

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

WRIT PETITION NO.7591 OF 2005

The Director of Health Services & Anr.

.. Petitioners

Vs.

Sopan Fulchand Zinzurate

.. Respondent

Ms.Vaishali Nimbalkar AGP for the petitioners.

Mr.M.B. Gawade for the respondent.

CORAM : A.K. MENON, J.

RESERVED ON : 18TH APRIL, 2018

PRONOUNCED ON : 26TH APRIL, 2018

JUDGMENT :

1. By this writ petition, the petitioners have challenged the impugned order dated 23rd March, 2004 passed by the Industrial Court, Nashik in Revision Application (ULP) Nos.12 of 2003 and 13 of 2003 and the judgment and order dated 22nd February, 2003 passed by the Labour Court, Nashik in Complaint (ULP) No.142 of 1995.

2. The facts in brief are as under : The respondent-complainant possessed B.Com. M.A. B.P.Ed degrees and is stated to have qualified to be a junior clerk. The respondent was working as a junior clerk pursuant to an appointment order issued by the Deputy Director of Health Services, Nashik

Circle, Nashik. The appointment was effective from 26th November, 1993 and was continued with artificial breaks of two days. On 7th October, 1994, the respondent-complainant is stated to have been appointed as a junior clerk to work at Navapur where he is stated to have worked till 26th May, 1995. His services were then terminated. At the relevant time the petitioner no.1 was the controlling authority over four districts. The petitioners contested the complaint on the basis that the Labour Court had no jurisdiction and that the proper forum was the Administrative Tribunal. The petitioners denied an employer-employee relationship between the parties. It is contended that the respondent was appointed for a fixed period of three months purely on temporary basis and that his services came to an end upon expiry of the said period. Lastly it was contended that there was no sanctioned post and when the respondent was appointed no selection process was followed. The Labour Court held that it had jurisdiction and that the petitioner had engaged in unfair labour practice. It directed reinstatement of the respondent with full back wages.

3. Learned A.G.P. in support of the petition submitted that the respondent was appointed as a junior clerk temporarily in the year 1993 for a specific period. According to the learned AGP the respondent's temporary appointment had been recorded that the respondent had accepted the conditions on which he was appointed. Learned AGP submitted that the

appointment was not made following due process and there was no advertisement issued. She relied upon a decision of this Court in the case of *Sandip Baliram Sandbhor vs Pimpri Chinchwad Municipal Corporation 2016(3) Mh.L.J. 562* and submitted that this Court had observed that relief based on sympathy ought not to have been granted. The court had taken into consideration the fact that in the public employment, at the end of litigation the Court should not pass an order out of sympathy and no leniency ought to be shown. The learned AGP therefore submitted that the petition is liable to be allowed.

4. In the present case there is no doubt that the workman concerned had completed more than 240 days in service. This aspect is not now required to be looked into since there is a finding to that effect in the order of the Labour Court and which has been upheld by the Industrial Tribunal. The only ground urged in the petition is that the respondent was appointed for a fixed period and that service came to an end automatically. That the petitioner is a Government department and the respondent was not selected through Selection Committee or Employment Exchange. According to the petitioners, the respondent has not worked for more than 240 days in a calendar year and there is no post available. It is contended that he was a daily wager and he was selected after going through selection process and assuming that he cannot be sponsored by the Selection Board as he is not appointed through selection process. Save and except no

other grounds have been urged before me today.

5. In the revision application, the Industrial Court dealt with the case of respondent herein and one Pramila Sakharam Musale. The present petition is filed only by Sopan Zinzurate. The Industrial Court framed two issues considering whether the impugned order before it called for interference and whether it was contrary to the law. The Industrial Court once again found in favour of the respondent. The Industrial Court found that the work of the respondent-complainant was not of temporary nature and there was no need to draw a conclusion to the contrary. The court found no reason to interfere with the order of the Labour Court. The Industrial Court found that the petitioner had not made out any ground for interference with the order of the Labour Court.

