THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

WRIT PETITION No.2043 of 2013

ORDER:

This Writ Petition has been filed by the petitioners to call for the records in I.D.No.140 of 2009 of the Industrial Tribunal-cum-Labour Court, Anantapur (1st respondent herein) (for short 'the Industrial Tribunal') and quash the award passed therein on 30-08-2012 which was published on 18-10-2012 vide G.O.Rt.No.1145, Labour, Employment, Training and Factories (Lab.I) Department dt.28-09-2012.

2. The Writ Petitioners are the Andhra Pradesh Central Power Distribution Company and its Superintending Engineer.

3. The 2nd respondent is the Secretary of the Anantapur District Andhra Pradesh Central Power Distribution Company Private Accounting Agencies Employees Union (Registered No.2109), Anantapur (hereinafter referred to as "the Union").

4. It is not in dispute that the 1st respondent company came into existence w.e.f. 01-04-2000 and catered to the Distribution of power supply to the Districts of Anantapur, Hyderabad, Ranga Reddy, Medak, Mahaboobnagar, Kurnool and Nalgonda Districts. Its predecessor, the then A.P.State Electricity Board (for short 'APSEB'), had been entrusting since 1995 works relating to collection of revenue from its customers by engaging Private Accounting Agencies (PAA)

who were Chartered Accountant firms. Even after the formation of the 1st petitioner company, work relating to LT bi-monthly service i.e. collection of revenues from consumers was entrusted to the PAAs.

5. According to the petitioners, these PAAs were required to process and generate reports such as entering of Bill Collector Remittance Challan (BCRC) into Consumer ledger, Service-wise preparation of disconnection list etc., that they were being remunerated as per the terms of agreement per service per month; and these PAAs engaged their personnel for execution of works agreed to in terms of the agreement entered into with them.

6. The 2nd respondent Union raised a dispute seeking regularization of personnel engaged by the PAAs before the Joint Commissioner of Labour, Kurnool Zone, Kurnool and vide proceedings No.D1/3238/2009 dt.27-08-2009 invoking Section 10(1) and (2) of the Industrial Disputes Act, 1947 (for short "the Act"), the following issue was referred for adjudication to the 1st respondent:

> *"Whether the contractor workers working under a contractor are eligible for regularization of services in APCPDCL i.e. Principal Employer Establishment?*
>
> *If not, to what relief the workmen is entitled?"*

This was numbered as I.D.No.140 of 2009 before the Industrial tribunal –cum-Labour Court, Anantapur (the 1st respondent) (for short 'the Tribunal').

Claim Statement of the 2nd respondent in I.D.No.140 of 2009

7. A claim statement was filed by the 2nd respondent Union on behalf of 59 persons (hereinafter referred to as "the workmen"). It contended that these workmen were engaged for varying periods of 23 years to 5 years in the 1st petitioner Company and had all put in more than 240 days in a period of 12 calendar months and therefore were entitled to be regularized in the 1st petitioner Company; that they were attending to the works such as Bill Accounting involving entering of BCRC into Consumer Ledger, Service-wise preparation of Demand and Credit consolidation Ledger-wise, preparation of yearly adjustments, arrears slips, disconnection list, its review, issue of first notice, review of additional consumption deposit, preparing of monthly abstract etc; that these works were clerical in nature; the work of these workmen was being supervised by employees of 1st petitioner called such as UDC Accounting, AAO of ERO and other Officers in Anantapur Circle; that they were working under the effective control of the 1st petitioner; and therefore they were employees of the 1st petitioner. It is contended that there is employer and employee relationship between them and the 1st petitioner, that they were discharging their duties sincerely and continuously without any break and were entitled to the benefits under the Act.

8. The 2nd respondent also contended that these workmen had appeared for interview conducted by the petitioners pursuant to orders of this Court in W.P.No.27857 of 1997 and W.P.No.23653 of

1997, but the petitioners had rejected them stating that they do not come under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970. It contended that to defeat the legal benefits they are entitled to, the petitioners created a *sham or camouflage system* of Agency.

9. It was contended that all these workmen possessed computer certificates apart from educational qualifications and that the entire work of the petitioners was done in the premises of the petitioners only from April, 2008; that the works being done by the workmen were permanent and perennial in nature; that the posts in which they were working continuously were vacant posts; and the petitioners themselves had called for service particulars of all workmen with regard to regularization of their services vide letter dt.07-04-2010; and consequently the workmen were entitled to time scale apart from regularization of their services.

10. The 2nd respondent relied upon the circumstance that petitioners terminated the services of one Srinivasan and others, who were similarly placed like the workmen in the instant case, that such termination orders were questioned in I.D.No.120 of 1991 and batch, that they were set aside, and the petitioners therein were directed to be reinstated into service with continuity of service by the Industrial Adjudicator. It is pointed out that Writ Petitions filed against the said orders by the petitioners were dismissed and were confirmed in Writ

Appeals, that Review Petitions also were dismissed and thereafter they were taken into service.

11. Along with the claim statement, 436 documents were filed by the 2nd respondent Union.

Counter affidavit of the petitioners in I.D.No.140 of 2009

12. In the counter-affidavit filed by the petitioners, they refuted the contentions of the 2nd respondent.

13. It was admitted that since 1985, the A.P.State Electricity Board was entrusting the work relating to collection of revenue from its consumers to PAAs; even after formation of the 1st petitioner Company, work relating to LT bimonthly service i.e. collection of revenue from consumers was entrusted to PAAs; that this was done under the Contract Labour (Regulation and Abolition)Act; that PAAs were required to process and generate reports such as Bills Analysis, Demand Extract, Bill Book extract, preparation of disconnection lists and preparation of the reports on debit analysis; and such agencies were given remuneration at rates specified in the agreement i.e. Rs.1/- per service per month and Rs.0.25 ps. per service per month towards cost of stationary.

14. It is however contended by petitioners that there was no Master and Servant relationship between them and the workmen/persons engaged by the PAAs; the persons engaged by the PAAs were not paid by the 1st petitioner; and the contract between the

1st petitioner and the PAA was governed by the Indian Contract Act, 1872.

15. According to petitioners, the work entrusted by the PAAs to the workmen is only a part time job as they perform other duties entrusted by the PAAs and therefore they are not employees of the petitioners. It is contended that the 2nd respondent Union has not chosen to implead the PAAs as a party respondents in the I.D. and therefore it cannot seek regularization of the services of the workmen in the 1st petitioner Company.

16. It is stated that the 1st petitioner had got its own service conditions and rules regulating recruitment; none of the petitioners had ever been recruited in accordance with such regulations; it had not issued any notice inviting applications nor made any selection nor issued appointment orders in accordance with service regulations; service certificates submitted by the workmen clearly show that they were issued by the concerned Chartered Accountants/PAAs only; and it is not true to say that they were attending the work of the 1st petitioner which was supervised and controlled by 1st petitioner.

17. In para-8 of the counter, however, it is admitted by the 1st petitioner that the workmen were engaged by the Chartered Accountant firm for handling the accounting work and *there is direct supervision* by the 1st petitioner as alleged by the 2nd respondent. The allegation that the workmen were continuing from 23 years to 5 years

and had put in more than 240 days in a period of 12 calendar months was however denied.

