

(2008) 07 BOM CK 0010

In the Bombay High Court

Case No : L.P.A. No. 14 of 2008 in Writ Petition No. 4141 of 2006

State of Maharashtra and Another

APPELLANT

Vs

Pandurang Sitaram Jadhav

RESPONDENT

Date of Decision : 31-07-2008

Acts Referred:

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

Citation : (2008) 5 ALLMR 497 : (2008) 119 FLR 224 : (2008) 3 LLJ 964

Hon'ble Judges : Swatanter Kumar, C.J;A.P. Deshpande, J

Bench : Division Bench

Advocate : A.P. Vanarse, AGP, for the Appellant; S.M. Dharap, instructed by Neel Helekar, for the Respondent

Final Decision : Allowed

Judgement

A.P. Deshpande, J.—These Letters Patent appeals involved a common question of fact and Law and hence the Appeals are heard together and are being disposed of by this common judgment.

2. Few facts that are relevant for adjudication of the issues are narrated hereinbelow. The appellant in all these appeals is the State of Maharashtra, through The Dairy Manager, Government Milk Scheme, Chiplun who appointed the respondents herein as daily wagers in the establishment of the dairy on payment of Rs. 81.29 Ps. per day. The respondents daily wagers have been in service of the appellant for a longer period running between 12 to 20 years. As the respondents were not granted permanency in service, they filed a complaint before the Industrial Court under Item 5, 6 and 9 of Scheduled IV of the M.R.T.U. & P.U.L.P. Act 1971. It was contended before the Industrial Court that the daily wagers were not granted permanency with an object to deprive them of the benefits of permanency which is an unfair labour practice. It was also contended that the daily wage employees are entitled to permanency on account of they having put in 240 days of service in the preceding year. The appellants herein opposed the claim by filing a written statement. The appellant State averred in

the written statement that there do not exist sanctioned vacant posts for grant of permanency to the daily wagers. It is specifically averred that only if sanctioned posts exist, then and then alone request for permanency could be considered and in the absence of sanctioned vacant posts, it is impermissible to direct conferment of status of, permanency on the daily wagers. Completion of 240 days by itself would not entitle the daily wagers to claim permanency. It is also pleaded by the appellant that the daily wagers are not entitled to permanency and that the appellant, has not committed any unfair labour practice.

3. The Industrial Court has on appreciation of facts recorded a finding that there does not exist sanctioned vacant posts. However it observed that:

it is for the respondent (Dairy Manager) to send proposal to the Government for sanction of the said posts by the Government. There is no any averment in the affidavit of respondent or stand taken in the written statement that such a proposal for sanction of the post has been sent by the respondent to Government but no sanction is accorded by the Government. Unless a proposal is sent, the Government will not suo moto accord sanction to these posts. I do not find any justified reason on the part of the respondent for denying the benefits of permanency.

It is thus clear that the Industrial Court expected the Dairy Manager to forward a proposal to the Government and seek sanction to the posts with a view to accommodate the daily wagers. Fact remains that no sanctioned vacant posts exists as of now. Despite recording the said finding, it concluded that the State has indulged in committing an unfair labour practice. It also held that the daily wagers being engaged for years together, ought to have been granted permanency and having not so done, faulted the State Government. It is held by the Industrial Court that the Standing orders provide for grant of permanency on completion of 240 days and breach of the Standing orders amount to failure to implement the agreement or settlement. It is on this premise, that the action on the part of the appellant in declining to grant permanency has been faulted with. The Industrial Court after declaring that the appellant has indulged in unfair labour practice, has issued direction to the appellant, forthwith to cease and desist from engaging in such unfair labour practices. A further direction is issued to grant permanency to all the complainants from the date of completion of 240 days of their service and extend all benefits of permanency.

4. The order passed by the Industrial Court was challenged by filing a writ petition before the learned single Judge of this Court. The appellant had contended before the learned single Judge that in the absence of sanctioned posts and available vacancies to accommodate the daily wagers, issuance of direction by the Industrial Court to grant permanency is contrary to the law laid down by the Supreme Court in case of *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, . The said submission was turned down by recording the following reasons:

In the present case, admittedly, the respondent workmen were employed in the Dairy run by the Government Milk Scheme. The Dairy is a factory, employing more than 50 employees. Consequently, the Industrial Employment (Standing Orders) Act would be applicable to the undertaking. There are no Certified Standing Orders applicable to, the Dairy and, therefore, the Model Standing Orders would govern the employment of the workmen of the undertaking. Under the Model Standing Orders, the employees are entitled to be made permanent after they, complete 240 days in service. Therefore, in my view, Secretary, State of Karnataka and Ors. v. Umadevi and Ors. (supra) case does not apply to the facts and circumstances in the present case. The Supreme Court was not dealing with an industrial establishment to which the Industrial Employment (Standing Orders) Act applies.

