

(2019) 08 BOM CK 0111
In the Bombay High Court
Case No : Writ Petition No. 7905 Of 2005

State Of Maharashtra And Ors	Vs	APPELLANT
Pravin Trimbak Kulkarni		RESPONDENT

Date of Decision : 22-08-2019

Acts Referred:

Maharashtra Recognition Of Trade Unions And Prevention Of Unfair Labour Practices Act, 1971 — Section 25B

Citation : (2019) 08 BOM CK 0111

Hon'ble Judges : Ravindra V.Ghuge, J

Bench : Single Bench

Advocate : N.T. Bhagat, P.L. Shahane, P.P. Shahane

Final Decision : Partly Allowed

Judgement

Ravindra V.Ghuge, J

1. I have considered the strenuous submissions of the learned AGP on behalf of the petitioners and the learned Advocate on behalf of the original complainant.

2. Issue is as regards the direction of the Industrial Court vide judgment dated 11/02/2005 allowing complaint (ULP) No.251/1996. To be specific, the directions of the Industrial Court are reproduced as under :-

"The complaint is allowed.

It is hereby declared that the respondents are engaged in and continued to engaged in unfair labour practice under Item 5, 6 and 9 of Schedule IV of the M.R.T.U. and P.U.L.P. Act 1971.

The respondents are hereby directed to cease and desist from continuing to engage by granting the permanency to the complainant along with the benefits attached to the permanency from 06/08/1996 on which date the present complaint is filed, within a period from one month from today. No order as to costs."

3. The learned AGP submits on the basis of the Civil Application No.11454/2018, filed by the Assistant Conservator of Forests, Aurangabad that the Government has issued a GR dated 10/05/2018 granting permanency to the complainant as an "Office Helper" and that this Court should direct the complainant to accept such a position without any protest. The specific prayer put forth by the petitioner in the civil application reads as under :-

"B. This Hon'ble Court may direct the respondent to direct the respondent to fulfill the conditions and provide all necessary documents which are required as per Government Resolution dated 10/05/2018 and accept order of the permanency as a Office Helper without any protest."

4. Learned Advocate for the complainant submits that he has no reason to accept the proposal of the petitioner since he was working as a Clerk-cum-Typist from 01/10/1991, though on daily wages. He filed his ULP complaint in 1996 and on account of the interlocutory orders, he was continued. He was paid a consolidated amount of Rs.611/- from 01/10/1991 till 21/10/2016. Mr.Shahane, therefore, strenuously submits that having worked from 1991 till today, he could not be shifted to the class of "Vanmajoor" and cannot be directed to accept permanency as an "Office Helper".

5. It is settled Law that an employee can not take an advantage of the continuance of employment under Court orders and such continuation in order to implement the directions of the Court, cannot be reckoned with as a part of continued employment.

Nevertheless, it cannot be ignored that the petitioners need Typists and as the complainant had continuously worked as a Typist, it is too late to contend that he could be granted permanency from 26/02/2012 by wiping out his past service, when he would be superannuating on 30/06/2020.

6. The Law in such cases has been crystallized. If a post is not available, there cannot be a direction for granting permanency on a non-existing post. However, such an employee cannot be deprived of a parity in wages. The complainant has been working on a paltry amount of Rs.611/- per month for 25 years. The said amount cannot be equated with minimum wages as a person would surely starve with Rs.611/- per month. It would be a travesty of justice to accept the contention of the learned AGP that no monetary benefits would be granted to the complainant and he should blame his destiny for having been paid Rs.611/- per month from 25 years.

7. Be that as it may, the directions of the Industrial Court are under judicial review in this petition. In catena of judgments delivered by various Single Judge Bench of this Court, it has been concluded that the Model Standing Orders cannot be made applicable to the employees working in State establishments or State Instrumentalities. An issue was referred to the Larger Bench at Nagpur in the matter of Municipal Council, Tirora and another Vs. Tulsidas Baliram Bindhade [2016 (6) Mh.L.J.867]. The issue was as to whether the State establishment or

the State Instrumentality can be directed to grant permanency to an employee on a particular date on the basis of the deeming fiction of permanency flowing from Standing Order 4C. The Larger Bench has answered the issue in the negative and it is concluded that the Model Standing Orders and the deeming fiction of permanency cannot be made applicable to State Instrumentalities.

