

(2007) 01 BOM CK 0054

In the Bombay High Court

Case No : Writ Petition No's. 2824 and 2828 of 1993

Prakash Aher and Another

APPELLANT

Vs

Amravati University and Others
 Amravati University
and Others Vs Shri Ashok Dada Wankhede

RESPONDENT

Date of Decision : 09-01-2007

Acts Referred:

Amravati University Act, 1983 — Section 25[1], 87
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 48
Maharashtra Universities Act, 1994 — Section 5[11], 51[8], 52, 8[3]
Maharashtra Universities Rules — Rule 51[8]

Citation : (2007) 2 BomCR 35 : (2007) 109 BOMLR 267 : (2007) 3 MhLj 138

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : P.C. Marpakwar, in Writ Petition No. 2828/1993 and J.B. Jaiswal, in Writ Petition No. 2824/2001, for the Appellant; J.B. Jaiswal and U.A. Patil, for Respondent Nos. 2 and 3 in Writ Petition No. 2828/1993 and A.S. Kilor in Writ Petition No. 2824/2001, for the Respondent

Judgement

B.P. Dharmadhikari, J.—Both these Writ Petitions are directed to be heard together. The question involved is whether the employer - Amravati University has indulged in unfair labour practice by prescribing qualification as graduate for post of Assistant Superintendent on its establishment. ULPA Complaint No. 203/1993 filed by the petitioners -employees in Writ Petition No. 2828/1993 challenging the said stipulation has been dismissed by the Industrial Court on 7.10.1993. ULPA Complaint No. 73/1993 filed by the respondent - Employee in Writ Petition No. 2824/2001, has been allowed by the Industrial Court on 12.1.2001. Those employees as also employer have challenged these orders in their respective Writ Petitions.

2. The petitioners-employees in Writ Petition No. 2828/1993 aspired to be promoted as Assistant Superintendent, and as per qualification of graduate prescribed by the employer vide notification dated 29.4.1989, the complainants

were aggrieved because they did not possess the said qualification. They relied upon the clauses in Standard Code which prescribed 3 years experience on Lower post for a employee to become eligible to claim promotion on next Class-III post. They contended that increase in educational qualification by notification dated 29.4.1989, was therefore beyond the powers of the Executive Council of the Employer and that constituted change in their service condition. The employees therefore, sought a direction to employer to promote them as per the mode and procedure prescribed in Standard Code. Their complaint was opposed by the employer - Amravati University, which relied upon the powers given to the Executive Council u/s 25[1][xxix] of the Amravati University Act, 1983 to contend that the Executive Council was competent to prescribe graduate as qualification and as such there was no question of any provision of Standard Code being violated in the matter. The employer therefore prayed for dismissal of the ULPA Complaints.

3. Vijay Joshi and Arun Joshi, filed applications for intervention in said ULPA Complaints. These persons are respondent Nos. 2 and 3 in W.P.No. 2828/1993. They supported the action of University and prescription of graduate qualification by notification dated 29.4.1989. The learned member of the Industrial Court considered the controversy and found that the prescription of graduate qualification by notification dated 29.4.1989 was not repugnant to the provisions of Clause III of Chapter I of Standard Code and therefore was not liable to be declared as bad u/s 87 of the Amravati University Act. It is found that there was no unfair labour practice under Item Nos. 5 and 9 of Schedule IV of the Act.

4. The respondent in Writ Petition No. 2824/2001, in similar circumstances filed ULPA Complaint No. 73/1993, making same grievance before the Industrial Court and contended that promotion given to one Shri Wankhede, as Senior clerk from 2.12.1991 on temporary basis and his subsequent promotion as Assistant Superintendent vide order dated 16.12.1992 constituted unfair labour practice as defined under item Nos. 5 and 6 of Schedule IV of the Act. He also contended that promotion was to be made on the basis of the seniority -cum-merit only and from amongst the persons who possess minimum qualification for lower post and three years experience. He relied upon Rule 3[3][iii] of the University Standard Code in support and contended that graduate cannot be the qualification for such promotion. The complaint was again opposed by the employer University on same grounds. The Industrial Court has delivered judgment on 12.1.2001 and allowed this complaint. While delivering this judgment the Industrial Court has also made reference to its earlier order which forms subject matter of Writ Petition No. 2828/1993. The Industrial Court has found that increase in qualification for promotion was not approved by the State Government as required by Rule 51[8] of the Maharashtra Universities Act, 1994 and as such the said qualification of graduate was not relevant while considering the case for promotion to the post of Assistant Superintendent. It also relied upon the provision of Section 5[11] of the Maharashtra Universities Act for the said purpose. It therefore, directed the employer to give promotion with all

consequential benefits to the respondent Ashok Wankhede from 16.12.1992 i.e. the date on which his juniors were given said benefits.

