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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3025 OF 2014

The Bombay School Sports Association & Anr. … Petitioners

vs.

Dattatray N. Tambadkar & Ors. … Respondents

Mr. J. S. Kini i/b. Mr. Suresh Dubey for the Petitioner.
Mr. Rahul Nerlekar i/b. Ms. Jyoti Devalekar Joshte for the Respondent.

CORAM : A.K. MENON, J.
RESERVED ON : 18th APRIL, 2018
PRONOUNCED ON : 11th JULY, 2018

JUDGMENT

By order dated 11th December, 2017 this Court ordered this petition to be disposed of at the stage of admission. Accordingly by consent of parties the same is taken up for final hearing and disposal.

1. This petition challenges an order dated 1st January, 2010 whereby Industrial Court partly allowed the complaint filed by respondent no. 6- Union against the petitioner inter alia declaring that by not making payment of difference in arrears of wages for the period 1st January, 1996 to 31st December, 2003 the petitioner had committed unfair labour practices under Item 9 of the Schedule IV of the MRTU & PULP Act, 1971 (the Act). The petitioners were directed to cease and desist from carrying on unfair labour practices and inter alia by calculating the difference of wages of five employees as per 5th Pay Commission in accordance with letters dated 29th March, 2000 and 23rd February, 2004 and after adjusting the amounts already paid within 60 days of the the order.

2. The impugned order dismissed the complaint as regards Item 1(a), (b) of Schedule II and Item 5 of Schedule IV of the MRTU & PULP Act, 1971. It is the petitioners case that while the operative portion of the impugned order was explicit and limited the obligation of the petitioner certain observation made there in called for interference inasmuch as these were not justified in the facts of the case. I consider it appropriate to refer to the issues so as to clearly identify the scope of the dispute. The issues framed read as follows :

> *1. Whether the complaint as framed and filed is tenable ?*
>
> *2. Does the complainant proves that the respondents have committed unfair labour practices under Items 1(a), (b) of Schedule II of the MRTU & PULP Act,1971 w.e.f. 1.10.2004 ?*
>
> *3. Does the complainant proves that the respondents have committed unfair labour practices under Items 5 & 9 of Schedule IV of the MRTU & PULP Act, 1971 ?*

The findings are to the effect that the complaint was maintainable. Issue no. 1 was answered in the affirmative, Issue no. 2 was answered in the negative and Issue no. 3 was answered partly in the affirmative.

For ease of reference the extracts of the aforesaid provisions are reproduced below :

Schedule II

> *1. To interfere with, restrain or coerce employees in the exercise of their right to organise, form, join or assist a trade union and to engage in concerned activities for the purposes of collective bargaining or other mutual aid or protection, that is to say -*
>
> *(a) threatening employees with discharge or dismissal, if they join a union;*
>
> *(b) threatening a lock-out or closure, if a union should be organised.*

<u>Schedule IV</u>

(1) …....

(2) …...

(3) …...

(4) …...

(5) To show favouritism or partiality to one set of workers, regardless of merits.

(6) …....

(7) …...

(8) …...

(9) Failure to implement award, settlement or agreement.

3. The petitioner is aggrieved by the observation in the impugned order which requires them to pay difference of wages in the manner set out in paragraph 17 and 18 of the impugned order. For ease of reference paragraph 17 and 18 are reproduced below :

