

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5088 OF 2022

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Municipal Corporation of Greater Mumbai
Through The Chief Fire Brigade Officer,
Mumbai Fire Brigade, Shaikh Hafizuddin
Raod, E-Ward Office, Byculla,
Mumbai – 400 008.

...Petitioner

Versus

Dattadas Prabhakar Sawant
9/692 MHB Colony, Near Tata Power
House, Borivali (E), Mumbai – 400 066

...Respondent

Mr. P. M. Palshikar, a/w Santosh Parad and R. Y. Sirsikar, for
the Petitioner – MCGM.

Mrs. Vidula Patil, for the Respondent.

Mr. S. S. Rane, Deputy Fire Officer, present.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 6th JUNE, 2023

PRONOUNCED ON: 2nd AUGUST, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. The challenge in this Petition is to the judgment and order dated 7th March, 2020 passed by the learned Member, Industrial Court at Mumbai in complaint (ULP) No. 56 of 2019, whereby it was declared that the petitioner - respondent therein, indulged in unfair labour practice under Item 9 of Schedule – IV of the Maharashtra Recognition of Trade Unions and Prevention of

Unfair Labour Practices Act, 1971 ("the Act, 1971"), and the petitioner was directed to treat 573 days period as the period spent on duty by the respondent instead of absence without leave for grant of benefits, except wages, and to refund the amount which was deducted from the salary of the respondent-complainant therein, which was recovered by treating the said period as absence without leave, by an order dated 2nd February, 2007.

3. The Petition arises in the backdrop of the following facts:-

(a) The respondent came to be appointed as a temporary Fireman from a reserved category subject to condition of furnishing Caste Validity Certificate, within six months. The petitioner claims, the respondent failed to furnish the Caste Validity Certificate. A show cause notice was issued to the respondent on 23rd November, 2010. The reply submitted by the respondent on 1st December, 2010 thereto, was found to be unsatisfactory. Therefore, with the approval of the competent authority, the services of the respondent were terminated with effect from 23rd December, 2010.

(b) The respondent preferred a Writ Petition bearing No. 169 of 2011 before this Court. On 12th December, 2011, when the said petition was listed before this Court, upon being

informed that the case of the respondent was similar to that of Mr. Mandre and Mr. Gowda, who were absorbed in service as open category candidates upon their failure to submit Cast Validity Certificate and there were some vacancies in the open category, a Division Bench of this Court, without entering into the merits of the case, disposed the petition by giving liberty to the petitioner to make a representation to joint Municipal Commissioner who, in turn, was directed to pass an appropriate order after providing personal hearing to the respondent.

(c) The Joint Municipal Commissioner, post giving personal hearing to the respondent and appraisal of the material including the facts and circumstances of the cases of Mr. Mandre and Mr. Gowda, formed an opinion that the facts of the cases of Mr. Mandre and Mr. Gowda and the respondent were identical and, thus, revoked the order of termination dated 13th December, 2010 and ordered that the respondent-complainant be absorbed in open category on the similar lines of Mr. Mandre and Mr. Gowda on the condition that the respondent - complainant shall not claim any benefit of reserve category in the future and that the said order shall not be treated as a precedent by anybody.

(d) The Chief Fire Officer again made a reference to the Joint Commissioner seeking clarification as to whether the respondent-complainant be re-appointed or he be given appointment retrospectively with effect from 6th September, 2006. The learned Commissioner ordered respondent be absorbed with effect from 6th September, 2006.

(e) The respondent-complainant thus came to be appointed by an order dated 18th July, 2012. It transpired that the respondent was paid wages, upon fixing the salary by granting increments for the period commencing from the date of the termination till the date of appointment in the open category as well. The Chief Fire Officer, by an order dated 23rd February, 2007, directed that the said period commencing from 23rd December, 2010 to 18th July, 2012 aggregating to 573 days be reckoned as absence without leave and the break in service be accordingly condoned. Consequently, the deduction from the salary of the respondent to recover the amount of wages allegedly erroneously paid, due to grant of increments for the said period, was sought to be made from the month of February, 2019, in as much as the entire net pay for the said month was deducted towards the recovery of the said amount.

