IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3766 OF 2024

Kumar Dashrath Kamble .....Petitioner
: Versus :
Bombay Hospital ....Respondent

Mr. Arshad Shaikh, Senior Advocate with Ms. Vinsha Acharya, Mr. Rajendra Jain and Mr. Pranil Lahigade i/b Mr. Ranjit A. Agashe for the Petitioner.
Mr. Sudhir Talsania, Senior Advocate with Mr. Netaji Gawade i/b. Sanjay Udeshi & Co. for the Respondent.

CORAM : SANDEEP V. MARNE, J.
JUDGMENT RESERVED ON : 15 DECEMBER 2025.
JUDGMENT PRONOUNCED ON : 23 DECEMBER 2025.

JUDGMENT :

1) ***Rule***. Rule made returnable forthwith. With the consent of the parties, the Petition is called out for hearing and disposal.

2) By this petition, Petitioner assails the judgment and order dated 3 May 2023 passed by the Member, Industrial Court, Mumbai dismissing the Complaint (ULP) No. 312 of 2018. In the said complaint, Petitioner had prayed for declaration of permanency since the year 2006 and for payment of consequential benefits arising out of permanency during 2006 to 2017.

3) Petitioner was engaged in the Respondent-Hospital as a Sweeper in the year 1994. According to the Petitioner, he was medically examined in the year 1999 and his HIV test was negative.

It appears that the recognised Union of the Hospital had filed Complaint (ULP) No. 187 of 2005 seeking grant of permanency to 188 temporary workmen working in the hospital. According to the Respondent-Hospital, the dispute in the complaint was amicably resolved and a Memorandum of Settlement dated 1 December 2006 was entered into. As per the said Settlement, the workmen whose names were included in Annexure-B, were to be declared permanent, subject to their medical fitness test carried out by the Chief Staff Medical Officer of the Hospital. According to the Respondent, case of the Petitioner was considered for permanency in accordance with the settlement, but during medical examination, he was detected HIV+ and was declared unfit and was hence not regularised. According to the Respondent, Petitioner was again subjected to medical examination in the years 2011 and 2016, and again he was found medically unfit. After intervention by the Mumbai District Aids Control Society, the Petitioner was granted the benefit of permanency w.e.f. 1 January 2017.

4) In the above background, Petitioner initially raised a demand before the Deputy Commissioner of Labour on 12 December 2017 seeking permanency since the year 2006. The Conciliation Officer recorded that the Respondent-Management did not co-operate in conciliation proceedings. Petitioner expressed desire to approach the Court and accordingly conciliation proceedings were closed. Petitioner thereafter filed Complaint (ULP) No. 312/2018 in the Industrial Court, Bandra seeking the benefit of permanency since the year 2006 and consequential benefits during the period from 2006 to 2017. The Complaint was opposed by the Respondent-Hospital by filing Written Statement. Petitioner examined himself to prove his case. A witness was examined by the Respondent-Hospital

in support of its case. After considering the pleadings, documentary and oral evidence, the Industrial Court proceeded to dismiss the Complaint by judgment and order dated 3 May 2023, which is the subject matter of challenge in the present Petition.

5) Mr. Shaikh, the learned Senior Advocate appearing for the Petitioner would submit that the Industrial Court has erred in dismissing Petitioner's Complaint despite rejecting the objections of approbation and reprobation, and delay. He would submit that the condition of medical examination imposed by the Respondent for grant of permanency is *ab initio* void. That application of principle of *res judicata* by the Industrial Court is clearly erroneous as mere execution of settlement cannot be a ground for violating statutory right of the Petitioner of permanency on completion of 240 days of services. He relies upon judgment of this Court in ***Madhu Fantasy Land Pvt. Ltd., Mumbai vs. Maharashtra General Kamgar Union, Mumbai***[1] in support of his contention that the principle of *res judicata* does not apply. In support of his contention that Model Standing Order **(MSO)** would prevail over settlement, he relies on judgment of this Court in ***Mahindra Sintered Products Ltd. vs. Bharatiya Kamgar Sena***[2]. In support of the same principle, he relies upon judgment of the Apex Court in ***Bharatiya Kamgar Karmachari Mahasangh vs. Jet Airways Ltd.***[3] Mr. Shaikh would further submit that the action of the Respondent-Hospital practicing discrimination against the Petitioner on account of him suffering from HIV is arbitrary and against the provisions of Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 **(HIV-AIDS Act)**. He relies upon the judgment of

1 2002 (3) Mh.L.J. 534

2 Letters Patent Appeal No. 147 of 2011 decided on 25 July 2025

3 2023 SCC Online SC 872

Division Bench of the Allahabad High Court in ***Shailesh Kumar Shukla vs. Union of India***[4]. He would submit that the services of the Petitioner are continued irrespective of him being detected HIV+. That the illness has not come in the way of the Petitioner performing his duties. That the Petitioner is a poor sweeper who is wrongfully denied similar treatment meted out to his colleagues. That it is inhuman and arbitrary to extract same work from the Petitioner but to pay him lesser wages. He would pray for setting aside the impugned order.

