

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

LETTERS PATENT APPEAL NO.567/2010 IN
WRIT PETITION NO.1064/2000 (decided)

- 1] Central Railway Employees' Co-operative Credit Society Limited,
Byculla, Mumbai-400 027
through its Chief Manager/Managing Director.
- 2] Central Railways Employees' Co-operative Credit Society Limited,
Old Control Office Building, D.R.M.Office Compound,
King's Way, Nagpur, through its Branch Manager.
- **APPELLANTS**

...VERSUS...

- 1] Arun S/o Baburao Bobde, (**Since dead through LR's**)
- 1-a) Smt. Kalpana wd/o Arun Bobde,
Age-58 years, Occ. Housewife.
- 1-b) Smt. Nalini w/o Nikhil Shrikhande (Daughter)
Age-33, Occupation-Housewife.
- 1-c) Smt. Minal w/o Bhushan Dangore (Daughter)
Age-30, Occ. Housewife.
- All R/o. Plot No.88-A, Pramod Apartment,
Pandey Layout, Khamla, Nagpur-25
- 2] Dilip s/o Shridhar Phalnikar,
Aged about 50 years, Occupation-Service,
R/o. Plot No.23, Suyog Nagar,
Wardha Road, Nagpur.
- **RESPONDENTS**

Shri H.V.Thakur, Advocate for appellants/Employer.

Shri A.D.Dangore with Shri V.A.Dhabe, Advocate respondents/complainants.

CORAM : A.S.CHANDURKAR and G.A.SANAP, JJ.

DATE ON WHICH THE ARGUMENTS WERE HEARD : 10.08.2021

DATE ON WHICH THE JUDGMENT IS PRONOUNCED : 03.09.2021

JUDGMENT (Per A.S.Chandurkar, J.)

The challenge raised in this Letters Patent Appeal filed under Clause 15 of the Letters Patent is to the judgment of the learned Single Judge dated 20.09.2010 in Writ Petition No.1064/2000. By the said judgment, the order passed by the Industrial Court in ULP (Complaint) No.1338/1993 dated 10.12.1999 has been set aside and after granting an opportunity to the respondents to file an application for condonation of delay, the Industrial Court has been directed to decide the proceedings a fresh.

2. Relevant facts giving rise to present proceedings are that it is the case of the respondents-complainants that they were appointed on the post Junior Clerk on 06.06.1981 and 30.10.1981 respectively by the appellants-Society. The said society has its head office at Mumbai and the appointment of the respondents was made therefrom. According to the complainants, on implementation of the recommendations of the 4th pay commission the revised pay scale became applicable from 01.01.1986. On account of re-structuring of various posts based on the revised pay-scales, some additional posts of Senior Clerks and Sub-Head of the Section were created. The complainants claim that they were entitled for promotion to the post of Sub-Head of the Section from 1.1.1986. On 8.9.1990 the complainants were promoted to the post of Sub-Head of the Section on ad-hoc basis. The complainants refused to accept such ad-hoc promotion and claimed that they be promoted on

permanent basis. This action, according to the complainants, of not considering the claim of the complainants for promotion on regular basis despite being senior resulted in commission of unfair labour practice covered under Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, the Act of 1971). It was the further case of the complainants that other employees who were junior to them had been promoted on regular basis and this amounted to showing favouritism to one set of employees which was an unfair labour practice covered under Item 5 of Schedule IV to the Act of 1971. A legal notice was sent by the complainants on 26.09.1994. By stating that the cause of action for filing the proceedings was continuous the complainants filed complaint under Section 28 of the Act of 1971 on 17.11.1994.

3. The Society filed its written statement and opposed the complaint. It was stated that the complaint as filed was barred by limitation in view of the fact that according to the complainants the cause of action for filing the complaint arose on 08.09.1990 while the complaint was filed on 17.11.1994 without explaining the reason for the delay. It was further pleaded that the complainants were offered promotions but they refused the same on their own will. The promotions were offered on 08.09.1990, 28.04.1992 and also on 17.04.1993. As the complainants refused such promotions, the employees who were next in line and who were willing to accept promotional posts were accordingly promoted. All other adverse allegations were denied.

