issued by the petitioner to other such workmen who were erroneously granted exemption.

7. Learned counsel appearing for the respondent herein (original complainant) placed reliance on the findings rendered by the Industrial Court and would submit that the respondent is not responsible for the exemption granted to the respondent 25 years back. He submits that the respondent had not asked for any such exemption. If the exemption would not have been granted to the respondent 25 years ago, the respondent would have appeared for the departmental examination. He submits that since the petitioner sought to demote the respondent and made an attempt to recover the differential amount based on the alleged error committed by the petitioner and the respondent admittedly being the Tracer, the complaint filed by the respondent was maintainable.

8. Learned counsel for the respondent placed reliance on the judgment of this Court in case of ***Ramesh Channapa Kompalli vs.***

State of Maharashtra & Ors., 2016(1) Mh.L.J. 389 and submits that it was not the case of the petitioner that the respondent had played any fraud or made any mis-representation or tried to obtain any undue advantage of the exemption from appearing in the departmental examination. He submits that the petitioner therefore cannot make any recovery of the promotional benefits from the respondent on the ground that the respondent did not pass the departmental examination. He submits that the respondent was admittedly a workman and the petitioner is an industry and thus the provisions of the Industrial Disputes Act are applicable. He submits that since the petitioner had attempted to recover the promotional benefits after expiry of 25 years for no fault of the respondent, the petitioner has committed unfair labour practice and thus the complaint filed by the respondent under the provisions of the said Act was maintainable against the petitioner.

9. A perusal of the record indicates that the respondent was granted exemption from passing the departmental examination for Tracers described by the Government by office order dated 2nd June, 1987 and on that basis as well as on merits had granted him all privileges, benefits and facilities of promotion to the post of Civil Engineer Assistant with effect from 20th December, 2001 and had made entries in his service book. The post of the Civil Engineer

Assistant was admittedly a sanctioned post and permanent in nature. A perusal of the affidavit in lieu of the examination in chief filed by the respondent clearly indicates that it was deposed by the respondent that the exemption granted to him 25 years ago was clear and unconditional. Though he was ready and willing to appear for the test, the petitioner had granted the exemption at their own accord. He had not claimed any exemption from appearing for such departmental examination. A perusal of the cross-examination of the respondent by the learned advocate for the petitioner clearly indicates that the deposition made by the respondent in the affidavit in lieu of the examination in chief was not shattered in cross-examination.

10. A perusal of the affidavit in lieu of the examination in chief filed by the witness examined by the petitioner indicates that according to the said witness the Superintending Engineer of the petitioner by an order dated 2nd June, 1987 had given exemption to the respondent from appearing for departmental examination and had promoted him as an Assistant Draftsman. In his cross-examination he admitted that on 23rd February, 1998 the respondent was given promotion as Draftsman and since 2001, the respondent was working as Civil Engineer Assistant. He admitted that there was no complaint about the work of the respondent. He further admitted that the petitioner had not specifically told the respondent to undergo the test.

11. The respondent has been working as Civil Engineer Assistant since 2001 and has been working as a permanent employee since 1985. The respondent has been working as Civil Engineer Assistant with meritorious record since 2001. Admittedly, the respondent is about 54 years of age.

12. The Industrial Court has taken a view that the respondent herein had not asked for any exemption. If the petitioner at the relevant time would not have granted exemption to the respondent, the respondent would have appeared for the departmental examination. It is held that the petitioner herein had deprived the respondent of his right to appear in the examination. The respondent has achieved the position where he is today, on merit and has been getting the pay of promotional post on his merits. The Industrial Court has also rendered a finding that withdrawal of the exemption and demotion of the respondent at this stage and further recovery of amount would be totally arbitrary and high handed exercise of powers by the petitioner under the service rules. It would amount to unfair labour practice under items 9 and 10 of Schedule-IV of the said Act.

13. In my view, since the petitioner has granted such exemption to the respondent from appearing in the departmental examination, which was not asked by the respondent about 25 years back and thereafter has considered his promotion on merits and has

granted various benefits and his confidential report showing him meritorious, the rights which are accrued in favour of the respondent in last 25 years ago cannot be taken away by the petitioner on the basis of the alleged error committed by the petitioner 25 years ago.

