

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

WRIT PETITION NO. 11519 OF 2014

Municipal Corporation of Gr. Mumbai,
Mahapalika Marg, Mumbai – 400 001.

... Petitioner

v/s

Kachara Vahtuk Shramik Sangh,
Shramik Bharati Chawl, Shanta Jog Marg,
Tilak Nagar, Mumbai – 400 089.

... Respondent

Mr. A.V.Bukhari, Senior Advocate along with R.N.Shah, B.V.Bukhari,
Ms. Fauzia T. Bukhari, and Vinod Mahadik i/by U.H.Deshpande for
the Petitioner.

Mr. Sanjay Singhavi, Senior Advocate along with K.Prasanna Kumar
and Rahul Kamerkar i/by Devmani Shukla for the Respondent.

Coram: N.M. Jamdar, J.

Reserved on : 6 December 2016.

Pronounced on : 22 December 2016.

JUDGMENT:

Rule. Rule made returnable forthwith. By consent of
learned Counsel for the parties, taken up for final disposal.

2. The Petitioner - Municipal Corporation of Greater

Mumbai, has approached this Court invoking the Article 226 and 227 of the Constitution of India to challenge the award of the Industrial Tribunal, Mumbai, dated 13 October 2014, rendered in Reference (IT) No.13 of 2007. The Industrial Tribunal has answered the Reference in affirmative against the Petitioner Corporation and has directed the Petitioner Corporation to treat 2700 employees concerned in the Reference as permanent employees of the Corporation and to extend them the benefits and status of permanent workers retrospectively from the date of completion of 240 days of service from their dates of joining.

3. The Petitioner - Mumbai Municipal Corporation, in short, the Corporation, is established under the provisions of Mumbai Municipal Corporation Act, 1888. (The Act) The Respondent – Kachra Vahtuk Shramik Sangh, in short, the Union, is a trade union registered under the Trade Unions Act and represents the cause of the workers engaged in the work of Solid Waste Management in the Corporation.

4. The Union took up the cause of workers working in the Solid Waste Management department of the Corporation in the year 1995 and a protracted litigation between the Union and the Corporation ensued. As far as the present dispute is concerned, the Union raised the charter of demands on 9 February 2007 and 23 March 2007 in respect of 2700 workers. Since there was no response,

a notice of strike was served by the Union under Section 22 of the Industrial Disputes Act, as the workers concerned are from the public utility services. The appropriate Government exercised powers under Section 10(1)(d) of the Industrial Dispute Act, 1947 (in short, the I.D. Act), made a Reference on 13 April 2007 to the Industrial Tribunal. The schedule to the Reference was as under :

SCHEDULE

- 1. That the workers listed in the annexures, who have been engaged in and have been working as Sweepers, Loaders, etc. are performing the work of sweeping, clearing the roads/gallies/areas/ markets, etc. of Gr. Mumbai of Municipal Corporation and performing the work of collection and transportation of garbage and other refuges be declared to be workers of B.M.C. And every such workman be extended the benefits and status of permanent workers of B.M.C. respectively from the date of completion of 240 days of service from the dates of joining of the respective workers.*
- 2. That the Corporation shall create permanent posts of sweepers/loaders, etc. accommodate the above-mentioned workers.*
- 3. Pending finalization of these demands the Corporation shall ensure to pay wages to the above workers concerned equal to the wages of unskilled workers of the Corporation.*
- 4. Pending finalization of these demands the Corporation shall provide that the present set of workers given above shall be continued in the activity of sweeping, cleaning etc. of the Corporation. In the event of change of so-called contractor/NGOs, they shall be granted priority in*

employment on the basis of seniority, in the same manner the workers in reference (IT) No.81 of 2005 are granted.

Pursuant to the Reference, the Union filed its statement of claim dated 8 May 2007 in the Industrial Tribunal, Mumbai. The gist of the case of the Union was as follows. The Union is espousing the cause of substantial number of workers in different wards of the Corporation all over the city, in respect of the activities of the Corporation in Solid Waste Management. These workers belong to drought-affected areas of Maharashtra and other states including Tamil Nadu. They come from the lower strata of the community, relegated to that status due to the caste system prevailing in their villages and they are forced to migrate to Mumbai. They are helpless and without roots, having to reside in the slums since they have no financial capacity to take up any permanent accommodation. They do not have access to the minimum basic facilities, such as, water and sanitation and there is a large-scale illiteracy amongst them. They are engaged in the work of collection and disposal of the solid waste. The Corporation is divided in various wards. The city of Mumbai consists of 504.46 kms. of roads, eastern suburbs about 507.05 kms and western suburb about 927.65 kms. The Corporation as of now has dumping grounds at Deonar, Mulund Malwani, Kurla and Gorai. Over the period of time, the dumping grounds have changed the locations. The Corporation is governed by the Act of 1888 and has mandatory statutory duty to deal with solid waste. Under the Environmental Protection Act, 1986 also the Corporation is duty

bound to maintain the city in clean condition. Under the Environmental Protection Act, 1986 the Central government has framed Municipal Solid (Management and handling) Rules, 2000, which are mandatory in nature. A methodology has been laid down for collection of municipal solid waste as regards the waste to be collected from house to house, collection of waste from slums, hotel, restaurants, slaughters, markets, biomedical waste and industrial goods. The storage facilities are created by taking into account the quantity of waste generation. The waste should be stored in such a manner that it is not exposed to open atmosphere. The manual handling of waste is prohibited. By transporting the solid waste through vehicles, the waste should be covered and not visible. The Corporation is expected to adopt suitable technology for biodegradable waste. The solid waste is to be carried out to land filling site in a prescribed manner. The Corporation has set up ward offices, with the assistance of engineers, assistant head supervisors, supervisors, to look after the activities. The ward office has smaller offices called chowkies. The provisions of Industrial Disputes Act, 1947, Industrial Employment (Standing Orders) Act, Model Standing Orders, Workmen's Compensation Act, the Payment of Wages Act, M.R.T.U. & P.U.L.P. Act and Equal Remuneration Act, are applicable to the Corporation. The Corporation is also a State as defined under the Constitution of India. The activities of the Corporation are to some degree controlled by the Urban Development Department of State of Maharashtra. The Union had

filed Writ Petition No.1027 of 1997, on behalf of the workers employed in the activity of collection of loading for transportation of garbage. The High Court had granted relief of abolition of contract system and had directed absorption of such workers as permanent workers. The orders were challenged in the Apex Court. The Apex Court remanded the proceedings. A settlement took place between the Corporation and the Union and some of the workers were given status as permanent workers. The workers concerned in the present dispute are being denied their permanent status, labeling them as volunteers. Writ Petition No.1334 of 1999 was filed by the Union. The High Court protected the interest of 540 workers and others on the statement that they will be given priority when the activities restart. The activities were started under different names, however, the work continued and no priority was given to the workers. Contempt Petition No. 118 of 2000 was filed against the Corporation, which was disposed of, wherein the Corporation reiterated the undertaking that they will give priority in the employment to the workers. Thereafter the proceedings were disposed of giving liberty to the Union to raise an industrial dispute. The Union accordingly initiated action to make a reference and the reference was made on 29 October 2005 being Reference No. 81 of 2005. Pursuant to the writ petitions filed, Reference No. 81 of 2005 was restricted to 580 workers. As regard the other workers, liberty was given to take up appropriate proceedings. The Union raised demands on 9 February 2007 and 23 March 2007, pursuant to which

present Reference is filed. The Corporation has accepted the position that large number of additional hands are required to comply with the statutory duties. The Corporation has gone on record to hide the true and correct employer-employee relationship. The Corporation is duty bound to carry out its mandatory and statutory duty by appointing permanent workforce. The concerned workers are doing the same work as of the permanent workers, alongside them. The entire work is under minute supervision and control of the Corporation. The Corporation is even imposing fines. The concerned workers work for long hours, they are not given weekly offs, there is no medical attention if any accident on duty takes place. The concerned workers are constantly monitored. The term 'volunteer' is a total misnomer and under different nomenclature, such as, Dattak Vasti, Hyderabad Pattern, the permanent activity of solid waste management is being carried out. The manner in which the tenders are issued and are executed clearly shows that it is a farce. The work is of perennial nature and for months and years together, the concerned workers are performing the duty as the workers of the Corporation under sham and bogus contract system. The manner in which the daily work is carried out, the work is supervised, the manner in which the tools have been given, and the role of the so called Non Governmental Organizations (NGOs), clearly show that there is no genuine contract system in place and the contract system which is sought to be presented is a fake. The Corporation has virtually engaged in a form of slavery under various nomenclatures, such as, the Hyderabad

pattern. It is, therefore, be declared that the paper arrangement made by the Corporation with so called contractors is sham and bogus and it be held that the master and servant relationship exists between the Corporation and the concerned workmen and the concerned workmen be extended the benefits and status of permanent workers from the date they complete 240 days of service.

8. In the Reference, an application was moved below Exh.U-4 by the Union seeking an interim order. The Industrial Tribunal, by an order dated 8 May 2007, directed the parties to maintain status-quo until the disposal of the application as regard the work done by the concerned 2700 workers. Writ Petition No.3928 of 2007 was filed by the Corporation challenging the order of status-quo. The learned Single Judge disposed of the writ petition by directing the Industrial Tribunal to dispose of the application filed by the Corporation for vacating the interim relief. The statement made by the counsel for the Corporation that the existing practice will be continued, was accepted. The Corporation was granted liberty to open the tenders invited by it but not to take final decision until 10 June 2007. The application for interim relief was finally heard by the Industrial Tribunal and by an order dated 6 June 2007, the application was allowed. The Corporation was directed to protect the employment of 2700 employees concerned in the Reference, until disposal of the Reference on merits. This order dated 6 June 2007 passed by the Industrial Tribunal was challenged by the Corporation

by Writ Petition (L) No. 1357 of 2007. The learned Single Judge, by an order dated 2 July 2007 adjourned the hearing, as the advocate for the Union had taken time to place an affidavit on record to state how many workmen are actually working as on that date. The writ petition was finally disposed of by the learned Single Judge on 2 November 2007. The learned Single Judge observed that no prejudice will be caused to the Corporation, if the order that they had accepted in similar circumstances in respect of 580 similarly placed workers, was passed. The learned Single Judge directed that the Corporation would be obliged to put a condition to the contractor to hire 60 percent of the workers to be engaged from amongst 2700 workers, until disposal of the Reference. The learned Single Judge observed that, if the contractors were not prepared to accept the condition, Corporation could cancel the tender process and initiate fresh process. The Tribunal was directed to dispose of the Reference within a time bound period.

9. Thereafter, the Corporation filed its written statement on 8 April 2008. The gist of the written statement was : In the earlier round of litigation in Writ Petition No.1862 of 2006 and 22 July 2006, which was disposed of by consent on 12 April 2006, the claim of 3158 workers was given up by the Union and the claim of 2700 workers involved in this Reference, has already been given up and rejected. Out of 580 workers on whose behalf original dispute was raised, never approached for getting any work. In Writ Petition

No.971 of 2007 filed on behalf of the concerned workers, the Division Bench has observed that the contentions raised on behalf of the Union that this Court to pass an order of status-quo against the Corporation, is without any merit. The concerned workers are not the employee of the Corporation. Their wages have not been paid by the Corporation. There is no employer-employee relationship. The Corporation is a statutory body and posts are created as per the requirement under Section 79 of the Act of 1888. At no point of time, the concerned workers have been engaged by the Corporation. The Corporation is not aware of the nature of work done by these persons. None of them has been employed by the Corporation. No procedure has been followed for appointments. None of the concerned workers has completed 240 days as claimed. In any case, not a single worker has worked for a single day with the Corporation. The interim orders passed in Reference No.81 of 2005, do not survive. The Corporation has adopted Hyderabad pattern for cleaning the city in the year 2004. Under this pattern, each ward is divided in different units and contract is awarded to various NGOs and cooperative societies. Tenders were invited by advertisements. As per the orders passed by the Court, the contractors were directed to accommodate specific number of concerned workers along with their own contract workers. The Corporation has followed the procedure by issuing advertisements and has called for fixed rate tenders from the cooperative societies. The circulars that are sought to be relied upon by the Union are not applicable to the Corporation.

The workers have chosen their own employment and their employment cannot be compared with the employment with the Corporation. The concerned workers are not carrying out the same work as the regular workers. The corporation is carrying out special cleanliness drive of sweeping, cleaning, transportation and garbage through cooperative societies and NGOs by inviting tenders and by lottery system. The requirement of workforce has come down due to sophisticated devices. The original claim of 580 workers is now been inflated to 2700. The Corporation is not aware with whom each of the concerned workers is working and what is their salary. There is no minute supervision as alleged and the concerned workers are working with the contractors who are supervising their work. The contractors are necessary parties and they are required to be impleaded. By feigning ignorance, the Union cannot avoid joining the contractors as parties. Without the presence of the contractors, the Reference cannot be adjudicated. Since the concerned workers have never worked with the Corporation, no direction to make them permanent can be issued to the Corporation, which is governed by statutory provisions, and, therefore, the Union is not entitled to any relief.

10. In the Industrial Tribunal, the parties produced documentary as well as oral evidence. The Union examined its Secretary Mr. Ranade and one of the concerned workers, Mr. Vijaykumar. The Corporation examined its officers, Mr. Kaskar, Mr.

Wasekar and Mr. B.P.Patil, as their witnesses.

11. In the meanwhile, during the pendency of the References, the Appeal No.1034 of 2010 filed by the Corporation before the Appeal Bench challenging the order passed by the learned Single Judge on 2 November 2007 came up for consideration. A Notice of Motion bearing No.601 of 2013 was taken out in the appeal. The Appeal Bench passed an order on 10 May 2013, directing the Investigating Officer of the Industrial Tribunal to carry out the process of verification of the concerned workers. The Investigating Officer submitted a report on 25 September 2014 stating that 1600 persons were identified as working with the NGOs.

12. Industrial Tribunal took up the Reference for consideration. Oral arguments were advanced as well as written submissions were tendered by the parties. The Industrial Tribunal concluded that the contract between the alleged contractors and the corporation was nothing but a camouflage and paper arrangement, entered into with an intention to deprive the concerned workers. The Tribunal held that it was not a case with a prayer of abolition of the contract, but whether the contract system is genuine or not. The Tribunal observed that the concerned workers were working under the direct supervision of the Corporation. Nature of duties and work discharged were permanent and perennial. Accordingly, the Industrial Tribunal, by the impugned award dated 13 October 2014,

answered the Reference in affirmative and directed the Corporation to make 2700 employees concerned in the Reference, as permanent. Thereafter the present petition is filed challenging the award

13. I have heard Mr. A.V. Bukhari, learned Senior Advocate for the Petitioner Corporation and Mr. Sanjay Singhavi, learned Senior Advocate for the Respondent Union.

