

(2012) 05 BOM CK 0033

In the Bombay High Court

Case No : Writ Petition No. 4666 of 2011

Ramesh Raghobaji Kirtane

APPELLANT

Vs

The Chandrapur District Central Co-operative Bank Ltd. and
Others

RESPONDENT

Date of Decision : 09-05-2012

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 42
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices
Act, 1971 — Section 28

Citation : (2013) 1 BomCR 383 : (2012) 134 FLR 726 : (2012) 4 LLJ 513

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : B.M. Khan, in Writ Petition No. 4666/2011, Writ Petition No. 4667/2011 and Writ Petition No. 4582/2011, Ms P.D. Rane, in Writ Petition No. 1919/2011, Writ Petition No. 1920/2011, Writ Petition No. 1921/2011, Writ Petition No. 1922/2011, for the Appellant; P.C. Madkholkar, for respdt. No. 1, Ms P.D. Rane, for respdt. Nos. 2 to 5, in Writ Petition No. 4666/2011 and Writ Petition No. 4667/2011, Shri P.C. Madkholkar, for respdt. No. 1 and Shri B.M. Khan, for respdt. No. 5, in Writ Petition No. 1919/2011, Writ Petition No. 1920/2011 and Writ Petition No. 1921/2011, Shri P.C. Madkholkar, for respdt. No. 1 and Shri B.M. Khan, for respdt. Nos. 4 and 5, in Writ Petition No. 1922/2011 and Shri P.C. Madkholkar, for respdt. No. 1 and Ms P.D. Rane, for respdt. Nos. 2 to 5, in Writ Petition No. 4582/2011, for the Respondent

Judgement

A.B. Chaudhari, J.—Heard. Rule. Rule returnable forthwith. Heard finally by consent of the learned Counsel for the rival parties. All these petitions are being disposed of by this common judgment and order. Writ Petition Nos. 1919/2011, 1920/2011, 1921/2011 and 1922/2011 have been filed by respondent nos. 2 to 5 in the original Complaints (ULP) No. 121/2006, 125/2006, 126/2006 and 130/2006.

2. Writ Petition Nos. 4666/2011, 4667/2011 and 4582/2011 have been filed by the original complainants in Complaint (ULP) Nos. 121/2006, 126/2006 and

125/2006. These complaints were decided by common judgment and order on 8.3.2011 by the Industrial Court, Chandrapur.

FACTS :

3. The original complainants filed complaints (ULP) Nos. 121/2006, 125/2006, 126/2006 u/s 28 r/w Item Nos. 5 and 9 of Schedule IV the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (for short the MRTU & PULP Act, 1971) claiming that respondent nos. 2 to 5 in the complaints filed by them were promoted from the post of peon to the post of clerk by respondent no. 1 - Chandrapur District Central Cooperative Bank Limited, Chandrapur without following promotional rule of seniority-cum-merit and also seniority mentioned in the seniority list. Though the complainants were senior, as per the seniority list, to respondent nos. 2 to 5 in the cadre of peon, they were not given promotion to the posts of clerks but respondent nos. 2 to 5 were given the said promotions by order of promotion issued on 24.6.2006. There was promotional channel from the post of peon to the post of clerk in accordance with the practice adopted by the Bank for the last number of years by giving promotion to a peon to the post of clerk upon passing H.S.S.C. examination and therefore, the same was a service condition. By not giving promotion to the complainants but giving the same to the respondents violating golden rule of the seniority, the employer respondent no. 1 Bank effected the "change" in the condition of service without following the provisions of Section 42 of the Bombay Industrial Relations Act, 1946. Therefore, the promotion given to respondent nos. 2 to 5 was contrary to the agreement or service condition agreed between the employer and employees and the employer thus engaged in unfair labour practice upon failure to implement the agreed service condition or the agreement. That is why there was unfair labour practice in terms of Item nos. 5 and 9 of the Maharashtra Act No. 1 of 1972. Consequently, they sought relief asking for promotion to the complainants w.e.f. 24.6.2006 so also their placement in the seniority list above respondent nos. 2 to 5 and the consequent benefits of salary etc. Respondent nos. 2 to 5 did not appear before the Industrial Court. Respondent no. 1 employer appeared and filed reply to the complaints and denied the averments in the complaints. Respondent no. 1 denied that there was any legal right in the complainants to challenge the promotion of respondent nos. 2 to 5. In addition, a stand was taken in paragraph no. 2 of the further pleadings that service rules were applicable to the staff of the Bank and as per the service rules, promotions were given to respondent nos. 2 to 5 in accordance with the recommendations of Ramkrishna Pattern, which provides for consideration upon seniority, educational qualification, efficiency and merits of the employees. One of the complainants by name Ramesh tendered evidence on affidavit and the other complainants adopted the said evidence. Respondent no. 1 Bank led evidence of Avinash Lanjewar. Finally, the Industrial Court dismissed all the complaints but found that the appointment by promotion of the respondent nos. 2 to 5 to the complaints was illegal and therefore, they were required to be demoted.

SUBMISSIONS :

4. In support of the writ petitions, Advocate Ms Rane in Writ Petition Nos. 1919/2011, 1920/011, 1921/2011 and 1922/2011 made the following submissions.

