

(2017) 01 BOM CK 0053
In the Bombay High Court
Case No : Writ Petition No. 8293 of 2016

Municipal Council

APPELLANT

Vs

Vilas Bhimrao Nikalje

RESPONDENT

Date of Decision : 18-01-2017

Acts Referred:

Citation : (2017) 153 FLR 243

Hon'ble Judges : Ravindra V. Ghuge, J.

Bench : Single Bench

Advocate : Mr. H.K. Munde, Advocate, for the Petitioner; Mr. B.R. Surwase, Advocate, for the Respondent No. 1; Mr. N.T. Bhagat, AGP, for the Respondent No. 2

Final Decision : Partly Allowed

Judgement

Ravindra V. Ghuge, J. (Oral)—Leave to add Director, Municipal Administration, Addition be carried out forthwith. Learned AGP waives service for the added respondent.

2. The Municipal Council, Jalna in both these matters is aggrieved by the identical judgment dated 27/11/2015 delivered by the Industrial Court in Complaint (ULP) Nos.28/2012 and 29/2012.

3. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

4. I have considered the strenuous submissions of the learned Advocates.

5. The issue as regards grant of regularization without considering the existence of sanctioned posts and by applying the principle of "deemed regularization" under Standing Order 4(C) of the Industrial Employment Standing Orders Act, 1946, has been raised by the petitioner. The other issue raised is that the petitioner does not have any employer-employee relationship with the respondent and the complaint under the MRTU and PULP Act, 1971 was not

maintainable in the light of the ratio laid down by the Hon"ble Apex Court in the matter of Vividh Kamgar Sabha v. Kalyani Steels Limited, (2001)2 SCC 381 = 2001(1) CLR 532 and Cipla Limited v. Maharashtra General Kamgar Union, 2001 LLR 305 = 2001(2) Bom.C.R. (S.C.) 822 = (2001) 2 SCC 381.

6. In so far as the issue of no employer-employee relationship is concerned, there is no dispute that besides putting forth such a contention in the written statement Exhibit C5 before the Industrial Court, the petitioner did not produce any evidence to suggest that these respondents were appointed by a Contractor and were deployed for performing contractual work with the petitioner/Municipal Council. Besides the bald statement in the written statement, no evidence has been adduced and not a single document was produced before the Industrial Court to indicate the existence of a contract between the petitioner/Council and the Contractor. Even the name and details of the Contractor or his firm were not mentioned in the written statement and were not stated even in the evidence of the petitioner. Even in the memo of these petitions, there is no mention about the name and details of the Contractor. In my view, the Industrial Court has rightly rejected the said contention as there is no iota of evidence even to remotely suggest the existence of a contractor. On this count, the impugned judgments call for no interference.

7. In so far as the claim of the respondents of deemed permanency in the light of Standing Order 4(C) as well as on account of Item 9 of Schedule IV of the Act of 1971, is concerned, the said issue is no longer resintegra. This Court, by its judgment delivered in the matters of Municipal Council, Tuljapur v. Baban Hussain Dhale in WP No.1843/2015 and connected matters decided on 26/02/2015 and in the matter of Mukhyadhikari, Nagar Parishad, Tuljapur v. Vishal Vijay Amrutrao and others, [2015(5) Mh.L.J. 75] has concluded that in the matters of State Instrumentalities, since the power to create posts is not vested in the establishment at the local place and the said power vests with the State Government, the Industrial Court cannot direct creation of posts in as much as it cannot direct regularization on the basis of deemed permanency.

8. Similarly, in the matter of Municipal Council, Tirora and another v. Tulsidas Baliram Bindhade [2016(6) Mh.L.J.867], this Court has observed in paragraph Nos.1, 2 and 19 as under :

"1. The Hon"ble The Chief Justice has in view of the following orders dated 22.01.2015 passed by the learned Single Judge in Writ Petition Nos. 5191/2004, 5199 to 5205/2004, 5207 and 5520 of 2004, referred to this Division Bench the following question :"

