

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7805 OF 2010
WITH
CIVIL APPLICATION NO. 1173 OF 2021

The Divisional manager,
Forest Development Corporation of Maharashtra
Ltd., Division Kinwat,
Taluka- Kinwat, District- Nanded.

...PETITIONER

[Orig. respondent in
Complaint ULP No. 18/2005]

VERSUS

Pramod S/o Vasant Rao Ganojwar
Age:- Major, R/o. At post Sawali
Tq: Ghatanji, District- Yawatmal

...RESPONDENT

[Orig. complainant in
Complaint ULP No. 18/2005]

ALONG WITH
WRIT PETITION NO. 7838 OF 2010
WITH
CIVIL APPLICATION NO. 1174 OF 2021

The Divisional manager,
Forest Development Corporation of Maharashtra
Ltd., Division Kinwat,
Taluka- Kinwat, District- Nanded.

...PETITIONER

[Orig. respondent in
Complaint ULP No. 17/2005]

VERSUS

Shaikh Abdul Saleem S/o Abdul Jabbar
Age: Major, R/o at Kinwat
Tq. Kinwat, District- Nanded.

...RESPONDENT

[Orig. complainant in
Complaint ULP No. 17/2005]

ALONG WITH
WRIT PETITION NO. 2408 OF 2023

Shaikh Abdul Saleem Abdul Jabbar

Age: 53 years, Occ- Nil,
R/o. Shivaji Nagar, Kinwat
Taluka; Kinwat, Dist- Nanded

...PETITIONER

VERSUS

1. Divisional Manager,
Forest Development Corporation
of Maharashtra Ltd., Division at
Kinwat, At Post Taluka- Kinwat
Dist. Nanded.
2. Range Forest Officer,
Range Forest Office, Kinwat
Forest Development Corporation of
Maharashtra, at post- Jaldhara,
Taluka- Kinwat, Dist. Nanded.

...RESPONDENTS

ALONG WITH
WRIT PETITION NO. 2409 OF 2023

Pramod S/o Vasant Rao Ganojwar
Age: 53 years, Occ- Nil,
R/o. At Post- Tad- Swali,
Taluka; Ghatanji, Dist- Yawantmal

...PETITIONER

VERSUS

1. Divisional Manager,
Forest Development Corporation
of Maharashtra Ltd., Division at
Kinwat, At Post Taluka- Kinwat
Dist. Nanded.
2. Range Forest Officer,
Range Forest Office, Kinwat
Forest Development Corporation of
Maharashtra, at post- Jaldhara,
Taluka- Kinwat, Dist. Nanded.

...RESPONDENTS

.....

Mr. Shailendra S. Kulkarni, Advocate for the petitioner in Writ
Petitions No. 7805/2010 and 7838/2010.

Mr. A.M. Gaikwad, Advocate for the respondent in Writ Petitions No. 7805/2010 and 7838/2010.

Mr. Avinash D. Hande, Advocate for the petitioners in Writ Petitions No. 2408/2023 and 2409/2023.

Mr. Shailendra Kulkarni, Advocate for respondent No. 1 in Writ Petitions No. 2408/2023 and 2409/2023.

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON: 25th APRIL, 2023

PRONOUNCED ON: 4th MAY, 2023

JUDGMENT:

1. Rule. Rule made returnable forthwith. Heard finally with the consent of parties.

2. For the sake of convenience the litigating parties are hereinafter referred to as, petitioners as 'respondents' and respondents as 'complainants'.

3. All these petitions challenge the common order of the Labour Court, Nanded, thereby allowing the complaints filed by the complainants and setting aside termination order issued to them and directing their reinstatement with continuity of service and 50% back wages. The orders passed in favour of complainants were challenged by the respondents by filing Revision Application (ULP) No. 42/2009 and Revision Application (ULP) No. 43/2009, which were partly allowed and order dated 05.09.2009 in Complaint No. 17/2005 and 18/2005 passed by

Labour Court, Nanded, was quashed and set aside to the extent of 50% of back wages as mentioned in clause no. 3.