5. Being aggrieved by the impugned order passed by the learned single Judge dated July 10, 2007, the present Letters Patent Appeals are filed.

6. The learned Assistant Government Pleader has contended that the Industrial Court so also the learned single Judge has erred in law in granting permanency to the daily wagers though there are no sanctioned posts available and vacant for accommodating the daily wagers. It is submitted that the issue involved in these Appeals is squarely covered by the Constitution Bench judgment of the Supreme Court in Secretary, State of Karnataka and Ors. v. Umadevi and Ors. (supra) case. It is also submitted that from the very nature of the appointment of the respondents i.e. "Daily Wagers" is indicative of the fact that the respondents were not appointed after following the prescribed procedure for making appointments in public employment and thus there is no legal right in the respondents to claim permanency.

7. It is further submitted that the Constitutional Scheme of public employment regulated by Articles 14, 16 and Rules framed under Article 309 is the only mode of public employment which confer a legal right on the employee qua the post and daily wagers having been appointed without undergoing a selection process cannot claim any right. It is then submitted that a daily wager has no legal right to the post as he does not hold any post. In the submission of the learned AGP, directing grant of permanency to the respondents results in imposing unnecessary financial burden on the State. It is also submitted that there are 778 daily wagers in the Dairy department and if the respondents are to be granted permanency, the others will have to be treated at par. Lastly it is submitted that the learned single Judge has erred in law in relying upon the Model Standing Orders for conferring the benefit of permanency on the respondent without noticing the legal position that the Model Standing I Orders are always subject to the constitutional scheme of public employment which in turn presupposes a right of equal participation for all.

8. The learned Counsel appearing for the respondent on the other hand contended that the respondents are serving as daily wagers for a long period, from 12 years to 20 years with the appellant which clearly indicates that there

does exist available work and the only reason for not creating additional posts and in not granting permanency to the respondents is to deprive them of all the benefits of permanency. It is also submitted that the Model Standing Orders which regulates service conditions provides for granting permanency on completion of 240 days. It is also submitted that the Industrial Court and the learned single Judge having found that the respondents are entitled to grant of permanency, the orders impugned be not interfered with. On the strength of long period of service having been put in by the daily wagers the doctrine of legitimate expectation is also pressed in service.

9. Before we proceed to deal with the submissions made by the learned Counsel for the respective parties, it would be appropriate to formulate the legal issues that emerge for consideration:

a) Whether the Constitutional scheme of public employment contained in Articles 14, 16 and the rules framed under Article 309 of Constitution of India regulate the appointments in the Government Milk Scheme? and if yes, what is the effect of non-compliance thereof on the appointments of the respondents?

b) Whether the provisions of the Model Standing Orders, which regulate the terms and conditions of service are subject to the Rules regulating the selection and appointment contained in the scheme of "Public Employment"?

c) Whether "Daily Wagers" have any legal right to claim permanency more so in the absence of "sanctioned vacant post" in the establishment?

10. The learned Counsel for the appellant has placed reliance on the judgment in the case of Secretary, State of Karnataka and Ors. v. Umadevi and Ors. (supra). The said judgment is an authoritative pronouncement of law by the Constitution Bench of the Supreme Court rendered after careful consideration of the entire law on the subject and in the concluding paragraph, the Supreme Court has observed thus:

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

11. The Supreme Court has in the said judgment considered various aspects of public employment and the obligation on the State in making appointments to the posts in public employment. After referring to the Constitutional provisions dealing with public employment more particularly, Articles 14, 16 and the Rules framed under Article 309, the Supreme Court has held that the Principle of "equality of opportunities" in public employment is the basic structure/feature of the constitution, It is then held that the only mode recognised by law in making appointment to the posts in public employment is the one which provides equal opportunity for all. It is also held that no other method of appointment in public employment either by grant of permanency or absorption to temporary, contractual, casual, daily wages or ad hoc employees appointed or recruited de

hors the constitutional scheme of public employment is permissible and hence cannot be legalised. The judgment further proceeds to hold that casual labourers/daily wagers have no right to regular or permanent public employment and that such persons who choose to accept the same accepts it fully knowing the nature of employment and hence the Court rejected the application of doctrine of legitimate expectation. The judgment emphasises that persons who get employed without following regular procedure or even through back door or on daily wages cannot seek direction from the Court to make them permanent in the post and to prevent regular recruitment to the posts concerned. Such employment is termed as "litigious employment." It is also held that a total embargo on temporary employment is not possible, given exigencies of administration, however such appointees cannot claim parity with permanent employment. The judgment criticises the orders passed by various Courts directing absorption, regularisation or permanent continuance, unless the recruitment itself was made regularly and in terms of the Constitutional Scheme.

12. It emphasise that regular recruitment should be insisted upon and the State should not be allowed to depart from the normal rule and indulge in making ad hoc appointments in permanent posts.

