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**(2008) 12 BOM CK 0059**

**In the Bombay High Court**

**Case No : Writ Petition No. 6016 of 2008**

General Secretary, Van Shramik Sangh

APPELLANT

Vs

The Director, Social Forestry, Maharashtra State and Others

RESPONDENT

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**Date of Decision : 01-12-2008**

**Acts Referred:**

Constitution of India, 1950 — Article 12, 14, 16, 226, 309

**Citation :** (2009) 1 BomCR 589 : (2009) 121 FLR 53 : (2009) 2 MhLj 956

**Hon'ble Judges :** D.Y. Chandrachud, J

**Bench :** Single Bench

**Advocate :** S.M. Dharap and Anjali Helekar, for the Appellant; A.P. Vanarase, AGP for Respondent Nos. 1 to 3, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

D.Y. Chandrachud, J.—A complaint of unfair labour practices was instituted before the Industrial Court under Items 5, 6, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The complainant-workmen were appointed as daily wagers under the Social Forestry Department. The workmen sought permanency and consequential benefits.

2. The Industrial Court by its judgment dated 11th April 2008 held that the workmen were not appointed on a regular vacant post, no sanctioned post was available and that appointments to a public post must be consistent with the constitutional scheme. The appointments of the complainant-workmen were not made in accordance with the prevailing rules by furnishing an equal opportunity to others. No regular vacant post being available, the workmen would not be entitled to permanency merely upon the completion of 240 days' service. The Industrial Court has inter alia relied upon the judgments of the Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , M.P. Housing Board and Another Vs. Manoj Shrivastava, and on several other judgments which take the view that regularization in public employment cannot

be granted when the initial appointment was de hors the prevalent rules and without following the regular procedure for recruitment.

3. At the hearing of these proceedings, it has been urged on behalf of the Petitioner that (i) The judgment of the Supreme Court in Umadevi's case was rendered in the context of the jurisdiction of the High Court under Article 226 of the Constitution; (ii) The judgment in Umadevi does not make any reference to local Acts under which jurisdiction has been vested in the Industrial Tribunal to pass appropriate orders in matters involving unfair labour practices; and (iii) The constitutional scheme does not cover employment in a temporary and casual capacity which would consequently be governed by local Acts; (iv) The Maharashtra Civil Services Rules define the expression "temporary posts" as posts with a definite rate of pay and for a definite period of time and the workman concerned must be regarded as having been appointed to temporary post; and (v) In the alternative, if the government has acted not as a public employer but as a private employer, then in that event no distinction can be made between the consequences that would follow in the case of a private employer and in respect of the government.

4. The submissions which have been urged on behalf of the Petitioner cannot be accepted in view of the judgment of a Division Bench of this Court consisting of the Learned Chief Justice, Hon'ble Mr. Justice Swatanter Kumar and Hon'ble Mr. Justice A.P. Deshpande, delivered on 31st July 2008 in a batch of matters (The State of Maharashtra v. Pandurang Sitaram Jadhav, Letters Patent Appeal 14 of 2008 in Writ Petition 4141 of 2006 and connected matters). In the cases which arose before the Division Bench, the workmen in question were daily wagers who were engaged in the Government Milk Scheme for periods between 12 to 20 years. The workmen instituted Complaints under Items 5, 6 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The defence of the State Government was that there was no sanctioned post to justify the grant of permanency and that completion of 240 days" service by itself, would not entitle daily wagers to permanency in service. The Industrial Court, while recording a finding of fact that there was no sanctioned post, held that the State Government was engaged in unfair labour practices. The Industrial Court held that the failure of the Government to grant permanency on the completion of 240 days" service amounted to a breach of the Standing Orders. Accordingly, a direction was issued for the grant of permanency to all the workmen concerned in the complaints on the completion of 240 days" service. A Learned Single Judge of this Court dismissed the Writ Petition filed by the State Government holding that since the Industrial Employment (Standing Orders) Act, 1946 would be applicable to the undertaking, the workmen were entitled to permanency on the completion of 240 days" service and the judgment in Umadevi's case would not be applicable. The State Government filed Letters Patent Appeals which were allowed by the Division Bench on 31st July 2008. The Division Bench relied upon the judgments of the Supreme Court in Umadevi (supra), M.P. Housing Board (supra), and Mahendra L. Jain and Others Vs. Indore

Development Authority and Others, and came to the conclusion that in the absence of a sanctioned post, no permanency in service could be granted. The Division Bench held thus:

Articles 14, 16 and the rules framed thereunder Article 309 apply to public employment only and has no application to private employment. The State within the meaning of Article 12 is bound by the mandate of Articles 14 and 16, and is obliged to afford equal opportunity to all, which is not a requirement and obligation in the private employment. In the present appeals we are dealing with issues in Public Employment, for which there exists a constitutional scheme which is entirely different from private employment.