4. Since, facts in all these petitions are similar, facts of Writ Petition No. 7805/2010 are taken up for consideration.

5. Complainants filed Complaint (ULP) No. 17/2005 and Complaint (ULP) No. 18/2005 claiming that complainant Shaikh Abdul Saleem Abdul Jabbar was appointed as Office Assistant at Jaldhara Range office w.e.f. 01.03.1989. Complainant Pramod Ganojwar was appointed on 16.05.1988 at Kinwat Range Office on the post of Field Office Assistant. They both were getting daily wages of Rs. 53.80 per day. They claimed that since the date of their appointment they were continuously working without any break and they have completed 240 days of service in each calendar year till the date of their termination. Complainants acquired status of permanent employees in view of the provision of section 4(C) of the Model Standing Orders. Respondents, so as to deprive them from getting permanency benefit, terminated their services by order dated 31.01.2001 w.e.f. 05.02.2001 on the ground of lack of availability of work. They claimed that Regional Manager of the respondents had directed to retrench services of surplus watchmen working on the field and there

were no directions to terminate the services of Office Assistants. By ignoring the fact that the complainants were appointed as Clerk and not as workers on field and by ignoring the seniority list, the complainants were terminated. The complainants accepted the retrenchment compensation under protest. Complainants further claimed that prior to their termination, they had filed complaint before Industrial Court, Jalna, seeking permanency benefit and during the pendency of said complaint their services were illegally terminated in violation of Section 33 of the Industrial Disputes Act, 1947 (for short 'ID Act'). Since, no permission was sought from the Industrial Court, the action of termination of services amounts to an unfair labour practice.

6. Respondents strongly opposed the complaint. They filed written statement contending that by terminating services of the complainants they have not committed any unfair labour practice. They admitted that as there were no sanctioned posts, complainants were engaged on daily wages of RS. 53.80 per day. They denied that complainants were engaged as Office Assistants. They claimed that procedure under section 25-F of the ID Act, was followed at the time of termination of complainants. It is further contention that considering the

financial status of respondents, they proceeded to terminate 84 labourers by following due procedure. Complainants were engaged as per the need of work and they were temporary employee, hence, they were rightly terminated.

7. Labour Court after recording evidence and hearing the parties allowed the complaints and set aside the termination orders and directed reinstatement of complainants with continuity of service and 50% back wages from the date of their termination. Being aggrieved by decision of Labour Court, respondents filed Revision Application (ULP) No. 42/2009 and Revision Application (ULP) No. 43/2009. Both the revisions were partly allowed and order dated 05.09.2009 in Complaint No. 17/2005 and 18/2005 passed by Labour Court, Nanded, was quashed and set aside to the extent of 50% of back wages as mentioned in clause no. 3. Respondents are aggrieved by both the orders passed in favour of complainants.

8. Learned advocate for the petitioners/respondents assailed the impugned order on various grounds. He submits that the appointment of complainants was not done by following due process of law. In view of decision of Secretary, *State of Karnataka and others vs. Umadevi*, (2006) 4 SCC 1, he submits

that both the Courts have erred in passing the orders in favour of complainants. He further submits that the complainants were appointed under EGS scheme and they were retrenched by following due process of law. He further submits that mere completion of 240 days service in each calendar year does not create any right in favour of complainants to hold the post. He submits that the complainants were appointed as casual/daily wage worker under the scheme since 1989 and they were terminated by following due procedure by paying them retrenchment compensation. Hence, the Labour Court has erred in holding that there was unfair labour practice on the part of respondents. Further submission is seniority list is not challenged by the complainants. In the seniority list, complainants were junior most. He further argued that complaint ULP filed by complainants under section 28 before the Industrial Court, seeking permanency benefit, does not amount to industrial dispute, hence, section 33(1)(A) has no application to the facts of the present case. The Courts therefore have erred in holding that said provision is not followed. He submits that though compensation was offered to the complainants and they have accepted the compensation under protest, the amount of compensation is not challenged by complainants. So also,

seniority list is not challenged. Complainants have not claimed that section 25-F of the ID Act was violated. Since, the complainants have accepted the compensation, they were not entitled for relief. In support of his submissions he relied on The Government of Tamil Nadu and Anr., vs. Tamil Nadu Makkal Nala Paniyalargal and others, Civil Appeal No. 10563-10569 of 2017, Uttam Baban Abhang vs. Durwani Karmachari Sahakari Pathsanstha Maryadit, Ahmednagar, Writ Petition No. 1250 of 2015 and The Divisional Manager, Forest Development Corporation of Maharashtra Ltd Divisions Kinwat, Tq. Kinwat, District- Nanded vs. Shri. Chandoba Janaji Gikwad, Writ Petition No. 5761 of 2010. He therefore submits that the writ petitions are deserve to be allowed by setting aside the impugned orders.

9. Per contra, learned advocate for the complainants submits that the complainants were appointed in the year 1988-89 on the post of Office Assistant and they were continued till 31.01.2001 i.e. for 12 years. On 24.07.2000 they filed complaint ULP seeking permanency and regularization. In view of their termination, said complaint was withdrawn on 06.10.2003 and thereafter present complaints are filed. He further submits that the complainants were appointed prior to the EGS scheme and

therefore it cannot be claimed that they were appointed in the scheme. Respondents have violated Rule 82 of the Industrial Disputes (Maharashtra) Rules, 1957 (for short 'said Rules') as on the date of which seniority list was published on the same day the termination orders were issued. He supported both the impugned orders. He further submits that this petitions were dismissed in default on four occasions and same were restored. He therefore submits that there is no substance in the writ petitions filed by the respondents and same are liable to be dismissed.

