

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 6250 OF 2011**

The Shipping Corporation of India Ltd.

...Petitioner

vs.

Lal Bavta Hotel Aur Bakery Mazdoor Union & Anr.

...Respondents

.....

Mr. K.M. Naik, Senior Advocate, a/w. Mr. Manek J. Kalyaniwalla, Solicitor & Advocate and Mr. Kunal Kirpalani, i/b. Mulla & Mulla Craigie Blunt and Caroe, for the Petitioner.

Ms. Nayana Buch, a/w. Mr. Hitesh Buch, i/b. Mr. Shailesh K. More, for Respondent No.1.

.....

CORAM : S.C. GUPTE, J.

26th / 27th / 28th JULY 2016

JUDGMENT :

. The petition, filed under Articles 226 and 227 of the Constitution of India, challenges an award passed by the Central Government Industrial Tribunal No.1 ("CGIT") on a reference made to it by the Central Government under Sections 10(1)(d) and (2-A) of the Industrial Disputes Act, 1947.

2. The Petitioner is a public company registered under the Companies Act, 1956. Respondent No.1 is a union representing canteen workers working in the canteen of the Petitioner. Respondent No.2 is a canteen contractor at the relevant time and for the time being. The dispute between the parties concerns the claim of the canteen workers to direct employment of the Petitioner. It is the case of the Petitioner that the canteen workers represented by the first Respondent union are contract labour

under the second Respondent contractor, whereas the case of the first Respondent union is that the contract between the Petitioner and the second Respondent is sham and bogus and that the canteen workers are really direct employees of the principal employer, namely, the Petitioner. The CGIT, in the impugned order, held the second Respondent contractor as an agent of the Petitioner and the canteen workers to be direct employees of the Petitioner. It held the contract under which the canteen workers were employed by the second Respondent to be sham and bogus and the union's demand for absorption of canteen workers as employees of the Petitioner to be justified.

3. The brief facts of the case may be noted as follows :

(I) The Petitioner has been providing canteen services in its various establishments. These canteens have been run through various canteen contractors, who have kept changing from time to time under different contracts awarded for specified periods. Since about June 1995, the second Respondent has been operating as a contractor at the canteens with which we are concerned ("canteen");

(II) Around the year 1999, the total number of workers working in the canteen under the 2nd Respondent contractor was 119. About 82 workmen were said to be covered by two settlements entered into between the Respondent union and Respondent No.2 contractor, and another union and Respondent No.2, which gave improved service conditions to those canteen workers;

(III) On or about 1 June 1999, the Respondent union, on behalf of

the remaining 37 workmen, who were denied the benefits of the settlements referred to above, wrote to the Central Contract Labour Advisory Board ("Board") and Government of India for abolition of contract labour, presumably under Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 ("Act"). The grievance of the Union was that these 37 workmen were similarly placed as the other 82 workmen who were covered under the settlements; these workmen were toiling under very bad service conditions and were kept on contract basis even though their work was of a perennial nature. The union enclosed with this letter a draft writ petition prepared on their behalf, urging the Board and the Government to look into the same and make all workers permanent. (As we have noticed below, the writ petition took an express position that the contract between the Petitioner and the canteen contractor, under which these workmen were employed, was sham and bogus and that the workmen were actually direct employees of the Petitioner.) This letter was followed by another letter of 9 June 1999, urging the Board to expeditiously pass an order making the workers permanent, voicing an apprehension that the management had come to know about the union's application and was likely to terminate the services of the concerned workmen.

(IV) Sometime later in June 1999, the Respondent union proceeded to file the writ petition before this Court, being Writ Petition No.1661 of 1999, praying for an order directing the Petitioner and Respondent No. 2 herein to treat 37 workmen concerned with the petition on par with the other canteen workers covered by settlements dated 13 February 1997 entered into with the Unions. The Petitioner also prayed for a direction to the State, namely, the Board and the Union of India, to forthwith investigate and decide the union's application for absorption of contract labour under

Section 10 of the Contract Labour Act, 1970, made vide letters dated 1 June 1999 and 9 June 1999 referred to above;

(V) On 18 August 1999, a Division Bench of this Court passed an order in that writ petition directing the Government of India to refer the matter to the Board to consider the question of abolition of contract labour in the Petitioner's canteen. As an interim relief, the Petitioner was restrained from employing any other person to work in the canteen;

(VI) Pursuant to the order of this Court, the Government of India referred the matter to the Board. After hearing the parties, at one of its meetings, the Board expressed a view that no action was warranted in the case, as the Respondent union did not urge its case for abolition of contract labour;

(VII) On 29 August 2000, the Government of India, following the recommendation of the Board, decided not to take any action on the question of prohibition of contract labour in the job of canteen services in the establishment of the Petitioner;

(VIII) Being aggrieved by the Central Government's decision, the Respondent union filed a notice of motion, being Notice of Motion No.33 of 2001 in Writ Petition No.1661 of 1999, praying for an order and direction to the Board and the Government of India to forthwith hear the Respondent Union's application afresh and make a fresh order on the letters dated 1 June 1999 and 9 June 1999;

(IX) On 11 January 2002, a Division Bench of this Court passed an

order recording withdrawal of the aforesaid notice of motion with liberty to file a fresh petition challenging the Government's order;

(X) The Union thereafter filed Writ Petition No.685 of 2002 before this Court praying for an order for quashing and setting aside the order of the Board and the Government and directing the Board and the Union of India to hear the Union's application under Section 10 afresh and make a new order on the application;

(XI) On 12 July 2002, a Division Bench of this court dismissed Writ Petition No.685 of 2002 as withdrawn in view of the judgments of the Supreme Court in the cases of **Steel Authority of India Ltd. vs. National Union Water Front Workers¹** and **Municipal Corporation of Greater Bombay vs. K.V. Shramik Sangh²**, granting liberty to the union to approach the appropriate government for adjudication of its demand, if permissible;

(XII) The union thereafter moved the conciliation machinery under the Industrial Disputes Act, 1947 and upon its failure, the Government of India, on 24 February 2004, referred the dispute for adjudication to the CGIT. The Respondent union filed its statement of claim in the reference praying *inter alia* for regularisation of employees concerned in the reference from the date of their joining the services of the Petitioner through the contractor and for other reliefs. The Petitioner filed its written statement and also its additional written statement.

(XIII) By its award dated 31 March 2011, the CGIT directed the

1 (2001) 7 SCC 1

2 AIR 2002 Supreme Court 1815

Petitioner to absorb and regularise such canteen workers as were still working in the canteen of the Petitioner as on the date of the award and who were medically fit and below the age of superannuation. The award, published on 18 May 2011, was directed to be implemented within a period of two months.

