

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2758 OF 2015**

Municipal Corporation of
Greater Bombay & Ors.

.. Petitioners.

Vs.

Aparna Kesarkar

.. Respondent.

Mr. A.Y.Sakhare, Senior Advocate with Mr.Vinod Mahadik i/b Mr. U.H. Deshpande for the petitioner.

Mr. S. C.Naidu with Mr.T.R. Yadav for Respondent No.1.

Mr. Aditya Bhagat i/b V.M. Thorat for Respondent No.2.

CORAM : A.K. MENON, J.

DATE : 4th JANUARY, 2018

P.C. :

1. Heard. By consent of the parties taken up for final disposal.
2. The petitioner has challenged an order dated 27th January, 2009 passed in Revision Application (ULP) No.113 of 2008 in Complaint (ULP) No.53 of 2000 on the application of the respondent herein prior to revision sought was of an order dated 13th September, 2007 passed by the 6th Labour Court in Complaint (ULP) No.53 of 2000. That Complaint was filed by the respondent along with two other complainants under Section 28 read with Item 1(a), (b), (c), (d) and (f) and 9 of Schedule IV of MRTU & PULP Act, 1971 and Item No.10 of Schedule V of Industrial Disputes Act, 1947.

Though the complaint came to be dismissed, the Labour Court directed the petitioner corporation to consider candidature of two other persons who were co-complainants with the respondent since they were already in the employment of the corporation. By the order dated 27th January, 2009 the Industrial Court had set aside two orders one dated 13th September, 2007 passed in Complaint (ULP) No.53 of 2000 and another dated 25th July, 2008 passed in Review Application (ULP) No.13 of 2007. The Court held that the petitioner – corporation had engaged in an unfair labour practice under Item (b) of Schedule IV of the MRTU and PULP Act and directed the petitioner corporation to reinstate the respondent with continuity of service and full back wages or to pay wages as earlier till the appointment of regular candidate in place of the respondent.

3. Briefly stated the facts are as under : The petitioner corporation had employed the respondent as a Laboratory Technician under a letter of appointment dated 15th January, 1999 for a period of six months or till a candidate for regular appointment becomes available in her place. It appears that the appointment was extended till the end of December 1999 but was discontinued from 31st December, 1999. It is the petitioner's case that in October 1998 there were 144 posts of lab technicians. The ratio of filling up posts was 50% by selection and 50% by promotion. Out of 72 posts for selection, 67 were stated to have been filled up and 5 posts were

reportedly vacant. Out of 72 promotional posts, 69 were filled and 3 posts were vacant. There were total of 8 vacancies. The petitioner has contended that in view of 8 vacancies it was decided to fill up posts temporarily by issuing local advertisements and by displaying a notice on the notice board of the hospital. An interview was conducted and on 12th January, 1999 and the applicant and 7 others were selected for the said posts. The respondent filed Complaint (ULP) No.53 of 2000. It is the petitioners' case that process of selection of regular candidates had already started and 8 regular candidates came to be appointed on different dates in the month of March 2000. The respondent and others came to be relieved on 31st December 1999.

4. Meanwhile the respondent filed a complaint challenging discontinuation of service from 31st December, 1999 and sought reinstatement with full back wages and continuity of service. The 6th Labour Court after considering the submissions dismissed the complaint. In the revision application, the Industrial Court found that the petitioner corporation had indulged in an unfair labour practice and therefore directed the respondent to be reinstated.

5. Mr. Sakhare, learned Senior Advocate appearing on behalf of the petitioner - corporation stated that the process of selection has already commenced. Mr. Sakhare submitted that in reply filed before the

6th Labour Court, the petitioner pointed out that the regular candidate has been appointed to the post of lab technician which was a reserved category and the respondent did not belong to such reserved category. Mr. Sakhare submitted that the Labour Court has correctly dismissed the complaint but the Industrial Court in the course of review lost sight of the fact that the regular candidates have been appointed in March 2000 and thus it could not have ordered reinstatement with back wages and continuity of service. The fact that the Industrial Court observed that in the alternative to reinstatement, the petitioner should be continued till a regular candidate is appointed showed that the Industrial Court was conscious of the fact that the respondent was not entitled to be reinstated in view of her appointment being on adhoc basis.

6. Mr. Sakhare submitted that since the petitioner has already appointed a regular candidate in place of the respondent, there was no question of reinstating the respondent in service but with a view to comply with the second part to pay wages till regular candidate is employed, the corporation had called upon the respondent to provide certain bank details in order to effect payment by direct credit to bank via ECS. On 25th November, 2009 a written request was made to provide the details. Mr. Sakhare invited my attention to Exhibit-D to the petition whereby a reference was made to the impugned order and the respondent was called upon to provide the ECS

form duly filled up and signed by the bank officer. The respondent had not provided information and accordingly had failed to comply with the request made in the letter dated 25th November, 2009. According to Mr. Sakhare by virtue of the said letter, the corporation was of the view that they had complied with the order of the Industrial Court and since regular appointments were made in March 2000, nothing further needs to be done.