(A) Reading of the prayer in the complaint does not show that any relief was claimed against respondent nos. 2 to 5, namely to demote them from the post of clerk but the only relief that was claimed was that the complainant should be promoted w.e.f. 24.6.2006 and should be accordingly placed in the seniority list. According to her, therefore, the Industrial Court could not have recorded any finding about their alleged illegal appointment on promotion nor could have directly or indirectly directed demotion of respondent nos. 2 to 5.

(B) The issue raised was only about seniority of the complainants as against respondent nos. 2 to 5 in the complaints and for grant of relief of promotion. The Industrial Court could not have gone ahead and issued direction which was not claimed, namely for demotion of respondent nos. 2 to 5. Though it is true that respondent nos. 2 to 5 seem to be juniors to complainants but then that by itself was not sufficient to grant them promotion or to direct demotion of present respondent nos. 2 to 5 to the complaint. Respondent no. 1 Bank supported the promotion given to respondent nos. 2 to 5 and opposed the complaint and also relied on the service rules applicable to the staff. The service rules of the staff have been held by the Industrial Court to have been superseded by subsequent circulars, issued by the Commissioner for Cooperation, which is not the correct position. The Industrial Court erred in not framing proper issues and then deciding the same according to law. She, therefore, prayed for setting aside the judgment of the Industrial Court and/or in the alternative for remand of the complaints.

5. Per contra, Advocate Shri Khan for the original complainants in support of the Writ Petition Nos. 4666/2011, 4667/2011 and 4582/2011 argued that in the complaints following issues were raised by the complainants.

(a) The complainants were senior to respondent nos. 2 to 5 in service and therefore, they were entitled to promotion w.e.f. 24.6.2006 when respondent nos. 2 to 5 were promoted.

(b) The complainants were senior to respondent nos. 2 to 5 and therefore, they should be shown above respondent nos. 2 to 5 in the seniority list.

(c) Grant of promotion from the post of peon to the post of clerk has been in vogue strictly as per the seniority by respondent no. 1 employer and has become agreed condition of service between employer and employees and therefore, granting promotion to respondent nos. 2 to 5 in violation of the seniority amounted to change in condition of service without following the procedure laid down u/s 42 of the Bombay Relations Act, 1946 resulting into illegal change.

(d) Since grant of promotion from the post of peon to the post of clerk has been

in vogue and has been the established agreement between the employer and employees by virtue of practice. Respondent no. 1 Bank could not have denied promotion to the complainants and failure to implement the agreement amounts to unfair labour practice within the meaning of Item no. 9 of Schedule IV of the MRTU & PULP Act, 1971

(e) Finding recorded by the Industrial Court that subsequent circulars issued by the Commissioner for Cooperation or the circulars supersede the service rules is not legal, correct and proper.

6. Advocate Shri Madkholkar for respondent no. 1 in all writ petitions supported the impugned judgment and order and argued that neither the original complainants nor the original respondents have any case. According to him, the qualification required for the post of clerk is graduate and neither the respondents nor the complainants could be promoted to the post of clerks as they were not graduates. There can be no compromise on the aspect of qualification and therefore, neither the complainants nor the respondents have any right much less legal right to institute the complaint under the MRTU & PULP Act, 1971 and therefore, none of the petitions can be entertained by this Court in extraordinary writ jurisdiction, and are required to be rejected summarily without going into the points raised by the petitioners.

He relied on the following decisions :

(i) State of Orissa and Another Vs. Mamata Mohanty, .

(ii) Secretary, State of Karnataka and Others Vs. Umadevi and Others, .

(iii) 2006 (4) SCC 44 (Secretary, State of Karnataka and Others v. Umadevi (2) and Others).

(iv) Secretary, State of Karnataka and Ors. v. Umadevi and Ors., (2004) 7 SCC 132 .

(v) Maharashtra State Road Transport Corporation and Another Vs. Casteribe Rajya P. Karmchari Sanghatana, .

(vi) State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, .

(vii) Union of India and Others Vs. Rakesh Kumar etc., .

(viii) Collector, Bilaspur Vs. Ajit P.K. Jogi and Others, .

CONSIDERATION :

7. At the outset, I am required to deal with the submissions made by Advocate Shri Madkholkar urging this Court to dismiss the petitions summarily. Respondent no. 1 employer never set up a plea before the Industrial Court that admittedly neither the complainants nor the respondents in the ULP complains were qualified to be appointed to the posts of clerks. In other words, such a plea is being set up for the first time before this Court. This Court is not exercising

plenary jurisdiction in these writ petitions. Further the service rules of respondent no. 1 Bank do not mandate that graduation is the minimum qualification. Whether subsequent circulars or permission to recruit staff would automatically change the service rules will have to be decided as mixed question of fact and law. Therefore, it is not possible to throw-out all these writ petitions on the ground that neither the respondents nor the complainants held the qualification of graduation and therefore, none of them were entitled to the promotion to the post of clerk. It is not therefore possible to agree with the submission made by Advocate Shri Madkholkar to reject the petitions summarily on that count. The decisions cited by him in the above context therefore do not have application.

