

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

**LETTERS PATENT APPEAL NO.259 OF 2010
IN
WRIT PETITION NO.4261 OF 1998**

Ichalkaranji Municipal Council
through Chief Officer

... Appellant

Vs

Praveen Shivgonda Patil & anr.

... Respondents

Mr.S.C. Naidu i/b Akshay P. Shinde for the Appellant
Mr.Kiran Bapat i/b Umesh J. Desai for Respondent

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

**JUDGEMENT RESERVED ON: SEPTEMBER 19, 2019
JUDGEMENT DELIVERED ON: OCTOBER 1, 2019**

JUDGEMENT (PER AKIL KURESHI, J.):

1. This appeal is filed by the Ichalkaranji Municipal Council to challenge the judgment of the learned Single Judge dated 12.8.2010 passed in Writ Petition No.4261 of 1998. Brief facts are as under:

Respondent No.1 was engaged as Deputy Engineer on work charge basis by the appellant Municipal Council under order dated 25.2.1987. The order provided that as per the Resolution passed

by the Council, the respondent is appointed as a Deputy Engineer on work charge basis to supervise the current construction work being carried out by the Municipal Council on consolidated fixed salary during the period of construction work. The respondent No.1 was continued on such basis for over three years. He thereupon filed complaint of unfair labour practice before the Industrial Court, Kolhapur. In such complaint dated 10.12.1990, he contended that he was a workman. Though he was designated as a Deputy Engineer, his main work was of physical and manual nature. He contended that though he had worked continuously for more than three years, he was not made permanent. This act of the Municipal Council amounted to unfair labour practice. The Council had continued him on work charge establishment in order to deprive him of permanent status and privileges attached to it. He alleged that though there are permanent vacant posts, the Council has not given him permanent status. He, therefore, prayed that the Council should be directed to pay wages as per the payscales applicable to permanent Deputy Engineer and he be made permanent on the said post.

2. The Municipal Council opposed the prayers. The affidavit in the nature of written statement was filed by the Chief Officer of the Council in which the employee's claim of being a workman was opposed. It was contended that he was discharging the duties in supervisory capacity. In connection with the allegations of unfair labour practice, it was contended that the complainant was engaged on work charge basis. It was averred that creation of the post is not within the scope of the Council which can be done only by the Government. It was contended that even if there is a vacant post, the same has to be filled by following due procedure including considering the right of promotion to the permanent staff of the Council.

3. The complainant's deposition was recorded before the Court in which he had stated that he was not enjoying any supervisory powers. He further stated that he was doing the work of a permanent employee.

4. On behalf of the Council, the Labour Officer was examined before the Court. In his deposition, he had stated that the complainant was working on a work charge basis. His duty was to see whether construction work was done according to the

specifications. He could stop the work if it was not according to the specifications. He stated that he was on work charge basis for supervision of a particular work of construction of Stadium. The work of the complainant was thus not of permanent nature. His designation was equivalent to class III post, which is to be filled by the selection board as per the government directives.

In the cross-examination, this witness agreed that in the appointment order of the complainant, it was not stated that he was appointed for a particular work. Even in the resolution of the Municipal Council No.788 of dated 18.2.1987, there is no mention that he was appointed for the work of stadium only.

5. The Industrial Court passed an order dated 22.7.1998. it was declared that the respondent had engaged in unfair labour practice. The complainant was ordered to be made permanent from the date of his having completed 241 days of service; he would be entitled to consequential benefits. In the said award, the major portion of the discussion was devoted to the question whether the complainant was a workman or not. Having held that the complainant was a workman, the Industrial Court proceeded to examine whether he was entitled to the permanent status. In this

context, the Industrial Court noted that the complainant was in service continuously from 2.3.1987. He had completed 240 days of service. His record was unblemished. The Industrial Court noted the government resolution providing that the appointment to certain posts shall be made by the Maharashtra Subordinate Selection board. He was however of the opinion that such resolution dated 9.2.1988 would not apply to the complainant since he was working since 2.3.1987. He was of the opinion that his appointment order did not specify that he was engaged in a particular work.

