

(2019) 07 BOM CK 0136

In the Bombay High Court

Case No : Writ Petition No. 14620, 14621, 14622 Of 2017

Mukhyadhikari Nagar Parishad Kalam

APPELLANT

Vs

Satish Baburao Jhadke And Others

RESPONDENT

Date of Decision : 17-07-2019

Acts Referred:

Maharashtra Recognition Of Trade Unions And Prevention Of Unfair Labour Practices Act, 1971 — Section 28(1)
Industrial Disputes Act, 1947 — Section 2(s), 2(oo)(bb)

Citation : (2019) 07 BOM CK 0136

Hon'ble Judges : Ravindra V. Ghuge, J

Bench : Single Bench

Advocate : B.R. Sontakke Patil, D.S. Kudle, S.P. Tiwari

Final Decision : Partly Allowed

Judgement

1. On 05/07/2019, I had passed the following order :Â?

"1. Shri Sontakke learned Advocate submits that in the Writ Petition wherein the sole respondent Shri Chandrasen Govardhan Kamble is involved, the

petitions would become infructuous as Shri Kamble has passed away. The learned Advocate Shri Kudle confirms the statement that the sole respondent/original complainant has passed away.

2. In view of the above, Writ Petition No. 14625/2017 stands abated.

3. Shri Kudle learned Advocate appearing on behalf of all the respondent workers in the remaining three petitions commenced his submissions. It was

noticed that in the first petition, there are seven workers involved. In the second petition, there are three workers involved and in the third petition,

there are nine workers involved. Shri Sontakke submits that though he has prepared a rough chart of the dates of joining of these workers and the

periods of their work, the said chart will have to be properly typed out and will have to be submitted to the Court. Shri Kudle submits that he would

also prefer to prepare such a comparative chart based on the conclusions drawn by the Industrial Court meaning thereby that the chart would contain

such dates which the Industrial Court has accepted as being the dates of joining.

4. Shri Sontakke submits that he would not be available till 10/07/2019 considering that a close relative would be getting married in that period. On his

request, matter is kept on 11/07/2019 as "partially heard." The learned Advocate Shri Kudle consents to have the matter on the same date.

5. Stand over to 11/07/2019 as "partially heard."

2. The hearing in these petitions took place on 04/07/2019 and was continued on 05/07/2019, 11/07/2019 and today.

3. The petitioner is the Municipal Council, Kalamb, Taluka Kalamb, District Osmanabad. All the respondents in these three petitions are the original

complainants, who had approached the Industrial Court, Latur by preferring their individual complaints under Section 28(1) read with Items 5, 6, 9 and

10 of Schedule IV of the MRTU and PULP Act, 1971. In all these matters, the Industrial Court has delivered identical judgments of the same date

22/08/2017 and has issued the following orders :—

"1. The complaint is partly allowed.

2. The respondent is directed to send proposal complete in all respect regarding grant of permanency/regularization to the complainant w.e.f.

completion of 240 days from respective initial appointment, to the competent authority within a period of two months from the date of instant order.

3. The respondent is directed not to terminate the services of the complainant during the pendency of said proposals.

4. The respondent is directed to pay monthly emoluments promptly to the complainant every month in accordance with the minimum of pay scale (at

the lowest grade, in the regular pay scale) applicable to the permanent employees till the decision of the proposal.

5. No order as to cost.

6. Proceedings are closed."

4. The petitioner Municipal Council is aggrieved by all these judgments on the ground that the Industrial Court has directed the petitioner to forward

the proposals to the competent authority for granting permanency with effect from the date on which each of the original complainants has completed

240 days in employment.

5. The learned Advocate for the Municipal Council has strenuously canvassed that neither does the Council have the power to create posts, nor can it

grant regularization to the daily wagers. A particular staffing pattern was made applicable to the Municipal Council. The number of the residents of

Kalamb was growing rapidly. Civics amenities had to be extended to the citizens and the demand for cleanliness, hygiene and all such facilities, which

are normally provided by the Municipal Councils, were being demanded by the residents. The Municipal Council also has Public Health Centres

(PHC). At some PHC, they had ambulances which required drivers. They had their vehicles for which drivers were to be recruited. They required

watchmen, labourers, helpers, Safai Kamgar and workers working in the Water Supply Department and drivers on Fire Brigade Vehicles.

6. In this backdrop, considering the volume of work, the Municipal Council had no option but to devise a method of attracting workers on contractual

basis. They had no permission to recruit workers and the Municipal Council was aware that engaging daily wagers for several years would lead to

litigation and such daily wagers would flock the Industrial Court for seeking regularization in employment. It was in this backdrop that the Municipal

Council devised a scheme of floating personal tenders in the sense that tenders were published for inviting applications from individuals to quote their

monthly charges for performing the work available with the Municipal Council. None of these workers have been directly issued with an appointment

order by the Municipal Council thereby establishing employer-employee relationship.

