

(2018) 10 BOM CK 0139
In the Bombay High Court
Case No : Writ Petition No.1593 Of 2014

Vinayak Dagaji Sarode And Others	APPELLANT
Vs	
Dhule Municipal Corporation, Dhule And Others	RESPONDENT

Date of Decision : 26-10-2018

Acts Referred:

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 30, 32
Maharashtra Municipal Corporations Act, 1949 — Section 51

Citation : (2018) 10 BOM CK 0139

Hon'ble Judges : Manish Pitale, J;Prasanna B. Varale, J

Bench : Division Bench

Advocate : A.S. Deshpande, N.N. Desale, A.P. Basarkar

Final Decision : Disposed Off

Judgement

MANISH PITALE, J

1 By these three writ petitions, the petitioners who were all appointed in clerical cadre (ClassÂIII) on daily wages with the erstwhile Dhule Municipal

Council, now the respondent No.1 Dhule Municipal Corporation, have raised a grievance that despite having been appointed way back between 1982

to 1992 and having orders of Courts of competent jurisdiction under the Labour Laws in their favour, they have been continued as temporary

employees by the respondent No.1Â Corporation, thereby wrongly depriving them of their rightful claims. It is also the grievance of the petitioners that

they have been granted benefit of recommendations of 5th Pay Commission from 06.11.2010 while depriving them of arrears and further that the

benefits of recommendations of the 6th Pay Commission have not been granted to them at all. It is the case of the petitioners that the respondent

No.1Â Corporation has granted benefit of permanency and absorption in sanctioned posts to employees appointed much after the appointment of the petitioners and that the respondent No.1ÂCorporation has indulged in a policy of pick and choose. On this basis, the petitioners in these three writ petitions have approached this Court seeking redressal of their aforesaid grievances.

2 The relevant facts of the present case are that the petitioners were appointed between 1982 to 1992 in the clerical cadre, details of which have been given in the chart at Exh.'A'. In this chart, details have also been given about the orders passed by the Industrial and Labour Courts in favour of the petitioners under the provisions of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1974 (hereinafter referred to as â??MRTU & PULP Actâ?). The petitioners were required to approach the said Court because in some cases their services had been terminated by the respondentÂ Corporation and in other cases the petitioners had approached the Courts claiming unfair labour practice on the part of the respondentÂCorporation in continuing them as temporary employees. In some cases, the Court passed orders setting aside the termination of service and granting permanency with immediate effect and in some cases benefits of permanency were granted and it was recommended that when sanctioned posts become available, the petitioners would be considered favourably.

3 It is the case of the petitioners that there were other employees appointed in a similar manner temporarily by the respondentÂ Corporation, much later than the appointment of petitioners, but, when sanctioned posts became available, such employees appointed after the petitioners were granted permanency and absorption against sanctioned posts, while depriving the petitioners of their claims despite the orders of the Court in their favour. The petitioners claim that their grievances were ignored by the respondentÂCorporation while granting relief to employees appointed much later in point of time. In fact, the petitioners have also placed on record details at Exh.'X' in the form of a chart showing how employees appointed later and in whose favour Courts had passed orders of permanency much later than the orders passed in favour of the petitioners were adjusted against sanctioned posts, while the petitioners were continued in temporary capacity.

4 The petitioners have placed on record a proposal dated 04.09.2003 submitted by the respondent No.1 Corporation to the State seeking grant of sanction for 482 new posts, in order to absorb and adjust large number of employees, including the petitioners. On 07.05.2004, the State issued a Government Resolution granting sanction to only 87 posts. It is the case of the petitioners that since they were appointed earliest in point of time and they had orders from the Courts in their favour, they ought to have been first adjusted against the aforesaid 87 sanctioned posts. Instead, the respondent Corporation adjusted other employees appointed later in point of time as compared to the petitioners against the aforesaid 87 sanctioned posts. It was pointed out that some of the employees adjusted against the said 87 sanctioned posts were those whose claims had been expressly rejected by Courts and yet they were granted relief, while the petitioners were continued in temporary status. It was also pointed out that whenever the State sanctioned posts, the Corporation ignored the claims of the petitioners, while adjusting/absorbing other employees who were also appointed temporarily and after the appointments of petitioners.

