



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

**WRIT PETITION NO. 7725 OF 2019**

The Municipal Council, Wardha,  
through its Chief Officer.

...PETITIONER

**Versus**

Ramesh Haribhauji Wankhede,  
aged about 70 years, Occ. Retired,  
R/o Gandhi Nagar, Arvi Road,  
Wardha.

...RESPONDENT

Shri Abhay Sambre, Counsel for the petitioner.  
Shri Bhushan Mohta, Counsel for the respondent.

CORAM : ANIL L. PANSARE, J.  
ARGUMENTS WERE HEARD ON : JUNE 20, 2024  
JUDGMENT IS PRONOUNCED ON : JULY 10, 2024

**JUDGMENT :**

The petitioner – Municipal Council is aggrieved by the award dated 25/9/2019 passed by the Industrial Tribunal, Nagpur, in Complaint (ULP) No. 250/2011. The Tribunal allowed the complaint and directed the petitioner to pay to respondent – complainant pension and other such benefits.

2] Briefly stated, the respondent approached the

Tribunal with a case that he joined the services of the Council in the year 1986 as Coolie on daily wages at Rs.15/- per day. He claimed that he continuously worked with the Council and in the year 1997, he was continued on a fix salary of Rs.1,500/- per month. According to him, seniority list was published by the Council, where his name appeared at Sr. No.34.

3] The respondent further stated that after completion of ten years of service, he filed a complaint being ULP No. 628/1996, for regularization. He, however, withdrew the complaint on 2/7/2003 on the assurance given by the Council to make him permanent and give all benefits of a permanent employee. He further stated that he was made permanent in the year 2003. He retired on superannuation on 31/8/2009. He submitted necessary information for preparation of pension case, but the Council did not take any step and no benefits were extended. Accordingly, the complaint under question came to be filed.

4]           The Petitioner - Council opposed the complaint on the ground that the respondent has unconditionally withdrew his complaint for regularization, which he had filed in the year 1996. He accepted the appointment order dated 3/6/2003. He retired in August – 2009. He had not completed ten years qualifying service in employment on a permanent post and, therefore, was not entitled for pension in terms of the Maharashtra Civil Services (Pension) Rules, 1982 (for short “Rules of 1982”). Necessary communication to that effect was sent to the respondent on 19/5/2010. Out of total gratuity amount, the petitioner has paid Rs.11,050/-. However, Rs.2,000/- has been withheld for audit objection, if any. The learned Counsel for the petitioner states that the petitioner is willing to pay the said amount. Thus, there is no dispute as regards payment of gratuity.

5]           The petitioner has then stated that an identically placed employee, namely, Sanjay Rewatkar, who had worked for seven years, had filed Writ Petition No. 1533/2011, which came to be dismissed by this Court holding therein that the

post against which the petitioner was regularized has been created for the first time on 3/6/2003 and, therefore, he is not entitled for pension.

6] Another ground put forth by the petitioner was that the respondent had not challenged the terms and conditions of order dated 3/6/2003, under which he was made aware that the benefits of earlier service will not be extended. This condition having been accepted willingly, he is not entitled for pensionary benefits.

7] The Tribunal noted that there is no dispute as regards appointment of the respondent in the year 1986 as Coolie on daily wages. He continued in employment and in the year 1997, he was appointed on fix salary of Rs.1,500/- per month. He filed complaint for permanency and other reliefs. During pendency of the said complaint, the Commissioner and Regional Director of Nagar Parishad issued an order (Exh. 47). The order indicates that the State Government made a decision to absorb the employees, like the respondent, who were

working continuously for the period prior to 10/3/1993. There were 60 daily wagers and for their absorption, 35 lapsed permanent posts were revived and 25 new posts were created. The respondent's name appeared against the post that was revived.

8]           The Tribunal further took note of the fact that the muster roll clearly indicates that the respondent had worked for more than 240 days in the year 1988. It has then referred to Clause 4C of Model Standing Orders (MSO); the judgments in the case of *Pyarelal s/o Ganesh Khichar Vs. Municipal Council, Ramtek and another* [1991 Mh.L.J. 1408] and in the case of *Century Rayon (A Division of Century Textiles and Industries Ltd. Vs. Anand Dadau Ubale and others* [2005(3) Mh.L.J. 209]. The Tribunal took note of the fact that the High Court in the said two cases has, by referring to Clause 4-C of MSO, held that this Clause would also attract the workman employed by the Municipal Council.