(f) The respondent thus filed a complaint alleging unfair labour practices under Items 5 and 9 of the Act, 1971. The order passed by the Chief Fire Officer treating the period of 573 days as absence without leave was stated to be of punitive in nature and thus required to be quashed and set aside.

(g) The petitioners resisted the complaint contending, *inter alia*, that the respondent was not entitled to earn wages and increments for the period during which he was not on duty. Since no financial benefits were to be granted to the respondent for the said period, the increments of pay also could not have been granted. Thus, the employer was justified in re-fixing the salary and recovering the amount which was wrongfully paid to the respondent.

(h) The parties led evidence before the Industrial Court. After appraisal of the oral evidence and the documents tendered for his perusal, the learned Member Industrial Court was persuaded to hold that the employer indulged in unfair labour practices. The learned Member was of the view that though the respondent was not entitled for wages for the period of 573 days on the principle of no work no wages yet the respondent was entitled for treating the period of 573 days as period spent on duty instead of period of absence without leave. Thus in the

opinion of the learned Member, Industrial Court, the order treating the period as absence without leave was illegal and so also the consequent recovery.

4. Being aggrieved the employer has preferred this Petition.

5. I have heard Mr. P. M. Palshikar, the learned Counsel for the Petitioner and Mrs. Vidula Patil, the learned Counsel for the respondent, at some length. The learned Counsel took the Court through the pleadings and material before the Industrial Court and the affidavit, reply thereto and the documents tendered before this Court as well.

6. Mr. Palshikar submitted that the impugned order is legally unsustainable. The learned Member, Industrial Court, committed a manifest error in holding that though the respondent was not entitled to wages for the period for which he was out of employment yet he was entitled to increment for the said period by construing the said period as period spent on duty. Where an employees is not entitled to wages for a particular period, according to Mr. Palshikar, no question of grant of increment for the said period arises. Mr. Palshikar would urge that the controversy is no longer *res integra* and is covered by a decision of the Supreme Court in the case of ***A. P. SRTC and Another Vs. S. Narsagoud***¹. The said decision,

1 (2003) 2 SCC 212

according to Mr. Palshikar, has again been followed by the Supreme Court in the case of *Laxman Reddy Vs. A.P.S.R.T.C. and Others*².

7. Mr. Palshikar would further urge that the learned Member, Industrial Court, lost sight of the fact that the respondent had failed to furnish Cast Validity Certificate and the respondent was absorbed in service from open category. Having not rendered the services on account of such default on the part of the respondent, the employer cannot be saddled with liability to release and pay increments for the said period of idleness, urged Mr. Palshikar.

8. In opposition to this, Mrs. Patil supported the impugned order. It was submitted that the order of termination was set aside, in its entirety, and the respondent came to be absorbed in service with effect from 6th September, 2006 with all benefits and continuity of service. Therefore, the denial of increments for the said period by treating it as absence without leave was wholly unjustifiable.

9. I have given anxious consideration to the rival submissions. The circumstances in which the respondent came to be terminated and reinstated in service bear upon the

determination of the controversy at hand. As noted above, the respondent came to be terminated by an order dated 23rd December, 2010 for failure to produce the Caste Validity Certificate. Pursuant to the directions of this Court in Writ Petition No.169 of 2011, dated 12th December, 2011, the Joint Municipal Commissioner revoked and set aside the said order of termination and directed that the respondent be absorbed in open category on the lines similar to that of Mr. Gowda and Mr. Mandre. By a further order dated 5th June, 2006, it was directed by the Joint Municipal Commissioner that the respondent be absorbed in the open category from 6th September, 2006 i.e. the date of initial appointment of the respondent with the petitioner.