6) The Petition is opposed by Mr. Talsania, the learned Senior Advocate appearing for the Respondent-Hospital. He would submit that the Complaint filed by the Petitioner was hopelessly time barred and was also barred by the principles of *res judicata*. That the Petitioner indulged in gross suppression of filing of previous Complaint by the Union and consideration of his case for permanency through Settlement executed through the Union. That the Complaint deserved rejection only on the ground of suppression of facts. That Petitioner subjected himself to medical examination in terms of Clause-114 of the settlement and acquiesced in the position of him not being declared medically fit. It is on humanitarian grounds that the Petitioner was granted the benefit of permanency. That after acquiring the benefit of permanency on humanitarian grounds, Petitioner turned around and initiated litigation for grant of benefit of permanency for the past period. He would submit that the findings of the Industrial Court about denial of permanency constituting continuous cause of action is erroneous and that the Respondent is entitled to challenge the same even in petition filed by the Petitioner. He would submit that the Settlement prevails over

[4] 2023 SCC Online All 429

MSO as per the provisions of Section 18 (1) of the Industrial Disputes Act, 1947 **(ID Act)**. That the Settlement is binding on the Petitioner. That his prayer for permanency based on completion of 240 days of service was completely time barred as 240 days would be completed in 1995 itself. He would submit that no inference is warranted in the impugned conclusion of the Industrial Court dismissing the Complaint. He would pray for dismissal of the Petition.

7) Rival contentions of the parties now fall for my consideration.

8) Petitioner has been working with the Respondent-Hospital since the year 1994 or 1999. It appears that the recognized Union took up the issue of grant of permanency to 188 temporary workers of the hospital by filing Complaint (ULP) No. 187 of 2005. On account of filing of the said Complaint, Memorandum of Settlement was executed between the hospital and Union on 1 December 2006. Clause-114, 115 and 116 of the Memorandum of Settlement reads thus :

> 114) It is agreed between the parties that the Management has the right to ask any workman to appear for medical check up before the Staff Medical Officer of the Hospital and Medical Research Centre in order to ascertain his / her physical fitness for work. Such medical check up by the Staff Medical Officer shall not be carried out to victimized any workman.
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> 115) Such medical check up by a Civil Surgeon / Government Medical Officer shall also be necessary in case of those workmen where authentic record of date of birth is not available.
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> 116) It is agreed that those workman whose names are shown in Annexure"B" attached to this Settlement will be declared permanent workman subject to their medical fitness test carried out by Hon. Chief Staff Medical Officer of the Hospital.

9) The name of the Petitioner was included in the list of 150 temporary workmen in Annexure-B to the said Settlement. However, it is the case of the Respondent-Hospital that upon being subjected to medical examination, Petitioner was found medically unfit. It appears that the physical fitness certificate dated 6 December 2006 was produced before the Industrial Court which indicates that the Petitioner was HIV+ as on the date of medical examination. Thus, Petitioner was denied the benefit of permanency in the Settlement on account of him being detected HIV+. Again on 23 March 2011, medical examination of the Petitioner was conducted and he was again found HIV+. It was only after the intervention by Mumbai District Aids Society that Petitioner was ultimately granted the benefit of permanency w.e.f. 1 January 2017.

10) After unsuccessful attempt of raising industrial dispute before the Deputy Commissioner of Labour, Petitioner finally approached the Labour Court by filing Complaint of unfair labour practice. In his Complaint, he did not disclose the factum of Union filing complaint (ULP) No. 187 of 2005, execution of Memorandum of Settlement or denial of permanency on account of medical unfitness. In his terse complaint, Petitioner raised following pleadings :

> 1. The complainant is residing in above said address and working in Bombay Hospital as a 'Sweeper', in the department of 12 NW (ICU) under the department of Class IV-Temp till date since the year 1994, Therefore the complainant is the workman defined u/s 2(s) of the Industrial disputes Act. The Respondent is a Hospital situated in the Mumbai city and having its office mentioned in the cause title.
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> 2. The Complainant work sincerely and honestly and his service record is very good and clean. Hereto Annexed & Marked Exhibit "A" is the copy of the Identity Card of the Complainant.

3. The complainant states that in the year 1999 to regularize his service H.I.V. test was done by the Respondent i.e. Bombay Hospital office & as per report the Complainant found negative. Hereto annexed & marked Exhibit "B" is the copy of the Examination of Blood report dated 07.07.1999.

4. The Complainant further states that thereafter to offer him permanent job in the year 2006 once again his Medical test was done for permanent job. The Complainant further state that the Respondent has not shown any report or not mentioned any reason to deny him permanent job.

5. The Complainant further states that he frequently wrote letter to Bombay Hospital. Hence management offered him permanent job in the year January 2017.

6. The complainant further states that from 2006 to January 2017, Bombay Hospital paid him temporary labor charges & also they are not given casual leave, sick leave, Bonus & also not provided any facility whatever is provided to permanent job holder.

7. Therefore complainant wrote letter to respondent demanding his unpaid wages and benefit. Hereto Annexed & Marked Exhibit "C" is the copy of letter dated 09.11.2017 sent by the Complainant to the Respondent.

8. The Complainant state that thereafter the Complainant had file statement of Justification before Hon'ble Deputy Commissioner of Labour. Here -Annexed & Marked Exhibit "D" is the copy of Statement of Justification.