14. Mr. Bukhari, learned Senior Advocate for the Petitioner in short submitted:

i. The Municipal Commissioner had visited Hyderabad, sometime in November 2003 for a seminar on disaster management and found an improvement in solid waste management and thereafter taking cue from this, a Hyderabad pattern was adopted to Mumbai city by dividing each ward in different units and to award contracts from various NGOs by giving tenders after issuing advertisements. The method adopted is transparent, carried out by issuing tenders in the local newspapers.

ii. The persons concerned in the reference are engaged by respective NGOs and Co-operative Societies working as volunteer members of the NGOs and Society and honorarium is paid to the concerned employee. It is admitted by the Union's witness that there was no employer – employee relationship between the Corporation and the concerned workers. No documents have been produced to

show that the concerned workers are employed by the Corporation or their wages have been paid by the Corporation. The witness of the Union has admitted that no appointment letters are issued. The contractors have issued cheques towards wages and till date, the wages are not paid by the Corporation.

iii. The Corporation has its own rules and regulations for employing persons in its service, which are public post and the posts are created as per requirements. Various NGOs and Co-operative Society to whom contracts are given are registered under their respective enactments and they cannot be considered as sham and bogus, nor can such transparent transaction be termed as bogus. It is not the case that these NGOs and Co-operative Society do not exist.

iv. The terms of Reference would indicate that the concerned workers are not the employees of the Corporation and that there are no posts. Therefore, the direction sought is to create posts. It is settled position of law that Courts cannot direct statutory bodies to create posts. However, by the impugned Award, the Industrial Tribunal has directed the Corporation to make the concerned persons permanent, without there being any vacant posts, which will amount to creation of posts. The creation and abolition of post being executive functions, the Courts cannot direct creation of posts.

v. The Union has deliberately chosen not to join the NGOs and Societies as the party to the reference, which were necessary parties

and if they had been being joined, it would have been clearly established that the concerned workers are employees of these entities. It is an undisputed fact that the NGOs and Societies have paid the honorarium and wages to the concerned volunteers.

vi. The Appeal Bench of this Court, in Notice of Motion No. 601 of 2013 in Appeal No. 1034 of 2010 on 10 May 2013 directed the Investigating Officer of the Industrial Tribunal to verify number of actual workers involved in the reference and with particulars. Report was submitted on 24 September 2014 wherein the Investigating Officer has identified only 1600 persons were working with the NGOs and not 2700, still the Award is issued in favour of the 2700 workers.

vii. None of the concerned workers has been able to produce any documentary evidence to show their length of service. In spite of the directions of this Court and report of the Investigating Officer, the Industrial Tribunal has proceeded to direct permanency for all 2700 workers.

viii. The Union and the concerned workers have not discharged their burden of showing that anyone has completed 240 days. Nothing has been placed to show from which date the workers are working. There is no finding in the Award regarding completion of 240 days continuously for 12 months preceding one year, as required in law before passing the impugned order. There is no discussion as

regards any documents regarding completion of 240 days. This settled law that the proof is on the workers to show that they had completed the requisite number of 240 days.

ix. Furthermore, mere completion of requisite 240 days *ipso facto* cannot lead to grant of permanency and Clause 4(c) of Model Standing Order cannot be read ignoring the Constitutional limitations and availability of post.

x. The settlement dated 15 February 2003, relied upon by the Union was only one time settlement and prior to execution of the settlement, a letter was issued on 16 December 2002 clearly provided that the reservation policy would be applicable to the employees under the scheme, and after completion of probation period they will be appointed in vacant posts, subject to availability of the post, suitability and requirement of the department and the performance. The persons under the settlement had put in 10 to 15 years without any orders from the Court and the case of the concerned workers cannot be equated with the workers covered under the scheme of 2003.

xi. The Apex Court has emphasized that such regularization and absorption of daily wagers, contract employees, casual and temporary employees are contrary to the principles enshrined in the Constitution of India. The Court has no jurisdiction to frame a scheme by itself, which would violate the constitutional norms.

Merely because a deviation has been made in the past is no ground that it should be made again.

xii. There is no substance in the finding that the contracts awarded are sham and bogus. The contracts were awarded after duly issuing the advertisements. The NGOs and Societies were selected randomly by lottery system, tender documents are specific and a transparent methodology has been used.

xiii. Awarding of a contract pursuant to a tender is an administrative decision, calling for tender is an offer, and the conditions in the contract are not open for judicial review. Before concluding that the contracts are sham and bogus, the Tribunal has completely misread the evidence and has ignored various admissions of the witness of the Union. It is clearly admitted that no appointment letters have been issued, wages have not been paid by the Corporation, sanction is required for creation of posts and that the Corporation has to follow Rules and Regulations for filling up the vacancies. It is also admitted that all the implements such as hand-gloves, safety shoes, gumboots, raincoats have been provided to the concerned workers by the NGOs. In the entire Award there is no discussion regarding these admissions.

xiv. Even on the aspect of supervision and control, the findings of the Industrial Tribunal are patently erroneous and perverse. The test laid down by the Apex Court on the aspect of supervision and control has been totally ignored. The burden is on the Union to show that

the contractors did not carry out any supervision. Not only they have failed to do so but on the contrary have given various admissions. The contract itself provides that the supervisors of NGOs and Society shall remain present. There is absolutely nothing to show that the supervision and control was by the Corporation. There is bound to be some element of supervision, but that it cannot lead to a conclusion that the contract system itself is bogus. To pay certain statutory dues is a duty of the principal employer under the Contract Labour (Regulation & Abolition) Act (CLRA Act) and nothing would turn on this aspect.

xv. Merely because there is no registration or a licence under CLRA Act cannot directly lead to a conclusion that the contracts are sham and bogus. Even otherwise, registration certificate was produced on record before the Industrial Tribunal. There is no provision for renewal of the registration certificate and the Industrial Tribunal has seriously erred in drawing an inference that because of lack of registration and licence, the contract is sham and bogus.

xvi. Reliance placed by the Union on the Government Circular dated 26 April 1985 and others, is entirely misplaced. These circulars were issued prior to the decision of the Apex Court in the case of *State of Karnataka & Ors. v/s. Umadevi & Ors.*¹ (*Umadevi 3*). Furthermore, since the concerned workers were not employed by the Municipal Corporation but by the NGOs and Co-operative Societies,

1 2006 (II) CLR 261-SC

the circulars cannot be binding on the Corporation. Reference is for creation of permanent posts and therefore, it is not the case of the Union that the concerned workers are already working with the Corporation.

xvii. The scheme of the Hyderabad Pattern is not statutory work and the work is over and above the cleaning done by the permanent staff of the Corporation. The Corporation is bringing any mechanization and therefore, the work is not of perennial nature.

xviii. The workers working on daily wages cannot be treated at par of regularly selected employees and the principle of equal wages for equal work cannot be evoked in this case.

xix. Whether the work is of perennial nature or not may be relevant for abolition of the contract system, but it has no relevance in the present case. The criteria for abolition of a contract system cannot be made applicable for determining whether the contract is sham and bogus.

xx. There is no prohibition under the CLRA Act against the Corporation for appointment of persons on contract basis and even after the contract is abolished, the concerned workers cannot become permanent employees. The concerned workers were not working for years together. The work they had carried out was only under the orders of the Court. In view of the order passed by the Industrial

Tribunal on 8 May 2007, the concerned workers have continued to work. Thereafter, by order dated 2 July 2007, the Corporation was directed to engage 60% of the workers of NGOs and Societies and therefore, there was a mandate to employ these workers and under these orders, they have continued. This is clearly a case of litigious employment. There cannot be any exploitation of this class of litigious employment and giving any relief to them will be contrary to Article 14 and 16 of the Constitution of India. Therefore, the Award being perverse and illegal, be set aside.

15. Mr. Singhvi, learned Senior Advocate for the Respondent on the other hand contended in short as follows :

i. The concerned workers are in fact and in law the workers of the Municipal Corporation and they have been termed as contract workers only to deprive them of the benefits of permanency. What is sought is a declaration of this existing position and not absorption on equitable basis *per se*. It is also not the case of the Corporation that the work undertaken by the concerned workers is no longer needed. It has come on record that the concerned workers are working alongside the permanent workers. The evidence led in the proceedings clearly demonstrates that norms are applied on equal footing to both, the permanent workers and the concerned workers. The concerned workers are being transferred from one contractor to the other just to create a record. The documentary evidence such as

daily report, log sheets of the Municipal Corporation would demonstrate that the workers are working along with the permanent workers. The Corporation also transfers these concerned workers from one ward to another and imposes punishments.

ii. The concerned workers work throughout the City and in all shifts. The terms and conditions, as well as the implements/tools that are being used by the permanent workers and the concerned workers, are the same. The Tribunal has rendered a finding of fact that in reality it is the Corporation who is the employer of the concerned workers. Various documents such as tender documents, log sheets would clearly establish that the entire control is of the Municipal Corporation. The Corporation has decided the allotment of work, the area to be allotted, strength of the unit, number of units per ward and nature of work allotted to the NGOs, contractors, irrespective what was the application made for. Even the financial aspects have been determined by the Corporation. The Corporation imposes fines for non-performance of the work, absenteeism and misconduct. The so-called NGOs and contractors have no expertise whatsoever and they have been randomly selected for lottery system, which clearly shows that the Corporation only wanted to create a screen to avoid treating the workers as permanent. The supervision of the work done which included planning daily rosters, imposition of fine clearly establishes that the concerned workers are in fact workers of the Corporation. The Corporation has even taken initiative to pay

bonus, provident fund, ESIS, privilege dues and have revised the wages. On this basis if a factual finding has been rendered, the same cannot be termed as perverse.

iii. That the wages are paid by the contractors and the implements are supplied by the contractors and no appointment letter is issued by the Corporation does not make any difference as it is only a false stand created by the Corporation. Only because payment has been made through contractors, does not take away the real relationship between the Corporation and the contractors.

iv. It is not the primary contention of the Union that merely because there is no registration certificate or licence, the concerned workers automatically become the workers of the corporation. The main argument is that, in fact the concerned workers are employed by the Corporation. The facts of present case would clearly demonstrate that there is the complete control and supervision of the Corporation and only paper arrangement has been arrived at. The present case not a case of regularization or temporary or casual workers. It is the case where knowingly a paper arrangement has been arrived at.

v. There is no back door entry of the concerned workers as the concerned workers have been engaged by competent authority with due procedure. If the Court finds upon lifting the veil that the contract workers are in fact workers of the principal employer and that, there has been exploitation of the work force, then the Industrial

Tribunal has all the powers to remedy such injustice.

vi. When the reference was made to the Industrial Tribunal, the reference was only between the Corporation and the Union representing the concerned workers. It was open to the Corporation to make the Contractors as parties, which was not done and the award cannot be set aside on this ground. The so-called contractors are sham and bogus, they kept changing, and therefore, it was not possible for the Respondent – Union to specify and join them as parties, as the concerned workers were being shifted from one contractor to another.

vii. Under Section 63-A of the Act of 1888 before giving the work to an agency permission of the State Government had to be taken which would specify the terms and conditions. No such directions were issued by the Government.

viii. The State Government had directed the Corporation not to engage the cleaning staff on contract basis. Under Section 520C of the Act of 1888, various powers are given to the State Government to issue general instructions as regard policy and functioning of the Corporation in public interest. Various Committees have been constituted by the State Government in respect of cleaning staff (safai mazdoor) and various directions were issued by the Committees, such as Lad Committee, Barve Committee, Malkani Committee and Page Committee. It has been directed that the Corporation should stop

the system of contract labour and create posts of safai mazdoor. These Committees have recommended that contract labour for the safai mazdoor should be discontinued, should not be resorted to and posts be created for safai mazdoor for completed 240 days of work. Therefore, there is no question of any back door entry by the concerned workers.

ix. The documents produced by the Labour Commissioner Office clearly shows that registration certificate was given to Solid Waste Management in the year 1999 much before the so called Hyderabad Pattern was introduced and the certificate was only in respect of workers concerned for removal of debris and that the certificate indicated that it needs to be renewed. It has not been renewed and therefore, there was no licence.

x. There is neither any creation of post nor any back door entry. The method of recruitment has been specified under Section 79 and 80-A of the act and the Commissioner and the Standing Committee can sanction creation of posts. No rules prescribing any procedure have been brought on record. The power to create posts exists and has been exercised and what is sought to be done is exploitation of work force. The Commissioner has a power to enter into a contract in consultation with a Standing Committee under Section 69 of the Act and there is no back door entry or any procedural irregularity.

xi. The financial burden cannot be an excuse, especially if it means

exploitation of the work force, and where there is a mandatory duty cast on the Corporation to maintain clean environment in the city .Such said duty cannot be shirked by citing lack of financial resources nor it can be done by exploitation of the work force.

xii. The scope of interference of this Court under Articles 226 and 227 of the Constitution of India, is limited. As long as there is sufficient material to justify the final outcome of the order passed by the Industrial Court, there is no reason to interfere with the Award.

xiii. The Industrial Tribunal has all the powers, which will include creation of a contract, to ensure that there is industrial peace. The impugned order is passed in consonance with constitutional principles, aimed at stopping exploitation of the work force and in furtherance of justice. The impugned Award therefore be sustained.

16. Before proceeding to consider the rival contentions and examine the impugned order, two basic positions will have to be prefixed. First is the nature of power of the Industrial Tribunal and secondly, the scope of interference under Article 226, 227 of the Constitution of India against the award of the Industrial Tribunal.

17. It is well settled that the power conferred on the Industrial Tribunal is much wider than a regular Civil Court. The Tribunal can confer rights and privileges on the parties, which it considers reasonable, even though they may not be in terms of any

existing agreement. The industrial adjudication is to be undertaken in the interest of social justice and with a view to secure peace and harmony between the employer and the workers, with the ultimate object to help the growth and progress of the economy. The industrial disputes are to be settled on the principles of fair play and justice. The provisions of the Industrial Disputes Act confer wide powers on the tribunals in determining the industrial disputes. The industrial adjudication does not mean mere adjudication according to laws of procedure, but the award of the Tribunal can contain various directions, which an ordinary court may not be able to issue. In settling the dispute between the management and the workers, the Tribunal can confer rights and privileges and need not merely interpret or give effect to contractual rights. The Tribunal is not fettered by the limitations of an ordinary court and it may create new obligations and modify contracts to bring about industrial peace. This however does not mean that the Tribunal can do anything and everything and the discretion vested in the tribunal must be exercised according to rules of justice. The Tribunal is not to decide the matters on abstract questions of law, but it has to make an attempt to deal with the merits of each case, according to the facts and circumstances of the case. Primary duty of the tribunal is to achieve peace in the industry keeping in mind the socio-economic situation. These basic principles laid down and enunciated by the Apex Court have been followed by the courts in the country while deciding the industrial disputes. The legality and correctness of impugned award

passed by the Industrial Tribunal therefore will have to be adjudged by keeping in mind the conferment of wide powers on the Industrial Tribunal to do justice, and its legality and validity cannot be restricted to only examining the technical legal positions.

18. The Corporation has invoked the Article 226 of Constitution of India and the powers of superintendence under Article 227, seeking writ of certiorari to quash and set aside the impugned Award. The scope and parameters of interference in the orders of an inferior tribunal are well settled. The High Court would interfere where the inferior tribunal has acted in excess of jurisdiction conferred upon it under the statute, where there is apparent error on the face of record, where the tribunal has erroneously applied well-settled principles of jurisprudence and where there is a flagrant violation of law and consequent grave failure of justice. This restriction is more in case of challenge to the awards of the Industrial Tribunal, who are not strictly bound by rigors of procedure and are conferred with powers to pass orders in furtherance of social welfare and industrial peace and harmony. It is not for correcting every error that the writ has to be issued.

19. Next position to be kept in mind is the basic principles of law relating to contract labour. The preamble of the Contract Labour (Regulation & Abolition) Act shows that it has been enacted to regulate the employment of contract labour in certain

establishments and to provide for its abolition in certain circumstances and for matters connected therewith. As per Section 2(b) 'contract labour' is defined to cover a workman who shall be deemed to be employed as contract labour in or in connection with the work of an establishment when he is hired in or in connection with such work by or through a contractor, with or without the knowledge of the principal employer. Section 2(c) defines 'Contractor' to mean a person who undertakes to produce a given result for the establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor. Section 2(3) defines the term 'establishment' to mean any office or department of the Government of a local authority or any place where any industry, trade, business, manufacture or occupation is carried on. Section 2(g) defines 'principal employer' in relation to an office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specified in this behalf, in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948, the person so named, so far as workmen is concerned. The provisions of the CLRA contemplate a genuine contract system. Provision is made for registration of the establishments under Chapter III of the Act. Chapter IV deals with licensing of contractors and Chapter V deals with welfare and health of contract labour. Though the contractor is made responsible for

payment of wages to each worker, presence of a nominee of the principal employer at the time of the disbursement of wages is required. If the contractor fails to pay the wages to the contract labour, the principal employer have to pay the full wages or unpaid wages, as the case may be, can recover the same from the amount payable to the contractor. Chapter VI deals with the contravention of the provisions of the Act, prescribes offences and lays down the procedure for prosecution of the offenders. Section 10 of the CLRA is important. Sub-sec. (2) of Section 10 of CLRA lays down the conditions on fulfillment of which abolition notification can be issued. It provides that before issuing any notification under sub-Section (i) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as whether the work is incidental to or necessary for work that is carried on in the establishment, whether it is of perennial nature, whether it is done ordinarily through regular workmen in that establishment, and whether it is sufficient to employ considerable number of whole time workmen. Section 10 thus empowers the appropriate Government to abolish contract labour system in any process, operation or other work in any establishment when any of the conditions laid down is or are fulfilled. Even if a contract labour system is abolished qua any activity, such abolition operates prospectively. The conditions mentioned in Section 10(2) of the Contract Labour Act are in connection with a genuine and legally

permissible contract system, which may be prevalent in any establishment. The conditions laid down in Section 10 of CLRA have nothing to do with the question as to whether contract labour system employed in any establishment is a genuine contract labour system or a mere camouflage. Such types of disputes are outside the ambit of Section 10 of the CLRA and have to be decided by the Industrial Adjudicator under the Industrial Disputes Act. This is broadly the legal framework.