17. In this case, the respondents agreed and in fact implemented the 5th Pay Commission with effect from 1.1.1996 but while implementing the same for concerned employees, the respondents have paid the benefits to the concerned employee half of the pay scale of Jr. Clerk which is not justified. All the 5 employees are entitled for difference of wages as per 5th Pay Commission as per the scale of their post i.e. for Malis at the pay scale of 2750-70-3800-75-4400 and for peons at the pay scale of 2550-55-2660-60-3200 as referred by the respondents in para 8 of WS at Exh C-7. By not paying the difference as per above pay scale to the concerned employees the respondents have committed unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act. The complainant has failed to prove unfair labour practice on the part of the respondents under Items 1(a), (b) of Schedule II and Item 5 of Schedule IV of the MRTU & PULP Act, 1971. Though the respondents have contended that the complainant union has no locus *standi to represent the employees of the Respondent no. 1 but not material has been produced in support of the same pleading. The complainant union is a registered trade union and can represent the employees becomes the member of the union. Hence, I am of the considered opinion that the complaint filed by the complainant is maintainable before this Court. Hence, I answer Issue No. 1 in affirmative, Issue No. 2 in negative and Issue No. 3 in partly affirmative to the extent of item 9 only.*

18. In the light of answer to Issue No. 3 in partly affirmative, I am of the considered opinion that 5 employees involved in the present complaint are entitled to receive the difference of 5th Pay wages for the period 1.1.1996 to 31.12.2003 as per the scale of Mali and Peon mentioned in paragraph 15 of this judgment i.e. for Mali in the scale of 2750-70-3800-75-4400 and in the case of peons in scale of 2550-55-2660-3200. Hence, the respondents are hereby directed to calculate the difference of wages of 5 concerned employees as per 5th Pay Commission for the period from 1.1.996 to 31.12.2003 as per letter dated 20.3.2000 and 23.2.2004 and after adjusting the amount if already paid to them towards difference of wages for above period, pay the remaining amount of difference to 5 concerned employees within 60 days.

4. In particular, the petitioner is aggrieved and as submitted by Mr. Kini, learned counsel for the petitioner that the Industrial Court found the complainant had failed to prove unfair labour practice in relation to Item 1 (a), (b) of Schedule II and Item 5 of Schedule IV. The Court however found the complaint maintainable the petitioner having allegedly committed unfair labour practices under Item 9 of Schedule IV. The petitioner complied with the directions of the Tribunal but the respondent contended that the compliance was improper and they were entitled to greater amounts from an earlier date since they were paid only about 50% of the

wages due. The respondent then filed individual applications under Section 33C(2) of the Act. These came to be opposed by the petitioners on the basis that they had already complied to the orders of the Industrial Court. After evidence was led by the parties, the respondents application came to be dismissed by the Labour Court vide order dated 11th December, 2012.

5. Mr. Kini submitted that allegations made in the application were incorrect and this was exposed in the course of cross examination. According to the Labour Court the respondents had already been paid more than what they were entitled to. Being aggrieved by this order, the respondents filed Writ Petition No.9857 of 2013 in this Court. This Writ Petition was heard finally at the stage of admission and vide order dated 1st July, 2014 this Court set aside the order dated 11th December, 2012 upholding the contention that the respondents were entitled to wages in accordance with the 5th Pay Commission and that the letters could not in any way deprive the respondents. The matter was remanded for fresh consideration for determination of the quantum payable to the respondents.

6. Being aggrieved by the said order of remand the petitioners filed a Special Leave Petition in the Supreme Court which is still pending. An interim order was passed by the Supreme Court on 15th July, 2016 whereby the Court directed the SLP to remain pending till the disposal of this Writ Petition and as an interim measure directed 50% of the arrears demanded as per 5th Pay Commission's recommended pay scale be paid to the respondents in terms of the impugned order passed by the High Court within a period of four weeks. This Court has since been requested to

decide the Writ Petition as expeditiously as possible and that is how this petition came to be taken up for hearing.

7. Before proceeding further it would be appropriate to consider the reasons why the order for remand was passed. The learned single Judge found merit in the submissions on behalf of the petitioners that the operative portions of the paragraph 13 will have to be read along with paragraph 17 and 18 quoted above as otherwise the order of the Industrial Court will be without any basis.

