

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 12th January 2018

Pronounced on: 08th March, 2018

+ W.P.(C) 225/2005

BHARAT SANCHAR NIGAM LTD. Petitioner

Through: Mr. Saurabh Leekha, Adv.

Versus

SMT. SHASHI KANTA RISHI Respondent

Through: Mr. Inderjit Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

%

JUDGMENT

C. HARI SHANKAR, J.

1. The impugned Award, dated 12th February, 2004, passed by the Central Government Industrial Tribunal-cum-Labour Court (hereinafter referred to as “the Tribunal”) holds the termination, of the services of the respondent, by the petitioner, to be illegal and unjustified and, consequently, directs her reinstatement with all consequential benefits, including full back wages. The petitioner, aggrieved thereby, is before this Court in the present writ petition.

2. The facts of the case, as projected before this Court in the present writ petition, by the petitioner, maybe set out thus:

On 23th January, 1984, the respondent was engaged, as a casual labourer, at wages of Rs. 12/- per day. No appointment order was issued to her, purportedly “since her services were engaged only on purely casual basis” (as stated in the writ petition). As the respondent became irregular in attending office, she was cautioned in this regard. On 29th September, 1989, the respondent submitted an application, to the petitioner, for being granted leave for the period 3rd October, 1989 to 7th October, 1999, as she had some urgent work, which required her to go to Delhi. The petitioner again cautioned the respondent, on 7th October, 1989, to make up her earlier irregular attendance; however, instead of maintaining punctuality, the respondent again applied for leave, on 23rd October 1989, for the period 22nd October, 1989 to 4th November, 1989. Though the respondent had remained absent from 8th October, 1989 to 21st October, 1989, she offered no explanation therefor. Neither was her leave application, dated 23rd October, 1989, accompanied by any medical certificate. In these circumstances, on 4th November, 1989, the respondent was informed that her services were no longer required. The respondent, thereupon, initiated an industrial dispute, which was referred, by the Central Government in the Ministry of Labour, on 23rd/31st January, 1991, to the Tribunal, for adjudication, with the following term of reference:

“Whether the action of the Director (North) Bareilly in engaging Smt. Shashi Kanta Rishi as casual labour and utilising as Typist and not absorbing her in regular service

and terminating her service October 89 is justified? If not, what relief she is entitled to and from what date?”

Before the Tribunal, the respondent contended, in her Statement of Claim, that she had been working on the post of typist, in the office of the petitioner, w.e.f. 23rd January, 1984. She contended that her absence from duty, from 10th October, 1989 to 4th November, 1989, was attributable to her illness, regarding which she sent medical certificates, from time to time, to the petitioner. The respondent submitted that she had been engaged, by the petitioner, as a Class III employee, and that, throughout her tenure with the petitioner, she was made to work as a typist. She also drew attention, in her Statement of Claim, to the fact that, in each year from 1984 to 1989, she had completed more than 240 days of work. *Per contra*, the petitioner, in its written statement filed before the Tribunal, submitted that the respondent had never been appointed as a typist, and that *there was, in fact, no vacant post of typist in its establishment*. It was emphasised that the respondent was only a casual worker, and that, therefore, there was no question of granting any leave to her. Casual workers, it was submitted, were paid according to the days during which they had worked, but the respondent had become a habitual absentee, leaving the petitioner no option but to terminate her services. A preliminary objection, to the effect that the petitioner was not an “industry”, within the meaning of the Industrial Disputes Act, 1947 (hereinafter referred to as “the ID Act”) was also advanced, by the petitioner, before the Tribunal; however, the said objection was rejected, by the Tribunal

