

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

<u>WRIT PETITION NO.3357/2017</u>	
<u>PETITIONER</u>	Municipal Council, Wardha, Through its Chief Officer. (ORIGINAL RESPONDENT)
<u>...Versus...</u>	
<u>RESPONDENTS</u>	1) Shri Prashan s/o Gajanan Mendhe Aged about 34 years, Occupation : Service, R/o Ward No.26, Pulfile, Wardha 2) Shri Dushyant s/o Parmeshwar Wankhede Aged about 34 years, Occupation : Service, R/o Ward No.26, Pulfile, Wardha. 3) Shri Rahul s/o Kashinath Bhagat, Aged about 36 years, Occupation : Service, Itwara Bazar, Wardha. (ORIGINAL COMPLAINANTS)
Shri Abhay Sambre, Advocate for petitioner Shri R. B. Puranik, Advocate with Shri Bhushan Mohta, Advocate for respondent nos.1 to 3	

CORAM : AVINASH G. GHAROTE, J.
DATE : 05/04/2023

1. Heard. Rule. Rule made returnable forthwith with the consent of the learned counsel for the parties. Mr. R. B. Puranik with Advocate Mr. Bhushan Mohta, learned Counsels waive notice on behalf of the respondents on merits.

2. The petition challenges the judgment dated 09/11/2016 (pg.112), whereby Complaint (ULP) No.63/2012 filed by the respondent nos.1 to 3, seeking permanency has been allowed and the petitioner herein is directed to extend the benefit of permanency to the respondent nos.1 to 3 on the date on which sanctioned and vacant posts of peons/Coolies/Safai Majdoors fall vacant with consequential benefits.

3. Mr. Abhay Sambre, learned counsel for the petitioner, contends as under :

(a) That the respondents were daily wagers and therefore did not have any entitlement to any permanency, as they were not working in any sanctioned posts.

(b) The engagement of the respondents according to him was of a temporary nature for working as coolies with the petitioner.

(c) The employment of the respondents was not of 240 days in a year as was the requirement for them to claim its continuation.

(d) Though initially, the respondents were appointed on 30/07/1994 as Coolies and were discontinued on 29/12/1995, however, on account of hunger strike they were again employed on 26/03/1996 and discontinued on 30/05/1996. Their employment,

according to him, thereafter since 17/09/1996 is on account of the interim order passed by the learned Labour Court in ULP No.1/1996 and 2/1996 and therefore, cannot assist them in any manner for claiming permanency.

(e) That as a special case, the State by the order dated 22/02/2021, has created supernumerary posts on one-time basis and had regularized the services of the respondents w.e.f. 05/02/2019, without any benefit regarding the earlier services rendered by them. These supernumerary posts created were to lapse upon the retirement of the respondents (pg.157). He, therefore, submits that since the creation of the supernumerary posts was itself on the condition of non-grant of permanency to the respondents, the claim of the respondents for permanency could not have been granted by the learned Labour Court.

(f) That since no sanctioned vacant posts were available, either at the entry level in the year 1994 or even thereafter, the respondents could not be permitted to be regularized by backdoor entry.

(g) Reliance is placed by him upon:

(i) ***Secretary, State of Karnataka Vs. Umadevi (3) and others 2006 (4) SCC 1 (para 34 and 45);***

(ii) *M.P. Electricity Board Vs. Hariram (2004) 8 SCC 246 (para 10);*

(iii) *Pune Municipal Corporation Vs. Dhananjay Prabhakar Gokhale 2006 (4) Mh.L.J. 66 (para 8);*

(iv) *The Municipal Council, Tirora, through its Chief Officer Vs. Tulsidas Baliram Bindhade 2016 (6) Mh.L.J. 866 (para 19 and 21);*

(v) *Sandip Baliram Sandbhor and others Vs. Pimpri Chinchwad Municipal Corporation and others 2016 (3) Mh.L.J. 562 (paras 34, 35 and 39) ;*

(vi) *Nathmal Shaligram Malani Vs. Rana Pratap 2007 (1) Mh.L.J. 444 (para 7)* on the point of pleadings, as according to him, the basic pleadings required for claiming permanency was absent in the complaint filed by respondents.

(h) It is, therefore, submitted that the impugned judgment which directs permanency from the date of availability of vacant sanctioned posts is required to be quashed and set aside.

