

(2017) 08 BOM CK 0144
In the Bombay High Court
Case No : 3070 of 2008

M/s. Lokmat Newspapers Private Limited	APPELLANT
Vs	
Motiram s/o Mahadeorao Dhoble	RESPONDENT

Date of Decision : 21-08-2017

Acts Referred:

Industrial Disputes Act, 1947, Section 10, Section 2A, Section 2(s) -
Reference of disputes to Boards, Courts or Tribunals - Dismissal, etc., of an individual workman to be de

Citation : (2017) 08 BOM CK 0144

Hon'ble Judges : Indira Jain

Bench : SINGLE BENCH

Advocate : V.P. Marpakwar, S.O. Ahmed

Judgement

1. This petition takes an exception to the judgment and order dated 12.3.2008 passed by the Industrial Court, Nagpur in Complaint (ULPA) No.97/2003. By the said judgment and order, Industrial Court allowed the complaint filed by the respondent under Section 28 of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (For short "Act of 1971") and declared that petitioner has indulged in unfair labour practice under Items 5, 7 and 9 of Schedule IV of the Act of 1971 and shall cease and desist from continuing the unfair labour practice.

2. The facts giving rise to the petition may be stated in brief as under : (i) Petitioner is a registered company under the Companies Act and is publishing daily newspapers from Nagpur. Petitioner-company is an industry within the meaning of Section 2(j) and complainant is a workman under section 2 (s) of the Industrial Disputes Act, 1947.

(ii) Respondent was appointed with effect from 25.5.1984. As the appointment order was issued in the name of M/s. Goldi Advertising and Marketing Services (P) Limited, respondent filed Complaint (ULP) No.459/1988 before the Industrial

Court claiming that his employment was under petitioner-company and the pay-scale applicable to the post of Junior Clerk was as per the Bachhawat Award. The said complaint was allowed on 21.4.1998. The litigation was contested up to the Hon''ble Supreme Court. Vide judgment and order dated 22.4.1999 in S.L.P. filed by petitioner-management against the order of the Division Bench of this court in L.P.A. No.219/1998, the Hon''ble Supreme Court confirmed that complainant was in employment of Lokmat Newspaper Private Limited with effect from 11.4.1988.

(iii) During pendency of complaint, complainant was put under suspension with effect from 21.12.1993, vide letter dated 16.12.1993 issued by Managing Director, Goldi Advertising and Marketing Services Limited. The suspension of complainant was revoked from 21.12.1999 and he was posted in RRD and Library Section. Complainant was working as a Librarian on higher pay-scale. Thereafter, he was transferred to the Circulation Department as a Junior Clerk.

(iv) Complainant then made representations and petitioner-management issued an appointment order to respondent dated 15.6.2002 in the pay-scale prescribed as per Manisana Award made applicable to petitioner-company. According to complainant, he was entitled to pay-scale with effect from 18.4.1988 as per Bachhawat Award.

(v) Respondent then filed Complaint (ULP) No.699/2001 on the basis of equal work equal pay and Complaint (ULP) No.97/2003 under Section 28 read with Items 5, 7 and 9 of Schedule IV of the Act of 1971.

(vi) The grievance of complainant in complaint was regarding denial of promotion out of vengeance, as he was claiming to be employee of petitionercompany and not the employee of M/s. Goldi Advertising and Marketing Services (P) Limited. According to complainant, petitioner-management had deliberately shown him under the employment of M/s. Goldi Advertising and Marketing Services (P) Limited. The persons employed after the complainant were given promotions every two years of the service. In his case, despite orders from the Hon''ble Supreme Court, complainant was not given his rights and was appointed on the post of Junior Clerk with a view to victimize the complainant, as he raised grievance against the management. It was submitted that complainant ought to have been promoted as a Senior Clerk in 1991, Assistant Circulation Officer in 1994, Circulation Officer in 1997 and, thereafter, as Circulation Manager. Complainant stated that at no point of time, during his service tenure, adverse remarks were communicated to him. The suspension order issued by M/s. Goldi Advertising and Marketing Services (P) Limited in 1993 was due to vengeance and prejudice. No departmental action was initiated against him. No charge-sheet was issued to him still he was put under suspension from 1993 to 1999 without any cause.