13. Reliance is placed by the learned Counsel for the appellant on the following paragraphs of the judgment Secretary, State of Karnataka and Ors. v. Umadevi and Ors. (supra):

4. Regular appointment must be the rule. But sometimes this process is not adhered to and the constitutional scheme of public employment is by passed. The union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme.

6. The power of a State as an employer w-more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily. Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and

recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer.

43. Thus, it is clear that adherence to rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. 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 at "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.

45. While directing that appointments, temporary or casual, be regularised or made permanent, the Courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain - not at arm's length - since he might have been searching for some

employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the Court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the Court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure. He is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission.

14. The next judgment on which reliance is placed by the Counsel for the appellant is the one the case of M.P. Housing Board and Another Vs. Manoj Shrivastava, . The Supreme Court has categorically held that "daily wage" does not hold the post or derive any legal right in relation thereto, unless he is appointed (1) against a duly sanctioned vacant post, and (2) upon following the statutory law operating in the field. If the appointment is made in contravention of either of the two requirements such appointment would be void and such appointment does not confer any legal right on the appointee. Reliance is placed on the following paragraphs of the said judgment at pp. 121, 122 and 123 of LLJ:

7. A person with a view to obtain the status of a "permanent employee" must be appointed in terms of the statutory rules. It is not the case of the respondent that he was appointed against a vacant post which was duly sanctioned by the

statutory authority or his appointment was made upon following the statutory law operating in the field.

9. It is one thing to say that a person was appointed on an ad hoc basis or as a daily wager but it is another thing to say that he is appointed in a sanctioned post which was lying vacant upon following the due procedure prescribed therefore.

12. A daily wager does not hold a post unless he is appointed in terms of the Act and the Rules framed thereunder. He does not derive any legal right in relation thereto.

14. It is now well settled that only because a person had been working for more than 240 days, he does not derive any legal right to be regularised in service.

15. The above legal position is summarised and restated concurring with the view taken in the case of Mahendra L. Jain and Others Vs. Indore Development Authority and Others, . In the said case it has been held that the Standing Orders governing the terms and conditions of service must be read subject to the; constitutional limitations wherever applicable. This judgment precisely considers the status of daily wagers and proceeds to hold that daily wagers do not hold any posts and in the absence of sanctioned posts, no permanency can be; granted. In para 31, it is held that:

The Standing Orders governing the terms and conditions of service must be read subject to the constitutional limitations wherever applicable. Constitution being the *suprema lex*, shall prevail over all other statutes.

16. The next judgment on which reliance is placed by the learned AGP is in the case of Branch Manager, M.P. State Agro Industries Development Corpn. Ltd. and Another Vs. Shri S.C. Pandey, . This judgment reiterates that completion of 240 days continuance service does not by itself confer any legal right for permanency. It is also considered in the said judgment that if two statutes are governing the employment, one dealing with selection and appointment and the other relating to the terms and conditions of service, an endeavour should be made to give effect to both the statutes. However, it is clarified that daily wager does not hold any post as he is not appointed in terms of the provisions of the Act and the Rules framed thereunder and in that view of the matter, he does not derive any legal right. The Supreme Court has held in paragraphs 17, 18 and 22 thus:

17. The question raised in this appeal is now covered by a decision of this Court in M.P. Housing Board v. Manoj Shrivastava (*supra*) wherein this Court clearly opined that: (1) when the conditions of service are governed by two statutes: one relating to selection and appointment and the other relating to the terms and conditions of service, an endeavour should be made to give effect to both of the statutes: (2) A daily wager does not hold a post as he is not appointed in terms of the provisions of the Act and the Rules framed thereunder and in that view of

the matter he does not derive any legal right: (3) only because an employee had been working for more than 240 days that by itself would not confer any legal right upon him to be regularised in service; (4) if an appointment has been made contrary to the provisions of the statute the same would be void and the effect thereof would be that no legal right was derived by the employee by reason thereof.

18. The said decision applies with all force to the facts of this case. In *Mahendra L. Jain and Ors. v. Indore Development Authority and Ors.* (supra) this Court has categorically held that the Standing Orders governing the terms and conditions of service must be read subject to the constitutional and statutory limitations for the purpose of appointment both as a permanent employee or as a temporary employee. An appointment to the post of a temporary employee can be made where the work is essentially of temporary nature. In a case where there existed a vacancy, the same was required to be filled up by resorting to the procedures known to law i.e. Upon fulfilling the constitutional requirements as also the provisions contained in the 1976 Regulations. No finding of fact has been arrived at that before the respondent was appointed, the constitutional and statutory requirements were complied with.