vide a preliminary Award dated 1st December, 1997, and the issue has not been pressed before me. The impugned Award, relying on documents produced before the Tribunal, held that *the evidence indicated that the respondent was, in fact, working as a typist, with the petitioner, from January, 1984 to 30th September, 1989, and that she had worked for over 240 days in each year.* It was further held that, if unauthorised absence was the basis for terminating the respondent's services, such termination ought to have been preceded by a regular domestic inquiry, for which purpose reliance was placed on the judgement of the Supreme Court in ***Scooters India Ltd vs M. Mohd Yakub, 2001 LLR 54.*** The termination of the respondent's services, it was held, was in violation of the principles of natural justice, and also amounted to infraction of Section 25-F of the ID Act, as the respondent had not been given any notice of retrenchment, compensation or pay as required by the said provision. The Tribunal opined that, in fact, the petitioner ought to have absorbed/regularised the respondent in service, rather than terminating her services. In view of the fact that the petitioner did not lead any evidence to establish that the respondent was in any gainful employment during the period of her "forced unemployment due to her illegal termination of service" by the petitioner, the Tribunal directed reinstatement of the respondent in service with all benefits including full back wages and continuity of service.

3. Having failed before the Tribunal, the petitioner is before this Court.

4. Notice was issued, by a learned Single Judge of this Court, in the present writ petition, on 10th February, 2005, in the following terms:

“The petitioner's case is that regularisation could not have been granted as regularisation scheme relied upon by the Tribunal was only in respect of the casual labourer. The finding of the Tribunal shows that in various documents filed by the respondent, she was always mentioned as 'Typist' which is Group 'C' post. Thus, the documents filed by the respondent were not denied by the petitioner. There is also certificate on record which records that the respondent is efficient, hardworking and responsible typist. Of course there were other certificates recording the respondent to be irregular in service. Consequently, since it has been admitted that the respondent was working with the petitioner from 1984 to 1989 well beyond 240 days and Section 25F was admittedly not complied with, the order of reinstatement with consequential benefits cannot be faulted. In so far as regularisation is granted to the respondent, the matter needs to be examined.

Issue notice subject to the deposit of the amount covered by the impugned award, in this Court within four weeks from today. The notice is confined to the regularisation granted by the Tribunal.

Mr. Kulbhushan accepts notice for the respondent. Counter affidavit be filed within four weeks from today. Rejoinder, if any, be filed within four weeks thereafter.

A sum of Rs.5000/- towards litigation expenses be paid to the respondent through counsel within four weeks from today.

In the meanwhile, there shall be stay of the award in so far as it grants regularisation of the respondent/workman.

List the matter on 23rd May, 2005.”

5. The above order, dated 10th February, 2005, was carried, in appeal, by the petitioner, to a Division Bench of this Court, *vide* LPA 1077/2005, which was disposed of, by the Division Bench, on 13th May 2005, by the following order:

“ Admit.

At the request of learned counsel for the parties, the appeal is taken up for final disposal.

This is an appeal filed against the order of learned Single Judge dated 10.02.2005 in terms whereof notice has been issued in WP (C) No 225/2005 and order to the issue of regularisation granted by the Tribunal is stayed. Interim stay has also been granted, but only in respect to the said aspect. The result is that the order of reinstatement with consequential benefits has been held to be valid and to that extent the award would be enforceable.

We have considered the submissions advanced by learned counsel for the parties.

It is agreed by learned counsel for the parties that validity of the award as a whole may be examined by learned Single Judge and the notice be not confined only to the issue of regularisation. It is further agreed that the impugned award of the Tribunal shall not be enforced till

the decision on the writ petition and the stay application subject to the condition that it shall be the duty of the appellant to provide work to the respondent as and when work is so available. Ordered accordingly.

The appeal stands allowed in the aforesaid terms.”

(Emphasis supplied)

6. CM 12276/2006 was filed, by the respondent, in the present proceedings, under Section 17-B of the ID Act, for being paid the minimum wages, or the wages last drawn by her, whichever was higher, during the pendency of these proceedings. The said CM was disposed of, by this Court, *vide* the following order, passed on 23rd May, 2007:

“ This is an application by the respondent-workmen seeking a direction to the petitioner to pay last drawn wages or minimum wages, whichever are higher.

Learned counsel for the petitioner though has filed reply to the application but nothing has been stated as to whether the respondent-workman is gainfully employed. In this view of the matter, the petitioner is directed to pay to the respondent-workman last drawn or minimum wages, whichever are higher from the date of the award and shall continue to pay the same, till the writ petition is disposed of. Let this be done within six weeks. The application stands disposed of.”

