IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4131 OF 2016

Narhari Tatyaba Dawale,
Age-Major, Occu-Service,
R/o At Post Rajur, Tq.Bhokardan,
Dist. Jalna -- PETITIONER

VERSUS

The Chief Executive Officer,
Zilla Parishad, Jalna,
Dist. Jalna -- RESPONDENT

WITH
WRIT PETITION NO.7568 OF 2016

The Chief Executive Officer,
Zilla Parishad, Jalna,
Dist.Jalna -- PETITIONER

VERSUS

Narhari S/o Tatyaba Dawale,
Age-Major, Occu-Service,
R/o at Post : Rajur,
Tq.Bhokardan,
Dist.Jalna -- RESPONDENT

Mr.P.P.More, Advocate for the petitioner.
Mr.B.B.Kulkarni, Advocate for the respondent.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 17/10/2016

ORAL JUDGMENT :

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

2. On 11/04/2016, I had passed the following order :-

"1. The petitioner / employee despite having succeeded before the Industrial Court by the impugned judgment dated 7.8.2015, whereby, his Complaint (ULP) No.30 of 2012 is allowed, is aggrieved to the extent of regularization having not been granted from the date of the complaint.

2. The petitioner has worked as a Watchman on daily wages from 1.3.1986 and was terminated on 1.4.1989. His Reference (IDA) No.2 of 1990 challenging his termination was partly allowed by the Labour Court by judgment dated 30.10.1998. It is stated that the said award has not been challenged by the respondent / establishment.

3. It is further stated that pursuant to the award, the petitioner was reinstated in 1998 with continuity from 1.4.1989. He has been deprived of the backwages. He, therefore, filed Complaint (ULP) No. 30 of 2012 on 18.6.2012, seeking regularization in service. Said complaint has been allowed by the impugned judgment and he has been granted regularization from the date of the judgment dated 7.8.2015. Shri More submits that the petitioner has, therefore, worked for the past 30 years with the respondents. His grievance is that the impugned judgment be modified and he be granted regularization from the date he had instituted the complaint before the Industrial Court.

4. Shri Kulkarni, learned Advocate has appeared on behalf of the sole respondent. He submits that the post of Watchman is not vacant. He, however, seeks time to take instructions.

5. S.O. to 25.4.2016.

6. Needless to state the respondents shall not terminate the services of the petitioner merely on the ground that he is a temporary."

3. Mr.Kulkarni, learned Advocate for the Zilla Parishad points out that the second petition has been filed for challenging the same judgment. The employee was never employed by the Zilla Parishad, he was working on Employment Guarantee Scheme (EGS). This fact has been put forth in the written statement of the Zilla Parishad Exhibit C-3. He, therefore, submits that the issue has been settled by this Court that an employee working on E.G.S. cannot be permitted to raise a claim for reinstatement or continued employment under the MRTU and PULP Act, 1971.

4. Mr.More, learned Advocate points out that the employee is in employment even today and his wages have not been paid from October 2015. This Court had directed the Counsel for the Zilla

Parishad to take instructions whether the wages have been paid or not. Today, Mr.Kulkarni submits that due to some errors in the documentation, the employee was paid only ½ of the amount and which is out of inadvertence.

5. I have considered the submissions of the learned Advocates. For the sake of brevity, the petitioner in the first petition is referred to as the employee and the Zilla Parishad, which is the petitioner in the second petition, is referred to as the establishment.

6. The contention of the establishment needs to be dealt with at the outset. The employee had earlier approached the Labour Court in Ref.(IDA) No.2/1990 for challenging his termination dated 01/04/1989. The establishment had taken a stand that the employee was never appointed by the establishment and he was working under EGS with the supervision and control of the Tahsildar and District Collector.

7. By award dated 30/10/1998, the Labour Court had granted reinstatement with continuity but without back wages by setting aside the oral termination dated 01/04/1989. It is informed that the said award has attained finality. Ever since then, the employee is in

continuous employment, though on daily wages, with the establishment. The contention of the establishment that he was working on E.G.S. has been rejected in the earlier litigation and the said issue now cannot be permitted to be re-opened at the behest of the establishment.

8. As such, the only issue that remains to be adjudicated upon is as to whether the Zilla Parishad Establishment has the power to create posts and grant regularization. This issue has already been dealt with by this Court in the matter of Lagwad Adhikari and Others Vs. Yasin Hamid Sayyad, 2008(2) Mh.L.J. 338. The relevant paragraph Nos. 6, 10, 12 and 15 of the said judgment read as under :-

> *"6. The short question this Court is required to consider is, whether the findings of the Industrial Court holding the present petitioners guilty of unfair labour practices within the meaning of Items 6 and 9 of Schedule IV of the Act are justified. Items 6 and 9 of Schedule IV of the Act reads as under:*
>
> > *6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.*

9. Failure to implement award, settlement or agreement.

It is a well settled position in law that when badlis, casuals or temporaries are continued for years together on account of non availability of permanent sanctioned posts, failure for their absorption in the respective posts either Class -D or Class -C per se, is not an act of unfair labour practice within the meaning of Item 6 of Schedule IV of the Act.

