

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

WRIT PETITION NO. 9868 OF 2016

The Dhule Municipal Corporation,
Dhule, District Dhule.
Through its Commissioner.

...PETITIONER

-VERSUS-

Laxmi Fattasing Vasave,
Age : years, Occupation : Nil,
R/o Plot No.38, Vankhedkar Nagar,
Deopur, Dhule, District Dhule.

...RESPONDENT

WITH
WRIT PETITION NO.9869 OF 2016

The Dhule Municipal Corporation,
Dhule, District Dhule.
Through its Commissioner.

...PETITIONER

-VERSUS-

Nirmala Gulab Ahire,
Age : years, Occupation : Nil,
R/o Plot No.38, Vankhedkar Nagar,
Deopur, Dhule, District Dhule.

...RESPONDENT

WITH
WRIT PETITION NO.9871 OF 2016

The Dhule Municipal Corporation,
Dhule, District Dhule.
Through its Commissioner.

...PETITIONER

-VERSUS-

Baban Vasant Zote,
Age : years, Occupation : Nil,
R/o Plot No.28/B, Yashwant Nagar,
Sakri Road, Dhule, District Dhule.

...RESPONDENT

...
Advocate for Petitioner : Shri Desale Nilesh N.
Advocate for Respondents : Shri S.R. Patil.
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 05th December, 2016

Oral Judgment :

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

2 On 05.10.2016, after hearing the learned Advocates for the respective sides, I had noted the submissions of the Petitioner in the order dated 05.10.2016 as under :-

- "1. In all these petitions, the same petitioner/corporation is challenging the award dated 29/12/2015 delivered by the Labour Court, Dhule by which Ref.(IDA) No.2/2014, 1/2014 and 3/2014 respectively, have been partly allowed.
2. The brief facts narrated by the petitioner are as under:-

- [a] These 3 identically placed respondents have been appointed on 13/03/1990 by the then Dhule Municipal Council on the strength of a resolution passed for appointing 94 such employees.
- [b] On the report of the Chief Officer dated 14/03/1990 submitted to the District Collector, the resolution was stayed by the District Collector on 22/03/1990 under Section 308 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965.
- [c] The President of the Municipal Council challenged the order of the District Collector before the Divisional Commissioner.
- [d] These 94 employees preferred WP No.2560/1990 and were granted protection by order dated 25/06/1990 by this Court.
- [e] On 13/07/1997, one petitioner out of the 94 withdrew the petition, which was therefore disposed of and interim relief was vacated.
- [f] These employees were terminated on 05/07/2001.
- [g] WP No.2560/1990 was restored by this Court on 24/07/2002 and disposed off on the same day directing the Divisional Commissioner to decide the challenge posed by the Municipal Council against the order of the District Collector.
- [h] On 31/12/2002, the Divisional Commissioner confirmed the order of the District Collector.
- [i] Only 17 employees, not including these 3 respondents, approached the State Government u/s 318.
- [j] On 07/08/2003, the Hon'ble Minister set aside the orders of the District Collector and the Divisional Commissioner and directed the appointment of those 17 employees.
- [k] These 3 respondents have filed these reference cases in 2014 and by the impugned award, the Labour Court, by allowing the reference cases, has granted reinstatement with continuity of service, but without back wages. Costs of Rs.5,000/- in each matter has been imposed on the petitioner.

3. *Issue notice before admission to the respondents in these matters, returnable on 19/10/2016. Mr.Patil, learned Advocate waives service on behalf of these respondents.*
4. *Considering the fact that these respondents are out of employment from 2001, they shall not resort to coercive steps or execution proceedings for seeking the execution of the impugned awards until further orders.”*

3 The Respondents/ Employees in all these matters have filed their affidavits in reply. Shri Patil, learned Advocate for the Respondents, has strenuously supported the impugned awards. He submits that the Labour Court has arrived at a finding on facts and as such, this Court should not interfere with the said conclusions. It is prayed that these petitions be dismissed.