8. In this backdrop, the first declaration of the Industrial Court, reproduced above, holding the petitioners guilty of unfair labour practices, is quashed and set aside.

9. In so far as the second direction issued by the Industrial Court to the petitioners to grant permanency to the complainant from 06/08/1996 is concerned, it also cannot be sustained for the reason that there was no evidence before the Industrial Court so as to conclude that the post of a Clerk-cum-Typist was vacant and that the complainant was not accommodated on the said post. So also, the Industrial Court lost sight of the fact that after the ULP complaint was filed, the complainant continued in employment under the protective orders of the Court from 1996 till the date of the impugned judgment, which is 11/02/2005. This period of continuance in employment cannot be reckoned as a matter of right while computing continuance in the uninterrupted service of the employer u/s 25B.

10. However, it also cannot be ignored that the complainant worked with the petitioners and therefore a legitimate right to earn wages at par, with the regular employees, for the actual days of his working, cannot be deprived. The law laid down by the Hon'ble Apex Court in the matter of Chief Conservator of Forest Vs. Jagannath Maruti Kondhare, reported at 1996 I CLR 680 = AIR 1996 SC 2898 would be squarely applicable to this case.

11. The learned AGP has strenuously canvassed that the Government Resolution dated 10/05/2018 placed on record with the civil application, would become applicable to the case of the complainant. With his assistance, I have gone through the said GR. Despite his efforts, the learned AGP could not point out that the said GR could be made applicable to the Clerk-cum-Typist working with the petitioners. I find that the said GR is aimed at regularizing the daily wage Vanmajoor (Forest Labourers). The categories are specifically mentioned in the GR which include such labourers, who used to clean the forest, used to work on plantations in the forest, who used to prepare saplings, etc. The complainant/employee, without his consent, cannot be forced to be included in the list of "Vanmajoor" when he was working as a Clerk-cum-Typist.

12. In view of the above, in the absence of vacant posts and as the Government does not have a specific scheme for absorbing clerks- cum-typists as on date, this Writ Petition is partly allowed. As noted above, the direction of declaration of ULP against the petitioner is quashed and set aside. Similarly, the second direction, granting permanency from 06/08/1996, stands modified as under :-

[a] Petitioner No.4 shall prepare and forward the proposals, of the respondent,

alongwith identically situated daily wage clerks/typists, to petitioner No.2/Social Forestry Department, for regularization. Such proposals shall be forwarded within 12 weeks from today. This proposal shall include specific data of the work tenure of all daily wagers including the original complainant, their area of work and the consolidated wages paid to them.

[b] After such proposals are received by petitioner No.2, it would consider the same in the light of the available vacant posts with the various departments of the petitioners and grant regularization to such daily wagers based on their seniority and length of service.

[c] Keeping the specific case of the complainant in focus, the petitioners shall apply the law laid down in the matter of Jagannath Kondhare (supra) for calculating the difference of monthly amounts paid to the complainant and similar labourers and such difference of amounts shall be paid to them while taking a decision on the proposals.

[d] Needless to state, the proposals shall be decided within 4 months after being received.

[e] Any grievance of the complainant or similarly situated daily wagers, if survives after the decision of the petitioners, would entitle them to raise their grievance by resorting to a remedy as may be permissible in Law.

[f] The complainant and similar daily wagers shall not be terminated merely on the ground that they are working as daily wagers in the peculiar facts and circumstances of the case.

[g] This protection shall not apply to the cases of disciplinary action.

[h] The petitioners shall also keep in mind that after regularization is granted to such daily wagers depending upon available posts and their seniority, their past tenure on daily wage employment, shall be considered as per rules for grant of retiral and pensionary benefits and the petitioners would consider the judgment delivered by this Court in the matter of Mahatma Phule Krishi Vidyapeeth, Rahuri Vs. Ganpat Kisan Karle [[2016(4) BCR 790] = [2016(3) ABR 697], if the said Law is applicable.

[i] Since the respondent herein is paid basic wages from 2016 under the orders of this Court dated 21/10/2016, the difference will be calculated with regard to the specific pay scale available since 2016.

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