10. In reply to the arguments advanced in writ petitions wherein back wages are challenged, he submits that the Labour Court has arrived at a finding that termination orders are victimization and they were issued malafide and therefore, award of back wages is justified in the facts of the present case.

11. Heard the learned advocate for the petitioners and learned advocate for the respondent at length. Perused the memo of writ petition, annexures thereto, impugned order and the citations relied upon by both the parties.

12. Admittedly, complainants joined service in the year

1988-89. It is also an admitted position on record that after rendering about 12 years of service complainants were retrenched, though by offering compensation, which they have accepted under protest. Admittedly, the complainants were working as Office Assistants. Mr. Imtiaz Arshad, Assistant Manager, Forest Project Division, Kinwat, was examined by respondents in support of their case. He has given following admissions:

(i) The scheme of Maharashtra Forestry Project was started in the year 1994 for new plantation. Daily wages workers were employed for this scheme.

(ii) He has further admitted that the complainants were shown in the category of Office-Assistant. He further stated that the Regional Manager has issued the Circular to remove the surplus employees of plantation work.

(iii) He has further admitted that there were no direction by the Managing Director to remove the office Assistants. He further admitted that both the complainants were doing the clerical job since 1989 before introducing the Maharashtra Forestry Scheme.

13. The reason given by the respondents in the termination order is that since the project Maharashtra Vaniki is

closed, the employees engaged in the said project are terminated. Indisputably, the complainants were doing the duty on clerical grade, even prior to the introduction of said scheme. Therefore, their services could not have been terminated. If the Regional Manager has issued circular to remove surplus workers, there was no occasion to remove the complainants.

14. As per Rule 81 of said Rules, the respondents are duty bound to publish/circulate seniority list at least seven days prior to the termination. In the present case, admittedly, the seniority list is published on the date of issuance of termination orders, therefore, there is clear breach of Rule 81 of said Rules.

15. Fact remains that no separate seniority list of the employees working on field and working in the office have been prepared by the respondents. Consolidated seniority list of the workers working in the field and workers working in the office is prepared. Probably, this is the reason why termination orders were issued to the complainants.

16. Since, the respondents have followed procedure section 25-F of the ID Act, while retrenching the complainants and have paid retrenchment compensation to complainants, it is

to be held that the complainants have been in continuous service of respondents and they have completed 240 days of service.

17. It is admitted by the witness of the respondents that complainants had filed complaint before the Industrial Court seeking regularization and during the pendency of said complaints, termination orders were issued to them. He further admitted that he did not feel it necessary to obtain permission of the Industrial Court, before terminating the service of the complainants. By relying on Executive Engineer P.W.D. vs. P.M. Malode, 2002 II CLR 113, the Labour Court has held that it was the duty of the respondents at least to inform the Industrial Court before terminating services of the complainants. Said omission on the part of the respondents amounts to violation of Section 33(1)(a) of ID Act.

18. By relying on Uttam Abhang (supra), the learned advocate for the respondents has assailed the aforesaid finding of the Labour Court. In Uttam Abhang (supra) learned Single of this has held:

"29. As such, a ULP Complaint filed under the State Act would be tenable before the Industrial Court and not before the Industrial Tribunal under the Central Act. It is in the

backdrop of the phraseology used in Sections 33 and 33A that the pendency of proceedings before the Conciliation Officer, Board, Arbitrator, Labour Court, Tribunal or National Tribunal would attract and the applicability of Sections 33 and 33A in relation to an "Industrial Dispute" which is pending before the Conciliation Officer or the authority as is provided under Section 33 of the Act. Naturally, pursuant to entertaining a Complaint under Section 33A, an award can be delivered by the Industrial Tribunal, and which is submitted to the appropriate Government for publication as per the provisions of the Central Act.

30. In the light of the provisions in the State Act and the provisions of the Central Act, as have been discussed in the foregoing paragraphs, I find that the Industrial Court under the State Act operates in a different field vis-a-vis the Industrial Tribunal under the Central Act.

33. In my view, therefore, considering the definitions of the Conciliation Officer, Labour Court, Tribunal or National Tribunal and the scheme for dealing with an Industrial Dispute under the Central Act, Section 33 would not be attracted with regard to a pending complaint under the State Act before the Labour Court or the Industrial Court, constituted under Sections 4 and 6 of the State Act.

