

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.269/2022

JOAQUINA GOMES E COLACO, aged
64 years, resident of House No.01,
Tolleaband, Davorlim, Navelim, Salcete
Goa 403707.

... Petitioner

Versus

1. STATE OF GOA, through Chief
Secretary, Secretariat, Porvorim, Bardez-
Goa.

2. OFFICE OF THE COMMISSIONER
OF COMMERCIAL TAXES, through its
Commissioner, Vikrikar Bhavan, Old
High Bldg., M.G. Panjim-Goa.

3. DEPARTMENT OF FINANCE AND
REVENUE, through its Secretary,
Secretariat, Porvorim, Goa.

4. DEPARTMENT OF PERSONNEL,
through its Secretary, Secretariat,
Porvorim, Goa.

... Respondents

Mr S. D. Lotlikar, Senior Advocate with Mr T. Sequeira and Ms
S. Kenny, Advocates *for the Petitioner*.

Ms Sapna Mordekar, Additional Government Advocate *for the
State*.

CORAM: **M. S. SONAK &
BHARAT P. DESHPANDE, JJ.**

Reserved on: **25th JANUARY 2023**
Pronounced on: **1st FEBRUARY 2023**

JUDGMENT: (Per M. S. Sonak, J.)

1. Heard Mr S. D. Lotlikar, learned Senior Advocate who appears along with Mr T. Sequeira and Ms S. Kenny for the Petitioner and Ms Sapna Mordekar, learned Additional Government Advocate for the State.

2. Based on the pleadings in the petition and the responses filed on behalf of the respondents, it is evident that from at least the year 1998, the Petitioner was engaged in the office of the Commissioner of Commercial Taxes, Government of Goa, to do the work of cleaning and sweeping of the office premises and the cleaning of the toilets. Though there is no formal appointment or engagement order, there is sufficient documentary evidence through muster rolls and payment vouchers to establish such engagement.

3. In the affidavit in reply dated 04.05.2018 filed by Shri Deepak Bandekar, Commissioner of Commercial Taxes, in Writ Petition No.867/2017, the affiant admitted this position. The record also shows that the Petitioner was initially paid an amount of Rs.6,00/- per month, which was revised at some later point to Rs.3,000/- per month. Such payments were made from the contingent fund or office expenses against the receipts/vouchers. At the time of Petitioner's initial engagement, she was about 38

years old. By the time her engagement was discontinued at her request, she was 63 years old.

4. In the last three to four years before her disengagement, i.e. since the financial years 2013-2014 and 2014-2015, the Petitioner was paid an amount of Rs.4,500/- per month and during the financial years 2015-2016 and 2016-2017, the Petitioner was paid Rs.4,950/- per month. All these orders are a part of the record. Additionally, they are reflected in the affidavit dated 04.05.2018 filed by the Commissioner of Commercial Taxes in Writ Petition No.867/2017 instituted by the Petitioner earlier.

5. The Petitioner's Writ Petition No.867/2017 was disposed of by Order dated 10.07.2018 with directions to the State Government to consider Petitioner's representation for regularization within eight weeks. By a further order dated 21.06.2018, it was clarified that this Court had not decided the rival contentions and instead, left these to be decided when the Petitioner's representation was to be considered by the State Government. Accordingly, it was clarified that the issues raised in Writ Petition No.867/2017 were left open and not concluded.

6. The Petitioner's representation was, however, rejected vide memorandum dated 20.12.2018. The reason for rejection was Petitioner's engagement of over 26 years was neither contractual nor was she a Nominal Muster Roll (NMR) employee. The memorandum asserted that the Petitioner was engaged to clean and sweep the office premises and the toilets attached to the Commercial Tax Office, Margao Ward. She was paid every month out of the contingent funds from the office expenses of the Commercial Tax Office, Margao Ward. Additionally, the memorandum asserted that the Petitioner was never paid any amount from the salary head. Finally, the memorandum states that the earlier office memorandum dated 07.06.2000 that permitted regularization applied to the employees who had completed five years of continuous service as NMR/Daily Wages and the Petitioner was neither; she could claim no benefits of this office memorandum.

7. After the rejection of her representation vide memorandum dated 20.12.2018 by the Assistant Commissioner of Commercial Taxes with the approval of the Commissioner of Commercial Taxes, the Petitioner instituted the present petition seeking *inter alia* relief of regularization and all service benefits.