"1. An unfortunate situation has arisen in the present matters. Writ Petition No.1209 of 2002 along with connected matters in respect of Class-IV employees of Municipal Council, Tumsar, were allowed by a common judgment and order delivered by the learned Single Judge of this Court (Smt. Vasanti A. Naik, J.) on 20-8-2011, and the common order passed by the Industrial Court directing

regularization on the basis of Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act read with Item 6 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, has been quashed and set aside and the complaints have been dismissed. Same is the view taken by me in respect of Class IV employees of the same Municipal Council in Writ Petition No.1207 of 2002 along with connected matters decided by common judgment and order dated 23-2-2013. In another set of Writ Petition No.3087 of 2001 along with connected matters decided by me by common judgment and order dated 17-6-2013, same view is followed. In Writ Petition No.3436 of 2001 in respect of the employees from the same Municipal Council, a different view is taken by the learned Single Judge of this Court (Shri Z.A. Haq, J.) in the judgment and order dated 22-11-2014, and the writ petition filed by Municipal Council, Tumsar, has been dismissed, confirming the judgment and order passed by the Industrial Court, directing regularization of the complainant in service, on the basis of Clause 4C of the Model Standing Orders. I do not find any distinction on facts in Writ Petition Nos.1209 of 2002, 1207 of 2002 and 3087 of 2001.

2. All these petitions arise out of the common order passed by the Industrial Court in the complaints under Section 28 read with Items 6 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 directing regularization of the complainants in service upon completion of 240 days" continuous service as per Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act, 1946. It is an undisputed fact that all the complainants were appointed and working as daily wagers for years together. They were neither working as badli or temporary employees. There is neither any pleading nor any evidence to prove that all of them were appointed and working on the posts, which are sanctioned, as required by Section 76 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. It is also not the case either of the complainants or the employer Municipal Council that the proposal to create or sanction the posts of Class IV employees to accommodate the complainants was forwarded to the Director of Municipal Administration under Section 76 of the said Act. Even if any such proposal is forwarded, no orders are passed to create or sanction the posts to accommodate the complainants as regular employees.

3. In the background of the aforesaid undisputed factual position, the Industrial Court has recorded the finding in all the matters that in terms of Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act, which are applicable to the employees working in the Municipal Council, the complainants have rendered 240 days" continuous service and hence they are entitled to regularization.

4. The facts stated in para 2 and the findings recorded by the Industrial Court are similar in all these decisions. There cannot be different view in the similar facts and circumstances. In the decision given in Writ Petition No.3436 of 2001,

delivered by Shri Z.A. Haq, J., I do not find any distinction on facts in Writ petition Nos.1209 of 2002, 1207 of 2002 and 3087 of 2001. The judicial discipline, therefore, requires all these matters to be placed before the Larger Bench to resolve the conflicting views and decide the following question of law so as to avoid a different view being taken in respect of Class IV employees working in the same Municipal Council :

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?

5. The matters be, therefore, placed before Hon"ble the Chief Justice for constitution of appropriate Bench in terms of Rule 7 of Chapter I of the Bombay High Court Appellate Side Rules, 1960 to decide the aforesaid question of law."

2. We find that the controversy already answered by at least two Division Benches of this Court in 2006 and in 2008 in 2 LPAs and by at least two learned Single Judges S/Shri S. J.Vazifdar J. and B.P. Dharmadhikari J, after appreciating the binding precedents of the Hon"ble Apex Court. We have therefore rejected the request of Adv. M.P. Jaiswal to place the reference before Full Bench. Judgments of the Division Benches of this Court in LPA 37 of 2006 in case of Pune Municipal Corporation v. Dhananjay Prabhakar Gokhale, (2006) 7 LJ Soft page 107 = (2006) 4 Mah. L.J. page 66 (RMS Khandeparkar J. and Roshan Dalvi J.) and in LPA 14 of 2008 dated 31.7.2008 reported at 2008 (5) All M.R. 497 = 2008 (10) LJ SOFT 53 State of Maharashtra and Anr. v. Pandurang Sitaram Jadhav (Swatanter Kumar, C.J., A.P. Deshpande, J.) as also of Single Judge (S.J. Vazifdar, J.) in Ramesh Vitthal Patil and Ors. v. Kalyan Dombivali Municipal Corporation and Ors. 2010 (6) Bom.C.R. 661 : 2010 (8) LJ SOFT 39 and another judgment of a Single Judge (One of us B. P. Dharmadhikari J.) reported at 2011 (2) CLR 336 : 2011 (4) Mh.L.J. 875 Shrirampur Municipal Council v. V.K. Barde, Member, Industrial Tribunal and Ors., are helpful here. In fact, the respective learned Single Judges whose concurring orders lead to this reference have also taken note of this legal position. Though Shri Jaiswal made request to place the matter before the Full Bench, he did not invite our attention to any contrary view of the Division Bench in the matter of public employment reached after considering the binding precedents. The third learned Single Judge to whom these two concurring views have been pointed out, noted the difference in facts presented to him and therefore, arrived at a different conclusion. As a question of law not requiring factual investigation is before us, respective Counsel have avoided to comment on merits of any of these orders and we also do not find it necessary to delve into it.