5 The petitioners have placed on record details of representations submitted on their behalf from the year 2003 to 2013 before the State authorities, as well as the respondent Corporation for grant of relief of being adjusted against sanctioned posts and all reliefs to which regular employees were entitled. It is pointed out that the respondent Corporation had continually appointed persons on temporary basis and that only one post of Clerk cum Typist was filled through advertisement in the year 2008 and that similarly only 8 posts of Clerk were filled in the year 2012. Apart from the said 9 posts, all persons employed by the Corporation in the said cadre were on temporary basis and that the respondent Corporation had indulged in policy of pick and choose while granting adjustment against sanctioned posts. It was pointed out that the petitioners were granted benefits of recommendations of 5th Pay Commission only from 06.11.2010 and that the benefits of 6th Pay Commission were never granted to petitioners.

6 As the petitioners were not being granted their rightful claims, in 2013 and 2014 the petitioners were constrained to file the present writ petitions seeking appropriate reliefs against the respondents. This Court issued notice to the respondents and by order dated 28.04.2017, the respondent

Corporation was restrained from filling 54 posts of Class III employees which were sanctioned posts, until further orders. On 18.08.2017, this Court

granted Rule in Writ Petition No.1593 of 2014. The other two connected writ petitions have been heard and accordingly Rule is hereby granted in the

said petitions also i.e. Writ Petition No.1881 of 2014 and Writ Petition No.2048 of 2013.

7 In response to the said writ petitions, the respondent Corporation filed affidavits and affidavits were also filed on behalf of the respondent No.3 i.e.

Divisional Commissioner, Nashik. The stand of the respondent Corporation in its affidavits essentially was that the petitioners had been appointed on

daily wages on posts that were not sanctioned and that they were not entitled to claim the benefit of regularization. It was further contended that the

petitioners had been granted benefits of permanency and that they were even granted benefits of recommendations of the 5th Pay Commission from

06.11.2010. It was strenuously contended that since the initial appointments of the petitioners were not merely irregular but illegal, that the petitioners

were not entitled to any relief as claimed by them in the writ petitions. It was contended that except pension and promotion, the petitioners had been

granted all reliefs of permanency and that therefore, the writ petitions deserved to be dismissed. The reply affidavit filed on behalf of respondent No.3

also stated that the creation of posts in the Corporation could be done only after prior approval of the State and that since the State had itself rejected

proposal submitted by the Corporation due to financial implications, no right could be claimed by the petitioners for the relief sought by them in the writ

petitions.

8 Mr. A.S. Deshpande Advocate and Mr. G.R. Sayed Advocate appeared on behalf of the petitioners. Their principal contentions were as follows.

a) The petitioners were appointed way back between 1982 to 1992 by the erstwhile Municipal Council, Dhule.

b) Although initial appointments of the petitioners were temporary in nature, the petitioners had approached the Courts of competent jurisdiction under

provisions of the MRTU & PULP Act for unfair labour practice on the part of the respondent Corporation in having continued them in temporary

capacity. The said Courts had passed orders in favour of the petitioners between 1989 and 1996, granting benefits of permanency and adjustment

against sanctioned posts.

c) Proposal had been moved by the respondent Corporation in the year 2003 for grant of sanction of 482 posts for adjusting/absorbing the petitioners

and others against sanctioned posts.

d) The State had issued Government Resolution dated 07.05.2004 granting sanction to only 87 posts. Since the petitioners had been appointed earlier in

point of time and there were orders of Courts in their favour, also earlier in point of time, it was only the petitioners, who ought to have been adjusted

against sanctioned posts by the respondent No.1 Corporation when 87 posts were sanctioned.

e) The respondent Corporation wrongly and illegally deprived the petitioners of the said relief and instead absorbed/adjusted those employees against

the said 87 posts, who were appointed later in point of time and in some cases who had orders of Courts which were also passed later in point of time.

In fact, some of the employees adjusted against the sanctioned posts were those, whose claims had been expressly rejected by the Courts for

permanency and adjustment against sanctioned posts. Thus, the respondent Corporation had indulged in policy of pick and choose, thereby

committing a grave illegality.

f) The petitioners had continuously represented before the respondents for grant of appropriate relief and yet their claims were ignored while others

were granted relief. Even the benefits of recommendations of 5th Pay Commission were granted only from 06.11.2010 while the petitioners were

entitled to such benefits from the time the orders of the Court were passed in their favour and they were illegally being deprived of benefits of the

recommendations of the 6th Pay Commission.