4. The parties then led evidence with the complainants examining themselves and the employer examining its retired Chief Manager. The learned

Member of the Industrial Court held that the complainants had a continuous cause of action to seek redressal of their grievances and therefore the complaint filed on 17.11.1994 was not time barred. It was then held that the complainants in their evidence had admitted that they had refused the ad-hoc promotions offered to them. They had also admitted that as they had refused to accept such ad-hoc promotions their juniors were considered for the same. The condition put by the complainants that they would accept the promotion only if it was given effect from 01.01.1986 was not acceptable to the employer and hence the complainants were rightly not given the promotion. It was thus held that the employer had not engaged in any unfair labour practice and hence the complaint came to be dismissed.

5. The complainants being aggrieved by the rejection of their complaint filed Writ Petition No.1064/2000. They challenged the order passed by the Industrial Court on merits and pleaded that the complainants were entitled to such promotion with effect from 01.01.1986. The writ petition was admitted and in the return filed by the employer it challenged the finding recorded by the Industrial Court that the complaint had been filed within time. It was pleaded that the complaint as filed was barred by limitation as the cause of action in favour of the complainants was not continuous.

The learned Single Judge after hearing both the sides observed that the grievance of the complainants that the service rules did not contemplate ad-hoc promotions could not be entertained for the first time in the writ petition. Similarly, creation of temporary vacancies as a justification for effecting the ad-hoc promotions also could not be gone into. It was observed that the question as to whether the

condition of up-gradation retrospectively from 01.01.1986 could have been overlooked by the employer arose for determination. However there were no arguments advanced in this regard before the Industrial Court. It was then observed that the promotion orders given to juniors on 28.04.1992 and 17.04.1993 had not been challenged by the complainants and the cause of action thus crystallized on the said dates, because the juniors to the complainants were promoted on those dates. A finding was also recorded that when the complainants got knowledge of the order dated 01.09.1992, their entitlement for consideration from 01.01.1986 accrued. By holding that the complaint could not be dismissed by accepting the argument of bar of limitation, the learned Single Judge proceeded to grant an opportunity to the complainants to file appropriate application for condonation delay before the Industrial Court. The Industrial Court was then directed to consider that application and if delay was condoned, to proceed with the complaint afresh in accordance with law. For that purpose the impugned judgment of the Industrial Court was set aside. It is this order which is the subject matter of challenge in the present letters patent appeal.

6. Shri H.V.Thakur, learned counsel for the employer submitted that the learned Single Judge committed an error of jurisdiction by remanding the proceedings to the Industrial Court to enable the complainants to file an application for condonation of delay despite recording a finding that the cause of action was not continuous and that the same had crystallized on the dates the juniors to the complainants had been promoted. Such promotion orders were dated 28.04.1992 and 17.04.1993. It was thus clear that the complaint as filed on 17.11.1994 was

clearly barred by limitation. He submitted that a specific objection that the complaint was barred by limitation had been raised in the written statement and pursuant thereto the Industrial Court had framed Point No.1 as to whether the complaint was barred by limitation. By holding the cause of action to be continuous it was held that the complaint was filed within limitation. In the return filed by the employer this finding was specifically challenged and in view of the observations and findings in paragraphs 11 and 12 of the impugned judgment, it was clear that the cause of action in favour of the complainants was not continuous but it had crystallized on 28.04.1992 and 17.04.1993. Despite recording this finding the learned Single Judge held that the complaint could not be dismissed by accepting the arguments as to bar of limitation. No reason whatsoever was given for remanding the proceedings after recording such finding. In absence of any legal basis whatsoever for remanding the proceedings to seek condonation of delay, the right accrued in favour of the employer was sought to be taken away without any legal basis. On this count alone, the impugned judgment was liable to be set aside.

In this regard reliance was sought to be placed on the decisions in *Union of India and others Vs. A.Durairaj (dead) by LRs (2010) 14 SCC 389, Maharashtra Industrial Development Corporation and others Vs. Baban Nathaji Sarode and another 2003 (1) Mh L J 63* and *Chittranjan s/o Devidas Wasnik Vs. Managing Director, Vasantrao Naik Vimukta Jati and Nomadic Tribe Development Corporation (Ltd), Mumbai and another 2010 (4) Mh L J 640*. It was urged that when the bar of limitation was raised by the employer at the first instance itself while filing the written statement, it was open for the complainants at that stage to have taken appropriate steps. The written statement was filed in the year 1996. The

complainants however pursued the complaint by urging that the cause of action was continuous. Having found that the cause of action was not continuous, no opportunity was liable to be granted to the complainants causing prejudice to the employer.

