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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4017 OF 2005

- 1 The Superintending Engineer,
Maharashtra State Electricity Board,
(O & M), Circle Office,
Parali.
- 2 Executive Engineer,
Maharashtra State Electricity Board,
Regional Office,
Main Road, Latur.

...PETITIONERS

-VERSUS-

Pandurang Ramhari Warape,
Age : 28 years, Occ : Service,
R/o Massakhandeshwari,
Tal.Kalamb, Dist.Osmanabad.

...RESPONDENT

...
Advocate for Petitioner : Shri Palodkar D.P.
Advocate for Respondent : Shri Salunke V.D.

...

CORAM: RAVINDRA V. GHUGE, J.
DATE :- 15th September, 2015

Oral Judgment:

1 This petition was admitted by order dated 25.03.2008 in the light of the judgment of the Apex Court in the case of *State of Karnataka v/s Umadevi*, 2006(4) SCC 1. Interim relief was granted to the Petitioners/ Employer in terms of prayer clause (E), which reads as under:-

“(E) Pending hearing and final disposal of this Writ Petition, the judgment order dated 07.09.2004 passed by the Ld. Member Industrial Court, Maharashtra, Latur in Complaint (ULP) No. (92/98)95/04 may kindly be stayed.”

2 It was, however, made clear to the Petitioners that the Respondent would continue to work in whatever capacity in which he is working at present.

3 Shri Palodkar, learned Advocate for the Petitioners, has strenuously criticized the impugned judgment and order dated 07.09.2004 delivered by the Industrial Court, Latur in Complaint (ULP) No.95/2004 (old No.92/1998), by which the complaint preferred by the Respondent herein has been allowed.

4 The directions issued by the Industrial Court while delivering the impugned judgment read as under:-

- “(i) Complaint is allowed.
- (ii) It is hereby declared that the respondents are indulged in Unfair Labour Practices under Item 5, 6, 9 and 10 of Sch.IV of MRTU & PULP Act, 1971 by keeping the complainant years together on a fixed charges and not giving benefits of a regular employee.
- (iii) The respondents are directed to cease and desist from such unfair labour practice.
- (iv) The respondents are directed to give the benefits of permanency to the complainant of the post of Gardener-cum-Sweeper with all benefits with effect from the date of filing of the present complaint i.e.

14.05.98.”

5 Shri Palodkar submits that the impugned judgment of the Industrial Court is perverse and unsustainable. The Respondent was never appointed by the Petitioners as a Gardener-cum-Sweeper. He was engaged on contractual basis. There was no supervision, direction or control by the Petitioners over the Respondent. He used to work for about one hour or little more for cleaning the office premises and storing the drinking water.

6 Shri Palodkar further submits that there was post of a Gardener-cum-Sweeper at Kalamb where the Respondent was appointed. Only one post was available. One Mr. T.S.Walmiki was working as a Gardener-cum-Sweeper. He was transferred out of Kalamb. Subsequently, the said post was abolished.

7 The Petitioners harp upon their contention that the Respondent was never an Employee of the Petitioners. Paragraph 5 of the complaint is pointed out to indicate that the Respondent himself admitted that he was shown as a contract employee. It is further pointed out from the Written Statement that the Respondent was doing the work of sweeping and filling the drinking water and was paid Rs.900/- per month for doing the said job, not as wages but by way of charges. The said

amount used to be paid from imprest cash. It was denied that the work done by the Respondent was of permanent nature.

8 My attention is drawn to the complaint lodged by seven persons by which certain grievances were made about the manner in which the Respondent was performing his duties at 132 KV Sub Station, Kalamb as a Gardener-cum-Sweeper.

9 It is further canvassed that presently there is no post available and there is no way in which the Respondent could be regularized in employment.

10 Shri Salunke, learned Advocate for the Respondent, submits that the Respondent was engaged as a Gardener-cum-Sweeper from 20.04.1987. He was sweeping and cleaning the office premises, storing the drinking water, working as a gardener in the garden admeasuring 2 Acres at the Sub-Station and he was also working in the colony which housed the employees of the Petitioners. He further submits that the Respondent used to do the same work which Shri T.S.Walmiki used to perform as a permanent employee on the position of Gardener-cum-Sweeper.

11 Shri Salunke further submits that Shri T.S.Walmiki was transferred out of Kalamb Sub Station and since then, there has been no Gardener-cum-Sweeper appointed on the said post which is abolished as per the contentions of the Petitioners in 2009.

12 Shri Salunke then submits that a vexatious plea has been raised by the Petitioners that there was no Employer-Employee relationship between the Petitioners and the Respondent. In fact, the Written Statement itself indicates that the Petitioners had engaged the Respondent to do the work of Gardener-cum-Sweeper and was paid Rs.900/- per month. He submits that the Petitioners intended to oust the jurisdiction of the Industrial Court before which the Respondent had preferred Complaint (ULP) No.92/1998 for seeking regularization and benefits incidental and consequential thereto.

13 Shri Salunke further submits that the Industrial Court has considered the oral and documentary evidence on record and has concluded that the Petitioners deserve to be directed to regularize the services of the Respondent. He is about 45 years old today and has about 13 more years to attain the age of retirement.

14 I have considered the submissions of the learned Advocates as

have been recorded herein above.

15 It is evident from paragraph 5 of the complaint filed by the Respondent that he has not suppressed the fact that he was being shown as an employee appointed on the contract basis and he was paid Rs.900/- per month as fixed salary. It is also apparent from the Written Statement filed by the Petitioners wherein they have averred in paragraph 5 that the Complainant/ Respondent herein was doing the work of sweeping and filling the drinking water and was being paid Rs.900/- per month towards job work charges and not wages.

