

JPP

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 262 OF 2015

1. Sandip Baliram Sandbhor
R/at : Sandbhor Vasti, Kiwale,
Tal. Haveli, Dist. Pune.
2. Manoj Pandharinath Chapale
R/at : Ratnashambhu Niwas,
Ganeshnagar, Dange Chowk.
3. Peter Suresh Salwe
R/at : CQAE Colony, Sangvi
Phata, Pune -27.
4. Ranjit Shersingh Kagada
R/at Moraya Raj Park,
Keshavnagar Chinchwad, Pune -33.
5. Dyaneshwar Narayan Dagade
R/at 46, Anand Van Society,
Theregaon Phata, Pune – 33.
6. Smt. Subhadra Lalbahadur Gorkha
R/at : Bhalke Chawl, Power House
Chowk, Chinchwad Gaon, Pune – 33.
7. Balu Ramdar Borde
R/at : Vetalnagar, Chinchwadgaon,
Pune – 33.
8. Indradev Kamata Prasad Singh,
R/at : Kate Vasti, Near Aundh Post
Camp, Pimple Saudagar, Pune – 27.

9. Smt. Urmila Surendraprasad Ram
R/at : Buadh Nagar, Pimpri, Pune -17.
10. Shankar Vithoba Waghire
R/at : Sudarshan Chowk,
Pimprigaon, Pune – 17.
11. Chandrakant Babu Kate
R/at : Kate Vasti, Pimple Saudagar,
Pune – 27.
12. Smt. Vijaya Mahadev Kamble
R/at : Reubai Chawl Bhim Nagar,
Chinchwadgaon, Pune – 33.
13. Anita Govind Fund
R/at : Ramchandra Chawl,
Kailas Nagar, Thergaon,
Pune – 33.
14. Nanasaheb Murlidhar Kalokhe,
R/at : Near Kalakhad Police Station,
Vakad, Dist. Pune.
15. Smt. Gaurabai Laxman Bajale,
R/at : Near Panchshil Hotel,
Indira Nagar, Chinchwad,
Pune – 19.
16. Ganpat Niwruti Gadekar,
R/at : 140, Ramnagar, Rahatni,
Pune – 17.
17. Smt. Sunanda Sonba Jagtap,
R/at : Bhimnagar, Chinchwadgaon,
Pune – 33.

18. Smt. Tipubai Hanumant Dongare,
R/at : Indira Nagar, Behind
Panchshil Hotel, Building No.2,
Chinchwad, Pune – 19.

19. Smt. Vandana Gautam Waghmare,
R/at : Vetel Nagar, Chinchwadgaon,
Pune – 33.

... Petitioners.

v/s.

1. Pimpri Chinchwad Municipal Corporation
(Through its Municipal Commissioner)
Pune Mumbai Road, Pimpri, Pune – 18.

2. Municipal Commissioner,
Pimpri Chinchwad Municipal Corporation,
PCMC Building, Pune – Mumbai Road,
Pimpri, Pune – 411 018.

3. Medical Officer of Health (M.O.H.),
Pimpri Chinchwad Municipal Corporation.
PCMC Building, Pune – Mumbai Road,
Pimpri, Pune – 411 018.

4. The State of Maharashtra
To be served through the Office of
Government Pleader, Appellate Side,
High Court, Mumbai.

... Respondents.

Mr. V.P. Vaidya with Neel Helekar for the Petitioners.

Mr. K.S. Bapat with G.H. Keluskar for Respondents 1 to 3.

Mr. A.D. Kango, AGP for Respondent 4.

CORAM : N.M. JAMDAR, J.

DATE : 3 DECEMBER 2015.

JUDGMENT :-

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for disposal.

2. The Petitioners, nineteen in number, challenge the Award passed by the Industrial Court, Pune dismissing their Complaint (ULP) No. 177 of 2005.

3. The Respondent No.1 is a local authority constituted for the Pimpri Chinchwad area, under the provisions of Bombay Provincial Municipal Corporation Act, 1949. The Respondent No.2 is the Municipal Commissioner. Respondent No.3 is the Medical Officer of Health in the services of the Municipal Corporation. The Respondent – Corporation has a public hospital known as Talera Hospital at Chinchwad. The Petitioners were initially working on Class IV post in Talera Hospital, through a contractor M.P. Enterprises. The contract with M.P. Enterprises came to an end by September 2004 and thereafter, the Petitioners continued to work for seven months with the Respondents, and apprehending their discontinuance, they filed a complaint (ULP) No. 177 of 2005.

4. The complaint was filed seeking permanency in services of the Respondent – Corporation and for parity in wages with other Class IV employees. In the complaint, it was contended as follows : the provisions of Bombay Industrial Employment (Standing Orders) Act, 1946 (Standing Orders) Act are applicable to the Respondents. In the Talera Hospital, there are 47 permanent Class IV employees. There were 14 posts of Ward Boy, 17 posts of Ward Aayas, 7 posts of Safai Kamgar, 3 posts of Laborers, 1 post of Peon, 4 posts of Mehetar and 1 of Kachara Kuli. Considering the heavy load of workload due to 100 beds of indoor patients and 500 OPD, the Respondents appointed M.P. Enterprises through which the Petitioners were working. The contract with M.P. Enterprises ended by September 2004. By the end of September 2004, there were 47 permanent Class IV employees and 23 contract laborers as Class IV employees through M.P. Enterprises. The Petitioners personally met the Respondent Nos. 2 and 3 on or about 20 September 2004 who assured them that the Petitioners will be absorbed in service however, will have to go through some procedure and other legal formalities. The Respondent Nos. 2 and 3 asked the Petitioners to continue to work in Talera Hospital as probationers and promised to give them appointments. Thereafter, the Petitioners continued to work without any appointment orders, with an expectation that they would get due appointment orders as permanent employees and since they apprehended termination, they filed the complaint. After completion of three months uninterrupted service as probationers, they had become permanent and the action of the Respondents was in breach

of 4-A of the Standing Orders and by not giving effect to this legal provision, the Respondents committed unfair labour practice as per Item 9 Schedule IV of M.R.T.U. & P.U.L.P. Act, 1971 (Act of 1971). The Petitioners were being treated differently than the other Class IV employees and therefore, there was a breach of Item 5 of Schedule IV of M.R.T.U. & P.U.L.P. Act. Accordingly, the Petitioners sought permanency in services with all consequential benefits.

