

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10008 OF 2023

Balu Madhavrao Magar
Age- 51 years, Occ- Nil,
R/o. Rajwada, Post- Daulatabad,
Dist. Aurangabad.

Petitioner
[Orig. Second Party]

VERSUS

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle
1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.

2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad. Respondents
[Orig. First Party]

ALONG WITH
WRIT PETITION NO. 4484 OF 2023

Ubed Khan Wahed Khan
Age- 39 years, Occ- Nil,
R/o. Abdi Mandi, Post- Daulatabad.
Dist. Aurangabad.

Petitioner

VERSUS

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle
1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.

2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad. Respondents

ALONG WITH
WRIT PETITION NO. 4485 OF 2023

Ranjeet Vishnu Kirtikar
Age- 38 years, Occ- Nil,
R/o. Rajwada, Post- Daulatabad.
Dist. Aurangabad.

Petitioner

VERSUS

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle
1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.
2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad. Respondents

ALONG WITH
WRIT PETITION NO. 4503 OF 2023

Shrihari Gopinath Tupe
Age- 53 years, Occ- Nil,
R/o. Mujjeb Colony, Post- Daulatabad.
Dist. Aurangabad.

Petitioner

VERSUS

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle
1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.

2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad. Respondents

Mr. Uday Khonde, Advocate for the petitioner.
Mr. R.B. Bhosale, Advocate for respondents.

ALONG WITH
WRIT PETITION NO. 10053 OF 2023

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle
1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.
2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad. Petitioners
[Orig. First Party]

VERSUS

Ranjeet Vishnu Kirtikar
Age- 35 years, Occ- Nil,
R/o. Rajwada, Post- Daulatabad.
Dist. Aurangabad. Respondent
[Orig. Second Party]

ALONG WITH
WRIT PETITION NO. 10054 OF 2023

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle
1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.

2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad. Petitioners
[Orig. First Party]
- VERSUS

Balu Madhavrao Magar
Age- 48 years, Occ- Nil,
R/o. Rajwada, Post- Daulatabad,
Dist. Aurangabad. Respondent
[Orig. Second Party]

ALONG WITH
WRIT PETITION NO. 10055 OF 2023

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle
1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.
2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad. Petitioners
[Orig. First Party]
- VERSUS

Ubed Khan Wahed Khan
Age- Major years, Occ- Nil,
R/o. Abdi Mandi, Post- Daulatabad.
Dist. Aurangabad. Respondent
[Orig. Second Party]

ALONG WITH
WRIT PETITION NO. 10056 OF 2023

1. The Superintending Archaeologist
Archaeological Survey of India,
Aurangabad Circle

1st Floor, D.R. BAMU Campus,
Near Municipal Hospital,
Nandanvan Colony,
Aurangabad.

2. The Conservation Assistant
Daultabad Fort,
Archaeological Survey of India,
Aurangabad, Tq. & Dist. Aurangabad.

Petitioners
[Orig. First Party]

VERSUS

Shrihari Gopinath Tupe
Age- 35 years, Occ- Nil,
R/o. Mujjeb Colony, Post- Daulatabad.
Dist. Aurangabad.

Respondent
[Orig. Second Party]

Mr. R.B. Bhosale, Advocate for the petitioners.
Mr. Uday Khonde, Advocate for respondents.

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON: 4th SEPTEMBER, 2023
PRONOUNCED ON: 3rd OCTOBER, 2023

ORDER :

1. Since these petitions involve similar question of law and facts, they were heard together and are being decided by this common order.

2. Writ Petition Nos. 10008 of 2023, 4503 of 2023, 4485 of 2023 and 4484/2023 are filed by the workmen challenging the part of the award, thereby refusing back wages to the workmen.

3. Writ Petition Nos. 10053 of 2023, 1055 of 2023, 10054 of 2023 and 10056 of 2023 are filed by Archaeological Survey of India ("ASI" for short), challenging the awards passed in favour of workmen, thereby allowing the references and directing their reinstatement with continuity of service.

