
(2015) 11 BOM CK 0026

In the Bombay High Court

Case No : Writ Petition Nos. 5427, 5428 of 1996 and 1645 of 1997

Municipal Council (Nagar Parishad)

APPELLANT

Vs

Vikas Machindra Mane and Others

RESPONDENT

Date of Decision : 26-11-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 227
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 75, 76, 76(1)

Citation : (2016) 1 ABR 417 : (2016) LabIC 748 : (2016) 1 LLJ 493

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

Bench : Single Bench

Advocate : Naiknavare Ramesh V., Advocate, for the Appellant; Bayas Anandsingh S., Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

R.V. Ghuge, J.—The petitioner in these three petitions is the Municipal Council, Osmanabad. The daily wage employees involved in these three petitions are represented by the respondent No. 1 Union. This Union had preferred Complaint (ULP) Nos. 395 of 1991, 468 of 1990 and 93 of 1989 before the Industrial Court, seeking benefits of permanency for the workers mentioned in the Annexure to the complaints. By identical three judgments, dated 11.1.1996, all these three complaints have been allowed. The petitioner has questioned these three judgments in these petitions.

2. Since all the daily wage employees, represented by the respondent Union are identically situated and an identical question of law is involved, I have considered these three petitions together.

3. While admitting these petitions, this Court has protected the services of the daily wage employees. Consequentially, barring a few who have retired, all such employees are in employment and all of them have been granted regularization by the order dated 31.10.2001, passed by the Regional Director, Municipal

Council Administration. It is, therefore, not in dispute that all these daily wage employees are now regularized in employment with effect from 31.10.2001.

4. For the sake of brevity, the petitioner Municipal Council is being referred to as the "Municipal Council" and the daily wage workmen at issue are referred to as "daily wagers".

5. The contention of the Municipal Council in these petitions is that the Industrial Court could not have granted regularization to the daily wagers. Unless the posts were created by respondent No. 3 - Director of Municipal Administration, the Complaints preferred by the daily wagers could not have been entertained by the Industrial Court. Reliance is placed upon the judgment of this Court in the matter of Municipal Council and another Vs. Mrs. Jaiwantabai Meshram and others, .

6. Shri Naiknavare, learned Advocate for the Municipal Council has strenuously criticized the impugned judgment dated 11.1.1996. Grievance is that unless a proper proposal was not forwarded by the Municipal Council for creation of posts, the daily wagers could not have been regularized. The Municipal Council cannot be termed to be an "Industry." Since the burden of providing amenities and health services to the residents falling within the Municipal Council was growing day by day, the Municipal Council could not cope up with the rise in work. Permanent vacant posts were not available. Since the permanent strength of workmen was insufficient to shoulder the burden of providing civic amenities, the Municipal Council had to engage daily wagers.

7. It is further submitted that merely because the daily wagers were working regularly, it would not mean that they were entitled for regularization only because they had completed 240 days in continuous employment. It is, therefore, prayed that the impugned judgments of the Industrial Court be set aside and the regularization granted to the daily wagers by order dated 31.10.2001 be sustained.

8. Shri Bayas, learned Advocate appearing on behalf of the daily wagers submits that the Municipal Council itself did not move an appropriate proposal for creation of posts. Had they so done with promptitude, the daily wagers would have been conferred with the privileges of regularization and would have been entitled for retiral benefits. He submits on the basis of the evidence recorded before the Industrial Court, that the witness of the Municipal Council admitted that the proposals were not promptly forwarded and hence the posts were not created early.

9. He further submits that the Municipal Council cannot continue the daily wagers for years together and exploit them. Security of employment is more important than merely continuing as daily wagers. Since the proposals were delayedly forwarded, the daily wagers have been regularized in employment by order dated 31.10.2001. He submits that there is no legal infirmity in the conclusions drawn by the Industrial Court and hence these petitions deserve to be dismissed.

10. I have considered the submissions of the learned Advocates as recorded herein above and have gone through the record available with their assistance.

11. It is trite law that the Municipal Council does not have the powers to create posts. Such power vests with the Director of Municipal Administration. It is not in dispute that vacant posts were created and all the daily wagers have been bestowed with benefits of regularization by order dated 31.10.2001.

