

(2000) 04 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition No. 1440 of 1994

Shri Gurubasappa Sangramappa Kangale and Another

APPELLANT

Vs

The Solapur District Industrial Bank Ltd. and Others

RESPONDENT

Date of Decision : 18-04-2000

Acts Referred:

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28

Citation : (2000) 4 ALLMR 402 : (2000) 4 BomCR 389 : (2000) 86 FLR 210 : (2000) 2 LLJ 840 : (2001) 3 MhLj 142

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : S.M. Dharap, for the Appellant; G.S. Godbole and Miss N.D. Buch, for the Respondent

Judgement

R.J. Kochar, J.—The petitioners have challenged the order dated 16-2-1994 passed by the Member, Industrial Court, Solapur, in a complaint filed by the three employees invoking Items 5 of Schedule I of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as MRTU & PULP Act), and have prayed for a declaration that the order dated 31-3-1995 granting permission to the respondent No. 2 as Chief Officer being unfair labour practice within the meaning of Item 5 of Schedule I of the Act. By the impugned order the Industrial Court has held that there was no evidence brought on record by the complainants to establish that the order passed by the Respondent Bank promoting the respondent No. 2 is mala fide, leads to victimisation or unfair labour practice as contemplated under Item 5 of Schedule IV of the Act. After considering the pleadings and evidence adduced by both the parties, the learned Industrial Court was pleased to dismiss the complaint by the impugned order. The two of the three complainants have filed the present writ petition challenging the said order. The third complainant has accepted the decision given by the Industrial Court and has not challenged the same before this Court. Hereinafter the parties would be referred to as "the

petitioners as per their numbers and the respondents also as per their numbers in the writ petition."

2. As far as the factual aspect is concerned there is absolutely no dispute amongst all the parties. Annexure B of the petition on page 21 is the service record of the petitioners as well as the 2nd respondent. In this schedule the dates of appointment, promotion etc. are given and there is no dispute about the same and therefore I have to proceed on the basis of the undisputed factual matrix on the file. Shri Dharap, the learned Advocate for the petitioners has urged that the promotion of the respondents No. 2 squarely falls within Item 5 of schedule IV of the M.R.T.U. and Unfair Labour Practices Act as there has been a clear cut case of favoritism and partiality regardless of merits between the parties and the respondent No. 2.

3. Petitioner No. 1 was appointed on 25-9-1978 as oversees and was promoted on 1-7-1981 as Deputy Engineer (post equivalent to Chief Officer as claimed by the petitioner No. 1 himself). It appears that on 23-9-1981 he was again promoted as Senior Inspector. His grievance against the promotion of the respondents No. 2 is that of favoritism and partiality shown against him. Shri Dharap has pointed out that the pay scale of the Deputy Engineer as notified by office order dated 23-7-1981 as :

Shri Dharap has further pointed out that by 23-9-1981 Corrigendum the above pay scale revised as under :

It is submitted by the learned Advocate for the petitioners that petitioner No. 1 was entitled to the already determined pay scale of Rs. 350-800 and the pay scale of Chief Officer/Superintending Engineer were the same. But the pay scale of the Deputy Engineer had been reduced adversely and therefore, the respondent No. 2 who is promoted as Chief Officer is continued in the higher pay scale while the pay scale of petitioner No. 1 who was promoted as Deputy Engineer have been reduced. This act on the part of the respondent No. 1 bank amounts to an unfair labour practice. There is hardly any substance in the submission of Shri Dharap. The bank has tried to correct its mistakes of clubbing both the posts of Chief Officer and the Deputy Engineer in one and the same pay scale by issuing Corrigendum dated 23-9-1981 reducing the pay scale of Deputy Engineers. The said mistake has been corrected and the pay scales of both the posts have been bifurcated. It is an admitted fact that the petitioner No. 1 was holding the post of a Deputy Engineer and therefore he was rightly given the pay scale of the Deputy Engineer as corrected subsequently. There is no dispute that the said pay scale had been corrected in respect of the entire cadre and not to the petitioner No. 1 alone. According to me, there is absolutely no merit in the contention of Shri Dharap that there is an unfair labour practice engaged in by the Bank in giving the petitioner No. 1 the pay scale of Deputy Engineer.

4. As far as the question of seniority of the petitioner No. 1 is concerned he is admittedly junior to respondent No. 2. The petitioner No. 1 was promoted to the

post of Senior Inspector on and from 23-9-1981 while the respondent No. 2 was promoted to the post of Senior Inspector from 1-4-1981. The respondent No. 2 is also senior in service to the petitioner No. 1 and the petitioner No. 1 was already enjoying the pay scale of the Deputy Engineer post equivalent to the post of Chief Officer as claimed by himself. I, therefore, do not find any merits in the contention of Shri Dharap to support the petitioner No. 1. According to me there is no unfair labour practice engaged in by the bank as far as the petitioner No. 1 is concerned.

