

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

WRIT PETITION NO. 8002 OF 2015

The Agriculture Produce Market Committee,
Jalna Tal and Dist Jalna.
Through its Secretary,
Shri Ganesh Basappa Chougule,
Age : 53 years, Occupation : Secretary,
APMC, Jalna,
Office at APMC, Jalna, Dist.Jalna.

...PETITIONER

-VERSUS-

- 1 The State of Maharashtra.
 Through the District Deputy Registrar
 of Cooperative Societies, Jalna.
 Administrative Building, 2nd floor,
 Collector Office, Jalna.

- 2 Suresh s/o Uttamrao Jige,
 Age : 47 years, Occupation : Nil,
 R/o Sindhipimpalgaon,
 Post Pirpimpalgaon,
 Tq.Badnapur, Dist.Jalgaon

...RESPONDENTS

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Advocate for Petitioner : Shri Kale Ajeet B.

AGP for Respondent 1 : Shri PN.Kutti.

Advocate for Respondent 2 : Shri T.K.Prabhakaran a/w Shri Suwarnkar
Nitin S.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 23rd August, 2016

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2 The Petitioner is aggrieved by the judgment of the Industrial
Court dated 30.09.2014 by which Complaint (ULP) No.214/2009 filed by
Respondent No.2/ Employee has been allowed and he has been granted
regularization as a Junior Clerk with all benefits incidental and
consequential thereto from 09.03.1996 when he was first appointed as a
Junior Clerk with the Petitioner.

3 For the sake of brevity, the Petitioner shall be referred to as
“the Employer”, Respondent No.1/ District Deputy Registrar, Cooperative
Societies, shall be referred to as “the State” and Respondent No.2/ original
Complainant shall be referred to as “the Complainant”.

4 I have considered the strenuous submissions of the learned
Advocates for the respective sides and with their assistance, I have gone
through the petition paper book and the affidavit in reply filed by the
Complainant.

5 It is not in dispute that the Complainant was appointed as a
Junior Clerk on 09.03.1996. There was break in service for few days and

he was again appointed for the period 10.08.1996 to 09.01.1997 followed by 11.01.1997 to 10.06.1997, followed by 12.06.1997 to 11.11.1997 and from 12.11.1997 to 11.04.1998.

6 The Complainant was terminated on 15.04.1998 and hence, he preferred Complaint (ULP) No.51/1998 before the Labour Court. The Labour Court specifically cast the issue as to whether, the Complainant proves that he was in service with the Employer continuously from 09.03.1996 to 13.04.1998. By its judgment, it concluded that the breaks of a day or two in between the above referred appointments, would amount to artificial breaks in service and hence, the Complainant has proved his continuous employment from 09.03.1996 till 11.04.1998. Since Sections 25-F, 25-G and 25-H of the Industrial Disputes Act, 1947 were not complied with, the Labour Court granted reinstatement with continuity of service and 50% back wages by its judgment dated 19.03.2003.

7 The Employer preferred Revision (ULP) No.19/2003 which was dismissed by the Industrial Court vide judgment dated 08.08.2003. It is conceded by the Employer that the said judgment of the Industrial Court has not been challenged before this Court and as such, it has attained the finality. Needless to state, by the judgment of the Labour Court, continuous employment from 09.03.1996 has been confirmed and

he was granted continuity from the date of termination.

8 The Complainant approached the Industrial Court by filing Complaint (ULP) No.214/2009 for regularization and consequential benefits.

9 The strenuous contention of Shri Kale, learned Advocate for the Employer, is that the Industrial Court got carried away by the order of reinstatement issued by the Labour Court and wrongly presumed that because the continuity in service was granted, the Complainant must be given confirmation/ regularization in employment from 09.03.1996. He has strenuously criticized the impugned judgment, since according to him, the Industrial Court erroneously proceeded on the belief that the issue of confirmation was settled by the Labour Court.

10 His further strenuous contention is that there was no material before the Industrial Court to grant regularization to the Complainant from 09.03.1996. In the absence of any evidence, merely because the Labour Court granted reinstatement, led the Industrial Court to an erroneous conclusion that the regularization also should be from 09.03.1996.