7. It was further submitted that as the complainants had refused promotions offered to them on 28.04.1992 and 17.04.1993 there was no legal basis whatsoever to subsequently make a grievance that their claim for promotions had been disregarded and that the juniors had been promoted. The refusal to accept ad-hoc promotion by the complainants was a voluntary act on their part and in the light of their admissions in the deposition, it was clear that no unfair labour practice was committed by the employer. Such finding was rightly recorded by the learned Member of the Industrial Court. However without reversing that finding and without even *prima facie* holding that any unfair labour practice had been committed, the judgment of the Industrial Court had been reversed. There was no legal basis whatsoever for doing so and on this count also the judgment of the learned Single Judge was liable to be set aside. In that regard reliance was placed on the decisions in *Premier Automobiles Limited Vs. Engineering Mazdoor Sabha and others, 1982 (2) LLJ 73* and *Siemens Limited and another Vs. Siemens Employees Union and another 2012(1) Mh.L.J. 548*. He further submitted that remand of the proceedings could not be directed to enable a party to fill up lacuna thereby causing prejudice to the other side. It was not the case that due opportunity was not made available to the complainants or that for want of proper opportunity they were not in a position to prosecute the proceedings before the Industrial Court. The parties had led

evidence in support of their respective stands and hence the proceedings ought to have been decided on the basis of the material available on record. To substantiate this contention, the learned counsel relied on the decisions in *Zarif Ahmad (Dead) through LRs and another Vs. Mohd. Farooq* (2015) 13 SCC 673, *Shivakumar and ors Vs. Sharanabasappa and ors. (2020) 7 SCALE 353* and *Mahadeorao s/o Damduji Satawne Vs. Nagpur Improvement Trust and others 2015 (5) Mh.L.J.70*. It was thus submitted that the judgment of the learned Single Judge was liable to be set aside on these counts.

8. On the other hand Shri A.D.Dangore learned counsel for the complainants supported the judgment of the learned Single Judge. Referring to the memorandum of settlement dated 17.10.1989 and Clause 8 thereof, it was sought to be urged that there was no provision for granting any ad-hoc promotion. Though the posts of Sub-Head of Section were available, the ad-hoc promotions were being offered to the complainants. He submitted that in view of the fact that about eight junior clerks were on medical leave, the employer proceeded to make ad-hoc promotions. In that regard, he referred to paragraph 15 of the return filed by the employer. According to him various juniors to the complainants were given promotions and there was no reason put forth by the employer for denying the promotions to the complainants from 01.01.1986. He referred to the communication dated 22.05.1992 issued by the complainant no.1 to the employer in which it was stated that the said complainant was willing to accept the promotion as Sub Head of Section provided it was granted with effect from 01.01.1986. He sought to indicate the availability of the posts of Sub Head of Section to urge that there was no need to

make any ad-hoc promotion on 08.09.1990. It was thus clear that the complainants had established commission of unfair labour practice especially under Item 9 of Schedule IV of the Act of 1971 and the complainants were thus entitled to necessary reliefs.

The direction to remand the proceedings as issued was supported by submitting that grant of such opportunity was found necessary in the interests of justice and hence there was no reason to interfere with the exercise of such discretion. It was further submitted that during the pendency of the proceedings the complainant no.1 had expired while the complainant no.2 had retired from the service on 31.03.2017 and hence this Court may adjudicate the proceedings on merits. He thus submitted that the Letters Patent Appeal was liable to be dismissed.

9. We have heard the learned counsel for the parties at length and we have perused the records of the case. We have given our due consideration to the rival submissions. The record indicates that initially on 06.09.1990 the employer resolved to fill in eight posts of Sub Head of Section on ad-hoc basis. In the document at Exhibit 61 it has been stated that in view of long medical leave of eight junior clerks and likelihood of they refusing promotions, it was proposed to fill in the said posts on temporary basis. Thereafter on 08.09.1990 the eight clerks were sought to be promoted on ad-hoc basis and the names of the complainants are at serial nos.2 and 3 as can be seen from Exhibit 36. The complainants were posted to the branch at Jhanshi. Both the complainants on 17.09.1990 expressed their unwillingness to go on transfer to Jhanshi on ad-hoc basis. Thereafter on 28.04.1992 as per Exhibit 42 the willingness of the complainants were again sought for their promotion and the