10. It is imperative to note that the Joint Municipal Commissioner was persuaded to revoke the order of termination dated 23rd December, 2010 and direct the absorption of the respondent in open category as it was found that the respondent was similarly circumstanced like that of Mr. Mandre and Mr. Gowda, who were absorbed in the open category, despite having failed to produce the Caste Validity Certificate. What weighed with the Joint Municipal Commissioner was the fact that Mr. Gowda and Mr. Mandre were subjected to a

disciplinary proceeding and, post inquiry, they were saddled with penalty of withholding one increment permanently, while allowing them to be absorbed in the open category. However, no disciplinary proceeding was initiated against the respondent and he was straightaway terminated from service on the premise that the explanation furnished by the respondent was found to be unsatisfactory.

11. The copies of the orders dated 4th January, 2011 and 3rd June, 2011, annexed to the affidavit-in-reply to the respondent (pages 226 and 227), passed in respect of Mr. Mandre and Mr. Gowda, indicate that Departmental Enquiry was conducted against them and they were found guilty of misconduct and thus they were punished with penalty of withholding one increment permanently. However, their services were not terminated and they were absorbed in the open category.

12. The aforesaid factual backdrop deserves to be kept in view while appreciating the submission forcefully canvassed on behalf of the petitioner that the respondent, not having worked for the period for which he was out of employment, cannot be permitted to earn increment for the said period. The legality of the order dated 23rd February, 2017 passed by the Chief Fire Officer, declaring that the said period of 573 days be treated as

absence without leave is also required to be tested in the aforesaid backdrop.

13. Mr. Palshikar invited the attention of the Court to the definition of, “absence without leave” contained in Chapter-II of the Brihanmumbai Municipal Corporation (Service) Regulations, 1989.

Rule 9(1) reads as under:

“**9(1)** Absence without leave means unauthorized absence. Such absence without leave will ordinarily constitute a break in service unless otherwise specifically directed by the authority competent to make appointments. Such period of absence will be excluded from the period to be countered for earning benefits such as increment, leave, pay and allowances and for service for Pension and Provident Fund.”

14. Mr. Palshikar also invited the attention of the Court to Rule 47 which provides that period of overstayal after the expiry of leave, absence, without leave or leave without pay and maternity leave would not be reckoned for grant of increments.

15. Banking on aforesaid prescription in the Rules, Mr. Palshikar would urge that increments can be earned only upon an employee having rendered the services. In the case at hand, since the respondent had been terminated for failure to produce the Caste Validity Certificate and, consequently, was out of employment, the respondent was not entitled to earn increments for the said period.

16. A very strong reliance was placed on the decision of the Supreme Court in the case of *S. Narsagoud* (supra). The facts in the said case are required to be noted to correctly appreciate the ratio of the decision therein. The employee therein was removed from service for the misconduct of unauthorized absence from duty. The Labour Court ordered reinstatement of the employee in service with continuity of service but without backwages. The employee preferred writ petition before the High Court, making a grievance that he was reinstated in service but while fixing the wages payable to him, on his reinstatement, the periodical increment which would have been earned by him, had he been in service during the period of absence, were not taken into account. The High Court directed the employer to compute the periodical increment and re-fix the wages payable to the employee by taking into account the said increments.

17. In the backdrop of aforesaid facts, a submission was advanced before the Supreme Court that the effect of the High Court judgment was that the employee upon being reinstated, inspite of having been held guilty of unauthorized absence from duty, continues to earn increments though there is no payment of wages for the period of absence, and that results in an incongruous situation.

18. The Supreme Court found merit in the aforesaid submission. The observations in paragraphs 9 and 10 are instructive and hence extracted below:

“9. We find merit in the submission so made. There is a difference between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits. Which necessarily flow from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit of the increments earned during the period of absence. In our opinion, the employee after having been held guilty of unauthorized absence from duty cannot claim the benefit of increments notionally earned during the period of unauthorised absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with the benefit of continuity in service.

