IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2049 OF 2006

Mr Ravindra Nemu Kane **... Petitioner**

Versus

The Chief Officer Ichalkarngi
Municipal Council, Ichalkarngi **... Respondent**

WITH
WRIT PETITION NO. 8426 OF 2003

Ichalkarngi Municipal Council
Ichalkarngi, Dist, Kolhapur
Through Chief Officer **... Petitioner**

Versus

Mr Ravindra Nemu Kane **... Respondent**

Mr. M.S. Topkar *a/w Ms. Bhargvi Patil for the Petitioner.*
Mr. Akshay Shinde *for the Respondent (IMC).*

CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 13 FEBRUARY 2025.
PRONOUNCED ON : 21 FEBRUARY 2025.

JUDGMENT :-

1) These are cross Petitions filed by employer-Municipal Council and the employee-Ravindra Nemu Kane challenging the judgment and order dated 12 September 2003 passed by the Member, Industrial Court, Kolhapur partly allowing Complaint

(ULP) No. 159 of 1993 and directing the Municipal Council to pay to the employee pay scale of the post of Junior Auditor from 1 June 1981. The employer has filed Writ Petition No. 8426 of 2003 challenging the direction for grant of pay scale of the post of Junior Assistant Auditor to the employee, whereas the employee has filed Writ Petition No. 2049 of 2006 to the extent of non-grant of designation of the post of Junior Assistant Auditor alongwith consequential benefit of seniority and further promotions etc.

2) Icchalkarnji Municipal Council is constituted under the provisions of Maharashtra Municipal Council, Nagar Panchayats and Industrial Townships Act, 1965. The employee Ravindra Nemu Kane was engaged on the post of Clerk in the Municipal Council on daily wages on 22 February 1980. He was offered regular appointment with effect from 1 January 1982 vide order dated 10 December 1983 as a probationary clerk in the pay scale Rs. 260-495/-. By resolution dated 10 April 1984, he was confirmed in the services of the Municipal Council as clerk with effect from 1 June 1981. The employee claimed that though he was designated and confirmed as Clerk, he was always made to work as Junior Assistant Auditor on account of his posting in the audit department right since the inception. That he was always performed duties and responsibilities of Junior Assistant Auditor. He accordingly filed Complaint (ULP) No. 159 of 1993 before the Industrial Court, Kolhapur for extension of pay scale of Rs. 395-800/- with effect from 22 February 1980. He also sought his confirmation in service with effect from 22 February 1980 instead of 1 June 1981. The complaint was resisted by the Municipal Council by filing written statement. The employee examined himself and also led evidence of Shri. Sambhajirao Bapusaheb Katkar, retired Municipal Auditor.

The Industrial Court proceeded to allow Complaint (ULP) No. 159 of 1993 by judgment and order dated 12 September 2003 directing the Petitioner-employer to extend the payscale of the post of Junior Assistant Auditor with effect from 1 June 1981. The Municipal Council has filed Writ Petition No. 8426 of 2003 challenging the direction for payment in the pay scale of the post of Junior Assistant Auditor to the employee. Writ Petition No. 8426 of 2003 came to be admitted by this Court by order dated 4 December 2003 and the decision of the Industrial Court has been stayed. The employee has thereafter filed Writ Petition No. 2049 2006 challenging the order of the Industrial Court dated 12 September 2003 to the limited extent of non-grant of prayer for confirmation on the post of Junior Assistant Auditor with seniority and further promotions. By order dated 4 December 2003 Writ Petition No. 2049 of 2006 has been admitted. Both the Petitions are called out for final hearing.

3) Mr. Shinde, the learned counsel appearing for the Municipal Council would submit that the Industrial Court has erred in allowing Complaint (ULP) No. 159 of 1993. He would submit that the employee was appointed on the post of Clerk and thereafter he cannot be paid pay scale of the post of Junior Assistant Auditor. That merely because he may have performed some duties and responsibilities of the post of Junior Assistant Auditor, the same would not mean that he could be paid salary and allowances of that post. That even if he may have held the charge of the post of Junior Assistant Auditor on few occasions but the same again would not make him entitled to draw salary and allowances of that post. He would submit that the qualifications, pay, allowances and other conditions of service of municipal servants are governed by Section 76 of the Maharashtra Municipalities Act, 1965 and that there is no

provision under the Act for payment of salary on the post on which the employee is not appointed. He would submit that there is vast difference in duties and responsibilities of Junior Assistant Auditor and that of a Clerk. That the Industrial Court has erred in relying on evidence of retired officer of Municipal Council who has assisted the employee by leading evidence about allotment of duties and responsibilities of the post of Junior Assistant Auditor. He would submit that the complaint is otherwise time barred and ought to have been dismissed. He would therefore pray for setting aside the impugned order of the Industrial Court.

