

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.2097 OF 2015

Maharashtra State Electricity Board
Thermal Power Station,
Parli-Vajinath,
Dist. Beed
through its: - Chief Engineer (Generation)

... PETITIONER

VERSUS

Sudhir Kamalkar Ayachit,
Age : 41, Occu: Telephone Operator,
R/o. Quarter No. T-17,
'Shakti Kunj', Vasahat,
At. Post Parli – Vajinath,
Dist. Beed.

... RESPONDENT

**WITH
WRIT PETITION NO.2098 OF 2015**

Maharashtra State Electricity Board
Thermal Power Station,
Parli-Vajinath,
Dist. Beed
through its: - Chief Engineer (Generation)

... PETITIONER

VERSUS

Anant Narhari Sonar,
Age : 35, Occu: Telephone Operator,
R/o. 'Priya Nagar', Parli – Vajinath,
At post Parli – Vajinath,
Dist. Beed.

... RESPONDENT

...

Advocate for Petitioner : Mr. V.J. Dixit, Senior Advocate i/b. Mr. A.M.
Gaikwad

Advocate for Respondent : Mr. T.K. Prabhakaran i/b. Mr. A.S. Kulkarni.

...

CORAM : MANGESH S. PATIL, J.

Reserved on : 01.09.2021

Pronounced on : 04.01.2022

JUDGMENT :

Heard. Rule in both the Writ Petitions. It is made returnable forthwith. The learned advocate Mr. T.K. Prabhakaran instructed by Mr. A.S. Kulkarni for the respondent in both these Writ Petitions waives service. At the joint request of the parties, the petitions are heard finally at the stage of admission.

2. Since common questions of facts and law arise in both the Writ Petitions wherein challenge is to the self same common judgment and order passed by the Industrial Court, the matters are being disposed of by this common judgment.

3. The petitioner is the Electricity Board constituted under the Electricity Act and is a State within the meaning of Article 12 of the Constitution of India. It is challenging a common judgment and order whereby the Industrial Court has allowed the complaints filed by the respondents under Section 28 (1) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter the ULP Act) and issued following directions:

“ORDER

Complaint ULP Nos.69/2003 and 71/2003 are hereby allowed.

It is hereby declared that the respondent has engaged in unfair labour practice covered under Item No.6 of schedule IV of the MRTU & PULP Act by not conferring permanency benefits to the complainants in both the complaints.

The respondent is hereby directed to cease and desist from commission of such unfair labour practice.

The respondent is directed to confer permanency benefits along with consequential monetary benefits to each of the

complainant w.e.f. 04-06-1996 and to pay arrears after fixation of their pay in the pay scale prescribed within six months from the date of the order.

The respondent is directed to pay to each of the complainant Rs.1,00,000/- by way of compensation and Rs.10,000/- towards costs of the proceeding and to bear its own costs.”

4. The bone of contention of the learned Senior advocate Mr. Dixit for the petitioner is to the effect that the petitioners were engaged purely on contractual basis to work as Telephone Operators and no employer-employee relationship ever existed between the petitioner and them. He would submit that no post of Telephone Operator was ever in existence and available in the petitioner establishment. The employees of the petitioner are governed by special service regulations. The respondents were never appointed pursuant to such regulation. There was no post, no public advertisement. Though couple of posts were created for its establishment at Parli-Vajinath in the year 1996, where the respondents have been working, those were abolished in the year 2007. No regular recruitment process was ever undertaken to fill the two posts. Since there is no question of any post being available, there cannot be any question of petitioner resorting to any unfair labour practice.

5. He would further submit that the direction under challenge is clearly in violation of the decision of the Supreme Court in the case of **Secretary, State of Karnataka and Ors. Vs. Umadevi and Ors.; AIR 2006 SC 1806** and the decision of the Division Bench of this Court in the matter of **State of Maharashtra and Anr. Vs. Pandurang Sitaram Jadhav ; 2008 (5) ALL M.R. 497** and the subsequent judgment of the Supreme Court in the matter

of **Maharashtra State Road Transport Corporation and Anr. Vs. Casteribe Rajya Parivahan Karmchari Sanghatna** ; (2009) 8 SCC 556. He would submit that the learned Judge of the Industrial Court has clearly misdirected himself by the observations in the case of **M.S.R.T.C.** (supra) and particularly paragraph No.26 wherein it merely observed that the decision in the case of **Umadevi** (supra) does not denude the Industrial and Labour Courts of their powers to grant permanency to the workers who have been victims of unfair labour practice. It clearly overlooked the fact that there was no clear sanctioned post and vacancy so that the respondents could get regularized.