18. Reference was made to clause-12 of the agreement between the 1st petitioner and the PAAs and it is stated that the said clause specifies that persons engaged by the PAAs have to perform the assignment, that they are employees of the PAAs and the 1st petitioner was in no way concerned with the liability for their services, wages or other payments etc., and that only the PAAs were responsible for securing proper accommodation and manpower necessary for doing the work at their own cost.

19. The petitioners relied on the decisions of this Court in W.A.No.619 of 1997 in W.P.22331 of 1997 and contended that it was held therein that employees engaged by private agencies and PAAs do not fall under the category of contract labour; and that PAA Accounting Employees entrusted with billing, do not fall under the definition of "employee" under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and they are not entitled to pay contribution for the work executed with the Distribution Company.

20. It was stated that the decisions in I.D.No.122 to 124 of 1991 have no relevancy.

21. Reliance is placed on the judgment of the Supreme Court in **State of Karnataka Vs. Umadevi (3)**[1] and **B.V. Rao and Co. and**

[1] (2006) 4 SCC 1

others Vs. The Regional Provident Fund Commissioner-II, Eastern Power Distribution Company of AP Ltd. (APEPDCL)[2] and it is contended that the workmen are not entitled to relief of regularization as well as payment of time scale.

22. Written arguments were also submitted on behalf of petitioners.

The amended reference

23. A representation was made to the Joint Commissioner of Labour, Kurnool on 21-02-2012 by the 2nd respondent Union to amend the reference made to the Tribunal. This was accepted and vide proceedings No.D1/3238/2009 dt.05-03-2012, the reference was amended as under:

> *"Whether the (59) workmen (details in annexure) who have been working regularly for APCPD Ltd., are entitled to regularization of their services and the pay scale attached to the category.*
>
> *If not, to what relief the workmen are entitled?"*

Award passed by the 1st respondent on 30-08-2012

24. Before the 1st respondent, the 2nd respondent Union examined 1 witness and marked Exs.W-1 to W-471. The petitioners examined M.W.1 and marked Exs.M-1 to M-9.

25. I.A.No.161 of 2012 was filed by the 2nd respondent Union confining the claim to only 46 workmen and this was allowed

[2] 2010(4) ALT 558

on 08-06-2012 and a neat copy was filed before the 1st respondent mentioning the names of these 46 workmen.

26. The Tribunal noted the documents filed by the parties and in particular those filed by the 2nd respondent Union and observed that xerox copies of educational qualifications filed by the workmen show that they possess requisite qualifications and on that basis, the PAAs had entrusted the work of the 1st petitioner and were doing its work; that the record indicates that some of the workmen were working since long time even prior to the formation of the 1st petitioner; they had filed W.P.No.27857 of 1997 and basing on the order therein, they had been called for interview (Ex.W-6); that Ex.W-7 was the letter issued by the Superintending Engineer, Operation Circle, Anantapur to one of the workmen by name K.Adinarayana Reddy that his application was rejected as he did not fulfill the conditions; that Ex.W-13 pertaining to the change of H.S.C.No. was addressed by an Accounting Agency by name A.G.V.Reddy and Company, Chartered Accountant, Anantapur to the Assistant Accounts Officer, ERO/Town AP Transco, Anantapur and at the end of the said letter, K.Adinarayana Reddy signed in his capacity as Manager of M/s.A.G.V.Reddy and Co; that this and other two letters indicate that M/s.A.G.V.Reddy and Company was doing the electricity Department work, that the said workman were completing the work and so he requested the 1st petitioner to regularize his service under Ex.W-14; Ex.W-16 computer generated

portal of the Central Power Distribution Company of A.P. Limited showed the name of K.Adinarayana Reddy as "User" in the Circle Anantapur, ERO:101 Anantapur Town dt.16-10-2010; and this indicates that he was working *with the* 1st petitioner and his services were utilized by it.

27. The Tribunal observed that K.Adinarayana Reddy was working as computer operator and is doing billing, accounting work and entering Bill Collector Remittance Challan into consumer ledger service etc. and Exs.W-18 to W-451 show that the 1st petitioner *wanted to extract the work of the workmen in a indirect way* though the work attended to by them is of permanent and perennial in nature.

28. The 1st respondent held that the wages of the workmen were being paid by the 1st petitioner through Agency and Ex.W-452 is a memo dt.07-04-2010 issued by the 1st petitioner calling information with regard to regularization of services of employees of Private Accounting Agencies in the 1st petitioner; the *workmen covered under the instant Industrial Dispute had enclosed service certificates issued by the Private Accounting Agencies showing that they were doing the work of the 1st petitioner*; that the witness M.W.1 examined by 1st petitioner in cross-examination admitted that *since February, 2008, the workmen were working in the ERO premises of the 1st petitioner and that User IDs were given to the employees shown in Ex.W-453 directly by the Corporate office*; and this shows that the workmen were working with the 1st petitioner; and consequently they were

entitled to seek regularization of their services in the 1st petitioner Company.

29. The Tribunal relied upon the decisions of this Court in W.P.No.8788 and W.P.No.19644 of 2001 and held that the decisions cited on behalf of the petitioners were inapplicable.

30. It held that the demand of 2nd respondent Union to regularize the services of 46 workmen in the 1st petitioner Company is justified and directed their regularization in their respective posts and to fix pay scales attached to their category as and when regular vacancies arise.

31. Assailing the same, this Writ Petition has been filed.

32. Heard Sri G.Vidya Sagar, learned Senior Advocate appearing for Smt.K.Udayasree, learned counsel for petitioners and V.Srinivas, learned counsel for the 2nd respondent Union.

Contentions of the petitioners

33. The petitioners contend that the workmen were engaged through a Chartered Accountant firm, that there was no Master and Servant relationship between the workmen and the 1st petitioner, that the firm is paid at a particular rate per service connection per month and not on monthly basis, that there is no direct supervision and such persons engaged through agencies are not contract labour. According to petitioners, the question of regularization would arise only if the workmen had been engaged directly by the 1st petitioner as casual

workmen/temporary employees, but not if they were engaged through an agency.

34. It is contended that there is no statutory right claimed by the workmen for regularizing their services in the 1st petitioner Company and in view of the decision in **Umadevi(3)** (1 supra), they are not entitled to seek regularization of their services.

35. According to petitioners, there is a difference between employment of persons *in* the 1st petitioner and employment of persons *for* the 1st petitioner.

36. Sri G.Vidyasagar, Senior Counsel appearing for petitioners contended that it was incumbent on the part of the Tribunal to consider the provisions of the Contract Labour (Regulation and Prohibition) Act, 1970 and take note of the fact that the workmen, as contract labour, had been subjected to a selection process, but did not qualify and so they cannot be granted any relief. He contended that the Tribunal did not consider the contracts entered into by the 1st petitioner with the Chartered Accountancy firm though they were filed before him as Exs.M-1 to M-9; and even M.W.1 had taken a stand that recruitment in the 1st petitioner is governed by Service Regulations, that the workmen do not fall within the definition of the term “employee” in such Regulations and there was neither a selection by the 1st petitioner of the workmen nor were they issued any appointment orders in accordance with the Service Regulations.

