

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14389 OF 2018

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| <p>1. Manoj Uttam Masalkhamb,
Age about 25 years,
Occ. Jr. Civil Engineer,
Working in the Solapur
Municipal Corporation,
Solapur.</p> <p>2. Raghavendra Krishna Gaidhankar,
age about 32 years,
Occ: Jr. Civil Engineer,
Working in the Solapur Municipal
Corporation, Solapur.</p> | } | <p>...Petitioners</p> |
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Versus

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| <p>1. The State of Maharashtra
Through its Principal Secretary,
Urban Development Department,
Mantalaraya, Mumbai – 400 032.</p> <p>2. The Municipal Commissioner,
Solapur Municipal Corporation,
Solapur.</p> | } | <p>...Respondents</p> |
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Mr. S.G. Kudle for the Petitioners.
Mr. R.M. Shinde, AGP, for the Respondent – State.
Mr. I.M. Khairadi for Respondent No. 2.

CORAM : PRASANNA B. VARALE &
S.M. MODAK, JJ.

RESERVED ON : DECEMBER 23, 2021.
PRONOUNCED ON : MARCH 29, 2022.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. Rule. Rule made returnable forthwith. With the consent of learned Counsel appearing for the respective parties, matter is taken up for hearing and disposal,

at admission stage.

2. The Petitioners are before this Court with following principal prayer :

b) This Hon'ble Court be pleased to issue the writ of mandamus, orders, directions or any other order, directions or appropriate writ in the nature of mandamus directing the Respondents herein and more particularly Respondent No. 2 herein to regularize the Petitioners' services for the post of Junior Civil Engineers with effect from 1.1.2013 thereby granting them regular pay scale attached with the posts in question holding that Petitioners were appointed in pursuance of the Government Resolution dated 2.8.2011 so as to fill in the backlog of reservation that too by regular selection committee as contemplated under Section 51 & 54 of BPMC Act, 1949 and hence the Petitioners are entitled to continue in the present posts as a matter of right and accordingly this Hon'ble Court further be pleased to issue the necessary directions to the Respondent No.2 herein to release the Petitioners' arrears of salaries dues and payable w.e.f. 1.1.2013 till date thereby adjusting the earlier honorarium amount paid to the Petitioners and the said arrears amounts in the question due and payable to the Petitioners be paid by Respondent No.2 within a period of one week or as early as possible.

3. Certain necessary facts giving rise to the present Petition can be summarized as under:

The Petitioners belonging to scheduled caste

category and validity certificate issued in favour of them by the competent authority are placed on record at Exhibit 'A' collectively. It was a common knowledge that the State of Maharashtra was unable to fill up the posts by making necessary provisions for the scheduled castes candidates and such backlog of the candidates was on rise.

Considering this aspect, the State of Maharashtra thought it fit to initiate special drive for filing the backlog of scheduled caste candidates, issued Government Circular / Notification dated 02nd August, 2011. Thus, it can safely be said that the State Government was desirous of filling up the posts by making appointment of suitable candidates belonging to scheduled caste category as early as possible.

Mr. Kudle, learned Counsel appearing for Petitioners submitted that on the same lines steps were taken by the local bodies. Respondent No. 2 – Solapur Municipal Corporation decided to fill up various posts on the backdrop of a constant request made in various meetings of the corporation. It was also decided to issue an advertisement for selecting the suitable candidates by adopting walk-in interview method. The

necessary note was submitted to the Commissioner and Assistant Commissioner of Solapur Municipal Corporation through Office of Superintendent, General Administration Department. The copy of the same is placed on record at Exhibit 'D'.

4. It would be useful for our purposes to refer to certain other points in the note namely, financial limit imposed by the State of Maharashtra on the Corporation. The note makes it also clear that in view of the financial limits and non grant of approval, posts were not filled in the Corporation for quite sometime. The note also states that post of Junior Engineer falls under the category of essential services and as such, there is dying need for filling up this posts initially on contract basis for a period of three years and after completion of period of three years, the employee would be entitled initially to the basic pay. The note also states that considering the imposition of financial limit the Commissioner of the Corporation in his discretion may grant approval for creation 14 posts as per reservation and candidates be initially appointed for period of six months and on

assessment of the performance of candidates the period of appointment can be extended. Accordingly, an advertisement was also published. The copy of the said advertisement dated 15.09.2012 is placed on record at Exhibit 'E'.

5. The Petitioners submitted their claim by attending the walk-in interviews and a common order of 12 selected candidates was passed. Copy of the said order is also placed on record at Exhibit 'B'. As the Petitioners were having the necessary qualifications and as they were fulfilling the requisite criteria, they contested their claim and were appointed. Perusal of the order dated 31.12.2012 show that the Petitioner no. 1 is placed at Sr. No. 7 and Petitioner No. 2 is placed at Sr. No. 12. The terms and conditions of the order are also referred to including the term that the appointment of these employees is temporary for a period of six months.