12. The issue, however, is as to what should be the date from which these daily wagers could be held to be regularized in employment and entitled for monetary benefits.

13. An identical issue fell for the consideration of this Court in the Municipal Council, Bhandara case (supra). The issue, "Whether the Municipal Council, Bhandara could create posts or not and what should be the date from which the daily wagers should be given benefits of permanency?" has been dealt with by this Court. It would be apposite to reproduce paragraph Nos. 7 to 13 of the said judgment as under:--

"7. I have heard the Counsel at length as also considered the various judgments which have been cited on the proposition. In the first case, it would be important to consider the provisos of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 and more specifically section 76 thereof. We are concerned with section 76(1) and (2) which reads as under:--

"76(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 the provisions of sub-section (3), the qualifications, pay, allowances and other conditions of service and the method of recruitment of any such officers and servants, excluding the posts equivalent to class IV posts in the State Government, shall be determined by general or special order made by the Director in this behalf. In case of posts equivalent to Class IV posts in the services of the State Government, the qualifications, pay, allowances and other conditions of service and method of recruitment shall be determined by bye-laws made by the Council in this behalf".....

(3)....

(4)...."

From a reading of the section, it is clear that the posts have to be created if they do not exist with the sanction of the Director. The petitioners by themselves have no power to create posts. All that they can do is, depending upon the nature of work, forward to the Director of Municipal Administration, their recommendations and/or resolutions for the creation of the posts. It is for the Director thereafter to sanction the said posts. In the instant case, admittedly, no posts have been

sanctioned though the petitioners have written to the Director for sanction of various posts which, according to them, are required for the purpose of conservancy, maintenance etc. within the jurisdiction of the Council. No rules or bye-laws pertaining to recruitment or conditions of service have also been placed before me. On pointed query to the Counsel for petitioners, it is pointed out that at least at the relevant time when the complainants/workmen were engaged on daily wage basis, there were no rules governing their conditions of service and/or qualifications for the appointment. This becomes relevant for the purposes of examining the various contentions that if the appointments have not been made in terms of the rules, the question of making such workers who have been recruited on daily wages as permanent, would not arise. In the absence of any such rules, the power would vest in the Council and/or delegated in terms of its business rules, to the Officers to make such recruitment. In the instant case, admittedly, all the workmen in the various complaints have been engaged on daily wages right from the time of appointment and have been working continuously with the petitioner. It is also important to bear in mind and note that the petitioner is a Local Authority. The petitioner cannot discriminate amongst its employees and as such Articles 14 and 16, would be attracted insofar as the petitioner Council is concerned. Once the tribunal or this Court has arrived at a conclusion that the workmen engaged by the petitioners and who had filed complaints before the Industrial Court were doing the same job or similar job and that the job done by the complainants was also done by regular workers in the Establishment, then in that case, merely because they were engaged on daily wage basis, they cannot be denied the benefit of regular pay-scale or pay after they have worked for a long time. The very fact that the complainants-workmen have been continued for a long time by itself would be an indication that the job was not a temporary, but in fact, regular jobs are available. From the fact that the petitioners have themselves written to the Director of Municipal Administration to sanction the posts also will be relevant for the purpose of arriving at a conclusion that there is a need for permanent posts and that is the reason why the petitioners have sought sanction for the said posts. Once there are persons doing the same work, can the petitioner discriminate in the matter of pay-scales and/or pay? In the case of *Randhirsingh v. Union of India*, (1982) 111 J 344 SC, the Apex Court has laid down the law i.e. Equal Pay for equal work. It is true that in respect of casual employees in the matter of pay scale, the Apex Court has thereafter approached it from a different angle. However, what is relevant for consideration is the fact that in the instant case the workmen could not be made permanent not because no regular posts are available, but because the Director of Municipal Administration has not sanctioned the posts. The workmen, therefore, cannot be denied the benefit to which they are legitimately entitled to on the precious plea that they are daily wage workers. The very fact that they are working continuously and many of them, for about 10 years by itself would suggest that it is a constitutional imperative that they must be entitled to regular pay which the similarly circumstanced employees in the Council are drawing.