11 Shri Kale has specifically drawn my attention to the conclusion of the Industrial Court in paragraph 14, last 05 lines, which read as under:-

“There is absolutely no any explanation from the respondent, under what basis, the service of the complainant came to be confirmed w.e.f. 01.12.2006 instead of confirming it from the date of his appointment.”

12 Shri Kale further draws my attention to the conclusions of the Industrial Court in paragraph 15 on the internal page 11, which read as under:-

“By going through this list, it reveals that 12 employees on the post of Clerk were appointed during the period of 09.03.1996 to 30.11.2006. One Clerk Kudale came to be appointed in the year 2006. Clerk B.A.Shinde and other Clerks were appointed on 24.09.2002. Clerk Nihal and Chbilwad came to be appointed on 01.07.2003 and on 10.10.2003. The Clerk Tanpure appointed on 25.06.2004. Clerk Palve appointed on 01.07.2004. The respondent Nos.1 and 2 are not with the case that these Clerks were not appointed on vacant post, but on temporary basis, etc. The list further shows that since 09.03.1996 upto the year 2005, 10 employees were either retired or died. Their particulars are not given in the case. From the list of appointment of new Clerks, it can be presumed that on the relevant dates, there were vacant posts of Clerks.”

13 Shri Kale then points out the conclusion of the Industrial Court from paragraph 16 which reads as under:-

“It is obligation upon the Respondent Nos.1 and 2 to comply the order of the Labour Court by confirming service of the Complainant with effect from the admitted date of his appointment i.e. 09.03.1996. Under these circumstances, confirmation of service of the Complainant w.e.f. 01.12.2006 is in clear violation of the direction of the Labour Court. It certainly amounts to unfair labour practice.”

14 Shri Prabhakaran, learned Advocate for the Complainant, has strenuously supported the impugned judgment. He has relied upon the affidavit in reply filed by the Complainant dated 28.03.2016. He has specifically drawn my attention to paragraph 5 of the affidavit in reply wherein the Complainant has given the list of 16 Junior Clerks, out of which, three have died in harness and rest have retired. The contention is that the first vacancy arose when Mr.B.N.Kakade retired on 30.06.1998.

15 Shri Prabhakaran further points out that Narayan Shirsath joined the Employer as Peon on 20.03.1987. He was not a Secondary School Certificate holder. He was appointed as Junior Clerk on 21.06.1997 after the Complainant and yet he was made permanent by the order dated 31.07.2006 w.e.f. 21.06.1997. His seniority was fixed at Sr.No.16 as a Junior Clerk instead of Sr.No.17 and the Complainant should have been at Sr.No.16.

16 He further points out from the affidavit that Prabhakar Tekale was similarly appointed as a Peon on 14.01.1987 and was promoted as a Clerk w.e.f. 01.07.1998. He also did not hold SSC certificate, yet by the order dated 31.07.2006 he was made permanent as a Junior Clerk w.e.f. 01.07.1998 and shown above the Complainant in the seniority list.

17 He has similarly indicated that Sanjay Chabilwad was appointed as a Junior Clerk on 10.10.2003 and was regularized ahead of the Complainant. Anil Kudale was appointed on compassionate ground on 01.12.2000. His case would, therefore, not comparable to the Complainant's case. Bhagwan Shinde was also appointed as a Junior Clerk on 24.09.2002. He is the real brother of Prabhakar Shinde, the then Director of the Employer. This was admitted by the witness of the Employer before the Industrial Court. The said Bhagwan was at Sr.No.19 in the seniority list and the Complainant was pushed down to Sr.No.29. Raju Hiwale was a contractual employee from November, 1996. He was appointed as a Junior Clerk on 24.09.2002 and was regularized ahead of the Complainant and shown at Sr.No.20 in the seniority list.

18 The Complainant has cited 14 such examples below paragraph 4.5 of his affidavit in reply, some of which have been referred to in this judgment only for the purpose of clarity.

19 Upon considering the judgment of the Labour Court and the scope of its powers exercised when it allowed the complaint of the Complainant by judgment dated 19.03.2003, the said judgment of the Labour Court, as has been rightly contended by Shri Kale, cannot be construed to be a direction to the Employer to regularize the service of the Complainant from 09.03.1996. This cannot be the interpretation of the judgment, inasmuch as, the Labour Court has not given any such direction. For the said reason, the conclusion of the Industrial Court in paragraphs 14 and 16 reproduced above, is rendered unsustainable. The basis of the Industrial Court in granting the effect of regularization to the Complainant from 09.03.1996 in the absence of adequate oral and documentary evidence, therefore, cannot be sustained.

