

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8847 OF 2016

The Municipal Corporation, Latur,
Dist. Latur,
Through its Commissioner

-- PETITIONER

VERSUS

1. Shivaji Dnyanoba Survase,
Age-68 years, Occu-Trade Unionist,
R/o Latur, Dist. Latur,
2. Sambhaji Dagduba Deokule,
Age-44 years, Occu-Service,
R/o Latur, Dist. Latur,
3. Prabhavati Vishwambhar Patil,
Age-42 years, Occu-Service,
R/o Hanumantwadi, Latur,
4. Gulabpasha Ismail Shaikh,
Age-45 years, Occu-Service,
R/o Lesha Colony,
Khorl Galll, Latur,
5. Balaji Tulshlram Kadane,
Age-39 years, Occu-Service,
R/o Thakre Chowk,
Behind N.P.School, Latur,
6. Dynadev Yeshwant Bhilvparvate,
Age-40 years, Occu-Service,
R/o Shldheshwar Ves, Latur,
7. Hansraj Datoba Jadhav,
Age-42 years, Occu-Service,
R/o Laxmi Colony, Latur,
8. Maheboob Kadir Shaikh,
Age-42 years, Occu-Service,

- R/o Labour Colony, Latur,
9. Goroba s/o Kamraj Kamble,
Through his LR's
Gangabai Kamraj Kamble,
Age-44 years, Occu-Service,
R/o Boudha Nagar, Latur,
 10. Bhagwant Nagnath Chakre,
Age-39 years, Occu-Service,
R/o Indira Nagar, Latur,
 11. Jayshri Bhagat Shendge,
Age-45 years, Occu-Service,
R/o Moti Nagar, Latur,
 12. Sojarbai w/o Kishan Adsule,
Age-49 years, Occu-Service,
R/o Indira Nagar, Latur
 13. Balaji Nivrutti Dumne,
Through his LR's,
Bharatbai w/o Balaji Dumne,
Age-42 years, Occu-Service,
R/o Labour Colony, Latur,
 14. Satish Bhanudas Kamble,
Age-45 years, Occu-Service,
R/o Gandhi Nagar, Latur,
 15. Suresh Mariba Kamble,
Age-52 years, Occu-Service,
R/o Bodhe Nagar, Latur,
 16. Balaji Prakash Dhotre,
Age-39 years, Occu-Service,
R/o Bodhe Nagar, Latur,
 17. Baswaraj Veerbhadra Vore,
Age-47 years, Occu-Service,
R/o Pochamma Galli, Latur,
 18. Laxmi Rajabhau Bansode,

Age-45 years, Occu-Service,
R/o Pochamma Galli, Latur,

19. Ismail Kasim Shaikh,
Age-42 years, Occu-Service,
R/o Hamal Galli, Latur

-- RESPONDENTS

Mr.A.V.Hon, Advocate for the petitioner.
Mr.T.M.Venjane, Advocate for all respondents.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 13/12/2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The petitioner/Municipal Council, presently Latur Municipal Corporation is aggrieved by the judgment of the Industrial Court dated 09/03/2016 by which Complaint (ULP) No.23/2009 has been allowed and the respondents/employees have been granted permanency from the date they have completed 240 days in continuous employment.
3. I have considered the submissions of the learned Advocates for the respective sides at length on 22/11/2016, 28/11/2016 and today.

4. I find that the Industrial Court has proceeded on the premises that each of these respondents would be entitled for permanency immediate upon completion of 240 days in service.

5. This Court in the matter of Municipal Council, Tuljapur Vs. Baban Hussain Dhale and others, decided on 26/02/2015 and in the matter of Mukhyadhikari Nagar Parishad, Tuljapur, Vs. Vishal Vijay Amrutrao and others, 2015(5) Mh.L.J. 75, has concluded that the provisions of the Model Standing Orders and especially 4(C) and 4(D) would not be applicable to the daily wage employees working in Municipal Corporations/Councils and State Instrumentalities as their regularization is dependent upon the creation of posts and the availability of permanent vacant posts.