4) *Per contra* Mr. Topkar, the learned counsel appearing for the employee would support the order of the Industrial Court to the extent of grant of benefit of pay scale of Junior Assistant Auditor to the employee. He would submit that the Municipal Council did not lead evidence in support of the defence taken by it. That on the contrary, the employee examined himself and also led evidence of the Auditor under whom he worked and performed duties and responsibilities on the post of Junior Assistant Auditor continuously after the year 1981. That therefore the Industrial Court has rightly appreciated the evidence on record for directing grant of pay scale of the post of Junior Assistant Auditor in favour of employee. He would submit that it is elementary principle of law that an employee must be paid salary and allowances of the post on which he was made to work. In support of he would rely upon judgment of this Court in ***Kisan Laxman Mane Vs. Director of Animal Husbandry, Pune & Ors.***[1]. He would accordingly pray for dismissal of Writ Petition filed by the Municipal Council. So far as Writ Petition No. 2049 of 2006 is concerned, he would submit that the Industrial Court has

1 1997 I CLR 51

erroneously not granted the prayer of the employee for his confirmation in service as Junior Assistant Auditor by granting him seniority and further promotions. That the law of absence of pleadings is not strictly applicable in Industrial Court adjudication and that therefore mere absence of specific prayer in the complaint was not an impediment for the Industrial Court to grant the prayer of confirmation on the post of Junior Assistant Auditor. He would accordingly pray for allowing Writ Petition No. 2049 of 2006.

5) Rival contentions of the parties now fall for my consideration.

6) Few facts which are undisputed are that the employee Ravindra N. Kane initially joined the services of the Municipal Council on daily wage basis on 22 February 1980. He came to be regularised in service by appointing him as a probationary clerk in the pay scale of Rs. 260-495/- with effect from 1 January 1982. Upon completion of period of his probation, his services were confirmed on the post of clerk by order dated 1984 retrospectively with effect from 1 June 1981. The Petitioner thus became confirmed clerk in the Municipal Council with effect from 1 June 1981. The Municipal Council has placed on record copy of his service book buttressing the above facts.

7) As per the written statement filed by the Municipal Council before the Industrial Court, its audit department consist of 9 posts headed by the Municipal Auditor. There are additional 5 posts of Junior Assistant Auditors and 3 posts of Clerks. The Municipal Council has placed on record copy of order dated 26 April

1973 issued by the Director of Municipal Administration creating three posts of Junior Assistant Auditor on the establishment of the Municipal Council in which the qualifications for the posts are prescribed as B.Com or SSC and P.S.C. with three years experience in municipal services. According to the Municipal Council the post of Clerk carries lesser eligibility criteria of SCC or equivalent examination.

8) The employee approached Industrial Court by filing Complaint (ULP) No. 159 of 1993 asserting that though he was appointed as a Clerk, he always worked as Junior Assistant Auditor in the audit department. The pay scale on the post of Clerk is Rs.260-495/- whereas the pay scale of Junior Assistant Auditor is Rs.395-800/-. The employee therefore prayed that he must be paid salary in the scale of Rs.395-800/-. The prayers made by him in his complaint were as under:

> a) Enquiry be made;
>
> (b) The Respondent be asked to cease to engage in unfair labour practice and the Complainant be granted reliefs as follows :-
>
> (i) It may be declared that the act of Respondent is not following the principle of equal pay for equal work and not allowing the scale of Rs. 395-800 and not regularising the service from 22-2-1980 be declared as unfair labour practice under item 9 of schedule IV of the M.R.T.U. and P.U.L.P.Act, 1971.
>
> (ii) On the principle of "Equal pay for equal work" the Complainant be granted scale of Rs. 395-15-500-20-800 from date of 22-2-1980.
>
> (iii) His service should be confirmed from 22-2-1980 instead of 1-6-1981.
>
> (iv) The Complainant should be paid arrears due within reasonable time i.e. one month.
>
> (v) Any other relief which the court may deem fit to grant.
>
> (iv) Cost of this Complaint may be given to complainant.