complainants stated that they were willing to go Bhopal, Jabalpur or Bhusaval provided they were promoted as Sub Head of Section against the upgraded post with effect from 01.01.1986. Similar is the position with regard to the vacancies that were to be filled in on 17.04.1993 which document is at Exhibit 43. The promotion to the post of Senior Clerk was thereafter effected on 30.04.1995 which included the names of the complainants at serial numbers 34 and 35. As stated above, the complainants issued a legal notice on 26.09.1994 and filed the complaint on 17.11.1994. Perusal of the complaint indicates that there is reference to the initial order of promotion dated 08.09.1990 on ad-hoc basis. By pleading that the cause of action was continuous in nature, the complaint was filed on 17.11.1994.

10. In the written statement a specific objection was raised by the employer as to the bar of limitation. It was stated that from the pleadings it was clear that the cause of action arose on 08.09.1990 and hence the complaint filed on 17.11.1994 was barred by limitation. The Industrial Court in the light of these pleadings framed Point no.1 as regards the bar of limitation and held that the cause of action was continuous and hence the complaint was not time barred. Since the complaint was dismissed on merits, in the writ petition filed by the complainants, the employer challenged the finding recorded by the Industrial Court that the cause of action was continuous. A detailed objection in that regard was raised in paragraph 11. It was stated that even the promotions offered in the year 1992-93 were on ad-hoc basis and hence the complainants ought to have accepted the same. Perusal of paragraphs 11 and 12 of the judgment of the learned Single Judge indicate that it has been observed that the promotion given to juniors on 28.04.1992 and 17.04.1993 had not

been challenged by the complainants and the cause of action in their favour crystallised on those dates. Their supersession also gave them a cause of action as observed in paragraph 12.

11. The Industrial Court, while deciding the complaint on 10.12.1999 has after considering the documentary evidence on record in paragraph 10 of its judgment held that on three occasions the complainants had refused to accept the promotion offered to them and therefore the employer was not at fault. A finding was recorded that the employer had not engaged in any unfair labour practice either under Item 5 or Item 9 of Schedule IV to the Act of 1971. After recording such finding the complaint came to be dismissed. At this stage it is necessary to refer to the provisions of Section 30(1) of the Act of 1971. The powers of the Industrial and Labour Courts are indicated by Section 30 and under sub-section(1) when the Court decides that any person named in the complaint has engaged in or has been engaging in any unfair labour practice it may in its order declare that an unfair labour practice has been engaged in or is being engaged in by that person. The Court can in its order direct such person/persons to cease and desist from such unfair labour practice and take such affirmative action which in the opinion of the Court would be necessary to effectuate the policy of the Act of 1971. From the aforesaid provision, it is clear that the Court gets jurisdiction to issue a direction to the person who is engaged in or has been engaging in any unfair labour practice to take necessary affirmative action. In other words, such jurisdiction is available with the Court only after making a declaration that an unfair labour practice has been engaged in by such person. As stated above, the Industrial Court in the impugned

judgment has in paragraph 10 clearly held that there was no unfair labour practice committed by the Employer. The learned Single Judge has not specifically dealt with that aspect in the judgment under challenge. In paragraph 13 it has been observed that the learned Member of the Labour Court had not considered all relevant aspects of the matter. On that basis an opportunity was given to the complainants to file an appropriate application for seeking condonation of delay.

12. In this regard, it is necessary to refer to the decision of learned Single Judge in ***Premier Automobiles Limited*** (supra). It has been held therein that for the purposes of exercising jurisdiction under Section 30 of the Act of 1971 a finding as to the commission of unfair labour practice has to be first recorded by the Court. If the Court finds that no unfair labour practice has been proved it cannot issue any direction nor can it decide the matters contemplated by Section 32 of the Act of 1971. It is thus clear that *sine qua non* for exercise of jurisdiction under Section 30(1) read with Section 32 of the Act of 1971 is a finding by the Court that the person/persons named have committed an unfair labour practice. In our view in the present case, it was necessary for the learned Single Judge to have first arrived at atleast a *prima facie* opinion that the employer was guilty of having committed an unfair labour practice thus warranting grant of an opportunity to the complainants to re-agitate their grievances. This is for the reason that the Industrial Court at the conclusion of the proceedings had held that no unfair labour practice was committed by the employer. However, without recording any *prima facie* opinion that the finding recorded by the Industrial Court of absence of any unfair labour practice being committed by the employer was not in accordance with law, its order has been