(vii) The next contention raised on behalf of complainant was that even after the judgment of the Hon''ble Supreme Court, he made several representations to the petitioner. As management could not redress his grievances regarding promotion

and the attached benefits, he was required to file complaint under the Act of 1971.

(viii) Petitioner-management resisted the complaint by filing written statement (Exh.12). Multiple defences raised by petitioner were :

(i) Establishment of petitioner is covered under the Industrial Disputes Act, 1947 and, therefore, provisions of Act of 1971 would not be applicable, as the Central Act would prevail over the State Act;

(ii) Complainant has no right to file proceedings about unfair labour practice as under the Industrial Disputes Act, no right has been granted to a workman;

(iii) Complaint having been filed on 11.2.2003 claiming promotion with effect from 1991, 1994, 1997 and 2000 is barred by limitation;

(iv) Absence of agreement regarding promotion of employees on the establishment of petitioner-management and absence of agreement or settlement to claim promotion;

(v) Granting of promotion is a prerogative of management and depends upon various factors like educational qualifications, experience, competency, ability to handle responsibility of higher post, availability of vacancies of higher post and assessment of controlling authority etc.;

(vi) Petitioner-management is in no way connected with M/s. Goldi Advertising and Marketing Services (P) Limited and not responsible for issuance of suspension and revocation of suspension orders;

(vii) Complainant was appointed as a Junior Clerk. He was performing as a Junior Clerk in Circulation Department. No employee is given right to claim promotion only on the basis of seniority and/or completion of specific period;

(viii) Employees employed in newspaper establishment are covered by Award and Award does not contemplate granting of any promotion;

(ix) Complainant has not raised an industrial dispute under Section 2-A or under Section 10 of the Industrial Disputes Act and, therefore, Item No.7 of Schedule IV is not applicable;

(x) Junior Clerks appointed in 1989 and onwards were promoted on the basis of their individual performance. Their appointments were in the establishment of petitioner-company and not M/s. Goldi Advertising and Marketing Services (P) Limited, as in the case of complainant and

(xi) Complaint being devoid of merits deserves to be dismissed.

3. On the basis of the rival pleadings, issues came to be framed at Exh.13. Parties examined their respective witnesses. Learned Member of the Industrial Court, upon considering the evidence and material placed on record and on hearing the submissions made on behalf of the parties, came to the conclusion

that management by denying the promotion to the complainant engaged in unfair labour practice and it should cease and desist from continuing such unfair labour practice. The court also held that complainant is entitled to his promotion as a Senior Clerk on 1.1.1993, Assistant Circulation Officer from 1.1.1998 and Circulation Officer from 11.2.2003. The court directed to pay all benefits attached to the placement of complainant as per Palekar Award, Bachhawat Award and Manisana Award. Being aggrieved by the said judgment and order, management has preferred the present writ petition.

4. Heard Shri Marpakwar, learned counsel for petitioner and Shri Ahmed, learned counsel for respondent.

5. Learned counsel for petitioner submitted that respondent has alleged breach of Item Nos.5, 7 and 9 of Schedule IV. According to learned counsel, case of complainant does not fall in either of the three items. It is submitted that complaint came to be filed in the capacity of an individual employee and for any kind of grievance an industrial dispute has to be raised under Section 2-A or Section 10 of the said Act, which was not done by the respondent. Learned counsel submitted that promotion in petitioner-company is based on educational qualification, experience, competency and ability to handle responsibility of higher post, requirements of persons and available vacancy of the post. The submission is that respondent did not fulfill the criteria and he has no right to claim promotion only on the basis of seniority. Petitioner submits that managerial functions are to be looked into by the management and Palekar, Bachhawat and Manisana awards cannot be interfered with by the Industrial Court. It is submitted that length of service is not the only criteria and taking into consideration the over all factors and keeping in view service conditions of newspaper employees as per the above said three awards, pay scales were duly given to respondent from time to time but this aspect has been totally ignored by the Industrial Court. A grievance is made that various important admissions elicited in the cross-examination of respondent were not taken into consideration to arrive at the proper conclusion.