6. The learned Division Bench of this Court while dealing with a reference made to it by the learned Single Judge in the matter of the Municipal Council, Tirora Vs. Tulsidas Baliram Bindhade and others, 2016(6) Mh.L.J. 867, has observed in paragraph Nos.1 and 19 as follows :-

“1. The Hon'ble The Chief Justice has in view of the following orders dated 22.01.2015 passed by the learned Single Judge in Writ Petition Nos. 5191/2004, 5199 to 5205/2004, 5207 & 5520 of 2004, referred to this Division Bench the following question :---

"1. An unfortunate situation has arisen in the present matters. Writ Petition No.1209 of 2002 along with connected matters in respect of Class-IV employees of Municipal Council, Tumsar, were allowed by a common judgment and order delivered by the learned Single Judge of this Court (Smt. Vasanti A. Naik, J.) on 20-8- 2011, and the common order passed by the Industrial Court directing regularization on the basis of Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act read with Item 6 of Schedule IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, has been quashed and set aside and the complaints have been dismissed. Same is the view taken by me in respect of Class-IV employees of the same Municipal Council in Writ Petition No.1207 of 2002 along with connected matters decided by common judgment and order dated 23-12-2013. In another set of Writ Petition No.3087 of 2001 along with connected matters decided by me by common judgment and order dated 17-6-2013, same view is followed. In Writ Petition No.3436 of 2001 in respect of the employees from the same Municipal Council, a different view is taken by the learned Single Judge of this Court (Shri Z.A. Haq, J.) in the judgment and order dated 22-11-2014, and the writ petition filed by Municipal Council, Tumsar, has been dismissed, confirming the judgment and order passed by the Industrial Court, directing regularization of the complainant in service, on the basis of Clause 4C of the Model Standing Orders. I do not find any distinction on facts in Writ Petition Nos.1209 of 2002, 1207 of 2002 and 3087 of 2001.

2. All these petitions arise out of the common order passed by

the Industrial Court in the complaints under [Section 28](#) read with Items 6 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 directing regularization of the complainants in service upon completion of 240 days' continuous service as per Clause 4C of the Model Standing Orders under the [Industrial Employment \(Standing Orders\) Act, 1946](#). It is an undisputed fact that all the complainants were appointed and working as daily wagers for years together. They were neither working as badli or temporary employees. There is neither any pleading nor any evidence to prove that all of them were appointed and working on the posts, which are sanctioned, as required by Section 76 of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965. It is also not the case either of the complainants or the employer-Municipal Council that the proposal to create or sanction the posts of Class-IV employees to accommodate the complainants was forwarded to the Director of Municipal Administration under [Section 76](#) of the said Act. Even if any such proposal is forwarded, no orders are passed to create or sanction the posts to accommodate the complainants as regular employees.

3. In the background of the aforesaid undisputed factual position, the Industrial Court has recorded the finding in all the matters that in terms of Clause 4C of the Model Standing Orders under the [Industrial Employment \(Standing Orders\) Act](#), which are applicable to the employees working in the Municipal Council, the complainants have rendered 240 days' continuous service and hence they are entitled to regularization.

4. The facts stated in para 2 and the findings recorded by the

Industrial Court are similar in all these decisions. There cannot be different view in the similar facts and circumstances. In the decision given in Writ Petition No.3436 of 2001, delivered by Shri Z.A. Haq, J., I do not find any distinction on facts in Writ petition Nos.1209 of 2002, 1207 of 2002 and 3087 of 2001. The judicial discipline, therefore, requires all these matters to be placed before the Larger Bench to resolve the conflicting views and decide the following question of law so as to avoid a different view being taken in respect of Class-IV employees working in the same Municipal Council :

Whether, in the absence of creation or sanction of the posts under Section 76 of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965, the complainants were entitled to claim permanency or regularization in service on the basis of Clause 4C of the Model Standing Orders under the [Industrial Employment \(Standing Orders\) Act, 1946](#)?

5. The matters be, therefore, placed before Hon'ble the Chief Justice for constitution of appropriate Bench in terms of Rule 7 of Chapter I of the Bombay High Court Appellate Side Rules, 1960 to decide the aforesaid question of law.

.....

19. In this reference, the position emerging before us is similar. There is no conflict between the provisions of M.S.O. 4-C and the provisions of the [S. 76](#) of the 1965 Act. In the event of the appointment having been made validly, it may be possible to invoke the provisions Cl. 4-C of M.S.O. A view to the contrary would result in

regularizing/validating a void act.

Cl. 4-C neither permits nor contemplates the same. As held in the above judgments, if the appointment is not made in accordance with the constitutional scheme, it is void ab-initio and, therefore, there can be no claim to its regularization or for grant of permanency in any manner. This is all the more so as Cl. 32 of the M.S.O. clarifies that the Standing Orders are not to operate in derogation of any other law i.e. [S. 76](#) of 1965 Act.