set aside. In paragraph 13 it has been observed that only for the purposes of permitting the complainants to file an appropriate application to seek condonation of delay the judgment of the Industrial Court dated 10.12.1999 was being set aside. Thus in absence of any *prima facie* indication that the order passed by the Industrial Court was not in accordance with law, it has been set aside. The learned counsel for the employer in that regard has referred to the decision in ***Mahadeorao s/o Damduji Satawne*** (supra) to urge that unless re-trial is found necessary a remand ought not to be ordered. Though the aforesaid decision considers the provisions of Order XLI Rule 23-A of the Code of Civil Procedure, 1908 on principles analogous to the same there ought to be an indication as to why the proceedings in the complaint have been directed to be conducted afresh. We find absence of this aspect in the judgment of the learned Single Judge.

In the passing we may note that it was not the case of the complainants in the writ petition that they were not afforded full opportunity by the Industrial Court as a result of which they could not put forth their grievances in accordance with law. On the contrary, both the complainants examined themselves while the employer examined one witness. Both the parties placed on record documentary material in support of their respective stands. Since both the parties were aware about the case as pleaded and the defences as raised, the proceedings deserve to be adjudicated on the basis of the material on record. In absence of any prayer made in that regard and in absence of any grievance as to lack of opportunity, we do not find any justification for deciding the complaint afresh. It is also not the case of re-trial being found necessary to support the order of remand.

13. The question then to be considered is as regards the correctness of the direction to remand the proceedings to enable the complainants to file an application for condonation of delay. It is to be kept in mind that since commencement of the proceedings, the employer had raised a plea that the complaint as filed was barred by limitation. In the written statement it was further stated that the promotions offered in the year 1992-93 to the complainants were refused by them and this fact was also suppressed by them in the complaint. In the light of these pleadings when the Industrial Court adjudicated the same in favour of the complainants, the employer while supporting the dismissal of the complaint on merits challenged the finding that the complaint was filed within limitation. It is thus clear from the record that the parties had joined issue on the aspect of limitation and there was an opportunity for the complainants to have taken appropriate steps in the light of the specific objection raised by the employer in the written statement. Having joined issue on the question of limitation and by continuing to urge that the cause of action for the same was continuous, it appears to be inequitable and unjustified at this stage to remand the proceedings so as to permit the complainants to seek condonation of delay in filing the complaint. The reason for permitting the complainants to avail of such opportunity cannot be gathered from the observations in paragraph 13 of the judgment of the learned Single Judge. When the parties to the litigation have joined issue on a particular point, permitting one of them to take steps so as to deprive the other party of any advantage gained at some stage of the litigation in the absence of any legal or justifiable reason is not found to be permissible. Such direction to seek condonation of delay definitely causes prejudice to the employer especially in the light of the right accrued to it in the form of

pleadings and evidence on record. It was not the case that the bar of limitation was being raised for the first time in the writ petition but the same was taken since inception of the proceedings. In the absence of any reason whatsoever for permitting the complainants to seek condonation of delay that direction cannot be sustained merely on the basis of the observations that the Industrial Court had not considered all relevant aspects of the matter. We thus find that the permission granted to the complainants to seek condonation of delay in these facts is without any legal justification.

14. Though it was urged by the learned Counsel for the complainants that this Court if found necessary could adjudicate the proceedings on merit, we are not inclined to undertake that exercise. Instead we find that the learned Single Judge could consider the writ petition afresh in the light of the material placed on record. Since we are of the view that the writ petition deserves to be decided on the basis of material placed on record by the parties, we have avoided reference to various decisions relied upon by the learned counsel for the parties which touch the merits of the dispute. These contentions can be raised while adjudicating the writ petition.

15. In the light of aforesaid discussion, the following order is passed :

- (i) The judgment of the learned Single Judge dated 20.09.2010 in Writ Petition No.1064/2000 is set aside.
- (ii) Writ Petition No.1064/2000 is restored to file for its adjudication on merits. Since the writ petition is of the year 2000 we request the learned Single Judge to expeditiously decide the same.

It is clarified that we have not examined the merits of the respective claims made by either parties and all contentions on merits are kept open.

(iii). Letters Patent Appeal No.567/2010 is allowed in aforesaid terms leaving the parties to bear their own costs.

JUDGE

JUDGE

Andurkar..