7. He further submits that after these respondents applied by putting forth their bid, they were selected and this was a contract for work to be

performed in a period of 11 months. After every 11 months, the Municipal Council again published the tenders and since many of the respondents

were successful bidders, they were continued on such contractual basis. He has relied upon the judgment of the learned Division Bench of this Court

in the matter of Vishwanath Shankar Sadafule and several others Vs. Maharashtra State Electricity Distribution Company Limited and others. These

were group of cases dealt with by this Court reported at 2017 SCC online Bom. 9692. He also relies upon the judgment of the Honourable Apex Court

in the matter of U.P. Cooperative Spinning Mills Federation Limited and others Vs. Amar Nath Dwivedi and another, 2017 2 , LLJ 380.

8. I find a peculiar situation. The condition of the Municipal Council is grim. On the one hand, the population is growing and residents are demanding amenities and on the other hand, the State Government is restricting the recruitment process and imposing financial fetters on the Municipal Council.

Though the work is available and though the Municipal Council needs such workers, the ultimate decision has to be taken by the Directorate of

Municipal Administration for making budgetary provisions, sanctioning posts and filling in such posts by regularization.

9. The learned Advocate for the respondents submits that no doubt the Municipal Council may not have the jurisdiction or power to create posts and

grant regularization. But the respondents are not at fault. These are poor persons, who are struggling for their livelihood. They are in need of

employment and they cannot sustain their families without any earning. They are helpless persons belonging to the weaker section of the society, who

do not have any bargaining power. Any employment that the Municipal Council would offer, is accepted by these workers blindly because they cannot

feed themselves and their families without any earning.

10. He further submits that the work of a Safai Kamgar and drainage cleaner is actually inhuman. It is extremely difficult for a human being to enter

sewerage pipelines and clean such pipelines. These persons are normally called in Marathi as "Mail Kamgar". When such workers are also working

with the Municipal Council, this Court will have to deal with an issue as to whether such human beings should work in inhuman working conditions and

yet litigate in the Courts for seeking their rights.

11. Considering the submissions of the learned Advocates for the respective sides, I have gone through the petition paper books and the record and

proceedings available. The learned Advocate for the petitioner has prepared a ready reference chart which is identified as 'A1' after taking it on

record. The said chart gives a clear view of these matters and the conclusions drawn by the Industrial Court.

12. Before I deal with the details about the tenures of these workers, I deem it

appropriate to direct the petitioner to add the Directorate of Municipal

Administration as a respondent in each of these petitions. Addition be carried out forthwith. The learned AGP causes an appearance on behalf of the

added Department of the State.

13. It would be difficult to refer to the serial numbers of these respondent workers in this judgment. Instead, it would be appropriate to refer to their

names for easy identification and for avoiding confusion. Since all these petitions are being decided together, I deem it appropriate to refer to the

names of these workers beginning from the first petition.

14. As I would be issuing directions in these matters, as per the law laid down by this Court in the matter of Mukhyadikari, Nagar Parishad, Tuljapur

Vs. Vishal Vijay Amrutrao and others, 2016(3) ALL MR 113 and Municipal Council, Tuljapur Vs. Baban Hussain Dhale, WP No. 1843/2015 and

connected matters, decided on 26/02/2015 and the judgment of the learned Division Bench of this Court at Nagpur in the matter of the Municipal

Council Tirora and anr. Vs. Tulsidas Baliram Bindhade, 2016 (6) Mh.L.J. 867, I am not required to mention the Departments in which these

respondents were working. The proposals to be forwarded to the competent authority would take care of these Minute details.

15. Suffice it to say that the record available on the basis of which the Industrial Court has delivered its judgment would indicate that,

(a) Satish Jhadke joined duties in April 2008.

(b) Kishor Shendge joined duties in January 2009.

(c) Rajesh Gaikwad joined duties in March 2010.

(d) Gajendra Rakhunde, Ranjit Rakhunde, Samadhan Rakhunde and Ali Nawab joined in March 2015.

16. All these workers had filed their ULP complaints in 2016. As such, Satish, Kishor and Rajesh would be entitled for regularization depending upon

their seniority in comparison to all the daily wage/ contractual employees of the Municipal Council. The cases of Gajendra, Ranjit, Samadhan and Ali

Nawab would be considered strictly as per their seniority list and as and when their turn comes.