20. In case of a grievance by the workmen that an employer has indulged into an contract labour system which is only a paper arrangement, the court will have to keep in mind the dicta of the Apex Court in the case of *Workmen of Nilgiri Co-op. Mkt. Society Ltd. V. State of T.N. and others*² The Apex Court took a survey of the earlier decision and culled out parameters to determine existence of the relationship in such cases. Apex Court observed that deciding the questions as to whether a contract is a contract of service or contract for service and whether the concerned employees are employees of the contractors has never been an easy. No hard and fast rule is laid down nor is it possible lay down such a rule. Each case has to be answered having regard to the fact involved therein. It was observed that no single test could be a determinative factor for determining the relationship of employer and employee. The nature or extent of control required to establish such relationship would vary

² 2004 (3) SCC 514

from business to business and, thus, cannot be given a precise definition. The nature of business for the said purpose is also a relevant factor. The apex Court held that the control test and the organization test, therefore, are not the only factors, which can be said to be decisive. The court will have to consider several factors such as : who is appointing authority; who is the pay master; who can dismiss; how long alternative service lasts; the extent of control and supervision; the nature of the job, e.g. whether, it is professional or skilled work; nature of establishment; the right to reject. The Apex Court referred to the commentary of I.T. Smith and J.C. Wood in 'Industrial Law', third edition, where in the learned authors opined that the modern approach has been to abandon the search for a single test, and instead to take a multiple or 'pragmatic' approach, weighing all the factors for and against a contract of employment and determining on which side the scales eventually settle.

21. The power of an industrial adjudicator to grant relief if it finds that the arrangement of contract labour is sham and merely a camouflage, is well settled and is not disputed. The Apex Court in the case of *International Airport Authority of India v/s. International Air Cargo Workers Union*³ has made this position amply clear. It was held that where there is no abolition of contract labour under section 10 of CLRA Act, but the contract labour contend that the contract between principal employer and contractor is sham and nominal, the remedy is under the Industrial Disputes Act. The remedy of the

3 (2009) 13 SC 374

workers is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct employees of the principal employer and the agreement is sham, nominal and merely a camouflage. The industrial adjudicator can grant the relief sought if it finds that contract between principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment.

22. The industrial adjudicator therefore can grant relief if it finds that the contract between the principal employer and the contractor is sham, nominal and merely camouflage to deny employment benefits to the employee and that in fact there is a direct employment. The meaning of the phrases 'sham', 'nominal', 'bogus', 'camouflage' will have to be noted. These phrases include a position where an employer may have an ostensibly perfect documentation with a contractor, but in reality, the persons are directly engaged with the principal employer. Therefore, what is relevant to determine whether the contract is sham, bogus or camouflage, is not merely the existence or perfectness of the arrangement on paper but the ground realities as to how exactly the relationship is being worked out. It is not sufficient to scrutinize only the paperwork but it is necessary to investigate the exact manner the relationship is actually being played out. For that purpose, evidence has to be led regarding the factual situation. By analyzing the evidence, the industrial adjudicator can go beyond the ostensible arrangement and find out the exact manner in

which the relationship is working. It is not uncommon that many unscrupulous employers, to avoid various statutory obligations, employ workers by creating documentary proof showing detailed methodologies to show that they are workers of the contractors. As the employers devise intricate, outwardly perfect system to defeat the welfare measures, the industrial adjudicator has to probe into such outwardly perfect arrangements to cull out the true nature of the same. This will have to be done on the basis of the evidence led before that tribunal. The factual position will obviously differ from case to case.

23. First to deal with Mr. Bukhari's grievance regarding the quality of reasoning in the award of the Tribunal. Mr. Bukhari vehemently submitted that the Award of the Industrial Tribunal is totally unreasoned and there are direct conclusions after the narration of pleadings and extracts from the case laws cited. He submitted that the award is vitiated by non-application of mind as no reasons have been given. Having gone through the award, it cannot be said that the grievance of Mr. Bukhari is entirely unfounded. The Tribunal could have given better and more reasoned Award keeping in mind the implications of the outcome of the reference. It cannot, however, be directly concluded that there are no reasons at all in the Award. The Tribunal has narrated the rival contentions as they appear from the pleadings and the documentary evidence. The Tribunal had before it the arrangement, which was stressed by the Corporation as a

valid arrangement by which contract labour, were being employed, while it was the assertion of the Union that in reality the situation was different. Therefore, the Tribunal had to carry out a fact-finding exercise. The Tribunal referred to the oral evidence of the parties and held that the evidence on record shows that the contract was sham and bogus and accordingly proceeded to hold the same. It was also held that because the Investigating Officer identified only 1600 workers does not mean that others cannot be given benefit, which they are entitled for. Better reasons could have been in support of the conclusion, which would have reduced the burden on this court. However, before setting aside an award only on the ground of lack of reasons, the purpose for which the reference is made for adjudication of Industrial Tribunal and the procedure to be adopted by the Tribunal, will have to be kept in mind. Because the writ court finds that the Tribunal could have given better reasons, automatically an order setting aside the Award may not be passed, without looking into all the aspects of the matter. The entire gamut of raising a demand, conciliation proceedings, reference to the Industrial Tribunal, is for the purpose of achieving industrial peace. The Industrial Tribunal is not akin to an ordinary civil court. The reasoning in an award may not necessarily be as elaborate as a judgment of a Civil Court. This does not however mean that the award can be totally unreasoned, but it only to emphasize that the yardstick generally applied to the Civil Courts and the expectations from a civil court regarding the depth reasoning do *not ipso facto*

apply to an award of the industrial tribunal. The Apex Court in the decision of *Bajaj Auto Ltd. V/s. Rajendra Kumar*⁴ elaborated the nature of industrial adjudication. It observed that peace in industrial atmosphere requires the parties to behave and conduct in a just and fair manner and the grievance of the aggrieved workers has to be adjudicated under the necessary enactments on the bedrock of fairness and just needs. Primary obligation and duty of an industrial forum is to see that peace is sustained between the management and the employees in an industry. It was observed that that is why the enactments provide a mechanism for arriving at a settlement to see that the growth and progress of industry is not scuttled by taking recourse to such methods, which will eventually affect the national growth. This object of the industrial adjudication will have to be kept in mind before proceeding to straight away set aside the Award on the ground for lack of adequate reasons. Furthermore, the resultant prejudice and the resultant situation will have to be kept in mind in this case. Therefore, an attempt will have to be made to see whether the material on record and the evidence led by the parties, for which both the parties had adequate opportunity, justify the outcome. If object of a reference and the award is to bring about industrial peace, ordinarily it may not be jettisoned only on the ground that the Industrial Tribunal could have given better reasons in the award. Therefore, even though I must record my disapproval regarding the quality of reasons in the Award, considering the

4 (2013) 5 SCC 691

magnitude of this legal as well social issue, I am inclined to accept the request of Mr. Singhavi that this court should examine if the Award can be sustained on the basis of the material that is placed on record. Before me, the matter was argued at great length by both the counsels on various dates and every relevant piece of evidence was shown and referred to.

24. With this background of statutory provisions and parameters of adjudication, one will have to focus on the facts of the present case. Firstly, the case of the Corporation as to what is the nature of the system. In the reply to the complaint, the Petitioner has enumerated the details of the arrangement. This has been repeated in the evidence, in the argument before the Tribunal as well as in this Court. It is stated by the Corporation that the Municipal Commissioner had visited Hyderabad city sometime in the year 2003 for World Seminar on Disaster Management, when he found a substantial improvement in that city. The Commissioner discussed with the Commissioner of Municipal Corporation of Hyderabad and was impressed by the system developed to get the work done on the contract basis. In the year 2004, the Corporation decided to implement the Hyderabad Pattern in Mumbai. It is decided that each ward in the city will be divided in the different units and tenders be awarded to various NGOs and Co-operative Societies who will apply. For this purpose, tenders are invited by giving an advertisement. Three schemes were introduced. First was Clean Area Scheme for

cleaning of roads and collection of refuse. It is stated that under this scheme, daily sweeping of the road, where there is no regular service by the Municipal employees, is being provided. The Corporation has network of about 2200 km. roads, which are swept daily. The second scheme is of Motor Loaders, where the Corporation has introduced automated vehicles for transportation of solid waste, after manual handling has been prohibited. The third scheme is of Manning, Mopping where the NGOs have been engaged by the Corporation in lieu of the payment to the NGOs. Under this scheme, the work of cleaning the roads in the afternoon session has been undertaken. After an advertisement is issued, the NGOs and Co-operative Societies apply and work is allotted to them on lottery basis. The said NGOs and Co-operative Societies pay honorarium to the concerned persons/volunteers. Their attendance and all record is maintained by the NGOs and Co-operative Societies. The office bearers of the NGOs / Co-operative Societies supervise the work of the concerned persons. In case of sweeping, the contract is for seven months and for other cases, the time period varies from two to seven months. Depending on respective wards, the NGOs / Societies are required to carry out work as per the tender conditions. Payments are made to these NGOs / Societies upon raising the bills and after approval of the Competent Authority. All payments to the concerned persons are made by the respective NGOs / Societies. Various vouchers issued by the NGOs in respect of the payments made to the concerned workers are produced on record. List of 131 NGOs and list of

contractors to hire vehicle for refuse is placed on record. The communications accepting the tender addressed to the NGOs are also placed on record. In short, the system that is stated to be adopted by the Municipal Corporation is issuing advertisements calling upon NGOs / Societies to apply and submit the tenders, thereafter, the work is allotted by way of lottery system, the concerned persons work under the supervision of the said NGOs and contractors, though there are instructions issued to the NGOs and contractors regarding the work to be carried out, the supervision and control is of the NGOs / Societies / Contractors, payment is made by the said NGOs / Societies / Contractors directly to the concerned persons and there is no notification prohibiting the contract system operating in the Municipal Corporation. Therefore, according to the Corporation, this is the clear and permissible contract system operating in the Municipal Corporation and there is nothing sham and bogus about the same and it is fully transparent.

25. Turning now to the oral evidence of the parties. On behalf of the Union, General Secretary, Mr. Milind Madhav Ranade led his evidence. Mr. Ranade deposed about the activities of the Union and the background of the concerned workers. His evidence of importance and thus is discussed in detail. It was stated that the concerned workers are mostly uneducated coming from drought-affected areas of the State of Maharashtra and other States. They live on the periphery of their villages due to caste system prevailing there

and because of their backward social and educational status, they do not even have basic documents available with them. They reside in shanties and slums, which are often unauthorized and have no accommodation available in the city. They have no access to bare minimum facilities of water, sanitation and health and it is difficult to organize them, yet the Union, after substantial struggle has been able to bring them within the fold of the Union. Mr. Ranade deposed about the statutory duties and the manner in which the City is subdivided and the population that is grown and details of the City and the length of the roads and the area, which needs to be kept clean by the Corporation. Mr. Ranade deposed about the manner in which the litigation has proceeded and the details were also given of the number of the workers and the fact that 2700 workers were involved in the Reference was reiterated. The policy of the State of Maharashtra in respect of the Safai Kamgars was relied upon and details were given in the deposition. It was asserted that it is the statutory duty of the Corporation under the provisions of the Act as well as under the Environmental Protection Act and Rules to keep the city clean. Mr. Ranade deposed about the details of the daily work that is carried out. It was asserted that one cleaning unit will have road length of nine Kms. and the nature of work was cleaning of roads, removal of silt, removal of roadside debris, collection of wastes, cleaning of roadside drains, removal of posters, cleaning of water stagnation points, sprinkling of disinfectant mixtures. It was stated that the time of operation was 6 a.m. to 11 a.m. in the first shift and

12.00 noon to 3.00 p.m. in the second shift. Mr. Ranade deposed that the so-called agencies carry out the work by engaging 18 persons and the specified number of wheelbarrows, spades, baskets, brooms, gumboots, raincoats, soap and mask would be provided for each unit. As regards the transportation unit, it was deposed that one vehicle has capacity of not less than 3.5 metric tons with four workers on it. The vehicle makes two trips per day to collect all collections points. Collection would be done of all municipal solid waste and activities of rag pickers and animals also have to be controlled. The vehicle has to be then taken to a notified landfill site. For this work, timing was 6.00 a.m. to 2.00 p.m. Specified number of shoes iron baskets, mask, spade, crow bar, bucket and mugs would be provided. He deposed regarding the night work carried out by the unit of identical nature as would be done by the day unit. Time of operation would be 11.00 p.m. to 5.00 a.m., which was the main cleaning work and 7.00 a.m. to 3.00 p.m. for mopping operations. He deposed that the work was done by 18 workers for night sweeping and 18 workers for day mopping. The nature of work was also stated and it was deposed that after the loading was done at the check post, log sheet was given to put their names and stamps. The workers were not allowed to any sort of work when asked for by the supervisor and they would work under the officers in charge. It was stated that as provided in tender the documents, in case of misconduct the officer of Corporation had power to terminate the worker and in case the compactor was not filled at least 80 percent capacity, then only half of the payment

would be made to the workers. In case of alcohol consumption, the worker could be removed and amount deducted from his salary. Mr. Ranade then deposed about the work carried out under the name Manning and Mopping. It was stated that there is no such area, which can be called as non-serviceable area, and in view of the additional area undertaken by the Corporation and as per Environment Protection Act and Rules, the responsibility of the Corporation has increased and there is nothing left now that the area is non-serviceable. Mr. Ranade then deposed that the concerned workers have to work for long working hours when permanent workers were working only for seven hours. The concerned workers were not given weekly off or paid off while the permanent worker had weekly off. In case of on duty accidents, the permanent workers were statutorily protected while the concerned workers were without any protection or benefit of treatment in any Municipal Corporation hospitals. It was stated that the concerned workers were continuously monitored by the Municipal Corporation and often fined for dereliction of duty. It was deposed that only different nomenclature such as Hyderabad Pattern, Mopping and Manning, Dattak Vasti Yojna are used to perpetuate exploitation of the concerned workers. It was stated that the Corporation has backdated registration agreement under the CLRA. It was stated that there was no written agreement between the Corporation and the so-called contractors. The work being of perennial nature, the contract could not have been awarded. The tender is so heavily tilted in favour of the Corporation

that it is not a contract at all. The contractors are not registered. It was deposed that the so-called contractors even paid the tools and equipments, which are not owned by the contractors. The contractors have no right to dispose of the refuse except the one stipulated by the Corporation. The Corporation controls almost every activity of the contractor, even recruitment takes place at the ward office and for assignment of work and attendance is also by the Corporation. Minute supervision is carried out. Fine is imposed and recovered. So-called contractors have no independent financial resources. Even the tender condition of paying wages by cross-cheques is breached. Commencement of entire work is controlled by the Corporation. The rate of wages are fixed by the Corporation. The so-called contractors have no independent skill or capacity. It was deposed that all of 2700 workers are dependent only on the Corporation for work. The tenders, which are issued, are deliberately issued for short period of time. The workers working on the transport of garbage also work alongside the permanent workers and they are required to work under complete guidance of the Municipal Corporation. The contractors or the NGOs have hardly any say in the manner in which the work is taken from the concerned workers.

26. Mr. Ranade was subjected to extensive cross-examination. A question was put to him that whether he was aware as to how many persons were working with the contractors and names and duration, to which he replied that he only knew about individual

workers and besides what is the work is done he does not know. He stated that 2700 workers were paid salary through cross cheque and thereafter stated only some of them are paid by cross cheque. Sixty percent were paid by cross cheques and others were paid either through cash or bearer cheques. He was shown the log sheet attached to Exhibit U-12 and stated that two out of six workers were working in the NGO. He also stated that a separate classification regarding number of employees and number of NGOs is in vogue since 2004 and that no written objection was taken. He stated that he had never worked as an employee of the Corporation in any capacity and he had seen the contracts entered into between the Corporation and NGOs and he has been seeing these documents from 10-12 years. He denied the suggestion that only 716 of the members of the union out of 2700 were working with various NGOs. He also stated that the Municipal Corporation issues appointment letters and no such appointment letter has been issued to any of the 2700 workers. He stated that he was not aware whether the rules required to be followed for appointment of the Municipal employees were followed in the case of 2700 employees and he was generally aware of the rules. He reiterated the nature of the work carried out by the concerned employees. He stated that it is true that the contractors or NGOs are providing hand gloves, safety shoes, gumboots and raincoats. He further stated that that was after the Union fought for these facilities. He stated that it is true that according to the Hyderabad Pattern, tenders are issued and contractors are appointed and this practice is

going on, and denied that the scheme is never challenged after 1994. As regard the cheques issued, he stated that the cheques were issued by the so-called contractors. It was stated that the many cheques were dishonoured right from the beginning. He stated that the members of the union were not given letters for appointment rendered by the Corporation and the wages were not paid by the Corporation. He stated that the concerned workers were employed by the Corporation after consideration of job requirement and sanction of Standing Committee. He stated that it is not correct that there is no evidence to show that the employees employed by the Corporation are inadequate. He accepted the fact that no notification abolishing contract system has been issued neither the Government is moved for abolition. It was stated that the Corporation does not have a valid and proper registration certificate. He also stated that no contractor has complained that he has no independent existence. He also stated that out of 2700 around 400 workers have left.