5. As far as the claim of the petitioner No. 2 is concerned he stands on far better and stronger position than the petitioner No. 1 qua the respondent No. 2. Petitioner No. 2 entered the feeder cadre of Senior Inspector on 1-4-1981 along with respondent No. 2. They are therefore equal candidates as for the post of Chief Officer. Between the two equals who has to be selected or preferred for promotion is the question. This is well recognised in the service jurisprudence that when two candidates are equal and on par in that case service seniority is to be considered and the candidate who had entered the service earlier is to be given promotion. There is no doubt that the respondents No. 2 who entered the service on 25-6-1963 is senior to the petitioner No. 1 as well as the petitioner No. 2. The petitioner No. 2 entered the service on 1-11-1967 as a Clerk. Though the factor of service seniority is in favour of respondent No. 2, he gets a serious set back on account of his service record. It is an admitted position that he was served with a charge sheet and was reverted to the post of Junior Clerk from the post of Junior Inspector by order dated 10-4-1970. As a result of the domestic enquiry held against him the Bank had punished him by way of reversion to the post of Junior Clerk. He continued to be in the post of Junior Clerk on reversion for 4 years. As against the service record of the respondent No. 2 the service record of the petitioner No. 2 is clean and there is nothing adverse against him. Comparing the service records of both these candidates it is clear that the service record of the petitioner No. 2 has to be given weightage as far as the merit part of the candidates is concerned. The allegation of fraud was made against the respondent No. 2 and that he was punished by way of reversion. This order of reversion was not challenged by him. As compared with the service record of the respondent No. 2 the service record of the petitioner No. 2 is meritorious and deserves to be considered favourably. Any reasonable man while considering the question of promotion to a higher post would accept a candidate, with clean record than a candidate with a stigma in service record particularly with the allegation of fraud for which he was punished by the bank. In the aforesaid circumstances it was incumbent on the part of the respondent No. 1 to have considered the claim of the petitioner No. 2 favourably for the post of Chief Officer on promotion. Service Rule 40 relates to promotions and which reads as under:-

40. Promotion will ordinarily go by seniority subject to merit fitness. The Board may grant special promotions without consideration of seniority for specific reasons to be recorded in writing.

The Rule is clear to the effect that ordinarily promotion will be given on the basis of seniority-cum-merits and fitness. The concept of merit and fitness has been considered to include a good past service record. If an employee has carefully served the bank without attracting any charge of fraud deserve better attention and consideration. He deserves preference to a candidate whose service record is not good particularly when he was punished for having committed fraud. According to me, between the two candidates the bank as a reasonable employer ought to have bona fide promoted the petitioner No. 2 to the post of Chief Officer. A simple resolution recording reasons therefore could have been enough. In the present case there is not a whisper anywhere as to why the respondent No. 2 was promoted in preference to the petitioner No. 2 inspite of bad record of the respondent No. 2 and good record of the petitioner No. 2. In the absence of any specific reason recorded by the bank the only inference which can be drawn is that of favoritism and partiality shown to the respondent No. 2, I am unable to agree with the submissions of Shri Godbole, for the Bank, that while considering the merits, length of service has to be considered and misconduct of fraud and punishment of reversion was a matter of past and need not be considered in the year 1985 for promotion as the same had taken place in 1970. Shri Godbole had also stretched his submission to the extent that there was no legal obligation for the bank to record any reason to prefer respondent No. 2. Shri Godbole further drew my attention to the fact that the respondent No. 2 who was restored to his position as Junior Inspector and was also given two special increments; the same indicates that he was improved and had become a deserving candidate for promotion. I am not able to agree with the submission of Shri Godbole that while considering the candidates for promotion to higher post service seniority alone will form part of the merits and that an event of remote past need not be considered. It is an admitted position that the petitioner No. 2 had clear and clean service records without any iota of charge of fraud etc. As against a clear and clean service record it is not possible to accept the submission on behalf of the bank that the candidate with a bad service record should be preferred only for his seniority. No reasonable man would give such conclusion. According to me, the bank has promoted the respondent No. 2 and has shown favoritism and partiality regard less of merits against the petitioner No. 2.

6. Ms. Buch appearing for the respondent No. 2 submitted that conduct of the candidate alone is not a part of merit. His efficiency and ability also should be counted. The bank having considered the efficiency and ability of respondent No. 2 and having been satisfied about the same has promoted the respondent No. 2. According to her, mere good record or a good conduct does form merit and opens doors of promotion for a candidate. I am not able to agree with the said submission of Ms. Buch. When promotions are to be given on the basis of seniority-cum-merits and fitness, the past behaviour and past service records form part of merits. These entries cannot be excluded from the category of merits. No doubt efficiency and ability are also the factors which have permanent place in the area of merits. Can it be accepted that a very efficient and able

candidate can be promoted inspite of his past record of several misconduct ? I am not able to answer in affirmative. However the candidate or the employee might be efficient or able he can never be promoted if he is corrupt or has other deficiencies against his moral character or integrity or honesty. If we accept the submissions of Ms. Buch in that case honesty will have no weightage in the service record of servant. By and large it is the experience that those who are efficient and honest can alone become entitled for promotion and according to me therefore the decision of the Bank to promote the respondent No. 2 attracts Item 5 of Schedule IV of the Act and the petitioner No. 2 is rightly aggrieved by the decision of the Bank. According to me he deserved promotion to the post of Chief Officer on and from 31-1-1985.

7. Inspite of my aforesaid decision I do not want to disturb the promotion given to the respondent No. 2, The petitioner No. 1 has resigned from the bank from 30-7-1994 while petitioner No. 2 was superannuated from 31-5-1995. Both of them are no more in service. In the given circumstances the respondent No. 2 may be continued by the Bank in the post of Chief Officer, if he still is holding the said post and if still he is in service. I have said so as none of the Advocates were sure about the latest position of the respondent No. 2. Since I have already held that the petitioner No. 2 deserves to be promoted while competing against the respondent No. 2 and since he is no more in service he is atleast entitled to the difference in the emolument of Chief Officer and Dy. Engineer which he would have drawn in the post and the scale of Chief Officer from 31-1-1985 to 31-5-1995 had he been rightly promoted. The respondent Bank shall compute the said difference and pay the same to the petitioner No. 2 within a period of six months from today.

8. The petition is disposed of. No order as to costs.

9. The Bank shall act on an ordinary copy of this order duly authenticated by the Sheristedar of this Court.

10. Petition allowed.