9) The Municipal Council in its written statement denied the assertion of the employee and pleaded that he never dealt with work of Junior Assistant Auditor but always performed clerical work. However, the Municipal Council did not lead evidence to prove its defence. On the contrary, the employee examined himself before the Industrial Court. Additionally, he also examined Shri. Sambhajirao Bapusaheb Katkar, retired Auditor in the Municipal Council to prove his contention of performance of duties and responsibilities on the post Junior Assistant Auditor. The Industrial Court has heavily relied upon evidence led by the employee for proving that he actually performed the duties and responsibilities of the Junior Assistant Auditor. After holding that the employee proved performance of duties and responsibilities of Junior Assistant Auditor, the Industrial Court has proceeded to allow the complaint directing payment of salary and allowances to the employee on the post of Junior Assistant Auditor.

10) In my view, the Industrial Court has committed a fundamental error in not appreciating the position that it is impermissible for the Industrial Court to direct a Government or a State Instrumentality to pay to the employee salary and allowances of the post not held by him. Unlike private employment, there is sanctioned staffing pattern approved in respect of government service as well as services in state instrumentalities. So far as the Municipal Council is concerned, Section 76 of the Municipalities Act governs the sanction of posts for appointment of Municipal servants and the manner in which the appointments are made. Section 76 of the Act provides thus:

76. Appointment of other officers and servants.

(1) A Council may, with the sanction of the Director, create such posts of officers and servants other than those specified in sub-sections (1) and (2) of section 75 as it shall deem necessary for efficient execution of its duties under this Act.

(2) Subject to provisions of the Maharashtra Public Services (Subordinate) [Selection Board Act], 1973 and the rules made thereunder, the qualifications, pay, allowances and other conditions of service and the method of recruitment of any such officers and servants -

> (a) if the minimum salary (exclusive of allowance) of the post is less than Rs. 75 per month shall be determined by by-laws made by the Council in this behalf; and
>
> (b) if the minimum salary (exclusive of allowance) of the post is Rs. 75 or more shall be determined by general or special order made by the Director in this behalf.

(3)(a) All appointments to the posts created under sub-section (1) (other than the posts of inferior municipal servants) shall be made, by the Chief Officer, or by any person duly authorised by the Council for the purpose from the list of the candidates selected under the Maharashtra Public Services (Subordinate) Selection Board Act, 1973.

(b) All appointments to the posts of inferior municipal servants created under sub-section (1) shall be made, by the Chief Officer, or by any person or authority authorised by the Council for this purpose, and such person or authority may be the same or different in respect of the posts referred to in clauses (a) and (b) of sub-section (2).

Explanation.- For the purposes of this section and the Maharashtra Public Services (Subordinate) Selection Board Act, 1973, a post of inferior municipal servant means any of the posts of municipal servants which are in the opinion of the State Government equivalent to the posts of Class IV Government servants and which are declared by the State Government, from time to time, by general or special order, to be posts of inferior municipal servants.

(4) No Council shall employ any person, who has not completed his fifteenth year, to serve as a member of its sanitary staff.

11) When the appointment is governed by a statute and a person is appointed against a post sanctioned in accordance with Section 76 of the Act, he cannot draw salary and allowances of another post. Mere performance of duties and responsibilities of higher post intermittently cannot be a ground for claiming salary and allowances of such higher posts. Public appointments which are governed by statutes, rules and regulations, must be made in strict

conformity therewith. It is not for the local or controlling authority to utilize employee appointed on one post to discharge duties of higher post and then recommend pay of that higher post. If this is permitted, the local controlling authorities would decide who should draw what salary as per their whims and caprices.