g) The respondents were not justified in seeking to deny the claims of the petitioners by relying upon Judgment of Constitution Bench of the Hon'ble

Supreme Court in the case of State of Karnataka ..Vs.. Umadevi, 2006(4) SCC 1, because the petitioners had orders of Courts under the Labour

Laws in their favour and that their case was covered under the Judgment of the Hon'ble Supreme Court in the case of MSRTC ..Vs.. Casteribe

Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556. It was contended that when the orders passed by the competent Courts had remained

unchallenged and they had attained finality in favour of the petitioners, the

respondents were not entitled to claim that the initial appointments of the petitioners were illegal.

h) It was contended that when the petitioners and those employees appointed later were performing the same duties, it was a travesty that the petitioners were drawing salaries which were almost half of those drawn by the said employees appointed later in point of time and who were wrongly granted all benefits by the respondent's Corporation.

9 Mr. S.P. Brahme along with Mr. Nilesh Desale learned counsel appeared for respondent No.1 while Mr. S.S. Dande, learned AGP appeared on behalf of the respondent No.3. It was contended by Mr. Brahme as follows.

a) The petitioners were all appointed on daily wages initially and that after the orders were passed by Courts in their favour, the petitioners had been granted all reliefs of permanency except promotions and pension. The petitioners were not justified in claiming that the respondent's Corporation had illegally deprived them of their claims when the Corporation was wholly dependent on the respondent State for creation and sanction of posts within the Corporation. It was contended that since the State had not granted proposals moved by the respondent No.1's Corporation for grant of sanction for posts, no fault could be found with the respondent's Corporation for the grievances raised by the petitioners.

b) The petitioners were not entitled to claim benefit of regularization in writ petitions when their initial appointments were illegal and that under the Constitution Bench Judgment of the Hon'ble Supreme Court in the case of State of Karnataka ..Vs.. Umadevi (supra) only irregular appointments could be regularized and appointments of petitioners could certainly not be regularized.

c) It was contended that the orders passed by Courts in favour of the petitioners under provisions of the MRTU & PULP Act could not be the basis for the reliefs claimed by the petitioners because the said orders were erroneous and that in any case, the petitioners were granted whatever benefits of permanency they could be granted, in the facts and circumstances of the present case.

d) The petitioners could not claim discrimination as against other employees because such employees were also those who had been illegally appointed initially and that equality could not be claimed by the petitioners on the basis of

any illegality that may have committed by the Corporation in respect of other employees.

10 Having heard the learned counsel for the parties and upon perusal of the record as well as Judgments relied upon by the parties, it will first have to be identified as to what is the nature of grievance raised by the petitioners and to what extent they would be entitled to relief from this Court.

11 Perusal of the record shows that certain undisputed facts can be identified in the present case. The petitioners were all appointed between 1982–

1992 in the clerical cadre i.e. Class–III of employees on temporary basis. All of them have orders passed by competent Courts in their favour under

the provisions of MRTU & PULP Act. These facts have not been contradicted by the respondents. The petitioners have also placed on record the

fact that the employees adjusted/absorbed in sanctioned posts by the respondent–Corporation were appointed later in point of time as compared to the petitioners. Some of them had orders of competent Courts in their favour, which were also passed later in point of time as compared to the orders

passed in favour of the petitioners. In some cases, the employees who were absorbed/adjusted against sanctioned posts by the Corporation were those

whose claims had been expressly rejected by the competent Courts. These facts pleaded by the petitioners have not be contradicted by the

respondent–Corporation and therefore, they are undisputed facts.

12 In the face of these undisputed facts it becomes clear that the respondent–Corporation is not justified in claiming that the petitioners are claiming

regularization and that when their appointments were illegal and back door entries, they were not entitled to any reliefs as laid down by the

Constitution Bench of the Hon'ble Supreme Court in the case of State of Karnataka ..Vs.. Umadevi (supra). The tenor and the nature of submissions

made on behalf of the petitioners clearly show that the petitioners are essentially claiming relief on the basis of orders passed by competent Courts in

their favour regarding permanency and adjustment/absorption against sanctioned posts, particularly when such orders have remained unchallenged and

they have attained finality. The thrust of the submission made on behalf of the petitioners is on the arbitrary and illegal manner in which the

respondent–Corporation has deprived the petitioners of their rightful claims,

while granting relief to other employees, who were admittedly appointed later in point of time as compared to the petitioners, particularly when those employees were also employed on daily wages without following any process of selection. In such a situation, mere reliance on the Constitution Bench Judgment of the Hon'ble Supreme Court in the case of State of Karnataka ..Vs.. Umadevi (supra) can be of no avail to the respondent's Corporation.