7. The petitioner did not comply with the above order, dated 23rd May, 2007, passed by this Court and, instead, moved an application

(CM 16678/2008), purportedly for clarification of the said order. During the pendency of the said application, the respondent filed CM 11366/2008, seeking vacation of the stay granted to the petitioner, for failure, of the petitioner, to comply with the order dated 23rd May, 2007 *supra*.

8. On 11th of March, 2010, this Court vacated the stay, granted vide the earlier order dated 10th February, 2005, by the following order:

“On the last date counsel for the petitioner took time to take instructions as to whether the petitioner has complied with the directions given by this Court under Section 17-B of the I.D. Act or not. It was also directed that if no instructions are received by the petitioner then the concerned General Manager shall remain present in Court. Today counsel for the petitioner submits that the said order could not be complied with by the petitioner as the petitioner could not arrive at any conclusion to disclose as to whether the respondent should be paid the minimum wages or the last drawn wages. Counsel further submits that the petitioner also could not ascertain as to what amount of minimum wages are payable in the category of the post on which the respondent workman was deployed with the petitioner.

I have heard learned counsel for the parties.

The plea taken by the petitioner is wholly fallacious. It is quite apparent that the petitioner has deliberately flouted the orders passed by this Court. The contention of the counsel for the petitioner that the petitioner has not been able to ascertain as to what minimum wages would be payable to the respondent in

the category of the post on which the respondent was employed, is devoid of any merit as the minimum wages as per the minimum wages of U.P. State Government in the category of the post on which the respondent was employed, could have been paid. The contumacious conduct of the petitioner is apparent from the fact that the petitioner for the last three years has not taken any steps to seek any clarification in this regard from this Court and it is only when this application was moved by the respondent seeks vacation of the stay order, the aforesaid excuses been taken. The petitioner is a Government Organisation and such conduct of the petitioner is not appreciated. In view of the said position since the petitioner has defied the said order dated 23.05.2007 therefore the stay granted by this Court might order dated 10.02.2005 is vacated.

List the matter for final disposal on 11.05.2010.”

9. Alleging that, though certain payments were made, by the petitioner, to her, purportedly by way of compliance with the orders issued by this Court under Section 17-B of the ID Act, they were far short of the correct amount payable to her, the respondent moved this Court by way of CM 20304/2010, seeking issuance of directions, to the petitioner, to pay minimum wages, to her, at a rate not below the rate fixed for skilled workers in the state of Uttar Pradesh, as well as to pay her arrears worked out on that basis. The said application was, however, disposed of, by this Court, *vide* order dated 23rd February, 2011, opining that enforcement of an order, passed under Section 17-B of the ID Act, could only be by way of proceedings under Section 33-C (2) thereof. The respondent was, therefore, advised to approach the

Labour Court with an appropriate application in that regard. The respondent did so, and her application was allowed by the Tribunal, vide order dated 14th September, 2012, with the consequent direction, to the petitioner, to pay, to the respondent, Rs 2,37,807/-. The said order of the Tribunal was challenged, by the petitioner, before this Court, by way of WP (C) 5642/2013. The said writ petition was also dismissed, by a learned Single Judge of this Court, vide order dated 25th April, 2014. Mr Inderjit Singh submits that, even after this order, the petitioner has not been paying his client the correct amount due to her, as per the order dated 23rd May, 2007 *supra*, passed by this Court, and that he has once again moved the Tribunal in this regard. The said proceedings are stated to be pending.

10. The respondent filed yet another application, being CM 10658/2014, complaining that the petitioner had not yet complied with the order, dated 23rd May, 2007 *supra*, passed by this Court, and that, therefore, the writ petition of the petitioner was itself liable to be rejected. The said application was, however, dismissed, by a learned Single Judge of this Court, vide order dated 25th August, 2014, on the ground that, as the order granting stay of the impugned Award, stood vacated by the order dated 11th March, 2010 *supra*, *the respondent was at liberty to enforce the impugned Award*, and that, therefore, the question of giving directions for compliance with Section 17-B of the Act did not arise.