17. In the second petition,

(a) Sumit Gaikwad produced his Experience Certificate dated 22/03/2013

indicating that he was working from March 2012 to 2013. The record reveals that his next appointment order was in March 2015. As such, while preparing his proposal, the Municipal Council will have to search from its records as to whether Sumit had been working even in 2014.

(b) Ranjit Kasbe received his first appointment order through such tender on 31/03/2010. His next order placed on record is dated 01/06/2015. In his case also, the Municipal Council would search its records to find out whether Ranjit Kasbe was working in 2012, 2013 and 2014.

(c) Shyam Gaikwad is found to have joined duties in June 2015. He had produced a register at Exhibit U-19 which was maintained by him in his capacity as a watchman. He claims that this document was produced only to indicate that he was in continued employment and the fact remains that he was working from April 2010. In this backdrop, the record before the Industrial Court does not clearly show that Shyam Gaikwad was working from April 2010. As such, while sending his proposal, the Municipal Council would scan its records and find out whether they have any material to show that Shyam Gaikwad was working from April 2010.

18. In the third petition, the evidence before the Industrial Court proved that,

(a) Nitin Garad was working from May 2011 onwards.

(b) Exhibits U-36, 37 and 38 indicated that Kailas Kale was engaged from April 2013 and he continued every year.

(c) Exhibit U-40 is an order dated 10/07/2008 which indicates that Nitin Shivaji Gaikwad was working as a driver from July 2008.

(d) Shridhar Sahaji Chonde was proved to have been working from November 2011.

(e) Mahadev Appa Hajgude was also working from November 2013.

(f) Gajanan Jadhavar was also working from July 2013. These persons, therefore, can be considered for sending their proposals for regularization.

(g) However, Sugat Waghmare was working from June 2014.

(h) Sunil Pawar was working from June 2015 and

(i) Prakash Waghchoure was also working from June 2015. These three persons approached the Industrial Court within one year of their joining duties by filing ULP Complaint No. 63/2016.

19. Though I find that the Municipal Council, Kalamb has devised a very strange

and alien scheme to the Industrial Disputes Act, 1947 by resorting to floating personal tender contracts for these employees, I find that the learned Advocate for the Municipal Council submits that the Municipal Council had no other option. It could not have brought the work to a standstill on the ground that it has no powers to appoint employees. The whole blame would have landed on the Chief Officer of the Municipal Council.

20. I, therefore, would not conclude that the Municipal Council has resorted to this method, deliberately. It does appear that it was bound by the fetters imposed upon it by the Government vide the staffing pattern, restrictions on financial expenditure towards the wages of the daily wagers and the fear of inviting litigation in the form of claims for permanency. Nevertheless, I find that the Municipal Council at the relevant time, from 2008 onwards, should have taken guidance from the Directorate of Municipal Administration and should have sought a clear advice as to how it should deal with this problem of increasing volume of work and limited vacancies for recruiting employees on permanent positions.

21. There are innumerable cases involving various Municipal Councils before this Court wherein temporary daily wagers' are kept in employment as the volume of work increased. But this type of contract tender engagement is a rare method which does not find any place in the Industrial Disputes Act or classification of workers even under the Industrial Employment (Standing Orders) Act, 1946. Considering the law laid down by the Honourable Apex Court in the matter of H. D. Singh vs. Reserve Bank of India AIR 1986 SC 13 2 and State of Haryana vs. Piara Singh (1992) 4 SCC 125, it is obvious that though the Municipal Council may not have intended to exploit these workers, the ultimate result is that these workers suffered exploitation. They have no security of employment.

After every 11 months of employment, they suffered a break in service, though artificial. On the one hand, they were performing inhumane and cruel work and on the other hand, they had no security of employment.

22. In Piara Singh (supra), the Hon'ble Apex Court has observed in paragraph 33 as under :^Â

"Now coming to the direction that all those ad hoc/temporary employees who have continued for more than a year should be regularised, we find it difficult to sustain it. The direction has been given without reference to the

existence of a vacancy. The direction in effect means that every ad hoc/temporary employee who has been continued for one year should be regularised even though (a) no vacancy is available for him which means creation of a vacancy (b) he was not sponsored by the Employment Exchange nor was he appointed in pursuance of a notification calling for applications which means he had entered by a backdoor (c) he was not eligible and/or qualified for the post at the time of his appointment (d) his record of service since his appointment is not satisfactory. These are in addition to some of the problems indicated by us in para 12, which would arise from giving of such blanket orders. None of the decisions relied upon by the High Court justify such wholesale, unconditional orders. Moreover, from the mere continuation of an ad hoc employee for one year, it cannot be presumed that there is need for a regular post. Such a presumption may be justified only when such continuance extends to several years. Further, there can be no 'rule of thumb' in such matters. Conditions and circumstances of one unit may not be the same as of the other. Just because in one case, a direction was given to regularise employees who have put in one year's service as far as possible and subject to fulfilling the qualifications, it cannot be held that in each and every case such a direction must follow irrespective of and without taking into account the other relevant circumstances and considerations. The relief must be moulded in each case having regard to all the relevant facts and circumstances of that case. It cannot be a mechanical act but a judicious one. Judged from this standpoint, the impugned directions must be held to be totally untenable and unsustainable."