8. I have perused the impugned judgment and order recorded by the Industrial Court. I have also heard learned Counsel for the rival parties at length. The judgment and order recorded by the Industrial Court no doubt is in good details. However, the issues raised in the complaints and the questions of law required to be decided while dealing with the complaints u/s 28 of the MRTU & PULP Act, 1971 have not been decided in the manner they are required to be decided. The reason appears to be that the Industrial Court framed the following two issues which are of too vague and general nature.

(1) Whether respondents have engaged in unfair labour practice ?

(2) To what relief the complainant is entitled for ?

9. It may be true that strict rules or procedure contemplated by the CPC may not be applicable to the proceedings. However, in order that the decision of the complaint does not go directionless, the principles for deciding the trials in the suit to the extent they benefit the administration of justice and the rules of fair play and natural justice should be adopted even in the litigation pertaining to the Labour and Industrial Law. In the case of Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another, , followed by this Court in the case of Nav Bharat Hindi Daily, Nagpur Vs. Nav Bharat Shramik Sangha and another, , the Hon"ble Supreme Court in paragraph nos. 31 and 32 has had to say thus :

31. If such be the duties and functions of the Industrial Tribunal or the Labour Court, any party appearing before it must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The quasi-judicial tribunal is not required to advise the party either about its rights or what it should do or omit to do. Obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be who would fail if no evidence is led. It must seek an opportunity to lead evidence. A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be

examined because the other side has no notice of it and if entertained it would tantamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in *Tin Printers (Pvt.) Ltd. v. Industrial Tribunal* (1967) 2 Lab LJ 677 at p. 680 (Punj), commends to us. The rules of fair play demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary.

32. Can it for a moment be suggested that this elementary principle does not inform industrial adjudication ? The answer must be an emphatic "no".

10. Unless proper issues are framed, parties would suffer a judgment on the basis of findings not based on proper issues and they may have legitimate grievance to contend that because of non-framing of issues or a precise or particular issue they have been denied the opportunity of leading proper evidence or for rebutting the relevant facts and evidence. If all the material facts are pleaded and issues arising therefrom are framed properly, then the parties are on notice. But when there is a likelihood of surprise being sprung to a party due to failure to adduce material evidence for absence of pleading and issue the trial may become directionless. The issues to be framed must be confined to the material questions of fact or law to fact probanda and not to fact probantia that is to say, the evidence by which material questions of fact are proved or disproved. The issues on subordinate facts i.e. fact probantia should not be raised. An issue arises when material proposition of fact or law is affirmed by one party and denied by the other party. Such material propositions should form the subject matter of distinct issues. The whole object is to direct the attention of the parties to the proposed questions of which they are at variance. The purpose adherent to the principles of natural justice is also served effectively upon framing of issues.

11. However, it is noticed that in the complaints which are tried before the Labour Court and Industrial Court under the MRTU & PULP Act, 1971, the issues of general nature or vague nature are framed as quoted by me above, which in my opinion, should at least now be taken care of by the learned Judges of the Labour and Industrial Courts. In the present case from the reading of the complaint, written reply of denial and the documents on record and from the submissions made before him, to my mind, the Industrial Court should have framed following specific issues before deciding the complaints. (1) Whether there is a agreed service condition or service rules for providing promotion from the post of peon to the post of clerk upon improvement of qualification and by the rule of seniority ?

(2) Whether grant of promotion and seniority above the complainants to

respondent nos. 2 to 5 from the post of peon to the post of clerk is an illegal change in accordance with Section 42 of the Bombay Industrial Relations Act, 1946 ?

(3) Whether denial of promotion and seniority to the complainants amounts to failure to implement agreement within the meaning of Item No. 9 of Schedule IV of the MRTU & PULP Act, 1971 ?

(4) Whether respondent no. 1 have indulged in unfair labour practice ?

(5) What order ?

To sum up, the proceedings of Complaint (ULP) Nos. 121/2006, 122/2006, 123/2006, 124/2006, 125/2006, 126/2006, 128/2006, 129/2006 and 130/2006 will have to be sent back to the Industrial Court for fresh hearing and disposal in accordance with law. Hence, I make the following order.

ORDER

(i) Writ Petition Nos. 4666/2011, 4667/2011, 1919/2011, 1920/2011, 1921/2011, 1922/2011 and W.P. No. 4582/2011 are partly allowed.

(ii) The impugned common judgment and order dated 8.3.2011, passed by the Industrial Court, Chandrapur in Complaint (ULP) Nos. 121/2006, 122/2006, 123/2006, 124/2006, 125/2006, 126/2006, 128/2006, 129/2006 and 130/2006 is set aside.

(iii) Complaint (ULP) Nos. 121/2006, 122/2006, 123/2006, 124/2006, 125/2006, 126/2006, 128/2006, 129/2006 and 130/2006 are restored to the file of Industrial Court, Chandrapur for hearing and fresh disposal in accordance with law.

(iv) Let the Industrial Court, Chandrapur decide the proceedings afresh within a period of ten months from the date of receipt of writ from this Court.

Rule accordingly. No order as to costs.