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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6190 OF 2004

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| 1. | Kailash s/o Shivrajappa Varad
Age - 37 years, Occ - Service (JE) | PETITIONERS |
| 2. | Kisan s/o Dadarao Satpute
Age - 36 years, Occ - Service (Clerk) | |
| 3. | Zafar Mehfooz Ansari
Age - 33 years, Occ - Service (Chowkidar) | |
| 4. | Mehboob Nabisab Bandgi
Age - 48 years, Occ - Service (Clerk) | |
| 5. | Musa Moinuddin Mubarak
Age - 28 years, Occ - Service (Clerk) | |
| 6. | Waman Govindrao Shinde
Age - 50 years, Occ - Service (Clerk) | |
| 7. | Vithal Baburao Nawade
Age - 43 years, Occ - Labour | |
| 8. | Rajendra Narayan Kamble
Age - 47 years, Occ - Labour | |
| 9. | Balaji Kisan Nawade
Age - 35 years, Occ - Labour | |
| 10. | Dilip Sadashiv Londhe,
Age - 37 years, Occ - Labour | |
| 11. | Amir Azizmiyan Sheikh
Age - 37 years, Occ - Service (Pump Operator) | |
| 12. | Vithal Madhavrao Kaudgave
Age - 40 years, Occ - Service | |
| 13. | Balaji s/o Rangrao Niture
Age - 36 years, Occ - Service | |

14. Sadhu Bhaurao Ture
Age - 41 years, Occ - Service (Labour)
15. Smt. Aruna Vithal Kaudgave
Age - 34 years, Occ - Service (Clerk)
16. Mohan Jairam Solunke
Age - 47 years, Occ - Driver
17. Bhanudas Tukaram Shinde,
Age - 49 years, Occ - Labour
18. Shankar s/o Vishwanath Talnikar
Age - 45 years, Occ - Labour
19. Maqbool Mohd. Ali Quadri
Age - 44 years, Occ - Labour

All are working in the Municipal
Council, Nilanga, District - Latur

VERSUS

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| <ol style="list-style-type: none"> 1. The State of Maharashtra
Through its Secretary,
Urban Development Department,
Mantralaya, Mumbai 32 2. The Director of Municipal Administration
New Administrative Building,
15th Floor, Mantralaya, Mumbai 3. The Divisional Commissioner and Regional
Director, Municipal Administration,
Aurangabad Division, Aurangabad 4. The Collector,
Latur 5. The Municipal Council, Nilanga
Through its Chief Executive Officer. | <p>RESPONDENTS</p> |
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Mr. Ajinkya Kale h/f Mr. S. B. Talekar, Advocate for the petitioners

Mrs. V. S. Chaudhari, AGP for respondent - State
Mr. S. G. Rudrawar, Advocate for respondent No. 5

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**[CORAM : SUNIL P. DESHMUKH &
P. R. BORA, J.J.]**

DATE : 23rd JANUARY, 2018

ORAL JUDGMENT (PER SUNIL P. DESHMUKH, J.) :

1. Mr. Kale, learned advocate appearing on behalf of the petitioners, at the outset, conveys that the petitioners confine challenge in present writ petition to order dated 8th April, 2004 at Exhibit-A of the writ petition, wherein respondent No. 3 has directed respondent No. 5 to recover excess salary paid to the petitioners treating them as daily wagers. Mr. Kale further conveys that the petition is restricted for reliefs to petitioners No. 1 to 17 only.

2. Petitioners No.1 to 17 have been working in respondent No. 5 municipal council from 1987 onwards. Their appointments have taken place during 1987 to 1992. The petitioners were initially appointed as daily wagers, as referred to in the chart annexed to the writ petition at Exhibit-C. It is not in dispute that the petitioners were working as class III and class IV servants.

3. By virtue of order dated 20th December, 1995, respondent No. 3 had created seventeen posts on the establishment of Municipal Council, Nilanga. The municipal council had submitted proposals to accord approval to regularization of services on the posts which were created and sanctioned by the State Government as aforesaid.

4. Response had been received from Deputy Director of Municipal Administration that the matter of regularization of service of municipal employees was under consideration. Resolutions of the municipal council which were communicated to respondent No. 3 were responded to by Deputy Director of Municipal Administration, Mumbai, referring to that approval has already been accorded for creation of seventeen posts under resolution of October, 20, 1995 and said posts were required to be filled in by prescribed procedure or the municipal council was competent to fill up the posts by promotion of the employees, at its level.