27. Next witness that was examined by the Corporation – Union was Vijaykumar Kuppan Kaunder, one of the concerned workers and a member of the Union. His evidence is also of importance as he as deposed about the actual functioning. He stated that he came to be appointed on Holi Festival day in the year 2005. He stated that he came to know about the vacancy of sweepers and cleaners through the permanent workers working in Kandivali and they introduced him to the Junior overseer who directed him to join

work. He stated that he was continuously working since 2005 and he was doing the work of sweeping and cleaning the roads along with seven others attached to the unit. He stated that his work was continuous and he had to work on all days and months without a weekly off. His rate of wages gradually increased from Rs. 80/- to Rs. 127/- per day and the female workers were getting Rs. 10/- less even though they were working on the same duties. He stated that he was doing work of cleaning, collection and transportation of garbage and allied refuse, which is a perennial work. The Municipal Corporation has various officers such as Ward Officer, Assistant Engineer (Environment), Assistant Head Supervisor, Supervisor, Junior Overseer, Mukadam who were controlling the work every minute. He stated that with a *malafide* intention, letters of appointment were not issued. He was being paid in cash and only because the efforts of the Union, Corporation agreed the amount were being paid by cheque. He submitted that it is due to intervention of the Union, large number of workers opened their bank accounts. He deposed about the daily work carried out. He stated that he was required to report to work every morning. The Junior Officer, Overseers, had list of cardholders. He tick marked in his notebook and allowed the workers to work in the unit and every day attendance is so marked. He stated that in his unit Mr. Bhushal, Junior Overseer and some time Mr. Desai, Senior Supervisor, Mr. Bangar, Head Supervisor, Mr. Khurade, Assistant Engineer directed him and others as to how and where the work is to be carried out. The cleaning work is carried out

either by broom or brush as per the specific instructions given by the Junior Overseers. If the Junior Overseer finds any dead animal in the street, they are instructed to remove it. He deposed that earlier the lunchtime was 11.00 a.m. to 12.00 noon, however, the Junior Overseer changed it to 12.00 noon to 1.00 p.m. to suit his convenience. The workers are required to report to work at 6.00 a.m. and if there is a delay, they are marked absent for a day. He deposed that due to efforts of the Union, three holidays in a year are given and also bonus was given in Diwali 2008. He stated that he and others were not allowed to use any other equipment other than the one to use solid waste management activities and designated trolleys and boxes had to be used. It was stated that in the absence of Junior Overseer, some other Senior Officer stepped in to supervise. He deposed that all the equipments are as per the specifications and the powder that is spread is also specified by the Municipal Corporation. The rate at which he and others are paid is also stipulated by the Municipal Corporation and money for such payment of wages comes from corpus of the Municipal Corporation for which cess is charged. He deposed that day-to-day work is closely and minutely looked after. In case of shortfall, Rs.150/- per day per worker is levied as fine by the Corporation. Cleaning work done by him and others is minutely supervised and amount if charged depending on the length of uncleaned area of roads such as Rs.200/- fine up to 1 k.m. and thereafter increased accordingly. The work of sweeping and transportation is also minutely supervised and fines are imposed.

Fine is imposed if disinfectant is not properly spread. If there is a shortfall in the transport activities, workers working on unit in Hyderabad Pattern are asked to work. He deposed that he had worked also on contacts for collection of garbage, which either is taken to Mulund dumping yard and Gorai dumping yard. He deposed that in the year 2005, the Petitioner – Corporation re-organized the entire working of Kandivali Ward and the workers were transferred. He deposed that the Junior Overseer in his unit has punished various workers for coming late or staying on leave. He deposed that nobody dares to raise any voice against such actions for fear of losing the work. He stated that he is not performing the work as a volunteer, but it is only out of sheer compulsion. He stated that the tender systems are only on paper and he and the other workers are performing statutory work of the Corporation under direct supervision and control of the officers of the Corporation.

28. Mr. Kaunder was subjected to cross-examination by the Corporation. In the cross-examination, he accepted that he was getting wages through cheque payment. It was put to him whether he was aware of Vanita Mahila Mandal and whether it was being cheque was being paid to him through the said entity. He stated that he never received payment slip by the Corporation and Corporation did not issue him any identify card, neither has he had any employee code. He accepted that he was not getting any medical leave, casual leave like the regular employee of the Municipal Corporation. He

stated that he has no proof to show that he is continuously working with the Municipal Corporation since 2005, but stated that he was working from the year 2007 as his bank passbook shows. He stated that he does not know the date of appointment of 2700 workers, their salaries and their appointing authorities. He denied the question that his work was not being supervised minutely by the officers of the Municipal Corporation. In the cross-examination, he stated about the accident that took place and that the injured employees themselves had to pay for their medical expenses. He stated that it is correct that no complaint in writing is made regarding the payment of wages and the fine imposed. He accepted that there is no documentary evidence to show that he had worked on the vehicles. He also accepted that he has no documentary evidence to show that he had worked in the Garbage Department.

29. On behalf of the Petitioner – Corporation, first witness examined was Vijaykumar Ganpat Kaskar, working as a Head Supervisor, Solid Waste Department since 16 December 2011. Important aspects of his examination in chief and the cross examination are as follows. He reiterated the manner in which Hyderabad Pattern was initiated. He stated that the concerned workers were engaged by the NGOs / Co-operative Societies and the Corporation was not required to maintain their register and that none of the persons were employed by the Corporation. He denied that the arrangement of the Corporation and the contracts are sham and

bogus. He reiterated the tender system and produced various documents on record, such as the vouchers signed by the one of the concerned workers receiving remuneration from NGOs, appointment letters, payment made by the NGOs and the cheques issued. He also produced on record a certificate of registration mentioning the list of contractors. He produced the list of contractors and NGOs, which were given the said contract. He stated that he does not know whether before implementation of Hyderabad Pattern, a resolution was passed and it is correct that he was not part of decision making for dividing the wards into different units. He stated that strength of the Safai Kamgars working for Corporation was 28018 and the same strength was there in the year 2005. He stated that the work of Manning and Mopping is not done by these 28018 Safai Kamgars, but is done by the concerned workers. He stated that there is no difference in work of loading and unloading the garbage vehicles and transportation done by 28108 Safai Kamgars and the concerned workers. He stated that it was the responsibility of vehicle owner to supply cleaner and driver. He accepted that the gumboots, raincoats and caps were being provided by the Municipal Corporation in the last year, however the same was not given for the year 2013. He was shown the Circular dated 13 February 2013 in respect of encashment of privilege leave and he stated that it is correct that the concerned workers in were not given the benefit. He accepted that the officers of every ward supervise the work and that if it is found that any worker has committed dereliction in his duties, he will be penalised

by the Junior Overseers. He stated that there are 12 to 15 Junior Overseers in each Ward. He stated that it is correct that the Corporation agreed to give four festival holidays. He stated that it is correct that the Solid Waste Management Department of Corporation has not got registration certificate under the CLRA and he does not know whether the concerned NGOs have any licence. He stated that it is correct that in the tender, there is no mention of a volunteer and none of the concerned worker have informed that they were volunteers. He also accepted that, earlier the concerned workers had to work for all 365 days in a year. He also accepted that if a worker remained absent on a particular day he is not entitled to wages and a fine of Rs.150/- imposed per worker on the concerned NGO. He stated that in the log sheet maintained for vehicle for transportation work, names of workers of the Corporation are mentioned but names of concerned workmen are not mentioned only number is written. He also accepted that the Corporation has refused to pay bonus/ex-gratia to some of the workers concerned in the reference because they participated in a strike. He stated that it is correct that under the Hyderabad Pattern, there are more than 2700 workers, but he could not state the exact number. He also accepted the position that because of the fine structure imposed by the Corporation, the workers are not even getting the minimum wages, however did not know whether because of this position the Corporation took decision to change the structure of imposing fine. He stated that the recommendations of Lad committee and Page Committee are made

applicable to the Corporation to the permanent workers.

30. The second witness that was examined by the Petitioner – Corporation was Mr. Dinkar Laxmanrao Wasekar, working as a Head Supervisor, Solid Waste Management Department since the year 2009. He was also cross-examined. It is necessary to note his statements in the evidence. Mr. Wasekar reiterated the decision taken by the Municipal Commissioner regarding the Hyderabad Pattern. He stated that the Corporation was not required to maintain attendance register, honorarium register and the work was not allotted by the officers of the Corporation. He reiterated that no point of time the persons were engaged by the Corporation and no appointment letters have been issued. He stated that the circulars issued by the State Government are not automatically applicable and the reliance placed on the circular dated 26 April 1985, is misplaced. He asserted that the workers are working under the supervision of the contractors and the NGOs. The contract is awarded after due scrutiny and payments are made only after raising the bills and after obtaining sanction.

31. In the cross-examination, Mr. Wasker made various statements, which have to be taken note of. He stated that he was one of the participants of the study group on the subject of Hyderabad Pattern. He stated that it is correct that the report was placed before the Standing Committee and after its sanction on consideration of all

relevant factors, it was implemented in May – June 2004. He stated that initially 114 units were established which was increased to 134. He stated that initially the tenders were issued in centralized fashion and now they are issued at ward level. He accepted that the Municipal Corporation has no certificate under the CLRA. He also stated that it is the responsibility of the Corporation to clean the road of 2000 kms. and approximately 1250 kms. of roads are cleaned by the permanent workers and the Corporation and rest of the areas are cleaned under the Hyderabad Pattern. He stated that it is partially correct that drinking water, urinals, toilet facilities are not provided to the concerned workers. He state that in the year 2009, the decision was taken to provide bonus/ex-gratia, provident fund, privilege leave and for that purpose the Corporation sanctioned 46% levy. He accepted that penalty is levied for lapses committed by the workers. He also stated that it is correct that the attendance of the individual workers is received by the Corporation monthly along with the bill. He stated that tenders are issued for seven months and again without any gap. He stated that the expenditure incurred on the work of Hyderabad Pattern is reflected in the budged of the Corporation. He also stated that the Corporation has issued instructions to the various NGOs to make payment by cross-cheques. He stated that 169 important streets and 350 collection spots were fixed by the Corporation for manning and moping ward-wise. He stated that the Hyderabad Pattern is known as 'Swaccha Bharat Abhiyan'. He stated that the requirement of 18 workers per day mentioned in the tender

specified that all the 18 workers should be given weekly off. After going through the tender, he stated that there is no such condition. He stated that it is correct that there has been increase in the generation of garbage and population of the city has increased so also length of its streets. He accepted the position that permanent roll of the workers was below the requirement in the Corporation and it is correct that the concerned workers are working on the required posts. He stated that initially there were unit of 14 workers, which has now increased to 18. He stated that it is correct that if the contractor breaches the contract, the workers working with that contractor are paid wages and bonus by the new contractor for the previous period. He denied the suggestion that this system is sham and bogus.

32. Third witness examined on behalf of the Corporation was Mr. Bhalchandra Pandharnath Patil, who working as Chief Engineer, Solid Waste Management Department, since the year 2010. His gist of his evidence is as follows. He reiterated the functioning of the Hyderabad Pattern. He stated that the workers are engaged through NGOs and contractors who supervise their work and pay such workers. He stated that from time to time strength of persons in Solid Waste Management Department has increased and in the year 2007, about 500 posts were created. He also reiterated the stand taken by the other witnesses of the Petitioner.

33. Mr. Patil was cross-examined by the Union and in the

cross-examination, he made various statements regarding the functioning. He stated that budgetary provisions for Solid Waste Management are made and in the year 2012, the budget of Rs.600 crores was submitted. He stated that during the period 2010-12, about 6000-6500 metric ton of Municipal Solid Waste per day was generated and day by day, this figure has increased. He stated that it is correct that the Central Government had issued an Ordinance and responsibilities are fixed on the Municipal Corporation for collection, transportation and disposal of the waste. He stated that it is correct that all terms and conditions of all tenders for the entire Mumbai are same. He stated it is correct to say that 46% levy is fixed by the Corporation for the purpose of extending the benefits of the labour legislation. He stated that it is correct that there are no separate rest room, canteen, washroom facilities and first aid provided to the concerned workers. He stated that the concerned workers can use the facilities of permanent workers, but accepted that there is no such written order. He admitted that it is correct that majority of the workers working for the Solid Waste Management Department belong to Schedule Caste/Schedule Tribe category. He stated that the nature of duties of permanent worker and the concerned workers are different. He stated that the Corporation is duty bound to keep the areas and roads in Mumbai city clean the 365 days in year. He accepted the position that he had not drawn the figure of 500 additional posts and when the proposal of filling of 500 posts was submitted. He stated that some of the NGOs / Contractors have

been black listed for a temporary period.

34. Thus, the witnesses of the Union focused on the factual aspects of the relationship and the witnesses of the Corporation deposed primarily about the documentation aspect. From the review of the oral evidence lead by the parties, following picture emerges. Majority of the concerned workers belong to backward class. They are hardly educated. Many of them have migrated to Mumbai in search of work. They live at the one of the lowest rungs of existence in the city. They do not have permanent housing and hardly any documentation. The Union has unionized such workers. The Corporation has stated a pattern of engagement of workforce as Hyderabad Pattern after due budgetary allocations. The tenders have been issued by the Municipal Corporation calling upon the contractors and NGOs to submit their bids. The nature of work that is carried out is specified therein. The contract is awarded to the NGOs and the Contractors by lottery system. The Contractors and NGOs do not have a registration certificate under the CLRA. The Municipal Corporation does not have a registration certificate under the CLRA. The evidence given by Mr. Kaunder regarding the manner in which he carried out his work, has remained unshaken in the cross-examination. Going by his evidence, the concerned workers report to duty and put in substantial hours throughout the day. Their work involves cleaning of garbage, removal of dead animals, refuse, superintending the streets, the work which is crucial

in nature to keep the city clean. These workers work alongside the permanent workers of Municipal Corporation in the transportation unit. They report to the Junior Overseer in the morning who takes down their attendance. The specification of the work and the specifications of the tools and the powders and chemicals used are scrupulously laid down by the Corporation. If the work is not carried out satisfactorily, fine is levied and amount is also deducted from wages. Earlier the concerned workers work for 365 days in a year, thereafter, four days in a year leave is introduced. These workers do not have medical aid, access to toilet facilities, washrooms, changing rooms, as a matter of right. If any accident takes place during the work, the concerned workers have no medical back up and have to look after themselves. During transportation work, names of permanent employees are entered, however only numbers of concerned employees are entered. The area to be cleaned, the population in the city and the amount of garbage generated, has steadily grown over the years. The existing work force is not adequate. The Hyderabad Pattern was adopted after due sanction by the Standing Committee and a budgetary allocation is made for carrying out the work. The terms of all tenders throughout the city of Mumbai for every ward are fixed. There is no particular qualification laid down for a contractor or NGO to apply for a tender. The contractors have no other independent work than the work carried out by the concerned worker.

35. Turning now to the terms of tenders and the log sheets. Below Exhibit U-193, specimen tenders for motor loading work were placed on record. Exhibit U-194 was the specimen tender notice for mopping and manning work. Exhibit U-195 was for road cleaning and transportation of collected waste. Exhibit U-195 was a tender for sweeping activities. The Corporation had also issued statements regarding the eligibility. Exhibit U-193 deals with a tender issued by the Petitioner – Corporation in respect of Kurla 'A' Ward for motor loading. The tender is called for period of 92 days. It was called from the Labour Co-operative Societies, NGOs. for providing workers in motor-loading work in the cleaning department. It was stated that those organizations, which have licences under the CLRA, should apply. Deposit was specified, certain conditions were given. The pay to be paid to the workers was specified as Rs.127/-. It was stated that it is mandatory to give a weekly off and the amount should be paid on or before 10th day of every month. The work sheet stated that for work of motor loading in Kurla "A" Ward around 80 workers are needed. The motor-loading work will be in two shifts. Morning 6.00 a.m. to 2.00 p.m. and second shift after 2.00 p.m. to 5.00 p.m. The nature of the work would be removal of garbage from the garbage bin or lying outside the street. The workers must wear a particular uniform and must wear the fluorescent jacket. If there is any shortfall, fine of Rs.150/- per month would be levied. Similar are the conditions for the other tenders that have been issued. The application form submitted by the NGOs, is to incorporate general

details about the Applicant. Exhibit U-106 is a specimen of statement of recovery of fine by the Corporation. This statement is in respect of one Nagarik Seva Sahakari Sangh for the period from 1 January 2008 to 31 January 2008 in Unit No. 23. It shows that Rs.1300/- has been levied as fine. The break-up of this fine is, penalty of non-supply of labour, penalty of unclean span of road, penalty for litter in open heaps, penalty for garbage found, and the penalty for unapproved apparels. Therefore, each activity is minutely supervised and for lapse of work, a fine has been levied. Forms to be filled are in a printed format. The details of the categories of fine have been enumerated in these forms, which are under 13 Heads. The Supervisor of the Corporation fills up the sheets. In some cases, fines have been levied for the workers for not wearing jackets, for not spreading the insecticides in sufficient quantity. If a unit did not have requisite number of equipments, then the workers were to sit idle. As far as the transportation work is concerned, detailed printed forms have been provided. Work has been specified, deficiency of vehicles are enumerated such as wiring, parking lines, cover of water tank, cover of petrol tank, rear view mirror, seats, battery, whether the engine has been in proper condition, condition of starter, clutch, radiator, the doors of the truck, cut out has been specified. They have been signed and countersigned by the Supervisors of the Corporation. Under Exhibit U-12/116-117, specimen log sheets have been produced on record by the Union. Details of each worker has been specified and has been styled as a volunteer or working in a

NGOs. For each daily payment, a signature has been placed by the worker. This log sheet is prepared in a printed format by the Corporation. The decision taken by the Corporation on 3 June 2009 to give revised minimum wages and 46% levy is placed on record. This decision has directed all the Assistant Commissioner and Superintendents to disburse the amount of minimum wages to those contract workers who were working under their supervision.