(XIV) Being aggrieved by the award, the Petitioner has presented this petition under Articles 226 and 227 of the Constitution of India.

4. Mr. Naik, learned Senior Counsel appearing for the Petitioner, makes the following submissions :

(a) Learned Counsel submits that the impugned award is beyond the terms of reference. He submits that the terms of reference call for an adjudication as to whether the union's claim for absorption of canteen workers in the direct employment of the Petitioner was justified or legal and what reliefs the workmen represented by the union were entitled to. He submits that the claim of absorption can only be on the basis that the position of the workmen as contract labour is admitted by the union. He submits that there is no reference as to whether the contract under which the workmen were employed by the canteen contractor was sham and bogus. It is submitted that inasmuch as the impugned award determines the contract as sham and bogus and grants relief to the canteen workers on that basis, the same is beyond the terms of reference. Learned Counsel relies on several judgments including judgments in the cases of **Gopal vs. Bharat Sanchar Nigam Limited**³ and **The Workmen of Cochin Port Trust vs. The Board of Trustees of the Cochin Port Trust**⁴, in support of his submissions.

³ 213 (2014) Delhi Law Times 325 (DB)

⁴ 1978 LAB. I.C. 1111

Learned Counsel further submits that in the alternative, the reference insofar as it seeks absorption of canteen workers, that is to say, a relief in the nature of abolition of contract labour, or does not require adjudication of the contract of employment as sham and bogus, is a defective reference. Relying on the case of **Tata Iron and Steel Company Ltd. vs. State of Jharkhand**⁵, Counsel submits that the reference ought to have been rejected and, in any event, it was not permissible for the industrial adjudicator to travel beyond the scope of the reference.

(b) Learned Counsel submits that the reference was impermissible also on the ground of *res judicata*, since the earlier claim for abolition of contract labour and absorption of canteen workers was disposed of by the Central Government. Alternatively, it is submitted that a contradictory plea cannot be permitted to be raised in the reference. Counsel submits that the original case of the Respondent union was on the footing that the contract labour system operating within the establishment of the Petitioner ought to be abolished and the canteen workers ought to be absorbed in the direct employment of the Petitioner. After disposal of this case by the appropriate Government, it is not permissible for the union to raise an inconsistent and contradictory plea that the canteen workers were not contract labour, but were direct employees of the principal employer, namely, the Petitioner, and on that footing claim a declaration that the contract of employment was sham and bogus. Learned Counsel relies on judgments in the cases of **Steel Authority of India Ltd. vs. Union of India**⁶ and **Gujarat Electricity Board, Thermal Power Station, Ukal, Gujarat vs. Hind Mazdoor Sabha**⁷, in support of his submissions.

⁵ (2014) 1 Supreme Court Cases 536

⁶ 2006-III-LKJ 1037 SC

⁷ 1995 I CLR 967

(c) On merits, it is submitted by learned Counsel that the correct tests, i.e. the control test and the organisation test, to be applied for determination of sham or bogus character of a contract of employment or a claim of direct employment under the principal employer, have not been applied in the present case. It is submitted that matters such as whether the Petitioner exercises complete administrative control over the employees serving in its canteen, particularly, whether the Petitioner, as principal employer, pays the salaries of the concerned workmen instead of the contractor, or whether it is the Petitioner, who effectively controls and supervises the work of the employees or has disciplinary control over them, have not been considered. Learned Counsel relies on judgments in the cases of **Haldia Refinery Canteen Employees Union vs. Indian Oil Corporation Ltd.**⁸, **International Airport Authority of India vs. International Air Cargo Workers' Union**⁹, **General Manager (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon vs. Bharat Lal**¹⁰ and **Balwant Raj Saluja vs. Air India Ltd.**¹¹, in support.

5. Ms. Buch, learned Counsel for the Respondent Union, on the other hand, submits as follows :

(a) Learned Counsel submits that the terms of reference very much relate to, and cover, the sham and bogus nature of the contract between the Petitioner and the canteen contractor and the claim of the canteen workers as direct employees under the principal employer, namely, the Petitioner. She submits that in any event, consideration of the nature of

⁸ 2005 II CLR 457

⁹ 2009-IV-LLJ-31 (SC)

¹⁰ 2011-I-LLJ-321 (SC)

¹¹ 2014 III CLR 751

the contract of employment and relationship of employer and employee as between the principal employer and the canteen workers is clearly an incidental matter covered in the reference. Learned Counsel relies on the discussion in **O.P. Malhotra's Industrial Disputes Act**¹² and also relies on the judgment of a Division Bench of this court in the case of **Ashok Jadhav vs. The Bombay Dock Labour Board**¹³, in support of her contentions.

(b) Learned Counsel submits that there is no case of *res judicata* or raising of contradictory pleas, as submitted by Counsel for the Petitioner. She submits that in any event, alternative pleas are permissible.

(c) On merits, learned Counsel submits that not only was there a case of direct employment under the principal employer when the canteen was in full operation, going by both the control and the organisation tests, but, in any event, after the service of meals was discontinued in the canteen and only tea and coffee service was offered, the canteen workers were actually redeployed by the Petitioner for various other duties in the establishment of the Petitioner. Learned Counsel submits that this change of circumstances not only enables the union to raise an alternative plea based on changed circumstances, but supports the union's case on merits that the canteen workers were in fact direct employees of the Petitioner or at any rate, actually redeployed as direct employees of the Petitioner after the part closure of the canteen.

6. In order to consider whether the impugned award of CGIT is beyond the reference, it is imperative for us to first see the terms of reference. These terms of reference must be understood in the light of the

¹² 6th Edn. Pgs. 1004 to 1011.

¹³ 1997 I CLR 919

respective cases urged by the parties before the appropriate Government both at the time of conciliation proceedings and whilst claiming a reference. It is pertinent to note that the union's case has always been that the canteen workers were direct employees of the Petitioner and that the Petitioner had inducted a contractor merely with a view to create a camouflage as to the true employer – employee relationship and to keep the workmen in a state of insecurity. Even the very first petition filed by the Petitioner before this court, namely, Writ Petition No.1661 of 1999, contained the following averments / pleas.