7. In view of the fact that the respondent had not complied with the request of the petitioner, the petitioner continued to believe that they had complied with the impugned order. It is in this background that the petitioner contends that it had selected candidates against vacant posts including the post under reference. Mr. Sakhare contended that interviews for the permanent posts were conducted on 14th December, 1999 and selection list of 12 candidates, 6 of them under OBC category and 6 under Schedule Tribe category was prepared and as per vacancies, 5 candidates were appointed on regular basis from 16th March, 2000 onwards. According to Mr. Sakhare quota of 5 selected posts was exhausted. He relied upon the selection list of candidates, a copy of which appears at Exhibit-E and submitted that in view of the aforesaid appointment there was no question of continuing the respondent in the post. Mr. Sakhare therefore submitted that the impugned order is bad in law and that the operation of judgment and order dated 27th January, 2009 be quashed and set aside.

8. In support of his contention Mr. Sakhare and Mr. Mahadik relied upon following judgments :

(i) Secretary, State of Karnataka and Others vs. Umadevi & Ors. (2006) 4 SC 1;

(ii) General Manager, Haryana Roadways vs. Rudhan Singh (2005) 5 SCC 591.

(iii) U.P. SRTC vs. Mitthu Singh (2006) 7 SCC 180.

(iv) Sandip Baliram Sandbhor and Ors. vs. Pimpri Chinchwad Municipal Corporation and Ors. 2016 (3) Mh.L.J. 561.

9. Mr. Sakhare submitted that in view of binding precedent in case of *Umadevi (supra)* the present impugned order is squarely bad in law. Mr. Sakhare submitted that the present writ petition has been directed to be heard along with Criminal Writ Petition No. 35 of 2015 wherein the Corporation is challenging issuance of process issued by the 6th Labour Court under Section 48(1) of MRTU & PULP Act. He submitted that the said petition be allowed, after setting aside the impugned order.

10. In the affidavit in reply dated 7th August, 2015 respondent no.1 has alleged gross suppression of relevant and material facts. She has contended that the petitioner has made false statements and misled this Court. The respondent no.1 has stated that in view of failure of the petitioner to implement the order dated 29th January, 2009, she has adopted suitable proceedings and the petitioner in said proceedings has set up a defence that it has complied with the order. It is contended that if the order has been

complied with there is no question of challenging the impugned order in the writ petition and the conduct of the petitioner would amount to approbation and reprobation. She has pointed out that there is huge delay in approaching this court since the impugned order is dated 27th January, 2009 and the present petition was lodged on 7th January, 2015. Thus for over six years the Corporation did not take any steps. She has contended that in January 1991 the notice had been put up in K.E.M.Hospital to fill up the posts for laboratory technicians on adhoc basis and she had applied as she was eligible. The respondent stated that since she was qualified and eligible she was taken as a laboratory technician with seven other candidates and her services were illegally terminated along with others on 1st January, 2000. She along with six other persons filed a complaint before the 6th Labour Court and vide interim order dated 25th October, 2000 the Labour Court directed the Corporation to continue service of the respondent till regular appointments were made from the employment exchange.

11. On account of failure of the corporation to act upon the order, letters dated 9th May, 2001 and 8th June, 2001 were issued calling upon the petitioner to take the respondent back in service, but her request was unanswered. The respondent then approached the Municipal Karmachari Kamgar Sena, Mumbai and the Union called for a meeting to settle the

issue. The meeting was held in the chamber of Assistant Municipal Commissioner (WS) on 2nd January, 2000 when the Assistant Commissioner ordered that out of eight candidates, four candidates belonged to various reserved categories and four candidates belong to the open category. The four candidates belonging to reserved category were directed to be absorbed in the services of respondent no.2 after obtaining approval of the competent authority and the four candidates be appointed on adhoc basis. That the respondent belong to OBC category and she was entitled to be absorbed in the employment. The minutes of meeting have not been disputed.

12. It is stated that all employees except respondents were taken back on services by respondent no.2 and the office order dated 25th March, 2003 was issued to seven co-employees. The co-employees were engaged as Lab Technicians.

13. Respondent No.1 states that the petitioner did not comply with the order dated 27th January, 2009 and hence she was compelled to initiate proceedings under Section 48(1) of MRTU & PULP Act, as a result of which show cause notice came to be issued to the Municipal Commissioner and the Dean of the K.E.M. Hospital. Process has since been issued as aforesaid. The respondent has also instituted an application for recovery of back

wages payable and by order dated 17th August, 2013 the Labour Court held that she is entitled to recover a sum of Rs.22,92,800/- and has directed issuance of recovery certificate against the petitioner and respondent no.2 to be recovered as arrears of Land Revenue. A revision application was filed against the said order dated 17th October, 2013. In the revision application (ULP) No.134 of 2013 the Industrial Court rejected the application for stay preferred by the petitioner in the matter of recovery proceedings. It is also been brought to the attention of the Court that the petitioner along with respondent no.2 had filed Writ Petition No.10981 of 2013 challenging the rejection of the stay application by the Industrial Court and sought stay of operation of the recovery certificate.