36. The thrust of the evidence of the Union was on the manner in which the work that being carried out and it asserted that it was only a paper arrangement. The admission of these witnesses relied upon by Mr. Bukhari were to the effect that the tenders existed, there was no abolition of the contract, payments were made by cheque, some of the workers have left and that there needs to be a procedure for recruitment in the Municipal Corporation services. As far as the actual work on site and how it was carried out, there was no in-depth cross-examination. The cross-examination was only to the existence of the system, which was any way being placed on record by the Union and in the cross-examination, the answers were only affirming the existence of a system and the legal position. However, in a case where allegations are made that the contract is sham and bogus, as discussed above, it is the reality on site, which is of prime importance. The witnesses of Union, by evidence of their witness and through cross examination of the Corporation witnesses, brought the reality clearly in focus.

37. There is bound to be some degree of control by the Principal Employer, ultimately it is the assessment of evidence which will pave the way and bring out the actual relationship between the employer and the workers. Where the contract labour is employed in a highly specialized and skilled work area and the principal employer is answerable to the consumers of the system, then the principal employer will naturally have a higher degree of supervision and cannot leave the work of supervision to the contractors alone. However, when the work is as basic as cleaning the streets as done by concerned workers, which does not require a high level of technical knowledge and expertise, then minute supervision on the work of the concerned workers by the Corporation will have to be taken note of. The tender does not specify any particular qualification on behalf of the contractor or an NGO. If the work of cleaning the streets was to be taken purely on a contract basis, then the reporting to the Overseer, similar terms of contract through-out the city, specifying the tools and powders, fining the workers, directing the subsequent contractor to pay the wages of workers of earlier contractors, repeatedly issuing tenders without any gap, would not normally arise. To find out whether the contractors are only introduced as intermediaries to avoid grant of permanent status, these aspects are crucial to be considered. The charge that the contracts are sham and bogus does not necessarily mean that the contractors do not exist, issue is what their status is and whether they are merely interposed.

As stated earlier there cannot be a single mathematical formula, but all factors must be considered cumulatively. The evidence which is culled out and discussed, taken cumulatively shows an all pervading role of the Corporation. The decision of the Standing committee, budgetary allocation, virtually no expertise of the contractors, norms in all wards being fixed, even margin of profit is fixed, almost all aspects of the work is determined by the corporation, transferability, that almost anyone can form an NGO and apply and that the Corporation does have any rigorous standards for applicants, are some of the key factors. This shows that on site there is a clear and direct connection between the Corporation and the concerned workers. The contractors exist only for the purpose of collecting money from the Corporation and passing on the same to the concerned workers. Any contractor or a Co-operative Society or any NGO without any past experience without much credentials can simply submit a tender, collect a specified amount, keep some men present as supervisor, show the specified number of workers working under the said contractors and pass on the money from the Corporation to the workers. They have no other role to play. The entire thrust of the argument of the Corporation is that the contracts have been given and there is no direct payment by the Municipal Corporation. The Union has not disputed this position, however, the basic grievance is that in spite of this being the position on paper in reality, there is no tripartite arrangement but the contractors or NGOs are only placed for the sake of convenience. This grievance is upheld by the Tribunal.

38. With this above review ,question is whether the conclusion drawn by the Industrial Tribunal , on assessment of facts, as to how on site the relationship is being played out can be termed as perverse. In my considered opinion, it is not. Apart from this position, the manner in which the Corporation has proceeded to adopt this system and its statutory powers, which aspect is detailed later, will be of importance.

39. Having reached a conclusion that finding of fact reached by the tribunal is a possible view of the matter, the effect and the legal positions that arise there from will also have to be considered and so also various arguments that have been raised by Mr. Bukhari in respect of creation of posts, power to create posts, law regarding registration and licenses, the effect of non-joining contractors as party to the Reference, the effect of the decision of the Apex Court in the case of *Umadevi* (3) and to how many persons the relief can be extended, in view of the report of the Investigating Officer.

40. One of the contentions of Mr. Bukhari is that the contractors have not been made party to the Reference, who were necessary. According to him without joining the contractors as party Respondents, no inference could have been drawn in respect of the legality of the system. Mr. Bukhari placed reliance on the order passed by the Division Bench dated 4 May 2007 in Writ Petition No.

971 of 2007, between the same parties. He submitted that the Division Bench clearly opined that the contractors, if not necessary, are proper parties for complete and just adjudication of the dispute. Mr. Bukhari submitted that in spite of these observations, the Union did not deliberately join the contractors. On the other hand, it is the contention of Mr. Singhavi that no objection was raised to the terms Reference that was made to the Industrial Tribunal wherein only the Corporation and the concerned workers and Union, were arrayed as parties. It was contended that the Corporation did not make any application for joining the contractors as parties.

41. Two questions therefore arises on this issue, as to whether the Award is vitiated for not joining the contractors as a parties and whether any cogent reason existed for not joining them. As far as the legality and validity of the Award is concerned, it will have to be seen who the parties to the Reference were. When the Government made a reference to the Industrial Tribunal, only the concerned workers Union, and the Corporation were made party. The contractors were not made a party to the reference. It is come on record that the Corporation was calling for tenders and giving the same by way of lottery system for period of seven months and after the seven months were over, it was re-issuing the tenders. It is also come on record that some of the concerned workers were transferred to different Wards and even if the contract was terminated mid-way subsequent contractor had obligation to pay the dues of the

concerned workers. It is the case of the Union, which has been borne out by the record, that such contractors had no special expertise, who kept on changing however, the concerned workers continued. It was stated that at a given time there were 113 such tenders. It was therefore not possible for Union to state with certainty that concerned workers were engaged through a particular contractor. Even if they had joined some of the contractors as party, the contracts were issued typically for seven months and which would have changed by the time the Reference would be heard. The Division Bench had observed that the contractors may be a proper party, but it did not hold that they were necessary parties. As rightly contended by Mr. Singhavi, it was open to the Corporation to make an application for joining the contractors as parties to the Reference.

42. In the case of *Hochtief Gammon V/s. Industrial Tribunal*⁵, a question that arose before the Apex Court in relation to construction of Section 18(3)(b) of the Industrial Disputes Act. A dispute arose between the Appellant Hochtief Gammon and the workers regarding payment of bonus. A reference was made to the Industrial Tribunal. Notices were issued not only to the parties but also to the Hindustan Steel Limited. Hindustan Steel appeared before the Tribunal and contended that it was not concerned and dispute and should not be added as party. At the same time, Hochtief Gammon made an application that Hindustan Steel be joined as a

5 AIR 1964 SCC 1745

party. The Tribunal deferred the question to be heard at the time of hearing of the Reference. Gammon approached the Apex Court. In that context, the Apex Court analyzed the provisions of law and held that the Industrial Tribunal is a tribunal of limited jurisdiction. Its jurisdiction to try the industrial disputes referred to it for adjudication is determined an order of reference. It is not open to the tribunal to travel beyond the terms of reference, as the terms of reference determine scope and jurisdiction from case to case. It was held that ,subsequently due to the amendment to Industrial Disputes Act, the appropriate government could refer to the industrial dispute, not only a specific dispute but matters connected with it. The Apex Court held that a party to the reference could make an application for joining another party to the reference, which according to is necessary. Therefore, Mr. Singhavi is right in contending that the Corporation could have sought an impleadment of the contractors in the said reference, which was not done. Therefore, on that ground alone I am not inclined to set aside the Award based on a reference, which consisted only of two parties. In addition, in this case the Union has given cogent reason as to why it was impracticable and fruitless to join the contractors who kept on changing.

43. It is the contention of Mr. Bukhari that merely because the provident fund and bonus has been paid does not mean that there is any supervision as it is in fact a statutory requirement under Section 21 of CLRA Act. It was also urged that the Tribunal placed heavy

reliance on non-registration and requirement of licence under CLRA Act, which has no relevance to the controversy. He relied on the decision of the Apex Court in the case of *Dena Nath v/s. National Fertilizers*⁶ and *Municipal Corporation v/s. K.V. Shramik Sangh*⁷. It is correct that merely because there is no registration under the CLRA Act, it cannot be stated that the contract is sham and bogus. Such contention is also not advanced by Mr. Singhavi. However if the Court otherwise finds that the contract labour system is in fact a sham and bogus system, then the principal employer or the contractors not having requisite licences under the provisions of CLRA could be in a given case an additional factor to be kept in mind by the industrial adjudicator. The absence of the licenses and registration cannot however be made as a sole foundation for drawing an inference that the contract is sham and bogus. In the present case, the Industrial Tribunal had to comment upon this issue in view of the assertion of the Corporation that it had the valid registration. The Tribunal referred to the documents produced by the Union through the office of the Deputy Labour Commissioner, which according to the Union, did refer to present work. The letter from the Deputy Labour Commissioner stated that the Registration Certificate has not been renewed as per law. In that context, the Industrial Tribunal concluded that there were no licences or registration done under the provisions of CLRA. Under CLRA, it may be duty of the Corporation as principal employer to pay the provident fund, but

⁶ (1992) LIC 75 SC

⁷ AIR 2002 SCC 1815

what needs to be noticed that the Corporation took lead in payment of this amount and also levied a cess. Therefore, the criticism levied by Mr. Bukhari on this conclusion drawn by the Industrial Tribunal is not warranted.

44. Mr. Bukhari advanced submissions *in extention* on the legal position regarding the manner in which public employment must take place and that the Courts do not have any power for creation of posts, which will result in the financial out lay on the part of the employer.

45. The first limb of this submission was based on the terms of Reference. According to Mr. Bukhari, the terms of Reference clearly indicate that the concerned workers were not employees of the Petitioner and that there are no posts for these concerned persons and Reference itself indicated that if it is granted, it will result in directing the Corporation to create permanent posts to accommodate the concerned workers. To appreciate this submission, the term of Reference will have to be looked at. The schedule of Reference, for ready reference, is reproduced again as under :-

SCHEDULE

- 1. That the workers listed in the annexures, who have been engaged in and have been working as Sweepers, Loaders, etc. are performing the work of sweeping, clearing the roads/gullies/areas/ markets, etc. of Gr. Mumbai of*

Municipal Corporation and performing the work of collection and transportation of garbage and other refuges be declared to be workers of B.M.C. In addition, every such workman be extended the benefits and status of permanent workers of B.M.C. respectively from the date of completion of 240 days of service from the dates of joining of the respective workers.

2. That the Corporation shall create permanent posts of sweepers/loaders, etc. accommodate the above mentioned workers.

3. Pending finalization of these demands the Corporation shall ensure to pay wages to the above workers concerned equal to the wages of unskilled workers of the Corporation.

4. Pending finalization of these demands the Corporation shall provide that the present set of workers given above shall be continued in the activity of sweeping, cleaning etc. of the Corporation. In the event of change of so-called contractor/NGO's, they shall be granted priority in employment on the basis of seniority, in the same manner the workers in reference (IT) No.81 of 2005 are granted."

Clause (I) of the schedule states that the term is that workers in the annexures be declared as workers of the Municipal Corporation. Clause (II) states that the Corporation shall create permanent posts to accommodate the workers and the other clauses are regarding interim reliefs. Clause (I) clearly indicates that what is sought is a declaration that the concerned workers who are performing the work of sweeping and cleaning the roads are in fact the workers of the Corporation and it be declared so and such workers be extended benefit of status of permanent workers. If an employer indulges in a contract system

which is sham and bogus, then the aggrieved workers who are working under such arrangement will have to seek a declaration that they are in fact the workers of such employer and they have been wrongly deprived the status of permanent workers. Therefore, if the contract is found to be sham and bogus and in fact, the workers concerned are found to be working as permanent workers of the employer, then the industrial adjudicator can direct the employer to acknowledge this fact. Therefore, such direction cannot strictly be considered as a direction for creating posts. Of course, there is a difference between a private employer and public body and concept of creation of posts would arise when the employer is a public body, which aspect is dealt with later. However, going by the terms of Reference, it cannot be contended that the Union had accepted the fact that the concerned workers are not the workers of the Municipal Corporation and were seeking permanency by a direction to create the posts. What they had sought was recognition of an existing fact. Heavy reliance was placed by Mr. Bukhari on the decisions of the Apex Court in the case of *Indian Drugs and Pharmaceuticals v/s. Workmen, Indian Drugs & Pharmaceuticals Ltd.*⁸, *Divisional Manager Aravali Golf Club v/s. Chander Hass & Anr.*⁹, *Shrirampur Municipal Council v/s. V.K. Borade*¹⁰, *Official Liquidator v/s. Dayanand & Ors.*¹¹, *Mahatma Phule Agricultural University v/s. Nasik Zilla Sheth*¹², to contend that the courts cannot direct creation

8 2007 (1) SCC 408

9 2008 (1) SCC 683

10 2011 (4) Mh.L.J. 875

11 2008 (10) SCC 1

12 2001(3) CLR 4 SCC

of posts by regularization.

46. On the other hand Mr. Singhavi submitted that none of these decisions are of any significance to the facts of the present case as it is not the case of the Union that any relief has been sought on equitable basis or any regularization, which any case the industrial adjudicator has power to grant, but the case of the Union is that the concerned workers are in fact and in law the workers of the Corporation and it is only that the Corporation is refusing to acknowledge this position and they are being treated as contract workers only to deprive them of the benefits.

47. In the case of *Mahatma Phule Agricultural University*, it was held by the Apex court that without existence of permanent posts, status of permanency cannot be granted and the order of granting benefit of permanency cannot be sustained. In the case of *Indian Drugs and Pharmaceutical Limited*, the Apex Court observed that merely on the basis of compassion and sympathy, a directive could not be issued for regularization and payment of wages and benefits of regular employees, and accordingly had set aside the impugned directions. It was also held that the creation and abolition of posts are clearly executive functions and the Court cannot create posts when none exist, and also cannot issue any direction to absorb such employees or to continue them in service. In the case of *Divisional Manager Aravali Golf Club*, the position was reiterated

that the creation and sanction of posts are prerogative of executive and legislative authorities and in absence of sanctioned posts, the Court could not issue directions of regularization. This legal position was reiterated in the case of *Shrirampur Municipal Council* by the learned Single Judge of this Court. The Apex Court in the case of *Official Liquidator* underlined the position that all Courts are bound by the decision of the Constitution Bench in the case of *Umadevi(3)*, which has laid down a basic principle that any entry in a public employment ought to be in consonance with Articles 16 and 14 of the Constitution of India.