4 Shri Patil then places on record the two documents which are collectively marked as Exhibit X for identification. He submits that the document at page 1 below Exhibit X would indicate that these Respondents had preferred the appeals before the Honourable Minister after the Appeal filed by the Municipal Council before the Divisional Commissioner was rejected on 31.12.2002. The said appeals were pending before the Honourable Minister. Page 2 of Exhibit X is a communication from the Desk Officer, Government of Maharashtra, to one of the Respondents that their appeals could not be decided since the Municipal

Council has got converted into a Municipal Corporation. Thereafter, after a passage of 10 years, the Respondents were before the Labour Court in Reference (IDA) Nos.2/2014, 1/2014 and 3/2014.

5 It is apparent that all these Respondents were sought to be appointed by the resolution dated 13.03.1990 passed by the Dhule Municipal Council. 94 persons including these Respondents were the beneficiaries. There is no dispute that despite the issue of public employment, neither any advertisement was published, nor any selection process was followed. It appears that merely on the strength of the will of the elected Councillors, these 94 persons were sought to be appointed. When the District Collector received the report from the Chief Officer dated 14.03.1990, the resolution was stayed on 22.03.1990 under Section 308 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short "the 1965 Act").

6 Section 308 of the 1965 Act reads as under:-

"308. *Powers to suspend execution of orders and resolution of Council on certain grounds:-*

(1) *If, in the opinion of the Collector, the execution of any order or resolution of a Council, or the doing of anything which is about to be done or is being done by or on behalf of a Council, is causing or is likely to cause injury or annoyance to the public or is against public interest or to lead to a breach of the peace or is*

unlawful, he may by order in writing under his signature suspend the execution or prohibit the doing thereof.

- (2) When the Collector makes any order under his signature, he shall forward to the Council affected thereby a copy of the order, indicating therein the reasons for making it and also submit a report to the Director, along with a copy of such order.*
- (3) Within [thirty days] from the receipt of such order of the Collector, the Council shall, if it so desires, forward a statement to the Director indicating therein why the order of the Collector should be rescinded, revised or modified. If no such statement is received by the Director within time, the Director shall presume that the Council has no objection if the order of the Collector is confirmed.*
- (4) On receipt of such report from the Collector and the Council's statement referred to in sub-section (3), if any, the Director may [within a period of six months, from the receipt of such report or within such period beyond six months as may, on the request of the Director, be extended by the state Government] rescind the order or may revise or modify or confirm the order or direct that the order shall continue to be in force with or without modifications:*

Provided that, the Director shall take into account the statement of Council, if received, before such an order is made by him."

7 All these 94 employees including the Respondents had approached this Court in Writ Petition No.2560/1990 and were protected by the order dated 25.06.1990. It is on the basis of the order of this Court that the Respondents continued till 13.07.1997, when one of the employees withdrew the said writ petition and interim relief was vacated. All the employees were terminated thereafter on 05.07.2001.

8 Pursuant to the above, though this Court restored Writ Petition No.2560/1990, the same was disposed of by directing the Divisional Commissioner to decide the challenge posed by the Municipal Council against the order of the District Collector. The employees were out of service. The Divisional Commissioner rejected the appeal and confirmed the order of the District Collector, vide order dated 31.12.2002. Only 17 amongst the 94 employees approached the State Government under Section 318 of the 1965 Act. By order dated 07.08.2003, the Honourable Minister set aside the order of the District Collector as well as the Divisional Commissioner and directed the appointment of 17 employees. According to the Petitioner, about 07 to 08 amongst these 17 employees have been reinstated. The Respondents submit that all 17 out of 94 employees have been reinstated.

9 The peculiarity in these cases is that these Respondents after passage of 10 years, approached the Labour Court by raising an industrial dispute. When the issue of granting back door entries by the Municipal Council was subject matter of the procedure under Section 308 of the 1965 Act, these Respondents should have approached the State Government as is the scheme of law. After sleeping for about 10 years, they have raised an industrial dispute. It is nowhere stated in the

statement of claim that the appeals preferred by these Respondents before the Honourable Minister were pending or that they were disposed of. The said aspect has been suppressed by the Respondents in their statement of claim.

10 When Section 308 of the 1965 Act lays down the procedure to deal with such resolutions, these Respondents kept silent for 10 years and then raised an industrial dispute before the Labour Court, which has granted them reinstatement with continuity of service without back wages. It is, therefore, apparent that the resolution passed by the Municipal Council dated 13.03.1990 to appoint these Respondents was stayed within 09 days by the District Collector on 22.03.1990. Yet, the Municipal Council appointed the Respondents against the orders of the District Collector. Thereafter, they approached this Court and due to the protective orders of this Court, they have continued in employment for 11 years. There can be no dispute that all these appointments are back door entries and the District Collector and the Divisional Commissioner have followed the procedure under Section 308 of the 1965 Act by suspending the resolution to appoint persons as like these Respondents.