37. He contended that the Tribunal did not go into the questions: (i) whether there were vacant posts where the workmen can be regularized; (ii) if so, on what basis such regularization can be granted; (iii) whether they were employed in the 1st petitioner Company or not; (iv) if there are intermediaries such as a Chartered Accountant firms as in the instant case, whether the contract between the intermediary and the 1st petitioner/principal contractor is sham or not, in the absence of prohibition of engagement of contract labour under the Contract Labour (Regulation and Abolition) Act, 1970.

38. He contended that if the contract between the intermediary and the 1st petitioner is not shown to be a sham document, the Industrial Tribunal could not grant any relief. According to him, in **Balwant Rai Saluja Vs. Air India Limited**[3], the Supreme Court had laid down the following tests to ascertain whether the worker of the contractor can be treated as employees of the principal employer on whose premises they work:

(i) Who appoints the workmen;

(ii) Who pays the salary/remuneration;

(iii) Who has the authority to dismiss;

(iv) Who can take disciplinary action;

(v) Whether there is continuity of service; and

(vi) Extent of control and supervision i.e. whether there exists complete control and supervision.

[3] (2014) 9 SCC 407

and in the instant case, none of these tests are satisfied.

39. He contended that for limited purposes of Factories Act, 1948, Employees State Insurance Act,1948 and Employees Provident Fund and Miscellaneous Provisions Act, 1952, though persons employed through contractor can be treated as direct employees of principal employer, this is only for a limited purpose, and it cannot be said that for *all purposes* they should be treated as direct employees of the 1st petitioner and that it is the principal employer.

40. He further contended that finding of the Tribunal about existence of Employer and Employee relationship between the 1st petitioner and the workmen is not supported by any material evidence, that its findings are perverse and the Tribunal ignored the evidence on record. He complained that written submissions were not considered by the Tribunal. He also contended that the Tribunal had not given a finding specifically that the contract between the intermediary and the 1st petitioner is sham and nominal and merely said that the 1st petitioner wants to extract work *in an indirect way* and on that basis it could not have granted any relief to the workmen.

41. According to him, the Tribunal ought to have discussed the duties of each individual employee and then come to a conclusion but it failed to do so. He also alternatively sought for a remand of the matter to the Tribunal for fresh consideration since its order appears to be cryptic and does not contain elaborate reasons.

42. He relied upon the decisions in **Steel Authority of India Ltd., and others etc. Vs. National Union Water Front Workers and others etc.**[4], **International Airport Authority of India Vs. International Air Cargo Workers Union and another**[5], **Gujarat Electricity Board, Thermal Power Station, Ukai, Gujarat Vs. Hind Mazdoor Sabha and others**[6] and **Cipla Ltd. Vs. Maharashtra General Kamgar Union and others**[7].

Contentions of the 2nd respondent

43. Sri V.Srinivas, learned counsel for the 2nd respondent refuted the above contentions.

44. Firstly, he contended that the petitioners in their counter-affidavit in para-8 had taken a plea that employees engaged by the private agencies and PAA do not fall under the category of contract labour and it is surprising that contrary to the said plea, much argument on the Contract Labour (Regulation and Abolition) Act, 1970 was being advanced by the petitioners. He contended that the petitioners cannot be allowed to approbate and reprobate in this manner.

45. According to him, taking meter readings, preparing bills, maintaining ledgers relating to consumers etc., which was done by the workmen is an indispensable part of the business of the 1st petitioner,

[4] (2001) 7 SCC 1
[5] (2009) 13 SCC 374
[6] (1995) 5 SCC 27
[7] (2001) 3 S.C.C. 101

such a work is perennial in nature, and the 1st petitioner has evolved this method of engaging services of persons like the workmen to discharge duties for it by engaging intermediaries such as Chartered Accountants, Lawyers and even Lions Club and Rotary Club; that anybody can be an intermediary but the ERO Office of the 1st petitioner is the place where the workmen sit and work and they are part of the ERO office.

46. He pointed out that M.W.1, the witness for the petitioners, admitted this fact and also further stated that only the work of the 1st petitioner was being done in the ERO premises since February, 2008 and there is supervision of the work done by the workmen by officials of 1st petitioner. He pointed out that even M.W.1 stated that he did not know whether the private Accounting Agency obtained licence under the Contract Labour (Regulation and Abolition) Act, 1970 for doing work of the 1st petitioner as detailed in Exs.M-1 to M-9 agreements.

47. He relied on **Hussainbhai Vs. The Alath Factory Tezhilali Union and others**[8] and contended that where workmen produce goods or services and these goods and services are for the business of the 1st petitioner, the 1st petitioner has to be deemed to be the employer of the workmen since it has economic control over their subsistence, skill and continued employment.

[8] AIR 1978 SC 1410

48. He contended that services of Srinivasan and others who were also engaged through Chartered Accountant firms were terminated by the A.P. State Electricity Board, the predecessor of the 1st petitioner, that this was questioned in I.D.No.120 of 1991 and batch and the defence of the said Board to the effect that there was no Employer and Employee relationship was rejected therein by the Labour Court and it was held that Srinivasan and others were employees of the said Board and that the termination of their services by the Board was illegal.

49. He referred to the contents of the awards in I.D.No.120 of 1991 and batch wherein the Labour Court directed the Board to reinstate Srinivasan and others with continuity of service and stated that this was confirmed in W.P.No.24052 of 1996 and batch on 10-03-1998 and in W.A.No.1645 of 1998 and batch on 18-07-2000. He pointed out that even M.W.1 admitted that workmen, who were parties in I.D.No.120 of 1991 to I.D.No.124 of 1991, were reinstated by the 1st petitioner. He also referred to the order dt.17-09-2016 in W.A.No.856 of 2016 and batch where a Division Bench of this Court rejected the contention of the 1st petitioner that workmen who were directed to be reinstated can be engaged again on contract basis through a contractor in execution of the awards of reinstatement passed by the Labour Court.

50. He contended that the earlier reference made to the 1st respondent on 27-08-2009 was general in terms and was not

specific to the workmen in question and that was why the amended reference was rightly made on 05-03-2012.

51. According to him, the amended reference made by the State Government itself recorded that the workmen in question had been working regularly *for* the 1st petitioner, that the said reference has not been questioned by the petitioners and therefore the question of the Tribunal going into the question whether the workmen are working regularly under the 1st petitioner and whether the contract between the Chartered Accountant Firm/intermediary and the 1st petitioner is a sham or nominal one, does not arise. He contended that it is not open to the petitioners to contend that the Tribunal should have gone into the existence of employer and employee relationship between the 1st petitioner and the workmen in question in the light of the wording of the amended reference dt.05-03-2012, and the Tribunal rightly went into the question whether reliefs of regularization/ payment of pay scale can be granted to the workmen. In any event he contended that the Tribunal did give a finding in para-27 of the award that the workmen were working *with the* 1st petitioner and that their services were utilized by it.