48. As regard legal position, which is reiterated by the Constitution bench in the case of *Umadevi (3)* and the above-referred case, cannot be disputed. The Apex Court has held that no back door entry into the services of State or its instrumentality, causing injustice to the majority of general public can be made. The Constitution bench has emphasized on the dangers of indiscriminate regularization of casual and daily and contract workers as regular employees, bypassing the mode of public employment and the recruitment rules so framed. The dicta of the Constitution Bench in *Umadevi (3)* is binding on all Courts, including the industrial adjudicator. However, in the circumstances where an unfair labour practice is committed by a public body by keeping the employees/workmen on temporary, casual and daily wage basis for years with an intention to deprive them of benefits and an unfair labour practice of this magnitude is

committed, then the industrial adjudicator is not powerless to grant an affirmative relief. The law laid down by the constitution bench in *Umadevi (3)* and powers of an industrial adjudicator has been reconciled by the Apex Court in the case of *Hari Nandan Prasad & Anr v/s. Employer I/R. To Management of Food Corporation of India and Anr.*¹³. An entry into a public employment must conform to Article 14 and 16 of the Constitution and 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. Once such exploitation is proved, then the power of an 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 *Airport Authority of India, Chhatrapati Shivaji International Airport v/s. Indian Airport Employees Union*¹⁴, this Court, has held that there can neither be an automatic absorption in public service nor complete denial of claim of absorption and permanency and the industrial adjudicator will have to balance the competing rights. There could be cases of recalcitrant officers of a public body deliberately, in collusion, enter into bogus contracts, and then prompt the workers to seek permanency in public service. In the case of *Hari Nandan Prasad*, the Apex Court has indicated few of the parameters and has left it to facts

¹³ (2014) 7 SCC 190

¹⁴ (2016) 2 CLR 805

and circumstances of each case. Existence of posts is also one of the criterions. Whether an order of directing permanency would advance justice or defeats it, would depend from case to case. A 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. In the case of *Airport Authority of India*, as above, this Court found the workers therein had failed to demonstrate that the contract was sham and bogus and the Court found that there existed a valid contract system, which governed the parties. In that case it was an admitted position that no methodology was followed by the Airport Authority of India, a statutory body governed by the rules for recruitment, and many of the workers had initially joined under a valid contract system and had continued under the orders of the Court mandating them to be employed irrespective of the fact that the contractors had ceased to function. In these circumstances, it was held that no straightjacket formula can be laid down and the issue would depend on the facts of each case.

49. On this general proposition of law, the contention of Mr. Singhavi is that on an equitable consideration, when permanency has been sought in the public employment, the industrial adjudicator has power to grant relief in the interest of justice. He submitted that in the present case however, relief is not sought on equitable consideration alone but that, in fact and law, the concerned workers are the employees of the Corporation.

50. The next important position to be considered is the manner in which the contracts are entered and the statutory framework. According to Mr. Bukhari what is sought to be achieved is creation of posts and regularization, while it is the contention of Mr. Singhavi that posts will have to be already treated as present and the Corporation has power to do so and the State Government has already issued directions and only thing is that this decision is being masked by superimposing a contractor.

51. Mr. Singhavi vehemently submitted that a conscious decision has been taken by the Municipal Corporation to employ the workers in a particular fashion for which requisite sanctions have been obtained, resolutions have been passed, budgetary allocation has been made and therefore, there has been a proper and valid recruitment of the concerned workers. It was contended that there is no surreptitious or back door entry sought by the concerned workers. In that context, the relevant statutory framework of the Act 1888 will have to be noted.

52. The Corporation is constituted and is governed by provisions of Act of 1888. Section 3 deals with of the definitions. The areas of the city of Mumbai as 'the city', 'the extended suburbs', 'Brihanmumbai', and 'the suburbs' are defined. 'Street' has been defined as of the highway, causeway, bridge, duct, road, lane, footway,

passage and such words in consequent definitions, street and public street have been defined. Section 61 deals with mandatory duties of the Corporation. Keeping the City clean is one of its mandatory duties. Section 69 of the Act empowers the Commissioner to execute contracts on behalf of the Corporation. Section 69 reads thus :

“ 69. Power to the Commissioner to execute contracts on behalf of the Corporation.

With respect to the making of contracts under or for any purpose of this Act, the following provisions shall have effect, namely :-

(a) every such contract shall be made on behalf of the corporation by the Commissioner;

(b) on such contract, for any purpose which in accordance with any provision of this Act, the Commissioner may not carry out without the approval or sanction of some other municipal authority, shall be made by him until or unless such approval or sanction has first of all been duly given;

(c) no contract, other than a contract relating to the acquisition of immovable property or any interest therein or any right thereto, which involves an expenditure exceeding rupees (fifty lakhs but not exceeding rupees seventy-five lakhs), shall be made by the Commissioner, unless the same is previously approved by the Mayor. For contracts involving an expenditure in (excess of seventy-five lakhs rupees), approval of the Standing Committee shall be necessary;

[Provided that, every contract made by the Commissioner involving an expenditure exceeding five lakhs rupees and not exceeding seventy-five

lakhs rupees shall be reported by him within fifteen days after the same has been made to the Standing Committee.]

[Provided further that], the total amount of all sanctions granted by the Mayor shall not exceed [seven crore fifty lakhs rupees] during a year:

[Provided also that, notwithstanding anything contained in Section 64], the Standing Committee shall consider and dispose of the proposals made by the Commissioner within thirty days from the receipt thereof, failing which the previous approval to such contract shall be deemed to have been given by the Standing Committee and a report to that effect shall be made by the Commissioner to the Corporation];

[Explanation – For the purposes of this clause, the period of “thirty days from the receipt shall be reckoned from the date of the meeting of the standing committee held immediately after the proposal is received in the office of the Municipal Secretary whether the item pertaining to such proposal is taken on the agenda of such meeting or not.]

*(d) [*****]*

(e) the foregoing provisions of this section [shall as far as may be, apply] to every contract which the Commissioner shall have occasion to make in the execution of this Act; and the same provisions of this Section which apply to an original contract shall be deemed to apply also to any variation or discharge of such contract.”

Section 70 describes the mode of executing contracts. Section 79 deals with the preparation of schedule of officers and servants to be prepared by Commissioner and sanctioned by the Standing Committee. Section 79 reproduced as under :

“79.(1) The Commissioner shall, from time to time, prepare and bring before the [Standing committee] a schedule setting forth the designations and grades of the other officers and servants [other than the officers and servants to be appointed for the purposes of officers and servants [other than the officers and servants to be appointed for the purposes of clause (q) of Section 61]; who should, in his opinion, be maintained, and the amount and nature of the salaries, fees and allowances which, he proposes, should be paid to each.

[(1A) The Commissioner shall from time to time, prepare and bring before the [Education Committee] a schedule setting forth the designations and grade of the officers and servants to be appointed for the purposes of clause (1) of Section 61, who should in his opinion be maintained, and the amount and nature of the salaries, fees and allowances which, he proposes, should be paid to each.]

(2) The [Standing Committee or the Education Committee as the case may be] shall sanction such schedule either as it stands or subject to such modifications as they deem expedient:

Provided that no new office of which the aggregate

emoluments exceed [rupees five hundred] per month shall be created without the sanction of the corporation:

[Provided further that the [Education Committee shall before sanctioning the schedule] obtain thereto the previous approval of the State Government and make such modifications therein as the State Government may direct:]

[Provided also that, any sanction accorded under this sub-section shall take effect from the date of such sanction, or such other date which may be retrospective as may be specified therein; but no such sanction shall take effect from a retrospective as date without the previous approval of the State Government, or so as to vary the conditions of service of any officer or servant to his disadvantage with retrospective effect.]

[(3) Nothing in this section shall be construed as affecting the right of the corporation or of the Commissioner to make any temporary appointment which they or he are empowered to make under Section 80A.]”

This section lays down that the Commissioner shall prepare and bring before the Standing Committee a schedule setting forth the designation and grades of the officers and servants. The Commissioner shall also prepare and bring before Education committee a similar schedule. Section 80 lays down that no permanent officer shall be employed in department unless he is appointed under Section 60A, 73A, 74 as per the provisions of the

Act or his office emoluments are included in the schedule at the time in force. Section 80A lays down as to whom the power of appointment vests. Section 80A reads thus :

“80A (1) The power of appointing municipal officers, whether temporary or permanent, [to the posts which rank equivalent to, or higher than, the post of Executive Engineer set forth in a schedule for the time being in force prepared and sanctioned under Section 79], shall vest in the Corporation.

[Provided that, temporary appointment to such posts for loan works may be made for a period of not more than six months by the Commissioner with the previous sanction of the Standing Committee; or in the case of works undertaken of the purposes of clause (q) of Section 61, of the Education Committee; and the Commissioner shall, forthwith report every such appointment, when made, to the Corporation. No such appointment shall be renewed on the expiry of the said period of six months without the previous sanction of the Corporation].

(2) Save as otherwise provided in this Act, the power of appointing municipal officers and servants [whether temporary or permanent, shall] vest in the Commissioner]

[Provided that such power in respect of permanent appointments shall be subject to the schedule for the time being in force prepared and sanctioned under Section 79.

Provided further that no temporary appointment shall be made by the Commissioner for any period exceeding six months and no such

appointment [to a post] [to a post which ranks higher than the post of a Registration Assistant set forth in a schedule for the time being in force prepared and sanctioned under Section 79] shall be renewed by the Commissioner on the expiry of the said period of six months without the previous sanction of the [Standing Committee or of the Education Committee, as the case may be].

[Explanation – For the purposes of this section, subsection (1) of Section 80B and Section 460U, a post shall be deemed to rank equivalent to, or higher than, the post if the minimum of the pay-scale of the former is equivalent to, or higher than, the minimum of the pay-scale of the latter.]”

Section 80B lays down the manner of making appointments. Chapter XX of the Act of 1888 provides for control of the State Government. Section 518 empowers State Government to enforce in performance of duties in default of the municipal authorities. Section 518 is reproduced as under :

“518. (1) If, upon complaint being made to (it) and after such inquiry as (it) thinks fit to make, it shall at any time appear to the State Government that any of the provisions of Sections 61, 62, [62C, 62D, [62E], 89F) 134, 225, [381, 381A] 434, [438 and 513A] have not been or are not being duly carried out or enforced, the [State Government] may make an order prescribing a period within which such provision shall be carried out or enforced.

(2) Provided that, except in any case which appears to the [State Government] to be one of

emergency, no such order shall be made until after the expiry of one month from the date of service of a written notice on the Corporation, and if the [State Government] shall think fit, on the Commissioner, requiring cause to be shown why such order should not be made, nor until the cause, if any so shown has been considered by the [State Government].

(3) If, within the period prescribed in any order made under Sub-section (1) the provision is not carried out or enforced, the [State Government] may appoint some person to carry out or enforce the same and may direct that the expense of carrying out or enforcing such provision together with such reasonable remuneration to the persons carrying out or enforcing the same as the [State Government] shall determine and the cost of the proceedings under this Section shall be paid out of the municipal fund.”

Section 520C empowers the State Government to issue instructions and directions. Section 520C reads thus :-

“520C Notwithstanding anything contained in this Act, the State Government may issue to the Corporation general instructions as to matters of policy to be followed by the Corporation in respect of its duties and functions, and in particular it may issue directions in the larger public interest or for implementation of the policies of the Central Government or the State Government and the National or the State level programmes, projects and schemes. Upon the issue of such instructions or directions, it shall be the duty of the Corporation to give effect to such instructions or directions :

Provided that, the State Government shall, before issuing any instructions or directions under this section, give an opportunity to the Corporation to make representation within fifteen days as to why such instructions or directions shall not be issued. If the Corporation fails to represent within fifteen days or, after having represented, the State Government, on considering the representation, is of the opinion that issuing of such instructions or directions is necessary, the State Government may issue the same.”

This section lays down that notwithstanding anything contained in the Act, State Government may issue to the Corporation general instructions as to matters of policy to be followed by Corporation in respect of its duties and functions and it may issue directions in larger public interest. Thus, as per the scheme of the Act, the Commissioner of the Corporation and the Standing Committee can sanction creation of posts. The State Government can issue rules prescribing the procedure. No recruitment rules have been placed on record by the Corporation. The power to enter into a contract also lies with the Municipal Commissioner, with consultation of the Standing Committee under Section 69 of the Municipal Corporation Act. The contracts in question have been entered into by following the requisite procedure and in consonance with all statutory provisions. Section 63-A of the Act deals with performance of functions by agencies. It states that where any duty is imposed or any function has been assigned to the Corporation, the Corporation may either discharge the said duty or perform such functions or

implement such scheme by itself or through an agency subject to such directions that may be issued and the terms and conditions as may be determined by the State Government. No such directions are placed on record. It is also provided that Corporation may also specify terms and conditions not inconsistent. The terms and conditions can be determined by the State Government for such agency agreements.

53. Under Section 520C of the Act, the State of Government can issue general directions and the Municipal Corporation is under mandate to give effect to the same. By Circular dated 26 April 1985 the State Government has issued directions to the Municipalities to stop the system of contract labour for Safai Mazdoor and to create posts so that Safai Mazdoor who have completed 240 days can be given benefit of permanency. The English version of Circular dated 26 April 1985, which is placed on record, reads thus :-

“ Various organizations institutions based in and outside the state time and again send their complaints demands about Bhangi Mukti (Prevention of Scavenging) to the State Govt. The tone of these complaints is that the Govt. does not take due measures to redress their grievances. As regards to Bhangi/ Safai workers demands, various departments of the Govt. take action on the related subjects. This department concerns with Municipal Corporations and Municipalities which are self-governing bodies. The govt. had appointed the Lad Committee to suggest various measures to redress the grievance of the Bhangi/Safai workers employed in the service of Municipal Corporations and

Municipalities. To implement its suggestion, the Dept. of Industry, Energy and Labour had already issued orders vide GR No. 1075/1792/Labour-5, dt. 12 Aug. 1975. The Govt. orders were sent to all Municipal corporations and the Municipal Administration. The said Directorate time and again issued clarificatory circulars to that effect.

2) Demands, beyond the preview of the terms and conditions of the lad committee, were submitted to the State Govt. and to the various committees of legislative. The Govt. feels that in such cases action to be taken by the local self bodies, i.e. Municipal Corporations and Municipalities should be on the following lines.

3) These from Meheter Community who have built houses by forming Co-operative Housing Societies, be paid 50% cost as per individual housing scheme. The Govt. had already issued directions to Municipalities to earmark 5/0 of their revenue for upliftment/betterment of backward classes. Municipalities should consider to extend financial assistance from the earmarked fund to Bhangi/ Safai workers, who have undertaken housing project on cities by forming Co-op. Housing Societies. Though no Govt. orders are issued in respect of earmarking 5/0 of the net revenue the Govt. feels that M.Cs should make budgetary provision to that effect from giving financial assistance for the upliftment of the backward classes and also examine whether they can utilise such a fund for extending financial assistance to Bhangi/Safai workers housing scheme.

4) M.Cs should build residential quarters in cities for Safai workers. The essential duties of M.C.s have been incorporated in clause 63 of the Bombay

Provincial Municipal Corporation Act provision listed at serial No. 23 under clause 63 of the said Act states that construction of residential quarters for Safai workers and its implementation is one of the essential duties of M.Cs. As such M.Cs should take necessary action for compliance of their essential duties.

5) Provide Churches and Ashram schools for the children of women Safai workers serving in Municipalities.

6) The Social Welfare Dept. of the state govt. gives all sorts of financial assistance to the voluntary organizations for running a church. Subject to the condition that 10% of the expenditure on this account is borne by the concerned institution considering the number of women workers the local self bodies feel it necessary to have a church or where there is a demand for it in such instructions are that the local self bodies should constitute the above mentioned 10% share from the funds made available to them under the scheme of upliftment of backward classes. As regards this matter the concerned institution should contact the Directorate of social welfare.”

54. The above circular was issued by the State Government on 26 April 1985 in respect of the safai workers employed by the Corporation. It was noted that time and again complaints were received regarding the demands of the safai workers. The State Government had appointed a Committee known as Lad Committee to suggest various measures to redress the grievance of the safai workers. In pursuant to its suggestions, Department of industry and

Labour had issued certain orders. Circular dated 26 April 1985 laid down welfare measures including the direction to municipalities to earmark part of their revenue for upliftment and betterment of this backward class. It was also suggested that residential quarters be constructed for safai kamgars as it is one of the essential duties of the Municipal Corporation to keep the city clean. A circular was also issued on 10 September 1985 by the Urban Development Departments that many safai workers are working for more than three years on temporary basis and no steps are being taken to make them permanent. Information was called for in respect of such safai workers. A circular was also issued on 1 October 2003, making reference to Lad and Page Committees in respect of welfare measures of the safai kamgars. It was directed that the protection in services be given to such safai kamgars, if necessary by relaxing the rules of recruitment. The power under which the circulars are issued by the State Government is traceable to its power to issue requisite direction to the Corporation under section 520 C of the Act of 1888.

55. It is a mandatory duty of the Corporation to remove the solid waste to keep the City clean. The Standing Committee and the Municipal Commissioner have powers to employ necessary workforce for carrying out the mandatory duties. The State Government has powers to issue necessary directions to the Corporation in respect of the duties to be carried out by the Corporation. The case of Safai Kamgars has always been treated on different footing by the State

Government, looking at the nature of work they do and their oppressed social status. The plight of Safai Kamgars, primarily consisting of the backward sections of the society, has engaged the attention of the State Government for long time and various committees have been constituted to suggest measures improve the living and working conditions. As the above circulars and the others placed on record show that directions have been issued by the State Government to avoid appointing the Safai Kamgars on contract basis and to absorb them in service. Various social welfare measures have been directed to be undertaken.