11 From the record available and the pleadings of the parties, I do not find that Section 76 of the 1965 Act was followed while making

appointments of these Respondents or any of the 94 persons. Section 76

reads as under:-

- "76. *Appointment of other Officers and servants.*
- (1) *A Council may, with the sanction of the Director, create such posts of officers and servants other than those specified in sub-sections (1) and (2) [of section 75] as it shall deem necessary for efficient execution of its duties under this Act.*
- (2) *Subject to the provisions of sub-section (3), the qualifications, pay, allowances and other conditions of service and the method of recruitment of any such officers and servants, excluding the posts equivalent to Class IV posts in the State Government, shall be determined by general or special order made by the Director in this behalf. In case of posts equivalent to Class IV posts in the services of the State Government, the qualifications, pay, allowances and other conditions of service and method of recruitment shall be determined by bye-laws made by the Council in this behalf.*
- (3) *Subject to any general or special orders, which may, from time to time, be made by the State Government in this behalf, appointments to the posts created under sub-section (1), shall be made by the Chief Officer from the list of the candidates selected by such selection authority or such other body, as the State Government may, by general or special order, specify.*
- (4) *No Council shall employ any person, who has not completed fifteenth year, to serve as a member of its sanitary staff."*

12 The learned Division Bench, in the case of *Municipal Council Tirora vs. Tulsidar Baliram Bindhade*, **2016 (6) Mh.L.J. 867** (decided on 22.07.2016) has dealt with illegal appointments and has concluded in

paragraph 19 as under:-

"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 Ichchaporla* (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."

13 In the above backdrop, the issue of violation of Section 25-F of the Industrial Disputes Act, 1947 and an opportunity of hearing would not arise when in fact the District Collector had stayed the illegal resolution dated 13.03.1990 on 22.03.1990 and yet, the Councillors of the Municipal Council got these Respondents illegally appointed, which can never be said to be a lawful procedure followed for appointing them under Section 76 of the 1965 Act.

14 The Labour Court has allowed the reference on the ground that these Respondents have suffered discrimination. THERE CAN BE NO EQUALITY OR PARITY IN ILLEGALITY. Few who approached the Honourable Minister, were granted reinstatement. Therefore, few of them have been accommodated by the Petitioner. It is undisputed that these Respondents have not acquired any order from the Honourable Minister. These aspects coupled with the fact that all these Respondents were in service only on account of the interim protective orders of this Court, should have been considered by the Labour Court before concluding that

the Petitioner is guilty of unfair labour practices under clauses (a), (b) and (f) of Item (5) of Schedule V of the Industrial Disputes Act, 1947.

15 Item 5(a, b and f), Schedule V of the Industrial Disputes Act, 1947 read as under:-

"5. *To discharge or dismiss workman --*
 (a) by way of victimization;"
 "(b) not in good faith, but in the colourable exercise
 of the employer's right;"
 "(f) in utter disregard of the principles of natural
 justice in the conduct of domestic enquiry or with
 undue haste;"

16 In the peculiar facts as above and when none of these Respondents had acquired an order from the Honourable Minister directing their reinstatement and when the appeal filed by the Municipal Council challenging the staying of appointments of these Respondents was dismissed by the Divisional Commissioner, I do not find that these Respondents had suffered "victimization" or that the Petitioner had acted in "bad faith", or in the "colourable exercise of it's right" or in "utter disregard of the principles of natural justice in the conduct of domestic enquiry" or with "undue haste". None of the three clauses under Item (5) of Schedule V of the Industrial Disputes Act, 1947, can be said to be attracted.

17 In the light of the above, these Writ Petitions are allowed. The impugned judgments and awards dated 29.12.2015 are quashed and set aside. Reference (IDA) Nos.2/2014, 1/2014 and 3/2014, respectively, stand rejected. Rule is made absolute in the above terms.

kps

(RAVINDRA V. GHUGE, J.)