6. The Municipal Council challenged this judgment of the Industrial Court before the high Court. The learned Single Judge by the impugned judgment, dismissed the petition. The learned Judge noted that there was no evidence suggesting that the workman was engaged for construction of the stadium. According to her, the record suggested that the vacancies were available for the post of Estate Manager which was sought to be filled in by calling names from the employment exchange. The name of the workman was one of them. He was interviewed and engaged since he was found more suitable than other candidates. In her

opinion, the respondent was thus, appointed in accordance with law. On such basis, the decision of the Supreme Court in the case of **State of Karnataka vs. Uma Devi**¹ was distinguished.

7. Against the said judgment, the Municipal Council has filed this Letters Patent Appeal. Learned Counsel for the parties did not raise serious arguments regarding the status of the respondent being that of a workman. Main arguments were around the question whether he could have been made permanent. Having heard the learned Counsel for the parties and having perused the documents on record, we find that the Industrial Court as well as the learned Single Judge have committed serious error in granting the reliefs to the respondent-workman. Our reasons for the same are as under.

8. As noted, the respondent was engaged on work charge basis under the order dated 25.2.1987. This order reads as under:

“ORDER

As per the above resolution, Shri Pravin Shivgonda Patil is hereby appointed as a Dy.Engineer on work-charge basis to supervise the current construction work being carried out by Municipal Council, on consolidated fixed salary in the pay scale of Rs.600 to 1150, till the period of construction work.

Hence, immediately join the duties and submit report.”

¹ (2006) 4 SCC 1

9. This order thus clearly specified that respondent No.1 was appointed as Deputy Engineer on work charge basis. This was to supervise the current construction work being carried out. He would be entitled to consolidated fixed salary and would be continued till the construction work is going on. This order has reference to the resolution of the Municipal Council No.788 dated 18.2.1987. This resolution was shown to the witness of the Council during his cross-examination before the Industrial Court. In this resolution, it was recorded that the report dated 11.2.1987 received from the Chief Officer regarding the Deputy Engineer on work charge basis for supervision of current construction work carried out by the Council was perused. It was thereafter resolved as under:

“ ...

As such, amongst the candidates who were interviewed for the post of Estate manager, Shri Pravin Shivgonda Patil is found to be more suitable and he is having work experience, he is being appointed as a Dy. Engineer on work-charge basis with the Municipal Corporation.”

10. The order of engagement of the respondent read with the said resolution on which it was based, would clearly show that the Council required to engage a suitable person as a Deputy

Engineer on work charge basis for supervision of the construction work being carried out by the Council.

11. It is not even the case of the respondent that he was appointed against a clear vacancy after following the due procedure of selection. The conclusions of the learned Single Judge that he was appointed in accordance with law after calling names from employment exchange holding interviews during which he was found suitable for the post, is plainly erroneous. These conclusions must be seen in light of the earlier observations made by the learned Judge in the judgment in which it was recorded that -

“14. There is evidence on record before the Industrial Court to the effect that the vacancies were available for the post of estate manager. These posts were sought to be filled by calling for names from the employment exchange. The respondent's name was one amongst many which was sent by the employment exchange. He was selected after an interview was held. That interview was conducted by the Municipal Council. A resolution as passed by the Municipal Council, appointing the Respondent as a Deputy Engineer on a work charged basis since the respondent who was interviewed for the post of estate manager was found more suitable than others and because he was experienced.”

12. The selection process for regular appointment undertaken by the Council thus, was for the post of Estate Manager for which

purpose, names were called from the employment exchange, one of them being that of the respondents. He alongwith the other eligible candidates was interviewed. It is not even the case of the respondent that he was selected and appointed to the post of Estate Manager, nor has he staked his claim on such post on the basis of such selection process. Plainly, thus, the Municipal Council utilised the exercise undertaken for the purpose of regular selection to the post of Estate Manager for making adhoc arrangement for engagement of a Deputy Engineer on work charge basis. In the process, since the respondent was already interviewed for the post of Estate Manager, he was found suitable for being engaged on work charge basis as Deputy Engineer. Thus, the regular selection process undertaken for the post of Estate Manager cannot be confused with the process for filling up the vacancy of Deputy Engineer. As noted, this is not even the case of the respondent that at the relevant time, regular vacancy for the post of Deputy Engineer was available and that he was engaged on such post pursuant to regular section process.

