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WP No. 2786/2008 &
WP No. 2882/2008 (J)

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

WRIT PETITION NO. 2786 OF 2008

1. Murlidhar Makdu Sapkale
Age : 61 years, occu.: nil
2. Vijay Murlidhar Sapkale
Age : 28 years, occu.: nil
Both r/o Asoda, Taluka Jalgaon,
District Jalgaon.

Petitioners.

Versus

1. The State of Maharashtra.
2. The Collector, Jalgaon,
Collector Office, Jalgaon.
3. The Municipal Corporation,
Jalgaon.

Respondents.

WITH

WRIT PETITION NO. 2882 OF 2008

1. Dinkar Popat Borale
Age : 59 years, occu.: nil
2. Harshal Dinkar Borale
Age : 28 years, occu.: nil
Both r/o Salawa, Tal. Dharangaon,
District Jalgaon.

Petitioners.

Versus

1. The State of Maharashtra.
2. The Collector, Jalgaon,
Collector Office, Jalgaon.

3. The Municipal Corporation,
Jalgaon.

Respondents.

Mr. M.M. Bhokrikar, Advocate for the petitioners.

Mr. Y.G. Gujrathi, A.G.P. for the State/respondent Nos.1 & 2.

Mr. P.R. Patil, Advocate for respondent No.3.

CORAM : **RAVINDRA V. GHUGE**
AND
SUNIL K. KOTWAL, JJ.

Dated : 24-11-2017.

ORAL JUDGMENT (PER RAVINDRA V. GHUGE) :-

1. Since both these Petitions are identical and since the petitioners are identically placed, we have taken up both these matters together for hearing.

2. The petitioners in Writ Petition No.2786/2008 have put-forth prayer Clauses 26-B, C & D, which read as under :-

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|-------|---|
| 26-B. | The Order and Judgment passed by the Hon. Member, Industrial Court, Jalgaon in Complaint ULP No.4/2002 dated 18.10.2007 may kindly be quashed and set aside. |
| 26-C. | The appropriate writ may kindly be issued against the respondents to appoint the petitioner No.2 as per the resolution passed by the respondent No.3 by accepting the application preferred by the petitioner No.1. |
| 26-D. | The direction may kindly be issued to the respondent to appoint the petitioner No.2 as an employee in place of the petitioner No.1 who is retired from the respondent No.3 on medical ground. |

3. The petitioners in Writ Petition No.2882/2008 have put-forth prayer Clauses 25-B, C & D, which read as under :-

- 25-B. The Order and Judgment passed by the Hon. Member, Industrial Court, Jalgaon in Complaint ULP No.5/2002 dated 18.10.2007 may kindly be quashed and set aside.
- 25-C. The appropriate writ may kindly be issued against the respondents to appoint the petitioner No.2 as per the resolution passed by the respondent No.3 by accepting the application preferred by the petitioner No.1.
- 25-D. The direction may kindly be issued to the respondent to appoint the petitioner No.2 as an employee in place of the petitioner No.1 who is retired from the respondent No.3 on medical ground.

4. These Petitions were earlier circulated before the learned Single Judge of this Court. By orders dated 04.12.2008, it was recorded that the petitioners do not desire to press Prayer Clause-B and would assert their claim only with regard to prayer Clause-C. By recording the said statement in the order dated 04.12.2008, the matters were placed before this Bench (Division Bench).

5. In the above backdrop, we have considered the submissions for the litigating sides in relation to prayer Clause-C reproduced as above.

6. While admitting these Petitions, this Court had declined interim relief to the petitioners.

7. Learned Counsel for the petitioners submits that petitioner No.1 in both these matters are fathers of petitioner No.2. Both the

petitioners No.1 were in employment of the Municipal Council, Jalgaon, which is now converted into a Municipal Corporation. Petitioner No.1 in the first petition made an application for retirement on medical grounds to the Municipal Council on 09.06.1999. He was sent to the Civil Surgeon for medical examination. He was retired by the Municipal Council on medical grounds on 05.07.1999.

8. In the second Petition, petitioner No.1 had made an application on 16.02.2000. He was also sent to the Civil Surgeon for medical examination under the advise of the Municipal Council. He was also allowed to retire on medical grounds on 29.02.2000.