6. Per contra, the learned advocate for the respondents vehemently submits that the respondents were initially appointed as Telephone Operators through a contractor Mr. S.N. Bhosale. From 04.10.1986 the petitioner entered into a contract with respondent Ayachit and through him the other respondent Sonar started working as Telephone Operator. The petitioner had bought a PBX Exchange machine and the respondents were engaged to operate it round the clock. They were working under the direct supervision of the officers of the petitioner. Each one of them was working in a 12 hour shift. A proposal for their regularization was favourably considered by their superior and was forwarded for being considered by the petitioner. Even the two posts were created in the year 1996. However, at no point of time, they were considered for regular appointments to the post of Telephone Operators. The posts were subsequently abolished in the year 2007 and all these

circumstances clearly indicated that the petitioner resorted to an unfair labour practice in terms of Item 6 in Schedule IV of the ULP Act. The learned Judge while passing the impugned order has clearly taken into consideration these facts and circumstances and rightly reached the conclusion and issued the direction for regularization of the respondents.

7. Lastly, the advocate for the respondents would submit that in several matters the petitioner has suffered similar orders holding it guilty of resorting to unfair labour practice and direction to grant benefit of permanency which decisions have been affirmed by the Supreme Court.

8. To begin with, it would be apt to bear in mind the fact that so far as the facts are concerned, there is not much of a dispute between the two sides, which have been rightly summarized by the learned judge in the judgment under challenge in paragraph Nos.19 and 20. Admittedly, no post of Telephone Operator was in existence when the respondents started working as telephone operators to operate the PBX Exchange machine under a contract with Mr. Bhosale in the year 1982. The arrangement continued upto the year 1984. Since thereafter the petitioner entered into contract with respondent Ayachit and both the respondents thereafter continued to do the job as telephone operators. However, at no point of time, any such post was in existence at Parli - Vajjnath where they were working except for the period 1996 to 2007. Though they were discharging duty round the clock under the direct supervision and control of the officers of the petitioner, since there were no post upto the year 1996 they could not be

appointed against such posts. It also stands admitted that two posts of telephone operators were sanctioned for the petitioner's office at Parli-Vajinath and were existence since 1996 to 2007 but not thereafter as the posts were abolished. As can be appreciated from the reasoning given in the judgment under challenge, this fact of availability of two posts in the interregnum has weighed with the learned Judge in concluding that the petitioner having engaged in unfair labour practice as defined under Item 6 of Schedule IV of the ULP Act. He has therefore concluded that the petitioner under a camouflage contract, with an intention to deny the benefit of permanency engaged respondents from time to time.

9. Though at the first blush it does appear that in spite of two posts being available to the petitioner of telephone operators from 1996 to 2007, it had deprived the respondents of the benefit of the permanency by regularizing them against the said posts, there is no dispute about the fact that right from the year 1982 up to the year 1996 no such post was available and none was available even after 2007. There is no material/evidence to demonstrate that the petitioner had created those two posts but abolished them with some ulterior motive to deny any conferment of permanency benefits to the respondents. The fact remains that it is only for some temporary period that, perhaps, an attempt was made to create two permanent posts of telephone operators but no recruitment process was ever undertaken to fill in those two posts by following the service regulations which are applicable to the petitioner establishment service regulations

framed under Section 79(c) of the Electricity (Supply) Act 1948 viz. the Maharashtra State Electricity Board Classification and Recruitment Regulations, 1961.

10. It is in view of such state of affairs, the decision in the matter of **Umadevi** (supra) would be squarely applicable. Certainly, in the case of Umadevi a distinction was made between the appointments or selections which are merely irregular and those which are illegal. However, such a distinction is absolutely irrelevant for the matter in hand in as much as, no such contingency arises to consider as to if the appointments of the respondents can be said to be either irregular or illegal. Admittedly no such post of telephone operator on which they were working was in existence except during the period of 1996 to 2007, whereas they have started working as such since the year 1982 under a contractor Mr. Bhosale or since 1984, independently. Since no such post was in existence there was no question of any recruitment to those posts under the service regulation (supra). As a corollary, if there were no such posts there was no question of petitioner having engaged them with an intention to deny them the benefit of permanency which is a *sine qua non* for constituting unfair labour practice under Item 6 of Schedule IV of the ULP Act.