9]           The Tribunal then took note of two more judgments

of this Court, namely, i) *Jagjeewan Jaikumar Sanghai (since deceased) through Legal Heirs Asha w/o Jagjeewanrao Sanghai and another Vs. Parbhani Municipal Corporation and others* [2018(4) *Mh.L.J.* 947]; and ii) *Mone Rashmi Shriram Vs. State of Maharashtra and others* [2017(6) *Mh.L.J.* 570]. The Tribunal found that the High Court, in these two cases, has considered Rules 30 and 57 of the Rules of 1982 and held that daily wagers, part time employee, etc. are entitled for pensionary benefits considering their previous employment, i.e., employment prior to order of permanency. The Tribunal took note of the said two judgments and by relying upon Clause 4-C of MSO held that the respondent was deemed to be permanent in the year 1988 and, therefore, was entitled for all benefits, including pensionary benefits, gratuity, etc. Accordingly, the Tribunal declared that the petitioner is engaged in unfair labour practices in terms of item nos. 5 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short “Act of 1971”).

10] The judgment and award of the Tribunal has been challenged on the following grounds :

I] There is no averment in complaint that the respondent was appointed after following due process of law. That he was holding any vacant sanctioned post and had worked for more than 240 days.

II] There was no prayer either to grant permanency or regularization.

III] The respondent has withdrawn previous complaint claiming permanency, which withdrawal was unconditional and, therefore, second complaint is not maintainable.

IV] The respondent was appointed without following due process of law and his appointment was not against permanent sanctioned post.

V] None of the employees, who were appointed along

with the respondent, were given such benefit.

VI] Identical relief sought by another employee, namely, Sanjay Rewatkar, has been refused by this Court.

VII] On 2/8/2003, 60 daily wagers, who were working since 1993, were regularized by issuing appointment order on probation for one year. These 60 posts were to be lapsed on their superannuation. One of the conditions in the appointment order was that previous service will not be counted for any financial service benefits.

VIII] The aforesaid order is not challenged and, therefore, is binding on the respondent.

11] As against, the respondent has supported the judgment *inter alia* on the grounds that :

I] the appointment of the respondent, which was made vide order dated 2/8/2003, was against a revived post and not against newly created post; and

II] Clause 9 of order by which a condition was put to the employee that he will not claim economical and service benefits of previous employment, was not mentioned in order (Exh. 47) passed by the Commissioner.

III] The petitioner did not led oral evidence and, therefore, it had not proved the defence put forth through written statement.

IV] The Tribunal has rendered a categorical finding that there were vacant sanctioned posts available when the respondent entered into employment, but those were lapsed due to non-appointing employees on the said posts and the respondent came to be appointed on the revived post, which fact was sufficient to hold that the respondent was working on a vacant sanctioned post continuously.

12] I have given thoughtful consideration to the submissions made by both the sides. The moot question is whether the petitioner was engaged in unfair labour practices.

13]           There is a fundamental difference between functioning of local authorities, like Municipal Council, on one side and the establishments contemplated under the Bombay Shops and Industrial Undertaking Act on the other hand. Local Authority is not a private business, trade or manufacture undertaking and/or establishment and, therefore, concept of profit making does not arise. Further, creation of post and filling vacant post in local authority is always subject to grant/approval by the State Government. Local Authority is dependent on the grants received from the State Government. It receives limited revenue by way of taxes and fee. In that sense, economic aspects will have to be borne in mind while granting status of permanency to an employee. As against, the employer in establishment or industrial undertaking has powers to create post as and when required, which are not dependent on any other authority and which does not require sanction or other formalities to be followed.

14]           The concept of unfair labour practices will have to be understood keeping in mind the aforesaid distinction in the

functioning of local authority and private earning establishments/industrial undertaking. In other words, the parameters that would be applicable against these two entities, while considering a claim made by the workman of unfair labour practices, will have different angles of appreciation.

15] If the employer in establishment/industrial undertaking engages services of a person as Coolie on daily wages for a continuous period of 240 days in a year, there is every reason to believe that the employer is engaged in unfair labour practices. It is so because the employer therein was well equipped with powers to create post and by not doing so, has with a view to deprive the workman of legitimate benefits, continued his services on daily wages.

16] As against, if such a person is appointed by local authority to meet the exigency, like to complete a particular project and/or to implement a scheme, would require to appoint workman on daily wages or casual workers or temporary workers, which may fall within the powers of the

local authority, but when it comes to a question of grant of permanency, even though case is made out, unless sanctioned post is vacant and/or available, the Court cannot compel to absorb them or to create post for absorption without permission from the State Government.