8. This Court was of the opinion that the reference to the letters in the operative portion was for the limited purpose of recording that by virtue of letters dated 20th March, 2000 and 23rd February, 2004 the recommendations of the 5th Pay Commission were adopted by the petitioner and in the absence of these letters the 5th Pay Commission recommendation would not have been ipso facto apply to the petitioners. The Court therefore observed in paragraph 13 as follows :

> *13. "The learned counsel for the Respondent then submitted that the Respondent No. 1 is a Sport Association surviving on donation and after 2004, the Petitioners have been getting wages as per the 5th Pay Commission. He submitted that it will not be possible for the Respondents to shoulder such heavy responsibility of payment of arrears as directed by the order of the Industrial Court.* ***The order of the Industrial Court has remained unchallenged.*** *Therefore the fact that the Petitioners are liable to receive these amounts is beyond dispute. As regards the financial incapacity, it was repeatedly inquired with the Respondent whether it would be willing to pay the Petitioners by installments or adding a certain component to their salary spread over certain period. There was no positive response and the Respondent chose to argue the matter on merits. However, since the*

> *Petitioners are still in service, it is open for the parties to negotiate as to whether this amount can be added as an additional component of their salary for certain period. It is also expected that the Petitioners will show positive attitude in that regard, if such proposal is given by the Respondent to them.* ……… *(emphasis supplied)*

9. While recording the submissions of the respondent [viz. the petitioners herein] that they were a Sports Association surviving in donations and would not be possible to shoulder the responsibility of paying arrears as directed by the Industrial Court was considered by this Court. Furthermore once the order of the Industrial Court has remained unchallenged, this Court found that the petitioners were liable to receive amounts and as far as financial incapacity was concerned enquiries were made with the petitioners, if they were willing to pay the amounts in installments or by adding the computation to the salaries over a period of time which did not meet with any positive response. The order passed in the 33C(2) was quashed and set aside and the exact quantum payable to the petitioner was to be determined by the Labour Court. The order of remand was only for the purposes of carrying out the computation of the quantum. Meanwhile pending the SLP this petition came to be filed. It is in this background that the order of the Industrial Court needs to be considered on merits.

10. The petitioners have challenged the order of the Industrial Court on merits on the basis that having rejected the contention of the respondents that the petitioners had not committed unfair labour practices under Item 1(a), (b) of Schedule II or even Item 5 of Schedule IV and hence there was no occasion to have

made the observations in paragraph 17 and 18. It is further contended that the observations in the said paragraph were out of context and the operative portion of the order which were otherwise unambiguous was rendered ambiguous by incorporation of paragraph 17 and 18.

11. On behalf of the petitioner additional affidavit had been filed by Rev. Father Rodrigues that placing reliance upon letter dated 4th November, 1999 by the aforesaid letter dated 4th November, 1999. Thus letter dated 4th November, 1999 issued by 9 employees enclosed therewith individual staff salary statements of revised pay applicable to non teaching staff in Non-Government Secondary Schools and seeking sanction of revised pay at the earliest at least from November, 1999. Mr. Kini submitted that the demands for arrears from 1996 were therefore completely unjustified.

12. Mr. Nerlekar submitted that the impugned order has been correctly interpreted. He contended that the payment as per revised pay scale was voluntary. He therefore submitted therefore the petition deserved no consideration. He relied upon affidavit of Dattatray N. Tambadkar who was one of the aggrieved employees wherein it is contended that the challenge to the impugned order has been made after more than 4 years without any explanation for the delay and that the workers had already filed an execution application. Now, it is only after the petitioner was faced with an order dated 1st July, 2014 in Writ Petition No. 9857 of 2013 and after approaching the Supreme Court against the said order on 8th September, 2014 that they had filed the present petition. Even the Supreme Court had refused to stay the

judgment and had directed the petitioner to pay 50% of the arrears demanded as per 5th Pay Commission recommendation.