4. Mr. R. B. Puranik, learned counsel for the respondents with Mr. Mohta, learned counsel, supports the impugned judgment and submits that :

(a) there is no challenge to the finding rendered in respect of Item – 6 of Schedule – IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (for short, “the MRTU and PULP Act”, hereinafter).

(b) that the Model Standing Orders constitute an agreement between the petitioner and the respondents and Clause 4-C of the Model Standing Orders would therefore come into play and the respondents having completed 240 days of service during the preceding 12 calendar months were entitled for regularization and permanency.

(c) that the petitioner, as an employer, was having the entire material regarding the employment of the respondents and therefore was the appropriate person to have place the same on record and having not done so, the learned Industrial Court was justified in drawing an adverse inference against the petitioner.

(d) By inviting my attention to the written statement of the petitioner, specifically para 4, it is contended that there is no denial that no vacant posts were available, rather on the contrary it is contended that the order dated 14/08/1997 (Exh.42) by the Chief

Executive Officer, whereby eight employees were appointed would indicate the availability of the vacant posts.

(e) Reliance is also placed upon the order dated 07/07/2012 [para 24/pg.106] to submit that on account of superannuation of the persons named therein the posts had become vacant and also to Exh.45, the order dated 13/06/2012 promoting seven Safai Majdoors and Peons to the post of typist-clerk (para 25/pg.106).

(f) that since the petitioner did not enter the witness box, the adverse inference drawn is clearly justified.

(g) Learned counsel in support of his submissions places reliance upon :

(i) *Parke-Devis (India) Ltd. Vs. Mahadev Bhiku Jadhav 2008 (3) Mh.L.J. 823 (para 14);*

(ii) *Pandurang Sitaram Jadhav etc. etc. Vs. State of Maharashtra through its Dairy Manager and another 2019 III CLR 639;*

(iii) *Maharashtra State Road Transport Corporation and another Vs. Casteribe Rajya P. Karmachari Sanghatana 2009 (12) SCALE 25;*

(iv) *Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif and others AIR 1968 SC 1413;*

- (v) *Rashtriya Hatmang Yantramag Kamgar Sangh Vs. K.D. Kochargaonkar and others* 2000 (1) CLR 917;
- (vi) *Umrala Gram Panchayat Vs. Secretary, Municipal Employees Union and others* 2015 (12) SCC 775;
- (vii) *Navnath Maruti Chavan Vs. Conservator of Forest and another* 2006 (1) Mh.L.J. 710;
- (viii) *Pyarelal Ganesh Khichar Vs. Municipal Council, Ramtek and another* 1991 (2) Mh.L.J. 1408.

5. The constitution Bench of the Hon'ble Apex Court, while considering plea regarding the direction for regularization or permanency of temporary or casual employees in *Umadevi* (supra) has held as under :

“34. In A. Umarani Vs. Registrar, Cooperative Societies and Others (2004 (7) SCC 112), a three judge bench made a survey of the authorities and held that when appointments were made in contravention of mandatory provisions of the Act and statutory rules framed thereunder and by ignoring essential qualifications, the appointments would be illegal and cannot be regularized by the State. The State could not invoke its power under Article 162 of the Constitution to regularize such appointments. This Court also held that regularization is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed

thereunder. Regularization furthermore cannot give permanence to an employee whose services are ad hoc in nature. It was also held that the fact that some persons had been working for a long time would not mean that they had acquired a right for regularization.

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or

temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

6. In ***Dhananjay Prabhakar Gokhale*** (supra), the learned Division Bench of this Court while considering the position regarding claim of permanency by an employee, on plea of having completed 240 days, held as under :

“8. It obviously shows that merely because an employee continued to render service for 240 days in a year, that by itself will not be sufficient for him to claim permanency in the post, unless he is able to establish that such a permanent post duly approved by the competent authority is vacant and the claimant is duly eligible for being appointed in such post. Mere completion

of 240 days of service by itself is not a carte blanche to an employee to claim permanency in the service of his employer. The law on this point is well-settled. No fault can be found with the contention sought to be raised on behalf of the appellants that the Industrial Court as well as the learned single Judge erred in ignoring this well-settled law while holding that the appellants had indulged in unfair labour practice under Item No. 6 of Schedule-IV of the said Act in relation to the respondent.”

7. In **Sandip Baliram Sandbhor** (supra), it has been held as under :

“31.The Court observed, reconciling the views in UP Power and MSRTC that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. If there are no posts available, such a direction for regularization cannot be given. To regularize such a person, only based on number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service, which is anathema to Article 14 of the Constitution. Further, such a direction would not be given when the worker does have the eligibility requirement. But if it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the leftover workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. In such a situation, the industrial adjudicator would be achieving the

equality by upholding Article 14. The Court concluded that it would depend on the facts of each case as to whether the order of regularization is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights.