9. It is not disputed that the Municipal Council had passed a Resolution in both these cases accepting the applications of these two fathers and had allowed them to retire from the dates mentioned, on medical grounds based on the medical certificates issued by the Civil Surgeon.

10. Subsequent to the above events, the Municipal Council forwarded the applications of these two fathers alongwith their Resolution to appoint their sons i.e. petitioner No.2 in both these Petitions on compassionate grounds, to the Collector. The District Collector ordered the two fathers to be subjected to medical examination by a Medical Board consisting of three Doctors. It is not in dispute that the medical certificate issued by the Medical Board indicates that both these fathers were

medically fit and there was no reason to declare that they are medically unfit to perform their duties. Based on the Medical Board's certificates, the applications of both these fathers were rejected.

11. The petitioners approached the Industrial Court, Jalgaon by filing two ULP Complaints under Section 28 (1) read with Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. By identical judgments dated 18.10.2007, both the Complaint (ULP) Nos. 4/2002 and 5/2002 were dismissed. These petitioners have given up their challenge to these judgments.

12. Learned Counsel for the Municipal Council submits that as the Municipal Council accepted the applications filed by these two fathers, the proposals were forwarded to the District Collector for seeking a sanction to the appointment of petitioner Nos.2 who are the two sons of these petitioners, on compassionate basis. The Municipal Council has followed the due procedure laid down in law.

13. The grievance raised by these petitioners is as to whether it was appropriate for the District Collector to refer the cases of these two fathers for examination to the Medical Board, whether the Resolution passed by the Municipal Council could be questioned by the District Collector and whether the proposals to appoint the two sons on compassionate grounds could have been rejected.

14. While considering the submissions of the litigating sides and upon perusing the record, we find that there were about 10 persons who had come together and who had followed the *modus operandi* of making an application for retirement on medical grounds, approaching the Civil Surgeon for medical examination on the basis of a recommendation of the Municipal Council and then their applications were accepted by the Municipal Council. In each of these 10 cases, the District Collector, while exercising his powers, had recommended these 10 candidates (fathers) for the medical examination by the Medical Board which is the Competent Authority to decide whether a candidate can be said to be medically unfit to perform his job or work.

15. In so far as these two cases are concerned, both these fathers had received certificates from the Civil Surgeon indicating that they were suffering from Ischemic Heart Disease. When they were examined by the Medical Board comprising of three Doctors, it was noticed that none of them were suffering from the said disease. The Medical Board, therefore, declared them to be fit for performing duties. It was based on these reports that the proposals of their two sons were rejected.

16. The above fact situation brought before us is quite disturbing since it indicates a particular methodology / *modus operandi* resorted to by the two fathers alongwith 8 other candidates for getting themselves examined by the Civil Surgeon and their proposals for retirement, based on such certificates, being accepted by the Municipal Council. The

principles of probabilities indicate that the Municipal Council had obliged such candidates. Another factor which we cannot ignore is that it was not the employer who noticed that these candidates are having some medical ailments or disabilities. When these candidates were nearing their retirement age, they themselves moved applications praying for leave to retire on medical grounds with the rider that their sons may be inducted in employment on compassionate basis.

17. It surely appears to us that the policy of compassionate appointment has been misused and while being closer to retirement, these candidates voluntarily moved applications only to facilitate the induction of their sons in employment on compassionate basis, thereby avoiding competition for recruitment with all other candidates, who are desirous of getting employment. It appears that since the District Collector was vigilant, that this *modus operandi* was exposed.

18. The petitioners have relied upon the judgment of the Hon'ble Apex Court in the matter of **Food Corporation of India and another Vs. Ram Kesh Yadav and another (AIR 2007 Supreme Court 1421)**. The Hon'ble Apex Court has considered the situation of "creating employment by succession". In the said cases as compared to the facts in hand, the distinguishing feature is that those candidates before the Apex Court had moved applications imposing a condition on the employer that if the son is appointed on compassionate basis, the father be retired on medical ground. The employer had accepted the said condition by allowing the

said applications and it was thereafter that the sons were appointed.

