

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4561 OF 2001

The State of Maharashtra & Anr. .. Petitioners.

Vs.

Kishor N. Chemburkar & Ors. .. Respondents.

Ms. Vaishali Nimbalkar AGP for the State.

Mr. C.G. Gavnekar for the respondents.

CORAM : A.K. MENON, J.

RESERVED ON : 31ST JANUARY, 2018.

PRONOUNCED ON : 11TH April 2018

JUDGMENT :

1. By this writ petition, the petitioner challenges the judgment and award passed by the Industrial Court directing the petitioner to absorb all seven respondents into permanent service. It is the petitioners' case that the respondents claim to have been engaged by the petitioners for long time and they have been working on daily wages for more than 240 days and therefore they are entitled for permanent post.
2. The complaint (ULP) No.37 of 1999 came to be filed by two complainants Shri Kishor Narhari Chemburkar and Shri Santosh Madhukar Dhumal for complaint of unfair labour practices under Item Nos. 6, 9 and 10 of Schedule IV of MRTU and PULP Act. The aforesaid

persons filed a complaint for themselves and on behalf of five co-employees. They claim to have authorised these two persons to agitate their case. All seven complainants have been working as drivers or peons for several years. The complaint alleges that three of the complainants have been working as drivers whereas four others have been working as peons. All have been working since various dates as set out in the complaint. That they were paid for 28 days in a month and were denied wages even though they had worked on such days on various post and even if there were no break in service of any of seven complainants. The gravamen of the respondents' complaint was that the petitioners have indulged in the unfair trade practice as aforesaid and they have been working continuously since long time and they continued to do so even after filing of the complaint.

3. The peons were employed initially in the year 1990 and were given wage of Rs.10/- per day and drivers were given Rs.25/- per day. Since 1993 the wages of peons have risen to Rs.44/- and for drivers Rs.57/- per day. As on date of complaint peons were paid Rs.67/- per day and drivers were paid Rs.86/- per day. The respondents were employed in connection with Multi Drugs Treatment (MDT) programme of leprosy conducted by the Health Services Department of the Government of Maharashtra. Some persons employed in the same programme in Osmanabad District of Maharashtra had filed a complaint in the Industrial Court, Solapur seeking permanency and as a result of

complaint to the Industrial Court, Solapur the Joint Director of Health Services (Leprosy) issued circular to all the Heads of the Programmed in various district of the State of Maharashtra intimating them of the Court case and directing them to obtain an affidavit from the employees to the effect that their services are temporary and they would not go to the Court.

4. The subject matter of the said communication was relied upon. The action of the petitioners was assailed as violation of law in the service conditions and services of the employees should be continued and the original complainant/respondents must be absorbed in the Health Services Department of Government of Maharashtra since they have put in continuous and long service. They sought an order directing the petitioners to cease and desist from continuing the unfair labour practices and also removing the respondents from service and reinstating seven employees.
5. The complaint was disposed of vide impugned judgment which held that the respondents had proved unfair labour practices by the petitioners and allowing the reliefs sought in the complaint which effectively required the respondents to make seven workmen as permanent employees and if any of them have been removed they were to be reinstated and absorbed in permanent service of the Health Services Department of the Government of Maharashtra.
6. This petition came to be admitted as on 1st October, 2001 and interim

relief in terms of prayer clause (b) of the petition was granted thereby staying the operation of the impugned judgment and award. This Court made clear that the petitioners would not terminate the services of the respondents till final disposal of the petition. Thus, as on date the respondents are stated to be in employment of the petitioners.

7. Ms. Nimbalkar, learned AGP submitted that the respondents were not entitled to be absorbed since the petitioners have not engaged in any unfair labour practice. Learned AGP submitted that the trial Court had failed to abide by the law as laid down by the Supreme Court to the effect that the employees on daily wages and as a part of the scheme were not entitled to benefits of permanency. It was further submitted that in view of said legal position the impugned order is clearly bad in law and deserves to be set aside. In support of her contentions the learned AGP contended that the Supreme Court in the case of *Executive Engineer, Zilla Parishad Engineering Division vs. Digambara Rao* 2004 (8) SCC 262 had held that daily wagers under specific schemes completing 240 days of continuous service in a year may not be a ground for regularisation and it is also not a case of the respondents and it was not possible to issue any direction for regularisation of services and continuation of their service beyond the life of the scheme does not arise. She submitted that mere completion of 240 days may not be a ground for directing regularisation as also considered in the case *Umarani vs. Registrar, Co-operative Societies and Ors.* (2004) 7

SCC 112. In yet another case of *Ramakrishna Kamat & Ors. Vs. State of Karnataka and Ors. (JT 2003 (2) SC 88)* the Supreme Court had taken a similar view. The Court found that the Labour Court and High Court committed a manifest error in directing regularisation. She further submitted that the impugned order is required to be quashed and set aside.