5. In Writ Petition No. 2828/1993 this Court has not passed any interim orders. It appears that in Writ Petition No. 2824/2001, this court has stayed the proceedings u/s 48 of the MRTU & PULP Act on 17.6.2003 and later on petitioner employer expressed his willingness to deposit the amount of difference of salary payable to respondent and that amount has been deposited on 30.07.1998. This Court has on 22.1.2004 permitted respondent Ashok Wankhede to withdraw the said amount. It is admitted position that the respondent has been promoted by the petitioner as Assistant Superintendent in obedience of the orders of Industrial Court.

6. I have heard Advocate Marpakwar and Advocate Kilor for respective employees. Advocate Jaiswal appears for Employer in respective petitions and Advocate Mrs. U.A. Patil, for respondent Nos. 2 and 3 in Writ Petition No. 2828/1993.

7. The question raised for consideration is the effect of provisions of Standard Code, particularly Rule 3[3] which prescribes the procedure for appointment of staff and qualification etc. Relevant portion of this Rule reads as under:

Rule 3[3][III] Ministerial and Technical posts included in Class -III ---(a) Appointments to the Senior post except those carrying the lowest scale of pay in the various departments of the Universities and the colleges and like the Superintendent, Accountant, Head Clerks, Senior Clerks, Store Keeper, Senior Laboratory Assistants, Senior Assistants, Senior Stenographers, Senior Library Assistants etc., where the recruitment qualifications required for the Junior posts in the same department or section are the same as prescribed for the Senior posts, shall be made by promotion only on the basis of seniority-cum-merit from amongst the persons who are working in the Universities or affiliated colleges and who possesses the minimum qualifications prescribed for the lower posts and the minimum experience of three years in the lower posts.

By placing reliance upon this provision, the employees argue that as the qualification prescribed for junior post is same and is applicable even for promotional post of Assistant Superintendent, the only relevant thing for promotion is seniority-cum-merit and persons working in lower cadre who possess similar qualification prescribed for lower post with minimum experience of three years are therefore eligible for promotion. They have also invited attention to the provisions of Section 87 of the Amravati University Act to contend that the provisions of any Statute, Ordinance, Regulation or Rules on matters included in the code, shall, to the extent of inconsistency be eclipsed and said provisions of Standard Code will therefore prevail over the provisions of notification dated 29.4.1989. According to them, therefore, the judgment delivered by the Industrial Court in ULPA Complaint No. 73/1993 on 12.1.2001 takes a correct view of the matter.

8. Advocate Marparkwar, has also pointed out that in Writ Petition No. 2828/1993 along with Civil Application for early hearing communication dated 31.08.1997 has been filed on record by the petitioners/employees and as per the said communication issued by the respondent No. 2 Government of Maharashtra, government has stated that the qualification of graduate is inconsistent with the provisions of the Standard Code and hence resolution No. 489 dated 29.4.1989 passed by the Amravati University is meaningless or without any force. Advocate Marpakwar, further states that in view of this clarification or communication by the State Government, Amravati University has promoted the employees juniors in service to the complainants. He contends that such junior employees are promoted and are working and whatever may be the result of the petition, the employees before this Court also deserve to be treated similarly. Advocate Kilor, who appears for employee in Writ Petition No. 2824/2001, has also relied upon the above provision to contend that the provision is not rightly appreciated by the Industrial Court in earlier ULPA Complaint which forms subject matter of Writ Petition No. 2828/1993. He states that the provisions of Rule 3 of the Code supercedes the resolution of 1989 and the view taken by the Industrial Court as assailed in Writ Petition No. 2824/2001, therefore needs to be maintained. He further argues that in any case the resolution dated 29.4.1989 is only for direct recruitment and cannot be read as applicable to even departmental promotion.