4. For the convenience, facts of Writ Petition No. 10008 of 2023 are taken into consideration.

5. At the instance of workmen, reference was initiated in the Labour Court, Aurangabad, under section 2A(2) of Industrial Disputes Act, 1947 (for short 'ID Act'). By filing statement of claim workmen claimed that he was appointed in the year 2002 at Daulatabad Fort, Aurangabad as labour. He was given work of cleaning the fort premises, cutting grass, maintaining the fort clean. He also worked on holidays and was paid overtime for it. The work allotted to the workmen was of perennial nature and he worked from 2002 to 13.12.2010, for 240 days in every calendar year. His services were discontinued w.e.f. 13.12.2010, without following procedure prescribed under section 25A, 25G of ID Act. ASI by filing written statement opposed the claim of the workmen stating that it is not an industry, therefore, reference is not maintainable. As per Office

Memorandum of Government of India, Ministry of Tourism and Cultural Department, New Delhi, dated 15.09.2013, it is held that activity of ASI does not constitute the industry for the purpose of ID Act. Reliance is placed on the decision of Central Government Industrial Tribunal cum Labour Court, Jabalpur in Case No. CGIT/LC/274/97, wherein it is held that, ASI is not a industry. Reference of order passed by this Court in Writ Petition Nos. 4483/2003 and 4484/2003 is also given to contend that, it was directed that the work should be provided as per seniority. It is claimed that the workmen is junior and the work is being provided as per seniority.

6. Labour Court, after recording evidence and hearing the parties answered the reference in the affirmative and granted reinstatement in service with continuity of service w.e.f. 13.12.2010, but did not give backwages. Workmen is aggrieved by the denial of back wages and the ASI is aggrieved by the reinstatement with continuity of service granted to the workmen.

7. Heard the learned advocate for the workmen and learned advocate for the ASI.

8. Learned advocate for the workmen submits that the

Labour Court has erred in denying back wages to the workmen without assigning any cogent reason and by ignoring the pleadings of workmen in statement of claim as well as evidence. By relying on Union of India Through its Secretary Culture and Another vs. Surendra Singh Rashtriya Adayaksha INTUC and another, 2019 SCC OnLine All 4671, he submits that ASI is an industry. He submits that, Labour Court is right in holding that the ASI is industry by relying on Chief Conservator of Forest vs. Jagannath Maruti Kondhare, 1996(2) SCC 293. He therefore, submits that by allowing the writ petitions filed by workmen, relief of back wages be given.

9. Learned advocate for the ASI on the other hand vehemently opposed the prayer of workmen. By relying on Superintendent, Department of Archaeological Survey of India & Anr. vs. Pras Nath Yadav & Anr. Civil Appeal No. 2488 of 2011 and The State of Madhya Pradesh & Ors. vs. Somdutt Sharma, Civil Appeal No. 6093 of 2021, he submits that ASI cannot be termed as industry as there is no manufacturing activity conducted at Daulatabad fort. The Labour Court has erred in relying on Bangalore Water Supply Sewerage of Board etc Vs. A. Rajappa and others, (1978) 2 SSC 213 and has erroneously held ASI as

an industry. By relying on Office Memorandum, dated 15.09.2003, he submits that ASI cannot be termed as an industry.

10. Perused the writ petition memo, annexures thereto, impugned award and the citations relied upon by both the parties.

11. This Court in earlier round of litigation, by order dated 24.03.2022, passed in Writ Petition No. 13914 of 2021 and connected matters, relegated parties back to the Labour Court with opportunity to lead evidence in support of their contention as to whether ASI is an industry or not. Pursuant to the said order, parties led their respective evidence and Labour Court by relying on *Benglore Water Supply (supra)* has held that; "*in the case in hand, a systematic activity carried on by first party with co-operation of his workmen. The services of first party with a view to satisfy human wants or wishes. Therefore, I have no hesitation to accept that first party an 'industry' defied in Section 2(j) of the I.D. Act.*"

12. On going through, the evidence led by ASI of Mr. Vilish Ramteke, Administrative Officer in the office of

Superintending Archaeologist, Archaeological Survey of India, Aurangabad Circle, Aurangabad, it is clear that he has relied on Office Memorandum dated 15.09.2003 and by relying on Bangalore Water Supply (supra) and other two decisions as well as decision of Central Government Industrial Tribunal cum Labour Court, Jabalpur in Case No. CGIT/LC/R/274/97, he has stated that ASI is not an industry. He has further stated that as per General Financial Rules, 2017, framed by Government of India, Ministry of Finance, need of casual labours is being fulfilled through outsourcing from contractor. Since 2017, no direct work is allotted by the ASI directly to the labours on daily work basis or otherwise. Since, 2017 all kind of work is allotted through consulting services providers. He has admitted in his cross examination that tourists visit throughout the year. He could not give exact revenue collection from publication of book-let of monuments. Till 2017, ASI had maintained muster roll and seniority list of the workmen as per the directions of this High Court, bench at Aurangabad.