Definitely any interpretation of Clause 4C conducive to defeating the Constitutional mandate is unwarranted.

Violation of Clause 4C of the MSO may tantamount to an unfair labour practice under item 9 of Sch. IV of the 1971 Act but unless & until, other additional factors are proved on record, finding of indulgence in an unfair labour practice under item 6 of Sch. IV thereof can not be reached. As explained by the Hon. Apex Court in case of [Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana](#), (supra), existence of a legal vacancy must be established & as discussed above, the power to recruit with the employer must also be demonstrated. In absence thereof, workman can not succeed in proving the commission of unfair labour practice under item 6 by the employer. These two ingredients, therefore, also must be established when benefit of Cl. 4-C is being claimed. Unless availability of a vacancy is shown or then power with the employer to create the post and to fill it is brought on record, mere continuation of 240 days can not and does not enable the workman to claim permanency by taking recourse to Cl. 4C read with item 9 of Sch. IV of 1971 Act. Clause 4C does not employ word "regularisation" but then it is implicit in it as no "permanency" is possible without it. Conversely, it follows that when a statutory provision like [S. 76](#) disables the employer either from creating or filling in the posts, such a claim can not be sustained. This also nullifies the reliance upon the judgment of learned Single Judge in case of Maharashtra Lok Kamgar Sanghatana Vs.

Ballarpur Industries Limited (supra) where the employer was a private Company not subjected to such regulatory measures by any Statute and enjoyed full freedom to create the posts and to recruit. One of us (B.P. Dharmadhikari, J.) is party to the judgment of this Court in Raymond UCO Denim Private Ltd. Vs. Praful Warade & Ors. (supra) which again needs to be distinguished for the same reasons. The judgment of learned Single Judge in case of [Indian Tobacco Company Ltd. vs. The Industrial](#) Court and Ors. (supra), judgment of Hon'ble Apex Court affirming it or then judgment of Hon'ble Apex Court reported at Western India Match Company Ltd. and Workmen are all considered therein & are distinguishable as the same do not pertain to the province of public employment or consider inherent Constitutional restraints (the suprema lex - [see Mahendra L. Jain v. Indore Development Authority and others](#) (supra) and Cl. 32 of the MSO. For same reasons, law laid down by the Full Bench judgment of this Court in 2007 (1) CLR 460- 2007 (1) Mah.L.J. 754- Gangadhar Balgopal Nair Vs. Voltas Limited & Anr. does not advance the cause of workmen. The Division Bench of this Court in [May & Baker Ltd. v. Kishore Jaikishandas Icchaporia](#) (supra) while construing [Section 10-A\(3\)](#) held that the expression "other law" would not refer to the model standing orders or the certified standing orders since they are laws made under the provisions of parent act itself and not under any other law. The Model Standing Orders and Certified Standing Orders, held the Division Bench, "are laws no doubt but they are laws made under the provisions of the Act". They were held not to be provisions under any other law. This discussion therefore shows how these words "in derogation of any law for the time being in force" in Cl. 32 of MSO need to be understood & does not help Adv. Jaiswal or Adv. Khan. "

7. There is no dispute that respondent Nos. 1 to 4 have been working from 1997 and respondent Nos. 5 to 9 are working from

2003.

8. In the light of the above, there can be no dispute that a direction by the Industrial Court to grant permanency after completion of 240 days has been held to be perverse and erroneous in the above referred judgments. As such, this petition partly succeeds.

9. This petition is, therefore, partly allowed. The declaration of ULP in clause (2) of the impugned order is quashed and set aside. The direction in clause (3) and (4) stands replaced with the following directions :-

(A) The petitioner shall consider the seniority of these respondents (original complainants) by taking into account their first date of joining as 'daily wagers' and based on the seniority, they shall be granted regularization with consequential benefits from the date on which they were eligible as per seniority as against a vacant post available.

(B) Needless to state, if any of these respondents are superseded, they shall be entitled for the benefits of regularization from the date on which any junior person has been absorbed against a permanent vacant post and the petitioner / Corporation shall then be responsible for the monetary burden that may be created while granting all consequential benefits to these respondents.

10. In the event, the respondents seek information from the petitioner with regard to any employee having been granted benefits of regularization though being junior to any of the respondents, the petitioner would be under an obligation to supply such information and ensure that the loss caused to the respondents is compensated by extending them the benefits from the date they were entitled to the same.

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

(RAVINDRA V. GHUGE, J.)