14. When the Writ Petition came up for hearing before the learned Single Judge, the Court vide order dated 20th December, 2013 directed the corporation to deposit the certificate amount in the Industrial Court within three weeks and the hearing of the revision application was expedited. When the revision application was heard, the Industrial Court found that the assignment of Recovery Application to the 3rd Labour Court was procedurally invalid and the order dated 17th August, 2013 came to be set aside. The recovery proceedings were then assigned to 6th Labour Court. On 5th March, 2015, the Labour Court observed that a sum of Rs.22,92,800/- had been deposited as directed by the High Court. Certain

additional claims made by the respondent were rejected and the respondent has since made an application for withdrawal with accrued interest.

15. In an affidavit in rejoinder filed by Shubhangi Chavan dated 5th October, 2012 the contents of the reply have been partly denied. There is no dispute about the fact that the meeting had taken place before the Assistant Municipal Commissioner as stated above. The affidavit seeks to deny that there were 31 vacancies but fails to set out how many vacancies there were. In fact paragraph 8 of the affidavit in rejoinder of the said Chavan seems to be in draft form which read as follows :

“8. With reference to para 10 of the affidavit in reply. I deny that there are 31 vacancies (to mention the correct position) and submit that the Respondent No.1 is not entitled for absorption in service as she does not possess required qualification as mention in MCGM advertisement.”

16. As can be seen from the quote, the deponent was expected to mention the correct position but what is pertinent to note is the Petitioner's contention is that the defendant is not entitled to be absorbed in service as she does not possess requisite qualification mentioned in the advertisement issued by the corporation. This contention in my view militates against the corporation's stand that the appointment was purely on adhoc basis and regular appointments had been made. The reason that she was not qualified

has not been pleaded in the petition and was not ground of challenge at the material time and is therefore suspect. The deponent has confirmed that although the ECS form was to be submitted by the respondent in order to make payment of salary as per the order dated 27th January, 2009 the respondent has chosen not to accept the same but filed criminal complaint and therefore the petitioner has no other alternative but to challenge the said order.

17. Mr. Sakhare had in the course of submissions relied upon paragraphs 4 and 10 of *Umadevi (supra)* and contended that the scheme of public employment cannot be bypassed and therefore absorbing the respondent would enable back door entry and without following regular procedure. It was submitted by Mr. Sakhare that in the present case there was no case made out for regular appointment. Mr. Sakhare then relied upon the evidence led by the respondent before the 6th Labour Court. He invited my attention to the affidavit in lieu of examination in chief of the respondent wherein the respondent deposed that she had joined the corporation on 15th January, 1999. That on 12th January, 1999 she had been interviewed for the post of lab technician and on 14th January, 1999 for the post of lab assistant since she had already applied for both posts. Mr. Sakhare submitted that she was informed by the Office Superintendent that she had been selected for the post of lab technician. She submitted that the

qualification required for the post of lab technician is Diploma in Medical Laboratory Technology ("DMLT") and that she had acquired the required qualification after her SSC and she had completed DMLT course from the SNDT University. She has deposed that her diploma course was duly approved by F.D.A. and that she was granted artificial breaks but was re-appointed throughout. She relied upon photocopy of an order issuing a break granted along with the order of reappointment. The breaks were granted on 31st July, 1999 and 31st December, 1999 but Mr. Naidu submitted that she was working even on those days. Mr. Naidu relied upon memoranda forming part of record. He sought to rely upon records of blood bank of K.E.M. Hospital which would establish that she was working on the days she was said to be on break. Thus even on 31st December, 1999 she was officially in employment of the corporation and although her appointment was shown as adhoc. She was asked to work continuously and therefore she is entitled for permanent employment. She has deposed that under the rules framed and service conditions of corporation there is no provision of adhoc appointment but there is provision for appointment on probation for two years.

18. Mr. Sakhare invited my attention to the cross examination of respondent where in paragraph 9 she has admitted that her appointment was not permanent and that the advertisement was not for a regular post

but it was given to her on adhoc basis. She has admitted that break given on 15th July, 1999 and again appointed on 16th July, 1999 but continued upto 15th October, 1999, thereafter on 16th October, 1999 consequently on adhoc basis. In paragraph 15 of her cross examination she admitted that one of the qualifications required for adhoc lab technician was five years experience but she was not having five years experience. She was having 3 1/3 years experience and she had not passed XII standard examination. Accordingly, she was not selected because she was not a graduate in science. In support of this case Mr. Sakhare submitted that a strong case was made out for interference with the impugned order.