52. He contended that the Chartered Accountant firms were impleaded in I.D.No.120 of 1991 and batch since in those cases Section 2A(2) of the Act was invoked by the petitioners therein on account of termination of their services, but in the instant case there was a reference under Section 10 of the Act by the Joint

Commissioner of Labour and therefore it is not possible for the Chartered Accountant firms to be impleaded as a party to the reference.

53. He also contended that the petitioners' contention that the agreements between the Chartered Accountant firms/intermediary and the 1st petitioner were not considered by the 1st respondent Tribunal is untenable for the reason that such agreements are not conclusive evidence and even according to the petitioners, it was open to the Tribunal to hold that they were sham and nominal.

54. According to him, the decision in **Umadevi(3)** (1supra) has no application because the said decision did not deal with powers of Industrial Adjudicators under the Act and in situations where employers indulge in *unfair labour practice* as laid down in Section 2(ra) r/w item 10 of schedule V to the Act, the Courts can declare that the workmen, who are subjected to such unfair labour practices, can seek regularization notwithstanding **Umadevi(3).** He placed reliance on the judgment in **Maharashtra SRTC Vs. Casteribe Rajya Parivahan Karmchari Sanghatana**[9] and **Oil and Natural Gas Corporation Limited Vs. Petroleum Coal Labour Union and others**[10]. He also cited **Nihal Singh and others Vs. State of Punjab**[11] to contend that a State entity like the 1st petitioner cannot be allowed to take a defence, after permitting utilization of services of

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[9] (2009) 8 SCC 556
[10] (2015) 6 SCC 494
[11] (2013) 14 SCC 65

large number of persons like the workmen for decades, and say that there are no sanctioned posts to absorb them and **Umadevi(3)** cannot be a licence for the petitioners to exploit the workmen.

55. He contended that most of the workmen had been working admittedly from 02-01-1987 for varying periods and this and other evidence on record was considered by the Tribunal, and findings were given that the 1st petitioner was extracting work from the workmen *in an indirect way*, that the work was of perennial nature and the work was being done for the 1st petitioner and therefore they are entitled to seek the relief of regularization of services.

56. He pointed out that the plea that the contract between the Chartered Accountant firm and the 1st petitioner was a sham and camouflage, was raised specifically by the workmen, and by holding that the 1st petitioner was extracting work in an "indirect way", the said contention was accepted by the Tribunal and consequently, the unfair labour practice issue comes into operation entitling the workmen to the relief of regularization and payment of pay scale.

57. He contended that all the tests mentioned in **Balwant Rai Saluja** (3 supra) need not be fulfilled to decide the existence of employer and employee relationship and it would be impossible to find in any case a situation where all of them stand fulfilled. According to him, even if one or two of the tests are satisfied, it would suffice. Once the camouflage is apparent as in the present case and

the control is admitted, one cannot find fault with the award of the Tribunal.

POINT FOR CONSIDERATION

58. From the above contentions, the followings points for consideration arise in the instant case:

(i) Whether the 1st respondent-Tribunal was correct in law in finding that the workmen represented by 2nd respondent were in fact employees of the 1st petitioner?

(ii) Whether the decision in ***Umadevi (3)*** *(1 supra) would come in the way to grant relief of regularization to the workmen?*

(iii) Whether the award passed by the 1st respondent-Tribunal suffers from an error apparent on the face of record?

(iv) To what relief?

THE CONSIDERATION BY THE COURT:-

Point (i)

59. The petitioners contend that the workmen are employees of the Chartered Accountant Firms/Private Accountant Agencies (PAA), that the said Agencies are paid remuneration of Re.1/- per service per month and Rs.0.25 ps per service per month for cost of stationery, that there is no master and servant relationship between the 1st petitioner company and the workmen who are engaged by the

PAAs, and that the wages of the workmen are also paid by the PAAs and not by the 1st petitioner.

60. The 2nd respondent-Union representing 46 workmen however contends that the contract between the PAA and the 1st petitioner is a sham and camouflage, that the duties performed by the workmen are for the benefit of the 1st petitioner and are performed by the workmen under the supervision and control of the 1st petitioner's employees and therefore they are to be treated as employees of the 1st petitioner.

61. In **Hussainbhai** (8 Supra) , the Supreme Court held that mere contracts are not decisive; where workmen produce goods or services and these goods and services are for the business of another, that other has to be deemed to be the employer of the workmen since it has economic control over their subsistence, skill and continued employment; and if he, for any reason, chokes off, the workmen would be virtually laid off. It held that the presence of intermediate contracts with whom alone the workmen have immediate or direct relationship *ex contractu* is of no consequence when, on lifting the veil or looking at the conspectus of factors governing their employment, the truth that the real employer is the Management is clear, though draped in a perfect paper arrangement of a contract. The Court observed:

> "*5.... Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of*

industry, the local conditions and the like may be resorted to when labour legislation casts welfare obligations on the real employer, based on Articles 38, 39, 42, 43 and 43-A of the Constitution. The court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances.

6. *If the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of an enterprise, the absence of direct relationship or the presence of dubious intermediaries or the make-believe trappings of detachment from the Management cannot snap the real life-bond. The story may vary but the inference defies ingenuity. The liability cannot be shaken off.*

7. *Of course, if there is total dissociation in fact between the disowning Management and the aggrieved workmen, the employment is, in substance and in real-life terms, by another. The Management's adventitious connections cannot ripen into real employment." (emphasis supplied)*

62. Thus the mere existence of agreements like Ex.M1 to M-9 cannot be a ground to accept the contention of the petitioners that there is no relationship of employer and employee between the 1st petitioner and the workmen.

63. From the pleadings of the respective parties, it is admitted that the workmen had been engaged through Chartered Accountant Firms to do activities such as maintenance of accounts and records relating to Electricity Revenue Office of the 1st petitioner, which maintains billing and accounting work. It is admitted that the workmen are involved in taking meter readings consumer wise, entering in consumer ledgers, preparing bills for various categories of consumers, preparation of Bill Collection Remittance Challan,

defaulters list, consumer arrears list etc. In para-8 of the counter, it is admitted by the 1st petitioner that the workmen were engaged by the Chartered Accountant firm for handling the accounting work and *there is direct supervision* of the 1st petitioner as alleged by the 2nd respondent.

64. The workmen had filed Service Certificates issued by the Chartered Accountant Firms which certify that the workmen were handling the AP State Electricity Board Billing and Accounting work even prior to the formation of the 1st petitioner and subsequent thereto also.

65. In his cross examination, M.W.1, the witness who was examined by the petitioners, admitted that revenue collection is permanent work and is supervised by the 1st petitioner's officers called AAOs, that the ERO work of accounting and billing is being done *in the premises of the ERO* from February 2008 for implementation of energy billing system and that *only the 1st petitioner's ERO work would be done in its ERO premises*. He admitted that the Superintending Engineer, Anantapur vide Ex.W453 dt.25-05-2010 submitted information to General Manager, Hyderabad regarding information of Ananthapur Circle about the number of Private Accounting Agency employees working in the Circle Division-wise with details of wages paid to the staff, length of service completed by them as called for by Ex.W452, a letter dt.07-04-2010; and that *all the 46 workmen who are mentioned in Ex.W453 were*

working in the ERO premises from February 2008 and prior thereto they were working for APSEB ERO in the premises of the concerned PAAs. He also admitted that if there are any defects in the work done by the workmen, the 1st petitioner would send it back to the PAAs and the same in-turn would be rectified by the same workmen who have prepared and sent it. He further admitted that user I.Ds. were given to the employees shown in Ex.W453 directly by the Corporate office. He also stated that he did not know whether 1st petitioner got registered under Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970 as principal employer and whether PAAs obtained licence under Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970 for doing the work of the 1st petitioner.