20 This leaves me to decide, on the basis of the available evidence, as to from what date would the Complainant be entitled to for regularization.

21 In paragraph 5 of the affidavit filed by the Complainant, it is categorically stated that the dates mentioned in the chart are the dates on which the respective employees passed away/ retired. It is stated that all of them are Junior Clerks. Shri Kale instantaneously contended that

Sr.No.1 S.B.Jadhav shown as Junior Clerk is incorrect because he was an Inspector and not a Junior Clerk. This list provided by the Complainant in the affidavit could be considered only upto Sr.No.8 since the Complainant has already been granted regularization by the Employer w.e.f. 01.12.2006.

22 It is trite law that in the State Government employment or employment with the instrumentalities of the State Government like the Petitioner/ Employer herein, regularization cannot be granted from the date of joining or merely on the basis of completion of 240 days in continuous and uninterrupted employment of the Employer. The regularization necessarily means that a person is granted benefits of the regularization from the date on which either the post was created or the date on which it fell vacant, so as to be occupied by the employee. Completion of 240 days in continuous employment in such peculiar facts will not have much relevance.

23 However, I find from the chart submitted by the Complainant that there was no evidence before the Industrial Court with regard to the deaths and retirements of the candidates from Sr.No.1 to 8. So also, 14 instances cited by the Complainant in paragraph 4.5 of the affidavit in reply were also not tested on the basis of oral and documentary evidence.

24 It is in this backdrop that I am inclined to remand the complaint only to the extent of permitting the litigating sides to lead evidence on these issues, lest it would amount to a travesty of justice that merely because this issue was not appropriately addressed to the Industrial Court that the Complainant would be deprived of the benefits to which he may actually be entitled to.

25 I, however, also find that the issue of the date from which the effect of seniority could be given, could be narrowed down considering the evidence that is available before the Court. Shri Kale has rightly submitted that unless there is a permanent vacant post available from 09.03.1996, the Complainant cannot be granted regularization from 09.03.1996 in the absence of any permanent post. There can be no dispute that unless the post is available and vacant, the regularization cannot be on a non existing post.

26 I find from the seniority list placed on record at page 111 and the evidence recorded by the Industrial Court, which is discussed in the impugned judgment, that the list Exhibit C/53 would indicate that 12 employees were appointed on the post of Clerks during the period 09.03.1996 to 30.11.2006. Bhagwan Shinde, Raju Hiwale, Dnyandev

Bhikaji Chand, Prafulla Babanrao Hiwrekar, and Kilas Bhaurao Unage, are shown to have been appointed as Junior Clerks w.e.f. 24.09.2002. It is contended by the Employer that their actual dates of joining were much prior to the dates mentioned in the said chart which is deceptive about the dates on which they have been granted benefits of regularization.

27 Considering the same, it is indicative that the posts of Junior Clerks were available as on 24.09.2002. Bhagwan Shinde was at Sr.No.19 when the name of the Complainant was shown at Sr.No.29. Logically, the Complainant should have been upgraded to Sr.No.20 and should have been placed below Bhagwan Shinde. The chart at page 113 indicates that Bhagwan Shinde was lifted to Sr.No.19 as a Junior Clerk and the Complainant was moved down to Rs.No.28. As such, this would indicate that in between Junior Clerks and those promoted as Senior Clerks, the Complainant who was below Mr.Bhagwan Shinde, was moved further below by being granted the benefits of regularization from 01.12.2006. All other Junior Clerks were posted in the seniority list after being regularized w.e.f. 24.09.2002.

28 In the light of this fact, I find that it would be safe and appropriate to tentatively place the Complainant along with Junior Clerks who have been granted regularization and benefits incidental thereto from

24.09.2002. With this conclusion, I bring to an end the dispute as regards the date, which can be considered for the present for regularization of the Complainant from 24.09.2002.