8. As noted earlier, the question of making the employees permanent in the absence of posts would not arise. If there is no post available, there is no question of conferring permanency. In the instant case, it is nobody's case that the posts are available. On the contrary, the evidence on record is that the petitioners have written to the Director of Municipal Administration for sanctioning the posts. It is only after the posts are sanctioned and the posts become available that the complainants-workmen could be made permanent against the said posts, Therefore, the question of making them permanent in the absence of sanction against the non-existing posts would not arise.

9. That leads us to main question to be decided in the petition as to what is the date from which the workmen are entitled to the benefit of pay or pay-scales and the other benefits which the employees who are regularly appointed are entitled to. In this context, let me first deal with the contentions raised on behalf of the workmen as it is the contention of the workmen that they are entitled to be regularised in terms of the Settlement. It is, therefore, important to consider the said statement.

10. The appropriate Government i.e. the State of Maharashtra was pleased to refer a dispute for the adjudication existing between the petitioner and the workmen employed under it with respect to the following two demands:--

"(1) The Council should apply the Bombay Civil Service Rules, to the conservancy employees as made applicable by the Council to all other employees so that the conditions of service regarding annual leave, holiday etc. could be regulated on par with other employees of the Council. The application of Bombay Civil Services Rules, should be given retrospective effect from the date of order.

(2) All the daily rated employees be made permanent with effect from the date of order".

We are not concerned with the first demand, but what would be relevant would be demand No. 2. Demand No. 2 has been discussed at paragraphs 18 and 19 of the Award. At the time, the demand was made, apart from 117 regular sweepers in the Sanitary Department, there were also 26 Safai coolies who were daily rated employees, it was also brought on record that the Council itself had represented to the concerned authority to create the posts, but no sanction had been received. Thereafter in para 19, the Industrial Tribunal observed that most of the Safai coolies are engaged on the work of permanent nature lasting throughout the year and they have to work for all working hours and all working days. Some of the workers had put in a few months and some had put in few days" service. In this context, the Industrial Tribunal observed that there was no valid reason as to why the Safai coolies who had put in sufficient length of service, should not be confirmed. The Tribunal then observed that at the same time, the general demand made by the workers that all the daily rated employees should be made permanent cannot be accepted. The Tribunal then went on to observe that only those daily rated employees who have put in

continuous and satisfactory service for 2 years, should be considered for being made permanent. The Tribunal was thereafter pleased to order that all daily rated employees who have put in two years continuous and satisfactory service, should be considered for being made permanent by the first party i.e. the Municipal Council, Bhandara. It is, therefore, clear that the direction to make them permanent was on putting two years continuous service and the service being satisfactory. This does not show and/or indicate that in fact, this was the general demand for all years to come. From the facts as emerge, what is seen is that this was the demand put on behalf of all employees who were then engaged on daily rates to be made permanent. The Tribunal rejected the demand as generally made, but directed that only those employees who have put in two years of continuous service and whose work is satisfactory, should be made permanent. In this context the judgment cited by the learned Counsel in the case of Regional Manager, MSRTC (supra), to my mind, is for the general proposition that violation of settlement would amount to unfair labour practice within the meaning of Item (9) of Schedule IV of the Unfair Labour Practices Act. In the instant case, the Industrial Court itself has held that by not giving the benefit of permanent employees to the workers, the petitioners have committed an act of unfair labour practice. The question is, whether the settlement, as referred to earlier, could be availed of by the complainants-workmen to contend that they are entitled to regularisation from the date of completing two years from the date of their regular continuous employment. From perusal of the complaints filed in these cases, which in all respects, are more or less the same what the complainants have averred is that the workmen are well qualified to hold the permanent status in employment of the respondent and has rendered honest and diligent service. Reference has been made to the Award which was passed on 30th July, 1975. It is evident that the said Award has not taken into consideration the provisions of section 76 of the Maharashtra Municipal Councils, Nagar Panchayats And Industrial Townships Act, 1965 to grant permanency, which would entail that there are posts which are available. If there are no posts available, question of making the workers permanent would not arise. It has been contended that the Award of the Industrial Tribunal was not challenged and has become final. The mere fact that on an earlier demand, the petitioner had accepted the Award would not mean that on a complaint being filed, it was not entitled to contend that the workmen could not be made permanent on account of non-existing posts. Once that plea was raised, the matter had to be considered by the Industrial Court. All the more, this Court has to consider the effect taking into consideration that what is being sought in support of their cases is the Award of 1975. It is impossible to accept the contention of the learned Counsel for respondents that the workmen are entitled to the benefits of the Award which was passed in the year 1975. Even if the said Award can be said to be continuing as a condition of service ex-facie in the face of section 76 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965, the question of making the workers permanent would not arise. This contention, therefore, has to be rejected.