66. From the above evidence, it is clear that the workmen were employed by the PAAs but they were discharging their duties for the benefit of 1st petitioner from the ERO office of the 1st petitioner since February 2008 and prior thereto they were performing the work of the APSEB ERO in the premises of the concerned PAAs. It is also clear that the work performed by them is directly supervised by the AAOs of the 1st petitioner and if there are any defects, the matter would be referred back to the PAAs for rectification by the same workmen who prepared and sent it. They were also given User I.Ds. by the 1st petitioner. Thus the ultimate authority over a worker in the performance of his work resided in the 1st petitioner and it had the right to reject the work of the workmen.

67. In **Gujarat Electricity** Board (6 supra) and in **Cipla Limited** (7 supra), the Supreme Court of India had declared that in view of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970, it is only the appropriate Government which has the authority to abolish *genuine labour contract* in accordance with the provisions of the said Section and that no Court including the industrial adjudicator has jurisdiction to do so. It was held further that if the contract is a sham or not genuine, the workmen of the so-called contractor can raise an industrial dispute for declaring that they were always the employees of the principal employer and for claiming the appropriate service conditions. When such dispute is raised, it is not a dispute for abolition of the labour contract and hence the provisions of Section 10 of the Act will not bar either the raising or the adjudication of the dispute. When such dispute is raised, the industrial adjudicator has to decide whether the contract is a sham or genuine. It is only if the adjudicator comes to be conclusion that the contract is a sham, that he will have jurisdiction to adjudicate the dispute. If, however, he comes to the conclusion that the contract is genuine, he may refer the workmen to the appropriate Government for abolition of the contract labour under Section 10 of the Act and keep the dispute pending.

68. This principle was also reiterated in **Sarva Shramik Sangh Vs. Indian Smelting & Refining Company Limited and others**[12] and **International Airport Authority of India** (5 supra).

[12] (2003) 10 S.C.C. 455

69. In the **International Airport Authority of India** (5 supra) case decided in 2009, it was held that whether a labour contract was genuine or sham can be raised before the industrial adjudicator under the Industrial Disputes Act, 1947 even if there is no notification for abolition of contract labour under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970. *It was held that if the contract is found to be sham or nominal and merely a camouflage to evade compliance with various beneficial legislations so as to deprive the workers of statutory benefits, then the so-called contract labour will have to be treated as direct employees of the principal employer and the industrial adjudicator should direct the principal employer to regularize their services in the establishment subject to such conditions as it may specify for that purpose.*

70. Recently in 2014 in **Balwant Rai Saluja** (3 supra), the Supreme Court, after reviewing the law, laid down that the relevant factors to be taken into consideration to establish an employer-employee relationship would include *inter alia*:

(i) Who appoints the workmen;

(ii) Who pays the salary/remuneration;

(iii) Who has the authority to dismiss;

(iv) Who can take disciplinary action;

(v) Whether there is continuity of service; and

(vi) Extent of control and supervision i.e. whether there exists complete control and supervision.

71. It is however to be kept in mind that the Court *did not say* that all these factors have to be present in order to give a finding in a given case that there exists relationship of an employer and an employee.

72. That apart, the evidence of MW 1, the witness examined on behalf of petitioners, that he did not know whether 1st petitioner got registered under Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970 as 'principal employer' and whether PAAs obtained licence under Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970 for doing the work of the 1st petitioner, is clearly evasive and suggests that 1st petitioner did not get itself registered under Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970 as 'principal employer' and the PAAs engaged by it did not also obtain licence under Section 12 of the Contract Labour (Regulation and Abolition) Act, 1970 for doing the work of the 1st petitioner. This shows an utter disregard by the petitioners of their statutory obligations and exhibits a blatant disregard for the law.

73. The evidence set out in paras 63 to 65, in my considered opinion, shows that in the instant case, there is continuity of service and complete control and direct supervision by the AAOs of the 1st petitioner company on the work done by the workmen, that they were in fact working with the 1st petitioner, that their services were utilized by it and that their wages were being paid by the 1st petitioner through the PAAs. So the contract between the PAAs and the

1st petitioner is obviously a sham and nominal transaction and is created to conceal the fact that they are directly employed by the 1st petitioner only and to evade the compliance with various beneficial legislations so as to deprive them of statutory benefits.

74. In this regard, the following facts are also very relevant.

The award in I.D.No.120 of 1991 and batch

75. The 2nd respondent Union in para-7 of its claim statement relied upon the decision relation to K.Srinivasan and others in I.D.No.120 of 1991 and batch citing it as a precedent and contending that the workmen in the present I.D. were similarly situated.

76. Admittedly K.Srinivasan and others had filed I.D.No.120 of 1991 and batch before the Industrial Tribunal-cum-Labour Court, Ananthapur challenging termination of their services taking the plea that they had joined as Ledger Clerks for preparing APSEB Billing Accounting Work for Ananthapur Operation Circle ERO; that on account of computerization, the said organization had terminated their services in violation of Section 25-F of the Act; that though no appointment orders were issued to them, the APSEB was paying their wages through a private agent (who was impleaded as 3rd respondent therein) and their work was being supervised by employees of the APSEB. They contended that they were under effective control of the APSEB and as such they were employees of it.

77. A specific defence was raised by the APSEB therein that the petitioners were never appointed by the APSEB; it had assigned certain billing and accounting work on commission basis to 3rd respondent therein; the petitioners must have been appointed by 3rd respondent therein; and they have no concern with the appointment or payment of wages or termination of the petitioners. It was contended that they were under the direct control of the 3rd respondent and the APSEB had entered into an agreement with the 3rd respondent; that the APSEB never paid any wages to the petitioners and it did not supervise the work done by the petitioners; that there is no relationship between petitioners and the APSEB of employees and employer; and the 3rd respondent is not even a contractor under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and he is an independent and professional expert.

78. This was supported by the 3rd respondent who contended that the petitioners were only trainees, they were paid stipend and not wages and though they were supervised by officials of APSEB, the provisions of the Act do not apply and the provisions of the Chartered Accountants Act, 1949 alone apply.

79. A common award was passed on 25-04-1996 by the Industrial Tribunal after considering the evidence on record which included service certificates issued by the 3rd respondent therein. The Tribunal held that the work entrusted to the petitioners by 3rd respondent was also being done by employees of the APSEB who

are not Chartered Accountants but only clerks; that the billing work was entrusted to the petitioners therein who are not Chartered Accountants at the instance of the 3rd respondent and the petitioners had not been imparted with any Chartered Accountant training; the billing work entrusted to the petitioners did not require professional skills as Chartered Accountant; that the 3rd respondent himself admitted that except the work of APSEB, the petitioners were not entrusted with any other work; that 3rd respondent did not get any registration under Section 7 of the Contract Labour (Regulation and Abolition) Act, 1970 and the 3rd respondent also did not get any licence under Section 12 of the said Act. It held that the 3rd respondent never claimed that he supervised the work of the petitioners and admitted that he used to only forward the record prepared by the petitioners to the APSEB and acceptance or rejection of work by the APSEB was direct and but for the demand for computerization, the petitioners would not have been fired from their jobs. It therefore held that the petitioners therein were employees of the APSEB and were entitled to reinstatement but no back wages on the ground that Section 25-F was violated.