12) So far as municipal services are concerned, the post of Junior Assistant Auditor is an altogether different and distinct post from that of a Clerk. There are as pleadings by the Municipal Council in its Petition that there are only five posts of Junior Assistant Auditor in the Municipal Council as against 265 posts of clerks. A clerk can be transferred from one department to another whereas the Junior Assistant Auditor will have to be necessarily posted in the audit department. In such situation, directing payment of salary and allowances to a Clerk of the post of Junior Assistant Auditor would virtually mean his promotion to that post. It is not even known whether the post of Junior Assistant Auditor falls in the same hierarchal promotion ladder and whether a Clerk is even eligible to be promoted to the post of Junior Assistant Auditor. Even if such promotion is permissible, there is seniority list of 265 Clerks working in the Municipal Council and promotions would be effected in accordance with of such seniority. Merely because Petitioner-employee has intermittently performed the duties and responsibilities of the post of Junior Assistant Auditor, while being posted as a Clerk in the audit department, it would not mean that he can claim status of the post of the Junior Assistant Auditor. In fact, the employee has filed Writ Petition No. 2049 of 2006 for seeking status on the post of Junior Assistant Auditor from the date of initial appointment. It would be preposterous to grant such relief in favour of an employee. Having accepted appointment on the post

of Clerk, he cannot seek conversion of his appointment to that of Junior Assistant Auditor by indirectly elevating his status to higher level. This kind of proposition is inconceivable in service jurisprudence, particularly when it comes to cases involving services in Governments and State Instrumentalities.

13) It must be appreciated that the Municipal Council is expected to bear expenditure of salary of each of the sanctioned posts as per staffing pattern. Even if the post of Junior Auditor is vacant the same would also not mean that a Clerk would be in position to claim salary of that post. The Industrial Court has failed to appreciate this fundamental proposition while accepting the prayer of the employee for extending pay scale of the post of Junior Assistant Auditor.

14) The net effect of the impugned order passed by the Industrial Court is that the employee has virtually become Junior Assistant Auditor from 1 June 1981 against his appointment on the post of Clerk on that date. This prayer is granted in complaint instituted after passage of more than 12 years from the date of his initial appointment. The Industrial Court has virtually ensured that the employee is directly promoted on a higher post of Junior Assistant Auditor by ignoring his initial appointment on the post of Clerk.

15) Reliance by Mr. Topkar on the judgment of this Court in ***Kisan Laxman Mane*** (supra) does not cut any ice. This Court held in paragraph 5 of the judgment as under:

> 5. After having heard the learned counsel on both sides and perused the record, I am satisfied that there is sufficient evidence on record to bear out the case of the petitioner that he was actually and physically carrying out the work of a Tractor Driver on several days as indicated in the log books. In fact, the log book of Tractor MTJ 8361 shows that right from January, 1983 the petitioner worked as Tractor Driver for full month upto December-February 1986. Apart from the finding of the Industrial Court that the petitioner had been continuously working from January. 1983 to December, 1985, the log book suggests that the petitioner has been carrying on the work of Tractor Driver right from September, 1980. The question whether the petitioner does possess a driving licence for a Tractor is not easily answered, because neither the Industrial Court was shown the driving licence, nor is it shown to me. Mr. Malvankar, learned Additional Government Pleader, states that the petitioner does not possess driving licence. It is difficult to accept this assertion of Mr. Malvankar as it is difficult to believe that responsible Officers of the First and Second Respondent had directed the petitioner, though he did not hold the driving licence, to discharge the duty of driver on different tractors. This is something that the top Officers in the Animal Husbandry Department must ponder upon. In any event, the Second Respondent having taken the work of driver from the petitioner right from September, 1980, I see no reason why the petitioner should not he paid said wages for the days on which he had discharged his duties as Tractor Driver right from September 5, 1980.

16) In my view, the judgment in ***Kisan Laxman Mane*** (supra) cannot be read in support of an absolute proposition of law that not every case where an employee is found to be performing some duties and responsibilities of another post, he must be paid salary of that post. In case before this Court, the Petitioner therein was appointed as Majdoor but found to have been utilised as Tractor Driver. In the peculiar facts and circumstances of that case, where the logbook proved that Petitioner therein continuously worked as Tractor Driver, this Court thought it appropriate to direct payment of *pro rata* wages of the post of Tractor Driver during period from 5 September 1980 to February, 1986. The judgment rendered in facts of that case cannot be cited in support of contention that in every case where an employee performs duties of higher post, he must be paid salary of higher post.