5. The Respondents filed their reply and opposed the reliefs sought. It was contended as follows : the Petitioners were never in direct employment of the Respondents. They were employees of a contractor and therefore, there was no question of any employer employee relationship. The entry of the Petitioner was a back door entry and upon conclusion of the arrangement with M.P. Enterprises, the Petitioners were working on casual basis. There was no such assurance or undertaking that the Petitioners will be employed on permanent basis. In fact, permanent post cannot be filled bypassing the recruitment procedure. The Respondents committed no unfair labour practice. The Standing Orders are not applicable to Talera Hospital as it is not an Industrial Establishment. The arrangement with the contractor had come to an end and bypassing the recruitment procedure and without following due process of law; no permanent appointment can be given in the services of the Respondent, which is a public body. The Respondents have to follow due recruitment policy, keep in mind qualifications, reservations and criteria set by the State Government. The Petitioners have not even

completed seven months and therefore, there is no unfair labour practice under Item 6 of Schedule IV. There is no question of applicability of Standing Orders and even assuming they do apply, Clause 4-A relied upon is not attracted as the appointments are illegal.

6. The Petitioners filed their rejoinder and contended that: The Standing Orders apply and the work carried out by the Petitioners is incidental to the main activities in the hospital. The Respondent – Corporation is an Industrial Establishment as it carries out construction, development of buildings, roads, etc. Since the Standing Orders apply, there is a breach of Clause 4-A and consequently of Item 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act. There are no Recruitment Rules framed by the Respondent – Corporation and therefore, there is no illegality in the appointment of the Petitioners.

7. The Petitioners examined one of the Petitioners as a witness who was cross-examined. They also examined one Dilip Kanoj, who was working as a Medical Officer during the relevant period, who was cross-examined. The Respondents examined their witness who was also cross-examined.

8. The Industrial Court, after considering the rival contentions and evidence on record, concluded that the provisions of the Standing Orders Act did not apply to the Talera Hospital, which is

different unit, and a hospital is not an Industrial Establishment. The Industrial Court held that even assuming the Standing Orders apply, there is no question of breach of Clause 4-A of the Standing Orders as the Petitioners were not appointed after following regular procedure and they cannot therefore seek permanency upon completion of three months' period. The Industrial Court also held that the Petitioners hardly worked for seven months and therefore, there was no question of granting them any permanency. Accordingly, by impugned order dated 17 November 2014, the complaint filed by the Petitioners was dismissed. The ad-interim relief, which was granted to the Petitioners during the pendency of the complaint, was extended to enable them file a Petition. Thereafter, the present Petition is filed.

9. I have heard Mr. V.P. Vaidya, learned Counsel for the Petitioners and Mr. K.S. Bapat, learned Counsel for the Respondent Nos.1 to 3 and Mr. Kango, AGP for Respondent No. 4.

10. Mr. Vaidya submitted as follows : that the Petitioners were appointed as probationers. Employer employee relationship established and therefore they can only be probationers. As per Clause 4-A of the Standing Orders, after period of three months, the Petitioners were deemed to be confirmed. Not making them permanent is an unfair labour being in breach of Clause 4-A of Standing Orders, and once there is an unfair labour practice, Petitioners will have to be made permanent as an affirmative action.

There is no back door entry as the Medical Officer with full acceptance of the corporation, appointed them and funds were given from the Municipal Corporation. The Petitioners have continued since long and it is not a litigious appointment as interim relief was granted in their favour. Since unfair labour practice is established, the only question is of relief and the relief could have been moulded. At that time and even today vacant post exist and the Respondent is appointing persons on contract basis. There are no recruitment rules and therefore the appointments are not in breach of any rules. Standing Orders are applicable and the Petitioners are employees of the Respondent – Corporation. The Municipal Commissioner has power to appoint temporary employees and the power is delegated. In any case relief can be molded by granting the difference in pay and/or they be continued in service since, regular recruitment is not taking place. Item 9 of Act of 1971 is breached because Clause 4-A is not given effect. Item 5 is breached because there is discrimination amongst similarly situated persons. The Apex Court in the Case of *Maharashtra State Road Transport Corporation v/s. Castribe Rajya Parivahan Karmachari Sanghatana*¹, *ONGC Ltd. v/s. Petroleum Coal Labour Unions*² and various other cases has held that the issue of back door entry does not arise when an unfair labour practice is established and the power of an industrial adjudicator to take affirmative action is not taken away even in public services.

¹(2009) III CLR 262)

²(2009) III CLR 262)

11. Mr. Bapat submitted : the Respondent is a public body and is bound to follow the law regarding employment in public service. The law laid down by the Constitution bench in *Secretary, State of Karnataka and Ors. v/s. Umadevi (3) and Others*³ is squarely applicable. The Standing Orders do not apply, as the establishment is a hospital, which is not covered phrase “establishment” under Payment of Wages Act. It refers to the place of work and not the entire Corporation. The activities carried out in the hospital are different. There is no breach of any provisions of law. There is no breach of Item 5, as concerned employees are not similarly situated. Even assuming Standing Orders apply, admittedly the entry in service is without public participation in recruitment process, which is in violation of Article 16. The entry is and with full knowledge of being temporary. The Petitioners worked only for 7 months and thereafter have continued by virtue of interim orders. Even assuming the entry is as a probationers, it must be legal if they are to seek automatic confirmation. No right flows from the back door appointments even assuming they worked as probationer, even if they have completed three months. Otherwise, it would mean that immediately upon expiry of three months, irrespective of back door entry, permanency must follow. There is no case under Item 6 made out and the period of work is only 7 months.

12. The learned Counsel for the parties have advanced extensive submissions on the power of the Industrial Court to grant

3(2006) 4 SCC 1)

relief of permanency in public employment. According to Mr. Bapat, the Industrial Court is bound by the decision of the Apex Court in the case of *Umadevi* (3) and cannot grant any relief, which will be in contravention in the dicta of the Constitution Bench, and therefore there was no error in the order passed by the Industrial Court. On the other hand it was contended by Mr. Vaidya that the power of the Industrial Court to grant relief of permanency when an unfair labour practice is established, is not taken away and it has been so emphasized in various subsequent decisions of the Apex Court which have distinguished the decision rendered in the case of *Umadevi* (3).

13. Since this issue arises in several cases, it will be fruitful to take a review of the decisions of the Apex Court and of this Court in respect of the powers of industrial adjudicator to grant relief of permanency in the public employment.

14. The discussion needs to be prefixed by stating that what is concerned in the Petition is the industrial adjudication in respect of a public body and not a private employer. It is needless to restate that there is a difference between the two, which is well understood.