13 Even otherwise, the Hon'ble Supreme Court in the subsequent Judgment in the case of MSRTC ..Vs.. Casteribe Rajya Parivahan Sanghtana

(supra) has categorically held in paragraph 36 as follows.

“36. Umadevi (3) does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the

MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6

of Schedule IV where the posts on which they have been working exist. Umadevi (3) cannot be held to have overridden the powers of the Industrial

and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the

employer under Item 6 of Schedule IV is established.”

Thus, it becomes clear that when orders are passed by the competent Courts under provisions of MRTU and PULP Act in favour of employees

granting permanency, they cannot be ignored by relying upon the Constitution Bench Judgment of the Hon'ble Supreme Court in the case of State of

Karnataka ..Vs.. Umadevi (supra).

14 Even otherwise, in the present case it is an admitted position that the said orders passed in favour of the petitioners by the competent Courts

remained unchallenged and they attained finality. The learned counsel appearing for the respondent's Corporation was not justified in contending that

the said orders were erroneous and that the petitioners could not claim any relief on the basis of such orders. This is because it is trite Law that when

an order or decree has attained finality, even if erroneous, it is binding, unless it is challenged and set aside by a higher forum. This has been

recognized in various judgments including Judgment of the Hon'ble Supreme Court in the case of J. Kodanda Rami Reddy ..Vs.. State of Andhra

Pradesh and others (2011) 1 SCC 197.

An order or decree would be a nullity only if it is passed by a Court usurping jurisdiction that it did not have. In the present case, the orders passed in

favour of the petitioners were by Courts of competent jurisdiction under the provisions of MRTP and PULP Act and such orders attained finality.

Thus, the said contention raised on behalf of the respondent's Corporation deserves to be rejected.

15 The learned counsel appearing for the respondent's Corporation was justified in relying upon Section 51 of the Maharashtra Municipal Corporations

Act, 1949, to contend that the Corporation did not have any authority to create posts until sanction was granted by the State. Thus, as long as the State

did not sanction posts, it was not possible for the respondent's Corporation to have granted relief to the petitioners. The material on record shows that,

while initially proposal for sanction of posts submitted by the respondent's Corporation was rejected on 24.09.2001, subsequent proposal dated

04.09.2003 was partially granted by the State by issuing Government Resolution dated 07.05.2004. Although the Corporation had sought sanction for

as many as 482 posts by said proposal, the State had granted sanction for only 87 posts.

16 Once such sanction was granted and the petitioners had orders of competent Courts in their favour, it was incumbent upon the respondent's

Corporation to have absorbed/adjusted the petitioners against the said 87 posts sanctioned by the State. In fact, the record shows that even thereafter

the State had sanctioned posts, but the Corporation continued to absorb/adjust employees against such sanctioned posts who were appointed much

after the appointment of petitioners. The respondent's Corporation deprived the petitioners of relief and adjusted/absorbed other employees against the

said posts. The facts on record show that the said employees were all appointed later in point of time and as observed above, some of them had orders

of Courts in their favour passed later as compared to the orders passed in favour of the petitioners and some of such employees were those whose

claims had been rejected by the Court. It is here that the respondent's Corporation committed an illegality and the petitioners were justified in claiming

that they had been discriminated against.

17 It is from the date when the said 87 posts were sanctioned by the State by Government Resolution dated 07.05.2004, that the petitioners were

entitled to be adjusted/absorbed against sanctioned posts. By depriving the petitioners of their rightful claim, the respondent's Corporation did commit an illegality and the claim of the petitioners is certainly justified from the said date i.e. 07.05.2004. At the same time, the employees who were adjusted/absorbed by the respondent's Corporation cannot be blamed for the petitioners being deprived of their claim. Therefore, this Court does not propose to pass any order that would adversely affect any of the said employees, while considering and granting reliefs to the petitioners in the present writ petitions.