11. Once the above contention is rejected, the question is the date on which the employees are to be given the benefit which the permanent employees are entitled to. Section 30 of the Unfair Labour Practices Act, confers powers on the Industrial and Labour Court to direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without backwages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act. This is, therefore, at the discretion which is vested in the courts. No doubt, the discretion must be exercised fairly. It must be exercised based on the material before it. Extraneous consideration cannot be used for the purpose of exercising this discretion or for forming the opinion. Once the Tribunal has exercised discretion based on relevant principles, this Court in the exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution would not interfere with the said exercise unless it is so irrational and/or perverse which no reasonable person could have arrived at. In the instant case, however, I am confronted with the fact that there are five different orders passed on various complaints. The nature of the relief granted in one set of complaints is different from the relief granted on another set of complaints. Under these circumstances, it would not be possible to call on the petitioners/employer to implement the orders of the Industrial Court which has fixed different criteria for workers similarly situated to be given the benefits of pay and regularisation from different dates. To that effect, the orders of the Industrial Court insofar as giving permanency to the employees and the benefits of the pay-scales would have to be set aside in order to enable this Court to pass an appropriate order which would be uniform and treat all the employees alike considering the date of the employment, the date on which the complaint was filed and the category in which they are working. What would, therefore, be relevant criteria to fix the pay of the complainants to give them the pay which the permanent employees are entitled to. The learned Counsel has invited my attention to the judgment of the Apex Court to the context that mere fact that additional financial burden would be occasioned, would be no reason to reject the relief if the workmen would be otherwise entitled to. In the case of Chief Conservator of Forest & another (supra), it was pointed out to the Apex Court that the effect of regularisation in case of employees in the office of the Chief Conservator of Forest, would work upto Rs. 300 crores. The Apex Court rejected the said argument on the ground that what they were considering was not the case of 1.4 lacs of employees, but the cases of employees who were deprived. What is also to be borne in mind that this seems to have been a last desperate attempt on the part of the petitioners before the Apex Court to argue that the workmen were not entitled to be regularised. To be fair to the petitioners herein, throughout they have contended that they have applied for sanction and as there has been no sanction, they could not appoint the petitioners to the post. However, though they did not appoint the workmen to regular posts in the absence of posts, on the plea that if there are no posts available, the workmen

are also not entitled to regular pay-scales or pay, they have not granted the said benefit to the workers. Therefore, the case of a Department of State which was not reconciled to regularisation of its employees, cannot be equated on the same footing as the petitioners before this Court who have at no point of time opposed the contention of the complainants that they were not entitled to permanency. Ultimately a Local Body is not on the same footing as the State Government. Local Body is dependent on the grants received from the State Government and the limited revenue it receives by way of taxes and fees. The Local Bodies have been set up to carry out the functions which, in fact, the Government ought to have, but is not in a position to do. In these circumstances, the economic aspects will have to be borne in mind considering the limited resources of the petitioners herein.

12. A large number of authorities have been cited before me in the matter of regularisation and/or non-regularisation. For the view of that is being taken it has been not necessary for me to discuss the various authorities. After the judgment of the Apex Court in the case of Randhirsingh, a public body cannot refuse to give the same benefits to its employees who are doing similar work. In the instant case, though the workmen have been styled to be engaged on daily wage basis nonetheless they have been working continuously without any break. In case of workmen of the same employer, daily/casual workmen were directed to be regularised on completion of two years service in terms of the award. In such a situation, the judgment of the Apex Court in Conservator of Forests (supra) would be applicable. Permanency is writ large in the work the petitioners are doing. On account of a technical requirement of posts not being sanctioned they have not been made regular. However, they are doing work of a regular nature and usually these employees would be entitled to the same pay-scales which the permanent employees are entitled to. Another contention which was canvassed on behalf of the workmen and which has not been adverted to earlier, is the question of the Model Standing Orders. As far back as the judgment of the Apex Court in the case of Corporation of City of Nagpur, it is now laid down that the departments of the municipality which carry on industrial activities would be governed by the provisions of the Industrial Disputes Act. It is the contention on behalf of the complainants that no Standing Orders have been framed and in the absence of Standing Orders, the Model Standing Orders would be applicable to the Establishment and as such according to the respondents, on completion of 240 days, they have to be made regular. As pointed out earlier, the question of confirmation of an employee or making him regular in the post would arise if permanent post was available. In the instant case, no permanent posts are available. The question, therefore, of making the workmen permanent on completion of 240 days would not arise. The said situation would have arisen if the posts had been created and employee had been engaged and had completed 240 days of continuous service. This question would not, therefore, arise in this case.

