



LP459.11(j)

1/29

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

LETTERS PATENT APPEAL NO.459/2011 IN
WRIT PETITION NO.5522/2010(D)

Bal Mandir Sanstha (Paranjpe School),
Khare Town, Dharampeth,
Nagpur through its Chairman.

... **APPELLANT**

-versus-

- 1] Devidas Kawaduji Raghute, Raghorte (corrected as per order dated 02.12.2021)
C/o. Bal Mandir Secondary School,
Neeri School Paranjpe Vidyalaya,
Laxminagar, Nagpur.
- 2] Deputy Director of Education,
Secondary, Zilla Parishad,
Civil Lines, Nagpur.
- 3] Education Officer (Secondary),
Zilla Parishad, Civil Lines,
Nagpur.

.... **RESPONDENTS**

.....
Ms. K.K.Pathak, Advocate with Shri S.A.Pathak, Advocate for appellant.
Shri D.S.Thakur, Advocate with Shri M.R.Sakharkar, Advocate for
respondent no.1.
Shri D. P. Thakre, Additional Government Pleader for respondent nos.2 & 3.

.....

CORAM : A. S. CHANDURKAR AND PUSHPA V. GANEDIWALA, JJ.

Date on which the arguments were heard : 08.09.2021

Date on which the judgment was pronounced : 30.09.2021

Judgment : (Per A. S. Chandurkar, J.)

In this Letters Patent Appeal filed under Clause 15 of the Letters Patent the judgment of learned Single Judge dated 04.10.2011 in Writ Petition No.5522/2010 is under challenge. The complaint filed by the respondent no.1 seeking the relief of regularisation on the post of Peon has been allowed by the Industrial Court by its judgment dated 14.10.2010 and

the writ petition preferred by the appellant under Articles 226 and 227 of the Constitution of India challenging that judgment has been dismissed giving rise to the present appeal.

2. The facts in brief as can be gathered from the averments made in the complaint filed by the respondent no.1-employee are that he joined the services of the appellant-employer on the post of Peon from 04.01.1986 on monthly salary of Rs.200/-. Thereafter from 01.07.1987 to 01.03.1993 he worked in the capacity as Peon cum Laboratory Attendant on monthly salary of Rs.300/-. He was also working as Chowkidar at night and was being paid monthly salary of Rs.500/-. According to the employee, the employer was running three institutions that were receiving financial aid from the Zilla Parishad. The employee having completed more than 240 days continuous service in 1986 itself, he was entitled to be made a regular and permanent employee. However his services were continued on temporary basis with the object of depriving him of all the benefits and privileges of a regular and permanent employee. Juniors to him in the same category were made regular and permanent by giving them salary as per permanent scale. This amounted to showing favouritism and partiality to one set of employees thus resulting in commission of unfair labour practice. According to the employee, he was getting meagre salary of Rs.600/- per month but his services were not regularised which gave cause of action to file complaint under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short, 'the Act of 1971')

invoking Items 5, 6 and 9 of Schedule IV of the Act of 1971. This complaint was filed on 14.07.1993.

The employer filed its written statement and admitted that the employee joined services from 04.01.1986 as Peon on monthly salary of Rs.200/-. It was stated that he was employed on part time basis. The averments with regard to getting salary of Rs.500/- per month and completion of 240 days continuous services were admitted. It was further pleaded that the employee had been given a free quarter to reside and if rent of the quarter, charges of electricity and water were computed in terms of money he was getting Rs.400/- to Rs.500/- per month in addition to Rs.600/- per month which was admittedly paid. It was further denied that any favouritism was shown to any junior. The employer took the stand that the services of the employee could not be regularised as there was no sanctioned post either of Laboratory Attendant, Peon or Chowkidar. He had been appointed as an additional temporary Class-IV employee and by the order dated 02.04.1993 his appointment was continued on the same terms and conditions until further orders. There was only one post of Peon available in the primary school run by the appellant and hence all appointment orders given to the employee were of temporary nature as an additional hand and not on any regular sanctioned post. It was thus submitted that the complaint was liable to be dismissed.

3. Before the Industrial Court the employee examined himself while on behalf of the employer its Director was examined. Both parties placed

various documents on record and after considering the same the learned Member of the Industrial Court recorded a finding that the employee had completed continuous service of more than 240 days since 04.01.1986. His evidence was found more reliable and trustworthy. In the light of the finding that continuous service of more than 240 days had been rendered since appointment, the employee was held entitled to the benefits and privileges of a regular and permanent Peon. It was thus directed that he be paid wages and all other allied benefits as applicable to the said post from 02.04.1993.