19. On behalf of the respondent Mr. Naidu submitted that the impugned order is passed in the year January 2009, whereas the petition has been filed in February 2015. That there is delay of six years which has not been explained. He, therefore, submitted that the petition is liable to be rejected. On the merits of the case he invited my attention to Exhibit-E to the petition and pointed out that 12 persons had been taken in place of the existing persons, from the selection/waiting list pursuant to the interview dated 14th December, 1999. He submitted that the date 14th December, 1999 clearly establishes the fact that these were no appointments made in March 2000. On the other hand these are not regular appointments but those are of the special categories. He submitted that the petitioner cannot be permitted to

approve and disapprove inasmuch as it is contended in ground 16(d) that the corporation was under bonafide belief that the corporation has complied with the order passed by the Industrial Court and was not required to take any further steps for challenging the order yet no steps are taken, despite the stand. Mr. Naidu invited my attention to ground (d) and also ground 16(i). He submitted that there was no reason for the corporation to deprive the respondent of employment in view of the fact during the evidence it has been established that the respondent was employed on the days when she was supposed to be on break.

20. Mr. Naidu invited my attention to the order dated 13th September, 2007 in Complaint (ULP) No.53 of 2000 wherein the Labour Court recorded uncontroverted and undisputed facts which entail that the Corporation published an advertisement inviting applicants for appointment of lab technicians on adhoc basis and that the complainant had applied. Mr. Naidu dealt with the petitioner's case that the services of the complainants were terminated from 31st December, 1999 and invited my attention to the judgment that in the course of examination of one Rashid Shaikh on behalf of the petitioner he has admitted that there is no provision for adhoc appointment in the Service Rule book. He deposed that all candidates were having appropriate qualification, except the respondent and deposed to the admitted fact that the corporation had filled post of lab

technicians and lab assistant at the same time. The Court observed that in the evidence of Mr. Shaikh, he has admitted in his cross examination that when the services of the complainant was terminated on 31st December, 1999 the process of appointment of regular candidate was in progress. He did not know whether the corporation had given the complainant an opportunity along with the regular candidates. Further he denied the suggestion that the corporation discontinued the services of the respondent and appointed a regular candidate. According to the order of the Labour Court the respondents had not completed 240 days in the year. In paragraph 18 of the order it is observed that the petitioner corporation had not produced the documentary evidence in order to show what procedure had been followed for appointment of regular candidate and when the list of regular candidate was prepared. The petitioner had given the names and dates of appointment of any regular candidates, who were appointed between 17th March, 2000 and 28th March, 2000. The list of selected candidates had been prepared by the end of December 1999 and their appointment were under process. This clearly shows that on date of filing the written statement dated 7th November, 2001 no appointment was made in place of the complainant.

21. The evidence of Mr. Shaikh to the effect that eight regular candidates were appointed between 17th March, 2000 and 28th March, 2000 was not

accepted. The Court observed that no appointments were made by the corporation at the relevant time since no documentary evidence was placed and no suggestion was given by the original complainant including the respondents. The petitioner corporation did not examine any candidate who was allegedly selected for the regular post. Furthermore, during pendency of the complaint before 6th Labour Court, “a settlement” was reached between the corporation and persons appointed on adhoc basis. According to respondent no.1, complainant nos.2 and 3 were once again employed on adhoc basis to the exclusion of respondent herein. The apparent reason was that the respondent no.1 did not have five years experience. By this reasoning, the trial Court considered that if eight regular candidates were already selected there was no need for the corporation to take lab technicians once again on adhoc basis and no explanation whatsoever has been given by the corporation in this behalf. The trial Court however observed that by virtue of the decision of the Supreme Court in *Umadevi (supra)* it would not be proper to appoint a person on permanent basis merely because he has been continued beyond his terms of appointment. There was no documentary proof to reach the finding of the 6th Labour Court that respondent had not completed 240 days and that regular appointments had been made in March 2000. On the contrary from the written statement of the corporation it appears that regular appointments were not made even as of 7th November, 2001

22. Mr. Naidu invited my attention to the impugned judgment wherein he pointed out evidence of the fact that the respondent was employed on 15th July, 1999 as well and that the respondent has signed muster roll and submitted blood group reports. Copies copy of these reports are available on record and is part of the compilation of documents filed on behalf of the respondent. This blood group report appearing at Sr. No.18 of compilation Volume No. II indicates that respondent no.1 whose initial "AK" appeared in the reports had signed the report for grouping and matching of blood bearing Serial No.36416. Although the document is faint the date on which it was signed is 15th July, 1999, several other reports bearing No. 36418, 36415 and 36417 are also signed on the same day. All these reports are signed by respondent no.1 on 15th July, 1999. Furthermore, it is seen from the record that on 17th February, 2009 the Director (ME & MH) of the petitioner corporation had endorsed directions on a letter dated 17th February, 2009 issued by respondent no.1 to the Corporation. The text of the endorsement is as under :

"Please take action as per Industrial Court's orders"

23. This meant that the petitioner was inclined to comply with the order of the Industrial Court. There are reminders sent by the respondent on 3rd November 1979 page 76 of compilation volume II; 26th November 1979 page 77 of volume II; 17th February 2010 page 78 of compilation volume II;

8th June 2010 page 79 of compilation volume II; Finally the Municipal Karmachari Kamgar Sena sent a letter on 17th March 2009 addressed to the petitioner in the matter of appointment of the respondent.

