

(2010) 06 BOM CK 0099

In the Bombay High Court

Case No : Writ Petition No. 5786 of 1997

Maharashtra State Electricity Distribution Co. Ltd.

APPELLANT

Vs

Vishwanath Shankar Sadafule, Revan Damu Suryavanshi,
(Smt. Vimal Vishnu Mane, Anil Vishnu Mane, Sudhir Vishnu
Mane and Pramod Vishnu Mane) and Shri R.U. Ingale

RESPONDENT

Date of Decision : 22-06-2010

Acts Referred:

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

Citation : (2010) 5 BomCR 690 : (2010) 127 FLR 257 : (2011) 1 LLJ 167

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

**Advocate : Vaibhav Sugdhare, instructed by M.V. Jaykar and Co, for the
Appellant; Nayana Buch and Shailesh More, for the Respondent**

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—The petitioner is a statutory body constituted under the Indian Electricity Supply Act, 1948 and called as "The Maharashtra State Electricity Distribution Company Limited". The respondents 1 to 3 were original complainants and as common facts and law was involved, all these complaints were disposed of by the common order. The challenge is made to the Order dated 29.04.1997 passed by the Member, Industrial Court, Maharashtra, Solapur. The operative part of the same is as under:

I) The Complaint is allowed.

II) It is hereby declared that the respondent has committed unfair labour practice prescribed under Items 6, 9 and 10 of Schedule IV of the MRTU & PULP Act, and the respondent is directed to cease and desist from practicing the same.

III) The respondent is directed to confer a status and privileges of permanent employee in the post of 'Watchman' on the complainants in - Complaint No. 210/1989, 211/1989 and 212/1989 from the date of completion of 240 days

work in the initial calendar year of their service and accordingly to pay them monetary benefits thereto since then.

IV) The termination of service of the complainants in complaint ULP No. 210/1989, 211/1989 and 212/1989 w.e.f. 4.11.1990 is illegal and nonest. It is therefore the respondent is directed to reinstate the complainants with payment of Full backwages.

V) In the facts and circumstances, no order as to costs.

2. The respondents 1 to 3 were engaged on rate contract basis for watchman's post for six months on 09-02-1988 with clear terms on monthly lump sum remuneration, reserving right of termination by giving one month's time and with clear condition that they would not entitle for any kind of permanency in the job nor preference in recruitment. The contract period was extended from time to time upto 03.01.1990. But before the expiry date on 11.12.1989, the complainants/respondents filed the separate complaints on 11.12.1989 under the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (MRTU & PULP Act) in the Industrial Court at Solapur. Both the parties led their respective evidence on 18.12.1996 and ultimately on 29.04.1997 the impugned order was passed.

3. This Court on 10.12.1997 admitted the writ petition and granted ad interim relief in terms of prayer (b). That resulted into stay of the enforcement of the above order. The same remained intact till this date. This matter is called from final hearing board and heard finally.

4. In view of clear terms of appointments as referred above, though extended as referred above, in my view, the respondents are not entitled for the reliefs so granted by the order. The respondents merely because got ad interim relief on 11.12.1989 before expiry of the contractual period, is also not a sufficient reason to maintain the impugned order. In view of the admitted contractual clauses and the fact that the respondents were appointed for a fixed period on lump sum basis with clear reservation/indication that they have no claim or any right of permanency of service and having accepted the same unconditionally, the reasoning based upon the standing orders and/or the judgments is also not correct basically in view of the following observations of the Supreme Court.

5. Strikingly, the Supreme Court in Md. Ashif and Others Vs. State of Bihar and Others, has dealt with the above judgments and while dealing with related subject has observed, referring to Secretary, State of Karnataka and Others Vs. Umadevi and Others, , as under:

8. .. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in

the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service.

9. The above decision has been followed by this Court in *Md. Abdul Kadir and Another Vs. Director General of Police, Assam and Others*, , where this Court held that employees who were recruited in connection with a scheme could not claim continuance or regularization in service even when they may have worked on ad hoc basis for as long as two decades. The decision of this Court in *State of Karnataka and Others Vs. Sri G.V. Chandrashekar*,], once more reiterated the legal position and declared that the observations made by a threeJudge Bench of this Court in *U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others*, , were only in the nature of obiter dicta. In *Pooran Chandra Pandey's* case (supra) a two Judge Bench of this Court had tried to distinguish the ratio of the decision of this Court in *Uma Devi's* case (supra) and held that the said decision had to be read in conformity with Article 14 of the Constitution and that the same could not be applied mechanically.

90. ...

91. ...

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the twoJudge Bench in *U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others*, should be read as obiter and the same should neither be treated as binding by the High Courts, tribunals and other judicial fora nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.

10. Reference at this stage may also be made to the decisions of this Court in *Pinaki Chatterjee and Others Vs. Central Administrative Tribunal and Others*, and *General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi and Others*, where this Court has followed *Uma Devi's* case (supra) and declared that regularization cannot be granted if the same would have the effect of violating Articles 14 and 16 of the Constitution.

6. It is clear that the present respondents case fall within the ambit of the term "litigious employment". They were continued on the post because of interim orders passed by the Court, but not as per the appointment letter/orders. In view of the interim orders, the petitioners were compelled to continue the respondents on the post of watchman though appointment was for fixed period and on lump sum salary. The claims on the basis of standing order so raised including completion of 240 days as contemplated that itself cannot be sufficient reason to continue the respondents on the post, in such fashion. [2008 III CLR 151 *State of Maharashtra v. Pandurang Sitaram Jadhav*]. The agreed terms and conditions and the facts and circumstance so referred and in view of the above reasons and decisions given by the Supreme Court, I am inclined to set aside the impugned order. In my view, no right is created in favour of the respondents to claim permanency and/or to continue on the post of watchman after expiry of

contractual period. As noted, this Court had already stayed the impugned order in the year 1997 itself. They are not in service since then. It is not the case of clear vacancy or existence of the post. The contractual appointment was fixed for tenure and for specific time bound project and on lump sum salary. The respondents demanded only an increase in the salary, but never demanded permanency earlier except through the complaints. In view of the above facts also the claim based upon the standing order is unsustainable. It is also necessary to know that the petitioner never appointed the respondents by following the due procedure as required before appointing any employee in such statutory body. Such persons cannot be made permanent as directed. [State of Bihar Vs. Upendra Narayan Singh and Others,].

7. In MSRTC and Anr. v. Casteribe Rajya P. Karmchari Sanghatana 2009 III CLR 262, the Supreme Court has observed as under:

31 Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the Courts.

The facts and circumstances in MSRTC (supra) are distinct and distinguishable. It will not assist the respondents to maintain the order though it is based upon the MRTU & PULP Act.

8. The employer has right to appoint temporary, contractual, casual, daily workers or ad hoc employees. One cannot overlook the power and the right of the employer to create and appoint the person like the respondents for temporary period for particular project on clear terms and conditions. Therefore, the respondents, who accepted the said terms and conditions, now cannot be directed to be made permanent. There is nothing to show that the action of the employer/petitioner is arbitrary, vitiated by malafides and/or contrary to any constitutional or statutory provision. The Court has exercised its jurisdiction and power wrongly in the present facts and circumstances of the case. [Official Liquidator Vs. Dayanand and Others,].

9. Considering above, I quash and set aside order dated 29.04.1997 passed by the Member, Industrial Court, Solapur. The writ petition is allowed in terms of prayer (a).

10. No order as to costs.