34. The review of the decisions would show that the dictum of the Constitution Bench in the case of Umadevi (3) is binding on all Courts, including the industrial adjudicator. Various arguments are advanced by the members of the bar under a mistaken impression that after the decision in MSRTC, the decision of Umadevi (3) is not applicable to the industrial adjudication governing public employment, which is entirely incorrect. However, in a circumstance where an unfair labour practice is committed by an employer by keeping the employees/workmen on temporary, casual and daily wage basis for years with an intention and an unfair labour practice of this magnitude is committed, then the industrial adjudicator is not powerless to grant relief. This position has been reconciled by the Apex Court in the case of Hari Nandan Prasad (supra).

35. An entry into a public employment must conform to Articles 14 and 16 of the Constitution and one of the cardinal principle is that there has to be a public participation at the time of entry in public service. A clandestine and back door entry in the public service is violative of Articles 14 and 16 and no rights will therefore flow from such an entry. There are however cases where there is an exploitation of workforce by a public body by keeping such workers temporary for years with an object of depriving them the status of permanency. Such unfair labour practice, as indicated under Item 6 of Schedule IV of Act of 1971, is itself a negation of Article 14 of the Constitution. Once such an exploitation is proved, then the power of the Industrial

adjudicator to take an affirmative action is not taken away. This however would depend on facts and circumstances of each case. In the case of Hari Nandan Prasad (supra), the Apex Court has indicated few of the parameters and has left it to facts and circumstances of each case. The Apex Court had deliberately kept this issue to be decided in the facts and circumstances of the case. Therefore, not only it is hazardous but also it will be impermissible to put this exercise in a mathematical formula. Whether an order of regularization would advance justice or defeats it, and will be contrary to the employer's right, would depend from case to case. Ultimately, the balance will have to be achieved between the rights of citizens for access to public employment vis-a-vis the need to prevent exploitation of the work force. The steps taken by the industrial adjudicator should be in furtherance of the equality doctrine.

39. *It is clear from the averments that there was no advertisement, no appointment letters, and no public participation at the time of employment of the petitioners. The petitioners were initially working through a contractor for 2-3 years for which they were paid by the contractor and after the end of the contract on some oral assurance of the Medical Officer, they worked for seven months when they filed a complaint and thereafter, they were continued based on interim orders of the Industrial Court. On the face of it, there is no exploitation of these petitioners nor there a fact situation wherein gross injustice is caused to the petitioners. No case at all can referred under Item 6 of Schedule IV of Act of 1971.”*

8. In ***Casteribe Rajya P Karmachari Sanghatana*** (supra), after considering ***Umadevi*** (supra), the learned Division Bench of this Court has held :

“26. The question that arises for consideration is: have the provisions of MRTU & PULP Act denuded of the statutory status by the Constitution Bench decision in Umadevi1. In our judgment, it is not. The purpose and object of MRTU & PULP AIR 1967 SC 1071 (1972) 1 SCC 409 (1979) 4 SCC 507 Act, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedule II, III and IV. MRTU & PULP Act empowers the Industrial and Labour Courts to decide that the person named in the complaint has engaged in or is engaged in unfair labour practice and if the unfair labour practice is proved, to declare that an unfair labour practice has been engaged in or is being engaged in by that person and direct such person to cease and desist from such unfair labour practice and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate policy of the Act. The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years , with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer. The provisions of MRTU & PULP Act and the powers of Industrial and Labour Courts provided therein were not at all under consideration in the case

of Umadevi1. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred, considered or decided in Umadevi1. Unfair labour practice on the part of the employer in engaging employees as badlies, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in item 6 of Schedule IV and the power of Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench. It is true that the case of Dharwad District PWD Literate Daily Wage Employees Assn.⁷ arising out of industrial adjudication has been considered in Umadevi1 and that decision has been held to be not laying down the correct law but a careful and complete reading of decision in Umadevi1 leaves no manner of doubt that what this Court was concerned in Umadevi was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognized by the rules or procedure and yet orders of their regularization and conferring them status of permanency have been passed. Umadevi1 is an authoritative pronouncement for the proposition that Supreme Court (Article 32) and High Courts (Article 226) should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad-hoc employees unless the recruitment itself was made regularly in terms of constitutional scheme. Umadevi1 does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of MRTU & PULP Act to order permanency of the workers who have been victim of unfair

labour practice on the part of the employer under item 6 of Schedule IV where the posts on which they have been working exists. Umadevi cannot be held to have overridden the powers of Industrial and Labour Courts in passing appropriate order under Section 30 of MRTU & PULP Act, once unfair labour practice on the part of the employer under item 6 of Schedule IV is established.”