The learned Single Judge while entertaining the writ petition filed by the employer found that since the employee had worked continuously for a period of about seven years, the post was a permanent one. Merely because there was no sanction from the Education Department the employee could not be denied benefits of permanency in terms of Item 6 of Schedule IV of the Act of 1971. After holding that the view taken by the Industrial Court was a possible view of the matter which did not call for any interference, the writ petition came to be dismissed. The aforesaid judgment is the subject matter of challenge in this appeal.

4. Ms K.K.Pathak, learned counsel for the employer in support of the appeal made the following submissions :

(a) In the absence of any sanctioned post of Peon being available for accommodating the employee, no direction for regularising his services could have been issued by the Industrial Court. The basic premise for seeking the

relief of regularisation was the availability of a sanctioned post. It was undisputed that there was only one post of Peon that was sanctioned and the same was held by another employee whose services were duly approved by the Education Officer. Merely because the employee had completed more than 240 days of continuous service, the same could not be the reason to grant him the relief of regularisation in the absence of availability of a sanctioned post. Disregarding this material aspect, the Industrial Court proceeded to grant such relief which was confirmed by the learned Single Judge without taking into consideration the settled legal position in this regard as held in *Mahendra L. Jain and ors. Vs. Indore Development Authority and ors. (2005) 1 SCC 639, State of Maharashtra and anr. Vs. R.S.Bhonde and ors. (2005) 6 SCC 751, U.P.Power Corporation Ltd. and anr. Vs. Buli Mazdoor Sangh and ors. (2007) 5 SCC 755, Gangadhar Pillai Vs. Siemens Limited (2007) 1 SCC 533, Raman Singh Vs. District Inspector of Schools, Jalaun at Orai and ors (2019) 8 SCC 138 , State of Bihar and others Vs. Kirti Narayan Prasad (2019) 13 SCC 250 and State of Bihar and ors. Vs. Devendra Sharma (2020) 15 SCC 466.*

(b) The entry in service of the employee was dehors to the provisions of Section 5(2) of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 (for short, 'the Act of 1977') and Rule 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 (for short, 'the Rules of 1981') which was another reason that disentitled the employee from getting the relief of regularisation. The appointment orders issued from 04.01.1986 to the employee clearly

stated that his appointment was temporary in nature and for fixed period. The employee accepted various orders of appointment issued to him and ultimately on 02.04.1993 his services came to be continued on the same terms and conditions as he was initially appointed. This indicated that the status of the employee as temporary continued for his entire service career. In this background and in the light of the fact that no sanctioned post was available, the Courts erred in conferring the status of a permanent employee to the complainant by relying upon the provisions of Section 5(2) of the Act of 1977. In that regard reliance was placed on the decision in ***Hindustan Education Society Vs. Sk. Kaleem Sk. Gulam Nabi (1997) 5 SCC 152*** to urge that an appointment on temporary basis can always be made by the employer and the same was not prohibited under law. Reliance was also placed on the decision in ***Priyadarshini Education Trust and others Vs. Ratis (Rafia) Bano Abdul Rasheed and others, 2007 (6) Mh. L. J. 667***

(c) In absence of availability of any sanctioned post on which the services of the employee could have been regularised the further direction to pay salary to the employee as per the scale applicable to the post of Peon was also not sustainable. The pay-scale applicable under the statute would be admissible only if services were discharged on a sanctioned post. As the employee had discharged services pursuant to the orders of appointment issued to him he was paid salary as agreed. There was no legal basis whatsoever to issue a direction to pay salary as per the scale applicable for the post of Peon. In that regard, reliance was placed on the decision in ***National Fertilizers Ltd. and ors. Vs. Somvir Singh (2006) 5 SCC 493***.

(d) The pleadings in the complaint were vague and not specific. Based on the appointment orders that were issued from time to time, it was pleaded that services were discharged on the post of Peon cum Laboratory Attendant and Chowkidar which itself indicated the improbability of the case of the complainant. There were no pleadings to indicate valid entry in service so as to form the basis for claiming regularisation. The complaint was liable to be decided in the light of these pleadings. However the Courts proceeded to consider the case of the employee under the provisions of Section 5(2) of the Act of 1977 and thereafter granted him the benefit of deemed permanency. In view of such vague pleas it was not possible for the employer to meet the case as considered by the Courts while granting the relief to the employee. Inviting attention to the decisions in *Management of Hindustan Steel Ltd. Vs. Workmen and ors.*(1973) 3 SCC 564, *Shri H.D.Vashishta Vs. Glaxo Laboratories (I) (P) Ltd.* (1978) 1 SCC 170, *State of Karnataka and ors. Vs. Ganapathi Chaya Nayak and ors.* (2010) 3 SCC 115 and *General Manager, Electrical Rengali Hydro Electric Project, Orissa and ors. Vs. Giridhari Sahu and Ors.* (2019) 10 SCC 695 it was submitted that on the aforesaid basis the employee was not entitled to the relief granted by the Courts.