17] It is well settled that any appointment and/or employment by the local authorities should be within the purview of Articles 14 and 16 of the Constitution of India. Any appointment in breach of statutory provisions and rules and regulations will have its own consequences, one of which is that the workman will not be entitled to seek permanency in service. In such circumstances, merely because an employee has completed 240 days continuous service in a year will not be sufficient to take recourse to Clause 4-C of MSO because there is illegality at the inception in service.

18] Law on this point has been dealt with in detail by Co-ordinate Bench of this Court in the case of *Municipal Council, Wardha, through its Chief Officer Vs. Shri Prashant*

*s/o Gajanaj Mendhe and others [Writ Petition No. 3357/2017 decided on 5/4/2023]*, wherein the Court held that Clause 4-C of MSO to claim either permanency or regularization cannot be invoked in absence of vacant sanctioned post with the Municipal Council.

19] The fundamental distinction between functioning of local authority and establishment/industrial undertaking as noted above, has been duly considered and explained by this Court in the case of *Sangli Miraj Kupwad Cities Municipal Corporation, Sangli Vs. Mahapalika Kamgar Sabha, Sangli [2012(5) Mh.L.J. 937]*, and, thereafter, the Court held that merely because workers appointed de hors as there were no vacant and sanctioned post available and that they have been working for long period, the order of grant of permanency just cannot be followed. The Court further held that the petitioner employer cannot be directed to bear the financial burden of benefits claimed and/or arising out of demand, as directed unless the same is sanctioned and approved by the Government and the concerned authorities under the Act.

20]           What follows from above discussion is that the persons, like the respondent, cannot claim permanency or regularization only on the basis of 240 days continuous service in a year, unless they come-up with a case that their appointments were in compliance with Articles 14 and 16 of the Constitution of India.

21]           In the present case, admittedly, there is no compliance of Articles 14 and 16 of the Constitution of India. It is nobody's case that the petitioner had issued advertisement notifying the availability of post. The respondent and other employees were not subjected to any test or interview. Thus, the respondent was aware of the fact of nature of his employment. He has accepted the same with eyes open. In the circumstances, the appointment having been made to meet the administrative exigency, though continued for considerable period, by itself will not be sufficient to grant benefit of permanency or regularization, which otherwise would amount to creating another mode of public appointment, which is not

permissible and law on this point is well settled.

22] The Tribunal opined that the respondent's appointment was against revived post and would thus mean that it was vacant post because the petitioner failed to fill in the post in time. This finding is contrary to the pleadings, in the sense it is not even the case of the respondent that his appointment was against vacant post or that there existed vacant post but he was appointed on daily wages. When such was the scenario, the Tribunal committed error of law in expecting the petitioner to lead evidence to prove that there was no vacant post lying with the Council at the time when the respondent was engaged on daily wages. The data as regards creation of these posts, the dates when they fell vacant, the reasons for not filling the said posts and the date when these posts stood lapsed, is not available on record. In absence thereof and more importantly in absence of case to that effect, the petitioner could not have been blamed for lapse of 35 posts, at least in context with the claim of the respondent. The Tribunal also lost sight of the fact that the State Government

has revived the lapsed post as an one time arrangement to extend benefit of regular employment to 60 employees. These 60 posts were to be lapsed upon superannuation of the employees.

23] The Tribunal, took recourse to Clause 4-C of MSO, ignoring the basic distinction in functioning of two entities as noted above. Further, the law laid down by this Court in the case of *Municipal Council, Tirora and another Vs. Tulsidas Baliram Bindhade* [2016(6) Mh.L.J. 867] was not brought to its notice. The following question was referred to to the Division Bench in the light of conflicting views expressed in the judgment rendered by the Single Bench.