In the case of Punjabrao Krishi Vidyapeeth, Akola v. General Secretary, Krishi Vidyapeeth Kamgar Union and Ors. , a Single Bench of this Court (Hon'ble Shri Justice V.S. Sirpurkar as His Lordship then was) considered the scope of Item 6 of Schedule IV and posed the following questions:

> *What then is the position of an employer who does not have the authority to employ such person permanently owing to a provision of law? Could it be said that an employer who is specifically prohibited from granting the status of permanency by creating posts is also covered under the language of Schedule IV, Entry 6?*

In para 8 His Lordship replied these questions as under:

> *"The answers to these questions will depend upon the true interpretation of this entry. Now, the plain*

language of entry No. 6 suggests that in continuing the employees as casuals or temporaries, there must be a definite object of depriving such workers of their rightful benefits. Then and then alone, this practice could be covered under the entry. How would that object be discerned is the question? By mere showing that there has been a practice of continuing the employees in the manner as shown above, does the complainant discharge his burden? The answer must be given in the negative. It is true that a continued practice of continuing the employee for years together as a badli employee or a temporary employee may definitely raise a finger of suspicion regarding the intention of that employee. However, in order to hold such employer guilty of such unfair labour practice as described in entry 6, something more is required. There must be "tangible evidence" to show that this was deliberately done. The words "with the object of" connote intention or mens rea on the part of employer, or a certain design in his mind to achieve certain results. Without that vital intention or that certain design, the employer cannot be dragged in...."

This view has been confirmed by the Apex Court in the case of Mahatma Phule Agricultural University (Supra). In para 14 their Lordships reproduced Item 6 of Schedule IV of the Act and stated as under:

"The complaint was against the Universities. The High Court notes, that as there were no posts the employees could not be made permanent. Once it comes to the conclusion that for lack of posts the employees could not be made permanent how could it then go on to hold that they were continued as "badlis", casuals or temporaries with the object of depriving them of the status and privileges of permanent employees. To be noted that the complaint was not against the State Government. The complaint was against the Universities. The inaction on the part of the State Government to create posts would not mean that an unfair labour practice had been committed by the Universities. The reasoning given by the High Court to conclude that the case was squarely covered by Item 6 of Schedule IV of the MRTU and PULP Act cannot be sustained at all and the impugned Judgment has to be and is set aside...."

10. There is one more issue which requires consideration, though may not be in all these cases and i.e. regarding calculating 240 days of work in one year. It is well settled that if a workman is paid on daily wages he does not get the benefit of weekly holidays and paid holidays for being taken into consideration for deciding the working days and only when a workman is monthly rated, such days are counted for calculating 240 days for a continuous period of one year within the meaning

of Section 25B of the Industrial Disputes Act, 1947. There is one more important aspect regarding the eligibility of the daily rated temporaries/casuals right for permanency on having put in such service for number of years, while engaged for such long period under a Scheme. Mr.Vanarase in this regard relied upon the Constitution Bench decision in Umadevi's case (Supra). In the case of Delhi Development Horticulture Employees Union v. Delhi Administration, Delhi and Ors.[(1992)IILLJ452][SC] the issue of regularisation in service merely on account of completion of 240 days of work under Jawahar Nehru Rojgar Yojana was considered by the Supreme Court and it has been held that the casuals/temporaries working under such Schemes were not entitled to claim regularisation in service. Their Lordships stated,

> *"...Those employed under the scheme, therefore, could not ask for more than what the scheme intended to give them. To get an employment under such scheme and to claim on the basis of the said employment, a right to regularisation is to frustrate the scheme itself. No Court can be a party to such exercise. It is wrong to approach the problems of those employed under such schemes with a view to providing them with full employment and guaranteeing equal pay for equal work. These concepts, in the context of such schemes are both unwarranted and misplaced. They will do more harm than good by depriving the many of the little income that they may get to keep them from starvation. They would benefit a few at the cost of the*

many starving poor for whom the schemes are meant. That would also force the State to wind up the existing schemes and forbid them from introducing the new ones, for want of resources. This is not to say that the problems of the unemployed deserve no consideration or sympathy. This is only to emphasis that even among the unemployed a distinction exists between those who live below and above the poverty line, those in need of partial and those in need of full employment, the educated and uneducated, the rural and urban unemployed etc.

"...The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal consideration including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years...."

12. Seeking regularisation in public employment must satisfy the requirements that the selection so made was as per the procedure prescribed under the Rules framed under Article 309

of the Constitution or any other Rules/instructions issued by the State Government in the absence of such Rules, the eligibility in terms of qualification and experience, the age limit, the aspect of reservation of seats depending upon the social status. For such public appointment on regular basis all eligible candidates must have a fair opportunity to apply, compete and face the selection process which ought to be transparent and fair. In short, the selection has to be on merits. The employees who are appointed on temporary basis either on daily wages or on monthly wages may be eligible to apply for such posts but merely because they worked for years together as temporaries or casuals directly engaged by the Department or by some Officer and without going through the selection process prescribed for Group D and C categories cannot claim regularisation in service only on the basis of the length of their service. The issue has been now well settled by the Constitution Bench judgment in Umadevi's case (Supra). It is clear that regularisation could be asked for by those who have come through the normal selection process prescribed under the Rules or notifications and not by those who are popularly called as the back door entries.