80. It is not in dispute that these awards in I.D.No.120 of 1991 and batch were challenged before this Court in W.P.No.24052 of 1996 and batch and the said Writ Petitions were dismissed on 10-03-1998 which was also confirmed in W.A.No.1645 of 1998 and batch on 18-07-2000 by a Division Bench of this Court.

81. The award in I.D.No.120 of 1991 and batch was marked as Ex.W-455 and the common order in W.A.No.1645 of 1998 was marked as Ex.W-457. In fact M.W.1 admitted that the award in I.D.No.120 of 1991 and batch was also implemented by the petitioners.

I.D.No.253 of 1992 and batch

82. Similar award as in I.D.No.120 of 1991 was passed on 30-10-1996 in I.D.No.253 of 1992 and batch wherein identical pleas as in I.D.No.120 of 1991 were raised and similar relief was granted by the Industrial Tribunal in I.D.No.253 of 1992 and batch also.

83. The APSEB questioned the same in W.P.No.23835 of 1997 and batch before this Court which dismissed it on 28-03-2005. This was confirmed in Writ Appeals and Special Leave Petitions were also dismissed.

84. When the Execution Petitions E.P.No.52 of 2005 in these I.Ds. were allowed by common order on 10-12-2009, they were questioned in W.P.No.18653 of 2010 and batch by the Transmission Corporation of AP, the successor of the APSEB and predecessor of the 1st petitioner, but the Writs were dismissed on 19-11-2015 and the said order was also confirmed in W.A.No.856 of 2016 and batch on 17-09-2016.

85. The learned counsel for the 2nd respondent Union relied upon the above orders and contended that when similarly placed

persons in those cases were treated as direct employees of the APSEB/AP Transco which were the predecessors of the 1st petitioner, for reasons alike, the award passed by the Industrial Tribunal in the instant case also cannot be interfered with by this Court. I find considerable force in the said submission.

86. It cannot be disputed that the workmen in the instant case are similarly situated to the petitioners in I.D.No.120 of 1991 and batch and in I.D.No.253 of 1992 and batch since in those cases also the petitioners had been engaged through PAAs/Chartered Accountant firms for performing the work of the 1st petitioner's predecessors the APSEB/APTRANSCO. Therefore the reasoning in those cases that the petitioners therein are employees of the AOSEB/APTRANSCO equally applies to the present case.

87. I therefore hold on point (i) that there exists employer-employee relationship between the 1st petitioner and the workmen and the finding of the Tribunal on this point cannot be found fault with.

Point (ii) :

THE DECISION IN UMADEVI(3) (1 supra)

88. I shall presently consider the decision in **Umadevi(3)** (1 supra) on which strong reliance was placed by learned Senior Counsel for petitioners.

89. The Supreme Court held in para 2 that public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder;

that our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf; equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated as equals; and that, any public employment has to be in terms of the constitutional scheme.

90. In paragraph no.6 of the judgment, the Court highlighted the fact that the *power of a State as an employer* is more limited than that of a private employer inasmuch as it *is subjected to constitutional limitations*, that it cannot be exercised arbitrarily and that *the State is meant to be a model employer*. After noting that (a) statutory rules are framed under the authority of law governing employment and (b) the settled legal position is that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law, the Court emphasized that following any other course could be disastrous as it would deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme which may amount to negating the accepted service jurisprudence. It declared that when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

91. Here I may point out that it is rather surprising that the petitioners, who swears by certain portions of the above judgment in

Uma Devi (3) do not refer to certain other important portions thereof (which will be referred to by me a little later).

92. In **Umadevi (3)**, the Supreme Court , conceded the right, if any, of the employees appointed by the State or by its instrumentalities on a temporary basis or on daily wages or casually, to approach the High Court for the issuance of a Writ of Mandamus directing that they be made permanent in appropriate post, the work of which they were otherwise doing, and the claim which was essentially based on the fact that they have continued in employment or engaged in the work for significant length of time, and that they were therefore entitled to be absorbed in the posts in which they had worked in the department concerned or the authority concerned.

93. The Court then referred to the equality clause represented by Article 14 and Article 16 of the Constitution which provided for equality of opportunity in matters of public employment apart from Article 309 which provides that Legislature may regulate recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State and Article 315 which provides for the constitution of the Public Service Commissions for the Union and for the States and their functions, the Court observed that the Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

94. It is true that the Court then observed that there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wage basis, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and which are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. It observed that this right of the Union or of the State Government has to be recognized and the Constitution does not prohibit it, but the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment.

95. It then went on to hold that *it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following due process of selection as envisaged by the constitutional scheme*. It held that there is only limited role of equity in such matters and otherwise it would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted in the country.

96. The Supreme Court no doubt also held that unless an appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the

appointment comes to an end at the end of the contract and if it were an engagement or appointment on daily wage or casual basis, the same would come to an end when it is discontinued. Similarly a temporary employee could not claim to be made permanent on the expiry of his term of appointment. Merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, it held that he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It held that the High Courts acting under Article 226 of the Constitution, *should not ordinarily* issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

97. The petitioners place strong reliance on the above portions of the judgment in **Uma Devi (3)**.

98. Now I shall refer to other portion of **Umadevi (3)**, which the petitioners have conveniently ignored.

99. After reviewing other decisions, it declared that *regular recruitment should be insisted upon, and only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for*

regularization. Therefore, applying this statement of law, the fact that, even in 2008, two years after the decision in **Umadevi (3)**, the petitioners were being employed and their services utilized through PAAs by paying paltry sums by the 1st petitioner to evade compliance with various beneficial legislations and without protection from arbitrary termination of their services, shows that the 1st petitioner is conveniently ignoring the above directive of the Supreme Court.

100. Secondly, the Supreme Court clearly held in paragraph-53 of it's judgment that in cases where *irregular* appointments (not illegal appointments) are made of duly qualified persons in duly sanctioned vacant posts and such employees have continued to work for ten years or more without intervention of orders of the Courts or of Tribunals, their regularization may be considered on merits and the Union of India, the State Governments and their instrumentalities should take steps to regularize *as a one time measure,* the services of such irregularly appointed persons and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts and that required to be filled up within six months from the date of its judgment.

101. From the above decision in **Uma Devi (3)**, the following principles have to be noted as regards the present case:

(a) That *ordinarily* High Court under Article 226 cannot direct regularization or absorption in permanent employment. Therefore that would mean that there can be exceptions and that there is *no absolute bar on exercise of jurisdiction of the High Court and if circumstances warrant, it can grant such reliefs;*

(b) Equities claimed by the employees who are engaged either temporarily or on casual basis for considerable length of time do not have much of a role and they cannot be allowed to defeat Articles 14 and 16 of the Constitution of India.