15. In the case of *Umarani v/s. Registrar, Co-operative Societies*⁴, a three-Judge Bench of the Apex Court took a survey of the earlier decisions and held that when the appointments which were made in contravention of mandatory provisions of the Act and

⁴(2004) 7 SCC 112)

statutory Rules framed would be illegal and cannot be regularized by the State. The Apex Court also held that even the jurisdiction of the Apex Court under Article 142 of the Constitution could not be exercised on misplaced sympathy.

16. In the case of *Union Public Service Commission v/s. Girish Jayanti Lal Vaghela*⁵, the Apex Court observed that Article 16 of the Constitution relating to the fundamental rights provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The object of Article 16 is to create a constitutional right of equality of opportunity and employment in public offices. It covers not merely the initial appointment but also promotion etc. The Apex Court stressed that the appointment to any post under the State can only be made after a proper advertisement, inviting applications from eligible candidates and by selection by a body of experts or a specially constituted committee, whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. It was asserted that a regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner, that may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment in a public post without issuing advertisement-inviting

5(2006) 2 SCC 482)

applications from eligible candidates and without holding a proper selection where all get a fair chance to compete, would in violation of Article [16](#) of the Constitution.

17. A reference was made to Constitution Bench in the case of *Umadevi (3)* since it was noticed that there were conflicting decisions of three Judges' Bench of the Apex Court regarding regularization and permanency in public service. Case of *Umadevi (3)* arose from a direction given by the High Court to regularize the services of casual/daily wages workers. The Apex Court took review of the entire case law regarding the scheme of public employment as envisaged under the Constitution. The decision of the Constitution Bench in *Umadevi (3)* settled the law regarding the public employment. It highlighted the ills of back door entry in public service and laid down stringent parameters to be followed by the courts. The primary emphasis was upon the recognition of the rights of those millions unemployed who are not before the Courts and that disputes regarding the public services are not a pure employer – employee disputes, but there is a third party i.e. the unemployed citizens who are not before the Court who are also aggrieved by the directions.

18. The Apex Court observed that the Constitutional scheme envisages employment by the Government and its instrumentalities based on a procedure established in that behalf and any public employment has to be in terms of the constitutional scheme. The

Constitution bench took note of the serious ills facing the country in terms of irregular and fraudulent entries in public service bypassing the Constitutional scheme of public employment. It was noted that public bodies resort to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. Persons, who are employed, through the back door or on daily wages, approach Courts, seek directions to make them permanent in their posts and to prevent regular recruitment to the concerned posts. It noted that the Courts have not always kept the legal aspects in mind and in some cases, have directed that these illegal, irregular or improper entrants be absorbed into service. The Constitution bench observed that a class of employment, which can only be called 'litigious employment', is seriously impairing the constitutional scheme. The Constitution bench observed that it is time that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. Such course of action tends to defeat the constitutional scheme of public employment. The Apex Court warned against directions based on equitable considerations or on individualization of justice. Equity for

the few who have approached the Court with a claim cannot supersede the equity for the millions seeking employment and seeking a fair opportunity for competing for employment.

19. The Constitution bench observed that the power of a State as an employer is more limited than that of a private employer and is subject to constitutional limitations. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 is enacted to ensure equal opportunity for those seeking employment. The Act places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed which have to be followed. It was stressed that following any other course could be disastrous inasmuch as it will infringe the right of equality conferred under the Constitutional scheme. The Constitution bench stressed on the equality clause under Article [14](#) of the Constitution and Article [16](#) which specifically provides for equality of opportunity in matters of public employment. Article [335](#) provides for claims of the members of the scheduled castes and scheduled tribes for employment. The Constitution does not permit any employment outside the constitutional scheme.

20. The Constitution bench observed that the so called equity arising from temporary employment or engagement on daily wages and the continuance of such persons in the engaged work for a certain length of time, can have only a limited role to play, when

every qualified citizen has a right to apply for appointment, the adoption of the concept of rule of law and the scheme of the Constitution for appointment to posts. The Courts cannot ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. The Constitution bench specifically stressed that the orders based on sentiments or approach result in perpetuating illegalities and in violation of scheme of public employment under the Constitution. This also results in depriving many of their opportunity to compete for public employment.

21. The Constitution bench in *Umadevi (3)* stressed that it is necessary to bring about certainty in the matter of public employment and a firm decision is necessary to put an end to uncertainty and clarify the legal position emerging from the constitutional scheme. It clarified that the executive or the court will not be in a position to direct that an appointment made in clear violation of the constitutional scheme, can be treated as permanent or can be directed to be treated as permanent. It held that the State should not be allowed to depart from the normal rule and must not indulge in persistent transgression of the rules of regular recruitment. The Constitution bench laid down that the adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding the violation of Article [14](#) or in ordering the overlooking of the need to comply with the requirements of Article [14](#) read with Article [16](#) of

the Constitution. Unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee.

22. The Apex Court observed that a contractual appointment comes to an end at the end of the contract, an appointment on daily wages or casual basis, would come to an end when it is discontinued. It is laid down that a temporary employee could not claim to be made permanent on the expiry of his term of appointment. Merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection. Merely because, an employee had continued under orders of Court, he would not be entitled to any right to be absorbed or made permanent in the service. The Constitution bench cautioned against needless sympathetic approach. A person, who accepts an engagement either temporary or casual in nature, is aware of the nature of his employment. He accepts the employment with full knowledge. Solely on the fact that the employee is not in a bargaining position, the constitutional scheme of appointment can be shelved; otherwise, it will be creating another mode of public appointment, which is not permissible. One has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it.

23. The Constitution bench held that the argument that since one has been working for some time in the post, it would not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, would be contrary to equality of opportunity under Article [14](#). It was held that such a person cannot invoke doctrine of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and expectation cannot be advanced by temporary, contractual or casual employees. The Constitution bench stressed that the State cannot constitutionally make such a promise. Those who are working on daily wages form a class by themselves and they cannot claim that they are discriminated as against those who have been regularly recruited based on the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work.

24. The Constitution Bench made it very clear that those decisions which were contrary to the principles enumerated in its decision or in which directions running counter to what was held in *Umadevi* (3) would stand denuded their status as precedent. By virtue of the Article 141 of the Constitution of India, the dictum of the Constitution Bench is binding on all Courts.

