

Bombay High Court

Mr. Ashok Harishchandra Dabhade ... vs Municipal Corporation Of Greater ... on 21 October, 2016

Bench: R.M. Savant

(903) wp-8548.15-aw-caw-46.16-

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8548 OF 2015

Municipal Corporation of Greater Mumbai]
Opp. C.S.T. Station, Fort,]
Mumbai 400 001]..... Petitioner.

Versus

1] Mr. Pravin Shantaram Ghag]
B Wing, Room No.106,]
Safalya CHS Ltd.,]

Link Road, Goregaon (W),]
Mumbai 400 104 ig]
]]
2] Mahesh Shantaram Ghag]
A/406, Safalya Devi Kanya Kumari SRA Society]

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3] Rakesh Vitthal Jadhav]

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Sangrash Nagar]

Powai, Andheri (East)]
Mumbai 400 072]
Mobile No.9969515624/9167046240].. Respondents

ALONG WITH
CIVIL APPLICATION NO.46 OF 2016
IN
WRIT PETITION NO.8548 OF 2015

Ashok Harishchandra Dabhade
& Anr.

: Applicants/
Org.Respondent Nos.4 & 17

In the matter between

Municipal Corporation of
Greater Mumbai

: Petitioner

Versus

Mr. Pravin S Ghag & ors.

: Respondents.

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Mr. A V Bukhari, Senior Advocate a/w Mr. B V Bukhari and Mrs. Fauzia

Bukhari i/by Mr. Vinod Mahadik for the Petitioner.

Mr. S C Naidu a/w Mr. Manoj Gujjar i/by Mr. Aniketh Poojari for
Respondent Nos.2, 3, 5, 6, 8 to 16 and 18 to 27.

Mr. S C Naidu a/w Mr. Manoj Gujjar i/by Mr. Rahul G Tanwani for the
Respondent No.1

Ms. Suvarna Joshi for the Respondent Nos.4 and 17 in Writ Petition and
for the Applicants in Civil Application.

Mr. Shaikh Nasir Masih i/by Mr. Vishal Jagwani for the Respondent No.7.
ig CORAM : R. M. SAVANT, J.

DATE : 21st October 2016.

ORAL JUDGMENT :

1 Rule with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the Award

dated 07/03/2015 passed by the learned Presiding Officer of the Industrial Tribunal, Mumbai by which Award the Reference in question filed by the Respondent Nos. 1 to 27 came to be allowed and resultantly the directions as contained in the operative part of the impugned Award came to be issued. The reference to the said directions would be made in the latter part of this judgment.

3 Shorn of unnecessary details a few facts giving rise to the above
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Petition can be stated thus :-

The Petitioner herein is the Municipal Corporation for Greater Mumbai ("MCGM" for short). The Respondent Nos. 1 to 27 herein were working as gardeners-cum-caretakers on temporary basis in various schools run by the Petitioner - MCGM. The Respondents had worked between the period from 1991 to 2002, barring a few of them who had worked intermittently till the year 1997. A chart of the number of days each of the Respondents had worked has been annexed to the Statement of Claim as also the Justification of Demands filed by the Respondents which are part of the annexure to the above Petition. The said chart discloses that the Respondents have worked for a period ranging between 30 days to about 1085 days during the said period of their temporary appointment. The Respondents along with the persons who were similarly situated as them, had filed Writ Petition in this Court being Writ Petition (L) No.585 of 2012 seeking a direction against the MCGM to grant them permanency and other attendant benefits. A Division Bench of this Court by the order dated 13/09/2012 directed the Respondents to approach the Labour Court in view of the fact that

the dispute raised by them was liable to be decided by the said Court.

4 Pursuant to the said order dated 13/09/2012 but after sometime had elapsed the Respondents raised a demand as regards their absorption and regularization in the MCGM. On the said demand being not accepted by the lgc 7 of 16 (903) wp-8548.15-aw-caw-46.16-

MCGM, the matter was referred to conciliation and on the conciliation proceedings ending in failure, a Reference was made to the Industrial Tribunal for adjudication of the dispute. The terms of the Reference are reproduced herein under :-

"1. Absorption and regularization of worker listed in Annexure "A" in the service of Corporation as Class IV employees V/s