*“Whether, in the absence of creation or sanction of the posts under section 76 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, the complainants were entitled to claim permanency or regularization in service on the basis of Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act, 1946 ?”*

The Division Bench noted that Section 76 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short “Act of 1965”), does

not permit the employer – Municipal Council either to create post or to fill it. It has to obtain sanction of the Director and after the posts are sanctioned, candidates for appointment against it are to be selected by such selection authority or such other body, as the State Government may notify. The Court then took note of Clause 32 of MSO, which reads thus :

*“nothing contained in these standing orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or agreement, settlement or award applicable to the establishment.”*

The Division Bench has then taken note of various judgments and proceeded to observe as under :

*“19. XXXX There is no conflict between the provisions of M.S.O. 4C and the provisions of the section 76 of the 1965 Act. In the event of the appointment having been made validly, it may be possible to invoke the provisions Cl. 4C of M.S.O. A view to the contrary would result in regularizing/validating a void act. Cl. 4C neither permits nor contemplates the same. As held in the above judgments, if the appointment is not made in accordance with the constitutional scheme, it is void ab initio and, therefore, there can be no claim to its regularization or for grant of permanency in any manner. This is all the more so as Cl. 32 of the M.S.O. clarifies that the Standing Orders are not to operate in derogation of any other law i.e. section 76 of 1965 Act. Definitely any interpretation of Clause 4C conducive to defeating the Constitutional mandate is unwarranted. Violation of Clause 4C of the MSO may tantamount to an unfair labour practice under item 9 of Sch. IV of the*

*1971 Act but unless & until, other additional factors are proved on record, finding of indulgence in an unfair labour practice under Item 6 of Sch. IV thereof cannot be reached. As explained by the Hon'ble Apex Court in case of Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (supra), existence of a legal vacancy must be established and as discussed above, the power to recruit with the employer must also be demonstrated. In absence thereof, workman cannot succeed in proving the commission of unfair labour practice under Item 6 by the employer. These two ingredients, therefore, also must be established when benefit of Cl. 4C is being claimed. Unless availability of a vacancy is shown or then power with the employer to create the post and to fill it is brought on record, mere continuation of 240 days cannot and does not enable the workman to claim permanency by taking recourse to Cl. 4C read with Item 9 of Sch. IV of 1971 Act. Clause 4C does not employ word "regularisation" but then it is implicit in it as no "permanency" is possible without it. Conversely, it follows that when a statutory provision like section 76 disables the employer either from creating or filling in the posts, such a claim cannot be sustained. XXXX"*

The Court then proceeds to answer the reference in

the following manner :

*"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."*

As could be seen, unless availability of vacancy is

shown or then power with the employer to create the post and

to fill it is brought on record, mere continuation of service for 240 days cannot and does not enable the workman to claim permanency by taking recourse to Clause 4-C read with Item 9 of Schedule IV of the Act of 1971. In sequel, when statutory provision, like Section 76, disables the employer either from creating or filling in the post, such a claim cannot be sustained. The Division Bench has also held that if the appointment is not made in accordance with the Constitutional Scheme, it is void ab-initio and, therefore, there can be no claim to its regularization or for grant of permanency in any manner.

24] In the present case, it is not even the case of the respondent that his appointment is made by following due process of law and was made against vacant post. Thus, his entry in service itself is not recognized for seeking permanency. Further, the petitioner moved proposal for absorption of the respondent and other such employees. The Regional Director, however, accepted the proposal with a rider that the respondent and other such employees shall withdraw the complaint pending before the Tribunal, which the respondent

has withdrawn unconditionally.

25]           The State Government, considering the issue involved, but as one time benefit, thought it proper to grant benefit of permanency to the respondent and others. Thus, as a special case, the order dated 3/6/2003 was issued in favour of the respondent and other such employees granting them regular employment. One of the conditions for the appointment, which the respondent accepted was that he will not claim benefit of previous service.

26]           It will be appropriate here to refer to the order passed by the Division Bench of this Court in a case of an identically placed employee, namely, Sanjay N. Revatkar (Writ Petition No. 1533/2011). The Division Bench has considered all the facts, as noted herein above. The Division Bench noted that 60 posts were created with a condition that if these posts fall vacant, the same shall stand lapsed. The Division Bench accordingly noted that after superannuation of the petitioner therein, his post has also lapsed. The Division Bench then considered another condition in the order, namely, condition

no.11 by which the petitioner was under obligation to withdraw the Court proceedings claiming benefit on account of his daily wage services. The petitioner has accordingly withdrawn the complaint and, therefore, the Court noted that the petitioner has already acquiesced in action and he has no legal right to claim pension. The Division Bench thereafter took note of Rule 30 of the Rules of 1982 to opine that qualifying service for pension commences from the date on which a Government Servant takes charge of the post to which he is first appointed either substantively or in officiating or temporary capacity. The petitioner, having been appointed on 3/6/2003 and retired in the year 2010, was found to have not rendered qualifying service for pension. Accordingly, his claim for pensionary benefit was dismissed.