29 As noted above, this complaint could have been disposed of with the above conclusion. However, it appears that there were three deaths and 13 retirements in between 21.06.1997 to 30.06.2014. The Complainant would be concerned with the last retirement on 30.11.2006 (Mr.S.R.Hande) since the Complainant was granted regularization by the Employer w.e.f. 01.12.2006.

30 The Industrial Court concluded that the Employer has not brought the evidence before it to indicate as to the dates of joining of those employees who are shown to be at Sr.No.18 onwards upto Sr.No.35 in the seniority list dated 31.03.2015. Had the Employer produced the evidence to indicate the initial dates of joining and the reserved posts on which some of them were appointed as Junior Clerks, things would have been even more easier for decision and the Industrial Court would have been better assisted in adjudicating upon the complaint. It appears that because these necessary details about other employees were not brought before the Industrial Court, it led to the passing of the impugned judgment.

31 Shri Kale has strenuously contended that the Industrial Court cannot decide the issue of seniority. I do not find that the said submission could be sustained for the reason that Items 5 and 9 of Schedule IV of the MRTU & PULP Act, 1971 sufficiently empower the Industrial Court, while deciding the issue of permanency, to decide the date from which the permanency can be granted and consequentially, which would decide the seniority of the Complainant.

32 It is also brought to the notice of this Court by Shri Prabhakaran and which is disputed by Shri Kale that Narayan Shirsath and Prabhkar Tekale, who were appointed as Peons, were granted regularization by orders dated 31.07.2006 w.e.f. 21.06.1997 and 01.07.1998, respectively. Shri Prabhakaran submits that this document on the basis of which he is making the statement is at Exhibit U/24 before the Industrial Court and therefore, the Complainant will have to be placed above Shirsath and Tekale since their initial appointments were as Peons and not as Junior Clerks. As this issue was not supported with oral evidence, I leave the said issue open for the Industrial Court to consider. If the contention of the Complainant to this extent is substantiated, he might be entitled to regularization from the date on which Shirsath has been granted regularization as a Junior Clerk.

33 In the light of the above, this Writ Petition is partly allowed. Complaint (ULP) No.214/2009 is remitted back to the Industrial Court for permitting the litigating sides to adduce fresh evidence on the issue as to whether, the Complainant is entitled for regularization prior to 24.09.2002 considering the conclusions of this Court in paragraphs 28 and 32 herein above and especially with regard to the contentions of the Complainant set out in the affidavit in reply dated 28.03.2016 from paragraph 4.5 till paragraph 6.

34 The Industrial Court while deciding the complaint, shall restrict its conclusions only to the aspect as to whether, the Complainant can be held to be entitled for regularization in service from any date prior to 24.09.2002 since this Court has already so concluded, on the basis of the available material, that the Complainant can be placed in the list of those Junior Clerks who have been regularized w.e.f. 24.09.2002.

35 As such, the Industrial Court will permit the litigating sides to lead further evidence so as to conclude as to when was the earliest post of Junior Clerk available to which the Complainant would be entitled to from the date of initial joining as Junior Clerk. Needless to state, the litigating sides shall produce further documentary evidence and lead additional oral

evidence so as to enable the Industrial Court to decide the complaint only to the extent of the issue for which the complaint is remitted.

36 It is expected that the Industrial Court shall decide the said complaint as expeditiously as possible and preferably on or before 31.03.2017. In order to avoid wastage of time in issuance of notice, the litigating sides shall appear before the Industrial Court on 13.09.2016 and shall refrain from seeking adjournments on trivial and unreasonable grounds.

37 It is pointed out by Shri Prabhakaran that Criminal Complaint (ULP) No.7/2015 is pending before the Labour Court at Jalna under Section 48(1) of the MRTU & PULP Act, 1971. Considering this order, it is submitted that the said complaint could be disposed of. As such, the Labour Court shall dispose of the said Criminal Complaint (ULP) No.7/2015.

38 The amount deposited by the Petitioner/ Employer in this Court towards difference of wages pursuant to the judgment of the Industrial Court, shall stand transmitted to the Industrial Court, Jalna forthwith. However, the Complainant would not be at liberty to withdraw the same till the complaint is decided and the Industrial Court shall invest

the said amount in a fixed deposit receipt in any nationalized bank for an initial period of six months.

39 Rule is made partly absolute in the above terms.

40 No costs.

kps

(RAVINDRA V. GHUGE, J.)