2. Pay the salary benefits annual increments and continuity of service from January 2003 onwards continuously.

5 On the Reference being made, a Statement of Claim came to be filed on behalf of the Respondents. Suffice it would be to state that in the said Statement of Claim the Respondents inter alia relied upon the Circular dated 23.1.1992 by which the Administrative Officer, Education was given the powers to make appointment to the post of gardeners-cum-caretakers on temporary basis in leave vacancies, and the Circular dated 27/11/2002 inter alia containing the modality adopted by the MCGM for regularizing the services of the temporary employees. By which circular two categories were carved out. It seems that pursuant to the Circular dated 27/11/2002 further circulars came to be issued by the MCGM for working out the modalities of absorption or regularization of the temporary gardeners-cum-caretakers who were appointed as a stop gap arrangement on account of the person going on leave or retiring. On behalf of the Respondent reliance was also placed on the lgc 8 of 16 (903) wp-8548.15-aw-caw-46.16-

further circulars, Minutes of the meetings, directions issued by the Chief Labour Officer of the MCGM, the Additional Municipal Commissioner (Admn) in the matter of preparing a list of the temporary gardeners-cum-caretakers for absorption. The case of the Respondents in the said Statement of Claim was also based on discrimination inasmuch as it is the case of the Respondents that except the Respondents about 8400 have been granted benefits of permanency in the various departments of the MCGM as also in the abattoir of the MCGM.

The Petitioner MCGM filed its Written Statement and dealt with the claims and contentions raised in the Statement of Claim. The MCGM denied the employer-employee relationship. The stand taken by the MCGM was that the employees who had completed 240 days of service were granted benefit of permanency and no others. The MCGM at the outset questioned the maintainability of the Reference, however, the ground on which the maintainability was questioned was not articulated. The MCGM also denied the case of the Respondents based on discrimination by contending that the 18 workmen who were absorbed were pursuant to the order passed by the Labour Court. It was the case of the MCGM that pursuant to the judgment of the Apex Court reported in AIR 2006 SC 1806 in the matter of Secretary, State of Karnataka and others v/s. Umadevi and others the Municipal

Commissioner had issued directions that there could be no absorption.

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7 The parties led evidence in respect of their respective assertions.

In so far as the Respondents are concerned, they led evidence of one witness i.e. the Respondent No.1 whereas the Petitioner MCGM led the evidence of its Deputy Education Officer, Central, Shri Ravindra Kale. In so far as the Respondents are concerned, they have placed on record 70 documents vide Exhibit U-5 which Exhibit inter alia contained the circulars as also other documents which were relevant to the case of the Respondents. The Petitioner also produced documents, amongst which was the ward-wise list of gardeners-

cum-caretakers and the number of days that they had worked.

8 The learned Presiding Officer of the Industrial Tribunal as indicated above by the impugned Award dated 07/03/2015 has allowed the said Reference and issued direction in terms of Clause (2) thereof which is to the following effect :-

"(2) The first party Municipal Corporation of Greater Mumbai shall absorb on regular basis the 27 workmen of the second party as shown in the Annexure "A" from the date of the award and pay them the wages and consequential benefits as per the rule in prevail."

Hence the direction is to absorb the 27 Respondents in the service of the MCGM. The gist of the reasoning of the learned Presiding Officer of the Industrial Tribunal as can be seen from the impugned order is that the benefits of permanency have not been granted to the 27 Respondents whereas the said lgc 10 of 16 (903) wp-8548.15-aw-caw-46.16-

benefits were granted to 18 temporary gardeners-cum-caretakers who were similarly situated as the Respondents and about 83 safai kamgars who were working in the slaughter house at Deonar. Significantly though it was the case of the Respondents which was founded in the policy of the MCGM as enunciated by the Circular dated 27/11/2002 and subsequent circulars and the Minutes of the various meetings which were held and the directions issued, the learned Presiding Officer has not even adverted to the said case of the Respondents except referring to the said circulars, Minutes of the Meetings and the directions in the impugned Award. It is required to be noted that the impugned Award is only based on the fact that there was alleged discrimination qua the Respondents inasmuch as the similarly situated 18 gardeners-cum-caretakers and 83 safai kamgars working in the abattoir were granted permanency. The evidence adduced on behalf of the parties has also not been analyzed by the learned Presiding Officer of the Industrial Tribunal.

9 Having regard to the nature of the controversy involved it was incumbent upon the learned Presiding Officer to address the Reference from the perspective of whether there was a policy for absorption of the temporary gardeners-cum-caretakers and whether the Respondents were entitled to the benefit of the said policy and then arrive at a conclusion whether they were discriminated in the matter of absorption. This was necessitated more so on account of the judgment of the Apex Court in Umadevi's case (supra) where lgc 11 of 16 (903) wp-8548.15-aw-caw-46.16-

the only exception for regularization of irregularly appointed persons is where there is a policy for such regularization. However, unfortunately what seems to have weighed with the learned Presiding Officer is only the fact that the similarly situated 18 gardeners-cum-caretakers and 83 safai kamgars working in the abattoir have been absorbed in service and made permanent.