8. On behalf of the respondents, the petition was opposed by Mr. Gavnekar. He submitted that the respondents (original complainant) were entitled to all benefits after becoming permanent. He submitted that the respondents were not being paid salary. Even after the petition was filed, the payments were made in irregular manner. He further submitted that apart from the respondents four other persons, namely, Mr. Jagannath Ganpat Mundhe, Mr. Ananda Nana Galande, Mr. Vinod Vasant Jamkhande and Mr. Narayan Dadosa Hange were employed by the Deputy Director Health Services (Leprosy) Satara as peons, drivers and sweeper. Initially under the Multi Drug Treatment and Therapy scheme but have later on granted permanency. He submitted that information obtained under the RTI Act reveals that Mr. Jagannath Mundhe was appointed as a peon on 12th November, 2001, Mr. Ananda Galande was appointed as a driver on 16th August, 2001, Mr. Vinod Jamkhande was appointed as a driver on 17th August, 2001 and Mr. Narayan Hange was appointed as a sweeper on 20th October, 2001. The copies of other appointments have been annexed to the

affidavit in reply at Exhibit-A (Colly.).

9. Mr.Gavnekar therefore submitted that there is no substance in the contention of the State Government. Mr.Gavnekar further submitted that the appointments orders and service records fairly indicate that these appointments have been made after filing of the writ petition and in the case of persons similarly situated, the petitioners are therefore discriminating against the respondents. He submitted that the petitioners have acted in arbitrary manner to deprive permanency to the respondents at the same time absorbing other persons whose appointments was much later.
10. In the affidavit in rejoinder filed on behalf of the Joint Director Health Services, it is contended that Mr. Jagannath Munde and three others have been employed permanently is incorrect. It is further submitted that all these four and one Mr.R D. Ghorpade had approached the Industrial Court, Satara and filed a complaint under MRTU and PULP Act that this project for which these persons were employed were known as NELP had been terminated on 1st April, 2000. Thereafter it was extended upto 30th September, 2000. It is further stated that Multi Drug Treatment scheme was subsidiary of NELP scheme and the Industrial Court noticed that there were vacancies in the MDT scheme and in ULP No.50 of 2001 directed to continue these complainants on the vacant posts. Thereafter it appears that the Assistant Director called for legal opinion from Government Pleader District Court, who opined

that after verification of roster wherever the posts of SC/ST/NT have been found vacant, the appointments were given and these five persons were continued only on the available posts. While denying that the petitioners were engaged in any unfair labour practice the State has contended that the competent authority of the respondents have now changed and appointing authority of Class IV employees is Civil Surgeon and in respect of Class III employees, the authority is Deputy Director of that region. In the instant case, it is submitted that after completing the project the employees have no right to claim permanency.

11. Mr.Gavnekar relied upon the decision of *Surendra Kumar and others vs. Greater Noida Industrial Development Authority & Ors. 2015 (14) SCC 382* and submitted that the question of regularisation of services will have to be considered on merits in the light of principles settled by the Supreme Court inter alia in the case of Umadevi (supra) and that the State Government and their instrumentalities should take steps to regularise appointments the services of such irregularly appointed persons, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of Courts or tribunals as a one time measure and should further ensure that regular recruitment is undertaken to fill the vacancies of sanctioned posts and that the process must be set in Motion within a period of six months.

12. Mr.Gavnekar relied upon a decision of the Single Judge of this Court in

case of *Sayali M. Gavhane & Ors. vs. Bajaj Auto Ltd. (2018 SCC Online Bom.81)* wherein this Court has taken a view that in case of grave miscarriage of justice or flagrant violation of law the High Court could interfere under Article 226 and 227 of the Constitution. He submitted that in the instant case, the stand taken by the petitioners was not justified inasmuch as the petitioners admit that MDT scheme was part of NELP and five persons who were employed under NELP programme were made permanent despite they have been appointed in the year 2001 that there was no justification in doing so.

13. On 19th June, 2016 the Court observed that the learned AGP had sought time to file an additional affidavit after the matter was partly heard, since it was observed that the State has not dealt with averments in paragraph 5 to 8 of the affidavit in reply by which the respondents brought on record the fact that five aforesaid persons have been employed under NEPL programme were absorb as permanent employees, However, the Court permitted the second affidavit to be filed and that is how the rejoinder dated 19th July, 2017 came to be filed.

14. In my view the contents of the rejoinder do not satisfactorily explain the reason for absorbing Mr. Jagannath Munde and four others. Clearly the petitioners have not acted fairly and the respondents have been discriminated against. Nothing has been placed on record in support of the contention that Mr. Jagannath Munde and others were

belonging to SC/ST/NT caste and said posts were vacant. The petitioners had sufficient time to demonstrate their bonafides in this respect. However, perusal of the Exhibit-A to the affidavit in reply reveals that pursuant to notification under the RTI vide communication dated 7th May, 2013 addressed to the respondent no.2, the concerned officer of Health Services department has admitted that between 1990 and 2005 the aforesaid five persons, namely, Mr. Jagannath Mundhe, Mr. Ananda Galande, Mr. Vinod Jamkhane, Mr. Narayan Hange and Mr. R.D. Ghorpade have been appointed. Copies of their appointment letters were also provided. The record does not indicate that these persons were appointed in any reserved posts.