Paragraph Nos.9 and 10 of the said judgment read as under :-

9. *But on facts, this case is different. The second respondent's application dated 26.4.1999 was a composite application for conditional voluntary retirement on medical grounds, subject to appointment of his son in his place. The application specifically stated that he desired to go on retirement on medical grounds if his son was provided with employment in his place. The second Respondent had thus clearly indicated that if employment on compassionate ground was not provided to his son, he was not interested in pursuing his request for retirement on medical grounds. FCI ought to have informed the employee that he could not make such a conditional offer of retirement contrary to the scheme. But for reasons best known to itself, FCI did not choose to reject the conditional offer, but unconditionally accepted the conditional offer. There lies the catch.*

10. *When an offer is conditional, the offeree has the choice of either accepting the conditional offer, or rejecting the conditional offer, or making a counter offer. But what the offeree cannot do, when an offer is conditional, is to accept a part of the offer which results in performance by the offeror and then reject the condition subject to which the offer is made.*

It was, in the above backdrop, that the Hon'ble Apex Court sustained the judgment of the Allahabad High Court in accepting the compassionate appointments of the dependents.

19. The Government Resolution dated 04.10.1997 which is applicable to these two cases, has been cited before us. It is provided in the said Government Resolution that the case of physical disability leading to a candidate being medically unfit to perform his duties, was to be considered by the Department and the same was to be forwarded to the District Collector for verification and sanction. After the District Collector

sanctions such retirement, the candidate is to be retired paving way for the appointment of the dependents on compassionate basis.

20. In the case in hand, there is reversal of the procedure which would appear to be like 'putting the cart in front of the horse'. Retirement of these fathers has occurred prior in time than the submission of their proposals to the District Collector which is impermissible. Thereafter, the District Collector has rejected the proposals after it came to light that the Medical Board found that none of these petitioners had any physical disability so as to declare them medically unfit to perform duties. By adopting this procedure the Municipal Council appears to have shown favours to these petitioners so as to accommodate their sons on the basis of compassionate ground.

21. It also cannot be ignored that it is more than 18 years that have lapsed pursuant to the retirement of petitioner No.1 in both these Petitions. The Hon'ble Apex Court in catena of judgments has laid down the law that compassionate appointment is aimed for providing immediate, solace and succor to a family which has abruptly lost an earning hand or the sole bread earner. In the case in hand, it appears that these petitioners have instrumentalised their retirement so as to obtain employment for their sons. Even if it is assumed that these petitioners suddenly lost their employment because of medical incapacitation, 18 years down line, the very object of compassionate appointment does not survive. Keeping the law as laid down by the Hon'ble Apex Court in view,

if we sanction such compassionate appointments, it would result into a mockery of the principle/policy of compassionate appointments.

22. It therefore appears to us that these two fathers as well as the Municipal Council have been responsible for all that has happened. Both need to suffer for their own deeds. On the one hand, these fathers have lost their employment and on the other hand, it was the Municipal Council which promoted their unethical cause.

23. Learned Advocate for the petitioners prays that as the petitioners Nos.1 have lost their employment before the actual date of their superannuation, some relief be granted.

24. In these circumstances, we find that while refusing compassionate appointments, an equitable order needs to be passed. Consequently, we hold that petitioner No.2 in both these matters are not entitled to compassionate appointment. Since petitioner No.1 in both these matters have lost their employment without sanction of the District Collector and as both of them had specifically led evidence before the Industrial Court and contended that they do not wish to be reinstated in service, as is rightly pointed out by the learned A.G.P., we feel that these two fathers could be granted notional continuity of service till their actual dates of retirement. The Municipal Council shall accordingly treat them on duty from the dates of their medical retirement till their actual dates of superannuation as per the service record. They would be entitled for

retiral benefits based on such continuity. However, they would be deprived of their wages for the said period by applying the principle “no work, no wages” coupled with the above recorded peculiar facts of a fraudulent conduct.

25. These two Petitions are, therefore, partly allowed only to the extent of the continuity of service.

26. Rule is made partly absolute.

(SUNIL K. KOTWAL)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE