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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

WRIT PETITION NO. 3004 OF 2015

Padurang Tukaram Arbune.

... Petitioner.

V/s.

Municipal Corporation of
Greater Mumbai and Ors.

... Respondents.

Mr. V.P. Vaidya i/b. M.M. Agavekar for the Petitioner.

Mr. A.Y. Sakhare, Sr. Advocate a/w. Ms. K.H. Mastakar for
Respondent 1 - BMC.

CORAM : N.M. JAMDAR, J.

DATE : 1 FEBRUARY, 2016.

ORAL ORDER :-

By this Petition the Petitioner challenges the order passed by the Industrial Court, Mumbai dated 9 July 2015 dismissing the complaint filed by the Petitioner. The Petitioner filed a Complaint (ULP) No. 326 of 2009 in the Industrial Court, Mumbai under Item Nos. 5 and 9 of Schedule IV of MRTU & PULP Act.

2. According to the Petitioner the Respondent – Corporation engaged in an unfair labour practice in respect of

maintenance of seniority list to the post of Assistant Security Officer. According to the Petitioner, the seniority list published on 31 October 2006 was changed because of which the seniority of the Petitioner was affected. The Petitioner applied for the post of Assistant Security Officer, pursuant to an advertisement issued in the year 1986, and he was given an appointment order on 3 December 1986. It was his grievance that in the seniority list which was published on 15 January 2007 the persons were appointed subsequent to him as an Assistant Security Officer were shown above him and earlier seniority list was changed. It was his case that a representation made against this change was rejected by the Respondent – Corporation on 13 September 2010. Accordingly, aggrieved by this action of the Respondent – Corporation in changing the seniority of the Petitioner in respect of the Assistant Security Officer, the above mentioned complaint was filed.

3. The Respondents filed their written statement and opposed the complaint. According to the Respondent – Corporation, the seniority list was published on 1 January 2003 in which the Petitioner was given in the correct placement. When a seniority list was published in the year 2006, various objections were raised and therefore, by seniority list of 2007, pursuant to these objections, the list was corrected. According to the Respondent – Corporation, the officers were appointed pursuant to the same advertisement and after complaints were received and

after taking legal opinion and considering decision of the Apex Court, it was decided to fix the seniority as per merit taking into account marks obtained during the selection process. On these and another grounds, the Corporation opposed the complaint.

4. The Industrial Court held that the grievance made by the Petitioner was hopelessly time barred and that the seniority was correctly fixed on the basis of merit. The Industrial Court also found that the methodology adopted by the Corporation in giving appointments on staggered basis even though all had applied pursuant to the same advertisement was erroneous and rightly corrected by issuing subsequent seniority list. The Industrial Court found that there was no breach of Item 5 of Schedule IV of M.R.T.U. & P.U.L.P. Act, 1971 as there was no question of unequal application of Standing Orders to different groups. The Industrial Court also found that there was no breach of Item 9 of Schedule IV of the Act of 1971. The Industrial Court noted that after lapse of 22 years, in view of the conduct of the Petitioner, it is not possible to re-open the entire matter regarding the seniority list. Accordingly, the complaint was dismissed by the impugned order dated 9 July 2015.

5. The learned Counsel for the Petitioner submitted that as regard the placement in seniority list is concerned, date of appointment is the only criteria. He submitted that there is no evidence as to the existence and availability of marks on the basis

of which subsequent seniority list was prepared. The learned Counsel also submitted that no objection was raised by the Respondent – Corporation except a stray line regarding delay on the part of the Petitioner. He submitted that as late as 2010 the position of seniority list was not settled and in fact in the year 2006 the seniority list was prepared which showed the position in favour of the Petitioner and it was changed in the year 2007. He submitted that the representation was rejected in the year 2010 and therefore, the finding of the Industrial Court is perverse. He also contended that the reliance by the Corporation on the decision of the Apex Court in *Masood Akhtar Khan and Ors. v/s. State of Madhya Pradesh and Ors.* [(1990) 4 SCC 24] is completely misplaced. The learned Counsel for the Respondent – Corporation supported the impugned order and stressed on the conduct of the Petitioner.