In the light of the aforesaid submissions, it was urged that the complaint as filed was liable to be dismissed and the employee was not entitled for any relief whatsoever especially in view of the undisputed fact that his services throughout were as a temporary employee and he was paid

salary as per the orders of appointment. The appeal therefore deserved to be allowed by setting aside the judgment of the learned Single Judge.

5) Shri D.S.Thakur, learned counsel for the employee opposed the aforesaid submissions and supported the impugned orders by which relief was granted to the employee. In that regard he submitted that :

Corrected as
per Court's
order dated
22.08.2023

(a) The fact that from 04.01.1986 till his superannuation on 12.08.2020 the employee was retained in service clearly indicated that the duties of Peon were available and such duties were discharged by the employee for all this period. His status could not be kept as temporary for such a long period on the specious plea that a sanctioned post was not available. It was submitted that the aspect of sanction to post was with a view to receive grant-in-aid from the State Exchequer. If the additional workload of Peon was available with the employer and the employee had discharged such duties, he could not be kept temporary in service so as to deprive him of the benefits of permanency. It was an admitted position that the employee had rendered continuous service of more than 240 days and in view of provision of Section 25B of the Industrial Disputes Act, 1947 the employee was entitled to the benefits of permanency. No fault could be found with the adjudication by the Industrial Court in view of the admitted position that service was rendered continuously by the employee thus entitling him to the benefits of permanency.

(b) As regards the employee's entry in service was concerned, attention was invited to the provisions of Rule 9(3) of the Rules of 1981 to

urge that the prescribed requirement was merely of applying for a non-teaching post by giving necessary details. The employer had not denied issuance of various appointment orders and having so appointed the employee, it was not permissible for the employer to turn around and contend that the entry in service of the employee was not in accordance with law. The appointment orders issued were admitted and so was the order dated 02.04.1993 issued by the employer thereby continuing the services of the employee. Moreover, such plea was never raised by the employer in the written statement. No fault could be found with the employee's entry in service especially in the light of the fact that the employee had superannuated after being continued on the post of Peon for all these years.

(c) To support the grant of relief of salary as per the pay-scale prescribed for the post of Peon, attention was invited to various statutory provisions such as Rules 6, 7, 9, 10 along with Schedule C of the Rules of 1981. It was also submitted that as per the salary chart at Exhibit 44 an amount of Rs.200/- was being deducted every month by the employer towards provident fund. This indicated that the employee's contribution towards provident fund was being regularly deducted thus indicating the status of the employee as permanent. There was no legal basis to deny grant of pay-scale that was admissible for the post of Peon to the employee.

(d) It was submitted that in the complaint the case set up by the employee was clearly indicated. According to the employee, it was his case that he could not have been retained as a temporary employee after rendering continuous service for more than 240 days. On that basis the

relief of regularisation and payment of salary as per the applicable pay-scale was prayed for. The case thus set up was understood by the employer and it was admitted in the written statement that the employee had been appointed but on temporary basis. The salary paid to the employee from time to time were also admitted and the only defence that was taken in the written statement was the non-availability of a sanctioned post of Peon on which the services of the employee could be regularised. In fact, it was even indicated in the written statement that despite the intention of the employer to regularise the services of the employee, the same could not be done for want of sanctioned post. Drawing attention to the decisions in *Kayastha Pathshala, Allahabad and anr. Vs. Rajendra Prasad and anr. 1989 (Supp) 2 SCC 732, Director of Education and ors. Vs. Gajadhar Prasad Verma (1995) 1 SCC 465* and *State of Punjab Vs. Jagjit Singh and ors. (2017) 1 SCC 148* it was submitted that the employee was entitled to the relief of grant of regular pay-scale and the burden to make payment was solely on the employer.

(e) Considering the fact that the employee was discharging duties as Peon and was a member of non-teaching staff, the Industrial Court had jurisdiction to grant the relief of regularisation/permanency in the complaint. There was no bar to grant such relief nor was the jurisdiction of the Industrial Court objected to in the written statement. Referring to the decisions in *Shri Gurudeo Ayurved Mahavidyalaya through its Principal and anr. Vs. Madhav s/o Narayan Mahakode and ors. 1996 (1) LLJ 515* and *Premlata Digambar Raodeo Vs. Principal St. Phelomine's Convent High*

School and ors. 1997 (1) Mh. L. J. 373 it was submitted that the jurisdiction in that regard was rightly exercised by the Industrial Court. It was submitted that the relief granted by the Industrial Court and maintained by the learned Single Judge did not call for interference. On the contrary, the arrears of salary were liable to be paid with interest @12% per annum.