8. The Petitioner's grandmother Mrs Filomena Almeida Gomes, in almost identical circumstances, had instituted Writ Petition No.166/1997, complaining that she too was engaged in the office of the Mamlatdar of Salcete, Margao Goa as a sweeper-cum-cleaner since 1970 against payment of meagre amounts. This Writ Petition No.166/1997 was disposed of by a detailed Judgment and Order dated 13.01.2000 passed by the Division Bench comprising B. N. Srikrishna, J. as his Lordship then was and R.M.S. Khandeparkar, J.

9. The Division Bench, by the above Judgment and Order dated 13.01.2000, allowed the petition by issuing the following operative directions:

"(1) The "service of the Petitioner shall stand regularised in accordance with Office Memorandum dated 29th October, 1990 on the post of Sweeper-cum-Scavenger in the appropriate applicable pay-scale with effect from the date on which she completed five years continuous service i.e. from the year 1975.

(2) The Respondents shall compute all monetary benefits flowing from the aforesaid direction and pay the arrears to the Petitioner within a period of eight weeks from today.

(3) The Petitioner shall also be entitled to retirement benefits, including pensionary benefits, if any, flowing from regularisation of service on completion of 5 years service

from her initial appointment, i.e. from some date in the year 1975."

10. Some of the observations and reasonings from the Judgment and Order dated 13.01.2000 are transcribed below for the convenience of reference:-

"This Writ Petition filed by an illiterate woman exemplifies how, despite celebration of the Golden Jubilee of the adoption of the Constitution of India, the salutary principles enshrined in the Constitution have not percolated down to the State Authorities. Part III of the Constitution lays down the Directive Principles of the State Policy which are fundamental in the governance of the country and it shall be the duty of the State to apply them in making laws. Articles 39(d), 39(e), 43 preach lofty principles. The hiatus between precept and practice is too glaring in this case for us to ignore."

"8. There could not have been a better admission of the fact that the Petitioner's case was one of sheer exploitation from any person other than the Hon'ble Minister for Law & Judiciary himself. Yet, the State Government remained unmoved and nothing happened. Petitioner, oblivious and ignorant of what transpired, continued to do the job of sweeping, scavenging and making tea at the same place for the same number of hours and on the same terms and conditions as before."

"20. One last point urged by Mr. Bharne is that the Petitioner's case could not be considered under the Circular dated 29-10-1990 as she had not completed 5 years of continuous service inasmuch as she had been appointed as Sweeper-cum-Scavenger on daily wages with effect from

1-2-1989 vide Order dated 17-2-1989. In our view, this argument only heaps insult on injury. In the first place, the Government ought to have created immediately a post for the post of Sweeper-cum-Scavenger since it is uncontestable that there was need for creation of such a post. Having failed to do the duty which was cast upon it, and having exploited the service of the Petitioner due to sheer ignorance of her legal rights, now for the State Government to turn around and plead this principle is something that cannot be countenanced. In our view, it is time to enunciate the principle "exploiter pays", as firmly as the principle of "polluter pays". That there has been exploitation of the Petitioner is indubitable. To say that she was not working for 5 years is neither true nor correct. As a matter of fact, she was working from 1970 right upto 30th July 1999, doing the same kind of work throughout. Thus, the contention that she had not put in 5 years for being considered for regularisation under the Circular dated 29-10-1990 has no basis whatsoever."

"21. Thus, we are of the view that none of the contentions urged by the State Government to oppose the Writ Petition has any merit. The Petitioner's is a hard case which ought to have been dealt with sympathetically in the facts and circumstances of the case. Due to rule-bound bureaucratic approach, this has not been done. This Court is, therefore, required to exercise its powers under Article 226 of the Constitution to render justice."

11. There is no appreciable difference in the facts obtained in Petitioner's grandmother's case, i.e. Writ Petition No.166/1997 and the Petitioner's case. But, unfortunately, despite all our sympathies, we understand that we may not be empowered to

grant the Petitioner the same or similar reliefs as were granted to her grandmother by the Division Bench in Writ Petition No.166/1997. This is mainly because the law on the subject of regularisation in Government service has undergone a sea change after the Constitution Bench's decision in *Secretary, State of Karnataka & Ors. vs. Umadevi (3) and Ors.*¹ which was delivered on 10.04.2006, i.e. almost six years after the decision in Writ Petition No.166/1997.