9. The Complainant submit that Hon'ble Dy, Commissioner of Labour & had send letter to Respondent & called them However Respondent never attend the office of labour commissioner Therefore Labour commissioner had close file & advised to complaint to approach this Hon'ble Court for the grievance. Hereto annexed & marked Exhibit "E" is the copy of Roznama of Labour Commissioner.

10. The complainant state that as the complainant working in the respondent office since 1999 it is duty of respondent to do permanent the complainant after 11 months or 240 days after joining of service of Respondent. However Respondent intentionally refuse to declare permanent to the complainant till 2017. Therefore it is just & necessary to the Respondent to provide all the benefit of a permanent worker to the complainant w.e.f. from 2006 to till 2017.

> 11. The complainant further states that the complainant had made various attempt to Respondent orally or through letter till date. However Respondent did not take a single step to solve the Complainant concern. Therefore complainant has no other alternate remedy apart from to approach this Hon'ble Court

11) Petitioner thus did not disclose the background leading to non-grant of permanency to him. He approached the Industrial Court with a plain case that he was working in the Hospital since 1994 and had completed 240 days of service and was entitled to permanency. Thus, in respect of the claim of initial engagement, there appears to be some inconsistency in averments in paras-1 and 10. In para-1, he averred that he was working in the hospital since 1994, whereas in para-10 he claimed that he was working since the year 1999. Again, while claiming the benefit of permanency from 2006, no justification was pleaded as to why the demand of permanency was sought from the year 2006.

12) By not disclosing the background in which other workers were regularised and Petitioner was left out, he raised a claim for permanency on completion of 240 days of service. This was done possibly to save the compliant from being hit by the principles of delay. However, in the prayers, permanency was demanded from 2006. Respondent raised the defence of approbation and reprobation, by referring to Union filing Compliant for same benefit, medical unfitness and grant of permanency on humanitarian ground. This defence is however rejected by the Industrial Court. The objection of delay raised by the Respondents is also rejected on account of peculiar frame of the Complaint. As observed above, the Complaint was not with regard to the grievance of denial of permanency on account of ailment of HIV+ in the year 2006. The complaint was plain and simple i.e., denial of permanency despite

completion of 240 days of service. On account of this peculiar frame of the Complaint, the Industrial Court has repelled the objection of delay in para-18 of the judgment, holding that the unfair labour practice was continued as on the date of filing of the complaint. Thus, the finding on the issue of delay is not to be read in the context of the real grievance of the Petitioner of denial of benefit of permanency in the year 2006 on account of detection of ailment of HIV+. The said finding is recorded in the context of Petitioner's prayer for permanency on completion of 240 days of service.

13) The Industrial Court thereafter went into the aspect of merits of claim of permanency on completion of 240 days of service. Here, the Industrial Court took note of pleadings and evidence of the Respondent which clearly indicated the exact reason for non-grant of benefit of permanency. After having gathered the reason of failure to clear medical examination in pursuance of Memorandum of Settlement dated 1 December 2006, the Industrial Court proceeded to examine whether right of permanency under the Clause 4(c) of MSO would prevail over the Memorandum of Settlement. The Industrial Court took note of the provisions of Section 18 of the ID Act as amended by Maharashtra Amendment Act of 1972. The proviso to Section 18(1) of the ID Act in its application to the State of Maharashtra reads thus:

> Provided that, where there is a recognised union for any undertaking under any law for the time being in force, then such agreement (not being an agreement in respect of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee) shall be arrived at between the employer and the recognised union only, and such agreement shall be binding on all persons referred to in clause (c) and clause (d) of sub-section (3) of this section.

14) The Industrial Court, after taking into consideration judgment of this Court in ***Novartis India Ltd vs. Association of Chemical Workers***[5] and of the Apex Court in ***Barauni Refineries Pragatisheel Shramik Parishad vs. Indian Oil Corporation Limited & Ors.***[6], held that when there is a settlement in operation, clause in the Standing Order cannot be enforced. Mr. Shaikh has objected to this finding by relying upon judgment of the Apex Court in ***Bharatiya Kamgar Karmachari Mahasangh vs. Jet Airways*** (supra) in which it has held in para-16 as under :

> 16. A cumulative reading of aforesaid clauses reveals that a workman who has worked for 240 days in an establishment would be entitled to be made permanent, and no contract/settlement which abridges such a right can be agreed upon, let alone be binding. The Act being the beneficial legislation provides that any agreement/contract/settlement wherein the rights of the employees are waived off would not override the Standing Orders.

15) However, the judgment in ***Bharatiya Kamgar Karmachari Mahasangh vs. Jet Airways*** appears to have been rendered considering the position that the appropriate government was apparently the Central Government and amendment effected to Section 18 of the ID Act in relation to the State of Maharashtra was not applicable therein. Section 18 of the ID Act has been amended in relation to Maharashtra by adding the above quoted proviso. The impact of the added Proviso in Section 18(1) has been considered by this Court in ***Ceat Ltd vs. Murphy India Employees' Union***[7]. Furthermore, in ***Barauni Refineries*** (supra), the Apex Court has held that where there is settlement in operation, clause in Standing Order cannot be modified.

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5 2005 1 CLR 903

6 1991 I LLJ 46

7 2005 II LLJ 1024

16) Be that as it may. It is not necessary to delve further into this aspect as the debate of supremacy of MSO or Settlement is not relevant to the present case. Petitioner never pitched his case before the Industrial Court pleading that he was entitled to permanency from the date of completion of 240 days of service irrespective of agreement in the Settlement. He claimed permanency from the year 2006, even though he had completed 240 days service in 1995 itself, he consciously prayed for permanency from the year 2006, which was the year in which his case was considered as per the Memorandum of Settlement and rejected. This is the reason why I have observed that the real grievance of the Petitioner is about validity of rejection of his claim for permanency on the ground of his status as HIV+ person.

17) As observed above, Petitioner did not pray for grant of benefits of permanency on completion of 240 days of service. He has virtually acquiesced in the Model Standing Orders since he ultimately prayed for grant of benefit of permanency from the year 2006. In this regard, the prayers raised by him in the complaint would be relevant which read thus:

> a) That this Hon'ble Court may be pleased to order and direct to Respondent to declare complainant is permanent employee w.e.f. 2006.
> b) That this Hon'ble Court may be pleased to order and direct to respondent to offer all facility and service benefits to complainant available to permanent employee in respondent hospital w.e.f. 2006 to till 2017.
> c) That pending the hearing & final disposal of present complaint this Hon'ble court may be pleased to direct and order to not take any coercion action against complainant without permission of this Hon'ble Court.
> d) Any other relief which this Hon'ble court may deem fit and proper.

18) Thus, the Petitioner did not pray for grant of benefit of permanency w.e.f. the date of completion of 240 days of service. The very fact that he demanded benefits of permanency since the year 2006 would clearly indicate that the demand flew out of the Model Standing Orders. True it is that the Petitioner did not disclose the factum of Memorandum of Settlement in the Complaint. I am however inclined to ignore this inadvertence on the part of the Petitioner considering the status and the ailment suffered by him. Thus, Petitioner's ultimate prayer in the complaint was for permanency in pursuance of the Settlement. Therefore, it is not necessary to delve deeper into the issue of aspect of supremacy of Memorandum of Settlement over Clause-4(c) of the MSO.

19) The Industrial Court has also erred in applying the principle of *res judicata* while dismissing the Complaint. The Industrial Court ought to have appreciated the real grievance of the Petitioner rather than going by the frame of the Complaint. Merely because the Union agitated the issue of permanency in Complaint (ULP) No. 187/2005 and merely because the said complaint resulted into Memorandum of Settlement dated 1 December 2006, it cannot be contended that Petitioner was precluded from raising the issue of denial of permanency at least in accordance with the terms of the Memorandum of Settlement. Rather than adopting a pedantic and hyper-technical approach of examining the Complaint for grant of permanency on completion of 240 days of service, the Industrial Court ought to have considered the real grievance of the Petitioner in denial of benefit of permanency on account of failure in the medical examination test conducted in pursuance of Memorandum of Settlement dated 1 December 2006. It is not that the Industrial Court has altogether ignored the aspect of medical examination. It is

held that the conditions for conferment of permanency stipulated in Settlement dated 1 December 2006 would prevail over the MSO Clause 4(c). Having held so, the Industrial Court ought to have walked a step further by examining whether the decision of the Respondent-Hospital in denying the benefit of permanency on account of Petitioner's status as HIV+ was proper or not. The approach by the Industrial Court while dealing with the Complaint filed by the Petitioner does not appeal to this Court.

20) In ***Madhu Fantasy Land*** (supra) relied upon by Mr. Shaikh, the learned Single Judge of this Court has held that mere passing of consent order disposing of complaint in view of settlement does not operate as *res judicata* since there is no final determination of dispute between the parties. This Court held in para-10 as under :

> 10. Adverting to the first issue regarding res judicata, it is not in dispute that the doctrine of res judicata or principles analogous to res judicata do apply to industrial adjudication. It has been so held in the case of Burn & Co., Calcutta v. Their Employees reported in AIR 1957 SC 38 and the case of Bharat Barrel & Drum Manufacturing Co. Ltd. v. Bharat Barrel Employees Union reported in (1987) 2 SCC 591 : AIR 1987 SC 1415. However, the question is whether on the facts and circumstances present before me, the principles of res judicata do in fact apply. In the instant case, the agreement signed under section 2(p) and 18(1) of the Industrial Disputes Act were entered into on 26-9-1994 and a consent order was obtained on 27-9-1994 from the Industrial Court which stated that the complaint is disposed of as settled as per the settlement dated 26-9-1994. Whether this would amount to an order of the Court deciding the issues contained in the agreement is in question. If the principles of res judicata are to apply, there must be a final determination of the dispute between the parties in a Court competent to try such an issue and which has been determined after being finally heard by the Court. Therefore, the issue in question is required to be heard by the Court and it is necessary for the Court to pass an order thereafter determining the issues. In the present case, what is decided by the Court is only that the complaint should be disposed of in view of the parties having arrived at a settlement. This does not mean that the Court has given any decision on the

issues between the parties or that the settlement between the parties had the imprimatur of the Industrial Court.

21) Even otherwise, the principle of *res judicata* is wholly irrelevant to the present case. Petitioner did not seek the prayer for permanency w.e.f. the date of completion of 240 days of service. He sought the said prayer from the year 2006. He was denied the benefit of permanency only on account of he being declared medically unfit on 6 December 2006. Thus, the real grouse in the complaint was with regard to the correctness of action of the Respondent-Hospital in denying the benefit of permanency for the reason of he being detected HIV+. The principles of *res judicata* therefore have no application in the facts and circumstances of the present case.

22) May be Petitioner ought to have been slightly more candid in disclosing the real reason of denial of permanency. His prayers in the Complaint ought to have been a bit clearer. While claiming the benefit of permanency since the year 2006, the Petitioner ought to have disclosed the exact reason why the same was denied to him. However, considering the twin factors of the Petitioner being a mere sweeper and his ailment being HIV+, it would be in the interest of justice not to insist on strict rules of pleadings and instead decipher his real grievance expressed through the complaint. I accordingly proceed to consider the real grievance of the Petitioner.

23) In the peculiar facts and circumstances of the present case, Petitioner is denied the benefit of permanency on the ground that he failed in medical examination conducted in accordance with

Clauses-114 to 116 of the Memorandum of Settlement. However, it is not that the Petitioner was terminated from service on account of his medical unfitness. He continued performing the duties of Sweeper despite denial of the benefit of permanency. He worked alongwith his cohorts and performed same duties and responsibilities in the hospital. His ailment of HIV+ did not come in the way of performance of duties of sweeper. In a subsequent enacted legislation of the HIV-AIDS Act in 2017, discrimination against a protected person who is HIV+ in the matter of employment is prohibited. Section 2(s) of the Act defines the term 'protected person' as under:

> (s) "protected person" means a person who is—
> (i) HIV-Positive; or
> (ii) ordinarily living, residing or cohabiting with a person who is HIV-positive person; or
> (iii) ordinarily lived, resided or cohabited with a person who was HIV-positive;

24) Section 3 of the HIV-AIDS Act imposes prohibition on discrimination and provides thus:

> **3. Prohibition of discrimination**.— No person shall discriminate against the protected person on any ground including any of the following, namely:—
>
> (a) the denial of, or termination from, employment or occupation, unless, in the case of termination, the person, who is otherwise qualified, is furnished with—
> (i) a copy of the written assessment of a qualified and independent healthcare provider competent to do so that such protected person poses a significant risk of transmission of HIV to other person in the workplace, or is unfit to perform the duties of the job; and
> (ii) a copy of a written statement by the employer stating the nature and extent of administrative or financial hardship for not providing him reasonable accommodation;
> (b) the unfair treatment in, or in relation to, employment or occupation;

(c) the denial or discontinuation of, or, unfair treatment in, healthcare services;
(d) the denial or discontinuation of, or unfair treatment in, educational, establishments and services thereof;
(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public, whether or not for a fee, including shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads, burial grounds or funeral ceremonies and places of public resort;
(f) the denial, or, discontinuation of, or unfair treatment with regard to, the right of movement;
(g) the denial or discontinuation of, or, unfair treatment with regard to, the right to reside, purchase, rent, or otherwise occupy, any property;
(h) the denial or discontinuation of, or, unfair treatment in, the opportunity to stand for, or, hold public or private office;
(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a person may be;
(j) the denial of, or unfair treatment in, the provision of insurance unless supported by actuarial studies;
(k) the isolation or segregation of a protected person;
(l) HIV testing as a pre-requisite for obtaining employment, or accessing healthcare services or education or, for the continuation of the same or, for accessing or using any other service or facility:

Provided that, in case of failure to furnish the written assessment under sub-clause (i) of clause (a), it shall be presumed that there is no significant-risk and that the person is fit to perform the duties of the job, as the case may be, and in case of the failure to furnish the written statement under sub-clause (ii) of that clause, it shall be presumed that there is no such undue administrative or financial hardship.

25) No doubt, the provisions of the HIV-AIDS Act would be prospective in nature and would not cover the incident of Respondent declaring Petitioner as unfit for permanency in the year 2006. At the same time, this Court cannot be ignorant of the position that Petitioner is ultimately denied the benefit of similar treatment on account of the ailment being HIV+. Despite being detected HIV+ in the year 2006, Petitioner has worked successfully with the

Respondent-Hospital for the last 19 long years. His ailment has not prevented him from discharging his duties nor has affected the activities of Hospital in any manner. What has happened in the present case is that HIV+ status of the Petitioner is being used by the Hospital for extracting same work from him by paying him lesser wages. If Petitioner could be continued in service for the last 19 long years after being detected HIV+, I do not see any reason why the benefit of permanency needs to be denied to him when his co-workers were made permanent. In ***Shailesh Kumar Shukla*** (supra), the Division Bench of the Allahabad High Court has held that employment or promotion cannot be denied only on the ground of a person's HIV status. It is held thus:

> 65. This Court is of the view that since a person, who is otherwise fit, could not be denied employment only on the ground that he or she is HIV positive and this principle also extends to grant of promotion. In any case, a person's HIV status cannot be a ground for denial of promotion in employment as it would be discriminatory and would violate the principles laid down in Articles 14 (right to equality), 16 (right to non-discrimination in state employment) and 21 (right to life) of the Constitution of India.

26) In my view, in the present case also, denial of benefit of permanency to the Petitioner on the ground of his status as HIV+ is clearly arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India. In my view therefore, Petitioner has made out a case for grant of benefit of permanency from the date the same was extended to his cohorts and the Industrial Court has clearly erred in dismissing the complaint.

27) Having held that the Industrial Court has decided the Complaint from an erroneous approach, ordinarily this Court would have remanded the proceedings before the Industrial Court for

reconsideration of Petitioner's case of wrongful denial of permanency on account of his HIV+ status. However, it is seen that the Petitioner is now at an advanced age of 55 years and has already spent 7 years litigating the issue of wrongful denial of permanency on par with similarly placed workers. Therefore, instead of remanding the Complaint for examination of this aspect by the Industrial Court, it would be appropriate that this Court puts curtains on the long litigation. Petitioner is a poor sweeper who is wrongfully denied the benefit of permanency on account of his status of being HIV+. Respondent- Hospital has extracted the same work from him by denying him the benefits admissible to permanent workers. In my view therefore, Petitioner deserves to be granted the benefit of permanency from the date the same was granted to similarly placed workers.

28) The next issue for consideration is whether the Petitioner would be entitled to arrears arising out of grant of permanency from the year 2006? Here the element of delay would creep in. As observed above, though the Industrial Court has recorded the finding that unfair labour practice continued as on the date of filing of the complaint, that finding is recorded in the context of Petitioner's claim of permanency on completion of 240 days of service. Both the Industrial Court, as well as this Court have examined the real grouse of the Petitioner which is denial of benefit of permanency on account of being detected HIV+ in the year 2006. The period of limitation for filing complaint of unfair labour practice under Section 28 of the MRTU & PULP Act, 1971 is 90 days.

29) It is well-settled principle that the principle of delay and latches applies in relation to arrears even in respect of continuous

cause of action. In ***M. R. Gupta Vs. Union of India***[8] the Apex Court had held that limitation would apply to relief of recovery of arrears. The principle is reiterated in subsequent judgment in ***Union of India & Ors. Vs. Tarsem Singh***[9], wherein the Apex Court, while recognising an exception to normal rule of limitation in cases involving continuous cause of action, has held that there is an exception to that exception where the arrears even in cases involving continuous injury need to be restricted to a period of three years. In ***Shiv Dass v. Union of India***[10] the Apex Court has held that if a petition is filed beyond a reasonable period, say three years, normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years.

30) Learned Single Judge of this Court (*S.C. Gupte J.*) in ***Jaihind Sahakari Pani Purvatha Mandali Ltd. Shirdhon Vs. Rajendra Bandu Khot and Ors***[11] has applied the above principles to complaints of unfair labour practice involving continuous cause of action and had held that the arrears would only be for the period prior to 90 days of filing of the Complaint. After considering the ratio of judgments in ***M R Gupta*** and ***Tarsem Singh***, this Court has held thus:

> 8. The Supreme Court has explained the difference between a continuous wrong and recurring or successive wrongs in the case of Union of India v. Tarsem Singh1. A continuing wrong is a single wrong causing a continuing injury In case of a continuing wrong, the grievance essentially is about an act which creates a continuous source of injury and renders the doer of that act responsible and liable for continuance of that injury The injury is not complete when the act is committed; it continues even thereafter; and so long as it does, the cause of action itself continues. A recurring or successive wrong, on the other hand, occurs when successive acts, each giving rise to a distinct and separate cause of action, are committed. Each act, in itself

[8] (1995) 5 SCC 628

[9] (2008) 8 SCC 648

[10] (2007) 9 SCC 274

[11] 2019 SCCOnline Bom 13271

wrongful, constitutes a separate cause of action for sustaining a claim or a complaint. It is important to bear in mind in this context the distinction between an injury caused by a wrongful act and the effect of such injury. What is to be seen is whether the injury itself is complete or is continuous. If the injury is complete, the cause of action accrues and is complete; the clock starts ticking for the purposes of limitation, notwithstanding the fact that the effect of such injury continues even thereafter. For example, let us take the case of an occupant of a house who is driven out of it. The injury is complete with the act of throwing him out, though the effect of that injury namely, his being unable to use or occupy the house, continues even thereafter. Take, however, the case of a person who is detained in a house and not allowed to roam about. The act of detention is the one which causes an injury : This injury, however, is a continuing injury, since the injury here consists in being unable to move about. This injury continues and since the injury itself continues, the wrong is a continuous wrong and the cause of action, a continuing cause of action. Take, on the other hand, the case of a person who is barred from entering a house he is entitled to enter. When he is barred for the first time, an injury follows, and a cause of action thereby accrues. Each successive day on which he is so barred gives rise to a fresh and distinct cause of action, making it a case of recurring/successive wrongs.

9. In service jurisprudence, this distinction (i.e. the distinction between a continuing wrong and a recurring one) becomes important particularly from the point of view of relief. In M.R. Gupta v. Union of India2, the Supreme Court has explained it succinctly The appellant before the court in that case was a workman, whose grievance was that his wage fixation was not in accordance with the applicable rules. He asserted that the wrong was a continuous one. The court held that his cause of action was a recurring cause of action rather than a continuous one. Each time he was paid a salary which was not computed in accordance with the rules, a cause of action accrued unto him. The Court held as follows (SCC pp.629-30):

> "So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery" of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time-barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs."