6. Though, the Petitioners were initially appointed for a period of six months in the year 2012, their appointment was continued by giving extension to them. The last orders are placed on record at Exhibit

'G' dated 12.12.2017. It is submitted in the Petition that it was learnt by the Petitioners that Zonal Officer of the Corporation forwarded an intimation to the Corporation for terminating the services of Petitioners and Petitioners being aggrieved by such proposed action of the Corporation approached this Court firstly for protection of their services and secondly, for their regularization in service.

7. By order dated 17th December, 2018, the Division Bench of this Court was pleased to issue notice to the Respondents, making the same returnable on 22nd January, 2019. It seems that the reply was not filed by the Respondent – Corporation, as such, vide order dated 22nd January, 2019 two weeks time granted as a last chance to file reply. In spite of grant of two weeks, the reply was not filed as such, vide order dated 05th February, 2019 by showing displeasure the Division Bench of this court granted one week time to file reply by way of an indulgence and further observed that if reply is not filed on or before 12th February, 2019, the Respondent No. 2 shall personally remain present in this Court and to show cause as to why

action should not be taken against him for not replying notice issued by this Court. Meantime, AGP also sought time to file reply and the reply of the state was also filed. It may not be out of place to refer to another order passed by the Division bench of this Court dated March 03, 2022:

1. Heard Mr. Kudle, learned Counsel for the petitioners. None has appeared for respondents.

2. Issue notice, returnable after six weeks.

3. Since there is no representation on behalf of the respondents Municipal Commissioner, Solapur Municipal Corporation shall depute a competent officer along with the relevant record to attend the Court proceedings on the next date since we intend to finally hear the writ petition on the returnable date.

4. Mr. Kudle has taken us through the averments made in the writ petition as well as the documents relating to recruitment of the petitioners. He has also taken us through the communication of respondent No. 2 dated 12.12.2017 to contend that respondent No. 2 is raising an unreasonable condition that petitioners should not avail their legal remedy questioning treatment of their employment as contractual employment and their payment on honorary income, thereby denying them employment on regular basis. He has also referred to and placed

reliance on a decision of this Court in the case of Sachin Ambadas Dawale v/s. State of Maharashtra, 2014(2) MLJ 36 to contend that such action of the respondents would amount to exploitation of the petitioners, besides being wholly arbitrary.

5. Without expressing any opinion on merits at this stage and balancing the interest of the parties, we feel that in the interregnum respondent No.2 should ensure that petitioners are paid their current honorarium as was paid to them on 01.01.2017 till disposal of the writ petition.

8. Now considering the above referred facts, there cannot be any dispute on the factual scenario namely, the Petitioners are working with Respondent No. 2 till date and under the directions of this Court the Respondent No. 2 was bound to pay an honorarium as was paid to them on 01.01.2017 till disposal of the Writ Petition.

9. Mr. Kudle, learned Counsel appearing for Petitioners vehemently submitted that the Petitioners were having the requisite qualifications and they were complying all the necessary conditions and they were selected by Respondent No. 2 for the post of Junior Civil Engineer.

10. The Petition is opposed by Respondent No. 2 by filing reply. Learned Counsel appearing for Respondent No. 2 submitted that the Petitioners were appointed purely on temporary basis and they were paid an honorarium considering the financial limits imposed by State of Maharashtra. It is also submitted by learned Counsel that if the regularization is granted and if Corporation is required to pay the regular salary to the Petitioners, the same would result in exceeding the establishment expenses limit of 35% imposed by the State Government. It is also submitted by learned Counsel that in view of the judgment of the Apex Court, the Petitioners cannot claim regularization as they were appointed as temporary employee on contractual / honorarium basis.

11. Learned Counsel for the Petitioners vehemently submitted that Petitioners were appointed by following due procedure namely, they submitted applications along with documents and as per the requirement their claim was considered along with other candidates and as the Petitioners were suitable candidates in the opinion of Authority an appointment order though on contractual

basis was issued in favour of the Petitioners. Learned Counsel for the Petitioner further submitted that though the entry of Petitioners in services of the Corporation is on contract basis, it cannot be termed as a backdoor entry.

12. By inviting our attention to the note for filling up the vacancies by Respondent No. 2 – Corporation, Mr. Kudle, learned Counsel for Petitioners vehemently submitted that the post on which the Petitioners appointed are filling in the category of essential services. It is specifically stated by Corporation in its note that these posts are not filled for considerable length of time and compliance of the policy of the State Government under special drive, the posts were filled in and the Petitioners were appointed. Learned Counsel further submitted that the note even refer to the factual aspect that there was constant demand for filling up the posts in the Public Health Division of the Corporation and Public Health Division is undisputadely an essential service of any Corporation. Thus, Respondent No. 2 cannot submit before this Court the entry of the Petitioners is a

backdoor entry.