12. Although there is documentary evidence and further, this fact was not even seriously disputed that the Petitioner was engaged to undertake sweeping and cleaning of office premises and cleaning of toilets for almost 26 years against the payment of paltry amounts per month from out-of-the-office expenses or the contingent funds, no process as such was followed for her engagement. There is no record of any sanctioned post, advertisement, selection process or appointment order concerning the Petitioner's engagement. Therefore, following the law in *Umadevi (supra)* and *Union of India vs. Ilmo Devi*², we decline relief of *post facto* regularisation. Besides, this petition was instituted after the Petitioner disengaged herself by writing to the

¹ (2006) 4 SCC 1

² 2021 SCC OnLine SC 899

respondents that she would no longer continue sweeping and cleaning.

13. But in the peculiar facts of the present case, we are satisfied that the State, taking advantage of the circumstances in which the Petitioner was placed and the apparent inequalities in bargaining power, has exploited the Petitioner for over two and a half decades. Therefore, though no relief of regularisation can be granted to the Petitioner, we think this is a fit case where the State should compensate the Petitioner for violating her rights under Articles 14, 21 and 23 of the Constitution of India. Our reasons for this opinion are based on the peculiar but mostly undisputed facts discussed hereafter.

14. The Petitioner has pleaded that she belongs to the Gauda community, which is recognized as a Schedule Tribe in the State of Goa. She has also annexed to the petition a Caste Certificate issued by the Deputy Collector and Sub-Divisional Magistrate on 17.02.2011. This certificate certifies that the Petitioner belongs to the Gauda caste, which is recognized as the Schedule Tribe under the Schedule Caste and Schedule Tribe (Amendment) Act, 2002. There is no denial insofar as this averment is concerned. There is no dispute raised about the certificate that is produced on record. No doubt, there is a note on the certificate stating that the same is

provisional and is issued subject to the scrutiny committee's decision. However, the certificate, at least *prima facie* establishes that the Petitioner belongs to the Schedule Tribe category. Therefore, the State should have displayed some enhanced level of sensitivity before extracting work of cleaning and sweeping of premises or cleaning of toilets from the Petitioner against paltry payments made over almost 26 years.

15. As noted earlier, even the Petitioner's grandmother was engaged on similar exploitative terms by the Government for over two decades. Nevertheless, her petition was allowed by the Division Bench of this Court on 13.01.2000. The Division Bench had rejected the contentions about the absence of a post by observing that the Government ought to have immediately created the position of sweeper/scavenger since it is uncontestable that there was a need to create such a post.

16. The Division Bench observed that the Government, having failed to do the duty which was cast upon it, and having exploited the service of the Petitioner due to sheer ignorance of her legal rights, cannot turn around and plead that regularisation was not possible for want of a regular post. In this context, the Division Bench observed that it was high time to enunciate the principle of "exploiter pays" as firmly as the principle of "polluter pays". The

Division Bench also held that there had been exploitation of the Petitioner's grandmother, which was indubitable.

17. In the above regard, reference can be made to the communication dated 28.02.2013 addressed by Shri S.G. Korgaonkar, Commissioner of Commercial Taxes, to the Joint Secretary (Personnel), Government of Goa. The Commissioner of Commercial Taxes recorded that the Petitioner was working in Margao Ward as a sweeper w.e.f. 01.01.1996 for the last fifteen years. He recorded that the Petitioner has passed Std.III, and her date of birth was 18.04.1959. The communication records that the Margao Ward, where the Petitioner was engaged to work, was functioning in the new premises on the third floor of the Osia Commercial Arcade Building. The premises were around 600 sq. mtrs. The communication also referred to the Government Notification dated 14.05.1997, formulating a scheme to grant temporary status to the daily wage workers of the Government of Goa who have rendered service for at least five years as on the date of the Notification, i.e. for five years.

18. The above communication dated 28.02.2013 addressed by the Commissioner of Commercial Taxes to the Joint Secretary (Personnel) concludes by saying that since the Petitioner and four others in some other departments of the Government have

worked continuously without any break for last twenty four years, they are eligible to qualify for temporary status labourer in terms of Notification dated 14.05.1997. Furthermore, this communication adds that the Commissioner of Commercial Taxes Department requires the services of the Petitioner and four others regularly. For example, in addition to office sweeping, they regularly clean the toilets and washing basins. Based on all this, the Commissioner of Commercial Taxes recommended that the Government consider the Petitioner's case for a grant of temporary status.