24. Mr. Naidu then invited the Court's attention to the guidelines for filling up reserved vacancies of Direct Recruitment in which clause 6.5 is material. Clause 6.5 read thus :

“6.5 Where sufficient number of candidates belonging to SC/ST/OBC are not available to fill up the vacancies reserved for them in direct recruitment, the vacancies should not be filled by candidates not belonging to these communities. In other words, there is a ban on de-reservation of vacancies, reserved for SCs, STs and OBCs in direct recruitment.”

25. This clause indicates that when sufficient number of candidates of SC/ST/OBC are not available from reserved category the vacancies should not be filled by the candidates belonging to these categories since there is bar on de-reservation of posts reserved for SC/ST/OBC. In Clause 6.6 it is further recorded that if suitable candidates are not available, a second attempt should be made for suitable candidates belonging to concerned category in the same recruitment year or as early as possible before the

next recruitment year to fill up these vacancies. If required numbers of candidates are not still available, the vacancies shall remain unfilled until next recruitment year and these vacancies should be treated as “backlog” vacancies.

26. In Clause 6.7 it is observed that in the subsequent year when the recruitment is made for vacancies of that year (called “current vacancies”) the backlog vacancies of SCs, STs, OBCs will also be announced for recruitment. The current vacancies will be treated in one group and backlog vacancies be treated in separate group belong to a distinct group of SC/ST/OBC category.

27. Mr. Naidu contended that the petitioner has willfully suppressed enforcement proceedings from this Court in this writ petition and that the order impugned in the present petition is subject matter of final order in the recovery proceedings which took into consideration all the evidence. Therefore, Mr. Naidu submitted that the impugned order stands merged with the final order passed in the recovery application and is no longer amenable to writ jurisdiction of this Court. It was contended that the conduct of the petitioner conclusively establish that it had complied with the orders and therefore cannot challenged the same now and the petitioner is estopped from challenging the order dated 27th January, 2009.

28. Mr. Naidu submitted that out of three complainants before the Labour Court, two of the complainants have since been employed by the petitioner but the respondent no.1 was singled out by discriminatory treatment. The affidavit highlights the fact that the petitioner had remained silent in respect of decision taken by the Municipal Commissioner in the meeting dated 2nd January, 2012 since four candidates belonging to various categories were directed to be absorbed in the vacancies reserved for the reserved category after obtaining approval from the competent authority.

29. In the present case I find that the respondent is also claiming under OBC category. Mr. Naidu therefore submitted that in the present case there is no doubt about the fact that eight candidates applied for the post in March 2000. It is seen in paragraph 4 page 3 of the petition that respondent was appointed as lab technician on adhoc basis for six months or till candidate for regular appointment becomes available whereas in paragraph 8 mentions that regular candidates have already been appointed in place of the respondent, but in paragraph 12 the petitioner states that the petitioner employed five employees as lab technicians following due process. These in my view are all contradictory statements. Mr. Naidu would submit that there is no challenge to the observation of the trial Court in paragraph 18 of the order of the trial Court wherein specific findings of fact has been arrived at after appreciation of evidence the case of the petitioner that they had

appointed eight candidates cannot be believed. The Corporation produced no documentary evidence to establish the appointments nor did they examine any candidate who was allegedly selected for the post. Mr. Naidu then submitted that the ratio in *Umadevi (supra)* will not apply in the instant case since she is not seeking regular appointment.

30. Mr. Naidu submitted that these are vital aspects of the case have been suppressed from all these documents which have been dealt with above were shown to the witness, yet there is no mention of the fact in this petition. Thus, even on the ground of suppression of vital information the petition is liable to be rejected. In specific terms in compilation no.I, a reference was made to select list of candidates for lab technician to be appointed on adhoc basis wherein the candidate was selected on merits. Perusal of the said document, it appears that name of respondent No.1 was displayed at Item No.2, Interview No. 20 and remarks in her name as she belong to OBC category. Similarly, other two persons who had been appointed at the same time were also seen to be mentioned at Item Nos.3, 7 and 8. These are eight candidates who were selected on merits after conducting an interview on 12th January, 1999. The selection is approved by four persons viz. Joint Ch.P.O. (General), Joint Ch.P.O. (D.C.Cell), HOD Biochemistry Dept. and Director (ME & MH) Dean (K.& G) as Chairman of the committee.