13. Learned Counsel for Petitioners invited our attention to the minutes of meeting wherein the subject of appointment of Petitioners and other appointments on the backdrop of walk-in interview dated 04.10.2012 were placed before the Corporation. The copy of the minutes of meeting also placed on record at Exhibit P-4.

14. Perusal of copy of minutes clearly show that walk-in interviews were conducted by a panel of members including the Commissioner of Corporation as Chairperson, Assistant Commissioner as Secretary, Accounts Officer of Corporation as Member and the representative of scheduled caste category, The District Welfare Officer, Assistant Director, Self Employment, and there were other invitees and subject experts etc. Perusal further show that walk-in interview was attended by 38 candidates and considering the academic qualification, requisite expertise, general knowledge and subject knowledge, six candidates were selected. Needless to state that the Petitioners were out of these six selected candidates. Five candidates were kept in waiting list and six were not

selected as they have secured less marks than the qualifying marks.

15. The reply filed on behalf of State Government through Shri. S.J. Moghe, Deputy Secretary refers to financial limits imposed by the State Government and it would be useful for our purposes to refer to certain material statements reflected in the affidavit-in-reply and the same reads thus:

4. I say and submit that, this policy is made applicable to all Municipal Corporations vide Government Resolution dated 04th May, 2006. By the said Government Resolution classification of Municipal Corporation is made, their staffing pattern is decided and certain guidelines are issued. In sub-para (1) of para 8 of the said Government Resolution, it is clearly stated that each Corporation should follow the limit of Maximum 35% limit is that 65% of amount of income should be available for development work within the area of Corporation. Now Solapur Municipal Corporation is having 42% establishment expenditure and so recruitment is not allowed unless the measures are taken to bring the expenditure below 35%.

6. ...

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As such Government will not relax the condition of 35% establishment expenditure

in this case for filling the post of Junior Civil Engineers. The salary and arrears issue are to be resolved by Solapur Municipal Corporation itself.

16. In the the reply filed by the State Government, learned Counsel appearing for Petitioners submitted before this Court that action of the State Government suffers from an arbitrariness and discriminatory treatment. In support of his submissions, learned Counsel invited our attention to the documents placed on record namely, Government Circular / Notification dated 27.07.2021.

17. The perusal of the circular show that Navi Mumbai Municipal Corporation appointed certain employees on contractual basis. It was submitted to the State Government that some of the employees were appointed by not following due process but 39 officers / employees from 5 categories were appointed by following due procedures such as issuance of advertisement, selection process etc and the proposal submitted for their regularization. Perusal of circular further show that there are as many as 4 appointments as Junior Engineer, 4 appointments in Health Department

and 21 appointments are in the category of coordinators. The proposal was accepted by the State Government subject to condition that the Corporation is to maintain the financial limit of 35%.

18. Learned Counsel for Petitioners vehemently submitted that the Petitioners are also appointed by following due procedure, they were selected by panel and they have worked continuously from their date of appointment till today with certain technical breaks and as such, the Respondents cannot adopt a discriminatory treatment to the Petitioners.

19. Considering these submissions, it will not be out of place to refer to the judgment and order of the Hon'ble the Apex Court in the matter of Sheo Narain Nagar & Ors Versus State of Uttar Pradesh & Ors¹, wherein the Hon'ble the Apex Court was pleased to observe thus:

7. Learned Counsel appearing on behalf of the respondent had relied upon paragraph 44 of the decision in Uma Devi (Supra), so as to content that it was not the case of irregular appointment but of illegal

¹ Civil Appeal No. 18510 of 2017 arising out of SLP (C) No. 6183 of 2015.

appointment; there was no post available on which the services of the appellants could have been regularized and appointment were in contravention of the reservation policy also; thus, termination order was rightly issued and, in no case, the appellants were entitled for regularization of their services.

8. When we consider the prevailing scenario, it is painful to note that the decision in Uma Devi (Supra) has not been properly understood and rather wrongly applied by various State Governments. We have called for the data in the instant case to ensure as to how many employees were working on contract basis or ad-hoc basis or daily-wage basis in different State departments. We can take judicial notice that widely aforesaid practice is being continued. Though this Court has emphasised that the incumbents should be appointed on regular basis as per rules but new devise of making appointment on contract basis has been adopted, employment is offered on daily wage basis etc. in exploitative forms. This situation was not envisaged by Uma Devi (Supra). The prime intendment of the decision was that the employment process should be by fair means