“The workmen concerned with this petition are employees of the Corporation but the Corporation has inducted a contractor namely the Respondent No.2 in order to create a camouflage as to the true employer employee relationship and in order to keep the workmen in a permanent state of insecurity. The workers are according to the Petitioner in law and in fact the employees of the Shipping Corporation of India and not of the contractor.” **(para 1 of the petition)**

“The Petitioner states that supervision and control is done basically by officers of the corporation and that the contractor is a mere name-lender and has been from time to time inducted in order to keep the workers in a permanent state of insecurity. All the instructions relating to the canteen come from the corporation. The menu is decided by the Corporation. Prices are decided by the Respondent No.1 corporation. The raw materials are to be brought is decided by the corporation. A very heavy subsidy is given by the company. Electricity is given free by the company. Water is given by the company. All utensils and cooking instruments are given by the corporation. Thus the canteen is overwhelmingly supervised and controlled by the Corporation. The workers carry out the work without the contractor being liable to do anything except to collect the money from the Shipping Corporation of India and make payment to the workers.” **(Para 10 of the petition)**

“As the Petitioner apprehends that the services of the workmen concerned with this case would be terminated

immediately on the respondent coming to learn of this petition the Petitioner has sent a copy of this petition to the Respondent No.3 and 4 with a covering letter requesting that investigation be done immediately and that the workmen concerned with this petition be made permanent and regular workmen of the respondent no.1 company.” **(Para 11 of the petition)**

“The Petitioner states that the actions of the respondent no.1 in keeping the workers on a contractor basis for permanent work is contrary to the decision in the case of Gujarat State Electricity Board and various other decisions of the Supreme Court and is arbitrary, harsh and discriminatory and is violative of Article 14 of the Constitution.” **(Para 12 of the petition)**

Based on these averments / pleadings, the union prayed for a writ of mandamus directing the Central Contract Labour Advisory Board and the Union of India to investigate and decide the applications of the union dated 1 June 1999 and 9 June 1999 under Section 10. The petition also prayed for directions for treatment of all workmen concerned in this petition on par with the canteen workers covered by settlements dated 13 February 1997 and directions to the Petitioner and the second Respondent contractor to continue to permit the workmen to perform their normal duties in the establishment of the Petitioner. Contrary to what Mr. Naik suggests, these pleadings do not indicate that the union was actually admitting that the canteen workers were contract labour, namely, employees of the second Respondent contractor. Their case has throughout been that the canteen workers were in fact direct employees of the principal employer, namely, the Petitioner, and the contract between the Petitioner and the canteen contractor was sham and bogus.

7. As we know the law of contract labour today, it seems rather odd that in the face of these averments and pleadings, the union should

have applied for consideration and investigation of their complaint under Section 10 of the Act. Section 10 provides for the power of the appropriate government to prohibit contract labour in any process, operation or other work in any establishment. The section, in other words, intends to create a bar on engaging contract labour in the establishment covered by a notification issued thereunder. What these pleadings really implied was that there was a case for approaching the industrial adjudicator, and not the appropriate government under Section 10 of the Act, for declaration of the contract of employment as sham and bogus and pray for absorption in the establishment of the Petitioner on that footing. The justification, however, seems to be that as the law stood around the time when the petition was filed and an approach was made to the Contract Labour Advisory Board, going by the then ruling judgment of the Supreme Court in **Air India Statutory Corporation vs. United Labour Union**¹⁴, the abolition of contract labour under Section 10 of the Act in any establishment was perceived as automatically leading to absorption of the contract labour as direct employees of the establishment. This position was overturned subsequently by a Constitution Bench of the Supreme Court in the case of **Steel Authority of India** (supra), which decision was followed in **K.V. Shramik Sangh's** case (supra). In this later view, the Supreme Court held that abolition of contract labour system in a particular establishment did not directly lead to absorption of contract labour as employees of the principal employer of that establishment; the question of absorption still needed to be decided by the Industrial adjudicator on the basis of various parameters laid down by the Supreme Court. Alternatively, if it were the case of the workmen that the contract between the principal employer and the contractor, under which they were employed, was sham and bogus and

14 (1997) 9 Supreme Court Cases 377

they were in fact direct employees of the principal employer, the adjudication lied only before the Industrial adjudicator and it was not for the appropriate government to decide such question under Section 10 of the Act. It is significant to note that after these later judgments were delivered by the Supreme Court, expressly in the light of these judgments, the Union had withdrawn its second petition, namely, Writ Petition No.685 of 2002, which itself was filed in pursuance of a liberty reserved in Writ Petition No.1661 of 1999, and sought leave to approach the industrial adjudicator for its grievance.

8. It is important to note that after withdrawing Writ Petition No.685 of 2002, the Union approached the appropriate government in conciliation proceedings with a justification statement concerning "*Industrial disputes regarding absorption of canteen staff with M/s. Shipping Corporation of India in the direct employment*". In this justification statement, the Union *inter alia* pointed out that the principal employer, i.e. the Petitioner herein, had directly or indirectly applied service conditions, pay scales, DA allowance linking with consumer price Index 1934 of ad-hoc employment to canteen employees, whose cause was espoused by the union. The union *inter alia* referred to its claim for departmentalising canteen employees. In reply, by their letter dated 28 January 2003, the Petitioner took up a position that the canteen workers were employees of the contractor and not of the Petitioner and it was desirable, in the premises, to require the presence of the contractor to resolve the disputes concerning the memorandum of settlement. The plea did not hold water and the canteen contractor was not joined to the conciliation proceedings. Upon failure of conciliation, in its application for reference to the appropriate government, the union expressly took up a position that its demand was that the services

of 41 workmen attending the canteen as well as other works of the Petitioner listed out in their letter of 27 January 2003, must be regularised in the direct services of the Petitioner from the dates of their joining the services. The union referred to its repeated requests to the management of the Petitioner to departmentalise the canteen services and absorb these workmen in the Petitioner's establishment. The union submitted that the wages and other service conditions of all these workmen had been decided and fixed by the management of the Petitioner from time to time. It referred to several documents in this behalf. It expressly submitted that the contract between the management of the Petitioner and the present canteen contractor, i.e. Respondent No.2 herein (just as the earlier contracts between the Petitioner and its various contractors), was sham and bogus and was a camouflage to deprive the concerned employees of the benefits available to permanent workmen. The Union submitted that the contractor was a mere name-lender; that these 41 workmen had been attending to the work of the Petitioner under direct supervision of the Petitioner's management; that the service conditions of these workmen were fixed and regularised by the Petitioner; that the contractor merely collected the amount from the Petitioner and paid wages to these employees; and that the real employer of these 41 workmen was the Petitioner and not the contractor. In the premises, the union actually sought a reference of the following disputes :

(a) Whether the contract between the Management of SCI and the Contractor M/s. Saikrupa Catering Services is sham and bogus and is a camouflage to deprive the 41 workmen, listed in Annexure-A, of the benefits available to permanent workmen of the SCI?

(b) Whether the concerned workmen should be declared as permanent workmen of SCI?

(c)The wages and consequential benefits to be paid to the concerned workmen?