13. It was further submitted that the petitioner had provided benefits of 5th Pay Commission to other employees but denied the same to the present employees since they had joined union and involved in union activities. Mr Nerlekar further submitted that the issue involved was whether the petitioners were liable to pay as per 5th pay commission. According to his contention that the pay commission recommendation were not mandatory because the petitioners were not receiving grant-in-aid and not a Government Organisation is misleading because the petitioner had agreed to pay the respondent as per recommendation of the 5th pay commission. Reference to the 5th Pay Commission was only by way of a point of reference and that the petitioners had in fact started making payments in keeping with the recommendations of the 5th pay commission with effect from 1st January, 2004 which fact is not in dispute. According to the respondent the amounts payable would be from 4th November 1999 and not earlier.

14. In this background after having heard counsel for parties I have perused the impugned order of the Industrial Court. The factual background is that out of the total of 13 employees 5 had joined the complainant union. All these 5 persons were permanent employees and that in January, 1996 5th pay commission had been introduced by the Government of Maharashtra and the respondents were covered by benefits and provision of 5th Pay commission. Although 5 employees are entitled to receive benefits with effect from 1st January 1996 the petitioner had started

paying only from 1st January, 2004 and vide the letter dated 29th March, 2000 the respondent had informed the workers that it would make payment of arrears from 1st January, 1996 upto 31st December, 2003 but had failed to do so and thereby committed unfair labour practices under Item 1(a), (b) of Schedule II and Item 5 and 9 of Schedule IV.

15. It was further contended that the petitioner was not a profit making organisation or industry and the Court had no jurisdiction in the matter. It was further contended that the 5th Pay Commission recommendation were not applicable to the employees of the respondents who had been paid on the basis of remuneration payable to recognised Non-Government Secondary Schools. It was pointed out that the executive committee of the petitioner in a meeting of 9th December, 2004 unanimously decided to implement 5th pay commission and accordingly they were being paid. Thereafter the petitioners contended that the 5th pay commission recommendation will be implemented from January, 2005 on the basis of new guidelines as per the Secondary School Code in respect of the 5 employees.

16. Thus after hearing the parties the Industrial Court held that the complaint was maintainable and after dealing with evidence came to the conclusion that the only question to be decided was whether the employees / complainants were entitled to difference in wages from 1st January, 1996 to 31st December, 2003. Whereas according to the petitioners vide letter dated 29th March, 2000 they had agreed to implement 5th pay Commission from January, 2000 and arrears from January 1996 to December, 1999 were to be paid within 5 years. The petitioners

had contended that they were ready to pay half of the pay scale to the malis and peons and that the letter records that they had sanctioned full pay scale for peon and malis with effect from 1st January, 2004. The Industrial Court took note of the fact that on 24th March, 2000 the executive committee unanimously decided to implement revised pay scale of the 5th pay commission.

17. The Labour Court after dealing with plethora of case law cited came to the conclusion that the petitioners had agreed and in fact implemented the 5th pay commission from 1st January 1996 but while implementing the same pay benefits to the concerned employees at half pay scale of Junior Clerks which was not justified and all the 5 employees were entitled to difference in wages as per the 5th pay commission. It was observed that by not paying the difference the petitioner had committed unfair labour practice under Item 9 of Schedule IV although the respondents failed to establish unfair labour practice under Item 1(a), (b) of Schedule II and Item 5 of Schedule IV. Maintainability of the complaint was not in question and Issue no 3 viz. whether the respondent proves that the petitioner had committed unfair labour practices under Items 5 and 9 of Schedule IV has been answered partly in the affirmative. This to the extent it concerned Item 9 i.e. failure to implement award, settlement or agreement in the result the petitioner herein were granted difference in wages .