(c) Though the State or its instrumentalities may be conceded in certain circumstances to engage persons temporarily or on daily wages, it ought normally to carry on regular recruitment.

(d) **Umadevi (3)** did not have occasion, on facts, to deal with '*unfair labour practice*' as defined in Sec.2(ra) r/w item 10 of Schedule V of the Act. Sec.2(ra) of the Act states that the term '*unfair labour practice*' means any of the practices specified in the V Schedule to the Act.

Paragraph 10 of Part I of the V schedule to the Act states that it would be an '*unfair labour practice*' on the part of the employers to *employ workmen as 'badlis', casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and priveleges of permanent workmen.*

<u>The Maharashtra State Road Transport Corporation and another (9 supra) case (2009) where Umadevi(3) was distinguished</u>

102. Three years after **Umadevi (3)** (1 supra), it was distinguished in **Maharashtra State Road Transport Corporation and another** (9 supra) in 2009 which arose under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (for short 'the Maharashtra Act'). In that case, the Industrial Court had given a direction which was confirmed by the High Court that casual labourers engaged for cleaning buses were entitled to status, wages and all other benefits of permanency applicable to the post of cleaners. It held that the power given to the Industrial and Labour Courts under Section 30 of the Maharashtra Act was very wide and the affirmative action mentioned therein is inclusive and not exhaustive.

103. *Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an 'unfair labour practice'* on the part of the employer under Item 6 of Schedule IV of the said Act.

104. It held that once such 'unfair labour practice' on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive directions to an erring employer. It was held that the provisions of the Maharashtra Act and the powers of Industrial and Labour Courts

provided therein were not at all under consideration in **Umadevi (3)** and that *the issue pertaining to "unfair labour practice" was not at all referred to, considered or decided therein and that it does not denude the Industrial and Labour Courts of their statutory power under the Maharashtra Act to order permanency of the workers who have been victims of "unfair labour practice" on the part of their employer.* It held that it is only an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not [normally, as stated in **Umadevi (3)**] issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or *ad hoc* employees unless the recruitment itself was made regularly in terms of the constitutional scheme.

The Nihal Singh (2013) (11 supra) case also distinguishes Umadevi (3)

105. Seven years after **Umadevi (3),** in **Nihal Singh** (11 supra), the Supreme Court considered the case of absorption of Special Police Officers appointed by the State, whose wages were paid by Banks at whose disposal their services were made available. It held that the mere fact that wages were paid by the Bank did not render the appellants 'employees' of those Banks since the appointment was made by the State and disciplinary control vested with the State. It held that the creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State, but if the State did not choose to create a cadre but chose to

make appointments of persons creating contractual relationship, its action is arbitrary. It also refused to accept the defence that there were no sanctioned posts and so there was justification for the State to utilise services of large number of people like the appellants for decades. It held that "*sanctioned posts do not fall from heaven*" and that the State has to create them by a conscious choice on the basis of some rational assessment of need. Referring to **Umadevi (3)**, it held that the appellants before them were not arbitrarily chosen, their initial appointment was not an 'irregular' appointment as it had been made in accordance with the statutory procedure prescribed under the Police Act, 1861, and the State cannot be heard to say that they are not entitled to be absorbed into the services of the State on permanent basis as, according to it, their appointments were purely temporary and not against any sanctioned posts created by the State. *It held that the judgment in **Umadevi (3)** cannot become a licence for exploitation by the State and its instrumentalities and neither the Government of Punjab nor those public sector Banks can continue such a practice consistent with their obligation to function in accordance with the Constitution.* This decision is an apt answer to the contentions raised by the respondents.

<u>The decision in Petroleum Coal Labour Union (10 supra) (2015)</u>

106. In this case also the Supreme Court held that the Industrial Tribunal has jurisdiction to direct the ONGC to regularize the services of the workmen concerned. It further held that **Uma**

Devi (3) did not consider the effect of the Industrial adjudicators' powers; and the said decision also did not consider "unfair labour practice" on the part of employer in engaging employees as *badli*, casuals or temporaries and to continue to them as such for years with the object of depriving them of the status and privileges of permanent employees. It held that though Article 14 would apply to the Industrial Tribunal as well and there cannot be any direction to regularize the services of a workman in violation of Article 14, the Industrial Tribunal has undoubtedly jurisdiction to grant relief of regularization having regard to the provisions of the Industrial Disputes Act specifically conferring such powers. It held that the *Industrial and Labour Courts are not denuded of their statutory power to order permanency of the workers who have been victims of "unfair labour practice" on the part of the employer* where the posts on which they have been working exist and this power was not over-ridden by **Uma Devi (3)**.

107. It followed its judgments in **Maharashtra SRTC case** (9 supra) and **Hari Nandan Prasad v. Food Corporation of India**[13].

108. It rejected the contention of the ONGC that the services of the workmen cannot be regularized as their appointment was originally and initially through contractors and thereafter, without following any procedure of selection and appointment as per the Recruitment Rules, they were appointed and that their appointment is

[13] (2014) 7 SCC 190

illegal. It followed its decision in **Ajaypal Singh v. Haryana Warehousing Corporation**[14] that when a workman was initially appointed in violation of Articles 14 and 16 of the Constitution, then the employer at the time of re-employment of the retrenched workman cannot take the plea that the initial appointment was in violation of the said Articles. It held that the ONGC cannot deny the rights of workmen by taking the plea that their initial appointment was contrary to Articles 14 and 16.

109. It held that even though due procedure was not followed by the ONGC for the appointment of the workmen, this does not disentitle them of their right to seek regularization of their services by it under the provisions of the Certified Standing Orders, after they have rendered more than 240 days of service in a calendar year from the date of the memorandum of appointment issued to each one of the workmen concerned in 1988.

110. It held that this *action of ONGC amounts to an 'unfair labour practice' as defined under Section 2(ra) of the Act, read with the provisions of Sections 25-T and 25-U of the Act, which prohibits such employment in the Corporation and that it would be unjust and unfair to deny the workmen regularization in their posts for the error committed by the Corporation in the procedure to appoint them in the posts*.

[14] (2015) 6 SCC 321

<u>The decision in Durgapur Casual Workers Union and others v. Food Corporation of India</u>[15]

111. In **Durgapur Casual Workers Union** (15 supra), the respondent-Corporation had set up a rice mill which was handed over to successive contractors for running the same. 49 workmen were working as contract labour under the contractor. The contract system was terminated and the rice mill was closed down in 1990-91. Thereafter, the workers concerned were directly employed by the respondents as casual employees on daily wage basis.

112. An Industrial Dispute between the workmen and the respondent regarding the regularization of the services of the workmen was referred to the Tribunal. The Tribunal answered the reference in favour of the workmen holding that continuing casualization of service of the workmen amounts to *unfair labour practice* as defined in item 10 in Part –I of the V Schedule to the Act and directed their absorption. A single Judge of the High Court dismissed the Writ Petition filed by the respondent challenging the Award of the Tribunal, but the Division Bench set aside the award. The Union of the workmen challenged it in the Supreme Court.