5. Pursuant to the same, the chief officer of municipal council purported to regularize service of the petitioners with effect from 23rd September, 1997. The pay scales of the posts underwent revision under Fifth Pay Commission Recommendations, in 2000.

It appears that there had been an attempt to challenge decision of the municipal council before the Collector and the challenge had been negated by the Collector.

6. Learned advocate for the petitioners submits that in the face of aforesaid situation, communication issued dated 8th April, 2004 to which the challenge has been confined, is improper. He submits that while there had been a communication from the Deputy Director of Municipal Administration, Mumbai stating that municipal council is competent to fill up the posts at its level by promotion, the impugned communication to the effect that the filling up of posts being not in accordance with prescribed procedure is untenable.

7. He specifically adverts to that as a matter of fact, by even dated order, appointments of the petitioners in their respective posts have been approved and regularized with effect from 20th April, 2001. He contends, in such a case, impugned order under which recovery of claimed excess payment of salary has been sought, is not proper.

8. He purports to support his submissions based on quite a few decisions, namely, "*State of Punjab V/s Rafiq Masih*"; AIR 2015 SC 1267, "*High Court of Punjab and Haryana and others V/s Jagdev Singh*"; (2016)

14 SCC 267, and “*Ravindra V/s State of Maharashtra and Others*”; 2013 (3) ALL MR 383, He points out that division bench of this court in the case of *Ravindra (Supra)* had referred and followed the decision of the Supreme Court in the case of *High Court of Punjab and Haryana (supra)*. He puts special emphasis on paragraph No.10 of the decision of the Apex Court.

9. Learned AGP Mrs. Chaudhari contends that appointments of the petitioners to the posts created cannot be said to have been by following due procedure and in such a case, the impugned order has been passed, since there is difference in pay to regularized posts and pay to daily wagers. The petitioners are to be treated as daily wagers up to the date of regularization of their services. As such, recoveries have been claimed. She submits that the municipal council has committed an error in recruiting petitioners *dehors* the prescribed procedure and thus the recoveries are justifiable.

10. Mr. Rudrawar, learned advocate appearing for respondent No. 5 municipal council states that recruitment of the petitioners have been made with reference to correspondence in that respect with the State authorities including respondent No.3. He refers to that in the correspondence, it has been referred to that

posts may be filled in from the daily wagers. According to him, communications give liberty to the municipal council to recruit employees at its level. Having regard to that the petitioners were qualified to be appointed and had been working from long time and the posts had been available, they were considered and appointed accordingly. He, however, leaves it to the court to decide the writ petition in accordance with merits of the case.

11. From aforesaid, it emerges that the posts were created in 1995 under the State Government Order dated 20th December, 1995. It will further be pertinent to note that the very resolution by which posts were created, refers to that posts be kept vacant for daily wagers. It had been left to the municipal council to fill up the posts at its level treating the municipal council to be competent. There had been exchange of correspondence among the parties. It is not the case of any of the respondent that the petitioners are not qualified to hold the posts they are occupying. As a matter of fact, it appears that on the very day by a separate order appointments of the petitioners have been regularized with effect from 20th April, 2001. It is not in dispute that the petitioners were working as class III and class IV servants. It further will have to be noted that no deliberate role in their such appointments have been attributed to the petitioners.

12. In the circumstances, we deem it appropriate to follow decisions thus far, particularly the one i.e. (2016) 14 SCC 267 (supra) wherein it has been observed thus -

“ 10. In State of Punjab V. Rafiq Masih (2015) 4 SCC 334, this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:

(i) Recovery from employees belonging to Class III and Class IV service (or Group C and Group D service) ”

13. It would thus emerge that recovery by employer would be impermissible in law from the class III and class IV cadre employees. Having regard to aforesaid, the petition partly succeeds. Order at Exhibit-A dated 8th April, 2004 is quashed and set aside. Recoveries sought to be made from petitioners No.1 to 17 thereunder would not be made. Rule is made absolute accordingly.

[P. R. BORA, J.]

[SUNIL P. DESHMUKH, J.]