56. As per the case of the Corporation, after the Municipal Commissioner visited Hyderabad and found that the Hyderabad pattern should be introduced in Mumbai, a proposal to that effect was put before the Standing Committee. The Standing Committee sanctioned the same and budgetary allocations have been made. The Act of 1888 contemplates that the Municipal Commissioner and the Standing Committee have power to create posts and employ necessary workforce to carry out the mandatory duties. The State Government has power to give directions if the State Government finds that the actions of the Municipal Corporation are not in public interest or amount to wastage of Municipal funds. The State Government has issued various directions to the Municipal Corporation to ensure that the living conditions of Safai Kamgars be improved. The witness of the Corporation, Dinkar Wasekar, Head

Supervisor stated that he was one of the participants of the study group on the subject of Hyderabad pattern. He accepted that the report, which was prepared, was placed before the Standing Committee and after due sanction, it was implemented from May – June 2004. He also admitted that the expenditure incurred on the work of Hyderabad pattern is reflected in the budget of the Corporation. Therefore after a conscious decision has been taken by the authorities empowered to create posts to proceed to engage the workforce, albeit through the nomenclature Hyderabad Pattern. Therefore, the engagement of the concerned workers cannot be considered as a surreptitious or a back door entry. A methodology required under the statute was followed. The case of the concerned workers therefore cannot be treated on par with daily wagers or contract workers employed illegally by officers of public bodies in contravention of recruitment rules and who seek permanency in public service on the basis of sympathy. Mr. Singhavi is right in contending that not only the entry of the concerned workers is not through the back door but is through the front door, if one can use such a phrase.

57. During the hearing of this petition the assertion of Mr. Singhavi regarding powers of the Commissioner, powers of Standing Committee, powers of State Government, Budgetary Allocation, Sanctions of the Standing Committee were not controverted. Therefore, as far as the concerned workers are concerned, their entry

into the service cannot be considered as violative of Articles 14 and 16 of the Constitution of India. The engagement of Safai Kamgars was with full knowledge of the State Government, who in fact cautioned the Municipal Corporation against engaging them on contract basis. Various Committees such as Barve Committee, Lad Committee, and Page Committee have issued various directions. The contentions of the Corporation in respect of the Circular dated 26 April 1985 and other circulars issued by the State Government is that such circulars are not automatically applicable and those have been issued prior to the decision of the Apex Court in the case of *Umadevi (3)*. It was submitted that such circulars cannot be given effect to as the persons are not employed by the Petitioner but by the contractors. Therefore, the stand taken by the Corporation is that since the concerned workers are the workers of the contractors, none of the circulars or the reports of the Committees are applicable and the absorption and regularization could not be granted by the Courts in contravention of the law laid down in the case of *Umadevi (3)*. However, factually if it is found that the concerned workers are in fact the workers of the Corporation, then this foundation is destroyed. Therefore, once it is found that in reality, the concerned workers are actually working for the Corporation then the question will remain of the legitimacy of their entry in the employment. As stated earlier the scheme of the Act, various circulars and the social welfare policy indicated in the circulars and the fact that the authorities empower to create posts have taken a decision, show that concerned workers have

been validly recruited.

58. The next limb of the argument of Mr. Bukhari is that none of the concerned workers have completed requisite 240 days and their engagement is under interim orders of the Court and can be termed as purely litigious employment. Mr. Bukhari strongly contended that the Union has not established that which of the concerned worker has completed 240 days and the Award also does not refer to any finding regarding completion of 240 days. He submitted that even going by the circulars relied upon by the Union that the concerned workers will have to complete requisite 240 days in service. It was submitted that the furthermore mere completion of 240 days itself could not entitle the person to claim permanency in the services of the employer under Clause 4(c) of the Model Stand Orders. Reliance was placed by Mr. Bukhari on the decision of the Apex Court in the case of *Surendranagar District Panchayat v/s. Dahyabhai Amarsinh*¹⁵, *R.M. Yellatti v/s. Asst. Executive Engineer*¹⁶, *Gangadhar Pillai v/s. M/s. Siemens Ltd.*¹⁷, *State of Maharashtra v/s. Pandurang Sitaram Jadhav*¹⁸, *M.P. Housing Board*¹⁹, *Mahendra Jain v/s. Indore Development Authority*²⁰. According to Mr. Singhavi, the

¹⁵ 2005(III) CLR 892

¹⁶ 2006(1) SCC 106

¹⁷ 2007(II) CLR 139

¹⁸ 2008 (III) CLR 151

¹⁹ 2006 (2) SC 7023

²⁰ 2005 (1) SCC 639

Respondent – Union had asserted that the concerned workers had completed 240 days and the Corporation could have stated that which one of the workers had not completed 240 days and thereafter, burden would have shifted back on the Union.

59. In the case of *Surendranagar District Panchayat*, Apex Court considered the case of a daily wager who claimed he was terminated after completion of 240 days in a year and his termination was in breach of Section 25F of the Industrial Disputes Act. The Apex Court held that it was for the workers to bring material evidence on record in support of his claim that he had worked for not less than 240 days. In the case of *R.M. Yellatti*, three Judges Bench of the Apex Court reiterated the legal position that the requirement of 240 days in service is upon the workers to prove. However, in this case the Apex Court acknowledged the position that in case of daily wagers, there may not be any appointment or termination and there will be no receipt of payment and in most cases the workmen could only call upon the employee to produce material on record to be given for the period the letter of appointment and drawing of adverse inference would depend on facts of each case and mere non-production of muster-roll by the employer would not lead to drawing an adverse inference against the management. Mr. Singhvi relied upon the decision in the case of *Bajaj Auto Ltd. v/s. Bhojane Gopinath*²¹. The Appellant had challenged the judgment of the High

21 2004(9) SCC 488

Court whereby the Award made by the Industrial Court was modified. Before the Industrial Court, it was argued by the Appellant – employer that none of the workers completed the work for 240 days and they were not entitled to any benefit on that count. The Industrial Court directed the Appellant to grant permanency to the workers after completion of 240 days in service. This Award was challenged in the High Court and the High Court dismissed the Petitions of the Appellant and modified certain directions issued by the Industrial Court. Before the Apex Court, it was urged that there was no unfair labour practice committed by the Appellant under Item 6 of the Schedule as a rule akin to 4(c) of Model Standing Order was not applicable as there was no such rule in the certified Standing Orders. According to Mr. Singhavi that in spite of this submission made, the Apex Court did not intervene and the Appeals were dismissed.

59. In the present case, the Union has asserted that the concerned workers were working continuously. A list of workers was annexed at Exhibit 'A' to the Statement of Claim. It was stated in the Claim that this list would show that the workers had worked continuously for the stipulated number of days. The manner in which the workers worked, the manner in which their attendance was kept and that they were only shown to be working through the contractors, was asserted. The stand taken in the written statement by the Corporation in this regard will have to be seen. The only

reference to the completion of 240 days is found in paragraph 16 of the written statement, where in one line the Corporation has stated that "the first party totally denies that any of the concerned workmen has completed 240 days of service as claimed'. This is in context of the main stand that, since the concerned workers were not the employees of the Corporation, they have not even worked for a single day with the Municipal Corporation. Therefore, having taken this categorical stand now it is not open to the Corporation to contend that the Respondent – Union failed to prove that the workers had completed 240 days. A schedule was annexed in which names of each concerned workers were referred to and the details of services was given for each worker. The Corporation cannot, in a single line, place the burden back on the Union.

60. Furthermore, it is the contention of Mr. Singhvi that though the concerned workmen have worked for period ranging from 1 to 3 years, at the time of award the subsequent service also will have to be added, taken into consideration that during the pendency of the reference instituted in the year 2007, the Corporation has consciously engaged the services of these workmen and it was not out of any compulsion or due to orders of the Court.

61. In this context, the interim orders passed during these proceedings, to which reference has been made earlier, will have to be examined. An Application was moved under Exhibit U-4 by the

Union seeking an interim order. The Industrial Tribunal on 8 May 2007 had directed the parties to maintain *status-quo*, which order was challenged by the Municipal Corporation in Writ Petition No. 3928 of 2007, which was disposed off directing the Industrial Tribunal to dispose of the application filed by the Municipal Corporation for vacating interim relief. The application for interim relief was heard by the Industrial Tribunal and was allowed by order the dated 6 June 2007. Corporation challenged this order by Writ Petition (Lodg.) No. 1357 of 2007. The Writ Petition was disposed off by the learned Single Judge on 2 November 2007. The relevant passage from the order is reproduced as under :-

“(a) The Corporation shall put all the tenderers, new or renewed, a condition to the effect that the contractors shall hire atleast 60% of the workmen from amongst the list of 2700 workmen involved in the present proceedings. If the contractors are not prepared to accept the condition, it is open for the Corporation to cancel the entire process of tenders and initiate fresh process of inviting tenders putting this as a condition precedent for allotting the contracts to the new contractors. Till the aforementioned process is completed the existing contractors may be allowed to be continued. However, the corporation shall conclude the said process within a period of eight weeks from today.

(b) The Industrial Tribunal is directed to dispose of reference (IT) No.13 of 2007 as expeditiously as possible and preferably within a period of six months from the date of receipt of this order. The parties are

directed to co-operate disposal of the reference within the timeframe. The parties shall refrain themselves from seeking adjournments on frivolous grounds.

With these directions the writ petition stands disposed of.”

There was a serious debate at the bar as to what is the meaning of the condition that the contractor shall hire at least 60% of the workers amongst the list of the 2700 workers in the present proceedings. According to Mr. Bukhari, it is due to this direction that the workers had to be continued otherwise they need not have been continued. It was contended by him that in view this direction that 60% of the 2700 concerned workers had to be engaged by the Municipal Corporation and because of this order they continued in service. It was submitted that therefore their services are purely on the basis of the order of the Court and therefore, is a litigious employment and this period cannot be considered.

62. The order passed by the learned Single Judge on 2 November 2007 will have to be looked at in its entirety. An order was passed by the Industrial Tribunal directing the Corporation to protect the services of 2700 workers. The Industrial Tribunal had directed that to protect the employment of 2700 employees, a condition shall be incorporated in the tender that the work should be provided on priority basis to 2700 employees for the purpose of

carrying out the work of sweeping, cleaning and transportation of garbage. The learned Single Judge noted the earlier order dated 12 April 2006 in Writ Petition Nos. 1862 of 2006 and 2207 of 2006 between the same parties earlier, wherein a condition was stipulated that the contractors shall hire at least 60% of the workers amongst the list of workers. The learned Single Judge opined that the question raised on the merits of the reference can be gone into at the time of hearing and a direction in respect of absorption of workmen need not be passed, but the Corporation will be obliged to put a condition to the contractor to hire at least 60% of the workmen from 2700 workmen till disposal of the reference. It was also stated that if any of the contractors were not prepared to accept the condition, the Corporation would cancel the entire process and initiate fresh process by appointing new contractors. This direction is clear and unequivocal. There is no mandate on the Municipal Corporation to continue to engage the concerned employees. If the Municipal Corporation was to give a contract in respect of the work in question, while engaging the workforce, instead of engaging all outsiders, the contractor would be obliged to take 60% of the workforce from the pool of concerned workers. Nothing stopped the Contractor from refusing such terms and conditions, in such case new contracts would have been easily issued. In the case of *Airport Authority of India, Chhatrapati Shivaji International Airport, Mumbai v/s. Indian Airport Employees' Union, Mumbai & Ors.*²², the contractors had

22 2016(II) CLR 805

refused to accept a similar condition and thereafter under specific orders of the court the workers were continued under direct employment of the Airport Authority. No such fact situation exists in the present case. As rightly contended by Mr. Singhvi, it is because that the Municipal Corporation needed the services of the concerned employees that they have continued even during the reference and not because they were forced to engage them due to the interim orders passed. The witness of the Corporation, Vijaykumar Kaskar admitted that the concerned workers in the reference were earlier required to work for all 365 days till they got four days off in a year. Mr. Wasekar admitted that there has been increase in the population of the city, in the length of the road and the generation of the garbage and the workers on permanent roll are below the requirement and it is correct that the concerned workers are working on this required posts. Therefore, from the evidence that has been led it is clear that the requirement of the Corporation for increase in man power, to perform its mandatory duty to keep the city clean, has grown over the years, as is admitted by the witness of the Corporation. Therefore, it is not out of interim order of this Court that the concerned workers have been continued but the Corporation required such work to be undertaken and for which work force is necessary. The work that is being carried out by the concerned workers and the condition in which they work are so low and demeaning and that many persons may not be willing to undertake task of cleaning human waste, removing dead and rotting animals, etc. Therefore, it is out need of

the Municipal Corporation to have increased work force that the concerned workers are employed and are continued, and not due to interim order of this Court has sought to be made out. Therefore, there is no question of any litigious employment of the concerned workers and there subsequent service will have to be taken into consideration.

63. Next argument of Mr. Bukhari is that even assuming the concerned workers have completed 240 days, *ipso facto* will not entitle them to permanency under Clause 4(c) of the Model Standing Orders. In the case of *Pune Municipal Corporation v/s. Dhananjay Prabhakar Gokhale*²³, of the Division Bench of this Court, relied upon by Mr. Bukhari, the Industrial Court had allowed a complaint filed by the Respondent under Item 6 of Schedule IV of MRTU and PULP Act, 1971. The Municipal Corporation had challenged the said decision on the ground that merely because stipulated 240 days were completed, permanency under this clause could not be automatically granted, ignoring the well-settled law by the Apex Court that such permanency cannot be granted in absence of availability of permanent posts. If the factual finding in the present case is that the concerned workers were validly recruited by the Corporation and continued and they are found to be working for the Corporation, then the position of law laid down in these decisions in which a permanency was claimed by a daily-wage worker appointed on

²³ 2006(2) CLR 105

temporary basis, will not be applicable. In the case of *Gangadhar Pillai v/s. Siemens*, the Apex Court had considered the case of casual and temporary employee who had worked for number of years and had sought permanency in the employment. Again the factual matrix of this decision is different than the one at hand, as stated above. In the case of *State of Maharashtra v/s. Pandurang S. Jadhav*, Division Bench of this Court was considering the grievance of daily wagers, who after working for 12 to 20 years had claimed permanency in service. These persons were not appointed through regular method and were appointed on daily wage basis. It is in this context the Division Bench emphasized the law laid down by the Constitution Bench in the case of *Umadevi (3)*. Therefore these decisions would be of no assistance to the Corporation.

64. Mr. Singhvi relied upon the settlement dated 15 February 2003 in which the Corporation had entered into a settlement with the Union for taking the Safai Kamgars on permanent basis. It was agreed that after period of three years as a probation workers referred to in the annexures to the settlement, would be treated as permanent workers of the Municipal Corporation. Relying on the Settlement it was contended that in the case of *Hari Nandan Prasad*, the Apex Court has held that the Industrial Court has held that the industrial adjudicator has power to grant an appropriate relief to the workers if similarly situated workmen have been granted such relief, otherwise it will amount to infraction of Article 14 of the Constitution of India. It

is the contention of Mr. Bukhari that this settlement contemplated that reservation policy would be applicable and it would be subject to the suitability of the candidate and good performance. Mr. Bukhari submitted that the letter dated 26 December 2002 will have to be read along with the settlement of the year 2002. He stated that by this letter the Municipal Commissioner had informed the Secretary of the Union, various conditions under which the settlement will have to be undertaken. It was submitted that those workers had completed 10 to 15 years without orders from the Court and it was a onetime settlement.

65. I do not find any distinction between the situation that existed when the settlement between the Petitioner – Corporation and Respondent – Union took place on 15 February 2003 and as of the present set of workers. As far as the reservation policy is concerned, it has been asserted by the Union that almost all of the concerned workers belong to backward class and marginal strata of the community, which has been accepted. In the circulars issued by the State Government and the report of the Lad Committee, Page Committee, etc. have repeatedly referred to the Safai Kamgars with reference to their status of members of backward class. If identically situated Safai Kamgars doing the same work as the concerned workers have been made permanent by the Corporation, then it will be negation of principal of equality enshrined under Article 14 of the Constitution of India if it is denied to the present set of workers. Even

otherwise, apart from this equitable consideration, the finding of fact is that the concerned workers are in reality workers of the Municipal Corporation. As far as length of service is concerned, looking at the sub human level at which the work is performed, one need carry out such work for decades to claim parity. No particular qualifications are placed on record. Therefore, extending the equality doctrine under Article 14 of the Constitution of India, which the industrial adjudicator is empowered to do, would be an additional factor in favour of the Union, if not the sole one.