9. In the present case, the engagement of the respondents was by the Municipal Council. The conflicting opinion expressed by different benches regarding applicability of Clause 4C of the Model Standing Orders to claim either permanency or regularization was referred to the learned Division Bench for an opinion, in ***Municipal Council, Tirora*** (supra), in which after considering ***Umadevi*** (supra) as well as ***Casteribe Rajya P Karmachari Sanghatana*** (supra), the following is the opinion rendered by the learned Division Bench :

“21. Thus, in the light of this discussion, it follows that in absence of vacant sanctioned posts with the Municipal Council, a workman who has put in continuous service of 240 days or more in span of 12 months, cannot invoke Clause 4C of the MSO to claim either permanency or regularization. We accordingly answer the question referred. Registry to place the writ petitions before the learned Single Judge as per roaster assignment for further consideration.”

10. Insofar as the question regarding existence of vacant sanctioned posts, with the Municipal Council, is concerned, it is material to note that the complaint under Section 28 of the MRTU & PULP Act, 1971 (pg.19 to 34) does not contain any averment/plea that the respondents/complainants were appointed on vacant sanctioned posts or against such vacancies. Rather, on the contrary, the avernment in this regard as contained in para 3 of the complaint being material is quoted as under :

“3. That the Complainants requested the respondent to continue them and make them permanent employees. However, the respondent orally terminated the services of the Complainants w.e.f. from 29.12.1995 and again reinstated them on 26.3.1996. Again the Complainants were terminated on 30.5.1996. However, no reason is given by respondent as to why the Complainants were terminated. Since the Complainants completed 240 days in service and since the work is very much available and there is no complaint as such against the Complainants, the alleged termination by the respondent is challenged by the Complainants before the Labour Court Wardha. The said complaints are registered as Complaint ULPA 1 of 1996 and Complaint ULPA 2 of 1996, wherein the present Complainant No.1 is the Complainant No.1 in Complaint ULPA 1 of 1996 whereas the Complainant no.2 was the Complainant no.2 in Complaint ULPA 2 of 1996 and the present Complainant no.3 was the Complainant no.2 in Complaint ULPA 2 of 1996. That in the abovesaid two complaints the Hon’ble Court allowed Interim Applications filed by the Complainants and directed the

Respondent to reinstate the Complainants on their formal post till the decision of the Complaint vide Order dated 17.9.96. Thereafter, evidence was recorded and after hearing the arguments the Hon'ble Labour Court was pleased to allow the Complaint and declared that the Respondent engaged in unfair labour practice as per item 1 of Schedule IV of Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971. The Hon'ble Labour Court further set aside the oral termination order dated 30.5.1996 and as such the services of Complainants are deemed to continue right from their joining the service from 30.7.1994 till today."

11. It would thus be material to note that the employment of the respondents was not continued against any vacant sanctioned posts, but was under the interim orders of the Labour Court and thereafter, the final order dated 17/09/1996.

12. This is further substantiated by the order dated 22/02/2021, filed along with pursis dated 30/08/2021 (pg.155) which is not disputed by the respondents, which indicates that in view of absence of sanctioned vacant posts, the State was constrained to create supernumerary posts, for regularization of the services of the respondents and other similarly situated employees. The reason for creation of such one-time supernumerary posts, as spelt out from the order, is absence of any sanctioned vacant posts.

13. The relevant clauses of the order dated 22/02/2021 for the purpose of this petition are reproduced as under :

“अटी व शर्ती :-

१. रोजंदारी कर्मचा-यांची सेवा दि. ०५.०२.२०१९ रोजीच्या दिनांकापासून नियमित करण्यात येत आहे. सदर दिनांकापुर्वीची रोजंदारीवरील सेवा कोणत्याही अर्थिक व सेवा विषयक लाभासाठी ग्राह्य धरण्यात येणार नाही.

