

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1710 OF 2015

1.Mr. Prabhakar Dadaji Bhat and
Anr. Petitioners

Vs

Yashwantrao Chavan Academy
of Development Administration .. Respondent

WITH

WRIT PETITION NO. 2048 OF 2015

Deepak Jijabrao Shitole and Ors Petitioners

Vs

Yashwantrao Chavan Academy
of Development Administration .. Respondent

Mr.Nitin A Kulkarni, Advocate for petitioners.

Mr. A. P. Vanarse, Advocate for respondent.

CORAM : R.G.KETKAR,J.

DATE : 09/03/2015

PC:

1. Heard Mr. Nitin A. Kulkarni, learned counsel for the petitioners and Mr. A. P. Vanarse, learned counsel for the respondent at length.

2. By these Petitions under Articles 226 and 227 of the Constitution of India, the original complainants have challenged the Judgment and order dated 20.1.2015 passed by the learned Member, Industrial Court, Pune (for short, "Tribunal) below Exhibit-U-2 in the complaints filed by them. By that order, the

Tribunal rejected the application-Exhibit U-2 and ordered that the order will take effect on and from 20.2.2015.

3. In support of these Petitions, Mr. Kulkarni invited my attention to the appointment orders that were issued to the complainants from time to time. He submitted that all these appointment orders were for a specific period and did not disclose that the complainants were appointed in any of the projects undertaken by the respondent. He submitted that the respondent is an autonomous body and is controlled by the Board of Governors. The Board of Governors, by passing resolutions, can create posts including posts on contract basis. Accordingly, the complainants were appointed from time to time on contract basis. Till date they are continued in the employment of the respondent. He, therefore, submitted that status-quo may be ordered to be maintained by both the parties, thereby, permitting the complainants to work in the respondent.

4. Mr. Kulkarni invited my attention to Schedule- A indicating number of vacant posts as on 31.12.2010 as also chart showing Academic Posts as on 31.3.2011 and in particular Course Associates (6 posts) and course Assistants (13 posts) at serial no. 8 and 9. This chart shows that out of 6 posts of Course Associates, 3 posts are to be filled in by regular recruitment and 3 posts on contract basis. As far as Course Assistant posts is concerned, out of 13 posts, 4 posts are to be filled in by regular

recruitment and 9 posts on contract basis. He further submitted that the complainants have produced U-13, i.e. the Minutes of 44th and 41st meetings of Board of Governors of the respondent. He submitted that this document was not at all considered by the Tribunal while passing the impugned order. He also relied upon the submissions dated 4.4.2009 made by in-charge officer of the respondent for creating posts of 11 Technical Assistants. In short, Mr Kulkarni submitted that the vacant posts are available or Board of Governors by passing Resolution can create posts on which the complainants can be accommodated. He further submitted that Notification under section 13-B of the Industrial Employment (Standing Orders) Act, 1946 is not issued thereby exempting the respondent from applicability of the provisions of that Act,. He further submitted that clause 4-C of the Model Standing Orders obliges the respondent to make the complainants permanent after completion of 240 days' service. The complainants have already put in more than 240 days' service in each year and the respondent itself has proposed to create certain posts. The posts are available for the complainants. Even if the posts are not available, the respondent has power to create the required posts. He further submitted that when a complainant seeks the benefit under Item 6 of Schedule IV of the Act, his complaint can be very easily frustrated, defeated or stultified by just throwing him out of service on

specious ground that he was employed as Badli or temporary and that his services are not required. He submitted that law cannot be allowed to be defeated in this manner by unscrupulous employers. It is the duty of the Tribunal to protect employment by ordering continuity of status-quo during the pendency of the complaint, subject to complainant making out a reasonable good prima facie case. In support of this submission, he relied upon the following decisions:

1. Alexandar Yesudas maikel Vs. Perfect Oil Seals and IRP, 1995 (1) CLR 942, to contend that prima facie the case does not fall in exclusionary clause (bb) of Section 2 (oo) of the Industrial Disputes Act, 1947;
 2. Saudi Arabian Air Lines Vs. Ashok Margovind Panchal, 2002 (3) CLR 743;
 3. Reliance Energy Ltd Vs. Yadayya Giri, 2011 IV LLJ 428 (Bom).
5. On the other hand, Mr Vanarse supported the impugned order.
6. I have considered the submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is relevant to note that earlier applications Exh.U-2 were decided by the Tribunal on 15.5.2014. The Tribunal rejected the interim relief and ordered the respondent to continue to provide employment/work to the complainants as and when the same is available during the pendency of the complaint. It was also made clear that even if services of the

complainants are terminated, the complaints claiming permanency shall not be rendered infructuous on the ground of termination of services. Aggrieved by that decision, the complainant instituted petitions in this Court. By order dated 8.7.2014, this Court set aside the order on the ground that the documents which were sought to be placed on record by way of affidavit in rejoinder were not available with the complainants when the impugned order is passed. This Court after setting aside the order directed the Tribunal to consider the documents which were sought to be placed on record instead of considering the same for the first time in writ jurisdiction.