9. It is in the light of these developments that the present reference has been made by the appropriate government to CGIT. The reference itself is in the following terms :

“Whether the claim made by Lal Bavta Hotel Aur Bakery Mazdoor Union for absorption of canteen workers in the direct employment of the Shipping Corporation of India Ltd., Mumbai is justified and legal? If not, what relief is the workers represented by the union entitled to?”

There is nothing to suggest that this reference was for abolition of contract labour and not for absorption in the direct employment of the principal employer on the basis of a sham and bogus contract between the contractor and the principal employer.

10. At the outset, it needs to be made clear that as held by the Supreme Court in **Steel Authority of India Ltd. and K.V. Shramik Sangh**, absorption of canteen workers in direct employment of the principal employer is not a resultant of abolition of contract labour under Section 10 of the Act. Secondly, abolition under Section 10 is for the appropriate Government itself to order and not for the industrial adjudicator to go into on a reference. Thirdly, the union had expressly given up its case for abolition of contract labour under Section 10 of the Act and had meant to approach the industrial adjudicator for a direction to absorb canteen workers. Fourthly, both during the conciliation proceedings, and thereafter whilst seeking a reference from the appropriate government, the Union had expressly urged that the canteen workers were actually direct employees of

the Petitioner and were, accordingly, entitled to absorption. This position was contested by the Petitioner and that led to the reference. In fact, even in the reference, the Petitioner in its original written statement, did not join issues with the Union on the question of the CGIT's jurisdiction to adjudicate the disputes on the ground of permissibility of such adjudication within the terms of reference. That ground was raised subsequently by way of an amendment application. In the face of all these circumstances, Mr. Naik submits that the terms of reference prayed for by the Union actually envisaged a dispute as to the sham and bogus character of the contract between the Petitioner and the second Respondent contractor and a claim for a declaration that the canteen workers were direct employees of the Petitioner. Learned Counsel, relying on the Supreme Court judgment in **Air Lines Hotel Pvt. Ltd. vs. Its Workmen**¹⁵, submits that since these disputes were not in terms referred to the industrial adjudicator by the appropriate government, the latter must be taken to have declined to refer them. The argument seems far fetched. In the back-drop of the circumstances noted above and what is mentioned in the foregoing paragraphs, it is legitimate rather to infer that the reference was sought, and the parties had joined issues whilst seeking the reference, for a claim of absorption on the basis of a sham and bogus contract of employment.

11. Besides, as may be seen from the terms of the reference, the reference concerns the justification and legality of the union's claim for absorption of canteen workers in the direct employment of the Petitioner. It does not refer to any particular ground on the basis of which such absorption is sought. The absorption itself could well be sought, and was indeed sought, as I have noted above, on the basis that the contract between the management of the Petitioner and the second Respondent Contractor

¹⁵ AIR 1961 (1) LLJ 663

was sham and bogus and was merely a camouflage and that the workmen always effectively worked as direct employees of the Petitioner. Such basis, in that case, would merely be a matter incidental to the reference. All incidental questions, which arise as a result of the dispute referred to adjudication, are clearly covered in the terms of reference. A Division bench of our Court in **Ashok Jadhav's** case (supra) has held that in a reference concerning termination of services of workmen, the question as to whether the workmen are direct employees of the Respondent establishment or are employees of an independent contractor or, in other words, whether or not there exists an employer–employee relationship between the applicant workmen and the Respondent establishment, is an issue which is clearly incidental to the reference. An incidental matter is a matter which is associated with the dispute. If the dispute pertains to a claim to be declared as direct employees of the principal employer, the sham and bogus character of the contract between the principal employer and the contractor, in pursuance of which the workmen are employed, is certainly a matter which is associated with, and has a bearing on, the dispute. In the premises, the issues concerning the nature of the contract between the Petitioner and the second Respondent contractor as sham and bogus or otherwise and the status of the canteen workers represented by the union as direct employees of the principal employer or otherwise, are certainly covered by the reference. It is apposite to note here what the Supreme Court said **Agra Electric Supply Company Limited vs. Workmen**. That was a case where the dispute referred to the Industrial Tribunal was about legality and justifiability of the retirement of the concerned workmen by the employer. The Tribunal awarded payment of gratuity to the workmen by way of retirement benefit. The argument of the employer before the Supreme Court was that the terms of reference did not cover the question of payment

of gratuity. The Supreme Court rejected the argument in the following words :

“ It is plain that industrial jurisprudence is an alloy of law and social justice and one cannot be too pedantic in construing the terms of a reference respecting a dispute for industrial adjudication. Liberally viewed, we are left with the impression that the Tribunal's construction of the terms of reference is correct. The question referred may be dichotomised. Was the retirement of the workmen legal and justified? If not, what compensation was payable to them? The first limb of the reference contains the pregnant impression “justified”. It is one thing to say, speaking in terms of industrial jurisprudence that an action is legal. It is another thing to say that it is justified. When the reference is comprehensive enough to cover both these concepts, it is within the jurisdiction of the Tribunal to investigate into whether the retirement is legal and, if legal, whether it is also justified. In the ordinary law of contract, when a thing done is legal there is an end of the matter but in industrial law the rigid rules of contract do not govern the situation and an amount of flexibility in the exercise of powers taking liberties with the strict rights of parties is permitted to Tribunals. Relying on a series of decisions of this Court for this wider ambit of jurisdiction permissible in industrial adjudication, the Tribunal had held that the grievance of the workmen that their services should come to an end by way of retirement without payment of gratuity is real and substantial and that pragmatic considerations justify a direction for payment of gratuity more or less prevalent in many industries in the region. This approach is informed by social justice, and it is not for us to fault the Tribunal when it makes a direction for payment of gratuity. We read the award in a composite and comprehensive sense as an award that the retirement is justified if it is accompanied by payment of gratuity. The dissection attempted in the submission made by learned counsel is a distortion of the true intendment of the award. In this view, we think there is substance in the first contention.”

There is no question, in the premises, of the reference being either defective or the industrial adjudicator travelling beyond the scope of the reference in deciding these issues. In that view of the matter, the judgments relied upon by Mr. Naik in support of his contention that the reference Court must keep within the terms of reference and not travel beyond them, do not advance

his case and need not be considered.

12. Coming now to the argument of *res judicata*, the matter directly and substantially in issue in the previous proceeding, namely, Writ Petition No.1661 of 1999, was whether or not the Contract Labour Advisory Board and Union of India ought to investigate the matter and decide the Union's application under Section 10 of the Act. On the other hand, the matter which is directly and substantially in issue in the reference before CGIT, and which is the subject matter of the present petition, is whether or not the contract between the Petitioner and the second Respondent contractor should be held to be sham and bogus and, on that basis, the canteen workers represented by the union should be absorbed in the direct employment of the Petitioner. These are materially different and no plea of *res judicata* can be founded on the union giving up its claim in Writ Petition No.1661 of 1999. Besides, the approach made to the appropriate government in pursuance of the order passed in Writ Petition No.1661 of 1999 was not pressed by the union. Such approach cannot possibly be termed as a matter which is heard and finally decided for founding a plea of *res judicata*.