Shri D.P.Thakre, learned Additional Government Pleader for the respondent nos.2 and 3 submitted that the said respondents were impleaded in the Letters Patent Appeal for the first time. They were not parties either before the Industrial Court or in the writ petition before the learned Single Judge. Inviting attention to the order dated 17.06.2011 passed by the learned Single Judge in the writ petition in the matter of considering the proposal submitted by the employer for accommodating the employee on the post of Peon, it was submitted that such approval was granted to the appointment of the employee as '*Shipai Sevak*' by the order dated 09.01.2013. This approval was for a period of three years from 28.08.2012. After completion of the period of three years, the said appointment was not further approved.

6. We have heard the learned counsel for the parties and with their assistance we have gone through the records of the case. We have given due consideration to the rival submissions. At the outset, it would be necessary to refer to the admitted facts that are available on record since it is found that principally, the parties were *ad idem* on certain aspects. The pleadings in the complaint and the written statement when read together indicate that

the appointment of the employee as Peon on 04.01.1986 on a salary of Rs.200/- per month which was subsequently increased to Rs.300/- per month, thereafter to Rs.500/- per month and ultimately to Rs.600/- per month is not disputed by the employer. The further fact that from 02.04.1993 the appointment of the employee was continued on the same terms and conditions until further orders is admitted by the employer. While it is the case of the employee that he was continued in service as a temporary employee, the said fact is sought to be justified by the employer on the ground that he was appointed as additional temporary Class-IV employee in view of the fact that there was no sanctioned post of Peon available besides one post that was duly sanctioned and occupied by another employee. It is the stand of the employer that all along the services of the employee were of temporary nature as an additional hand and his appointment was not made on any regular sanctioned post. It is on that basis that the employee continued in service till he attained the age of superannuation on 12.08.2020. As stated above, for a period of three years the Education Department approved the appointment of employee on honourarium of Rs.1,700/- per month. These facts would have to be kept in mind while adjudicating upon the rival contentions of the parties.

Corrected
as per
Court's
order dated
22.08.2023

7. Having noticed the pleadings of the parties, it would be necessary to refer to the documentary material on record that was placed by the parties before the Industrial Court. Along with the list at Exhibit 36 various appointment orders from 04.01.1986 onwards were placed on

record. The order dated 02.04.1993 at Exhibit 40 reflects the name of the employee at Serial No.6 along with various other employees in which they have been informed that the services of each of them were continued on the same terms and conditions until further orders. Admittedly the continuation of the employee in service is on the basis of this order dated 02.04.1993. The documents at Exhibits 54 and 55 indicate that the temporary appointment of the employee was put to an end on 30.04.1986 and 30.04.1989 respectively. However as stated above from 02.04.1993 the services of the employee were continued on the same terms and conditions. Exhibit 44 is the salary statement of various employees of the primary school run by the employer. The same shows payment of salary for the month of November 2005. The designation of the employee is shown as Peon and his salary has been credited to his Savings Bank Account No.8372. His basic pay has been shown at Rs.834/- and he has also been paid dearness allowance of Rs.834/- thus totalling Rs.1,668/-. From this amount, Rs.200/- has been deducted towards provident fund and the net amount paid to him is Rs.1,468/-. This salary statement is not disputed by the employer.

8. Pleadings of parties :

While it is the contention raised on behalf of the employer that the pleadings in the complaint were vague and not specific as a result of which the employer could not meet the case that was considered by the Courts, according to the employee the pleadings in the complaint clearly indicated the case that was set up by him and he was entitled for the reliefs

as prayed. We have perused to the pleadings of the parties in the complaint, written statement and also to the documentary material placed on record by them. The same would give an indication as to whether the case as pleaded by the employee in the complaint was clear for being defended by the employer. It has been noticed that the appointment of the employee as Peon on 04.01.1986 and his subsequent continuation by virtue of order dated 02.04.1993 has been admitted by the employer. The pleading of the employee that he was continued in service as a temporary has been met by the employer by raising a plea that in absence of availability of any sanctioned post of Peon, the services of the employee were required to be continued as temporary additional hand. We find that the case as pleaded by the employee was not vague and it was clearly pleaded that his services were continued as temporary despite completion of continuous service of more than 240 days for a number of years. We do not find that the employer was in any manner prejudiced or was not in a position to meet the case as pleaded by the employee. Considering the case as pleaded and the defence as raised, the contention raised on behalf of the employer that the pleadings in the complaint were vague cannot be accepted. Merely because the Industrial Court proceeded to consider the case of the employee by applying the provisions of Section 5(2) of the Act of 1977 that can not be a reason to hold that a case not pleaded was considered by the Court. Since the employee had discharged duties on the post of Peon in a school that was governed by the provisions of the Act of 1977, it was but obvious for the

Industrial Court to have considered the entitlement of the employee to the relief of regularisation under the provisions of Act of 1977. The ratio of the decisions relied upon by the learned counsel for the employer as regards insufficient pleadings cannot be applied to the case in hand.