25. Two Judges bench in the case of *U.P. State Electricity Board v/s. Pooran Chandra Pandey*⁶, doubted the correctness of the decision of the Constitution bench in *Umadevi (3)*. In this case, employees who were employed by a co-operative society, which was taken over by the State Electricity Supply Board, sought benefit of a policy decision of regularization and moved the High Court. The Calcutta High Court held in favour of the employees and the Electricity Board moved the Apex Court. A bench of two Judges of the Apex Court observed that *Umadevi (3)* case is being applied by Courts mechanically as if it were a Euclid's formula without seeing the facts of a particular case. It held that a little difference in facts or even one additional fact might make a lot of difference in the precedential value of a decision. It opined that *Umadevi (3)* case cannot be applied mechanically without seeing the facts of a particular case, as a little difference in facts can make *Umadevi (3)* case inapplicable. The bench also drew attention to the decision of seven-Judge Bench decision of the Apex Court in *Maneka Gandhi v. Union of India*⁷ where it was held that reasonableness and non-arbitrariness is part of Article 14 of the Constitution and that the Government must act in a reasonable and non-arbitrary manner otherwise Article 14 of the Constitution would be violated. It held that in *Maneka Gandhi* is a decision of a seven-Judge Bench, whereas *Umadevi (3)* case is a decision of a five-Judge Bench of this Court and

⁶(2007)11 SCC 92

⁷ (1978) 1 SCC 248

that a smaller Bench decision cannot override a larger Bench decision of the Court.

26. In the case of *Official Liquidator v/s. Dayanand and Ors.*⁸ again, the issue of regularization of services arose before the Apex Court and the Apex Court took note of the decision in the case of *Pooran Chandra*. The Apex Court in the case of *Official Liquidator* analyzed the decision in *Pooran Chandra*. It found that in the case of *Pooran Chandra* the only issue which fell for consideration by the two-Judge Bench was whether the daily-wage employees of the society, the establishment of which was taken over by the Electricity Board along with the employees, were entitled to be regularised in terms of the policy decision taken by the Board and whether the High Court committed an error by invoking Article 14 of the Constitution for granting relief to the writ petitioners. It held that the two-Judge Bench in *Pooran Chandra* had no occasion to make any adverse comment on the binding character of the Constitution Bench Judgment in *Umadevi (3)*. The Apex Court in *Official Liquidator* clarified that the comments and observations made by the two-Judge Bench in *Pooran Chandra* should be treated as obiter and the same should neither be treated as binding by the High Courts, tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench. The Apex Court reiterated that all Courts are bound by the dicta of the Constitution Bench in the case of *Umadevi (3)*.

8 (2008) 10 SCC 1

27. In the case of *U.P. Power Corporation and Another v/s. Bijli Mazdoor Sangh and Ors.*⁹, issue arose regarding regularization in the services of a public body. The Respondents therein were initially appointed as chowkidars on daily wages. Their services were terminated. Dispute was referred to the Tribunal. The Tribunal held that the termination was improper as the Respondents had completed 240 days of services and the termination was in violation of legal provisions. Thereafter, they were reinstated. The Respondents raised another dispute which reached the High Court and the matter was remanded back to consider whether the Respondents were entitled to regularization. The Tribunal held that after three years of their joining services, the Respondents were deemed to have been regularized. This decision was challenged, and after having failed before the High Court, the U.P. Power Corporation moved the Apex Court. On behalf of the Corporation, reliance was placed on the decision of the Constitution Bench in *Umadevi (3)* case. On the other hand, it was contended on behalf of the workers that in *Umadevi (3)* case, the powers on industrial adjudicator were not under consideration. It was submitted that there is a difference between a claim raised in civil suit or a writ petition and the one adjudicated by the industrial adjudicator. It was submitted that the Labour Court can create terms in the existing contract to maintain industrial peace and therefore, it can vary the terms of the contract. The Apex Court did not accept this contention in its absolute terms.

⁹(2007) 5 SCC 755)

It observed that it is true that the question of the industrial adjudicators' powers was not directly in issue in *Umadevi (3)* case, but *Umadevi (3)* case is based on Article 14 of the Constitution of India and though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is in violation of Article 14. If the case is one, which is covered by the concepts of regularization and permanency, the same cannot be viewed differently. It held that the concept of regularization and permanency are clearly linked with Articles 14 and 16 of the Constitution and if in a case the fact situation is covered by para 45 of *Umadevi (3)* case, the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in *Umadevi (3)* case about regularization. The Apex Court in this case, on facts found that the worker was engaged as daily labourer on daily-wage basis and did not possess the requisite qualification. The Apex Court then held that the direction for regularization, could not have been given in view of what has been stated in *Umadevi (3)* case.

28. The issue of powers of the industrial adjudicator and the applicability of the ratio in *Umadevi (3)* was put issue before the Apex Court in the case of *Maharashtra State Road Transport Corporation and Anr. V/s. Maharashtra Castribe Rajya Praivahan Sanghatana*¹⁰. In this case, the Union of employees working with the Maharashtra State Road Transport Corporation had filed a complaint under the provisions of Act of 1971 alleging that the Corporation had

¹⁰(2009) 8 SCC (556)

committed Unfair Labour Practice under Items 5,6,9 and 10 of Schedule IV of Act of 1971. According to the Union, the employees were required to work for at least eight hours every day, their work was of permanent nature, however they paid a paltry sum. Even though the posts were vacant, the employees were kept on casual and temporary basis for decades. The Industrial Court, in one of the complaint, held that the Corporation had indulged in unfair labour practice under Item 6 of Act of 1971 and directed benefits of permanency to the employees. The orders were challenged in the High Court and the High Court disposed off the Writ Petition holding that the Corporation had indulged in unfair labour practice under Item 6 and confirmed the directions regarding permanency. After the Letters Patent Appeals were dismissed, the Corporation approached the Apex Court. Before the Apex Court, a contention was raised by the Corporation that in view of the decision of *Umadevi* (3), such direction to grant permanency to casual/daily wages whose appointments were made without following the due procedure, was unsustainable.