6. In respect of each of these aspects the Labour Court has considered in depth the facts and circumstances of the case and had come to the conclusion that there was indeed a vacant post at all material times and that the witness has deposed that after about 19 requisite candidates were selected through selection board all have been absorbed in other vacancies. The cross examination of the petitioner's witness reveal that the respondent was eligible for appointment and no candidate has been appointed through the Selection Board. It was admitted that one post for the complainant was available.

7. The order of the Labour Court recorded that during cross examination, the petitioner's witness admitted that initial appointment was for three months and the respondent was not selected by any selection process and further that there was a clear vacancy in respect of the post. In the cross examination the petitioners' witness is found to have admitted that the respondent was qualified for the said post and at the time of termination of his services there was no candidate appointed through the Selection Board. The alleged Selection Board was not functioning and the post of the respondent existed all the time.

8. The order records that there was a post available for absorption of the respondent and the petitioner's witness confirmed that the appointment orders produced by the respondent indicated that the petitioner had initially issued appointment for three months and then continued but the appointment order dated 7th October, 1994 had not specified any period. It was observed that the appointment of the respondent could come to an end at any time if and when a candidate was selected by the Regional Selection Board. In other words it was contended that the respondent's was an adhoc appointment and there was prospects of further continuation of services. It appears that on 24th May, 1995 the appointment was brought to an end on the ground that the services were not required. The Court found that at the time of termination of services

no other candidate had been appointed through the selection process. The respondent had been working by virtue of interim orders of the Court and the contention of the respondent is that he had worked for more than 240 days was established. The petitioners' witness admitted that the post was available for absorption of the complainant. Meanwhile the Regional Selection Board has been abolished. The Court recorded that the evidence of the respondent-complainant that he had worked for 240 days in the preceding year has not been challenged. There was a clear vacancy as well and there was no reason for his removal.

9. The Petitioners' contention that there was no sanction for the post also was found to be incorrect. The impugned order held that even if appointment was irregular, termination could not have been made without following due process of law. Dealing with the contention that the order should have been challenged before the Administrative Tribunal, the impugned order holds that since the respondent-complainant qualified as a workman and therefore could approach the Labour Court under the MRTU & PULP Act and hence reinstatement was ordered.

10. It is now by well settled that mere completion of 240 days is no ground for regularisation. Unlike in the case of *Ramakrishna Kamat & Ors. Vs. State of Karnataka and Ors. (JT 2003 (2) SC 88)* and as contemplated in the case of *Sandip Sandbhor* (supra) the appointment in the case at hand was not

on sympathetic grounds. In *Maharashtra State Road Transport Corporation vs. Casteribe Rajya Parivahan Karmachari Sanghatana* (2009) 8 SCC 356, Supreme Court held that the decision in *State of Karnataka v/s. Umadevi* 2006 (4) SCC 1 did not denude the Industrial and Labour Courts of their statutory powers to order permanency. In *Municipal Council, Tirora and Anr. Vs. Tulsidas Baliram Bindhade* 2016 (6) Mh.L.J.867. the Division Bench of this court considering the decisions in a line of cases held that existence of legal vacancy is must be established and the power to recruit must be demonstrated. In the instant case the orders of the Labour Court and as confirmed by the Industrial Court find in favour of the respondent that the post was indeed available. In view of clear finding in favour of the respondent to the effect that there was vacant post available and that the post was of permanent nature. Moreover the finding is to the effect that the petitioner was the controlling authority for four districts had at the material time of appointment of the respondent. The power of recruitment was very much in place. Indeed that aspect has not been challenged by the petitioners.

11. In my view there is no substance in the challenge in this petition. There is no dispute as to the effect that the petitioner had power to recruit and as held in the case of *Municipal Council, Tirora* (supra) there is no blanket prohibition against regularisation but this aspect has to be considered in the facts and circumstances of each case. In absence of blanket prohibition and given the observations in *Casteribe* (supra) and *Municipal*

Council, Tirora (*supra*) the impugned order reveals that there was a vacancy for the post in question.

12. The tests set out in the above decisions are in my view satisfied in the present case and hence I find no reason to interfere with the order :

(a) Writ petition is dismissed.

(b) No order as to costs.

(A.K. MENON,J.)