9. Aspect of regularisation :

While considering the entitlement of the employee to the relief of regularisation as claimed by him, it would be necessary to refer to the settled legal position in that regard. It has been the consistent view that in the absence of availability of a sanctioned post a direction to grant regularisation would be impermissible merely on the basis of number of years of service put in by the employee. The fact that an employee has been engaged as a casual or temporary employee for a number of years by itself cannot lead to the conclusion that such appointment has been made with the object of depriving him of the status and privileges of a permanent employee especially when there is absence of availability of a sanctioned post - *Gangadhar Pillai* (supra). The completion of 240 days of continuous service again in the absence of availability of any sanctioned post cannot lead to a direction to regularise the services of such employee - *R.S.Bhonde* (supra).

10. Since the services of the employee are governed by the provisions of the Act of 1977, it would be necessary to refer to certain relevant provisions that have material bearing on the issue under consideration. Rule 8 (1)(b) of the Rules of 1981 specifies that the number

of posts with regard to the non-teaching staff has to be determined on the basis of the strength of students on roll or the number of divisions of the school as the case may be as on 1st August of a year. Rule 8 (2) requires the Management to forward the names, particulars of qualifications and experience of the persons so appointed on teaching and non-teaching posts to the Education Officer. Rule 10 (1) specifies the categories of employees who shall be either permanent or non-permanent. Non-permanent employees may either be temporary or on probation. As per Rule 10(2) a temporary employee is one who is appointed on a temporary vacancy for a fixed period. Rule 20 stipulates that every employee of an aided school or un-aided school working either on full time post or on part time basis and doing full time load of work shall subscribe to the contributory provident fund as in force from time to time. Rule 21 prescribes the work load of the teaching as well as non-teaching staff of the school.

A perusal of the aforesaid statutory provisions and especially Rule 8(1)(b) indicates that the admissibility of any post of teaching as well as non-teaching staff has to be determined on the basis of strength of students on the roll or the number of divisions of the school. As per the provisions of Section 3(1) of the Act of 1977, the Act is applicable to all private schools in the State of Maharashtra whether receiving grant-in-aid from the State Government or not. This would thus indicate that the aspect of admissibility of post of the teaching and non-teaching staff is not related to the fact as whether the school is receiving grant-in-aid or not, but the

same has a direct nexus with the strength of students on the roll or the number of divisions of the school. That the requirement of approval to an appointment relates to disbursal of grant-in-aid which is a matter between the employer and the State which does not invalidate an order of appointment is now settled in view of the decision of the Full Bench in *St.Ulai High School Vs. Devendraprasad 2007(1) Mh.L.J. 597*. This vital aspect has to be kept in mind while considering the question as to whether the relief of regularisation can be granted to an employee ignoring the aspect of availability of an admissible post.

11. The record indicates that one post of Peon was sanctioned in the school where the employee was discharging duties and that post was occupied by one Smt. Nirmala Ramteke whose services were also approved. According to the employer the services of the employee were engaged as additional temporary hand considering the requirement of the employer. It would have been different matter if despite availability of a sanctioned post, the services of the employee were continued as temporary which could thus be categorised as resulting in commission of an unfair labour practice. In the absence of any sanctioned post of Peon besides the only one available which was occupied by another Peon, it is to be held that the services of the employee could not have been regularised on the post of Peon that was not admissible.

12. In this regard, it would be advantageous to refer to the observations in paragraph 6 of the judgment of the Hon'ble Supreme Court

in ***R. K. Sabharwal and ors. Vs. State of Punjab and ors. AIR 1995 SC 1371***

in the context of “post” and “vacancy”. The said observations are as under :

“6. The expressions “posts” and “vacancies” often used in the executive instructions providing for reservations, are rather problematical. The word “post” means an appointment, job, office or employment. A position to which a person is appointed. “Vacancy” means an unoccupied post or office. The plain meaning of the two expressions made it clear that there must be a ‘post’ in existence to enable the ‘vacancy’ to occur.”