13. Alternatively, it is submitted that the plea raised in the present reference is inconsistent with, and contradictory to, the plea raised in Writ Petition No.1661 of 1999, on the basis of which the parties were referred to the appropriate government for a decision under Section 10 of the Act. I am afraid there is no substance in this contention. A litigant may well rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from claiming two or more inconsistent reliefs in the alternative. As the Supreme Court in the case of **Firm Srinivas Ram**

Kumar vs. Mahabir Prasad¹⁶ has clearly held, it is permissible to claim alternative reliefs which may be inconsistent, even if they be based on inconsistent sets of allegations. What is necessary is to show that each of the inconsistent reliefs alternatively claimed is maintainable. This position has since been reiterated even in the latest judgment of the Supreme Court in the case of **Praful Manohar Rele vs. Krishnabai Narayan Ghosalkar**¹⁷. The Supreme Court in this later case, quoted the observations in **Firm Srinivas Ram Kumar** in the following words :

“18. The general rule regarding inconsistent pleas raised in the alternative is settled by a long line of decisions rendered by this Court. One of the earliest decisions on the subject was rendered by this Court in *Firm Srinivas Ram Kumar v. Mahabir Prasad* wherein this Court observed: (AIR p. 179, para 9)

“9... It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs.30,000 was advanced by way of loan to the defendants second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative.” ”

14. What the Code prohibits, as held by the Supreme Court in the case of **Steel Authority of India Limited vs. Union of India** cited by Mr. Naik, is raising of contradictory pleas which are mutually destructive. In this latter case, a definite stand was taken by the employees that they had been

¹⁶ AIR 1951 SC 177

¹⁷ (2014) 11 Supreme Court Cases 316

working under the contractor. In the face of such a stand, the court held that it would not lie in their mouth to take a contradictory plea that they were also the workmen of the principal employer. In our case, there are no inconsistent sets of facts, though reliefs claimed are inconsistent with each other. As I have noted above, in our case, it was never the canteen workers' case that they were actually employees of the contractor and not of the Petitioner. As I have shown above, even in the very first petition, Writ Petition No.1661 of 1999, the express plea of the union was that the canteen workers were actually working as direct employees of the Petitioner and that the contract between the Petitioner and the canteen contractor was merely used as a camouflage to deny the benefits of regular employees of the Petitioner to the canteen workers. It may be that this set of allegations prompted the union to apply for a relief under Section 10, incorrectly though as it later turned out having regard to the judgments of the Supreme Court in the cases of **Steel Authority of India Ltd.** and **K.V. Shramik Sangh** (supra), but the same set of allegations certainly would entitle the union to the relief, now correctly formulated, for absorption on the basis of a sham and bogus contract between the canteen contractor and the Petitioner and direct relationship of employer-employee between the Petitioner and the canteen workers. This is not a case where the plea on which the relief is sought in the reference before CGIT is destructive of the plea made in the earlier proceedings. This is simply a case of an alternative relief, which, though inconsistent with the relief claimed earlier, is nevertheless maintainable on the same set of allegations as in the earlier case. There is, thus, no substance in the objection on the ground of inconsistent pleas.

15. Besides, it may also be seen that the set of workmen on whose

behalf the petitions were filed in the earlier round of litigation claiming relief under Section 10 of the Act (i.e. 37 canteen workers whose services were terminated) and the set of workmen on whose behalf the present reference was made claiming absorption on the basis of a sham and bogus contract (i.e. 41 existing canteen workers) are different. In that case, there is no question of either application of the principles of *res judicata* or inconsistent pleas. So also, Ms. Buch is right in submitting that after closure of the canteen (i.e. partial closure as noted above) and re-deployment of canteen workers, there is a definite change of circumstances, which may warrant inconsistent or even contradictory pleas compared to the earlier round of litigation.

16. Coming now to the merits of the union's case, what we need to examine in the present petition is whether or not the CGIT correctly appreciated the facts of the case and applied the relevant law including the correct tests to determine whether the contract between the Petitioner and the second Respondent contractor was sham and bogus, and the canteen workers were actually in direct employment of the Petitioner. At the outset, it needs to be noted that though Mr. Naik is right in submitting that the tests, such as the control and the organisation tests, need to be applied and the various factors laid down by the Supreme Court in the cases of **Haldia Refinery** and others, noted above, need to be considered by the court for determining the character of the contract and the nature of the employment, the approach does not have to be pedantic. These tests need to be applied, and the various factors to be considered, pragmatically and as a matter of substance and not literally or dogmatically.

17. The Supreme Court in the case of **Indian Overseas Bank vs.**

IOB Staff Canteen Workers Union¹⁸ held as follows :

“The standards and nature of tests to be applied for finding out the existence of Master and Servant relationship cannot be confined to or concretised into fixed formula(e) for universal application, invariably in all class or category of cases. Though some common standards can be devised, the mere availability of anyone or more or their absence in a given case cannot by itself be held to be decisive of the whole issue, since it may depend upon case to case and the peculiar device adopted by the employer to get his needs fulfilled without rendering him liable. That being the position, in order to safeguard the welfare of the workmen, the veil may have to be pierced to get at the realities. Therefore, it would be not only impossible but also not desirable to lay down abstract principles or rules to serve as a ready reckoner for all situations and thereby attempt to compartmentalise and peg them into any pigeonhole formulae, to be insisted upon as proof of such relationship. This would only help to perpetuate practising unfair labour practices than rendering substantial justice to the class of persons who are invariably exploited on account of their inability to dictate terms relating to conditions of their service. Neither all the tests nor guidelines indicated as having been followed in the decisions noticed above should be invariably insisted upon in every case, nor the mere absence of any one of such criteria could be held to be decisive of the matter. A cumulative consideration of a few or more of them, by themselves or in combination with any other relevant aspects, may also serve to be the safe and effective method to ultimately decide this often agitated question. Expecting similarity or identity of facts in all such variety or class of cases involving different type of establishments and in dealing with different employers would mean seeking for things, which are only impossible to find.”