6. There are no statutory Rules governing the appointment and fixation of seniority for the concerned post. It is the case of the Petitioner that it is the matter of practice in the Corporation that the seniority is decided on the basis of the date of appointment. There is no contest about this position. The question is therefore in the absence of any statutory rules, whether any right can be claimed by the Petitioner. Secondly whether the action of the Respondent – Corporation in fixing seniority on the basis of marks, is an unfair labour practice.

7. It is also an admitted position that there was one advertisement in the year 1986 pursuant to which all the candidates applied. The selection process went on and the appointments were made as an on going process. However, there was only one selection process pursuant to a single advertisement. The appointment of the Petitioner at an earlier stage was only as a matter of chance and nothing is shown as to whether there was any application of mind to make the appointment of the Petitioner with a deliberate intent to give him seniority over others. The Industrial Court has rightly found that the initial procedure adopted by the Municipal Corporation in giving staggered appointments to the candidates selected under one selection process and giving them seniority accordingly was a mistake and an unfair action be taken. Once the Respondent – Corporation received complaints in respect of this action, the Corporation corrected the seniority list in the year 2003. In view of this correct conclusion of the Industrial Court that action of the Corporation in giving appointments to the candidates in such a manner was unfair, I do not find that the case is made out for interference in equity jurisdiction of this Court to unsettle this position. What is done by the Municipal Corporation is correcting the injustice caused to those candidates who applied pursuant to the same advertisement and who unfortunately were given appointment letters subsequently and placement in the seniority list accordingly. As stated earlier, no statutory right is shown by the Petitioner that

even in these circumstances the Petitioner should have been treated senior, taking the date of appointment as a basis.

8. As regard the contention of the learned Counsel for the Petitioner that nothing is shown that marks were available when the seniority list was corrected is concerned, this has taken place in the year 2003. The Petitioner himself has challenged the action at such a belated stage and it is not possible to direct the Municipal Corporation to produce the material at this stage to justify their action taken in the year 2003 and much earlier.

9. It is an admitted position that the seniority list was initially published in the year 2003. Thereafter, the seniority lists were published at the subsequent stages and right upto the year 2007. Consistently, in these seniority lists seniority of the Petitioner was as per the merit. It is only in the year 2006 that a deviation was made, to which the complaints were received and it was corrected in the year 2007. What was done in the year 2007 was not for the first time but reiteration of the position of the year 2003. There is also no substance in the contention that the position was fluid and kept fluctuating, as the only aberration was made in the year 2006, which was immediately corrected in the year 2007.

10. As regard the contention that the action of the Corporation solely based on the decision of the Apex Court in the

case of *Masood Akhtar Khan and Ors. v/s. State of Madhya Pradesh and Ors.* [(1990) 4 SCC 24] and that the decision is not applicable is concerned, merely because in the internal correspondence the Corporation has referred to the decision of the Apex Court which may not be applicable does not mean the action of the Respondent – Corporation which is otherwise proper in law, can be set aside.

11. The Petitioner may have made representation earlier but the Petitioner could have approached the Industrial Court in the same manner which the Petitioner did in the year 2009. The Industrial Court has rightly considered the practical implications of entertaining such belated challenge and unsettling the position. By entertaining such stale and belated challenge in the matters of seniority, the Court while exercising its equity jurisdiction cannot be oblivious to the administrative hardship to the employer as well as to the hardship to those who are likely to be affected. While filing the complaint, the Petitioner did not even join the persons who are likely to be affected by the outcome of the complaint. The Respondent No.4 was joined in the complaint after he made an application for joining himself as party Respondent.

12. In the circumstances, no case for interference is made out. Writ Petition is rejected.

(N.M. JAMDAR, J.)