7. In pursuance thereof, the Tribunal once again decided the applications Exhibit U-2 afresh and after considering the documents produced on record, rejected the applications. While rejecting the applications, the Tribunal observed that such of those complainants who are working with the respondent shall be allowed to work and earn wages till date when the order will take effect , i.e. on and from 20.2.2014. The respondent was directed to provide employment/work to all the complainants as in the past as and when the same is available during the pendency of the complaints. It was also expressly made clear that termination of services of the complainants shall not be a ground to oppose the claim of permanency and in any case the complainants claimed that permanency shall not be rendered

infructuous in the event of termination or discontinuance.

8. The Tribunal, after considering the material on record, prima facie held that the respondent is an instrumentality of the State. The respondent is under administrative control of General Administration Department of Government of Maharashtra. The respondent has got three kinds of personnel working therein. One is permanent staff on the permanent establishment which is recruited as per the advertisement and following selection procedure and salaries are paid from the funds of the respondent. The second type of employees are the Government Officers including IAS and IPS officers who are posted in the respondent on deputation. Third category is of the fixed tenure/contract employees engaged mostly on projects. After considering the appointment orders as also pleadings in the complaints, the Tribunal prima facie observed that appointments were periodical or conditional. None of the complainants were ever assured permanency in the service. The appointments were either project based or based having regard to exigencies of work. Funds for such project are received from outside.

9. In paragraph 23, the Tribunal considered Rule 12(b) under which the respondent makes recruitment. The appointments given to the complainants from time to time were periodical and subject to terms and conditions. The respondent had continued the complainants as the work was available. The respondent

further came out with the case that there are no posts or there is no project work. In view thereof, the Tribunal was of the opinion that it would not be justifiable to force the respondent to continue the complainants after appointments came to an end. The Tribunal also observed that the employment given to the complainants mostly related to projects. One of the complainants had admitted that the post which was given to him did not exist.

10. In paragraph 25, the Tribunal considered the arguments advanced on the basis of clause 4-C of the Model Standing Orders. After considering the decisions of the Apex Court in the case of Secretary, State of Karnataka Vs. Umadevi, 2004 (7) SCC 132 and MSRTC Vs. Castribe Rajya P Karmachari Sanghatana, 2009 (8) SCC 556, the Tribunal recorded the findings in paragraph 27 that the complainants have not established strong prima facie case for granting injunction against the termination of services. At the same time, having regard to the fact that the complainants have rendered services in the past it issued directions to the respondent to provide employment/work to the complainants as in the past as and when the same is available during pendency of the complaint.

11. Mr. Kulkarni relied upon the decision of this Court in the case of Alexandar Yesudas Maikel (supra). In that case, the petitioner was given a letter of appointment that he would be employed for a period of 7 months from 20.4.1985 to

19.10.1985. After 19.10.1985, the petitioner was neither removed from service, nor was the contract of employment deemed to have run out, bringing about disruption of the employer-employee relationship. Respondent no.1 continued the petitioner in service till 22.11.1985, on which date, a letter of termination of service was served on the petitioner terminating his service with effect from 22.11.1985. After a gap of about 10 days, the petitioner was re-appointed on 2.12.1985, for a fresh period of six months. When the six month period ended on 1.5.1986, the petitioner was allowed to continue in service till 31.5.1986. On that date he was served with a letter terminating his service with effect from 31.5.1986. The Labour Court dismissed the complaint by its order dated 13.3.1987 holding that the termination of his service did not amount to "retrenchment" as it specifically fell within the newly added clause (bb) of Section 2(oo) of the Act. The revision was dismissed by the Industrial Court on 4.8.1988. The Industrial Court held that the petitioner had failed to prove that he had completed 240 days' service.

12. In paragraph 3 of the report, it was observed that the petitioner's service was finally terminated on 31.5.1986. During the period of 12 months prior to the said date, i.e. from 1.6.1985 to 31.5.1986, the only period during which the petitioner was not

in service was the short period from 22.11.1985 to 1.12.1985. Otherwise he was continuously in service. This Court also noted that on 2.4.1987 the petitioner made an application for production of the Muster-cum-wage registers of respondent no.1 for the period 1.9.1984 to 31.5.1986. They were actually produced for inspection, and, after taking inspection, the Advocate of the petitioner filed a praecipe in the Labour Court on 3.3.1987 showing the results of his inspection. It showed that during the period January 1985 to May,1986, the total number of working days put in by the petitioner in the employment of the first respondent was 271. In other words, the petitioner had put in more than 240 days service during the relevant period. This Court, therefore, held that the petitioner had put in one year's continuous service within the meaning of Section 25-B of the Act when his service was terminated.