That was a case where a co-operative canteen was promoted not only with the blessings and active co-operation and assistance of the Central office of the bank, but all promoters were actually the serving members of the staff of the bank. Though a separate account had been opened in the name of the

¹⁸ 2000-I-LL Supreme Court 1618

canteen, funds were credited to this account by the Central office. The record indicated that the contribution of funds and the subsidy were being increased from time to time depending upon the escalation of the costs of maintenance on the representation of the persons in charge of the running of the co-operative canteen. With the closure of the canteen, the workers engaged there had been thrown out of the employment. The Industrial Tribunal, when the matter was sent to it on a reference by the Central Government, in exercise of its powers under Clause (d) of sub-section (1) took into consideration the various factors, namely: (1) that the canteen was in the premises of the Bank; (2) that the canteen was for the exclusive use of the staff of the Bank; (3) that the working hours and days of the canteen were the same as those of the Bank; (4) that the Bank provided the infrastructure like furniture, utensils, refrigerators, water coolers apart from meeting the cost of gas, electricity and water; (5) that the cost of the materials was met and wages for the workmen paid only from the funds provided by the Bank; (6) that neither the workers nor the Managing Committee contributed either to the capital or the expenses for running the canteen; (7) that the Bank gave a subsidy for supplying food articles to its employees at concessional rates; and (8) that they even provided cycles and tricycles to the canteen for the supply of food stuffs. Based on these factors, the Tribunal came to the conclusion that the employees of the canteen would have to be treated as the employees of the Bank, despite the fact that the ultimate control and supervision over the employees of the canteen was with the managing committee of the canteen and also the fact that the employees of the canteen were appointed only by the managing committee and not directly by the Bank. The award of the Industrial Tribunal was overturned by a learned Single Judge of the High Court. The judgment of the learned Single Judge was set aside by a Division Bench of that Court.

When the matter was carried before the Supreme Court, the argument before the Court was that the correct tests which are formulated for decision on these questions were not applied. The observations of the Supreme Court quoted above were in this context. The Supreme Court faulted the approach of the learned Single Judge of the High Court holding that if on the facts proved, the findings recorded by the Tribunal were justified and could not be considered to be based on no evidence, there was no justification for the court in exercising its writ jurisdiction to interfere with the same.

18. Even in the case of **Indian Petrochemicals Corporation Ltd. vs. Shramik Sena**¹⁹, the Supreme Court was concerned with canteen workers in the appellant's establishment. The canteen was managed by a contractor. The workers' case before the High Court was that they were regular workmen of the appellant's establishment and a direction was sought that they be absorbed accordingly. The appellant's contention was that the canteen workers were employees of the contractor. The High Court accepted the canteen workers' case. In the appeal, the Supreme Court, noted that the following facts were clearly established from the record :

- “(a) The canteen has been there since the inception of the appellant's factory.
- (b) The workmen have been employed for long years and despite a change of contractors the workers have continued to be employed in the canteen.
- (c) The premises, furniture, fixture, fuel, electricity, utensils etc. have been provided for by the appellant.
- (d) The wages of the canteen workers have to be reimbursed by the appellant.

¹⁹ (1999) 6 Supreme Court Cases 439

- (e) The supervision and control on the canteen is exercised by the appellant through its authorised officer, as can be seen from the various clauses of the contract between the appellant and the contractor.
- (f) The contractor is nothing but an agent or a manager of the appellant, who works completely under the supervision, control and direction of the appellant.
- (g) The workmen have the protection of continuous employment in the establishment.”

The Court held that considering these factors cumulatively, the respondent workmen were in fact the workmen of the appellant.

19. Mr. Naik tried to distinguish this judgment, submitting that in that case the canteen was a statutory canteen. (A canteen established as a result of the mandate of Section 46 of the Factories Act, which requires the employer to provide canteen facilities to his workers, has come to be termed as a 'statutory canteen', the workmen in such canteen being regarded as employees of the management for the purposes of the Factories Act.) I am afraid the facts of that case cannot be so distinguished. In fact, in the case of **Indian Petrochemicals Corporation**, the Supreme Court clearly accepted the appellant management's case that canteen workers of a statutory canteen were employees of the management only for the purposes of the Factories Act and not for all other purposes. In other words, the Supreme Court did not accept the workmen's case that because they were working in a statutory canteen, they must be treated as direct employees of the principal establishment for the purposes of regularization or absorption into the latter's services. After considering the matter thus, the Court proceeded to consider the next question, namely, “*whether from the material on record it could be held that the workmen are, in fact, the*

employees of the management for all purposes.” The Court then considered the established facts, noted by me in the foregoing paragraph, and held in favour of the workmen.

20. Mr. Naik also submits that in view of the later judgments of the Supreme Court, particularly, judgments in **Haldia Refinery Canteen Employees Union** (supra), **International Airport Authority of India** (supra), **Bengal & Nagpur Cotton Mills** (supra) and **Balwant Rai Saluja** (supra), the following two well-recognized tests have to be applied for finding out whether the contract labour are the direct employees of the principal employer, namely,

- (i) whether the principal employer pays the salary instead of the contractor; and
- (ii) whether the principal employer controls and supervises the work of the employees.

Learned Counsel submits that the supervisory control referred to in clause (ii) above must be an effective control as opposed to a mere secondary control. Learned Counsel distinguishes between (i) primary control, (ii) secondary control, and (iii) effective control. He also relies on the definition of 'contractor' in the Act, which includes a person “ *who supplies contract labour for any work of the establishment*”. Counsel submits that in case of a mere supplier of contract labour, almost invariably the supervisory and administrative control over the labour supplied would be with the principal employer, which can be termed as secondary control, though the primary control (say, hiring of the labour) and the effective control (say, firing of the labour or disciplinary control over it) would be with the contractor. Relying on these later judgments, learned Counsel faintly suggests that the

case of **Indian Petrochemicals Corporation** is practically overruled or at any rate, the law has come a long way since that case. Learned Counsel also argues that mere granting of benefits or favourable conditions of service directly by the principal employer to the contract labour employed in the establishment cannot make the contract labour direct employees of the principal employer. He cites the proviso to Section 30 of the Act and argues that the scheme of the Act, as reflected in the proviso, envisages extending of various benefits to the contract labour by the principal employer and the former cannot be considered 'direct employees' of the latter simply on that ground. Learned Counsel submits that the impugned award disregards all these important considerations and erroneously considers the canteen workers as employees of the Petitioner.