19. The record also bears out that there was no valid consideration of the recommendation. The recommendation was rejected because the Petitioner was alleged to be neither a daily wage worker nor an NMR worker. The Petitioner has placed several extracts from the muster roll on record. These muster roll extracts show Petitioner's attendance. The muster roll extracts also show that the Petitioner used to sign the muster roll almost four times each day. Therefore, at least *prima facie*, the contention that the Petitioner worked only for a few hours each day part-time is rather challenging to commend acceptance. This contention is raised for the first time in the affidavit filed by Shri Sarpreet Singh Gill, I.A.S., on 21.11.2022. The affiant is possibly the present Commissioner of State Taxes, Government of Goa. He

has stated that his affidavit is based on the office's records. However, no record was produced to show that the Petitioner was working only on a part-time basis, as alleged in the affidavit. The documents produced by the Petitioner, along with her petition, have not been disputed. These records do not indicate that the Petitioner worked only part-time or for only a few hours.

20. Significantly, in the earlier Writ Petition No.867/2017 instituted by the Petitioner, Shri Dipak Bandekar, the then Commissioner of Commercial Taxes, has filed an affidavit. There is no appreciable difference between the pleadings in Writ Petition No.867/2017 and the present petition. However, Mr Bandekar's affidavit nowhere alleged that the Petitioner was working only part-time. Even the muster roll records were never disputed. Mr Bandekar had only pleaded that the Petitioner was neither appointed as NMR nor a daily wager, but she was engaged for monthly charges paid out of office expenses.

21. Therefore, the material on record shows that the work of cleaning and sweeping office premises admeasuring almost 600 sq. mtrs. and cleaning toilets and wash basins was extracted from the Petitioner against payments of paltry amounts for over 26 years by the Commercial Taxes Department of the Government of Goa. The records also disclose that the payments made to the

Petitioner were much less than even the minimum wages paid to manual labourers engaged by the Public Works Department or other departments of the Government. Moreover, despite a recommendation from the Commissioner of Commercial Taxes, the Government did not consider granting the Petitioner even a temporary status or benefits of the schemes formulated by the Government itself on the technical grounds that the Petitioner was neither a daily wager nor an NMR employee. This engagement was continued despite the strong observations in the Judgment and Order dated 13.01.2000 in the Writ Petition instituted by the Petitioner's grandmother, who was also similarly exploited by the Government. The record *prima facie* shows that the Petitioner had studied up to Std.III and further, she belonged to the Schedule Tribe category.

22. On cumulative consideration of all these factors, it is apparent that the State Government breached the Petitioner's right not to be treated in such an arbitrary fashion and her Right to life and dignity. The State Government has also breached the Petitioner's human rights. For all this exploitation, the State Government must compensate the Petitioner even though the relief of *ex post facto* regularisation of her services cannot be granted to her.

23. The State is liable to compensate the victim for violating fundamental rights or human rights. Further, such compensation can be awarded in a public law remedy like a Writ Petition under Article 226 of the Constitution of India. In ***People's Union for Democratic Rights vs. Union of India***³, the Hon'ble Supreme Court made the following observations:-

"The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of Law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the Fundamental Right to carry on their business and to fatten their purses by exploiting the consuming public, have the 'chamars' belonging to the lowest strata of society no Fundamental Right to earn an honest living through their sweat and toil?

The former can approach the courts with a formidable army of distinguished lawyers paid in four or five figures per day and if their Right of exploit is upheld against the Government under the label of Fundamental Right, the courts are praised for their boldness and courage and their independence and fearlessness are applauded and acclaimed. But, if the Fundamental Right of the poor and helpless victims of injustice is sought to be enforced by public interest litigation, the so called champions of human rights frown upon it as waste of time of the highest Court

3 (1982) 3 SCC 235

in the land, which, according to them, should not engage itself in such small and trifling matters. Moreover, these self-styled human rights activists forget that civil and political rights, priceless and invaluable as they are for freedom and democracy, simply do not exist for the vast masses of our people. Large numbers of men, women and children who constitute the bulk of our population are today living a sub-human existence in conditions of abject poverty: utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system."

24. In *People's Union for Democratic Rights (supra)*, the Hon'ble Supreme Court held that it was evident that ordinarily, no one would willingly supply labour or service to another for less than the minimum wage when he knows that under the law, he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is 'forced labour', that is, labour or service which a person is forced to provide and 'force' which would make such labour or service 'forced labour' may arise in several ways. It may be the physical force which may compel a person to provide labour or service to another, or it may

be a force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force'. If labour or service is compelled as a result of such 'force', it would be 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered. And in doing so, he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service he provided would be clearly 'forced labour.' There is no reason why the word 'forced' should be read in a narrow and restricted manner to be confined only to physical or legal 'force' particularly when the national charter, its fundamental document,

has promised to build a new socialist republic where there will be socio-economic justice for all and every one shall have the Right to work, to education and to adequate means of livelihood.