६. रोजंदारीच्या कर्मचा-यांना विशिष्ट परिस्थितीत एका वेळेची विशेष बाब म्हणून सामावून घेण्यास मान्यता दिली जात असल्याने त्या पदावरील कर्मचा-यांची सेवा निवृत्तीमुळे अथवा कोणत्याही इतर कारणास्तव ही पदे रिक्त झाल्यास ही पदे आपोआप व्यपगत होतील व भविष्यात ही पदे नगरपरिषदेला भरता येणार नाहीत. तसेच ही पदे भरली जातात अगर कसे याबाबतच आढावा नगरपरिषदेची वार्षिक तपासणी करणारे पथक व लेखा परिक्षक यांनी आपल्या तपासणीच्या वेळी घ्यावयाची आहे.

११. समावेशन झालेल्या पदावर रूजू व्हावयाचे नसल्यास वा आक्षेप असल्यास खुलाश्यासह लेखी निवेदन आदेश प्राप्त झाल्याचे तीन दिवसाचे आंत मुख्याधिकारी व जिल्हाधिकारी यांचे मार्फत या कार्यालयास सादर करावे. विहीत मुदतीनंतर आलेले आक्षेप विचारात घेतले जाणार नाही.”

14. This would indicate that the employment of the respondents was regularized under the order dated 22/02/2021 and the contents of the order indicated that such regularisation was w.e.f. 05/02/2019 on the terms that any employment prior to such regularisation would not be considered for any financial and service

benefits. There is nothing on record to indicate that the respondents had accepted the order under protest.

15. Thus, the absence of sanctioned vacant posts, is now an admitted position between the parties hereto, in light of the order dated 22/02/2021, in view of which, Clause 4C of the Model Standing Orders is clearly inapplicable to the respondents, in light of the opinion rendered by the learned Division Bench in ***The Municipal Council, Tiroda*** (supra), as the entire claim by the respondents is based upon a plea of completion of 240 days. ***Pyarelal Ganesh Khichar*** (supra) therefore, is of no assistance to the case of the respondents.

16. It is also material to note that the petitioner/Municipal Council in para 4 of their written statement (pg.31), before the learned Labour Court had specifically raised a plea that the respondents/complainants were not appointed on any vacant sanctioned posts and they had never worked on any sanctioned posts. In view of this specific plea, it was necessary for the respondents/claimants to bring on record that their engagement/employment was against the sanctioned vacant posts, as the initial burden for establishing the factum of their continuous

work for 240 days in a year rests with the respondents/complainants, as held in ***M.P. Electricity Board*** (supra), which would also indicate that the burden to demonstrate the engagement/employment of the respondents/claimants was against a sanctioned vacant post also rested upon them. It is a settled position of law that a party coming to the Court has to not only raise a plea but establish the same [see : ***Nathmal Shaligram Malani*** (supra)]. A perusal of the complaint indicates that there is no plea that the engagement/employment of the respondents/claimants was against a sanctioned vacant post. The mere plea that the petitioner was having the best evidence in this regard and having failed to produce it on record, justified the drawing of adverse inference relying on ***Gopal Krishnaji Ketkar*** (supra) and ***Rashtriya Hatmag Yantramag Kamgar Sangh*** (supra) is neither here nor there, as there cannot be any evidence for a negative plea. That apart, since the respondents were claiming permanency/regularization, such permanency/regularization could only have been ordered, if their engagement was against a sanctioned vacant post and not otherwise, which as is indicated above by the averments made in para 19 of the impugned judgment is not the case at all and was a plea which was

to be established by them. It is also an admitted position, that no application was filed by the respondents, before the learned Industrial Court, seeking a direction against the respondents to place on record the relevant documents, indicating the initial employment of the respondents.

17. A perusal of the impugned judgment would indicate the following position recorded therein :

“19. The Complainant no.1 undergone cross-examination conducted on behalf of the Respondent. In cross-examination, the complainant no.1 admitted that his date of birth is 21/2/1977 and he S.S.C. failed. So also he does not remember exact date about submitting application to the respondent for providing him employment. The complainant no.1 admitted fact that, when they appointed with the respondent, no advertisement was published notifying post on which they are claiming permanency and their interview was not conducted by any selection Committee. The complainant no.1 further admitted that they cannot say under whose order they joined with the respondent. So also, no appointment orders issued by the Respondent but they were doing job of spray of pesticide, cleaning and collecting garbage. The complainant no.1 further admitted that he was getting wages at month end for the days on which he worked and he was used to send in various department wherever work was available and he was also doing cleaning work in the wards and some time he was visiting in the weekly market to collect fees from the vendors and some he was working being a Peon in the ward to look after sweepers. This witness further admitted that the post on which

he was working is not sanctioned post with the respondent no.1 by the State Government and he is in employment of the respondent in pursuance of interim order passed by the Labour Court, Wardha in complaint ULP no.1/96 and finally he reinstated in employment in pursuance of final order passed therein.”