21. There is no quarrel with these propositions, though Mr. Naik is not right, in my opinion, in his take on the **Indian Petrochemical Corporation's** case. It cannot be suggested that the later decisions of the Supreme Court in the line of cases starting from **Haldia Refinery Canteen Employees Union's** case, noted above, have either overruled, or differed from, **Indian Petrochemical Corporation**. Whatever was latent in that decision, has been brought out succinctly and formulated into convenient test tools by the later judgments. What the three learned judges of the Supreme Court in **Indian Petrochemical Corporation's** case considered was really the kind of control exercised by the principal employer over the employees termed as contract labour, including the aspects of supervision, control, payment of wages, protection of employment despite change of contractors, etc., which are nothing but individual components which go to make up the consideration for the tests later formulated by the Supreme Court. After all, as we have seen above, and as succinctly put by the

Supreme Court in **Indian Oversea Bank's** case (supra), there are no absolute tests. Though some common standards can be devised, some ready reckoners can be employed, there is no pegging of situations in pigeonholes and measuring up of the materials by straitjacket tests.

22. With the law, thus, put into proper perspective, let us consider the facts of our case, which can be said to be fairly established at the trial. The evidence of the parties before the CGIT shows that the canteen contractors have been working for the canteen in the Petitioner's establishment for long, much before the present contractor, Respondent No.2, came on the scene in 1995. Originally there was a contractor named M/s. Kalpana Caterers in 1983-84; then there was M/s. Park Caterers around the year 1987; then came M/s. Gambhir Caterers in 1991-92; and finally, the present caterer in 1995. (See the Union's justification statement before the Regional Labour Commissioner, dated 21 November 2002.) This position is not disputed by the Petitioner. The canteen workers were required to be absorbed by successive contractors. (See the admission of the Petitioner's witness in cross-examination page 199 of the petition in respect of the absorption by the present contractor.) There is a letter addressed by the Petitioner to the present contractor (letter dated 15 May 1995) requiring the latter to absorb 78 canteen workers which include the present 41 employees. Then there is another letter (letter dated 13 February 1997), where the Petitioner has confirmed that even though the canteen contractors may change from time to time, services of canteen workers would be continued upto the superannuation age of 60 years. So much for the so called control of the successive contractors over the canteen workers as against the security of tenure of the workers under the dispensation of the Petitioner. As for the salaries of the canteen workers,

the evidence on record bears out that the salaries were disbursed to them in the accounts department of the Petitioner after releasing the same to the contractor. (See the admission of the Petitioner's witness in his cross-examination - Pg. 200 of the petition.) Medical reimbursements were made directly by the Petitioner. Wage revision communications were addressed by the Petitioner. Coming now to the complete and pervasive administrative and disciplinary control, the record bears out that after partial closure of the canteen in 2002, canteen workers were freely re-deployed by the Petitioner through its administrative machinery. Letters are placed on record, which bear this out. (See, for example, letters dated 20 May 2002, 18 November 2003 and 23 March 2004.) The arrangements of re-deployment were said to be flexible and the canteen staff was to be assigned to any other group/department depending on the exigencies of the work involved. The work, for which the canteen workers were re-deployed, included (i) providing of drinking water as and when required by the officers on the floor, (ii) movement of files within the same building, (iii) taking out photocopies for the concerned Departments, (iv) filing of papers depending upon the ability of the concerned worker and (v) any other suitable work assigned by the concerned officer. The canteen workers were to report to AGM (L) of the Petitioner every day at the beginning of the office hours. In case any of the canteen workers deputed on the floors were not performing their assigned work, the designated staff of the Petitioner was advised to bring it to the notice of the administration for a suitable action. (See letter dated 9 May 2002 addressed by the Petitioner to the 2nd Respondent contractor.) Mr. Naik submits that the contractor was informed by the Petitioner about the re-deployment and directed to instruct the canteen workers accordingly. But by reason of that fact alone, it cannot possibly be suggested that the contractor was to have any say about the re-

deployed work the canteen workers were to carry out in other departments of the Petitioner. The canteen contractor had no role whatsoever to play insofar as other departments of the Petitioner were concerned. He was merely a canteen contractor. After the closure of the canteen in 2002 (i.e. discontinuation of the meal service), the contractor hardly had any role to play vis-a-vis the canteen workers. There is no way any control would have been exercised by him over the canteen workers, much less an effective control. It is legitimate to infer, in that case, that the instructions addressed to him in this behalf (i.e. the letter of 9 May 2002) were a mere nominal exercise, in keeping with the facade of a contract for supply of labour. The last, though not the least important, piece of evidence is the minutes of meeting dated 13 February 2001 between the Petitioner and in its own recognized staff union, where the Director (P&A) of the Petitioner has clearly stated that on the closure of the canteen (which happened in 2002), all existing canteen boys would be absorbed in the Petitioner's pay-roll. This is even reiterated in the Petitioner's letter. There is also evidence on record that certain facilities such as house building loan were extended by the Petitioner to the canteen workers to be absorbed. Mr. Naik submits that the absorption proposed did not materialise as the same was subject to the management's approval, which did not come about. The point is not whether the canteen workers were actually absorbed or can claim absorption as of right by reason of the aforesaid proposal. What is relevant is the support this proposal of absorption, concrete as it was as reflected in the minutes, lends to the canteen workers' case that they were under the effective control of the Petitioner and not the 2nd Respondent contractor.

23. Let us now consider if on these facts, which were proved before CGIT, its conclusion that the contract between the Petitioner and the second

Respondent contractor was sham and bogus and that the canteen workers were direct employees of the Petitioner is justified, that is to say, supported by material evidence which was before it and which was capable of sustaining the findings, and whether there is any relevant material disregarded, or any irrelevant and non-germane material considered. On the basis of the material placed before it, the factual position which emerged has been summarised by CGIT as follows :

“(a) The canteen workers have been working for about 30 years and despite change of contractors the canteen workers have continued to be employed uninterruptedly in the canteen.

(b) The present contractor M/s. Saikripa Catering Services is there from 1995 and while entering into a contract with it the Corporation required M/s. Saikripa Catering Services to adsorb the present canteen workers and this was also confirmed by the Corporation in a letter addressed to the Union that even though the canteen contractors might change from time to time services of the present canteen workers would be continued subject to superannuation age of 60 years.

(c) In addition to their normal work relating to canteen the canteen workers have been assigned the jobs relating to movement of files, taking out photocopies for the concerned department, filing of papers depending upon the ability of the concerned worker and any other suitable work assigned by the Corporation officer. Thus officers of the Corporation exercise supervision and control over the canteen workers.

(d) The benefit of warm clothing allowance and facility of house building loan have been extended to the canteen workers.

(e) It is clear from the minutes of the meeting dated 13.2.2001 of the Corporation with the Corporation staff Union where the Director (P&A) of the Corporation agreed for absorption of the present canteen workers.

(f) Wages of the canteen workers are reimbursed by the

Corporation.”

It is on the basis of this established factual position that the court came to the conclusions that the contractor was merely an agent of the Petitioner; that the contract under which the canteen workers were employed was sham and bogus; and that the canteen workers were in fact the employees of the Petitioner.