The Division Bench held that the State Government is obliged to make appointments in adherence to the Constitutional Scheme. The Court held that the daily wagers in the complaints were appointed without following the procedure prescribed for public participation and had not acquired any legal right to claim permanency. Finally it was held that Model Standing Orders are subject to the Rules regulating appointment as well as to the Constitutional scheme in the matter of public employment.

5. In view of the judgment of the Division Bench, the submissions which have been urged before the Court cannot be accepted. In Umadevi's case, the Supreme Court has held that in making regular appointments to posts under the Government and its instrumentalities, equality and equal opportunity must rule. Public employment is governed by the requirements of Articles 14 and 16. Unless an appointment to a post under the Government is made in accordance with the governing rules, no rights can be conferred on such an appointee. Mere continuance of a temporary, casual or daily wage employee would not entitle the employee to claim permanency in service. In the M.P. Housing Board case, the Supreme Court held that a daily wager can claim no entitlement to continue unless his appointment was against a duly sanctioned post and after following the statutory provisions governing the field. The mere completion of 240 days would not entitle the employee to regularization. In Indore Development Authority (supra), the Supreme Court held that the Standing Orders governing the terms and conditions of service must be read subject to constitutional limitations wherever applicable. The same view was reiterated in Branch Manager, M.P. State Agro Industries Development Corpn. Ltd. and Another Vs. Shri S.C. Pandey, . The view which has been taken by the Industrial Court in the present case is consistent with the law laid down by the Supreme Court. The view is also in conformity with the judgment of the Division Bench dated 31st July 2008 (supra).

6. In paragraph 44 of the judgment in Umadevi's case (supra), the Supreme Court clarified that there may be cases where irregular appointments (not illegal appointments) are made of duly qualified persons in duly sanctioned vacant posts and the employees may have continued to work over ten years or more, but without the intervention of the order of any Court or Tribunal. The Supreme

Court held that the question of regularizing the services of such employees may have to be considered on merits in the light of the principle settled by the Court and that the government and its instrumentalities may consider taking a one time measure to regularize the services of such irregularly appointed persons. In the present case, these observations will not advance the case of the Petitioner because there is absolutely no factual material in the evidence on the record which would establish that the appointments of the Petitioners were made "of duly qualified persons in duly sanctioned vacant posts". Learned AGP is justified in submitting that no factual foundation has been laid either in the pleadings or in the evidence. That apart, Shri B.H. Patil, Deputy Director in the Social Forest Department deposed on behalf of the State Government in the evidence and he submitted a chart showing the bifurcation of the period spent by each of the complainant workmen in the Employment Guarantee Scheme and under other schemes of the government. There was no cross examination on this aspect. The workmen cannot in the circumstances lay a claim to regularization. In a judgment of a Learned Single Judge of this Court (B.H. Marlapalle, J.) in *Lagwad Adhikari v. Yasin Hamid Sayyad* CDJ 2007 BHC 1697 delivered on 4th December, 2007 it has been observed thus:

Seeking regularisation in public employment must satisfy the requirements that the selection so made was as per the procedure prescribed under the Rules framed under Article 309 of the Constitution or any other Rules/instructions issued by the State Government in the absence of such Rules, the eligibility in terms of qualification and experience, the age limit, the aspect of reservation of seats depending upon the social status. For such public appointment on regular basis all eligible candidates must have a fair opportunity to apply, compete and face the selection process which ought to be transparent and fair. In short, the selection has to be on merits. The employees who are appointed on temporary basis either on daily wages or on monthly wages may be eligible to apply for such posts but merely because they worked for years together as temporaries or casuals directly engaged by the Department or by some Officer and without going through the selection process prescribed for Group D and C categories cannot claim regularisation in service only on the basis of the length of their service. The issue has been now well settled by the Constitution Bench judgment in *Umadevi's case* (Supra). It is clear that regularisation could be asked for by those who have come through the normal selection process prescribed under the Rules or notifications and not by those who are popularly called as the back door entries.

7. In the circumstances, no case for interference is made out. The Petition is dismissed.