

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Review Petition No. 36 OF 2017
IN
Writ Petition NO. 6433 OF 2007

Shri Niranjan Punjaji Netawane ...Petitioner
Versus
The Commissioner, Nashik Municipal Corporation and Anr ...Respondents

WITH
Review Petition NO. 35 OF 2017
IN
Writ Petition NO. 7153 OF 2007

Shri Satish Hari Wagh ...Petitioner
Versus
The Commissioner, Nashik Municipal Corporation And Anr ...Respondents

WITH
Review Petition NO. 37 OF 2017
IN
Writ Petition NO. 6882 OF 2007

Shri Vijay Madhavrao Bhalekar ...Petitioner
Versus
The Commissioner, Nashik Municipal Corporation And Anr ...Respondents

WITH
Review Petition NO. 38 OF 2017
IN
Writ Petition NO. 7017 OF 2007

Shri. Subhash Shivram Kalamkar ...Petitioner
Versus
The Commissioner, Nashik Municipal Corporation And Anr. ...Respondents

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Mr. N.V. Bandiwadekar a/w. Sagar Mane, Advocate for the Petitioners.
Mr. M.L. Patil, Advocate for the Respondents.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 15th FEBRUARY, 2018
PRONOUNCE ON : 26th FEBRUARY, 2018

P.C.

1. Heard Mr.N.V. Bandiwadekar, learned Counsel for the petitioners and Mr.M.L. Patil, learned Counsel for the respondent, at length.
2. By these Petitions under Section 114 read with Order XLVII Rule 1 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the petitioners have sought review of the order dated 26.3.2015 passed in Writ Petitions instituted by the respondents herein. By these orders, the Petitions were allowed and the complaints instituted by the petitioners herein were dismissed.
3. In support of these Petitions, Mr. Bandiwadekar strenuously contended that there are several errors of law apparent on the face of record. He submitted that this Court committed serious error in holding that there was no agreement between the parties and, therefore, Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, 'Act') is not attracted. He submitted that this Court also committed error in holding

that a perusal of the complaint does not indicate that any allegations are made as regards failure on the part of the Corporation to implement any award, settlement or agreement as contemplated by Item 9 of Schedule IV of the Act. He submitted that the very fact that the Standing Committee and the General Body of the Corporation passed resolution followed by order of the Municipal Commissioner amounts to agreement on the basis of which the petitioner was paid revised salary and allowances in respect of the concerned posts. In any case when the employer paid salary to the employee at the end of each month, it amounted to agreement between the parties and, therefore, non payment of salary or any portion thereof also amounted to failure to implement said agreement. He submitted that the order cancelling the deemed date and recovery of excess salary from the petitioner was hopelessly time barred. It was also without any authority or jurisdiction. The Municipal Commissioner was not justified in passing the orders to that effect after lapse of a long time.

4. Mr. Bandiwadekar submitted that the petitioners have discharged their duties in the posts for which they were given deemed date and accordingly were paid salary. The order of recovering alleged excess salary cannot be substantiated. He submitted that it is not the case of the Corporation that the petitioners misrepresented and misled

the authorities of the Corporation in giving deemed date. In short he submitted that at the highest it can be said that the benefits flowed to the petitioners were consequent upon a mistake committed by the authorities of the Corporation. There was no participation of the petitioners in the mistake committed by the Corporation in extending the alleged undeserved monetary benefits. The petitioners are innocent.

5. Mr. Bandiwadekar heavily relied upon the decision in *State of Punjab and others vs. Rafiq Masih (White Washer)*, (2015) 4 SCC 334 and in particular paragraph-18 thereof where the Apex Court summarized the situations wherein recoveries would be impermissible in law, as under:

- (i) Recovery from the employees belonging to Class-III and Class-IV service (or Group C and Group D service).
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the Court arrives at the

conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

6. On the other hand, Mr. Patil submitted that no case for reviewing the order dated 26.3.2015 is made out. He submitted that in fact the petitioners are privy to and beneficiaries of the orders passed by the Standing Committee and the General Body. The petitioners were promoted to the posts which were not in existence. In fact the petitioners were given deemed date in respect of the posts which were imaginary. He, therefore, submitted that no case is made out for reviewing the order dated 26.3.2015.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. A perusal of the order dated 26.3.2015 shows that deemed date of appointment / promotions were given to the petitioners on the basis of the resolutions passed by the Standing Committee and the General Body. On the basis of these resolutions and after considering the applications, the Municipal Commissioner had passed the orders giving deemed date. A perusal of the order shows that the resolutions passed by the Standing Committee and the General Body and the consequential order of the Municipal Commissioner giving deemed date

of promotion amounted to creation of imaginary post that too with retrospective effect.

8. In paragraph-1 of *State of Punjab* (supra), the Apex Court observed that the benefits flowed to the employees were consequent upon a mistake committed by the Competent Authority. In paragraph-2 it was observed that any participation of the private respondents in the mistake committed by the employer, in extending the undeserved monetary benefits to the employees, was totally ruled out. The private respondents were innocent in the wrongful determination of their inflated emoluments. In paragraph-6, the Apex Court observed thus:

“6. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.”

9. In the present case it cannot be said that the petitioners who were beneficiaries, did not participate in passing of the resolutions by the Standing Committee and the General Body and consequent orders passed by the Municipal Commissioner. The petitioners also cannot claim that they were innocent parties. In fact the benefits were

conferred upon the petitioners in respect of posts which were not even in existence. Mr. Bandiwadekar submitted that the recoveries were ordered after the retirement of the petitioners. As against this, Mr. Patil submitted that the recoveries were ordered when the petitioners were in employment. I find merit in the submission of Mr. Patil.

10. In view thereof, reliance placed by Mr. Bandiwadekar on *State of Punjab (supra)* does not advance the case of the petitioners. Insofar as the contention that the applicability of Item 9 of Schedule IV of the Act is concerned, in paragraph-12 of the order dated 26.3.2015, this aspect was dealt with. It was observed that perusal of the complaint showed that there was no allegation as regards failure on the part of the respondent Corporation to implement any award, settlement or agreement as contemplated by Item 9 of Schedule IV of the Act. It was further observed that the decision in Writ Petition No.4091/2007 squarely applies even to the facts in the present case. In view thereof, I do not find any merit in this contention as well.

11. In the result, no case is made out for reviewing the order dated 26.3.2015. Hence, Review Petitions fail and the same are dismissed.

12. At this stage, Mr. Sagar Mane orally applies for stay of this order for a period of 8 weeks from today. He submits that though

recoveries were ordered in the year 2002, till date no recoveries are effected. Mr. Patil opposes this request.

13. In view of the fact that recoveries are not effected from 2002, I find that the request made by Mr. Mane is reasonable. Hence, notwithstanding dismissal of the Review Petitions, this order shall remain stayed for a period of 8 weeks from today with a clear understanding that no further application for extension of stay shall be made and entertained. Order accordingly.

(R.G. Ketkar, J.)

Deshmane (PS)