18 Having reached the conclusion that the petitioners are entitled for adjustment/absorption against sanctioned posts from 07.05.2004, the next question is with regard to the nature of reliefs to which the petitioners would be entitled. As far as financial benefits are concerned this Court needs to take into consideration the fact that the petitioners have approached this Court in the year 2013-14, while they could have immediately approached this Court after the respondent's Corporation failed to absorb/adjust them against posts sanctioned by the State on 07.05.2004. Although the petitioners have been able to make out the case in their favour as regards the relief to be granted and they have been suffering a continuing wrong of being deprived of financial benefits, as far as arrears are concerned, it cannot be said that the petitioners would be entitled to arrears from aforesaid date i.e.

07.05.2004. The Hon'ble Supreme Court in this context has held in the case of Union of India and others ..Vs.. Tarsem Singh, (2008) 8 Supreme

Court Cases, 648 as follows :

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury.

But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several

others also, and if the reopening of the issue would affect the settled rights of

third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of sixteen years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to sixteen years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances.â??

19 Applying the said principle laid down by the Hon'ble Supreme Court, it becomes evident that in so far as arrears of financial benefits are concerned, the petitioners would be entitled for relief only for the period three years prior to the dates on which they filed the writ petitions. As a result, since the petitioners have been already granted the benefit of recommendations of 5th Pay Commission from 06.11.2010, their prayer for grant of arrears under the said head cannot be granted, except partial relief to petitioner in Writ Petition No.2048 of 2013. As far as benefits of 6th Pay Commission are concerned, which the petitioners have claimed from 01.01.2006, by applying the said principle, the petitioners would be entitled to arrears of the benefits of recommendations of 6th Pay Commission only from three years prior to the dates on which they filed the writ petitions.

20 As regards the other reliefs, the petitioners would certainly be entitled to adjustment/absorption in sanctioned posts from 7. 05.2004 with other consequential benefits.

21 Consequently, the writ petitions are partly allowed in the following terms.

1) The petitioners shall be treated as adjusted/absorbed against sanctioned posts from 07.05.2004 in the respondent No.1Â?Corporation.

2) They shall be entitled to all consequential benefits from the said date except grant of entire arrears.

3) The petitioners in Writ Petition No.1593 of 2014 shall be entitled to arrears including benefits of 6th Pay Commission from 07.02.2011 (as the Writ

Petition was filed on 07.02.2014) while petitioner in Writ Petition No.2048 of 2013 will be entitled to arrears including benefits of 6th Pay Commission

from 25.02.2010 (as the Writ Petition was filed on 25.02.2013) and petitioner in Writ Petition No.1881 of 2014 shall be entitled to arrears including

benefits of 6th Pay Commission from 24.02.2011 (as the Writ Petition was filed on 24.02.2014), following aforesaid principle laid down by the Hon'ble

Supreme Court in the case of Union of India and others ..Vs.. Tarsem Singh, (2008) 8 Supreme Court Cases, 648 (supra).

4) Applying the said principle, the petitioners in Writ Petition Nos.1593 of 2014 and 1881 of 2014 shall not be entitled to arrears of benefits of 5th Pay

Commission as they have been already granted the said benefits from 06.11.2010. The petitioner in Writ Petition No.2048 of 2013 would be entitled to

arrears of benefits of 5th Pay Commission only for the period between 25.02.2010 to 06.11.2010.

5) It is made clear that the grant of aforesaid relief to the petitioners herein shall and can have no adverse effect on other employees who were

granted adjustment/absorption against sanctioned posts by the respondent No.1 Corporation. This is because it has already come on record that there

are still 54 sanctioned posts in Class III in the respondent Corporation that have not been filled. The petitioners as well as those employees already

absorbed/adjusted by the respondent No.1 Corporation against sanctioned posts shall continue hereafter as employees on sanctioned posts. The

respondent No.1 Corporation shall make fresh appointments on sanctioned posts only after taking into consideration this aspect of the matter.

6) As some of the petitioners in the present writ petitions are said to have retired, they shall be given benefits in terms of this order. As all the

petitioners have been held to be adjusted/absorbed against sanctioned posts with effect from 07.05.2004, they will be entitled to benefits of promotion

or Time Scale Promotion Scheme as the case may be and to benefits of pension as per scheme applicable on 07.05.2004. The benefits of petitioners who

have already retired shall also be worked out accordingly.

7) The reliefs granted including financial benefits granted to the petitioners under this order shall be worked out and disbursed to the petitioners by the

respondent No.1Â?Corporation as expeditiously as possible and in any case within a period of six months from the date of this order.

8) Rule made absolute in above terms. Pending Civil Applications, if any, are disposed of.