15. In *Municipal Council, Tirora and Anr. Vs. Tulsidas Baliram Bindhade* 2016 (6) *Mh.L.J.* 867 the Division Bench of this Court has dealt with the entire line of judgments pertaining to regularisation of temporary employees. The Apex Court in case of *Maharashtra State Road Transport Corporation vs. Casteribe Rajya Parivahan Karmachari Sanghatana* (2009) 8 SCC 356 has held that existence of legal vacancy is must be established and the power to recruit with the employer must also be demonstrated. In absence thereof workmen cannot succeed in proving unfair labour practice. Two ingredients must be established if one is claiming benefit of model standing order Clause 4C. Unless availability of a vacancy and power of the employer to create the posts and to fill it is brought on record, mere completion of 240 days cannot

and does not enable the workman to claim permanency under clause 4C.

16. Mr. Gavnekar submitted that Section 28(1) applies to all and no issues were framed in order to respond to meet the case of the petitioners. He further submitted that the decision in Umadevi (supra) could not apply because the respondents were appointed on daily wages and continued for seven years without break and in these circumstances the Court found the unfair labour practice being committed. He submitted that the case of Digambara (supra) does not apply since post is vacant post. There was no evidence laid by the petitioner to establish their case.

17. Mr. Gavnekar invited my attention to further affidavit in reply of the respondents dated 3rd October, 2017 in which the deponent has contended there was no merit in the contention taken up by the petitioners as set out in the affidavit in rejoinder of Mr. Sanjeev Kamble dated 19th July, 2017. According to Mr. Gavnekar the dates of appointment of 7 persons similarly placed, category, class of their posts are mentioned. Paragraph 6 of the additional affidavit sets out names of the respondents, their category, class and dates of appointment. One of these persons Mr. Vishwas Anant Naik has since retired on 31st December, 2016 but he has not been paid pensionary and other benefits at the time of retirement. The affidavit further reveals that in order to get more information of the available posts of Drivers and Peons under Director of Health Services, the respondent approached the office of the Deputy Director seeking information of vacant posts of Drivers

and Peons and they were furnished information by the letter dated 8th September, 2017. The information provided is as of 30th June, 2017 when there were 28 posts vacant in Thane district, 13 posts in Palghar district and 22 posts in Raigad district. The affidavit has annexed thereto the reply received from the Deputy Director's office pursuant to RTI enquiry. Thus, it is evident that there were sufficient vacant posts even as of 30th June, 2017.

18. In the circumstances it appears that the information provided in the affidavit in rejoinder of Mr. Kamble is inaccurate to say the least. Paragraph 7 of the affidavit suggests that there are no vacancies, however, the deponent has not made any categorical statement that there are no vacancies but only implied the said fact by suggesting that when the posts are not vacant for the absorption these adhoc employees have no right to claim on worked post. Thus in affidavit in rejoinder dated 19th July, 2017 merely position is obtained from the extract received under RTI as of June 2017 ought to have been reflected. It appears that the affidavit does not faithfully reflect the record. It contains guarded averments apropos the vacancies.

19. Faced with this position the learned AGP sought to take further instructions and accordingly time was granted to her and on 4th April, 2018 she produced further communication addressed to her dated 3rd April, 2018 wherein it is sought to be suggested that a statement in the affidavit of Mr. Kamble was justified, however, perusal of the extract

attached to the said letter reveal that in Raigad district alone 9 posts of Peons and 7 posts of drivers were vacant apart from a number other posts. Thus, the respondents can be accommodated in these posts since posts are now vacant. According to the additional affidavit of three posts of drivers and four posts of peons at Thane, Palghar and Raigad and 15 other posts available in the said districts. What has been produced by learned AGP seems to suggest that in Raigad district no posts of drivers are vacant, however the communication from the Health Authorities in Raigad Zilla Parishad, Alibag itself shows that 57 posts of Peons were vacant. The second extract, however, shows that according to the Civil Surgeon 7 posts of drivers are vacant and 9 posts of Peons were vacant. Thus, these respondents could easily be accommodated across the districts of Thane, Raigad and Palghar. Surprisingly, nothing is produced as regards vacancies at Palghar and Thane.

20. Learned AGP has relied only on the extracts received in respect of Raigad district which also did not support the case of the petitioners that there are no vacancies. In the circumstances there is no merit in this petition. There is no blanket prohibition as has been reiterated in the case of Municipal Council, Tirora. In the case of Casteribe it is held that existence of legal vacancy is must and the power to recruit with the employer must also be demonstrated. These tests in my view are satisfied in the present case.

21. In the circumstances, the petition has no merit and the impugned order is sustained. The respondents shall be continued in service. Mr. Vishwas Anant Naik having retired is entitled to benefits of the impugned order. In the circumstances I pass the following order :

- (a) Writ Petition is dismissed.
- (b) No order as to costs.

(A.K. MENON,J.)