19. In this reference, the position emerging before us is similar. 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 Clause 4C of M.S.O. A view to the contrary would result in regularizing/validating a void act. Clause 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 Clause 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 practise under item 9 of Sch. IV of the 1971 Act but unless and until, other additional factors are proved on record, finding of indulgence in an unfair labour practise under item 6 of Sch. IV thereof can not be reached. As explained by the Hon. 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 can not succeed in proving the commission of unfair labour practise under item 6 by the employer. These two ingredients, therefore, also must be established when benefit of Clause 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 can not and does not enable the workman to claim permanency by taking recourse to Clause 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 can not be sustained. This also nullifies the reliance upon the judgment of learned Single Judge in case of Maharashtra Lok Kamgar Sanghatana v. Ballarpur Industries Limited (supra) where the employer was a private Company not subjected to such regulatory measures by any Statute and enjoyed full freedom to create the posts and to recruit. One of us (B.P. Dharmadhikari, J.) is party to the judgment of this Court in Raymond UCO Denim Private Ltd. v. Praful Warade and Ors. (supra) which again needs to be distinguished for the same reasons. The judgment of learned Single Judge in case of Indian Tobacco Company Ltd. v. The Industrial Court and Ors. (supra), judgment of Hon"ble Apex Court affirming it or then judgment of Hon"ble Apex Court reported at Western India Match Company Ltd. and Workmen are all considered therein and are distinguishable as the same do not pertain to the province of public employment or consider inherent Constitutional restraints (the *suprema lex* see Mahendra L. Jain v. Indore Development Authority and others (supra) and Clause 32 of the MSO. For same reasons, law laid down by the Full Bench judgment of this Court in 2007 (1) CLR 460 : 2007 (1) Mah.L.J. 754 Gangadhar Balgopal Nair v. Voltas Limited and Anr. does not advance the cause of workmen. The Division Bench of this Court in May and Baker Ltd. v. Kishore Jaikishandas Icchaporia (supra) while construing Section 10A(3) held that the expression "other law" would not refer

to the model standing orders or the certified standing orders since they are laws made under the provisions of parent act itself and not under any other law. The Model Standing Orders and Certified Standing Orders, held the Division Bench, "are laws no doubt but they are laws made under the provisions of the Act". They were held not to be provisions under any other law. This discussion therefore shows how these words "in derogation of any law for the time being in force" in Clause 32 of MSO need to be understood and does not help Adv. Jaiswal or Adv. Khan."

9. Considering the crystallized position of Law, the impugned judgment granting the status and privileges of a permanent employee to the respondents from the date of the judgment of the Industrial Court, cannot be sustained. The proposal of the respondents need to be forwarded to the Director, Municipal Administration for considering availability of vacant posts and absorption of the respondents from the dates the concerned posts which can be occupied by the respondents have fallen vacant. There is no dispute that both these respondents are working as "Lineman" in the Water Supply Department of the petitioner/Council.

10. In the light of the above, these petitions are partly allowed. The declaration of ULP under Item 6 of Schedule IV against the petitioner is quashed and set aside. The relief in terms of paragraph Nos. 17(C) and (D) of the impugned judgments stand modified as follows :

[a] The petitioner/Council shall prepare individual proposals of the respondents indicating the date of their first appointment in service and the nature of work performed by them coupled with the wages earned by them, within 6 (six) weeks from today.

[b] The said proposals shall be forwarded within the above mentioned period to the Director of Municipal Administration, who shall consider the said proposals and depending upon the availability of posts, shall grant regularization to the respondents on the posts which they can occupy considering the nature of their duties.

[c] The said proposals shall be decided within 16 (sixteen) weeks from the date of receipt.

[d] In the event, posts are not vacant and available, these respondents shall not be terminated by the petitioners and they would be considered on the basis of their seniority for absorption as and when the posts are created.

[e] The above protection shall not be applicable in matters of disciplinary proceedings.

11. Rule is made partly absolute in the above terms.