22. Such appointments in our opinion, having regard to the decisions in *Mahendra L. Jain and Ors. v. Indore Development Authority and Ors.* (supra) and *M.P. Housing Board v. Manoj Shrivastava* (supra) must be made in accordance with extent rules and regulations. It is also a well settled legal position that only because a temporary employee has completed 240 days of work, he would not be entitled to be regularised in service. Otherwise also the legal position in this behalf is clear as would appear from the decision of this Court in *Dhampur Sugar Mills Ltd. v. Bhola Singh* apart from *Mahendra L. Jain and Ors. v. Indore Development Authority and Ors.* (supra).

Placing reliance on the Supreme Court judgments referred to herein above, the learned Counsel for the appellant has contended that the respondent's complaint filed before the Industrial Court is conspicuously silent in regard to the mode and manner of appointment. It is pointed out that the respondents did not even aver much less establish that they were appointed in conformity with the prescribed procedure after undergoing a process of selection. This aspect of the matter has neither been considered by the Industrial Court nor the learned single Judge. According to the appellant, daily wagers are never appointed by following the prescribed procedure.

17. Per contra the learned Counsel for the respondent has relied upon the judgment of the Supreme Court in the case of *U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others*, . In the facts of the said case employees of Cooperative Electric Supply Society were absorbed in the services of the Electricity Board on a take over on April 3, 1997. The Board had before taking over, decided to regularise the services of its employees on daily wages working before May 4, 1990. Whereas the employees of the Cooperative Electric Supply

Society were not regularised in service. Hence they filed petitions being Daily wage employees working in the society from before May 4, 1990 claiming parity with the daily wagers working with Electricity Board department. In the above facts the Court after distinguishing the facts in the case of Secretary, State of Karnataka and Ors. v. Umadevi (supra), has dismissed the appeal filed by the Electricity Board. The question involved in the said case was touching the issue of discrimination between two similarly situated sets of employees and in the facts of the case, the Court has distinguished the same from Secretary, State of Karnataka and Ors. v. Umadevi (supra) case. This judgment does not advance the case of the respondent any further.

18. Reliance is also placed on a judgment of Division Bench of this Court in case of Mahindra & Mahindra Ltd. Nagpur v. Avinash D. Kamble and Anr. 2008 II CLR 265. The Division Bench in the said judgment was considering a batch of petitions involving a dispute between the private employer and its workers under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971. In that case the Court granted the benefit to the workmen under the Model Standing Orders. The said judgment has no relevance and applicability to the facts of the present case. 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 sand obligation in the private employment.

19. 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. Thus the view expressed by the Division Bench in the said judgment has no bearing while deciding the questions raised in the present petition.

20. Reverting back to the facts in the present case, it is crystal clear that there are no sanctioned posts and vacancies in existence in the petitioner's concerned department. Hence the claim for permanency could not have been granted by the Industrial Court. By observing that sanction for the posts could be asked for and obtained from the State by the authority concerned clearly indicate absence of sanctioned vacant posts. No finding has been recorded either by the Industrial Court or by the Learned single Judge that the respondents were appointed in adherence to the rules regulating appointment. The respondents did not even claim that they were appointed in adherence to the procedure prescribed for appointments. From the very nature of appointment as "daily wagers", it is obvious that the respondents have not been appointed in compliance of the procedure prescribed for making the appointments.

21. As the respondents have failed to demonstrate that their appointments were made in accordance with the procedure prescribed for selection and appointment and as they have further failed to establish that there exists; sanctioned vacant posts, it would be wholly unjust to direct the appellants to grant permanency to

the respondents. The learned single Judge has concluded the issue by placing reliance on the Model Standing Orders which regulates the terms and conditions of service in the matter of grant of permanency on completion of 240 days of service without dealing with the effect of non availability of sanctioned posts and the requisite vacancies. In our considered view, the order passed by the learned single Judge cannot be sustained. Provisions of Model Standing Order by themselves cannot and does not confer any right of permanency unless and until the other two prerequisites are satisfied i.e. (1) appointment being in conformity with the rules relating to appointment and (2) permanent sanctioned vacant posts being in existence.

22. In the above premise, we conclude that the Appellant State is obliged to make appointments in adherence to the constitutional scheme of Public employment which regulate the appointments in the Government's Milk Scheme. We also hold that as the respondents/"Daily Wagers" were appointed without following the prescribed procedure for selection by passing public participation, they I do not acquire any legal right to claim permanency. We also hold that the provisions of Model Standing Orders are subject to the Rules regulating selection and appointment so also subject to the constitutional scheme of public employment.

23. In the result, holding that Respondent/Dairy wagers has no legal right to claim permanency, we allow the appeals and set aside the impugned orders, passed by the Industrial Court dated April 28, 2004 in Case No. 951/2001 along with other connected matters and the impugned order passed by the learned single Judge, in W.P. No. 4141/2006 dated July 10, 2007 and in connected writ petitions.