13. Having considered all the above aspects, in normal cases, the relief monetary

or otherwise is three years from the date on which a person approaches the Court based on a cause of action. In the case of continuing wrong like denial of wages, the cause of action may be continuous. If the workman does not approach the Court within the period of limitation, question of granting relief by way of arrears would not arise. In the instant case, the workers have come to the Court in the year 1988. The normal rule in such circumstances would be to extend benefit of the pay-scale without giving arrears for the period barred by limitation. As such, in the instant case, the workmen who would be entitled to pay-scales for three years before filing of the complaints. As pointed out earlier, the issue involves payment to a large number of workmen. The petitioners if called upon to pay benefits as prayed for by the workmen, would be crushed by the financial burden considering the numbers involved. At the same time, the workers who have worked with the petitioners cannot also be denied benefit on the ground that the petitioner is not able to make good the payment. Consequences may be large scale retrenchment which is not in the interests of the workmen and citizens. Considering these various aspects, it would be appropriate to pass the following order. The order/s of the Industrial Court are set aside to the extent of monetary and other benefits. It is made clear that the finding of the Industrial Court that the petitioners have committed unfair labour practice is not being set aside and that is being affirmed. The following order is passed.

(1) The complainants before the Industrial Court would be entitled to be paid wages in the scale which a regular workman doing the same work is getting, from the date of complaint.

(2) In computing the Pay that the workman would be entitled to, it will be deemed that his pay is fixed three years previous to the date of the complaint is so made and he would be placed in the appropriate pay on the date of the complaint. If he has not completed three years as on the date of complaint, the pay will be fixed as on the date of his complaint.

(3) The complainants would also be entitled to other benefits which the permanent employees are entitled from the date of the complaint.

(4) Insofar as permanency is considered, the petitioners to make permanent the complainants on receiving sanction from the Director of Municipal Administration in terms of section 76 of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965."

(Emphasis supplied).

14. In the instant cases, the dates of joining duties as daily wagers have been placed on record in these petitions. Many of these daily wagers have been working from 1985 and onwards. It is not in dispute that they have been continuously working with the petitioners in the Class IV category. The Industrial Court has granted the status and benefits of permanency from the date of completion of five years to all the daily wagers drawing an analogy from the

Kalelkar Award/Settlement, applicable to several departments of the State Government. This Court in the Municipal Council, Bhandara case (supra) has concluded that the daily wagers could be entitled to fixed pay, three years prior to the date of the complaint. They were held entitled for the benefits, which the permanent employees are entitled from the date of the complaint.

15. It is not disputed that these daily wagers have filed their complaints in 1989, 1990 and 1991. Same have been decided on 11.1.1996. The financial burden of the petitioners cannot be ignored.

16. In the light of the above, since the posts were created and the daily wagers were absorbed as permanent employees from 31.10.2001, I find it appropriate to modify the impugned judgments and especially in the light of the fact that the daily wagers have not challenged the benefits granted to them by order dated 31.10.2001, as follows:--

"(A) The directions of the Industrial Court in Clauses I, II and III are sustained.

(B) The direction of the Industrial Court in Clause IV is modified to the extent that all the daily wagers, who are parties to these complaints shall be entitled for retiral/pensionary benefits, considering their initial date of joining as daily wagers and shall be entitled for monetary benefits incidental to regularization with effect from the date of the judgment of the Industrial Court, which is 11.1.1996."

17. The petitions are partly allowed and Rule is made partly absolute in the above terms.