

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

WRIT PETITION NO. 4893 OF 1997

Dhule Municipal Council, Dhule.
Through its Chief Officer.

...PETITIONER

-VERSUS-

Smt.Aashabai w/o Sakharam Gavli,
Age Adult, R/o A & P Narvhal,
Tal. & Dist.Dhule.

...RESPONDENT

...

Advocate for Petitioner : Shri S.P.Shah.

Advocate for Respondent : Shri Bajaj Anil S. a/w Shri Ruchir S. Wani.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 20th January, 2017

Oral Judgment :

1 The Petitioner/ Municipal Council (presently the Municipal Corporation) has challenged the judgment of the Industrial Court dated 25.07.1996 by which Complaint (ULP) No.70/1994 has been allowed and declaration of unfair labour practices under item (6) of Schedule-IV of the MRTU & PULP Act, 1971 has been made against the Petitioner.

2 While admitting this petition on 24.11.1997, interim relief in

terms of prayer clause (B) was granted by this Court and consequent thereto, the impugned judgment was stayed.

3 By order dated 07.08.2001 passed on Civil Application No.68/1998, this Court noted that the Respondent/ Employee continued in service. Considering this position, the interim relief granted was modified and the Petitioner was directed to continue the Respondent in employment on daily wages. There is no dispute that the said order is in force today.

4 Shri Shah, learned Advocate for the Petitioner, has strenuously criticized the impugned judgment. He submits that the Petitioner does not have the power to create posts and also does not have the jurisdiction to grant regularization without referring the matter to the appropriate authorities. Even if the Respondent was continuing for many months or years as a daily wager, the Petitioner did not have the jurisdiction to create posts and direct absorption of the Respondent. If the object of depriving the status and benefits of permanency is not established, item (6) of Schedule IV of the MRTU & PULP Act, 1971 would not be attracted and as such, there cannot be a declaration of ULP.

5 He further submits that when no declaration of ULP is made,

no relief can be granted to the Respondent and the Industrial Court is divested of its powers to grant any relief. He, therefore, prays that this petition be allowed and the impugned judgment be quashed and set aside.

6 Shri Bajaj, learned Advocate for the Respondent, has strenuously supported the impugned judgment. He draws my attention to the findings on facts as are set out in the impugned judgment, which would indicate that the Respondent had put in more than 240 days in continuous employment in the calender year preceding the date of reference which is the date of filing of the complaint. He specifically draws my attention to paragraph 5 of the impugned judgment and submits that these findings on facts, based on oral and documentary evidence, cannot be dislodged by the vehement submissions of the Petitioner. He, therefore, prays for the dismissal of the petition with costs.

7 Having considered the submissions of the learned Advocates as are recorded herein above, I find that the view taken by this Court in the matters of *Mukhyadhikari, Nagar Parishad, Tuljapur vs. Vishal Vijay Amrutrao*, **2015(5) Mh.L.J. 75** and *Municipal Council, Tuljapur v/s Baban Hussain Dhule*, **judgment 26.02.2015 in Writ Petition No.1843/2015,** and the view of the learned Division Bench of this Court in the matter of

Municipal Council, Tirora and another vs. Tulsidas Baliram Bindhade, **2016(6) Mh.L.J. 867**, would squarely cover this case.

8 In the judgments delivered by this Court in the matters of the Municipal Council, Tuljapur (supra), it has been concluded that the State instrumentalities as like the Petitioner herein do not have powers to create posts and cannot grant regularization at the local level. The powers vest in the the State Government. Merely because, the litigant has approached the Court would not lead to his regularization since there are many other similarly situated workmen who may have such a right based on the seniority ahead of the employee who has approached the Court.

9 In Municipal Council, Tirora judgment (supra), the learned Division Bench has observed 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."

10 At this stage, Shri Shah further submits that there are many employees as like the present Respondent and many of them are not before the Court. Therefore, this petition filed by the Respondent should be treated as a stand alone petition and any direction that the Court may

issue, be restricted to the claim of the present Respondent. He further submits that unless 240 days have been put in by the employee and unless it is established that he has worked continuously, such workers cannot be considered for regularization merely on the ground that they are working as daily wagers. Some of them may work for one day in a month or few days or few weeks in a year. This would not entitle them either to raise the claim for permanency or to file the ULP complaints seeking regularization in employment. He, therefore, submits that the direction to forward the proposal of the Respondent should be restricted only to the extent of this Respondent.

11 This Court has come across several such matters from several Municipal Councils or Municipal Corporations. This Court has consistently passed the orders directing the Establishments to forward the proposals of the claimants to the Director of Municipal Administration or to the Principal Secretary, Urban Development Department, Maharashtra State, Mantralaya, Mumbai-400032, for consideration. The directions for assessing the availability of posts, exploring the possibility of creating posts, granting regularization strictly on the basis of the seniority and continued employment, have also been issued by this Court.

12 Now, the Court has realized that merely because one litigant

comes before the Court, the direction to forward his proposal and grant him regularization, is likely to cause injustice to the other similarly situated daily wagers who may be senior to the claimant, who has come to the Court. I am, therefore, inclined to issue the direction to the Petitioner/Municipal Corporation to consider the cases of similarly situated employees as like the Respondent and forward their proposals so that as and when the positions are created or substantive posts are available or become vacant on account of any contingency, such employees, based on their length of service and seniority, would get a chance of regularization. This would amount to doing justice to all such similarly situated employees.

13 In the light of the above, this Writ Petition is partly allowed. The impugned order is modified as under:-

- (a) The declaration of ULP under Item (6) of Schedule-IV of the MRTU & PULP Act, 1971 is quashed and set aside.
- (b) The directions in clauses 1 and 2 below paragraph 6 of the impugned order are, therefore, set aside.
- (c) Insofar as the direction to grant permanency to the Respondent is concerned, the Petitioner shall prepare the proposal of the Respondent keeping in view the other similarly situated employees and would also prepare a

comprehensive proposal of all such similarly situated employees, and shall forward the said proposal to the Principal Secretary, Urban Development Department, Maharashtra State, Mantralaya, Mumbai-400032, within a period of SIX WEEKS from today.

- (d) The said proposal shall contain the names of employees as like the Respondent inclusive of the Respondent and would indicate the dates from which such employees have been working on daily wages, nature of work performed by them, daily wages paid to them and duration of employment put in by them.
- (e) After the proposal is forwarded to the Principal Secretary, Urban Development Department, the said Authority shall decide the said proposal within a period of SIXTEEN WEEKS from the date of receipt of the proposal.
- (f) Needless to state, the Principal Secretary, Urban Development Department, shall consider the availability of permanent posts and shall accord regularization/ permanency to such daily wagers based on their seniority and their total duration of employment.
- (g) The said Authority shall also consider whether, the employees similarly situated are still in employment or whether, they

have left the daily wage employment with the Petitioner and accordingly, pass necessary orders with due circumspection.

14 Rule is made partly absolute in the above terms.

kps

(RAVINDRA V. GHUGE, J.)