6. Petitioner filed an affidavit of its Senior Manager- Legal dated 29.6.2017 and submitted that after the decision of the Hon'ble Supreme Court and after issuance of the order dated 15.6.2002, respondent filed complaint within eight months and there was no occasion for management to consider service record of respondent as he was never considered as an employee of petitioner-company but was treated as an employee of M/s. Goldi Advertising and Marketing Services (P) Limited for all purposes till the decision of the Hon'ble Supreme Court. Regarding grievance of complainant that similarly situated junior employees were granted promotions, submission of petitioner-company is that those employees named by complainant were never in the service of M/s. Goldi Advertising and Marketing Services (P) Limited, but they were the employees of the petitioner-company. According to the petitioner, after considering the respondent as an employee of petitioner-company, appraisal forms were filled in by the

concerned departmental heads with recommendations. The appraisal forms of respondent were filled in from time to time and his work was not found satisfactory, therefore, he was given normal increments. Based on the above grounds, it is submitted that petitioner-company has not engaged into unlawful labour practice, as alleged by the complainant and the Industrial Court has wrongly held the petitioner-company liable for the same.

7. Per contra, learned counsel for respondent-employee submits that seven employees junior to respondent were promoted and respondent was denied promotion, though his entire service record is unblemished, clean and clear. It is submitted that not considering the senior and promoting the junior without any reason is nothing but victimization and in clear term indicating that petitioner-company had engaged into unlawful labour practice. Respondent pointed out that Complaint (ULPA) No.459/1988 was allowed on 21.4.1998 by the Industrial Court and though the said order was maintained up to the Hon'ble Supreme Court, petitioner-company did not consider the respondent for promotion. It is submitted that petitioner, despite the orders of the courts, has not fixed the pay scales of respondent as per the entitlement and respondent was required to file contempt petition for disobedience of the order and the said contempt petition is pending. Respondent fully supports the impugned order and prays to dismiss the petition with heavy costs.

8. Section 3 (16) of the MRTU & PULP Act, 1971 defines "unfair labour practice" to mean the unfair labour practices as defined in Section 26 of the said Act. Section 26 says that "unfair labour practice" means any of the practices listed in Schedules II, III & IV. In the case on hand, complainant alleges breach of Items 5, 7 and 9 of Schedule IV. For ready reference, these items are reproduced as follows :

Item 5 : To show favouritism or partiality to one set of workers, regardless of merits.

Item 7 : To discharge or discriminate against any employee for filing charges or testifying against an employer in any enquiry or proceeding relating to any industrial dispute.

Item 9 : Failure to implement award, settlement or agreement.

9. On going through the pleadings and averments in the complaint, it is apparent that item 7 and item 9 are not applicable to the present controversy. The main grievance of complainant is that juniors, whose names have been mentioned in the complaint, were promoted and respondent was not at all considered for promotion, though his service record is unblemished throughout. He alleges victimization on the ground that petitioner-company had shown favoritism to the juniors regardless of the merits.

10. In the normal course, it would have been permissible to this court to decline to go into the merits of the case because what has been done by the Industrial

Court is to be followed by petitioner in law, but having gone through the facts and circumstances of the case and the law governing the jurisdiction of the courts under the MRTU & PULP Act, it is necessary to go into the rival contentions of the parties and to decide the question arising therefrom.

11. Respondent has admitted in the cross-examination that he never worked on higher posts. He further admitted that he has not filed any document to show that employees were promoted only on the basis of seniority or length of service. There is no whisper in the complaint that the junior employees named in the complaint were initially appointed with M/s. Goldi Advertising and Marketing Services (P) Limited. Respondent admits in unequivocal terms in the cross-examination that to grant promotion factors like seniority, availability of work, posts, vacancies, qualifications and experience has to be taken into account. The Industrial Court did not consider all these material admissions brought in the evidence of complainant.

12. Needless to state that promotion or increase in salary in a private establishment is a managerial function and cannot be claimed to be a condition of service if there is no scope in the management for the same. The learned counsel for petitioner submitted that M/s. Goldi Advertising and Marketing Services (P) Limited had no promotional channel and till the order of the Hon'ble Supreme Court and issuance of order by petitioner-company, there was no scope for the petitioner-company to consider the case of complainant for promotion. According to petitionercompany, the persons named in the complaint were initially appointed by petitioner-company and not by M/s. Goldi Advertising and Marketing Services (P) Limited. While giving promotion, management is supposed to follow the service conditions as per the awards. The service conditions of the employees of petitioner-company are governed by Palekar, Bachhawat and Manisana Awards but none of the Awards contemplate granting of promotions. It is not denied by complainant that pay-scales prescribed under the Awards were duly given to him. In these circumstances, if promotion is not given to complainant by petitionercompany that ipso facto would not amount to victimization unless complainant establishes factual mala-fides, malice in law and effectual victimization by proving that promotions to some junior persons were given superseding the complainant without any reason or necessity.

13. It is significant to note that till the orders passed by the Hon'ble Supreme Court, complainant was treated as an employee of M/s. Goldi Advertising and Marketing Services (P) Limited. Vide communication dated 7.12.1999, petitioner asked the respondent to report for duties subject to final outcome and decision of the matter then pending before the Hon'ble Supreme Court. After the SLP was decided, order dated 15.6.2002 was issued by petitionercompany treating the complainant as its employee. Complaint (ULP) No.97/2003 came to be filed by respondent on 11.2.2003 claiming promotion as Senior Clerk from 1991, Junior Circulation Officer from 1994, Circulation Officer from 1997 and Assistant Manager from 2003. All these chronological events would indicate that within a

short span of eight months after the order dated 15.6.2002 was issued by petitioner-company, complaint came to be filed. It means there was no occasion for the management to consider the service record of respondent as respondent was never considered as an employee of petitioner-company but was treated as an employee of M/s. Goldi Advertising and Marketing Services (P) Limited for all purposes by petitioner-company till the decision of the Hon''ble Supreme Court. The action or inaction on the part of management, in such a situation, cannot be said to be unfair and arbitrary. Respondent could not prove factual mala-fides, malice in law and effectual victimization at the end of petitioner-company and having failed to prove the same cannot attribute unfair labour practice to petitioner-company.

14. It is an admitted fact that there is no standard or norms or policy for promotions to the employees working in petitioner-company. That does not mean that tribunal is powerless and cannot adjudicate industrial disputes between the management and workmen. The Industrial Tribunals are intended to adjudicate factual disputes between the management and workmen and pass effective awards in such a way that industrial peace and harmony between the employer and employees is maintained. The promotion is a managerial and administrative function of the management.

15. In the instant case, it has come on the record that promotion is not based solely on the seniority or length of service. There are various other factors which are required to be considered for the same. In such a situation, where initial appointment of complainant was with M/s. Goldi Advertising and Marketing Services (P) Limited and it is only after the orders of the Hon''ble Supreme Court that petitioner-company treated the complainant as its employee and issued the orders accordingly asking the complainant to report for the duties, it was necessary for the complainant to wait and watch and allow the management to consider his service record for promotion.

16. Instead of doing so, complainant rushed to the court and filed complaint within a short span after the petitioner issued the order dated 15.6.2002. Petitioner has categorically stated that M/s. Goldi Advertising and Marketing Services (P) Limited had no promotional channel and as soon as petitioner-company treated the complainant as its employee in view of the orders of the Hon''ble Supreme Court, management was to complete the formalities of appraisal forms to be filled in by the departmental heads with recommendations and assess the work performance of respondent. As complaint was filed, there was no occasion for management to consider the case of complainant for promotion. Complainant is not challenging the promotions given to the junior employees. Those employees were not joined as parties to the complaint. There is no evidence to establish malafides or malice in law or effectual victimization at the hands of management. The learned counsel for petitioner upon instructions states that respondent has retired from the service and financial benefits as per his entitlement have been granted to him by management.

17. In the above premise, the course open to the Industrial Court was to ask the management to decide the representations made by the complainant on 11.1.2000, 20.3.2001, 15.7.2002 and 20.1.2003 and consider the case of complainant for promotion in terms of the then prevailing norms/requirements for promotion in petitioner-company. As Industrial Court has not adopted the proper course available in law and in the absence of the evidence to attract unfair labour practice under item 5 of the MRTU & PULP Act, wrongly held management liable for breach of item 5, this court finds that the impugned order is unsustainable and needs to be interfered with in the present petition. In the result, petition succeeds. Hence, the following order : O R D E R

(i) Writ Petition No.3070/2008 is allowed.

(ii) Impugned order dated 12.3.2008 passed by the Industrial Court, Nagpur in Complaint (ULPA) No.97/2003 is quashed and set aside.

(iii) Complaint (ULPA) No.97/2003 stands dismissed.

(iv) Rule is made absolute in the above terms.

(v) No costs.