10. This law has been reiterated and summarised by the Supreme Court in Tarsem Singh's case in the following words (Para 7 @ P651 of SCC):

> "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 re-fixation 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, the principles relating to recurring/successive wrongs will apply As a consequence, 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."

11. The three years' period considered by the Supreme Court in Tarsem Singh's case was on the basis of a general limitation for recovery of a money claim. What was considered was that since the recovery period being considered by the High Court was in a writ petition, where the case was not covered by any particular article of limitation, the normal rule of limitation for recovery of money dues, i.e. limitation of three years, should apply unless there are extra-ordinary circumstances. Had the case been before an administrative tribunal, it would have been the particular article of limitation which would have applied. In the present case, since we are dealing with an unfair labour practice of not honouring a settlement between the employer establishment and its workmen, the period is of three months. Ordinarily, therefore, salaries and other emoluments payable for three months prior to the complaint can alone be considered for relief as a normal rule. The Industrial Court appears to have disregarded this law. It appears to have proceeded on the footing of a continuous cause of action. It ought to have instead considered each successive act of nonpayment as a separate injury and cause of action and proceeded to consider the successive acts as recurring causes of action. Going by that, as per the law stated in Tarsem Singh's case, enforcement of settlement could have always been ordered for future and as for arrears, they could have been ordered only for three months as per the limitation period ordinarily applicable. The court should then have considered whether and to what extent to exercise its discretion to go beyond this ordinarily applicable period, depending on good and sufficient reasons being shown for the delay This aspect of the matter, however, has not been addressed to at all by the Industrial Court, since it, as we have seen above, wrongly, treated the cause of action as a continuing one and gave relief on that basis. The impugned order of the court, thus, deserves to be quashed and the complaint remitted to the court for consideration of the period of recovery that is to say, how far to go back for ordering recovery of arrears.

31) In ***Jaihind Sahakari Pani Purvatha Mandali Ltd. Shirdhon*** attention of this Court was invited to various judgments of

this Court, which had laid down principles contrary to ***M. R. Gupta*** and ***Tarsem Singh***. This Court held the said judgments to be *per incurium*. It is held thus:

> 14. The Division Bench of our court in Warden & Co. (India) Ltd. v. Akhil Maharashtra Kamgar Union6 was concerned with a workmen's complaint of unfair labour practice of non-payment of wages from February 1992, and bonus, leave travel allowance, encashment of privilege and causal leave for the years 1990-1991 and 1991-1992. The complaint was filed on 29-3-1993 under MRTU & PULP Act. Though the main controversy before the court was whether an unrecognised union was entitled to appear and act on behalf of workmen of an industry governed by the Industrial Disputes Act in a complaint relating to unfair labour practice other than those specified by Items 2 and 6 of Schedule IV of the MRTU & PULP Act, the Division Bench did consider the other issue involved in the matter, namely whether the complaint was barred by limitation. From the employer's side, the same provision of limitation was pressed into service, namely Section 28 of the Act, providing for three months' period. The Division Bench observed that the complaint was of an unfair labour practice under Item 9 of Schedule IV of the Act, namely, "failure to implement award, settlement or agreement"; Section 28 enabled a complainant to file a complaint where "any person has engaged in or is engaging in any unfair labour practice" and every time wages were not paid when due, it could be averred that the employer was engaging in an unfair labour practice under Item No. 9 of Schedule IV That was the basis on which the Division Bench did not find merit in the submission of the employer based on limitation of three months. The Division Bench, with respect, correctly held the complaint as not barred under Section 28, but that was on the basis of a recurring cause of action - every time wages were not paid, the employer could certainly be said to have engaged in an unfair labour practice. The Division Bench, however, does not appear to have considered the further question, namely, what should be the period for which arrears of wages should be ordered or in other words, which arrears, calculated on the basis of difference in pay were recoverable as within time and which were time-barred. The decision of the Supreme Court in M.R. Gupta's case (supra) was not brought to the notice of the Division Bench. The Supreme Court in M.R. Gupta, as we have noted above, made it clear that so long as an employee was in service, a fresh cause of action arose every month when he was paid his monthly salary on the basis of a wrong computation; if the employee's claim of computation was found to be correct on merits, he would be entitled to be paid according to the properly fixed pay scale "in the future? and "the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated or the basis of difference in the pay which has become time barred would not be recoverable?. This has now been fully explained and reiterated by the Supreme Court, by making out a clear distinction between a continuing cause of action and recurring causes of action particularly from the standpoint of service jurisprudence in Tarsem Singh's case (supra). After this latter decision, it is impermissible to argue

that since each time wages are not paid when due there is a resultant unfair labour practice, arrears could be ordered to be paid for any length of time, that is to say without reference to any time-bar. **The judgments of two learned Single Judges of our court in Indian Smelting & Refining Co. Ltd. v. Sarva Shramik Sangh7, Maharashtra State Electricity Board v. Suresh Ramchandra Parchure8 and Cipla Ltd. v. Anant Ganpat Patil9 also, with utmost respect, do not state the law correctly to the extent they allow the claims of arrears of wages without reference to the bar of limitation for claiming past dues. The decisions could be said to be per incuriam for not considering the law laid down in M.R. Gupta's case (supra) and, in any event, now impliedly overruled by the Supreme Court decision in Tarsem Singh's case (supra).**

16. Accordingly, for the reasons stated above, the impugned order of the Industrial Court cannot be sustained to the extent of past arrears beyond three months prior to the date of the complaint and will have to be set aside to that extent and the matter remanded to the Industrial Court for considering the claim of past arrears in the light of its discretion to order recovery beyond three months prior to the complaint for good and sufficient reasons.