15. In the premises, these petitions succeed and they are hereby allowed. The impugned Judgment Order rendered by the Industrial Court in respective petitions is hereby quashed and set and Complaint (ULP) Nos. 370/94, 130/96, 522/96, 46/97, 128/96, 562/90 and 124/96 are hereby dismissed. And the aside 64/96, order as to costs.

Rule is made absolute accordingly with no order as to costs."

9. The Hon'ble Supreme Court in the matter of Secretary, State of Karnataka & Ors. vs. Uma Devi (3) & Ors., 2006(4) SCC 1, has observed in paragraph Nos.44 and 45 as under :-

> *"44. The concept of 'equal pay for equal work' is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after the Dharwad decision, the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments*

had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution of India permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on

the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity

enshrined in Article 14 of the Constitution of India."

10. As such, it is trite law that where such employees have been working for more than 10 years, though having been inducted irregularly, the establishment is to create a scheme for regularizing their services. The power to regularize the service of the employee, is not vested in the Zilla Parishad. This issue was dealt with by this Court in a group of about 25 petitions in WP No.11257/2014, Mukhyadhikari, Nagar Parishad, Tuljapur Vs.Vishal Vijay Amrutrao and others by its judgment dated 11/12/2014. It was concluded that the Zilla Parishad will have to forward a proposal to the appropriate authority which is the Director of Municipal Administration, Government of Maharashtra and such proposal would then be decided by the said Department.

11. The observations of this Court in the judgment dated 11/12/2014 in the Mukhyadhikari case (supra) in paragraph Nos. 27 to 31 read as under :-

> *"27. Nevertheless, the grievance of the petitioner to the extent of a declaration of ULP by the Industrial Court, needs to be entertained. It is settled law that when the state instrumentality cannot create posts and cannot grant permanency to an employee, on a non existing vacant permanent post, the object of*

depriving the workers of the benefits and status of permanency cannot be said to be proved and which is a salient ingredient of Item 6 of Schedule IV. To this extent, the ratio laid down by this Court in the Lagwad Adhikari case (supra), will be applicable.

28. When the Industrial Court itself was convinced that the petitioner needs to send the proposals to the Government for approval, it should have refrained from issuing a declaration of Unfair Labour Practices. There was no evidence as regards any act of force or violence on the part of the petitioner so as to attract Item No.10 of Schedule IV. Similar was the case as regards the object required under Item No.6, which consequentially also affects Item No.9 of Schedule IV. The Industrial Court has rightly directed the petitioner to send the proposals of the respondents for approval since the Government has to take a call on the services of such respondents / workmen at the earliest. However, there could not have been a declaration of ULP.

29. In the light of the above, I hereby allow these petitions partly only to the extent of modifying the impugned judgment in so far as the declaration of ULP is concerned. Clause 2 of the operative part of the impugned judgment is modified only to the extent of setting aside the declaration of ULP as against the petitioner. The remaining portion of the impugned judgment alongwith its directions to the petitioner to send the proposals to the Government for approval and for grant of permanency, is sustained. The same shall be complied with within two months

from today and the State shall take a decision on the said proposals within four months after receiving them from the petitioners.

30. It is pointed out by the learned Advocate for the respondents that one of the respondents / workers Smt.Janabai Ambadas Pophale in complaint (ULP) No.86/2011 and who is a respondent in WP No.11262/2014, has recently retired. As such, in her case, the petitioner is expected to send her proposal to the extent of seeking an approval to her regularization with retrospective effect in accordance with the rules, so as to make retiral benefits available to her.

31. Petitions are accordingly partly allowed in the above terms."

12. In the light of the above, both the petitions are partly allowed and the impugned judgment of the Industrial Court dated 07/08/2015 is modified to the extent of the order passed by the Industrial Court as under :-

[a] The declaration of ULP under clause B and clause C are quashed and set aside.

[b] The directions in clause D and E are modified by directing the establishment to forward the proposal of the employee for regularization to the Director of Municipal Administration, Government of Maharashtra within a period of 8 (eight) weeks

from today.

[c] The appropriate authority i.e. Director of Municipal Administration shall decide the proposal within 4 (four) months from the date of receipt.

[d] The claim of the employee for regularization shall be sanctioned from the date the post of Watchman has fallen vacant or from the date on which such a post is sanctioned, whichever is earlier.

[e] The benefits incidental and consequential to regularization shall be extended to the employee from the effective date on which he is granted regularization as a watchman.

[f] The unpaid wages / arrears of wages from October 2015 till passing of this order shall be paid expeditiously and preferably within 4 weeks from today.

[g] The monthly wages of the employee shall be paid regularly on the pay date.

[h] The directions of this Court to forward a proposal and during the pendency of the decision on such proposal, the service of the employee shall not be dispensed with only on the ground of the pendency of his proposal.

[i] The above protection shall not be attracted in the case of disciplinary action.

13. Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)