25. In *People's Union for Democratic Rights (supra)*, the Hon'ble Supreme Court concluded that where a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. The Hon'ble Supreme Court, therefore, held that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service he provided clearly falls within the scope and ambit of the words forced labour under Article 23. Accordingly, such a person would be entitled to come to the Court for enforcement of his fundamental Right under Article 23 by asking the Court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied.

26. In *Bandhua Mukti Morcha vs. Union of India*⁴, the Hon'ble Supreme Court has held that Article 21 assures the Right to live with human dignity free from exploitation. The State is under a constitutional obligation to ensure no violation of any person's fundamental rights, particularly weaker sections of society. The State is bound to ensure observance of social welfare and labour laws enacted to secure workmen's basic human dignity. The Court also held that power under Article 226 can always be exercised where the complaint is about the infringement of fundamental rights and consequent exploitation of the weaker sections of the society.

27. In *Mukesh Chandra vs. State of U.P. & Ors.*⁵ the State of Uttar Pradesh appointed the Petitioner as a clerk till regular selection was made. The Petitioner was paid a paltry amount. In such circumstances, the Learned Single Judge of the Allahabad High Court concluded that this was exploitation. The Court referred to Article 39 of the Constitution of India, which requires the State to direct its policy to secure adequate means of livelihood. The Court observed that if the State, on the other hand indulges in curtailing the adequate means of livelihood determined by it either by paying lesser than the amount fixed or

⁴ (1984) 3 SCC 161

⁵ MANU/UP/0057/2000

taking more work, then it would be violative of this guarantee. The Court held that if a citizen of this country accepts lesser amount due to economic compulsion, as beggars cannot be choosers, then how does it cease to be exploitation.

28. In *Rajpati Devi vs. State of Bihar & Ors.*⁶, the Learned Single Judge of the Patna High Court (Aftab Alam, J. as his Lordship then was) held that the appointment of the Petitioner as a sweeper of the Government Girls' Middle School for paltry remuneration for several years amounted to exploitation and was in breach of the provisions of Article 23 of the Constitution of India. The Court noted that the Petitioner was paid this paltry amount through Government funds, and therefore the plea that such engagement was not within the knowledge of the Government could not be accepted. Consequently, the Court deduced that the Petitioner was subjected to a highly exploitative arrangement in gross violation of her fundamental rights. Therefore, directions were issued to compensate the Petitioner.

29. Considering the peculiar circumstances of the present case and for all the above reasons, whilst declining the relief of regularisation of services or payment of any regular retiral benefits like pension, etc., we direct the State Government to pay to the

⁶ MANU/BH/0272/2002

petitioner compensation that we assess at Rs.5 lakhs within two months from today. However, suppose such compensation is not paid within two months from today. In that case, the same shall carry interest @ 7% p.a. This interest payment will be without prejudice to the Petitioner's Right to initiate appropriate proceedings for expeditious recovery of this amount.

30. The reasons for computation of the compensation amount are mainly the fact that the Petitioner was made to work as a sweeper/cleaner of premises and toilets for the last 26 years. However, the Petitioner was paid paltry amounts. Even if the Petitioner were to have been paid the daily wages as were paid to the other daily wagers or the minimum wages payable to a manual labourer by the Public Works Department or other departments of the Government, then this amount, over the years, would have easily amounted to much more as submitted by Mr Lotlikar. However, considering the genesis of the Petitioner's appointment and such other factors based on which no relief of regularisation can be granted to the Petitioner, we think that the interest of justice would be met in this particular case by directing the respondents to pay compensation of Rs.5 lakhs to the Petitioner. This compensation is for the violation of Petitioner's fundamental rights and the exploitative treatment meted out to

her, perhaps, by taking advantage of her weak and helpless position.

31. The Rule in this petition is disposed of by directing the respondents to pay the Petitioner Rs.5 lakhs within two months from today. Suppose this amount is not paid within two months from today. In that case, the respondents will be liable to pay interest on this amount @ 7% p.a. This direction for payment of interest is without prejudice to the Right of the Petitioner to take out appropriate proceedings for the enforcement of this direction for payment.

32. The Rule is made absolute to the above extent. There shall be no order for costs.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.

SUCHITRA NANDAN SINGBAL Digitally signed by SUCHITRA NANDAN SINGBAL
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