23. I would find fault with the Municipal Administration of the State of Maharashtra which is a nodal body in charge of the overall administration of the Municipal Councils in the State. It should have arrived at a definite policy which should have been made universally applicable to all the Municipal Councils in the State of Maharashtra. Neither can such matters be left to the whims and fancies of the Municipal Council, nor can the State of Maharashtra as a model employer allow exploitation of workers.

24. In the matter of Vishwanath Shankar Sadafule (supra), those appellants were ex-servicemen and had applied for the post of watchman with the Electricity Distribution Company. They were working on fixed term contracts on consolidated salary of Rs. 400 per month and had worked for only

19 months. The learned Division Bench of this Court, therefore, concluded that the Industrial Court could not have applied Standing Order 4C as a

ground for granting deemed regularization to such ex-servicemen. It was also concluded that their employment came to an end by efflux of time and

thereafter they approached the Industrial Court which granted them regularization. Therefore, this Court interfered with the said conclusion.

25. In U.P. Co-Op. Spinning Mills (supra), the employee was appointed on 'contractual basis' on the post of a Training Officer only for one year.

Firstly, he was an officer and it is a settled position in law that the service conditions of an officer who is not a workman under Section 2(s) of the

Industrial Disputes Act, 1947, is to be engaged through a contract of employment. The Honourable Apex Court, therefore, concluded that he could not have been granted regularization.

26. In the instant cases, all these employees are within the definition of workmen. Each of them is a Class IV employee. The methods of

employment and unemployment are prescribed under the classification of workmen found in the Industrial Employment (Standing Orders) Act, 1946

and the Industrial Disputes Act, 1947.

27. Considering the above fact situation, injustice would be further perpetuated if this Court is to ignore the fact that all these workers are working in

the employment of the Municipal Council wherein work of a perennial character is available and therefore, Section 2 (oo) (bb) of the Industrial

Disputes Act, 1947 would not be applicable. The engagement and disengagement of these workers through an artificial minor break in service in the

face of continued employment, would not attract Section 2 (oo) (bb).

28. In these circumstances, I find that all these petitions deserve to be partly allowed, considering the established law and the fact that the Industrial

Court has issued directions purely on the basis of Standing Order 4C of the Model Standing Orders granting deemed permanency to these

respondents.

29. As such, these petitions are partly allowed. The direction of the Industrial Court at Clause 2 and Clause 4 are quashed and set aside. The said

directions are replaced with the following directions :—

(a) The petitioner Municipal Council shall prepare a proposal of all its daily wage/temporary/contractual employees, who are performing identical

nature of duties, within 3 months from today.

(b) These proposals would contain the full names of all such employees, their nature of duties, their dates of joining duties either on the basis of an appointment order or a contractual order and their age.

(c) The said proposal would also contain the total duration of work performed by such employees.

(d) These proposals shall be forwarded to the added respondent Directorate of Municipal Administration, State of Maharashtra, within 3 months from today.

(e) After the said competent authority receives the proposals, it shall cause a detailed assessment of such proposals and after considering the available vacant posts, shall direct regularization strictly on the basis of the seniority of such employees and length of employment.

(f) Such regularization would be carried out by keeping in mind that these persons must have worked for atleast some period in each calendar year while considering their seniority on such basis.

(g) The Directorate of Municipal Administration shall urgently issue appropriate directions to the Municipal Council, Kalamb insofar as recruitment of daily wagers or temporaries are concerned, by following a uniform policy to be made applicable to all the Municipal Councils in the State of Maharashtra.

(h) Until such decision is taken by the Municipal Administration and until the proposals of all such employees are decided, they shall not be terminated from service merely on the ground that they are temporaries or daily wagers, save and except disciplinary cases. However, if any temporary/daily wager/contractual worker himself abstains from duties or does not report for duties, this shall not amount to the Municipal Council terminating him.

(i) Insofar as the issue of age barrier is concerned, those employees who have been working in each calendar year with the Municipal Council and have not attained the age of retirement as per the rules, would not be excluded from the proposal for regularization.

(j) In the event of there being any age barrier in the consideration of the competent authority while granting regularization, such age barrier would not come in way of an otherwise eligible employee.

(k) The record and proceedings received from the Industrial Court, Latur be returned expeditiously.