(emphasis added)

32) I respectfully agree with the statement of law expounded by Gupte J. in ***Jaihind Sahakari Pani Purvatha Mandali Ltd. Shirdhon***. The Division Bench of this Court in ***Maruti R. Wankhede vs. Union of India***[12] , has summarised the principles of limitation in cases involving continuous cause of action, as under:

12. It would be proper for us, at this stage, to summarize the propositions of law deducible from the authorities cited at the bar and those considered therein for the purpose of consideration of its application to the present case. They are:

(i) When an order is passed by a Court/Tribunal to consider or deal with a representation of an individual raising a stale or a dead claim and such claim is rejected even on merits on an impression that failure to do so may amount to disobedience of the order of the Court/Tribunal, such an order does not revive the stale or dead claim, nor amount to some kind of "acknowledgment of a jural relationship" to give rise to a fresh cause of action. [C. Jacob (supra)];

(ii) Disposal of proceedings by seemingly innocuous orders directing consideration of representation though result in quick or easy disposal of cases in overburdened adjudicatory institutions but

12 2021 SCCOnline Bom 14203

such orders do more disservice than service to the cause of justice. [P. Venkatesh (supra)];

(iii) Denial of pay fixation of an employee, while he is in service, not in accordance with the rules resulting in payment of a quantum of salary not computed in accordance with the rules can give rise to assertion of a continuing wrong against such act giving rise to the cause of action each time he is paid less than his entitlement and so long as such employee is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of such wrong computation. [M.R. Gupta (supra)];

(iv) **Even if a delayed claim relating to disability pension is found to be of substance on merits and succeeds, the arrears should be restricted to three years prior to filing of the writ petition. [Tarsem Singh (supra)];**

(v) When the issue relates to fixation of salary or payment of any allowances, the challenge is not barred by limitation or doctrine of laches, as the denial of benefit occurs every month when the salary/allowances are paid thereby giving rise to a fresh cause of action based on continuing wrong. [Yogendra Shrivastava (supra)]; and

(vi) **If a petition is filed beyond a reasonable period, say three years, normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. [Shiv Dass v. Union of India, (2007) 9 SCC 274].**

(emphasis added)

33) In my view therefore, though this Court is inclined to grant the benefit of permanency to the Petitioner from the year 2006, the principle of delay and laches would come into play in respect of arrears arising out of grant of such permanency. Petitioner slept over his rights for over 12 years. No doubt, he was wrongfully denied the benefit of permanency in the year 2006. Therefore, he ought to have raised the said grievance immediately after denial of benefit of permanency. His medical examination in pursuance of Memorandum of Settlement was held on 6 December 2006. He ought to have filed the complaint of unfair labour practice within 90 days of denial of benefit of permanency. In that view of the matter, the Respondent-Hospital cannot be saddled with the financial burden of paying difference in wages for unduly long period of 12 long years. In the facts and circumstances of the case, it would

be appropriate to deny the actual benefits arising out of permanency during the period from 2006 till 90 days before the date of filing of the complaint. The principle of restricting the arrears for three years in ***Tarsem Singh*** and ***Shiv Dass*** is on account of period of limitation for filing of suit of three years. However, in respect of complaints of unfair labour practice under the MRTU & PULP Act, 1971 the prescribed period of limitation is only 90 days. Therefore, Petitioner would be entitled to actual arrears from 90 days prior to filing of his Compliant.

34) The Petition deserves to be allowed partly by directing Respondent-Hospital to confer the benefit of permanency on the Petitioner from the date of execution of Memorandum of Settlement ie. 1 December 2006. However, he would be entitled to the actual financial benefits in respect of period 90 days before the date of filing of Complaint before the Industrial Court i.e. 5 July 2018.

35) The Petition accordingly succeeds partly, and I proceed to pass the following order:

(i) Judgment and order dated 3 May 2023 passed by the Industrial Court in Complaint (ULP) No. 312/2018 is set aside.

(ii) Complaint (ULP) No. 312/2018 is partly allowed declaring that the Petitioner be declared as permanent employee of Respondent-Hospital from 1 December 2006.

(iii) The actual financial benefits arising out of permanency w.e.f. 1 December 2006 shall however be extended to the Petitioner only w.e.f. 5 July 2018, i.e. 90 days before filing of Complaint.

(iv) All arrears arising out of notional grant of permanency from 1 December 2006 and actual benefits from 5 July 2018 shall be paid to the Petitioner by the Respondent-Hospital within 3 months, failing which the Respondent-Hospital shall be liable to pay interest @ 8% p.a. on the said amount after expiry of period of 3 months.

36) With the above directions, the Petition is partly allowed. Rule is made partly absolute. Considering the facts and circumstances of the case, there shall be no order as to costs.

[SANDEEP V. MARNE, J.]