34. As such, the protection to an employee, by keeping his conditions of service unchanged under certain circumstances during the pendency of proceedings, as is provided for under Section 33 of the Central Act, would not be available to a Complainant in a pending Complaint (ULP) before the Industrial Court

under the State Act."

19. In view of above observations, said finding recorded by the Labour Court and confirmed by the Industrial Court cannot be sustained.

20. Next argument of the respondents that there are no sanctioned posts as the scheme is closed and therefore, direction of reinstatement is unsustainable. In support of said submission he relied on the Government of Tamil Nadu (*supra*), wherein it is held that:

"47. There cannot be a quarrel with the proposition that the Courts cannot direct for creations of posts. In the case of Divisional Manager Aravali Golf Club and Another Vs. Chander Hass and Another, it has been held as under:-

"15. The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and the first appellate court to create the posts of tractor

driver and regularise the services of the respondents against the said posts cannot be sustained and are hereby set aside.”

47. Later, in Maharashtra State Road Transport Corporation and Another Vs. Casteribe Rajya Parivahan Karamchari Sanghatana, this Court held as under:-

“41. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the courts.”

51. In the absence of any further extension been granted, at least there was no right in favour of either of the person engaged to seek further continuance under the scheme thereafter.

53.they have not gone through the process of selection as provided under their respective rules and were allowed to continue on ad-hoc basis for almost more than a decade. This Court deprecated such practice but as one time measure permitted the Government to regulate such employees who are working against the sanctioned post and permitted by the government without intervention of the Court as referred to under Para 53 of the judgment.

55..... In the instance case, the respondents were never appointed in the establishment of the Government against a regular sanctioned post, in the absence

whereof, judgment may be of no assistance.

58. This Court, in a recent judgment in State of Gujarat and Others (supra) has considered the view expressed by us in paras 10 and 11 as follows:-

"10.The posts on which the respondents were appointed and working were not the sanctioned posts in any regular establishment of the Government.

11..... Therefore, when the respondents were appointed on a fixed term and on a fixed salary in a temporary unit which was created for a particular project, no such direction could have been issued by the Division Bench of the High Court to absorb them in Government service and to regularise their services. The High Court has observed that even while absorbing and/or regularising the services of the respondents, the State Government may create supernumerary posts. Such a direction to create supernumerary posts is unsustainable. Such a direction is wholly without jurisdiction."

21. In the case in hand, taking into consideration the fact that complainants were working with respondents since 1988-89 and had rendered about 13 years of service on clerical post and since their appointments were prior to the implementation of the scheme, there is every reason to believe that only so as to deprive complainants from regularization/permanency benefits their names were shown in the scheme. In that view of the

matter, the above observations and ratio would not help the respondents.

22. Reliance is placed by respondents on order passed by learned Single Judge in Writ Petition No. 5761 of 2010, in support of contention that, in the case of complainants adequate compensation was awarded and same is not challenged by them and therefore they are not entitled for any relief.

23. Facts of said writ petition are different. There was a confusion as regards the date of cause of action. The reference was made to the Labour Court in respect of oral termination of the workmen working on EGS scheme. Considering the evidence in that case, this Court held that, 'there is no evidence that, as on date, whether any post of a Watchman is available. He had worked for about 13 years as watchman on daily wages and for 17 years he was out of employment.' In these facts, this Court by relying on four Supreme Court judgments awarded compensation of Rs. 40,000/- per year of service put in in lieu of reinstatement and other benefits. Hence, it is of no help to the case of the respondents.

24. So far challenge to the grant of back wages is

concerned in view of concurrent findings recorded by both the Courts that impugned termination orders were issued by way of victimization and not in good faith but in colourable exercise of powers and/or by citing false reasons, no interference is called for in the direction given by the Industrial Court.

Following observations of Supreme Court in **B.S.N.L. V. Bhurumal**, **AIR 2014 SC 1188**, supports the case of the respondents.

"23. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious."

25. Findings recorded by the Labour Court are on the

basis of evidence on record. The order passed by the Labour Court is a well reasoned order and Labour Court has rightly appreciated the evidence on record. Findings recorded by the Labour Court is based on material available on record and hence same is acceptable. The Industrial Court has upheld the findings recorded by the Labour Court. Both the Courts have recorded concurrent findings of fact. There is no illegality or perversity in the orders impugned in the present petitions. No case is made out by the petitioners to warrant interference in the extraordinary writ jurisdiction. Writ petitions being devoid of merits are dismissed.

Rule stands discharged.

26. In view of disposal of writ petitions, civil applications stand disposed of.

[NITIN B. SURYAWANSHI, J.]