9. Advocate Jaiswal, who appears for employer University has contended that in judgment dated 12.1.2001 the Industrial Court has however ignored the fact that the impugned promotion has been effected when provisions of Amravati University Act, 1983 were holding the field, and Industrial Court there has erroneously relied upon the provisions of Maharashtra Universities Act, 1994. He contends that said Act was not at all in force at the time of impugned promotion or impugned action. Hence the view taken by the Industrial Court is unsustainable. He further states that in the judgment dated 12.1.2001 the earlier judgment of Industrial Court dated 7.8.1993 has been discussed, and distinguished due to provisions of Maharashtra Universities Act, 1994 and hence again there is failure to apply mind properly even in that respect. He argues that provisions of Code do not prescribe any qualification for promotional post and qualification prescribed are only for lower post and therefore Rule 3 of Standard Code on which the employees have placed reliance is not at all applicable. He contends that Section 87 of the Amravati University Act, also has no application. He argues that the communication on which Advocate Marpakwar has placed reliance i.e. communication dated 13.08.1997, was not presented before this Court in accordance with law and as such the employer has not been given any opportunity to meet such plea or to point out the effect of said communication. He argues that the promotions given by the employer are in accordance with law. He further states that the employees whose names are mentioned by Advocate Marpakwar, as juniors, may have crossed 40 years of their age, and therefore, the law does not require them to possess graduate qualification to become eligible for claiming promotion to the post of Assistant Superintendent. He states

that accordingly relaxation could be given to these employees and they may have been given said promotion.

10. Mrs. Patil, who appears for respondent Nos. 2 and 3 in Writ Petition No. 2828/1993, contends that the prescription of graduate as qualification by resolution dated 29.4.1989 is within the jurisdiction of employer and no provisions of Amravati University Act, 1983 has been violated. She contends that employee who is not graduate cannot be promoted and the view taken by the Industrial Court in its order dated 7.10.1993 therefore needs to be maintained.

11. Section 87 of the Amravati University Act, reads as under:

Section 87. Notwithstanding anything contained in this Act, the State Government may, for the purpose of securing and maintaining uniform standards, by notification in the Official Gazette, prescribe a Standard Code providing for the classification, manner and mode of selection and appointment, reservation of posts in favour of members of the Scheduled Castes, Scheduled Tribes and Other Backward Classes, duties, workload, pay allowances, post-retirement benefits, other benefits, conduct and disciplinary matters and other conditions of service of the Officers, Teachers and other employees of the University and the Teachers and other employees in the affiliated colleges and recognised Institutions, other than those managed and maintained by the State Government. When such Code is prescribed, the provisions made in the Code shall prevail, and the provisions made in the Statutes, Ordinances, Regulations and Rules for matters included in the code, shall to the extent which they are repugnant to the provisions of the Code be void."

Bare perusal of this section shows that when ever a particular matter is prescribed or covered by the code, provision made in code for that purpose prevails over the provision, if any, made for same purpose in Statute, Ordinance, Regulation and Rules by the University, and section declares such contrary provisions made elsewhere except in code to be void. It is therefore, apparent that the employees have to show that there is provision elsewhere, or in code which prescribes qualification for the post of Assistant Superintendent. The provisions of Rule 3[3][iii] of Standard Code clearly show that where recruitment qualification required for junior post in the same department or section are same as prescribed for senior post, the employee in order to become eligible to claim promotion must possess minimum qualification prescribed for lower post with minimum experience of three years. Thus this provision contemplates that qualification prescribed for senior post must be the same as prescribed for junior post. The employees either before the Industrial Court or even before this Court have not demonstrated that qualification prescribed by code or by any Rule, Ordinance or Regulation for senior post i.e. post of Assistant Superintendent was same as that of junior post. In view of this it is apparent that the said Rule 3[3][iii] will have no application in the matter.

12. The employer has relied upon the provision of Section 25 [1] Clause (xxix) of

the Amravati University Act, to point out that said provision empowers the Executive Council to prescribe the qualification for senior post. The said provision reads as under:

25 Powers and duties of the Executive Council.

25(1) ...

(1)(xxix) appoint officers and other employees of the University, prescribe their qualifications, fix their emoluments, define the terms and conditions of their service and discipline, and, where necessary, their duties.

It is therefore, apparent that Legislature has given power to Executive Council to prescribe qualifications for employees of University. The resolution dated 29.4.1989 passed by the Executive Council of University is thus in exercise of such powers. The said resolution is not shown to be contrary to any provision of Code and therefore, Section 87 of Amravati University Act is not violated. The said resolution, cannot be declared as void and it therefore governs the qualifications relevant while effecting any promotion to the senior post. The Industrial Court has considered this controversy rightly in its order dated 7.10.1993 in ULPA Complaint No. 203./1993. In view of the law as mentioned above, I do not find any jurisdictional error or perversity in the application of mind by the Industrial Court.