The first essential requirement therefore would be the availability of a post. A vacancy can arise only when there exists a post for being filled in. As per provisions of Section 5 of the Act of 1977, the manner in which appointments are to be made has been stipulated. The said provision contemplates filling in of either a permanent vacancy or a temporary vacancy. The judgment of the Full Bench of this Court in ***Ramkrishna Chauhan Vs. Seth D.M.High School and ors. 2013(2) Mh.L.J. 713*** has held that the provisions of Section 5(5) of the Act of 1977 cannot be construed to mean that the Management has been forbidden to make a contractual or temporary appointment in respect of a permanent vacancy if the situation so warrants. There is also no legal fiction or deeming provision that every appointment made against a permanent vacancy is deemed to be one on probation. The right to make an appointment on temporary basis or for a limited period has been recognised. It has been held in paragraph 12 of the aforesaid decision that the inherent power of the Management to make an appointment on contractual basis has not been taken away either expressly or impliedly by law. In other words, therefore unless a post is

shown to exist that would give rise to a vacancy which vacancy can be filled in either on temporary basis or by making an appointment on probation, the question of regularising such appointment as made would not arise. The basic requirement for granting the relief of regularisation would therefore be the existence of a post for being filled in. In absence of any such post being available, the question of regularising an appointment made on a non-existent post would not arise. The Division Bench in ***Priyadarshini Education Trust*** (supra) has held that for claiming benefit of deemed permanency, amongst other factors the appointment must be in a clear and permanent vacancy.

13. The learned Judge of the Industrial Court while granting the relief to the employee has relied upon the admission of the employer in its written statement that by the order dated 02.04.1993 the employee was continued in service on the same terms and conditions that were made applicable earlier. Since continuous service of 240 days put in by the employee was admitted, he was held entitled to the relief of permanency. It is to be noted that the aspect of availability of the post of Peon on which the services of the employee could be regularised has not been gone into by the Industrial Court. In fact a specific plea in that regard was raised by the employer in paragraph 5A of its written statement that in the absence of availability of a regular sanctioned post, the services of the employee could not be made regular on the post of Peon.

The learned Single Judge while maintaining the order of the

Industrial Court has observed that absence of sanction from the Education Department for providing grant-in-aid could not result in denying the benefits of permanency in terms of Item 6 of Schedule IV of the Act of 1971. It has been further observed that though there were three posts of Peon existing in the primary school, the benefit of regularisation and permanency were not given to the employee. Reference was also made to the provisions of Section 5 of the Act of 1977 while upholding the entitlement of the employee to the status of a deemed confirmed employee.

14. It has been found that there was only one post of Peon that was duly sanctioned at the school run by the employer where the employee was serving. That post was occupied by one Smt. Nirmala Ramteke whose services were approved. The question is not of sanction from the Education Department for the purposes of grant-in-aid to the post in question. The provisions of Rule 8 (1) (b) of the Rules of 1981 require a post to be admissible which admissibility has to be determined on the basis of strength of students on the roll or the number of divisions in the school as the case may be as on 1st August every year. If as per Rule 8(1)(b) the post of Peon was not admissible on which the services of the employee could be regularised, the deeming fiction as per provisions of Section 5(2) of the Act of 1977 would not arise. This is for the reason that under Section 5 (1) it is only a permanent vacancy which can be filled in by the Management by following the procedure prescribed. A permanent vacancy would arise only on a post found admissible as per Rule 8(1)(b) of the Rules of 1981 insofar

as a member of the non-teaching staff is concerned. If it is shown that there was no post admissible under that provision, the question of filling in such permanent vacancy would not arise for the simple reason that no vacancy could arise for being filled in on a non-existent post. On the aforesaid premise therefore it is found that the view taken by the Industrial Court that on the employee rendering continuous service of 240 days he became eligible for grant of the relief of regularisation cannot be a possible view for being confirmed in the writ petition preferred by the employer.

15. When the aforesaid material on record is considered in the light of the statutory and legal position referred to hereinabove, the only conclusion that can be drawn is that in the absence of availability of a sanctioned post of Peon under Rule 8(1)(b) of the Rules of 1981 on which the services of the employee could be availed he would not be entitled to the relief of regularisation despite completing continuous service of more than 240 days or for that matter service for a long period on a post that was not admissible on the basis of strength of students on roll or the number of divisions in the school. The finding to the contrary recorded by the Industrial Court and upheld by the learned Single Judge is accordingly set aside.

16. Entitlement to monetary relief as per pay scale :

The Industrial Court while allowing the complaint preferred by the employee has granted him monetary relief in the form of wages and all other allied benefits that were applicable to the post of Peon from

02.04.1993. According to the learned counsel for the employer since no sanctioned post was available on which the employee could have discharged duties, the employee was not entitled to receive salary as per the pay scale applicable for the post of Peon. On the other hand, according to the employee the relief of regularisation having been granted, it was but natural that the employee was entitled to receive his salary as per the prescribed pay scale. It has been held hereinabove that in the absence of a sanctioned post of Peon under Rule 8(1)(b) of the Rules, 1981 the employee would not be entitled to the relief of regularisation though he had completed continuous service for more than 240 days. The status of the employee thus remained as temporary employee on a post that was not sanctioned. While considering the aspect as regards entitlement to monetary relief based on applicability of the pay scale as prescribed under Schedule C of the Rules, 1981, the fact that the initial engagement of the employee on 04.01.1986 on a salary of Rs.200/- per month has been admitted. It was then increased to Rs.300/- per month and thereafter further increased to Rs.500/- / Rs.600/- per month as agreed between the parties which is also admitted. The order of continuation dated 02.04.1993 refers to such continuation on same terms and conditions that were earlier applicable. In other words, on his initial appointment and subsequent confirmation on 02.04.1993 it was agreed between the employer and the employee that the employee would be paid salary as agreed between them. This fact that the employee was being paid agreed salary has been admitted by the employee in paragraph 9 of his cross-