13. It has come in the evidence of workmen that ASI is a establishment of Central Government and for visitors tickets are sold.

14. In Surendra Singh (supra), learned Single Judge of Allahabad High Court has held;

"4. So far as the question as to whether ASI falls within the definition of "Industry" under Section 2(j) of the Act, 1947, the contention of the workmen was that the maintenance of the Garden was carried out through the revenue generated from the sale of tickets to the visitors and tourists at the various sites and monuments maintained by ASI and therefore it was an organized commercial activity of ASI Department and in any case the workmen respondents were engaged in the maintenance of Gardens and monuments which was a work of a perennial nature involving their labour and manual skill and in any case the work of maintenance of Garden cannot be said to be a sole sovereign function of the Government of India. Reliance was placed on the judgment of the Supreme Court in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa reported in (1978) 2 SCC 213. The Tribunal decided the issue relying upon the judgment of A. Rajappa (supra) and held that the Garden/Horticulture Wing of the ASI was an "Industry".

5. XXX

7. So far as the first question as to whether Garden/Horticulture Department of the ASI falls within the definition of "Industry" as defined in Section 2(j) of the Act, the Supreme Court in the case of A Rajappa (supra) has held as under: "Where there is (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical), and (iii) for the production and/or distribution of goods and

services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.g. making on a large scale Prasad or food), prima facie, there is an 'industry' in that enterprise."

8. From the nature of the work done by the respondent workmen it cannot be said that the same is of a sovereign nature, therefore, I have no difficulty in holding that the Garden/Horticulture Department of the ASI is an "Industry" as defined in Section 2(j) of the Act, 1947. The management next submitted that if the respondent-workmen were claiming to have worked under the management, the burden of proof lay upon them to prove the same and not upon the management. However, the workmen relied upon the judgment of the Supreme Court in case of Director, Fisheries Terminal Department Vs. Bhikubhai Meghajibhai Chavda reported in (2010) 1 SCC 47 wherein it has been laid down by the Supreme Court that the burden to prove that the workman had worked continuously for 240 days or otherwise lay upon the management as the management alone had in its custody the entire records and the burden to prove the same cannot be thrust upon the workman as it would be difficult for him to access the records such as muster roll, seniority list etc."

I am in respectful agreement with the above view.

15. In Jagannath Kondhare (supra), it is held;

12. We may not go by labels. Let us reach the hub. And the same is that the dichotomy of sovereign and non-sovereign functions does not really exist - it would all depend on the nature of the power and manner of its exercise, as observed in para 23 of Nagendra Rao's case. As per the decision in this case,

one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such action in courts of law. It was stated by Sahai, J. that like defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State is immune from being sued in such matters. But then, according to this decision the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non sovereign power has largely disappeared.

13. The aforesaid shows that if we were to extend the concept of sovereign function to include all welfare activities as contended on behalf of the appellants, the ratio in Bangalore Water-Supply case would get eroded, and substantially. We would demur to do so on the face what was stated in the aforesaid case according to which except the strictly understood sovereign function, welfare activities of the State would come within the purview of the definition of industry; and, not only this, even within the wider circle of sovereign function, there may be an inner circle encompassing some units which could be considered as 'industry' if substantially severable.

16. Considering the tests laid down by the Apex Court in

Bangalore Water Supply (supra), Labour Court has recorded a finding that the activities of the ASI at Daulatabad fort would fall within the definition of Industry.

In the light of aforesaid ratio, finding recorded by the Industrial Court on the basis of evidence led before it cannot be faulted with.

17. In Somdutt Sharma (supra), the Apex Court was considering the issue whether irrigation department is an industrial establishment. It is held that, *"the Irrigation department does not carry on manufacturing process. As it is not carrying on manufacturing process, it is not a factory within the meaning of clause (m) of section 2 of the Factories Act. Therefore, the Irrigation Department of the first appellant will not be an Industrial Establishment within the meaning of Section 25L. Accordingly, Chapter VB will have no application in that case."*

Since, this decision is rendered in different facts, it is of no help to the case of ASI.