10 During the course of the hearing of the above Writ Petition, the learned Senior Counsel appearing on behalf of the Petitioner - MCGM Shri A V Bukhari sought to controvert the case of the Respondents by seeking to rely upon the documents which are admittedly not on record of the Industrial Tribunal in the said Reference. The learned Senior Counsel sought to question the relief granted in the Reference on the basis of the judgment of the Apex Court in Umadevi's case (supra) which governs public employment and the principles that ought to weigh with the Court whilst considering the relief of regularization/permanency.

The learned Senior Counsel sought to demonstrate how the case of the 18 gardeners-cum-caretakers as also the 83 safai kamgars was distinguishable from the case of the Respondents. In support of the said contention, he sought to rely upon the documents which were not on record.

The learned Senior Counsel sought the setting aside of the impugned Award on the ground of the maintainability of the Reference, which ground though lgc 12 of 16 (903) wp-8548.15-aw-caw-46.16-

fleetingly taken in the Written Statement, does not seem to have been urged before the Industrial Tribunal.

11 Per contra, the learned counsel appearing for the Respondents Shri S C Naidu sought to justify the impugned Award on the basis of the policy as contained in the Circulars etc. which as indicated above has not been taken into consideration by the Industrial Tribunal. The learned counsel Shri S C Naidu also sought to draw this Court's attention to the exceptions which have been carved out in so far as applicability of the judgment in Umadevi's case (supra) is concerned. The learned counsel Shri Shaikh Nasir Masih appearing for the Respondent No.7 and the learned counsel Ms. Suvarna Joshi appearing for the Respondent Nos.4 and 17 would adopt learned counsel Shri S C Naidu's submissions but in addition made submissions as to why there is no merit in the above Petition.

12 Having heard the learned counsel for the parties, in my view, it is not necessary for this Court in its writ jurisdiction under Article 227 of the Constitution of India to carry out a judicial review of the impugned Award on the basis of the material which has not been taken into consideration by the Industrial Tribunal or the material which was not before the Industrial Tribunal whilst it adjudicated the Reference in question. In my view, the interest of justice would be served if the

impugned Award is set aside and the Reference lgc 13 of 16 (903) wp-8548.15-aw-caw-46.16-

in question is relegated back to the Industrial Tribunal, Mumbai for a de-novo consideration.

13 In view of the conclusion that this Court had reached, this Court has not referred to the facts in great detail. This Court also did not deem it appropriate to consider the rival contentions lest the same causes prejudice to the parties on remand.

The learned counsel Shri S C Naidu appearing for the Respondents except Respondent Nos.4, 7 and 17 and the learned counsel Ms. Suvarna Joshi appearing for the Respondent Nos.4 and 17 and the learned counsel Shri Shaikh Nasir Masih appearing for the Respondent No.7 are agreeable to the aforesaid course of action being followed.

15 Hence the following directions :-

1] The impugned Award dated 07/03/2015 is quashed

and set aside and the Reference in question being Reference (IT) No.10 of 2014 is relegated back to the Industrial Tribunal, Mumbai for a de-novo consideration.

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2] The parties are agreeable to additional pleadings being

filed by the parties, for additional documentary and oral evidence being led. The Industrial Tribunal would accordingly allow the parties to file additional pleadings and to lead additional evidence both oral and documentary.

3] The contentions of the parties are kept open for being urged before the Industrial Tribunal Mumbai including the maintainability of the Reference in question.

Needless to state that the Industrial Tribunal would decide the Reference in question on its own merits and in accordance with law.

4] The parties to appear before the Industrial Tribunal, Mumbai on 28/11/2016 at 3.00 pm. The Respondents would file their additional Statement of Claim within four weeks thereafter. The Petitioner MCGM would file its Written Statement within six weeks thereafter.

5] The learned counsel appearing on behalf of the Respondents Shri S C Naidu states that the lgc 15 of 16 (903) wp-8548.15-aw-caw-46.16-

Respondents would withdraw the Complaint (ULP) No.242 of 2015 filed for implementation of the impugned Award. Statement is accepted.

6] On remand, the hearing of the Reference in question is expedited.

7] The above Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

8] In view of the disposal of the above Writ Petition, Civil Application No.46 of 2016 does not survive and the same to accordingly stand disposed of as such.

[R.M.SAVANT, J]

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