31. In complaint No.53 the order passed on the interim relief application Exhibit-C-2 reveals that the respondent no.1- complainant and her colleagues were appointed in the Corporation as Lab Technicians as per appointment orders at Exhibit-A colly. Mr. Naidu drew my attention to the fact that the meeting was held in the chamber of the Assistant Municipal Commissioner (WS) (AMC) on 2nd January, 2002 at 4.30 pm. between AMC and the Union whereat Item No.2 pertained to issue of Lab Technicians. Since this is very material part of the evidence it would be appropriate that the same is reproduced. Accordingly, item no.2 is reproduced as below under :

“Item No.2 Laboratory Technicians

At the outset Shri Prabhakar Desai has once again requested AMC (WS) to absorb 8 laboratory technicians who were working on the establishment of K.E.M. Hospital on adhoc basis and their services were terminated even though the matter was in court. He has also requested AMC (WS) that out of these 8 candidates, 4 were belonging to various backward classes therefore they should be absorbed in the vacancies meant for reserved class candidates and the remaining four candidates from open category should be taken on adhoc basis till the court case is finally decided.”

32. The minutes record that the issue of Lab Technician was discussed. K.E.M. Hospital had nine vacancies and backlog of various years were 30, however, there was no vacancy for open class. This observation has to be read with at Exhibit-E Page 50 which clearly lists out 12 candidates, who are in selection/waiting list as on 14th December, 1999. The conclusion of AMC is very material. It records that out of eight candidates, four candidates will be absorbed in vacancies for reserved category after obtaining approvals. Four candidates belong to open category will be taken on adhoc basis till suitable candidates are made available by following due procedure and the petitioner were to withdraw the Court cases. The union representative had agreed to this. These minutes though admitted (for want of denial) has not been disclosed in the affidavit in rejoinder. The petitioner has not come with clean hands to this Court. The other reasons i.e. lack of qualification obviously has no merit since the minutes of appointment which is disclosed in compilation volume No.1 clearly establishes that selected list, the persons who have arrived at merit list after interview. As far as qualifications were concerned, Mr. Naidu submitted that the notice dated 1st January, 1999 a copy of which is annexed to the petition at Page 87 sets out the required qualifications. The qualifications are in the alternative.

33. Item 2 and 4 reads as follows :

“2. Inter Science / XIIth Std. with Science with certified training of not less than 9 months in Laboratory Tech.course conducted by Govt. or Municipal Medical Institutions.

4. S.S.C. With 5 years experience as a Lab Assistant subject to his passing a test in laboratory Techniques to be conducted by Municipal Administration.”

34. Mr. Naidu had pointed out that the respondent complies with Item No.4 since a copy of the original advertisement appears at page 1 of Volume II. Thus, on the aspect of qualification, I do not find there is anything to fault the respondent since she is clearly qualified having completed SSC with five years experience as Lab Assistant. The allegation that she was not qualified is only an after thought. In the office order dated 15th January, 1998 page 3 Volume II is evidence of the fact that qualification was not an issue. The respondent was governed by Municipal Corporation Regulations, 1999 as seen from item No.7. It is also on record that she was to report to blood bank as seen from endorsement at the bottom of the office order addressed to Dr. Sunita on 16th January, 1999. This read with the fact that on 17th February, 2009 AMC (WS) had addressed a letter to the Director (ME & MH) to take action as per Court order, leaves no manner of doubt that qualification was not an issue and is merely an after thought.

35. Having heard all counsel at length, in the course of submissions enquired of Mr. Sakhare as to why, if the ECS form was not provided, the respondent was not paid by cheque especially since if Mr. Sakhare's clients are correct that would have been the last payment to be made by the petitioner and there was no reason to issue ECS form. On a query to the petitioners as to mode of payment of salary during the earlier period when the respondent was serving no reply was forthcoming. If the respondent had not responded to the request to submit the ECS form, it was always open for the petitioner to issue a cheque, that was not done yet, the petitioner contends that the order has been complied with. The contradiction in terms is therefore more than evident. According to the deponent the respondent has no case on merits and it is contended that the respondent was not required to be absorbed against a reserved post as she does not belong to a reserved category or OBC. This is once again in contradiction what has been stated by the respondent in her reply.

36. The finding of the Labour Court that the respondent had not completed 240 days appears incorrect. I also find that the contention that the respondent no. 1 had been given break in service was not established because even when she was supposed to be on a break, there is evidence to show that she has reported for the duty at blood bank. The fact that she has qualified with

DMLT is evident from the certificate granted by the SNDT Women's University, Mumbai to the present respondent in her maiden name. This is to be read with a certificate dated 20th March 2003 issued by the Maharashtra State Board Technical Education certifying that the respondent has obtained a degree which is of (10 + 3 years) and a full time course in the English medium. The deployment was to be treated as equivalent to Standard XII. Thus, this certificate is issued by the Assistant Secretary, Maharashtra State Board of Technical Education and as such reiterates the fact that the contention of the respondent that she was not qualified is completely wrong. The Labour Court which was fact finding authority has also found in its order dated 25th October, 2000 while deciding the interim application that admittedly, that the candidate has fulfilled the qualification for the post of Lab Technician, though were not from the employment exchange but were selected by the corporation and as on date of termination the post of laboratory technician was available.