13. In plain terms, he was engaged on work charge basis as Deputy Engineer. The selection process undertaken for the

purpose of filling up the post of Estate Manager was utilised for making this adhoc arrangement. As recorded by the learned Single Judge since the respondent was already interviewed on earlier occasion, he was found suitable for being engaged on such post. The appointment order refers to the resolution passed by the Municipal Council. The resolution also refers to the interview held for the post of Estate Manager in which the respondent had participated and on account of which it was decided to engage him as a Deputy Engineer on work charge basis. This was for supervising the on-going construction work. It is true that neither the order of appointment nor the resolution refer to construction of the stadium. However, this would not be the decisive factor so far as the respondent's request for permanency is concerned. The fact remains that it is not even the ground of the respondent that his appointment was against the clear vacancy and made after following due selection process. The Municipal Council being a State within the meaning of Article 12 of the Constitution of India, had to follow the principles of equality and equal opportunity in public employment flowing from Articles 14 and 16 of the Constitution of India. The judgment of the Supreme Court in the case of **Uma Devi** (supra) has dealt with this aspect at great length

and observed as under:

“43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of the Court, which we have described as “litigious employment” in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in

issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

44. The concept of “equal pay for equal work” is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after the Dharwad decision, the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even

been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution of India permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain – not at arms length – since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an

employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sick) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

46. Learned Senior Counsel for some of the respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial Taxes Department, should be directed to be regularized since the decisions in *Dharwad*, *Piara Singh*, *Jacob*, and *Gujarat Agricultural University* and the like, have given rise to an expectation in them that their services would also be regularized. The doctrine can be invoked if the decisions of the Administrative Authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn [See *Lord Diplock in Council for Civil Service Unions V. Minister for the Civil Service*, *National Buildings*

Construction Corpn. Vs. S. Raghunathan and Chanchal Goyal (Dr.) Vs. State of Rajasthan]. There is no case that any assurance was given by the Government or the department concerned while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the Commissioner of the Commercial Taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after *Dharwad decision*. Though, there is a case that the State had made regularizations in the past of similarly situated employees, the fact remains that such regularizations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this Court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission.

Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been

selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.”

14. We may at this stage refer to the decisions cited by the learned Counsel for the workman. In the case of **Chief Conservator of Forests and another vs. Jagannath Maruti Kondhare and others**², the issue discussed was of burden on the workman to establish certain facts for the purpose of seeking

² (1996) 2 SCC 292

permanency. In the case on hand, it is not even the case of the workman that the vacancy was permanent and filled by his appointment through regular selection and that giving an appointment on work charge basis was only a facade.

15. Reliance was placed on the decision of the Supreme Court in the case of **Punjab State Electricity Board and others vs. Jagjiwan Ram and others**³ in which the concept of work charge establishment was explained as under:

“9. We have considered the respective submissions. Generally speaking, a work-charged establishment is an establishment of which the expenses are chargeable to works. The pay and allowances of the employees who are engaged on a work-charged establishment are usually shown under a specified sub-head of the estimated costs of works. The work-charged employees are engaged for execution of a specified work or project and their engagement comes to an end on completion of the work or project. The source and mode of engagement/recruitment of work-charged employees, their pay and conditions of employment are altogether different from the persons appointed in the regular establishment against sanctioned posts after following the procedure prescribed under the relevant Act or rules and their duties and responsibilities are also substantially different than those of regular employees.”

These observations however would not directly aid the workman.

³ (2009) 3 SCC 661

16. Reliance was placed on the decision in the case of **Maharashtra State Road Transport Corporation and another vs. Casteribe Rajya Parivahan Karmachari Sanghatana**⁴, to contend that under the shield of the judgment in **Uma Devi** (supra), the state authorities cannot commit unfair labour practices. In this very judgment itself, the Court had held that undoubtedly, creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is equally true that the status of permanency cannot be granted by the Court when no such post exists and that executive functions and powers with regard to the creation of posts cannot be arrogated by the Court. We may recall in the present case, the Industrial Court had directed the employer to grant permanent status to the workman immediately upon completion of 240 days of work. The Industrial Court has not even come to the conclusion that at the time of engagement of the workman, or even at the time when the judgment was rendered, sanctioned posts were vacant. The directions issued by the Industrial Court would thus virtually amount to creating post, where none existed.

4 (2009) 8 SCC 556

17. For all these reasons, the impugned judgments are set aside. The appeal is disposed of.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)