10. The Regulations referred to hereinabove clearly spell out that the period spent on the extraordinary leave or leave without pay or a period of overstayal after the expiry of leave or joining time cannot count towards increments unless the order of the competent authority sanctioning the extraordinary leave or leave without pay or the order commuting the period of overstayal into extraordinary leave or leave without pay is accompanied by specific order to count the period for increments. A period of unauthorised absence from duty treated as a misconduct and held liable to be punished by any of penalty cannot be placed on a footing better than the period of extraordinary leave or leave without pay or a period of overstayal. Ordinarily, the increments are earned on account of the period actually spent on duty or during the period spent on leave, the entitlement to which has been earned on account of the period actually spent on duty. The direction of the High Court entitling the respondent to earn increments during the period of unauthorized absence from duty though held liable to be punished in departmental inquiry proceedings would amount to putting a premium on the misconduct of the employee.”

(emphasis supplied)

19. The aforesaid judgment was followed by the Supreme Court in the case of *Laxman Reddy* (supra) and in *A. P. Road Transport Corporation and ors. vs. Abdul Kareem*³

20. The aforesaid pronouncement, in my considered view, does not lay down a proposition of law that whatever be the circumstances in which an employee was compelled to be out of employment, he would not be entitled to claim benefit of increments on the principle that he had not worked for the said period. The correct ratio of the aforesaid judgment is that an employee who has been found guilty of misconduct, be it of unauthorized absence or of other nature, and thereafter reinstated in service, cannot claim the benefit of increments notionally earned during the period of unauthorized absence or the period during which he was out of employment, in the absence of a specific direction in that regard. This becomes evident from the observations of the Supreme Court in paragraph 10 of the judgment in the case of *S. Narsagoud* (supra) to the effect that permitting an employee to earn increment during the period of unauthorized absence from duty though held liable to be punished in the departmental enquiry proceedings would amount to putting a premium on the misconduct of the employee.

3 2005(3) CRS 207 SC.

21. The distinguishing feature of the case at hand is that no disciplinary proceeding was at all initiated against the respondent and he was straightaway dismissed from service on the premise that his explanation was not found satisfactory. In contrast, two similarly circumstanced employees were given the dispensation of absorption in the open category by imposing punishment of withholding one increment permanently, post a Departmental Enquiry. It is this factor which predominantly weighed with the Joint Municipal Commissioner to order the setting aside of the termination and absorption of the respondent in the open category as no distinction was found between the case of the respondent and that of Mr. Gowda and Mr. Mandre. In effect, the respondent had been discriminated against in the context of the treatment meted out to similarly circumstanced employees.

22. In the backdrop of the aforesaid facts, I find it rather difficult to draw an inference that the respondent was kept away from employment for a proved misconduct. The order passed by the Joint Municipal Commissioner to absorb the respondent in service from the date of initial appointment i.e. 6th September, 2006 makes the intent of the employer clear and explicit. The proposal dated 9th April, 2012 submitted by the Chief Fire

Officer, wherein directions were sought as to whether the respondent be re-appointed or he be absorbed with effect from 6th September, 2006 retrospectively, makes it clear that the Competent Authority took an informed decision thereon to absorb the respondent with effect from 6th September, 2006. The subsequent order dated 23rd February, 2017 by which the period of absence was condoned with a rider that the absence of 573 days be treated as absence without leave, in the aforesaid backdrop, becomes unsustainable.

23. From the aforesaid standpoint, the learned Member, Industrial Court, was justified in ordering that the said period of 573 days be treated as the period spent on duty, instead of absence without leave for all benefits, except wages. Properly construed, in the peculiar facts of the case, the said period cannot be termed as absence without leave as the employer having realized the impropriety of the termination in the face of the treatment meted out to two similarly circumstanced co-employees, revoked the order of termination and made amends. Therefore, the contention on behalf of the petitioner that the said period of absence deserves to be reckoned as the absence without leave does not merit acceptance. In any event, as the respondent has been denied all the wages for the said period,

and has been held entitled to the benefits of increments notionally, for the said period, I do not find any justifiable reason to interfere in exercise of extraordinary writ jurisdiction. Hence, the petition fails.

24. Thus, the following order:

: O R D E R :

- (i)** The petition stands dismissed.
- (ii)** Rule discharged.
- (iii)** In the circumstances, there shall be no order as to costs.

[N. J. JAMADAR, J.]