11. Much emphasis has been placed in the observation in the matter of Umadevi in paragraph No.44 which reads thus:

“44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra), and B.N. Nagarajan (supra), and referred to in

paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.”

12. A bare perusal of these observations would clearly indicate that pursuant to the distinction made in the earlier part of the judgment between irregular and illegal appointments it was held that as a one time measure the irregular appointments where the employees have continued to work for 10 years or more sans any order of the court or tribunal can be regularized and the direction was given to the Union, the State Governments and their instrumentalities to take steps. Therefore, *ex facie* the case of the respondents is not at all covered by such direction in the matter of **Umadevi** (supra).

13. The learned Judge in the judgment under challenge has referred to the decision in the case of **M.S.R.T.C.** (supra) which in a way

appears to create an exception to the directions in **Umadevi's** case. Relying upon the observations in the paragraph No.26 in the case of **M.S.R.T.C.** (supra) the learned Judge has observed that **Umadevi** does not denude the Industrial and Labour Courts of their statutory powers under Section 30 read with Section 32 of the ULP Act to order permanency to the workers who are victims of unfair labour practice.

14. Suffice for the purpose to note that it is not the question as to if in a given case the Labour and Industrial courts have powers under Section 30 read with Section 32 of the ULP Act to grant permanency. The question is as to if in the absence of any post such a direction for conferment of permanency benefits can be issued. A careful reading of the decision in the case of **M.S.R.T.C.** (supra) would clarified that creation of posts does not lie within the domain of judicial function which pertains to the executive and no such permanency can be granted by the Court where no posts exists.

15. Pertinently in the case of **U.P. Power Corporation Ltd. Vs. Bijli Mazdoor Sangh (2007) 5 SCC 755** it was held that the decision in the case of **Umadevi** was applicable also to the Industrial Tribunals and Labour Courts. Subsequently in the matter of **Hari Nandan Prasad and Anr. Vs. Employer I/R to Management of Food Corporation of India and Anr.; (2014) 7 SCC 190** it was observed by referring to the decisions in the case of **M.S.R.T.C.** and **U.P. Power Corporation** (supra) as under :

“39. On a harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularisation only

because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularisation would be impermissible. In the aforesaid circumstances giving of direction to regularise such a person, only on the basis of number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service which is an anathema to Article 14 of the Constitution. Further, such a direction would not be given when the worker concerned does not meet the eligibility requirement of the post in question as per the recruitment rules. However, wherever it is found that similarly situated workmen are regularised by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularisation in such cases may be legally justified, otherwise, non-regularisation of the left-over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. Thus, the industrial adjudicator would be achieving the equality by upholding Article 14, rather than violating this constitutional provision.”

As can be gathered, the whole emphasis has been placed on the availability of posts as a precursor for issuing directions for regularization. In the absence of which no such directions can be issued.

16. It is in view of such a legal position, when admittedly except for few years in between as mentioned herein above, no post of Telephone Operator has ever been in existence, it cannot be said that the petitioner engaged in unfair labour practice as defined under Item 6 of Schedule IV of the ULP Act and the Industrial Court could not have granted any such declaration and obviously could not have issued any direction to confer permanency benefit to the respondents. The learned Judge has merely referred to the decision in the case of **M.S.R.T.C.** (supra) without adverting to subsequent decision in the case of **U.P Power Corporation** (supra).

17. True it is that in few other matters the petitioner has suffered such orders which have been confirmed up to the Supreme Court, however, these cannot be precedents unless it is pointed out that all such employees were similarly situated like the respondents herein. No such decision pertaining to any telephone operator who has been granted benefit of permanency is placed on the record. The instances that are placed on record are pertaining to few other posts like Peon, Safi kamgar etc. Obviously those decision can certainly be distinguished on facts.

18. Be that as it may, the fact remains that in view of discussion, the learned Judge has clearly erred in giving a declaration regarding commission of unfair labour practice and granting the relief of directing the petitioner to consider the case of the respondents for permanency when no such post is in existence. The impugned judgment is therefore clearly illegal and liable to be quashed and set aside.

19. The Writ Petitions are allowed. The impugned judgment and order is quashed and set aside and the complaints of the respondents are dismissed.

20. The Rule is made absolute.

(MANGESH S. PATIL, J.)