examination. It is permissible for an employer to engage an employee on mutually agreed terms and conditions and on acceptance such terms and conditions, the relations between them would be so governed by such agreement. Reference in this regard can be made to the decision in ***Kalpataru Vidya Samasthe Vs. S.B.Gupta (2005) 7SCC 524*** wherein it has been held that after accepting the terms and conditions of appointment it is not permissible for the employee to turn around and contend otherwise. It thus becomes clear that since his initial appointment on 04.01.1986 the employee was paid salary as agreed to be paid by the employer.

17. It is however relevant to note that at Exhibit 44 is a salary slip of various employees of the school including the employee which indicates that in the month of November 2005, the employee was paid monthly salary by crediting the same to his savings bank account No.8372. His basic pay was shown as Rs.834/- alongwith dearness allowance of Rs.834 thus totaling Rs.1,668/-. From that amount, Rs.200/- was deducted towards provident fund and net amount of Rs.1,468/- was paid to the employee. This salary slip at Exhibit 44 is admitted by the employer. This salary slip therefore indicates that in the month of November 2005 the employee was paid an amount of Rs.1,668/- per month from which Rs.200/-per month was deducted towards provident fund. In the written statement it has been admitted in paragraph 5 that the employee was getting salary of Rs.600/- per month. In the light of the salary slip at Exhibit 44 and in the absence of any further agreement being shown by the parties as regards the quantum of

salary, it would be safe to infer that at least from November 2005 the employee was being paid higher salary than what was agreed. This factor would have to be kept in mind while considering the entitlement of the employee to the prayer for applicability of the pay scale that governs the post of Peon as per Schedule C of the Rules, 1981.

18. The employer has sought to rely upon various decisions to contend that when the employee does not discharge duties on a sanctioned post, he would not be entitled to pay scale that is applicable to an employee working on regular basis on a sanctioned post. In this regard, it would be necessary to note that under Section 2(7) of the Act of 1977 a member of the non-teaching staff of a recognised school is included in the definition of employee. As per Rule 7, the scale of pay and allowances of the teaching as well as non-teaching staff has to be as specified in Schedule C of the Rules of 1981. Similarly various allowances such as dearness allowance, compensatory local allowance and house rent allowance has to be such as may be from time to time determined by the government by special or general order. This position is clear from a perusal of Rule 7(iii) of the Rules of 1981. As noted above, the category of employees under Rule 10 includes a non-permanent employee who may either be temporary or on probation. It has been found that even according to the employer, the status of the employee was “additional temporary Class-IV employee”. It thus becomes clear that even a temporary employee as indicated by Rule 10 is entitled to pay and allowances as stipulated by Rule 7 of the Rules, 1981.

Since the only material on record in the form of Exhibit 44 which is a salary slip for the month of November 2005 that indicates departure in the matter of payment of agreed salary to the employee, we find that from the month of November-2005 onwards the employee can be granted the relief of being paid salary as per the pay scale prescribed in Schedule C of the Rules, 1981 for the post of Peon. Since the employee has admitted that he was being paid as agreed, he would not be entitled to receive salary for the period prior to November 2005 as per prescribed pay scale as he had agreed to accept such salary as was being paid by the employer.

19. To support the finding that despite having served as a temporary employee during his entire service career on a post that was not sanctioned, the employee is entitled to salary as prescribed under Schedule C, reliance can be placed on the law laid down in **Jagjit Singh** (supra). The Hon'ble Supreme Court in the said decision has considered the question of extending the benefits of the principle of "equal pay for equal work" to temporary employees. It has been observed in paragraphs 57 and 58 as under :

"57. There is no room for any doubt that the principle of "equal pay for equal work" has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court and constitutes law declared by this Court. The same is binding on all the Courts in India under Article 141 of the Constitution of India. The parameters of the principle have been summarised by us in para 42 hereinabove. The principle of "equal pay for equal work" has also been extended to temporary employees (differently described as work-charge, daily wage, casual, ad hoc, contractual

and the like). The legal position, relating to temporary employees has been summarised by us, in para 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us yet again.