37. Although the petitioner corporation contended that regular appointments had been made from the employment exchange no particulars of the candidates who were selected have been furnished justifying and leading to an adverse inference being drawn. Even before the Industrial Court no attempt was made to establish that the regular candidates had been appointed. Thus, on record there is nothing to show

even today that the appointments had been made as contended. In the written statement while opposing the recovery application, no challenge was mounted to the qualification of the respondent at any stage. As far as recovery application is concerned, the same was dealt with by the judgment dated 15th March, 2013 which records that in Application Exhibit-1 was filed for recoveries of monies under Section 50 and the same came to be dismissed.

38. In Deepali Surwase (supra) the Supreme Court had culled out certain propositions from various judgment which can briefly stated as follows:

- (i) In action of wrongful termination of the services, reinstatement with continuity is normal rule.*
- (ii) The Rule is subject to rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration length of service of the employee/workmen, the nature of misconduct proved against the employee/workmen the financial condition of the employer and similar other factors;*
- (iii) Ordinarily, when services of the workmen are terminated and who is desirous of getting back wages is required to either plead or make a statement before the adjudicating authority and the Court that he/she was not gainfully employed or was employed on lesser wages, they must plead*

and lead cogent evidence to prove that the employee was gainfully employed and getting wages.

(iv) The burden of proof is upon the person who makes positive averments. The Industrial Tribunal has the discretion to award full back wages if it found that the punishment was disproportionate to the misconduct. If the Tribunal finds that the employer has acted in gross violation of statutory provisions or the principles of natural justice or is guilty of victimisation of an employee, the Court is fully justified in granting back wages and in such cases the superior Court shall not exercise power under Article 226 or 136 of the Constitution to interfere with the award merely because there is possibility of forming a different opinion on the entitlement of the employees to get full back wages or the employer's obligation to pay the same and do grave injustice to the employee simply because there is long time lost between termination of service and finality to the order of reinstatement.

39. In my view the law on this aspect of matter is very clear and elaborately dealt with as above. In case of *State of Rajasthan Industrial Development and Investment Corporation (supra)* the Supreme Court held in paragraph 9 that the party cannot be allowed to “blow hot and cold”, “fast and loose” or “approve or reprobate” and where one contract of conveyance is established from denying the validity of or the binding effect

of the contract and that these rule is applied to the ensure equity. It is further held that doctrine of election is based on the rule of estoppel the principle one cannot approbate or reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel). In my view this is a fit case where this doctrine would apply and the petitioner cannot be allowed to approbate or reprobate on one hand to contend that the order is complied with and yet deserve to change the order. The challenge in any case is belated. There is no reason to condone delay even proceeding on the basis that the usual excuse trotted out is that the concerned persons were busy and the matter was lost sight of.

40. In *Yunus Padvekar (supra)* the Supreme Court, held while quoting from one of its own judgments that delay or laches is one of the factors which is to be borne in mind, that the High Court while exercising special powers under Article 226 of the constitution may refuse to invoke its extraordinary powers if there is negligence or omission with the lapse of time and other circumstances. In my view this is a case where extraordinary powers vested in this Court ought not to be exercised. The cavalier and negligent attitude of the corporation will certainly not justify rewarding the petitioner by invoking extra ordinary powers of this Court to benefit the petitioner in the given situation.

41. In the instant case it is not as if the respondent is being regularised out of turn. She has worked in the K.E.M. Hospital and has been deliberately kept out of the chance of the appointment by giving reasons which are not bonafide. In paragraph 53 of the judgment in *Umadevi (supra)* the Court clarified that there may be cases where irregular appointments (not illegal appointments) of duly qualified employees may have to continue for more than ten years without intervention of the orders of the Courts or of tribunal and the question of regularisation of service, if any, need not be reopened but there should be no further bypassing of the constitutional requirement and regularising or making permanent those not duly appointed as per the constitutional scheme. In the present case respondent no.1 was qualified and in all respect and was properly placed to be absorbed in relevant category where vacancies existed yet by arriving at settlement in two of other co-complainants they were continued in services to exclusion of respondent no.1.

42. On behalf of the petitioner reliance was placed on the judgment in the case of *Haryana Roadways (supra)* in paragraph 8 it was observed that there is no rule of thumb that in every case where the Industrial Tribunal gives a finding that the termination was in violation of section 25 F the entire back wages should be awarded. It was observed that host of factors like method of selection and appointment etc will have to be weighed and

balanced before taking decision of back wages and main factor is length of service of the workmen. It is observed that its total length of service is small award of back wages from the date of termination till date of award will be wholly inappropriate.

43. The counsel for the petitioner then relied upon the fact that in ***Saran Kumar Gaur vs. State of UP 1993 (supp) 2 SCC 749*** the Court held that when the work was not done, remuneration is not to be paid and did not make any order for award of past salary. In ***State of UP vs Atal Bihari Shastri 1992 (Supp) SCC 207*** it was observed that in absence of clear finding that the employee was not gainfully employed during relevant period, setting aside the order of High Court directing appointment and back wages would not be appropriate and therefore directed lump sum to be paid.