and not by back door entry and in the available pay scale. That spirit of the Uma Devi (Supra) has been ignored and conveniently over looked by various State Governments /authorities. We regretfully make the observations that Uma Devi (Supra) has not be implemented in its true spirit and has not be followed in its pith and substance. It is being used only as a tool for not regularizing the services of incumbents. They are being continued in service without payment of due salary for which they are entitled on the basis of Article 14, 16 read with Article 34 (1)(d) of the Constitution of India as if they have no constitutional protection as envisaged in D.S. Nakara v. Union of India, AIR 1983 SC 130 from cradle to grave. In heydays of life they are serving on exploitative terms with no guarantee of livelihood to be continued and in old age they are going to be destituted, there are being no provision for pension, retiral benefits etc. There is clear contravention of constitutional provision and aspiration of down trodeen class. They do not have equal rights and to make them equals they require protection and cannot be dealt with arbitrarily. The kind of treatment meted out is not only bad but equally

unconstitutional and is denial of rights. We have to strike a balance to really implement the ideology of Uma Devi (Supra). Thus, the time has come to stop the situation where Uma Devi (Supra) can be permitted to be flouted, whereas, this Court has interdicted such employment way back in the year 2006. The employment cannot be on exploitative terms, where as Uma Devi (Supra) laid down that there should not be back door entry and every post should be filled by regular employment, but a new device has been adopted for making appointment on payment of paltry system on contract basis/adhoc basis or otherwise. This kind of action is not permissible, when we consider the pith and substance of true spirit in Uma Devi (Supra)

10.

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The appellants were required to be appointed on regular basis as a one-time measure, as laid down in paragraph 53 of Uma Devi (Supra). Since the appellants had completed 10 years of service and temporary status had been given by the respondents with retrospective effect in the 2.10.2002,

we direct that the services of the appellants be regularized from the said date i.e. 2.10.2002, consequential benefits and the arrears of pay also to be paid to the appellants within a period of three months from today.

20. Considering above aspects of the matter, we are of the opinion, that there is merit in the submissions of learned Counsel appearing for Petitioners. Though, Respondents opposed the Petition on the ground of Petitioners entry is backdoor, we are unable to accept this submission. On the contrary, learned Counsel for Petitioners was justified in submitting that the appointments of the Petitioners are not only by following due procedure but also by going through the selection test contesting with other candidates.

21. There is also merit in the submissions of learned Counsel for Petitioners that the services of the Petitioners falls in the category of essential services and in the proposal of the Corporation itself it is stated that there was constant demand and need of filling up these posts. It is also part of record that

in the proposal for filing up the posts the Corporation states that though initial appointment would be for temporary and for six months, considering the performance of the Petitioners the Corporation can extend period and admittedly the period of these Petitioners was extended from time to time and as per the order of the Division bench dated March 03, 2020, the Respondent – Corporation was also directed to pay the honorarium til the final disposal of the Petition. Thus, till date the Petitioners are working with the Corporation on honorarium basis. There is nothing on record to say that the services of the Petitioners are unsatisfactory. Learned Counsel for Petitioners was also justified in submitting before this Court that the State Government in the case of Navi Mumbai Municipal Corporation approved the proposal for regularization.

22. Considering all these aspect, the Petition is partly allowed. Though, the Petitioners have claimed for their regularization from the date of their appointment, in our opinion, the Petitioners would be entitled for such regularization from January, 2019 and would be entitled for basic pay as consolidated pay in

view of document placed on record at Exhibit 'D' and particularly clause 1 and same reads thus:

"उपरोक्तप्रमाणे अत्यावश्यक सेवेतील पदे आजला भरावयाची झाल्यास ती मा.म.न.पा.ठराव क्र. २१२ दि.१०/१२/२००४ अन्वये म.न.पा.आस्थापनेवरील रिक्त पदे एकवट वेतनावर नियुक्तीच्या तारखेपासून तीन वर्षाकरिता व तीन वर्षांनंतर सदर पदाचे वेतनश्रेणीनुसार नेमणेस ठरावाच्या दिनांकापासून पुढे नियुक्त करणा-या सेवकांस लागू करणेत येत असलेबाबत ठराव पारित झालेला आहे. त्या पदाच्या मुळ आस्थापनेवरील मंजूर वेतनश्रेणीमधील प्रारंभिक मुळ वेतन हेच एकवट वेतन राहिल. असे आदेश ठरावाच्या अनुषंगाने पारित करण्यात आलेले आहेत."

23. We direct the Respondent No. 2 – The Municipal Commissioner, Solapur Municipal Corporation, Solapur, to grant benefits to the Petitioners as regular employees from January, 2019 and any other consequential benefits in accordance with law as expeditiously as possible.

24. We further make it clear that the Petitioners be granted continuity of services for other purposes except monetary purposes from the date of their initial appointment.

25. Rule made absolute in above terms. With these directions, the Writ Petition is disposed of.

(S.M. MODAK, J.)

(PRASANNA B. VARALE, J.)