14. The Division Bench of this Court in case of ***Ramesh Channapa Kompalli*** (supra) after adverting to the judgment of the Division Bench of this Court delivered on 10th December, 2013 in case of ***Naeem Ahmedkhan Dilawarkhan vs. State of Maharashtra & Ors.*** in Writ Petition No.6700 of 2012 has held that it was not the case of the employer that the employee had played any fraud or by way of mis-representation, tried to get undue advantage and had received an amount which was not admissible. The exemption in the matter to the employee from passing professional exemption was granted in the year 2004 and the said employee was promoted. The employer had proposed the action of cancelling the alleged wrong order of exemption and the order of recovery in the year 2012. The Division Bench of this Court held that the act of the employer in trying to make recovery of the promotional benefits from the employee on the ground that he did not pass the professional examination could not be maintained and accordingly quashed and set aside the notice of recovery.

15. The Division Bench of this Court in ***Naeem Ahmedkhan***

Dilawarkhan (supra) after adverting to various judgments of the Supreme Court and more particularly in case of ***State of Punjab and Anr. vs. Shamlal Murari & Anr. AIR 1976 SC 1177, Shyam Babu Verma & Ors. vs. Union of India & Ors. (1994) 2 SCC 521*** and in case of ***Syed Abdul Quadir & Ors. (2009) AIR SCW 1871*** has held that the act of the employer trying to recover from the petitioner the benefits of increments in view of the professional examination had not been passed, could not be maintained and accordingly quashed and set aside such action. In both the judgments referred to aforesaid delivered by this Court, the employers were the Maharashtra Jeevan Pradhikaran, the petitioner herein.

16. In my view, the petitioner could not have initiated any action for demoting the respondent and reducing the pay scale after completion of 25 years of service, which would affect the respondent financially and also his seniority. It was not the case of the petitioner that the respondent had committed any fraud or made any mis-representation or was trying to take any undue advantage of getting exemption from appearing in departmental examination. The respondent cannot be made to suffer because of the alleged error, if any committed by the petitioner of granting exemption to the respondent from appearing for the departmental examination and that also after 25 years. The judgments of the Division Bench of this Court

in case of ***Ramesh Channapa Kompalli*** (supra) and ***Naeem Ahmedkhan Dilawarkhan*** (supra) squarely apply to the facts of this case. Similar actions of the Maharashtra Jeevan Pradhikaran, the petitioner herein, in those two petitions were quashed and set aside by this Court. I am respectfully bound by those two judgments which are delivered after adverting to the similar principles of law already laid down by the Supreme Court in the above referred judgments.

17. Insofar as the submission of the petitioner that the complaint filed by the respondent under items 9 and 10 of Schedule-IV of the said Act itself was not maintainable on the ground that even if the petitioner had committed any error in granting exemption, correction of such error by the petitioner cannot amount to practicing any unfair labour practice is concerned, in my view, there is no merit in this submission of the learned counsel for the petitioner. The respondent herein (original complainant) is a workman and the petitioner herein an industry. The provisions of the Industrial Disputes Act are thus applicable considering the relationship between the petitioner and the respondent. In my view, since the petitioner sought to take an action for withdrawing the exemption and consequently bringing down the pay and further recovery of the salary paid by the petitioner to the respondent, who being a workman, such action on the part of the petitioner would amount to an unfair labour practice

under items 9 and 10 of Schedule-IV of the said Act. There is thus no substance in the submission made by the learned counsel for the petitioner that the provisions of items 9 and 10 of Schedule-IV of the said Act would not attract to the complaint filed by the respondent alleging unfair labour practice by the petitioner and that the complaint was not maintainable.

18. Insofar as the submission of the learned counsel for the petitioner that under section 64 of the Maharashtra Jeevan Pradhikaran Act, no legal proceedings could lie against any action which was taken in good faith is concerned, in my view, since the petitioner had practiced unfair labour practice, it attracted the provisions of items 9 and 10 of Schedule-IV of the said Act. There is thus no merit in this submission of the learned counsel for the petitioner.

19. In my view, the Industrial Court has rendered detailed reasons and has considered the oral and documentary evidence led by the parties and has rightly set aside the notice issued by the petitioner for recovery and for other action. No infirmity can be found in the impugned order passed by the Industrial Court. The petition is devoid of merits and is accordingly dismissed. No order as to costs.

(R.D. DHANUKA, J.)