It is, therefore, apparent that the employment of the respondents was not in any sanctioned vacant posts. That apart, no finding whatsoever has been rendered by the learned Industrial Court in the impugned judgment that the engagement of the respondents, was on sanctioned vacant posts. Rather, on the contrary, the above position would indicate the situation to be otherwise.

18. The plea that there had arisen vacancies subsequent in point of time, by referring to the order dated 14/08/1997 by the Chief Executive Officer (Exh.42), and so also due to subsequent superannuation, is also without any merit for the reason that the position regarding existence of vacancies has to be considered, on the date of the appointment and not otherwise.

19. It is also material to note that the respondents were initially engaged on daily wages from 30/07/1994 to 26/03/1995 and thereafter from 29/12/1995 to 28/05/1996. Thereafter, since

they were not continued, a complaint came to be filed by them before the learned Labour Court being Complaint (ULP) No.1/1996 and 2/1996 in which on account of the interim order dated 17/09/1996 passed by the learned Labour Court, Wardha they were reinstated on their former posts and continued as such till the judgment dated 19/01/2012 and thereafter also. It is thus apparent, that the continuation of the respondents was under the cover of an interim order granted by the learned Labour court and thereafter the judgment dated 19/01/2012 and would clearly indicate that such continuation would not entitle the respondents to claim any right of absorption to make the service permanent as has been held by the Hon'ble Apex Court in ***Pandurang Sitaram Jadhav*** (supra) [para 8].

20. ***Parke-Davis (India) Ltd.*** (supra) considers a position under Item-6 of Schedule-IV of the MRTU and PULP Act on the ground that continuing to employ workmen on a temporary, casual or Badli basis in order to deprive them of permanency would constitute an unfair labour practice under Item – 6. It is, however, not on a proposition where the employment, is regulated by the availability of sanctioned vacant posts, as is the case in respect of the petitioner/Municipal Council and therefore does not consider the

opinion of the reference Court in *The Municipal Council, Tirora* (supra). *Umrala Gram Panchayat* (supra) relied upon by Mr. Puranik, learned counsel for respondents does not lay down a proposition that in spite of the appointment not being made against sanctioned vacant posts the services of the employees have to be regularized.

21. *Navnath Maruti Chavan* (supra) does not notice the opinion of the learned Division Bench in *The Municipal Council, Tirora* (supra) holding that Clause 4C of the MOS to claim either permanency or regularization cannot be invoked in absence of vacant sanctioned posts with the Municipal Council, which is squarely applicable in the present matter considering that the petitioner is a Municipal Council.

22. The impugned judgment insofar as it draws an adverse inference against the petitioner on account of non-production of information regarding, about vacant or sanctioned posts of Coolies/Safai Majdoors/Peons with the petitioner does not take into consideration that the existence of the sanctioned posts ought to have been indicated on the day when the respondents claim to have been engaged, in view of what has been held in *The Municipal*

Council, Tirora (supra). Therefore, merely because information has not been supplied, that by itself, cannot permit the grant of permanency to the respondents, from the date of their engagement and specifically so in light of the position as noticed in para 19 of the impugned judgment.

23. The impugned judgment also recognizes the position, that sanctioned vacant posts, were not available with the petitioner, which is indicated from operative para 3 of the impugned judgment (page 112), and also notices the law as laid down in ***The Municipal Council, Tirora*** (supra), however, without recording a finding as to existence of vacant sanctioned posts, at the time of engagement of the respondents, merely directs grant of extension of the benefits of permanency, which is clearly contrary to the law as enunciated in ***The Municipal Council, Tirora*** (supra).

24. In the above view of the matter, the impugned judgment, which merely directs permanency from the date on which the sanctioned and vacant posts fall vacant with all consequential benefits, that too, without determining the existence of sanctioned vacant posts and the date on which the same were vacant, in relation to the respondents, who claim to have been engaged in the

year 1994, cannot be sustained and is hereby quashed and set aside and the complaint is dismissed.

25. Rule is made absolute in the aforesaid terms. No order as to costs.

(AVINASH G. GHAROTE, J.)

Wadkar