24. The above conclusions are clearly warranted by the established facts, as noted above. The Court has duly considered all relevant material placed before it and no irrelevant or non-germane material is considered for arriving at the conclusions. In substance, what emerges is that the CGIT has actually applied both the control and organisation tests, without naming these tests in particular or without formally considering whether these particular tests are satisfied in the present case. In effect, the Court has considered: who was responsible for the payment of wages to the canteen workers; who exercised an effective control over the workers; and who ensured their uninterrupted services within the establishment - matters which are clear components of the two tests described above.

25. Mr. Naik is hard put to explain each of the factual circumstances which is considered by the court for arriving at its findings. The fact that the canteen workers were actually working for about 30 years and despite changes of contractors from time to time, for example, is sought to be explained away by submitting that the Act does not provide for any particular length of service for the contract labour and having regard to the work rendered by the contract workers it is not unusual for the principal employer to provide for their continuation under a new contractor who takes the place of the old. The assignment of other work, in addition to the

canteen work, to the canteen boys is sought to be accounted for by submitting that after all, effective use had to be made of the time spent by the workers in the Petitioner's establishment after partial closure of the canteen, and that such re-deployment was, in any event, with an intimation to the contractor. The benefits extended to the canteen workers directly by the Petitioner are said to be immaterial, since Section 30 of the Act does admit of improved service conditions and extension of benefits directly by the principal employer to the contract labour; that does not *per se* indicate any effective control of the principal employer or a direct relationship between him and the contract labour. Well, each individual circumstance may have an alternative explanation and may not be sufficient in itself to warrant an inference of a sham and bogus contract between the principal employer and the contractor. What is important to note, however, is that all these circumstances cumulatively considered and in the light of each other, certainly lead to a conclusion, not just a possible conclusion, but a fairly probable one, that the contract between the Petitioner and the second Respondent contractor was sham and bogus and that the canteen workers were in fact direct employees of the Petitioner.

26. Mr. Naik, lastly, submits that the Petitioner is a Central Government Public Sector Undertaking, i.e. State under Article 12 of the Constitution of India, and that the relief of regularization cannot be granted to the canteen workers represented by the Union contrary to the constitutional scheme, particularly Articles 14 and 16 of the Constitution, as laid down by the Supreme Court in the case of **Secretary, State of Karnataka and others vs. Umadevi**²⁰.

20 (2006) 4 SCC 1

27. The Supreme Court in **Umadevi's** case took a review of the entire case law concerning the scheme of public employment as envisaged under the Constitution. The Court held that adherence to the rule of equality in public employment was a basic feature of the constitution and regularization of any employment under the State, which was, in the first place, not made by following a proper appointment procedure would defeat the principle of equality of opportunity generally under Article 14 and particularly, in relation to public employment under Article 16. It may also have implications from the standpoint of Article 335, which provides for claims of members of scheduled castes and tribes for employment, and in pursuance of which reservations are made in public employment. Later, in the case of **Maharashtra State Road Transport Corporation vs. Maharashtra Castribe Rajya Parivahan Sanghatana**²¹, the Supreme Court explained that the decision in **Umadevi's** case does not envisage denuding the industrial adjudications of their statutory powers to grant affirmative reliefs such as regularization or permanency of employment to workmen in industrial disputes involving unfair labour practices. In reference to the power under Section 30 read with Section 32 of the MRTU & PULP Act, 1971, the Court held that once an unfair legal practice on the part of the employer (such as denying the benefits of regular or permanent employment to workmen appointed for perennial jobs) is established, it was open to the industrial adjudicator to require the employer to desist from such practice and even to order affirmative measures (such as regularization or declaration of permanency of the workmen). In a subsequent judgment, in **Hari Nandan Prasad vs. Management of Food Corporation of India**²², the Supreme Court reconciled the position, by holding that fine balancing is required while adjudicating such industrial disputes. Where there is an

21 (2009) 8 SCC (556)

22 (2009) III CLR 262

unfair labour practice, say where the workmen have been continued for years as daily wagers or ad-hoc or temporary workers, in the face of availability of posts, with a view to exploit the workmen, the industrial adjudicator may well grant the relief of regularization, relying on the **Maharashtra State Road Transport Corporation's** case; on the other hand, absent any unfair labour practice, it would not grant the relief simply because a workman has continued as a daily wager or ad-hoc or temporary worker for a number of years, on the principle of **Umadevi's** case. The relief, in that case, would infringe the mandate of equality of opportunity to all. More importantly, the Court in **Hari Nandan Prasad's** case observed that such balancing would depend on the facts of each case. Going by these facts, the adjudicator has to consider whether the order of regularization is necessitated to advance justice by redressing the unfair labour practice or such order defeats justice by breaching the mandate of Articles 14 and 16.

28. A Learned Single Judge of our Court in **Sandip Baliram Sandbhor vs. Pimpri Chinchwad Municipal Corporation**²³ put the matter thus :

“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

23 WP/262/2015 dated 3 December 2015, Coram : N.M. Jamdar, J.

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.”

29. It is singularly important to note that whereas, whilst urging its case for regularization and permanency, the Union pressed its case of exploitation of canteen workers, who were continued for over 30 years in perennial jobs in the Petitioner's canteen as contract labour, under a sham and bogus contract, which was only a camouflage to deny the benefits of regular employees to the canteen workers, the Petitioner never objected to such regularization and permanency on the ground of its position as the State and the mandate of Articles 14 and 16 applicable in its case. The parties never joined issues on this aspect and, naturally, the CGIT had no occasion to decide such case. Had the Petitioner raised such case, the Union would have had an opportunity to lead evidence and satisfy the CGIT that the balancing of interests had to be in favour of the Union's case of exploitation under the principle of the **Maharashtra State Road Transport Corporation's** case rather than denial of relief under the principle of **Umadevi**. After all, as the Supreme Court said in **Hari Nandan Prasad's** case, it was a matter dependent on the facts of the individual case. There are many factors, as the Supreme Court noted, most of whom factual, to be considered by the industrial adjudicator for accomplishing this balancing

act, under its special jurisdiction in the matter of an industrial dispute. It is too late in the day now to allow the Petitioner to raise such defence in a review of the impugned award under Articles 226 and 227.

30. In the light of the foregoing discussion, I have come to the conclusion that the impugned order of the CGIT is clearly sustainable and ought not to be interfered with in the judicial review permissible to this court under Articles 226 and 227 of the Constitution of India.

31. The petition is, accordingly, dismissed. The Petitioner shall comply with the impugned order of CGIT within a period of eight weeks from today.

32. Certified copy is expedited.

(S.C. GUPTE, J.)