17) Mr. Topkar has strenuously relied on evidence of Shri. Sambhajirao Bapusaheb Katkar, retired Municipal Auditor in support of his contention that the employee always worked as Junior Assistant Auditor. I have gone through the evidence of Shri. Sambhajirao Bapusaheb Katkar. He led evidence in favour of the employee after retiring from the services of Municipal Council. His testimony appears to be contrary to the records as he deposed that *"There were no sanctioned post of clerk in the Audit Department"*. If this was so, how the employee got appointed on the post as Clerk in the audit department has not been explained by the said witness. Though he stated in the evidence that he used to distribute work to various Junior Assistant Auditors including Shri. Ravindra Nemu Kane, he admitted in the cross-examination that he had no authority to appoint any employee or to give him any grade/posts. He led evidence that the employee worked as Junior Assistant Auditor from the year 1980, which again contradicts the factual position that the initial appointment of the employee is with effect from 1 June 1981. His service book shows that he was appointed as probationary clerk on 1 January 1982. Letter by order dated 10 April 1984, he was confirmed as Clerk with effect from 1 June 1981. It therefore becomes inconceivable that he could render services as Junior Assistant Auditor since the year 1981 as sought to be suggested by the witness. In my view, therefore, there is no credible evidence that the employee always worked as Junior Assistant Auditor or that he did not perform any clerical duties at any point of time during the course of his employment.

18) In my view, the employee was appointed on the post of Clerk and cannot be directed to be paid salary and allowances of the post not held by him. He never questioned his appointment on the

post of Clerk. It is not his case that his selection was for the post of Junior Assistant Auditor and that he was erroneously posted as Clerk. This is a clear case of admitted appointment on the post of Clerk. Merely because the employee performed few duties and responsibilities of Junior Assistant Auditor, the same would not *ipso facto* mean that he was holding said post or was entitled to draw salary and allowances of that post. If the principle payment of salary and allowances of the higher post while holding lower post is accepted in Government service, the same would create a havoc. It may be possible that on account of administrative exchanges, duties and responsibilities of another post are also assigned to employees by their controlling officers. However, performance of duties and responsibilities of higher post on account of instructions given by the controlling officer is accepted as norm for payment of salary and allowances of higher posts to such employee, the same would result in complete administrative chaos where the local level controlling officers would keep on assigning some duties of higher posts to holders of lower posts, who would then claim salary of higher posts. Thus promotional movement of employees would no longer remain dependent on eligibility, seniority or merit and would be dependent on whims and facies of controlling officers who would assign duties of higher post to employee of their choice and then recommend his elevation to higher post. In Government service as well as in services of State Instrumentalities, an employee cannot draw salary of the post on which he is not appointed. His entitlement to salary is not dependent on the instructions given to him by his controlling officer, but governed by Rules and Regulations, sanctioned staffing pattern etc.

19) What is done by the Industrial Court in the present case is to virtually elevate a Clerk to the position of Junior Assistant Auditor from the date of his confirmed appointment as Clerk. Thus after 22 long years, the Industrial Court has ensured that the employee ought to have been appointed as Junior Assistant Auditor and not as a Clerk. Curiously there was no such prayer in the Compliant. There is thus jurisdictional error in the order passed by the Industrial Court.

20) In my view, the Industrial Court has erred in partly allowing the complaint filed by the employee. The judgment and order dated 12 September 2003 is clearly indefensible and liable to be set aside.

21) I accordingly proceed to pass the following order:

i) Judgment and order dated 12 September 2003 passed by Member, Industrial Court, Kolhapur in Complaint (ULP) No. 159 of 1993 is set aside and Complaint (ULP) No. 159 of 1993 is dismissed.

ii) Writ Petition No. 8426 of 2003 is allowed in above terms and Rule is made absolute therein.

iii) Writ Petition No. 2049 of 2006 is consequently dismissed and Rule is discharged therein.

(iv) Considering the facts and circumstances, of the case there shall be no orders as to costs.

[SANDEEP V. MARNE, J.]