58. *In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another who performs the same duties and responsibilities. Certainly not, in a welfare State. Such an action besides being demeaning, strikes at the very foundation of human dignity. Anyone, who is compelled to work at a lesser wage does not do so voluntarily. He does so to provide food and shelter to his family, at the cost of his self-respect and dignity, at the cost of his self-worth, and at the cost of his integrity. For he knows that his dependents would suffer immensely, if he does not accept the lesser wage. Any act of paying less wages as compared to others similarly situate constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation.*

It thereafter concluded that such temporary employees would be entitled to minimum of the pay scale of the category to which they belong. In our view therefore the law as laid down in the aforesaid decision can be made applicable to the facts of the present case. It can be seen that the Hon'ble Supreme Court considered various earlier decisions holding the field and thereafter made the aforesaid observations which we are inclined to follow. Moreover, as held in **Director of Education** (supra), the burden to bear such expenditure would be from its own resources without claiming reimbursement from the State.

Corrected as per Court's order dated 22.08.2023
--

20. In the light of aforesaid discussion, it is found that there was no sanctioned post available on which the employee could discharge his duties. Since the services of the employee were engaged from 04.01.1986 till he attained the age of superannuation on 12.08.2020, it is clear that the employer was in need of his services on the post of Peon. In absence of a sanctioned post of Peon on which the employee could be accommodated, he would not be entitled to the relief of regularisation despite completing continuous service of more than 240 days in a number of years. Similarly he would not be entitled to the relief of being declared “deemed permanent” under Section 5(2) of the Act of 1977 as the post of Peon was not admissible under Rule 8(1)(b) of the Rules 1981. From 04.01.1986 to October 2005 there is material on record in the form of admission of the employee that he was being paid salary as agreed by the employer. The departure therefrom is first evident from the month of November 2005 vide salary slip at Exhibit 44. Hence he would be entitled to receive salary as per pay scale admissible under Schedule C of the Rules 1981 from November 2005 till his superannuation. For the reasons stated hereinabove the judgment of the Industrial Court dated 14.10.2010 as upheld by the learned Single Judge in Writ Petition No.5522/2010 deserves to be modified on aforesaid lines as a case of commission of unfair labour practice under Item 9 of Schedule IV of the Act of 1971 to the aforesaid extent has been made out.

21. Before concluding, we note that on behalf of the appellant reliance was placed on about thirty five decisions of various Courts. We

have referred to and considered those decisions that were found relevant to the facts of the case. While the endeavor and effort to bring home the point that is urged by counsel is understandable, no useful purpose is served by citing decisions which merely reiterate a settled legal position. Where the legal position stands settled, usually one decision for such proposition should suffice unless there is an effort to make out a new point or to urge some distinguishing feature. We have made these observations since we found that most of the decisions cited merely reiterate and apply the law settled earlier. In this regard we may refer to what has been observed by the Hon'ble Supreme Court in ***Rashmi Metaliks Limited and anr. Vs. Kolkata Metropolitan Development Authority and ors. (2013) 10 SCC 95*** which is as under :

“7. This Court, and even more so the High Court as well as the subordinate courts have to face lengthy arguments in each case because of the practice of citing innumerable decisions on a particular point of law. The correct approach is to predicate arguments on the decision which holds the field,..... The law of precedence and of stare decisis is predicated on the wisdom and salubrity of providing a firmly founded law, without which uncertainty and ambiguity would cause consternation in society. It garners legal predictability, which simply stated, is an essential. The sheer plethora of precedents makes it essential that this Court should abjure from discussing each and every decision which has dealt with a similar question of law. Failure to follow this discipline and regimen inexorably leads to prolixity in judgments which invariably is a consequence of lengthy arguments.”

“10.5. This analysis of the cited case law shows that there is little or no advantage to be gained from the manner in which the Court has responded to the factual matrix as other Courts may legitimately place emphasis on seemingly similar facts to arrive at a different

conclusion. But the ratio decidendi has to be adhered to. The counsel must therefore exhibit circumspection in the number of cases they cite.” (emphasis supplied)

In the hope that such circumspection would be shown in future, we leave the matter at that.

22. Accordingly the following order is passed :

(i) The judgment of the Industrial Court in Complaint (ULP) No.1092/1993 dated 14.10.2010 as upheld in Writ Petition No.5522/2010 on 04/10/2011 is partly modified. It is held that for want of sanctioned post the services of the employee cannot be regularised. He is however entitled to salary as per the pay scale prescribed under Schedule C of the Rules, 1981 from November, 2005 till his superannuation dated 12.08.2020. He shall be entitled to the minimum of the pay-scale applicable but shall not be entitled to any increments. The benefits accordingly be paid to the employee within a period of three months from date of this judgment.

(ii) Letters Patent Appeal No.459/2011 is partly allowed in aforesaid terms leaving the parties to bear their own costs. Pending civil applications are also disposed of.

JUDGE

JUDGE

Andurkar..

Corrected as
per Court's
order dated
22.08.2023