113. The Court allowed the appeal of the workmen and restored the Award of the Tribunal and the single Judge.

114. In that case also, **Umadevi (3)** was strongly relied upon by the respondent, but the Court held that the decision therein did not

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[15] (2015) 5 SCC 786

override the powers of the Industrial and Labour Courts in passing appropriate order, once unfair labour practice on the part of the employer is established.

115. Relying on the decision in **Maharashtra State Road Transport Corporation and another** (9 supra) and the decision in **Ajaypal Singh** (14 supra) it held that once the contract system was terminated, the workmen were entitled to re-employment under Section 25-H of the Act and that was why they were re-employed in June, 1991, and in the absence of a plea taken by the respondent before the Tribunal that the initial appointments of the workmen were illegal or that they were appointed through back-door means, the Division Bench of the High Court could not have held that their initial appointments were in violation of Articles 14 and 16 of the Constitution of India and the High Court cannot deny them the benefit under item 10 of Part-I of V Schedule of the Act when the Tribunal gave a specific finding about adoption of "unfair labour practice" on the part of the Management of the respondent.

116. Thus it is clear from the decisions in the **Maharashtra State Road Transport Corporation and another** (9 supra) case, **Petroleum Coal Labour Union** (10 supra) and **Durgapur Casual Workers' Union** (15 supra) that the decision in **Umadevi(3)** did not deal with powers of Industrial adjudicators under the Act and it will not apply if the Management indulges in "*unfair labour practice*" as

defined in Section 2(ra) of the Act read with Item 10 of Part-I of V Schedule to the Act.

117. In **Sudarshan Rajpoot Vs. Uttar Pradesh State Road Transport Corporation**[16] decided in 2015, the Supreme Court held that extracting work of permanent nature continuously for more than 3 years on the plea that the employment is on contract basis is wholly impermissible and this amounts to an "unfair labour practice" as defined under Section 2(ra) of the Act r/w Section 25-T which is prohibited under Section 25-U and Chapter V-C of the Act.

118. In the instant case too, once the workmen are held to be employees of the 1st petitioner and are found to have been employed for long periods through PAAs under sham and nominal contracts, with the object of depriving them of the status and privileges of permanent workmen, it is a clear case of 'unfair labour practice' coming under Sec.2(ra) of the Act r/w Item 10 of Part-I of V schedule to the Act. So **Umadevi (3)** cannot come in the way of the Tribunal to grant relief to the workmen.

119. In the **International Airport Authority of India** (5 supra) case, it was again held that whether a labour contract was genuine or sham can be raised before the industrial adjudicator under the Industrial Disputes Act, 1947 even if there is no notification for abolition of contract labour under Section 10 (1) of the Contract Labour (Regulation and Abolition) Act, 1970. *It was held that if the*

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[16] (2015)2 SCC 317

contract is found to be sham or nominal and merely a camouflage to evade compliance with various beneficial legislations so as to deprive the workers of statutory benefits, then the so-called contract labour will have to be treated as direct employees of the principal employer and the industrial adjudicator should direct the principal employer to regularize their services in the establishment subject to such conditions as it may specify for that purpose.

120. Therefore I hold that the decision in **Umadevi(3)** cannot help the petitioners since the 1st respondent Tribunal can grant relief of regularization to the workmen if the contract between the PAAs who engaged the workmen and the 1st petitioner is a sham and a camouflage and if they have indulged in '*unfair labour practice*' coming under Sec.2(ra) of the Act r/w Item 10 of Part-I of V schedule to the Act.

121. Having regard to the above legal position, the decision of this Court in **B.V.Rao and Co. and Ors** (2 supra) cannot be of any help to the petitioners, since the issue of 'unfair labour practice' by the 1st petitioner was not in issue there and was not considered from the said perspective. Nor does the fact that the workmen, who were interviewed pursuant to orders in W.P.27857 of 1997 and W.P.23563 of 1997 were not selected have any bearing in view of the decision in **International Airport Authority of India** (5 supra).

122. The copies of decisions in W.A.No.619 of 1997 in W.P.22331 of 1997 relied upon by the petitioners were not made available to this court and so this court is not able to express any view on them.

123. So point (ii) is answered against the petitioners and in favour of the 2nd respondent Union.

<u>Point (iii) :</u>

124. Under this point I will consider whether the award passed by the Tribunal suffers from an error apparent on the face of record?

125. The evidence set out in paras 62 to 65, in my considered opinion, was correctly considered and interpreted by the Tribunal to come to the conclusion that the workmen were in fact working with the 1st petitioner and their services were utilized by it and that their wages were being paid by the 1st petitioner through the PAA. The Tribunal also relied upon Ex.W452, letter dt.07-04-2010 issued by the 1st petitioner dealing with the subject of *request for regularization of services of employees of Private Accounting Agencies* wherein the General Manager (IR & L) sought information from all Superintending Engineers/Operations/APCPDCL to furnish information of (a) number of Private Accounting Agency employees working in the circle, division-wise; (b) details of wages paid to

Private Accounting Agencies' Staff and (c) length of service completed by them.

126. In the instant case, it cannot be disputed that there is continuity of service and complete control and supervision by the AAOs of the 1st petitioner company on the work done by the workmen and so the finding of the Tribunal that there exists employer-employee relationship between the 1st petitioner and the workmen does not warrant any interference by this Court since it cannot be said to be perverse or based on no evidence. In fact on independent consideration of the evidence on record, I have also come to the same conclusion.

127. It is true that in the impugned award the words "sham" or "camouflage" were not used by the Tribunal and it has used the words "the respondent wants to extract the work of the workmen *in an indirect way*" in para 27 of the impugned award. But not only in para-27 but also in paras-28, 29, 30 and 32 of the impugned award, it had clearly held that they were working with the 1st petitioner/doing work of 1st petitioner. Therefore the question whether there is employee-employer relationship between the workmen and the 1st petitioner was certainly in the mind of the Industrial Tribunal and by implication the question whether the contract between the PAAs and the 1st petitioner was a sham or nominal/camouflage is also to be inferred to be present in its mind and it has to be construed that it has decided the question in favor of the workmen. Therefore petitioners are not correct in

contending that the absence of the words "sham" and "camouflage" indicate that the Industrial Tribunal did not consider these aspects in the impugned award.

128. The mere fact that the 1st respondent Tribunal did not consider the evidence adduced in relation to each workman separately, in my considered opinion, is irrelevant since it is not disputed that service certificates issued by the Chartered accountants firms to each of the workmen employed by them are not substantially different in contents.

129. No doubt the Tribunal's order is not very elaborate but once it had considered the material on record and come to a conclusion which is neither perverse nor is contrary to law or based on no evidence, it cannot be interfered with on exercise of power under Art.226 of the Constitution of India.

130. Therefore this point is also answered in favor of the 2nd respondent and against the petitioners.

Point (iv)

131. For the aforesaid reasons, I see no reason to interfere with the impugned award passed by the 1st respondent Tribunal.

132. Consequently the Writ Petition is dismissed. No costs.

133. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 07-02-2017
Vsv/Kvr