18. In Parasnath Yadav (supra), the Apex Court by considering the facts of that case modified the award passed in

favour of the workmen by setting aside reinstatement and granted Rs. 2,00,000/- as full and final settlement of dues. It is observed, "*We have not expressed any view on the points raised by Mr. A.D.N. Rao, learned counsel, regarding Archaeological Survey of India falling under the definition of 'Industry' . This order passed in the peculiar facts of the case shall not be treated as a precedent*".

In view of these observations, this decision is of no help to the case of ASI.

19. Considering the financial rules and the fact that policy of contractual employment is adopted by the ASI, workmen are out of service since year 2010 and the termination of the workmen is found illegal because of procedural defect, reinstatement of the workmen cannot be fasted on the ASI, and monetary compensation will meet the ends of justice, as is held **B.S.N.L. V. Bhurumal**, AIR 2014 SC 1188.

20. In **Assistant Engineer Rajasthan Development Corporation and another vs. Gitam Singh**, 2013 (5) Mh.L.J., 1, it is held; "*With regard to the wrongful termination of a daily wager, who had worked for a short period, the award of*

reinstatement cannot be said to be proper relief and rather award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors, including mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute. In the present case, the workman was engaged as daily wager on 1-3-1991 and he worked hardly for eight months from 1-3-1991 to 31-10-1991 and was directed by the Labour Court to be reinstated with continuity of service and 25% backwages. The judicial discretion exercised by the Labour Court suffers from serious infirmity and cannot be sustained and has to be set aside and is set aside. Compensation of Rs. 50,000/- by the appellant to the respondent shall meet the ends of justice."

21. *B.S.N.L. vs. Man Singh* (2012) 1 SCC 558 it is held;

"4. This Court in a catena of decisions has clearly laid down that although an order of retrenchment passed in violation of section 25-F of the Industrial Disputes Act may be set aside but an award of reinstatement should not be passed. This Court has distinguished between a daily wager who does not hold

a post and a permanent employee.

5. In view of the aforementioned legal position and the fact that the respondent workmen were engaged as "daily wagers" and they had merely worked for more than 240 days, in our considered view, relief of reinstatement cannot be said to be justified and instead, monetary compensation would meet the ends of justice."

22. In the case in hand also the Labour Court has failed to take into consideration the relevant factors i.e. nature of service, mode and manner of recruitment, length of service and that the workmen were working as temporary daily wager. The Labour Court has failed to take into consideration the settled legal position that even if order of retrenchment is passed in violation of Section 25-F of ID Act, award granting reinstatement should not be passed in cases of employees who are daily wagers. In these facts, Labour Court has erred in granting relief of reinstatement to the workmen and adequate compensation should have been given to the workmen. In *Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota Vs. Mohan Lal* [2013, LLR 1009], *Assistant Engineer, Rajasthan Development Corporation and another vs. Gitam Singh* [2013 5 SCC 136], *BSNL Vs. Man Singh* [(2012) 1 SCC 558] and *Jagbir Singh Vs. Haryana State Agriculture Marketing Board* [(2009) 15

SCC 327], the Apex Court has held that, reasonable compensation of about Rs. 40,000/- per year of service put in can be granted in lieu of reinstatement and other benefits. In this view of the matter, workmen are entitled for compensation @ Rs. 40,000/- per year of service rendered by them, in lieu of reinstatement.

23. For the aforesaid reasons, following order:

ORDER

- (i) Writ petitions are partly allowed.
- (ii) Impugned awards dated 21.09.2022, passed by Labour Court, Aurangabad, in Reference (IDA) Nos. 29/2018, 27/2018, 28/2018 and 30/2018, thereby granting reinstatement with continuity of service, are hereby quashed and set aside.
- (iii) In lieu of reinstatement workmen are awarded compensation as follows:

Workmen	Period	Compensation (Rs. 40,000/- per year)
Balu Madhavrao Magar	2002 to 13.12.2010 (9 years)	Rs. 3,60,000/-
Shrihari Gopinath Tupe	2002 to 13.12.2010 (9 years)	Rs. 3,60,000/-
Ranjeet Vishnu Kirtikar	2004 to 13.12.2010 (7 years)	Rs. 2,80,000/-
Ubed Khan Wahed Khan	2002 to 13.12.2010 (9 years)	Rs. 3,60,000/-

[NITIN B. SURYAWANSHI, J.]