29. The Apex Court in *MSRTC* analyzed the provision of the Act of 1971 and the legislative intent behind the enactment of Act of 1971. The Apex Court observed that the provisions of Act of 1971 are not denuded of the statutory status by the Constitution Bench decision in *Umadevi* (3). The purpose and object of Act of 1971, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedule II, III and IV. It held that Act of

1971 empowers the Industrial and Labour Courts to decide that the person named in the complaint has engaged in or is engaged in unfair labour practice and if the unfair labour practice is proved, to declare that an unfair labour practice has been engaged in or is being engaged in by that person and direct such person to cease and desist from such unfair labour practice and take such affirmative action as may be necessary to effectuate policy of the Act. It was held that the power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under item 6 of Schedule IV. Once such an unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to such an employer. It observed that these provisions of Act of 1971 and the powers of Industrial and Labour Courts provided therein were not under consideration in the case of *Umadevi (3)*. It noted that Unfair Labour practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in item 6 of Schedule IV and the power of Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench. It was noted that *Umadevi (3)* is an

authoritative pronouncement for the proposition that Supreme Court and High Courts under Article 32 and Article 226 respectively should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad-hoc employees unless the recruitment itself was made regularly in terms of constitutional scheme. It was observed that *Umadevi (3)* does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of Act of 1971 to order permanency of the workers who have been victim 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 exists. *Umadevi (3)* cannot be held to have overridden the powers of Industrial and Labour Courts in passing appropriate order under Section 30 of Act of 1971, once unfair labour practice on the part of the employer under item 6 of Schedule IV is established.

30. Thus the Apex Court in *MSRTC* held that the powers of the industrial adjudicator are not denuded after the decision of *Umadevi (3)*, and once unfair labour practice on the part of the employer under Item 6 is established and it is open to the Industrial Court to take affirmative action. The Apex Court took note of the fact that the concerned employees were working for decades on a paltry amount. They were being paid much less salary than the regular workers were. They were working round the clock and they were deprived of all other benefits, which were available to the regular employees. The Apex Court accordingly confirmed the

directions granting permanency to the concerned employees.

31. The seeming conflict between the view taken in *UP Power* and *MSRTC*, regarding applicability of *Umadevi (3)*, regarding the process of the industrial adjudicator, was noted by the Apex court in the case of *Hari Nandan Prasad & Anr. v. Employer i/r. To Management of Food Corporation of India and Anr.*¹¹. In this case, an issue of regularization of services in Food Corporation of India came up for consideration before the Apex Court. The Tribunal had held in favour of the employees. The High Court set aside the orders passed in favour of the employees and thereafter, the Appellants employees approached the Apex Court. Before the Apex Court, the decisions in the case of *Umadevi (3)* and *U.P. Power Corporation Ltd.* were cited on behalf of the Food Corporation and the decision in the case of *M.S.R.T.C.* was relied upon by the employees to contend that the case of *Umadevi (3)* will not preclude the Industrial Court and the Labour Court from granting relief of taking affirmative action. The Court analyzed these two decisions in detail. It found that in *MSRTC* the factual position was that there was a finding of fact recorded that the Corporation had indulged in unfair labour practice by engaging these workers on temporary/casual/daily-wage basis for decades and paying them paltry amount even when they were discharging duties of eight hours a day and performing the same duties as that of regular employees. In this backdrop, the Court in *MSRTC* case was of the opinion that the direction of the Industrial Court to accord

¹¹(2014) 7 SCC 190

permanency to these employees against the posts which were available, was permissible and within the powers, statutorily conferred upon the Industrial/Labour Courts under Section 30(1)(b) of Act of 1971 which enables the industrial adjudicator to take affirmative action against the employer and as those powers are of wide enough to include a direction to grant permanency. The bench held that these two cases do not lay down contradictory position. In *U.P. Power*, the Court has recognized the powers of the Labour Court and at the same time emphasised that the Labour Court is to keep in mind that there should not be any direction of regularization if this offends the provisions of Article 14 of the Constitution on which the judgment in *Umadevi (3)* is primarily founded. At the same the Court in *MSRTC* has recognized the principle that having regard to the statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the Judgment in *Umadevi (3)* case. The Court observed that such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up permanent posts even when available and continuing to employ workers on temporary/daily-wage basis and taking the same work from them and making them do some purpose which was being performed by the regular workers but paying them much less wages. The Court observed that the powers of the industrial adjudicator under the Industrial Disputes Act are wide and can take affirmative steps to prevent the unfair labour practices and

secure the policy of collective bargaining as a road to industrial peace. The Court however warned that such a power conferred upon the Industrial adjudicator is not unbridled, and is circumscribed. An Industrial adjudicator cannot do anything and everything when dealing with an industrial dispute. This power is conditioned by the subject matter with which it is dealing and by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to that matter as laid down by the legislature or by the Apex Court. The Court laid down that fine balancing is required while adjudicating a particular dispute. The Court observed, reconciling the views in *UP Power* and *MSRTC* that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily-wage worker/ad-hoc/temporary worker for number of years. If there are no posts available, such a direction for regularization cannot be given. To regularize such a person, only based on number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service, which is anathema to Article 14 of the Constitution. Further, such a direction would not be given when the worker does have the eligibility requirement. But if it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left-over workers itself

would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. In such a situation, the industrial adjudicator would be achieving the equality by upholding Article 14. The Court concluded that it would depend on the facts of each case as to whether the order of regularization is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights.

32. Thus the Apex Court in *Hari Nandan*, held that a fine balance will have to be achieved and even though the powers of the Industrial adjudicator are not taken away after the decision of *Umadevi* (3), it does not mean that the Industrial Court can do anything or everything while dealing with matters of industrial adjudication. If there is an unfair labour practice, wherein workers have continued for years as daily wages, ad-hoc, and temporary, there are posts available, by the employer with intention of exploitation, then not removing such injustice would itself amount to violation of Article 14. More importantly, the Apex Court stressed that it would depend on facts of each case as to whether the order for regularization advanced justice or defeats it.

33. In the case of *Oil and Natural Gas Corporation Limited v/s. Petroleum Coal*¹², the Apex Court granted relief of regularization to the concerned employees who were working in the establishment of ONGC from 1988 holding that there was a clear case of unfair

12 (2015) 6 SCC 494

labour practice on the part of the employer *ONGC*.

34. The review of the decisions would show that the dictum of the constitution bench in the case of *Umadevi (3)* is binding on all Courts, including the industrial adjudicator. Various arguments are advanced by the members of the bar under a mistaken impression that after the decision in *MSRTC*, the decision of *Umadevi (3)* is not applicable to the industrial adjudication governing public employment, which is entirely incorrect. However, in a circumstance where an unfair labour practice is committed by an employer by keeping the employees/workmen on temporary, casual and daily wage basis for years with an intention and an unfair labour practice of this magnitude is committed, then the industrial adjudicator is not powerless to grant relief. This position has been reconciled by the Apex Court in the case of *Hari Nandan Prasad (supra)*.

35. An entry into a public employment must conform to Article 14 and 16 of the Constitution and one of the cardinal principle is that there has to be a public participation at the time of entry in public service. A clandestine and back door entry in the public service is violative of Articles 14 and 16 and no rights will therefore flow from such an entry. There are however cases where there is an exploitation of workforce by a public body by keeping such workers temporary for years with an object of depriving them the status of permanency. Such unfair labour practice, as indicated under Item 6 of Schedule IV of Act of 1971, is itself a negation of

Article 14 of the Constitution. Once such an exploitation is proved, then the power of the Industrial adjudicator to take an affirmative action is not taken away. This however would depend on facts and circumstances of each case. In the case of *Hari Nandan Prasad (supra)*, the Apex Court has indicated few of the parameters and has left it to facts and circumstances of each case. The Apex Court had deliberately kept this issue to be decided in the facts and circumstances of the case. Therefore, not only it is hazardous but also it will be impermissible to put this exercise in a mathematical formula. Whether an order of regularization would advance justice or defeats it, and will be contrary to the employer's right, would depend from case to case. Ultimately, the balance will have to be achieved between the rights of citizens for access to public employment vis-a-vis the need to prevent exploitation of the work force. The steps taken by the industrial adjudicator should be in furtherance of the equality doctrine.

36. Mr. Vaidya relied upon various decisions, which arose from a factual situation wherein there was a clear exploitation by the employer. There were factual findings rendered in those cases by the Industrial adjudicators that the employees were working for decades and the employer had an intention to keep them temporary to deprive them of a permanent status had indulged in unfair labour practice. It is in the circumstances where there was an unfair labour practice akin to Item 6 of Schedule IV of Act of 1971 that the Apex Court has approved the direction to grant permanency in public

employment. No decision is shown wherein absence of such factual situation and in the absence of an unfair labour practice under Item 6 or akin to Item 6, that a direction for regularization of a back door entry has been approved. Because in a particular facts and circumstances of the case, the Courts have approved the direction of industrial adjudicator, even though the entry in services of the concerned employees is in contravention of Article 16, does not mean that it is open to the industrial adjudicator to direct regularization in public services in every case ignoring the decision in the case of *Umadevi (3)* and the constitutional scheme for entry in a public employment.

37. Turning now to the facts of the case. As far as the entry of the Petitioners in the services of the Respondents is concerned, one does not need to travel further than the case of the Petitioners themselves. In the complaint, the Petitioners state as under:-

“h. The complainant realizing and anticipating the end and closure of contract of M/s. M.P. Enterprises with the respondents, personally met the respondent nos. 2 & 3 on or about 28/9/2004 and got them alighted of the situation that there used to be heavy working load in Talera Hospital and the current total staff of class IV employees in Talera Hospital was not sufficient to meet the exigencies of urgent hospital work, and that, the complainants were working for number of months and years in Talera Hospital and thus acquired the practical working knowledge on these posts in the

Hospital, and therefore, they requested the respondent nos.2 & 3 to absorb them as the regular permanent employees of the corporation and to allow to continue to work them in Talera Hospital instead of appointing other employees on these posts. The respondent nos. 2 and 3 sympathetically appreciated the submissions of the complainants and promise to absorb them on the regular permanent employment of the corporation. However, the respondent nos. 2 & 3 told to the complainants that they would have to go through some procedural and such other legal formalities in order to absorb the complainants as regular permanent employees in the corporation, and it will take some reasonable time of about 3/4 months. The respondent nos. 2 & 3 therefore asked the complainants to continue to work in Talera Hospital as probationers as class IV employees and promised them to give due appointment orders as regular permanent employees of the corporations within a period of 3/4 months, after completing such compliance and formalities and also the period of probation. The complainants in good faith believe these representations and agreed to continue to work as Class IV employees in Talera Hospital as probationers, and even without any written appointment orders with expectations that they would get due appointment orders as permanent employees in due course. The Respondent No.3 then immediately instructed telephonically to the Senior Medical Officer and in charge of Talera Hospital to allow the complainants to continue to work on the posts, they were already working as Class IV employees in Talera Hospital.”

38. In the cross-examination the Petitioner who was examined as witness on behalf of all, admitted as under:-

“3. I have not made any written representation to Respondent No.1 for issue me written appointment letter. It is true I have not made any written complaint to Government authority or to the Court against Respondent No.1 for not issuing me appointment letter. I did not ask any explanation from M.P. Enterprises on the point whether agreement between M.P. Enterprises and Respondent No.1 came to an end or not.

4. It is true the Respondent No.1 did not issue any advertisement calling application for my post. I was working as a Ward boy. I did not enquire in writing with Respondent No.1 as to whether the posts of Ward boy are vacant. It is true I did not apply at any time for the post of Ward boy with Respondent No.1. It is true the Respondent No.1 did not appoint me permanently on the post of Ward boy.

5. I did not enquire in writing with Respondent No.1 what are the terms and conditions/service conditions of the post of Ward boy. It is true Talera Rugnalaya is hospital where the indoor and outdoor patients are treated.

6. It is true till today the Respondent No.1 did not issue me any appointment letter. It is true after 1.10.2004 my interview was not taken. I did not enquire in writing about the reservation applicable in Respondent No.1. I did not enquire in writing with

Respondent No.1 what are the reservations applicable and what are the qualifications for the post of ward boy. I know the contents of my affidavit. The contents of para 6 of my affidavit are incorporated in my affidavits as per the advice given by the Advocate. It is true I do not know personally about contents of para 6. It is true whatever the legal averments I made in the affidavit the said contentions are taken as per the advice given by my Advocate. It is true personally I do not know about the legal provisions.

7. I have not produced any documentary evidence in this matter that after 1.10.2004 for how many days I worked with the Respondent.

8. I do not know how the post of Ward boy is filled up in the Respondent No.1 and what the procedure is to that effect. I never applied to Respondent No.1 for recruitment.

9. It is true as per the interim order passed in this matter, I am in the employment of Respondent No.1.

11. I have not applied for employment with M.P. Enterprises. M.P. Enterprises was paying us wages. The Respondent No.1 had not given us written appointment letter. I had applied pursuant to the advertisement of Respondent No.1, but the advertisement is not produced. I had got a call letter. Written examination was conducted, but I do not know its result. This happened after employment with M.P. Enterprises.

12. It is correct that I am continued because of the interim orders, I am getting wages."

39. It is clear from the averments that there was no advertisement, no appointment letters, and no public participation at the time of employment of the Petitioners. The Petitioners were initially working through a contractor for 2 – 3 years for which they were paid by the contractor and after the end of the contract on some oral assurance of the Medical Officer, they worked for seven months when they filed a complaint and thereafter, they were continued based on interim orders of the Industrial Court. On the face of it, there is no exploitation of these Petitioners nor there a fact situation wherein gross injustice is caused to the Petitioners. No case at all can referred under Item 6 of Schedule IV of Act of 1971.