13. This earlier judgment of Industrial Court is considered by the Industrial Court in its later judgment dated 12.1.2001 in ULPA Complaint No. 73/1993. However, the Industrial Court has misdirected the entire enquiry by taking recourse to Maharashtra Universities Act, 1994 and by relying upon Section 51[8], Section 52, Section 8[3] and Section 5[11] of the said Act. It is admitted position that the action to give promotion in this case is prior to coming into force of Maharashtra Universities Act, 1994 and complaints filed before the Industrial Court are of the year 1993. In these circumstances, it is apparent that because of this error the Industrial Court has refused to exercise jurisdiction available to it in the matter. No similar requirement of approval from State Government as is found in the provision of Section 51[8] read with other provisions of the Maharashtra Universities Act, by Industrial Court has been pointed out anywhere under the provision of Amravati University Act, 1983 or the Standard Code framed thereunder. In the circumstances, I find that the judgment dated 12.1.2001 delivered by the Industrial Court in ULPA Complaint No. 73/1993 cannot be sustained.

14. The learned Counsel for petitioners in Writ Petition No. 2828/1993, has relied upon the communication dated 13.08.1997 issued by the Section Officer of Government of Maharashtra. As already stated above, the said communication has not been presented before this Court by moving an application for amendment, and therefore, the employer Amravati University has not been given any opportunity to meet the same. Advocate Kilor, states that the said communication was before the Industrial Court in ULPA Complaint No. 73/1993

filed by the respondents in Writ Petition No. 2824/2001. Perusal of the judgment dated 12.1.2001 shows that in para No. 13, the Member of the Industrial Court has considered the said letter as Exh.21/10 and Industrial Court has found that the said letter clearly reveals that there was no approval given to resolution dated 29.4.1989 by the Government. It is to be noted that said letter is after coming into force of the Maharashtra Universities Act, 1994. We are considered with situation which is obtaining in 1993 or in 1992. The said letter therefore, has no relevance for considering the present controversy. However, if the employer Amravati University has given benefit of the said letter to any of its employees who are juniors to employees before this Court in both the writ petitions, and have given them promotion on senior post, I find that the employer cannot discriminate between the employees before this Court and deny said benefit only on the ground that these employees had approached Industrial Court in ULPA Complaint. The Amravati University will consider the case employees before this Court in the light of the said letter dated 13.08.1997, and shall given them same benefits in accordance with law, if it is already given to their juniors.

15. In the circumstances, I do not find any substance in Writ Petition No. 2828/1993. Subject to observations made above, the said Writ Petition is dismissed. Writ Petition No. 2824/2001 is accordingly allowed, but again subject to the observations as made above. In Writ Petition No. 2824/2001, the respondent has been permitted to withdraw the amount by this Court, subject to final result of Writ Petition. As the Writ Petition is being allowed, it is apparent that the respondent has to refund the said amount to petitioner Amravati University. Advocate Kilor, states that as the juniors have already been promoted and given benefit as per the communication dated 13.08.1997, the case of respondent Ashok Wankhede should also be considered in the light of the said communication, and if he is found fit and promoted, the question of recovery will not arise. He contends that therefore, the refund of amount should be postponed till further date and in the meanwhile the petitioner Amravati University should be directed to consider the case of Ashok Wankhede for promotion. In the circumstances, as the respondent is already promoted and is working on the promotional post I find it proper to direct the petitioner Amravati University to consider the claim and case of Ashok Wankhede for promotion to senior post as per the communication dated 13.08.1997 within a period of eight weeks from today. If, after consideration of such claim, the petitioner Amravati University maintains the promotion given to Ashok Wankhede, there will be no question of any refund to be made to Amravati University. If Amravati University does not grant said promotion, Amravati University will be free to revert respondent Ashok Wankhede to his substantive post and also respondent shall refund the amount withdrawn by him because of the interim orders of this Court within a further period of four weeks thereafter.

16. In view of the above Rule is discharged in Writ Petition No. 2828/1993 and is made absolute in Writ Petition No. 2824/2001. However, in the circumstances of

the case, there shall be no order as to cost.