13. It is in that context in paragraph 5 of the report, it was observed that clause (bb) of Section 2(oo) has itself been restrictively interpreted and the judicial consensus appears to be that, if the post continues and the work continues, clause (bb) cannot be said to operate as a charter for unscrupulous employers to jettison their workmen. In my opinion, the said decision is not applicable in the facts of the present case as in that case after a full-fledged trial, after considering the evidence

on record this Court noted that the Courts below ignored the material on record in holding that the petitioner in that case did not put in continuous service of 240 days.

14. Mr. Kulkarni relied upon the decision in the case of Saudi Arabian Air Lines (supra). The decision of Alexandar Yesudas Maikel (supra) was also considered by this Court. In paragraph 7 of that report, this Court reproduced paragraph 18 from the Judgment of Industrial Court. In his evidence, the complainant had stated that the post on which he was working is a permanent post, namely security guard and nature of the duties which was performed by him on that post was of perennial nature. The Tribunal came to the conclusion that the post held by the complainant was a permanent post and that the complainant had proved that he had rendered and completed 240 days uninterpreted service and was, therefore, entitled to permanency. It was thereafter observed by this Court that the Industrial Court had found on the basis of evidence and material on record that the post held by the respondent was a permanent post and that he could not be appointed as temporary or causal on the post which was of permanent nature. The Industrial Court found as a matter of fact and was no dispute that the respondent completed two years of employment continuously and not merely 240 days which is required under clause 4(c) of the Model Standing Orders. In paragraph 8, this Court observed that the work of security

guards has to be considered as of perennial nature. The Deputy Commissioner of Police also had issued permanent airport pass for the respondent-complainant. This conduct clearly showed that the respondent was to be considered as a permanent employee. This Court therefore held that the case cannot be said to have been covered under section 2(oo)(bb) of the Act.

15. Mr. Kulkarni relied upon paragraph 11 of the report and submitted that in such type of complaint it is the duty of the Industrial Court to protect the employment by ordering continuation of "status quo" during the pendency of the complaint, if of course, a reasonable good prima facie case is established by such employee that he was employed and continued as badli, temporary or casual for years together. In this case as well, after a full-fledged trial, the Industrial Court had held that the respondent-complainant had proved that he had put in 240 days continuous service and that the nature of work was of perennial nature. In the present case, after considering the material on record, the Tribunal held that prima facie case is not made out by the petitioner.

16. Mr. Kulkarni relied upon the decision of this Court in the case of Reliance Energy Ltd, Mumbai. (supra). In that case too, after a full-fledged trial, the Industrial Court had held that the petitioner had committed unfair labour practices under Items 5,6,9 and 10 of Schedule IV of the Act and that there was no

material on record to indicate that the workmen were being engaged only after a tenure of a particular project. I, therefore, do not find that the decisions relied by Mr Kulkarni are of any assistance to the petitioner.

17. Mr.Kulkarni relied upon submissions dated 4.4.2009 made by in-charge officer of the respondent to the Director General. However, the petitioner has not placed on record the decision, if any, taken in pursuance of the submissions dated 4.4.2009. Mr. Kulkarni has also relied upon Resolution No.41 wherein it was resolved that the entire expenses for implementation, evaluation and planning of the State Trading Policy including creation of 27 posts mentioned thereunder will be given by the State Government through its Plan STP Budget as lump sum Course Fee amount. The petitioner, however, has not placed any material on record indicating that actually 27 posts set out therein were created.

18. Perusal of all these decisions indicated that the decisions were rendered in cases where the complaints were disposed of finally after considering the evidence on record. Prima facie, after considering the material on record, the Tribunal has observed that there is no vacant sanctioned post and, therefore, it would not be justifiable to force the respondent to continue the complainants who are already in employment or to take back those whose appointments came to an end.

19. I do not find that the Tribunal committed any error in arriving at that conclusion. Mr. Kulkarni was not in a position to demonstrate that the sanctioned vacant posts are available or have been created by the Board of Governors.

20. In view thereof, no case is made out for invocation of powers under Articles 226 and 227 of the Constitution of India. These petitions fail and the same are dismissed. It is made clear that the observations made herein are tentative and prima facie only for the purpose of deciding whether the petitioners have made out case for granting interim relief. The Tribunal will decide the main complaints on the basis of evidence on record and in accordance with law, uninfluenced by any observations made herein.

21. At this stage, Mr. Kulkarni orally applies for continuation of ad-interim order dated 18.2.2015 passed by this Court for a period of four weeks from today. He submitted that the Industrial Court after passing the impugned order on 20.1.2015 directed that the said order shall take effect on and from 20.2.2015. On the other hand, Mr. Vanarse opposed this application on the ground that no prima facie case is made out by the petitioner. Having regard to the fact that the ad-interim order which is operating pending disposal of application-Exhibit U-2, as also by the impugned order dated 20.1.2015 the Tribunal directed that the said order shall take effect on and from 20.2.2015, as also having due regard to the fact that the petitioner intends to challenge this order in higher Court, in my opinion, the ends of justice would be served by continuing the ad-interim order dated 18.2.2015 passed by this Court for a period of four weeks from today.

(R.G.KETKAR, J.)