18. Having considered this aspect of the matter one thing is clear that the petitioner had no quarrel with the order as of which was passed on 1st January, 2010 till the filing of this petition which is affirmed on 10th November, 2014. In

my view the contention of the respondents that the present petition is merely an after thought of being faced with the order passed by this Court in Writ Petition No. 9857 of 2013 is correct. Even when the application under Section 33C(2) came to be filed in the year 2010 no attempt was made to challenge the order impugned in this petition. Even thereafter when the 33C(2) application was decided vide common judgment dated 11th December, 2012, the petitioner did not think it fit to challenge the impugned order on merits. Even after the order dated 1st July, 2014 was passed by this Court in Writ Petition No. 9857 of 2013 which in paragraph 13 observed that the petitioners had not challenged the order impugned herein as on date of deciding the Writ Petition No. 9857 of 2013 the order of the Industrial Court was not challenged.

19. Perusal of the letter dated 29th March,2000 clearly reveals that the executive committee at a meeting held on 24th March. 2000. had unanimously decided the implementation of the revised pay scale of 5th pay commission from January, 2000 and that arrears from January, 1996 to December, 1999 would be paid within 5 years. Similar letters were addressed to 5 persons. Thereafter vide letter dated 23rd February, 2004 the petitioner records as follows :

> *"Your collective letter requesting for the consideration of the full pay scale as per the Vth Pay Commission was placed before the Executive Committee and after deliberating on the same, the Executive Committee has considered to provisionally sanction the full pay scale of Peon / Mali as the case may be as per the Vth Pay Commission.*
>
> *You are also informed that the full pay scale will be implemented from January 2004 on a complete New guidelines*

(Rules and Regulation), Terms and Conditions and Work Schedule with Hours of work) as per the Secondary School Code."

20. In the circumstances it is not as if the petitioners were forced to cross the line and implement the recommendation of the 5th pay commission. Clearly this decision to implement the commission's recommendations was not as a result of a misunderstanding of any kind. Letter of 29th March, 2000 records that the executive committee had taken decision unanimously to revise pay scale in accordance with the 5th pay commission and also pay arrears from 1st January, 1996 to December, 1999. The executive committee's decision was not in any manner faulted. It is not the case of the petitioner that the committee had no power to take the decision. The letter dated 23rd February, 2004 records that the executive committee had after deliberating upon the issue had provisionally sanctioned full pay scale to the peons and malis as well. Thus, even the provisional sanction to peons and malis entail that there was no doubt about providing the same facilities to the other employees. Peons and Malis were therefore sought to be included for beneficial revision of pay scale.

21. In my view therefore, the challenge now presented is merely by way of an after thought and an attempt to revisit the decision of the enquiry committee. The attempt now is to contend that the 5th pay commission was not applicable. This in my view cannot be the ground to challenge the impugned order. Although the 5th pay commission may not be statutorily applicable in view of the constitution of the association, they are seen to have adopted the recommendation voluntarily and for the benefits of their employees. This is to be read with the finding, which in my

view was justified, that the petitioners were found engaging in unfair labour practices contemplated under Item 5 of Schedule IV read with letter dated 29th March, 2000 and 23rd February, 2004 leaves no manner of doubt that the decision to extend benefits of the pay revision was taken consciously after due deliberation and voluntarily. The petitioner in my view are not entitled to back out from the said decision on the ground now sought to be made out. One more reason why this belated challenge should not be entertained is the fact that the delay has not been explained. There is not even an attempt to explain the delay in seeking to challenge this order. Paragraph 17 of the petition states as follows :

> *"17. Lest it be stated that the observations of the order of the Industrial Court have not yet been challenged, the present Petition is being filed."*

22. The challenge is thus only to cover up the fact that the observation that the Industrial Court not having been challenged it should not be an impediment in the petitioners' attempt to thwart the consequences of the decision. This only reiterates the view that the petitioner was well aware that they had failed to challenge the impugned decision of the Industrial Court at the material time or within reasonable time and complied within it albeit or part. For the aforesaid reasons, I find the impugned order calls for no interference and in the result the challenge failed. Accordingly, I pass following order :

(i) Writ Petition is dismissed.

(ii) No order as to costs.

(A.K. MENON, J.)

Rajeshwari Ramesh Pillai

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