27] Similar is the case in hand. The respondent herein was also appointed vide order dated 3/6/2003. He retired on 31/8/2009 and has rendered service of about six years, which falls short of qualifying service for pensionary benefits.

28]           The learned Counsel for the respondent, by taking aid of the judgment of the Hon'ble Supreme Court in the case of *Maharashtra State Road Transport Corporation And Another Vs. Casteribe Rajya Parivahan Karmchari Sanghatana [(2009) 8 SCC 556]*, submits that the judgment passed by the Division Bench in the case of Sanjay Revatkar cannot be an impediment for the Tribunal to issue directions to the petitioner to regularize the services of the employees, who have been continued for years together on daily wages.

29]           To my mind, the counsel misread the judgments. One of the questions that was dealt with by the Supreme Court was whether the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practise Act, 1971 have denuded of the statutory status by the Constitution Bench's decision in *Secretary, State of Karnataka And Others Vs. Umadevi (3) And Others [(2006) 4 SCC 1]*. The Supreme Court answered the question in the negative. While doing so, the Supreme Court noted that the issue of unfair labour practice was not at all referred, considered or decided in

Umadevi and further clarified that in Umadevi's case, emphasis was on exercise of power by the High Courts under Article 226 and by the Supreme Court under Article 32 of the Constitution of India in the matters of public employment, where 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.

30] The Supreme Court then clarified that the judgment in Umadevi is an authoritative pronouncement of the proposition that the 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 in terms of constitutional scheme. In that context, the Supreme Court has held that the judgment in Umadevi does not denude the Industrial or Labour Courts of their statutory power under Section 30 read with Section 32 of the Act of 1971 and to order permanency of workers, who have

been victim of unfair labour practice on part of the employer.

31]           Thus, what has been held by the Supreme Court is that the Industrial or Labour Courts, in cases where unfair labour practice is established, are empowered to pass appropriate order under Section 30 of the Act of 1971. The judgment, however, also recognizes that in matters of public employment, where employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognized by rules or procedure, cannot claim status of permanency.

32]           In the case of Sanjay Revatkar, the employee approached the High Court seeking pensionary benefits on the ground that he has rendered qualifying service, if his earlier service is taken into account. The Division Bench found no substance in his case for the reasons noted earlier. Thus, the issue before the Division Bench was not of conferring status of permanency, but was whether the earlier service rendered by the employee could be taken into account for granting him pensionary benefits, and having found no merit, the relief was

denied. This order has attained finality and, therefore, is binding on this Court as well as on the Industrial Court. It appears that this order was not placed before the Industrial Court and, therefore, the same was not considered.

33] It further appears that the judgment in the case of Municipal Council, Tirora was also not placed before the Industrial Court. As noted earlier, in the said judgment, a crucial issue was considered and answered, *viz.*, in absence of vacant sanctioned post with Municipal Council, a workman, who has put in continuous service of 240 days, is not entitled to invoke Clause 4C of MSO to claim either permanency or regularization. The Court then, in clear terms, held that mere completion of 240 days of service by itself is not a *carte blanche* to employee to claim permanency in service of his employer.

34] The Tribunal has referred to four judgments of this Court, however, in none of these judgments, the issue was tested in the light of scope of Section 76 of the Act of 1965

read with Clause 32 of MSO. The Tribunal failed to take note of the fact that there were no vacant sanctioned posts with the Municipal Council and the respondent was not appointed after following due procedure of law. Most importantly, the Municipal Council was not even empowered to create post.

35] In fact, it is not even the case of the respondent, as cannot be, that the petitioner was empowered to create post. In absence thereof, the petitioner cannot be blamed for unfair labour practices as it was not within its domain to either create a post or fill in the same without prior approval from the State Government. Further, the petitioner has not made the State Government party respondent before the Tribunal. In absence thereof, the Municipal Council cannot be blamed for not creating the post.

36] There is thus nothing on record to show that the petitioner has engaged into unfair labour practices. Once it is so held, there arises no question of considering previous service of the respondent to extend him pensionary benefits. The

finding of the Tribunal is, therefore, unsustainable.

37] Resultantly, the Writ Petition is allowed. The award dated 25/9/2019 passed by the Industrial Tribunal, Nagpur, in Complaint (ULP) No. 250/2011 is quashed and set aside. The Complaint is dismissed.

38] Rule is made absolute in the aforesaid terms.

**JUDGE**

Sumit