40. The contention of Mr. Vaidya primarily is that the Petitioners were appointed on probation and after completion of probation period, they were deemed to be confirmed under Clause 4-A of the Standing Orders and therefore, not acknowledging this position amounts to unfair labour practice under item 9 of Act of 1971 and since unfair labour practice is committed, case of *Umadevi* (3) can be considered only for the purpose of grant of relief.

41. There are two facets to this submission. First is whether the Standing Orders apply. The Industrial Court has held that the Talera Hospital is severable entity and is not an Industrial Establishment. The Standing Orders Act was framed to provide for certainty in conditions of employment in the Industrial Establishment. Industrial Establishment means an industrial

establishment as defined in clause (ii) of Section 2 of the payment of Wages Act, 1936 or a factory as defined in clause (m) of Section 2 of the Factories Act, 1948 or a railway as defined in clause (iv) of Section 2 of the Indian Railways Act, 1890. The Payment of Wages Act inter-alia defines an Industrial Establishment as an establishment in which any work relating to the construction, development or maintenance of building, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on.

42. On the issue of applicability of the Standing Orders Act, Mr. Bapat relied upon the decisions of the learned Single Judge of this Court in the case of *Pune Municipal Corporation v/s. Keshav Ganpat Bhise and Anr.*¹³ in addition, the Apex Court in the case of *Messrs. Alloy Steel Project v/s. The Workmen*¹⁴ to contend that the phrase Establishment would mean place of work and merely because some part of the Corporation is covered under the definition of Industrial Establishment, the other department cannot be stated to be covered when it does not fulfill the conditions of being an industrial establishment. In the case of *Pune Municipal Corporation (supra)*, the learned Single Judge considered the issue of subsistence allowance payable to an employee who was working as a Mixer Driver in Roads Division under Standing Orders Act. The learned

1 3 (1983) 2 BCR 715

1 4 (1971) 1 SCC 536

Single Judge noted that the Division where the employee was employed conformed to the definition of Establishment and held that that particular Division or Establishment in which the workmen was working was covered by the Standing Orders Act and therefore, the employee was entitled to relief. In the case before the Apex Court, the Apex Court held that the phrase Establishment is something different from a Company as defined under the Companies Act. It observed that suppose a Company has office premises and a workshop, which are entirely distinct, then the Act may apply to the factory and not to the other establishment if the criterion were not fulfilled there. In the present case, there cannot be any dispute that there is no manufacturing activity going on in Talera hospital. The reliance placed by the Industrial Court on the decision of the Division Bench of Delhi High Court in the case of *Indraprastha Medical Corporation v/s. NCT of Delhi and Ors.*¹⁵ cannot be said to be misplaced.

43. Mr. Vaidya contended that the decision of the Apex Court in *Alloy Steel* was given in different fact and circumstances where the Apex Court was only considering whether the unit which had been recently set up was entitled to certain exemptions under the provisions of law and the issue regarding a definition of establishment, did not arise directly for consideration. However, Mr. Vaidya has not been able to substantiate that, the irrespective of there being a distinct department, which does not conform to

1 5 (2006 (110) FLR 1176)

definition of an Establishment, because the other department conforms to the definition of Establishment, Industrial Employment (Standing Orders), would apply to all. Nothing is shown why the decision of the Industrial Court on this count is incorrect in law. Mr. Vaidya however contended that there is no such factual foundation led by the Respondents and there is a finding of fact that the Petitioners are employees of the Municipal Corporation. No benefit can be taken from this observation in the Judgment, when the Industrial Court has categorically proceeded on the basis that Talera hospital is severable. If the position of law is that there can be distinction between different departments, then it was up to the Petitioner to show that there was no such distinction and the Standing Orders Act applied to the hospital. In any case, an issue that would have wider implications as far as the Respondents are concerned need not be concluded finally as the following discussion shows that even if the Standing Orders so apply, the Petitioners are not entitled to succeed.

44. Proceeding on the basis that Standing Orders apply the issue will be about Clause 4-A of the Model Standing Orders as applicable to workers doing manual or technical work. Clause 2-B defines a Manager means a person who is managing the establishment and includes an officer duly authorized and such authorization is notified to the workers by displaying it on the notice board. The workers have been classified as permanent workers; probationers, badlis or substitutes, temporary workers, casual

workers and apprentices. Clause 3(2)(b) defines a 'probationer' to mean a workman who is provisionally employed to fill in a permanent vacancy or post and who has not completed three months of uninterrupted service in the aggregate in that post. Clause 4-A reads as under :-

“4-A. Every probationer who has completed the period of three months uninterrupted service in the post in which he is provisionally employed shall be made permanent in that post by the Manager by an order in writing, within seven days from the date of completion of such service :

Provided that, where certified standing orders which prevail on the date of coming into force of this rule prescribe a longer probationary period than three months, the probationer shall complete such probationary period:

Provided further that, if the services of the probationer are found to be unsatisfactory, the Manager may terminate his services after his probationary period.”

45. Mr. Vaidya firstly sought to contend that the Petitioners were appointed by a Manager as defined under the Standing Orders and their entry is lawful. He also relied on Section 66 of the B.P.M.C. Act, wherein the Commissioner has been granted power to appoint persons for six months. In the complaint, the Petitioners have stated that they were taken in services by the Commissioner and the Medical officer on oral assurance. However, in the examination-in-chief, the Petitioners have not referred to the Commissioner at all and

have stated that the Medical Officer was the one who gave them assurances and employed them for work and the Medical Officer was the Manager. Therefore, the theory of appointment by Commissioner is abandoned in evidence. It has to be demonstrated that there was a due authorization in favour of the Medical Officer and such authorization was notified by displaying it on notice board. No such evidence is led by the Petitioners. The Petitioners have examined a retired Medical Officer, but the Petitioners have not shown that the person who employed them on assurance fulfilled the criteria of being Manager.

46. Even assuming that the appointment of the Petitioners was on probation, still in view of the law laid down in the case of *Umadevi (3)*, no relief can be granted. No public body or any Officer holding public post has any power to employ a person on permanent basis in public employment without conforming to mandate of Article 16. There is no such free charter to a public body to appoint any persons at will. No public body can hold out such assurances as claimed by the Petitioners. There cannot be a legitimate expectation or any estoppel in respect of such promise, which is constitutionally void. Under Clause 4-A of the Standing Orders, a probationer, after a period of three months, is deemed to be confirmed in service, unless steps are taken as provided. The only impediment in the way of an employee to become permanent is unsatisfactory services and on that basis, the services are not specifically continued. Therefore, being appointed on probation, is a step towards permanent appointment

and if the services are satisfactory and if the employee does not communicate continuation or termination, there is a deemed confirmation. It therefore clear that even the probationer must be appointed by following the dicta following by the Constitution Bench in *Umadevi (3)* that is of public participation, and by a procedure, which is transparent, to claim deemed confirmation.