44. In ***UPSRTC (supra)*** Mr. Mahadik, learned Advocate for respondent no.1 had relied upon a decision of the Supreme Court to the effect that in the facts and circumstances of the case since limited issue was payment of back wages it observed that back wages may not have been awarded to the respondent workmen. The decision in ***UPSRTC*** relied upon observations in ***Haryana Roadways (supra)*** it is observed that a regular service of a permanent character cannot be compared to short or intermittent, daily-wage employment though it may be for 240 days in a calendar year. Mr.

Mahadik also relied upon *UPSRTC vs Sharda Parsad Mishra (2004) 4 SCC 733* to the effect that there is no “cast-iron rule” that can be laid down when payment of full back wages be allowed by the Court and it depends on the facts and circumstances of each case. The approach of the Court should not be rigid or mechanical and then the Court may come to the conclusion that action taken in terminating services of the employee may have been illegal and/or otherwise than in accordance with law and in such cases it would be necessary that the workmen must be entitled for reinstatement but the question of payment of back wages would be independent of the first question as to entitlement to reinstatement.

45. There is no finding that respondent no.1 was, in interregnum, employed and absence of such finding it would be improper to deny back wages. In the instant case the impugned order directs reinstatement with full back wages. Lastly, in the case of Sandeep Sandbhor, Mr.Mahadik reiterated paragraph 15 of the judgment which refers to *Umarani vs. Registrar of Co-operative Societies* wherein the three Judge Bench of the Supreme Court considered earlier decision and held that appointment were made in contravention of mandatory provisions of the Act and statutory rules framed were illegal and cannot be regularised and that even under Article 142 of the Constitution, the Supreme Court could not exercise jurisdiction on misplaced sympathy. Relying upon the said decision it was contended that even constitution bench

in *Umarani (supra)* addressed that it was necessary to bring certainty in the public employment and that contractual employment comes to end at the end of the contract.

46. In the instant case I am of the view that the petitioner has failed to make out any case for interference. I am not inclined to condone delay for which there is absolute no reasons given. Even assuming the Corporation was under an impression that they had complied with the order and therefore no further action was required, when we test this contention we find that in the petition itself, the statement made in ground no.16(e) reads as follows :

“(e) The Respondent No.1 thereafter started to initiate recovery proceedings and also contempt proceedings in Criminal prosecution under Section 48(1) of MRTU & PULP Act, 1971 in the year 2012 for the first time. The Corporation defended the said proceedings. However, the labour Court sanctioned the prosecution by its order dated 19.8.2013 and the Industrial Court dismissed the said Revision application of the Corporation by its order dated 24.6.2014. The Petitioner thereafter filed the petition being Writ Petition No.9918 of 2014 before the Division Bench of this Court. The said petition was thereafter withdrawn and

the Criminal Writ Petition 35 of 2015 was filed before the Single Judge of the High Court which is pending."

47. Thus, in 2012 the petitioner came to know about the impugned order yet Writ Petition No. 9918 of 2014 came to be filed only in 2014. After obtaining ad-interim stay to the impugned order dated 19th August, 2014 and 24th June, 2014, on 17th December, 2014 the petition came to be withdrawn in order to file a Criminal Writ Petition and accordingly the leave was granted. Thus, there was no challenge to the impugned order dated 27th January, 2009 and this petition seeking to challenge the impugned order came to be filed only on 6th February, 2015. The delay is inexcusable. Even otherwise the Petitioner has failed to disclose the numerous developments within the corporation viz the meeting with the AMC (W/S) etc.

48. Apropos the impact of the ruling in *Umadevi (supra)*, it is necessary to also consider that in ***Maharashtra State Road Transport Corporation and Anr. vs. Casteribe Rajya Parivahan Karmachari Sanghatana (2009) 8 SCC 556*** the Supreme Court observed that while *Umadevi (supra)* is an authoritative pronouncement for the proposition that the Supreme Court and High Court under Article 32 and 226 should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or adhoc employees unless the recruitment

was made in accordance with a constitutional scheme it also clarifies that *Umadevi (supra)* does not denude the Industrial and Labour Courts of their Statutory powers under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practices. I am of the view that the present case is not affected by the ruling of *Umadevi (supra)* since no one is being deprived of the post. It does not in any manner affect the usual course of public employment. I therefore find that for the aforesaid reasons, including the wanton delay in approaching this court, suppression of material documents and even on merits, this is not a fit case where this court should exercise its writ jurisdiction and interfere with the impugned order which is passed on merits of the case with due consideration of evidence and in accordance with law.

49. In the circumstances I pass the following order :

- (i) Writ Petition is dismissed.
- (ii) No order as to costs.

(A.K. MENON,J.)