66. It was contended by Mr. Bukhari that the finding of the Tribunal that the work being of perennial nature, the contract is sham and bogus is incorrect as this criteria has no relevance and may have relevance for abolition of contract under Section 10 of CLRA. It was contended that there is no prohibition and the contract has not been abolished and therefore the Award of the Tribunal is bad in law. There is no dispute about the proposition that under Section 10 of CLRA, one of the criteria that the appropriate Government will have bear in mind before issuing a notification under sub-Section (1) is that the work is of perennial nature. It is therefore correct to submit that merely because the work is of perennial nature, the contract does not become sham and bogus *ipso facto*. However, there is no dispute and cannot be a dispute that the work of keeping the city clean and the solid waste management is a work of perennial nature for the Municipal Corporation and it is one of its mandatory duties.

Therefore, though this factor alone would not lead to a conclusion that the contract is sham and bogus, this factual position will be of relevance to the argument that the concerned workers have been continued in service not because of the orders of the Court but the Municipal Corporation requires them. This factual position will cement and supplement the conclusion that the Municipal Corporation engaged in such a paper arrangement only to avoid giving status of permanency to the concerned workers.

67. Heavy reliance was placed by Mr. Bukhari on the report of the Investigating Officer pursuant to the order passed on 10 May 2013 in Notice of Motion No. 601 of 2013 in Appeal No. 1034 of 2010. The Investigating Officer of the Industrial Tribunal was directed by the Division Bench to verify the numbers and identify the actual workers involved in the reference. It was submitted that the report dated 25 September 2014 had identified only 1600 persons and not 2700. It was submitted that even Mr. Ranade admitted in the cross-examination that 400-500 members have left and in spite of this position the Industrial Tribunal has granted permanency to 2700 workers. It was contended by Mr. Singhvi that the Investigating Officer only carried out an exercise for the purpose of interim relief and he ascertained the position only on the basis of documents such as Adhar Card, PAN Card, etc. He submitted that many workers who have migrated to a City in search of jobs and are residing in slums do not have such documents. It was contended that the declaration that

these workers are workers of the Corporation will relate back to the date of the reference. Mr. Singhvi relied upon Section 18(3)(d) of the Industrial Disputes Act and pointed out that the Award when passed will relate to the date of the dispute. It was submitted that even assuming the concerned workers have left when the report of the Investigating Officer was submitted on 24 June 2013, even these workers will be entitled to receive their wages.

68. The Investigating Officer submitted a report pursuant to the directions passed by the Division Bench of this Court. When the Petition came up before the learned Single Judge the Union had made a statement that an affidavit will be filed giving details of the workmen. Thereafter, when the Petition was disposed of on 2 November 2007, direction was issued to the Corporation to the effect that the contractors will hire at least 60% of the workers amongst 2700. It was the contention of the Municipal Corporation that the Corporation had submitted three lists on affidavit. First list was of 1255 workers, second consisted of 560 workers and third of 51 workers. Therefore, in the Appeal it was contended that the requirement of 60% be reduced to 1842, that is the total of three lists. This was opposed by the Union stating that what is sought is to reduce the ambit of engagement from 2700 to 1842. The Division Bench noted that at that the monsoon was just around the corner and the controversy was necessary resolved speedily so that the Municipal Corporation can engage the requisite number of Safai Kamgars as an

interim measure and accordingly directed the Investigating Officer to carry out the verification and that the direction in respect of 60% would operate to 1842 workmen. Pursuant to this direction the Investigating Officer carried out an enquiry. The concerned workers were interrogated with reference to the record like Adhar Card, PAN Card, etc. to verify their identify. The Investigating Officer submitted a ward-wise list and identified 1600 workers. The Reference in respect of 2700 workers, whose details were given as a schedule to the reference, was pending for final adjudication when these interim directions of verification were passed. The Appeal Bench had kept in mind the urgency and had issued certain directions of immediate nature. The entire exercise was with reference to the stipulation of engagement of 60% of the concerned workers. This exercise was not to finally determine the entitlement of the workers concerned in the reference. This adjudication could not have been undertaken by the Investigating Officer. Therefore, this exercise will have to be limited for the purpose of determining the pool from which the concerned workers had to be engaged by the contractor as an interim measure. The report of the Investigating Officer cannot be elevated to the status of final determination of the dispute. Furthermore, once a declaration is granted that the concerned workers were in fact engaged as permanent workers by the Corporation, then they are to be treated as permanent workers from the date of the Reference. Mr. Singhvi is right when he gave an example that during the pendency of the reference if a person expires and it is declared that he was

permanent workman, then his survivors would get a monetary benefits and it would not be that he will not be treated as a permanent workman at all because on the date of the Award he was not alive. Therefore if some of the workmen have left the service being a permanent workman, the Corporation being their employer, a disciplinary action and termination from service from the date of the absence, can always be taken by the Corporation but this will not lead to a position their status of being a permanent worker, is taken away.

69. Mr. Singhvi heavily relied on the recent decision of the Apex Court in the case of *Nihal Singh and Ors. v/s. State of Punjab & Ors.*²⁴, to my mind rightly, as it is of importance for adjudication of the present dispute. The decision therefore will have to be carefully perused. An appeal was filed in the Apex Court from the decision of the High Court of Punjab and Haryana. There was a large scale disturbance in the State of Punjab in 1980's. The State could not handle the prevailing law and order situation and the State invoked the provisions of the Police Act, 1861, which enabled the State to appoint Special Police Officers. A meeting was held between the State and the officers of the banks in public sector wherein it was decided that the Special Police Officers (SPO), would be required, however, it was not possible for the State to provide police guards and if the banks took over the responsibilities of SPOs, they could be so

24 (2013) 14 SCC 65

appointed. The Appellants before the Apex Court were such SPOs who were registered through employment exchange. The Appellants and similarly situated persons approached the High Court seeking directions for regularization of services. The Petition was disposed of directing the consideration by the State. The Superintendent of Police rejected the claim of regularization on the ground that the Appellant and the others were appointed only at the request of the bank authorities and when they were working with the bank, no seniority list is maintained and therefore, they could not be regularized. The High Court accepted the position that the relationship of master and servant of SPOs was with the State Government and not with the banks, however rejected the claim of regularization on the ground that there was no regular cadre and there were no requisite number of posts, and these factors clearly mitigated against such services being regularized. Before the Apex Court it was contended that once it was held that master and servant relationship existed, then regularization could not have been denied. It was urged that the State cannot extract work from for long period and then turn back and contend that the appointments were not made against sanctioned posts. The decision of the High Court was defended by the State relying on the decision of the Constitution Bench in the case of *Umadevi (3)* and it was contended that in absence of sanctioned post, relief as prayed for cannot be granted. The Apex Court examined the manner in which the SPOs. were appointed and held that it was obvious that they were appointed in exercise of statutory

powers and only distinction was that they were paid daily wages and that the payment was to be made by the banks. The Apex Court did not find any justification for the State to take a defence that after permitting utilization of service of large number of people for decades to contend that there are no sanctioned posts. The State has to create sanctioned posts on the basis of rational assessment of the need.

70. As regard the question whether the Court can compel the State to create posts, in *Nihal Singh*, the Apex Court examined the ratio of *Umadevi (3)* and observed that the Constitution bench was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution in view of the fact that instrumentalities of the State had resorted to irregular appointments, especially in the lower rungs of the service, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. The Apex court observed that in *Umdevi (3)* the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the scheme of the Constitution in the matters of public appointments and the Constitution Bench while recognizing the authority of the State to make temporary appointments engaging workers on daily wages, declared that the regularization of the employment of such persons, which was made without following the procedure conforming to the

requirement of the Scheme of the Constitution in the matter of public appointments, cannot become an alternate mode of recruitment to public appointment. Commenting on the facts of the case before it, the Apex Court observed that the initial appointment of the Appellants could never be categorized as an irregular appointment. It was held that the initial appointment of the Appellants was made in accordance with the statutory procedure contemplated under the Act and the decision to resort to such a procedure was taken at the highest level of the State by a conscious choice. As regards the creation of posts and need to employ workforce it was observed by the Apex Court that the assessment of the need to employ a certain number of people for discharging a particular work is with the executive but that does not mean that an examination by a Constitutional Court regarding the accuracy of the assessment of the need, is barred. It was held that the facts before the Apex Court demonstrated that there was need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts and stop extracting work from persons such as the Appellants therein itself would be arbitrary action/inaction on the part of the State. Apex Court concluded by observing that the decision of *Umadevi (3)* cannot become a licence for exploitation by the State and its instrumentalities. Facts in the present case are similar. The Municipal Commissioner and the Standing Committee have taken a conscious decision. Engagement of the concerned workers is not a back door entry. The work exists, which even the witnesses of the Corporation

have admitted. The concerned workers are working full time. There is no question of creation of posts. It is a facade put up by the highest authorities in the Corporation to mask the real terms of engagement by introducing a paper intermediary. Industrial adjudicator is fully empowered to stop such exploitation of workforce at the hands of a public body.

71. As regards the contentions of Mr. Bukhari that the award will place financial burden on the Corporation, the mandatory duties of the Corporation will have to be noticed. The Corporation has a duty to ensure that the city is kept clean and hygiene is maintained. Section 61 deals with the mandatory duties of the Municipal Corporation. Relevant provisions of Section 61 reads thus :-

“ 61. Matters to be provided for by the Corporation.

It shall be incumbent on the corporation to make adequate provision, by any means or measures which it is lawfully competent to them to use or to take, for each of the following matters, namely :-

(a) the construction, maintenance and cleansing of drains and drainage works, and of public latrines, urinals and similar conveniences;

(ab) urban forestry, protection of environment and promotion of ecological aspects;

.....

(c) scavenging and the removal and disposal of excrementitious and other filthy matters, and of all ashes, refuse and rubbish;

(d) the reclamation of unhealthy localities, the removal of noxious vegetation and generally the abatement of all nuisances.

.....

(m) the construction, maintenance, alteration and improvement of public streets, bridges, culverts, causeways and the like [and also other measures for ensuring the safe and orderly, passage of vehicular and pedestrian traffic on streets];

(n) the lighting, watering and cleansing of public streets.”

The mandatory duties include construction, maintenance of streets cleaning of drains and drainage works, public latrines and similar, conveniences, scavenging and removal of excrements and such other filthy matters, ashes, refuse and rubbish. Protection of environment and promotion of ecological aspects, cleaning of solid waste, removal of refuse, and maintenance of cleanliness on the streets are mandatory duties of the Municipal Corporation. In the rules framed under the Environmental Protection Act also such duty has been cast on Municipal Corporation. There is no dispute on this aspect. For that purpose the Municipal Corporation has employed large number of permanent staff. Its witnesses have admitted that

due to the growing population, increase in the streets, increase in generation of solid waste, extra work force is required and in fact this need is filled in by the concerned workers. It is also necessary to keep in mind the decision of the Apex court in *Mahatma Phule Agricultural University*. This case arose from a complaint filed under the Maharashtra Recognized Trade Union and Prevention of Unfair Labour Practices (MRTU & PULP) Act. It was submitted before the Apex Court that the Universities had no funds to make payments. The Apex Court repelled the argument referring to decision of the Supreme Court in *Chandigarh Administration v. Rajni Vali*²⁵ wherein it was held that the State Administration cannot shirk its responsibility on the plea of lack of resources. It is for the Administration to find out ways and means of securing funds for the purpose. Therefore, the Municipal Corporation cannot take up a ground of lack of finances for implementation of the Award as the Municipal Corporation cannot shirk its mandatory duty, citing lack of resources. It is for the Municipal Corporation to secure and rationalise funds for the said purpose.

72. Mere existence of a contractor does not mean that the contract system is unquestionable. It may be a perfect paper arrangement but in reality it could be the management who is the employer and not the contractor. The Industrial Tribunal is entitled to go behind the paper arrangement to ascertain the nature and duties

25 2000 1 CLR 482 SC 159

and circumstances how the work is actually being carried out and is entitled to conclude that the contract is not genuine. The CLRA applies to cases where there is a bonafide contract and the workers claim its abolition. This is different from an allegation that the workers have been deprived of a permanent status under the garb of a bogus contract system. The present case has nothing to do with a genuine contract system and its abolition. In the present case the Union has proved that the paper arrangement by the Corporation is a subterfuge and the Industrial Tribunal had all the powers to ascertain whether the contract was genuine and bogus. Having come to the conclusion that the contract system was sham and bogus it had power to declare that there was a relationship of employer and employee with the Corporation and the concerned workers and to extend all the benefits to the concerned workers. Merely because there existed a contract did not preclude the Industrial Tribunal from lifting the veil, taking into consideration the totality of the circumstances. In the present case, the Corporation had taken a preposterous stand that the concerned workers are merely volunteers working with NGOs. Subsequently such stand is not pressed further. But it only goes to show the length at which the Corporation had gone to deprive the benefits of permanency.

73. In view of the recent pronouncement of the Apex court in the case of *State of Punjab & Ors. V/s. Jagjit Singh*²⁶, after concluding, the learned counsel for the parties again addressed the

court. This case arose from the decision of the Appeal Bench of Punjab and Haryana High Court wherein the judgment of the learned Single Judge directing the State to pay the daily- wage workers, wages and allowances as were being paid to regular employees, was set aside by the Appeal Bench. The learned judges of the Apex Court took a detailed review of the earlier decisions and found that the courts had intermingled the issue of regularisation of the employees while adjudicating upon the preposition of pay parity. Mr. Singhvi submitted that though the decision may not have any direct bearing on the main controversy, the observations made by the Apex Court and shift in the legal reasoning will be of importance to be taken note of and also the direction to pay equal wages. Mr. Bukhari submitted that only if it is found that the Corporation has employed the concerned workers on temporary basis, the dicta may be made applicable. He submitted that the parity in pay was only an interim relief in the terms of the present Reference. In view of the finding that the concerned workers were always the employees of the Municipal Corporation, duly appointed, the principle of pay parity enunciated by the decision need not be made applicable. However, the observations of the Apex Court in paragraph 55 of the report are illustrative. The Apex Court held that policies to create artificial parameters to deny fruits of labour to an employee engaged for the same work cannot be countenanced in a welfare state. Such an action, besides being demeaning ,shocks of the very foundation of the human dignity, as one who is compelled to work on lesser wages does

not do so voluntarily. The Apex Court observed that such action constitute an act of exploitation emerging from a dominant position. Reliance was also placed on Article 7 of the International Covenant on Economic, Social and Cultural Rights 1966, to which India is signatory having ratified the same on 10 April 1979. Under this convention the India has recognized the right of every one to the enjoyment of just conditions of work, healthy working conditions, leisure, reasonable limitations of working hours, periodical holidays and pay.

74. By the Award, the Concerned workers are declared to be permanent workers of the Corporation. They will have to be given benefits on par with the other permanent workers. These 2700 workers are working shoulder to shoulder with 28000 odd permanent workers engaged in keeping the City clean. While the permanent workers are accorded all the facilitates and security of tenure, the working and living conditions of the concerned workers, are pitiable. The way they have to live, the manner in which they are made to work, is below human dignity. Many have no permanent shelter, hardly any access to medical treatment, washrooms, toilets, changing rooms, which facilities the permanent workers enjoy. Many workers get injured on duty while handling the garbage, develop illnesses, and are left to fend for themselves, with almost no medical care. They have to manually remove excrement, rotting animals, ride on the trucks carrying garbage, rotting carcasses. These workers

work throughout the year, barring four days. One does not have to go through years of such sub-human existence to complain of exploitation. The various ameliorative measures contemplated by the State for this class, their extreme backwardness tied up with the caste system, the lowly menial work they are forced to engage into by a public body which is bound to follow the ideals of the Constitution of India, makes the case of the concerned workers *sui generis* and cannot be compared to any other contract labour dispute. The Corporation is under a mandate to keep the City clean. Residents of the City have a fundamental right to a clean environment. This fundamental right and the mandatory duty, cannot be achieved by subjugating the fundamental rights of the workers to basic human dignity. The anxiety to find innovative ways to maintain a clean city can be understood, but in a welfare state, cleanliness for one class of citizens cannot be achieved by engaging in 'slavery' of the others. These 2700 workers, working round the year, provide the foundation on which the City functions. Instead of acknowledging this importance and giving them stability of permanent tenure to improve their living conditions, the Corporation, a public body, has taken advantage of its dominant position to exploit this lowest strata of the community, disregarding various welfare measures suggested by the State. In the circumstances, setting aside the award in the equity jurisdiction of this court, will be a travesty of justice.

75. The Writ Petition is dismissed. Rule is discharged. No orders as to cost. The Petitioner will implement the impugned award within three months from today.

(N.M. Jamdar, J.)