47. Much emphasis is laid by Mr. Vaidya on the lack of recruitment rules in the Respondent. But that does not mean that the Respondent is free to appoint any persons in any manner they like. The Respondent has placed on record that the permanent employees are appointed in their establishment by recruitment policy analyzing qualifications, reservations and calling for an advertisement. The basic position of law that there has to be a public participation, as held in the case of *Umarani* and affirmed by the Constitution Bench in *Umadevi (3)*, cannot be given go by. It cannot be that for the permanent appointment, the procedure adopted must conform to Article 14 and 16, but for probationer it can be dispensed with, and after period of three months, upon services being satisfactory, a person who has come through back door would get confirmed in public employment. Permitting such methodology will open up a great abuse, which is specifically prohibited and mandated again by the Constitution Bench in *Umadevi (3)*. The Industrial Court has not permitted the same and therefore, no fault can be found with the order of the Industrial Court declining to grant permanency to the Petitioners.

48. The Petitioners worked initially through contractor, then on oral assurance of a Medical Officer for seven months and thereafter continued by interim orders of the Court. There is absolutely no procedure followed wherein there was a public participation. The Petitioner therefore cannot be stated to be appointed on probation and there is no question of any deemed confirmation. Mr. Vaidya sought to contend that the stand taken by the Corporation that the Petitioners are casual workers is incorrect. However, the Petitioners are seeking declaration of breach of Item 9 of Schedule IV on the ground of breach of Standing Orders. It is the Petitioners who must show that they were appointed as probationers and they were entitled for deemed confirmation. The Petitioners are presuming that their back door entry is in fact an appointment on probation when there was not even regular appointments orders. Further, Clause 32 Schedule I of the Model Standing Orders makes it clear that nothing in the Standing Orders will operate in derogation of law for the time being in force. Therefore, in case of public employment, the Standing Orders will have to be read along with Article 14 and 16 of the Constitution of India and the mandate in the case of *Umadevi (3)*. Therefore, the entry of the Petitioners being in violation of Article 14 and 16 and being a back door entry, there cannot be deemed appointment as a probationer and deemed confirmation. No right of confirmation can be conferred on the Petitioner, even assuming appointed as a probationer, as it will open up a pernicious practice sought to be put to an end to by the Apex Court in *Umadevi (3)*. There was no breach of Clause 4-A, therefore,

there is no question of unfair labour practice being committed under Item 9 of Schedule IV.

49. As regard the violation of Item 5 is concerned, the Petitioners cannot be stated to be similarly situated as the other employees who were working on the establishment on permanent basis. Clear answer provided in *Umadevi (3)* where the Constitution Bench has held that there is no such comparison. Therefore, there is no breach of Item 5 either.

50. Mr. Vaidya then submitted that the Industrial Court can mould relief and could have directed that the Petitioners to continue until regularly selected candidates are available. He submitted that this Court had earlier directed the Respondents to place on record whether any vacancies exist and as per the reply filed by the Respondents, there are ample vacancies and in fact, the Respondents are getting the work done from some contractor. He submitted that in the said circumstances, the Petitioners could be continued. He submitted that this Court can mould the relief and such direction will not be in contravention of the direction issued by *Umadevi (3)*.

51. One fails to understand under which provision of law such direction can be given. I have held that there is no error in the decision of the Industrial Court in coming to the conclusion that there was no unfair labour practice under Item 9 or under Item 5. There is no case of unfair labour practice under Item 6 of Schedule

IV. There is no exploitation nor does a situation exist that if the Petitioners are not made permanent it would lead to failure of justice. The Petitioners worked hardly for seven months and thereafter, moved a complaint on apprehension of termination and have been continued in service on the basis of interim orders. All that has happened is that purely due to pendency of the litigation, the Petitioners have continued for some period. The same scenario, which the Constitution Bench has warned against, unfolds and a relief on sympathy is sought. A belief has taken root that once one somehow gets in the public employment and manages to hold on and keeps litigating, then at the end of the litigation; Court will pass some order out of sympathy. It is only when such litigants are firmly dealt with and a clear message is sent that no benefit can accrue for such litigating class that this tendency would be curbed. There is absolutely no reason whatsoever as to why any sympathy be shown to the Petitioners when thousands are waiting outside the Employment Exchange to work, even on temporary basis.

52. The Petitioners have managed to secure entry in the public employment and within seven months moved the present complaint. The Petitioners worked with full knowledge of the fact that their entry in public service was not through public participation. The Respondents have placed on record, by way of an affidavit that they carried out recruitment process during the pendency of this litigation, in which some of the Petitioners appeared and the ones, who passed successfully, were made permanent.

53. It was then contended by Mr. Vaidya that there should be a direction for age relaxation of the Petitioners so that they can now participate in the recruitment process. Having held that there was no unfair labour practice on the part of the employer, it is not possible to give such directions. There is no reason why such indulgence be shown. There would be thousands who are over aged yet unemployed. Merely because the Petitioners have been litigating with full knowledge of their illegal entry does not give them any advantage over the ones who are unemployed. The Petitioners have taken a calculated risk on a growing belief that all that one has to do is to get an entry in public service in any manner, litigate, hold on and get some relief in the end. In fact, such sympathetic directions was the very reason that the Apex Court in the case of *Umadevi (3)*, elaborated the legal position and mandated the Courts that any direction contrary to the law laid down in the case of *Umadevi (3)* will stand denuded of force of law. The decision in the case of *Umadevi (3)* which seeks to eradicate the malpractices regarding entry in public employment must be given full effect to. It is only in the circumstances where an unfair labour practice on the part of the employer leading to exploitation of workmen is established, that the Industrial Adjudicator may be justified granting a relief. No such facts and circumstances are established in the present case. The Petition therefore cannot be entertained, and is dismissed. Rule discharged. No order as to cost.

54. At this stage, Mr. Vaidya seeks continuation of the ad-interim order passed in this Petition. Mr. Bapat opposes considering the facts and circumstances the same is continued for period of twelve weeks from today.

(N.M. JAMDAR, J.)