16 The Petitioners had examined Shri Mahaling Nagnathappa Shete, Assistant Engineer with the Petitioners at Osmanabad, at Exhibit O/6 before the Industrial Court as their witness.

17 In cross-examination, the said sole witness of the Petitioners disclosed that the Respondent was working as a Gardener-cum-Sweeper. He was doing the work of cleaning the office, filling water and gardening. The fixed salary was at the rate of Rs.900/- per month. He was doing the work for about four to five hours and used to stay back in the office till 5:30 pm daily.

18 The said witness admitted that the garden at Kalamb Sub-Station was over 2 acres of land. He further admitted that there was a residential colony of employees and the work performed by the Respondent was of perennial nature. He has further admitted that the post of Gardener-cum-Sweeper on which a regular employee used to work, was identical to the work performed by the Respondent.

19 The Petitioners have pointed out the complaint dated 10.09.1998 purportedly filed by the seven persons who are employees of the Petitioners. The subject of the complaint was that the Respondent was not doing the work properly as a gardener at 132 KV Sub Station, Kalamb. The said complaint indicates that the Respondent was working as a Gardener-cum-Sweeper. Sometimes, he also used to work as a Watchman by coming to the office at 10:00 PM and in the morning, used to sweep the office premises. He was not performing the work in the garden properly and was not ensuring proper releasing of water to the quarters occupied by the employees. It was also stated that the drainages are not being cleaned properly by him, as a result of which, the entire colony is stinking and had become filthy.

20 The above complaint also indicates the nature of duties being performed by the Respondent. The contention of the Petitioners is that

there is no post available. The nature of duties performed by the Respondent indicates that the work is required to be done on day to day basis as it involves cleaning of offices, gardening, supplying water to the colony and cleaning the colony as well. Having put in about 28 years in service as on date, the contentions of the Petitioners that he was never given work by the Petitioners and was only sweeping the offices, are unsustainable submissions in the light of the testimony of the Petitioners' witness.

21 It is informed that the Respondent is working even today under the Court orders.

22 The Petitioners have specifically contended that there is no post available. It is also submitted that the Petitioners' Department at Kalamb or its office at Osmanabad cannot create posts. It is not disputed that the Respondent is a graduate.

23 Shri Salunke has attempted to point out the available posts in the category of Lower Division Clerks, whose educational qualification is also graduation. He submits that the Respondent is willing to undergo any training in the event the Petitioners can accommodate him on any post of a peon or clerk considering his educational qualification.

24 The Petitioners are not agreeable.

25 In the light of the above and considering the oral and documentary evidence before the Industrial Court, the Petitioners have been unable to establish that the impugned judgment could be termed as being perverse or erroneous. It, however, cannot be overlooked that in the event the Petitioners do not have vacant position of a Gardener-cum-Sweeper, the order of the Industrial Court directing regularization on a non-existing post, would be set to naught.

26 The Apex Court, in the case of *Chief Conservator of Forests v/s Jagannath Maruti Kondhare*, **AIR 1996 SC 2898 : (1996) 2 SCC 293**, has concluded that if the Employer does not have a permanent vacant position, it would not absolve the Employer from the obligation that the wage structure made available to such temporary employee is kept at par with the wage structure of a permanent employee who performs the same duties/ work.

27 I am, therefore, of the view that clause (iv) below paragraph 13 of the impugned judgment of the Industrial Court deserves to be modified subject to certain directions to be issued to the Petitioners to

ensure that ends of justice are met.

28 Paragraph 44 of the judgment of the Apex Court in State of Karnataka v/s Umadevi (supra) is a complete answer in the present situation. It would be apposite to reproduce paragraph 44 of the said judgment herein below:-

“44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V.Narayanappa* (supra) [AIR 1967 SC 1071], *R.N.Nanjundappa* (supra) [AIR 1972 SC 1767], and *B.N.Nagrajan* (supra) [AIR 1979 SC 1676], and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent,

those not duly appointed as per the constitutional scheme.”

29 As such, this Writ Petition is partly allowed only to the extent of modifying clause (iv) of paragraph 13 of the impugned order with the following directions:-

- (a) The Petitioners shall continue to engage the services of the Respondents in the light of the order passed by the Industrial Court.
- (b) The Respondent shall be entitled for wages at par with a comparable Gardener-cum-Sweeper as per the scales of the Petitioners considering the number of years put in by the Respondent.
- (c) The Petitioners shall regularize the services of the Respondent on the post of Gardener-cum-Sweeper in the event there is any such permanent vacant post available or is likely to fall vacant in the near future at any location in Maharashtra considering the possibility of natural retirement of any employee or under any VRS.
- (d) Notwithstanding the above, the Petitioners are at liberty to consider the educational qualification of the Respondent and accommodate him on the post of Peon/ Sweeper / Lower Division Clerk considering the available vacancies.

- (e) The Respondent shall be entitled for all the retiral benefits as may be available to the post of Gardener-cum-Sweeper or Peon as per the service conditions of the Petitioners.
- (f) The Respondent will be at liberty to follow the due process of law for seeking recovery of difference in wages in comparison to the Gardener-cum-Sweeper in the light of the directions of the Industrial Court.

30 Rule is made partly absolute in the above terms.

31 At this stage, Shri Palodkar prays for staying of this order.

32 Shri Salunke has opposed the said request.

33 The impugned judgment of the Industrial Court was stayed only to the extent of consequential benefits. The Respondent was directed to be continued in employment by the interim order dated 25.03.2008. Hence, the request of the Petitioners is accepted and this order is stayed for a period of four weeks. However, staying of this order shall not entitle the Petitioners to dispense with the services of the Respondent.

(RAVINDRA V. GHUGE, J.)