11. It is not in dispute that, de hors the issue of compliance, by the petitioner, of the order, dated 23rd May, 2007, passed by this Court under Section 17-B of the ID Act, the impugned Award, dated 12th February, 2004, has not been complied with, till date. In the meantime, it appears that, on 2nd August, 2016, the respondent attained the age of superannuation.

12. Arguing on behalf of the petitioner, Mr. Saurabh Leekha sought to submit that the observation, by the Tribunal, that the respondent was entitled to be regularized as typist, was totally contrary to law, as the post of typist was a Group 'C' post, and there was no post of "casual typist". He emphasised that the respondent has been engaged only as a casual labourer, though he admitted that, from time to time, the petitioner did ask her to do typing work, on casual basis. He reiterated that, in the Bareilly office of the petitioner, there was no post of typist and, therefore, there was no question of the respondent being recruited as a typist, or being regularised as one. Without prejudice, he urged that, at best, the respondent could be regularised on a Group 'D' post, and not as a typist. In any event, he submits, the respondent would have attained the age of superannuation on 2nd August, 2016. He also submits that, under Section 17-B of the ID Act, the respondent has been paid minimum wages, as revised from time to time, till August 2017.

13. *Per contra*, Mr. Inderjeet Singh, learned counsel for the respondent, submits that, consequent to vacation of the stay earlier granted, by this Court, on 11th March, 2010, his client was entitled to be paid the wages of typist, which, till date, have not been given to her. He draws attention to various documents, on record, which indicate that his client was always working as typist with the petitioner. In fact, he contends, the petitioner extracted, from his client, the work of typist, but paid her only daily wages, which was an unfair labour practice. He has reiterated the contentions advanced in his written submissions, which have already been filed before this Court.

14. In rejoinder, Mr. Leekha would submit that, in view of the order, dated 13th May, 2005 *supra*, passed by a Division Bench of this Court, the order, dated 11th March, 2010 *supra*, which was by a learned Single Judge, would be of no effect. He sought to contend that, in para 4.5 of the “additional counter-affidavit”, filed by her, the respondent had admitted that she was appointed against a Group ‘D’ post. I may immediately note, here, that I am unable to find any such admission, in para 4.5 of the “additional counter-affidavit” filed by the respondent in the present proceedings, which only admits that “she was engaged as a casual labour on daily wages”.

15. Both learned counsel have been heard in detail, and the relevant record perused.

16. In the opinion of this Court, two facts admit of no dispute, in the present case; firstly, that the respondent did, in fact, work, with the petitioner, for more than 240 days, in each year from 23rd January, 1984 till 9th October, 1989, and, secondly, that she was made to work as a typist and was, if not *de jure*, at least *de facto*, a typist, for all intents and purposes. Reference to the following documents, which are part of the record, would suffice, for this purpose:

(i) Certificate No DTN/Genl/Casual Rates/Ch. I/39, dated 18th June, 1987, issued by the Assistant Director Telecom, in the office of the Director Telecom (North) (the predecessor office of the petitioner), certified that the respondent had worked, as Casual Labour in the office of the Director Telecom (North), 140-A, Rajendra Nagar, Bareilly, w.e.f. January, 1984 to December, 1986, for a period of 339 days in 1984, 295 days in 1985 and 242 days in 1986.

(ii) Certificate, dated 30th of November, 1988, issued by the Accountant, Telecom District Engineer, Bareilly, certified that the respondent had worked as Casual labour “*for type work*”, for

425 days between 26th of May, 1987 and July, 1988. It may be noted that this Certificate clearly stated that, between January, 1988 and July, 1988, the respondent had worked for 213 days.

(iii) Memo No DIN/Genl/Casual Rates/156, dated 5th July, 1989, issued by the office of the Director Telecom (North on Area), 140-A, Rajendra Nagar, Bareilly, certified that the respondent had worked for 153 days between August and December, 1988, and 181 days between January and June, 1989.

(iv) The details of daily wages paid to the respondent, by the office of the Director Telecom (Northern Area), Bareilly, indicated that the respondent had, from January, 1986 to September, 1989, been paid for the following number of days, each month:

January 1986 – 24

February 1986 – 18

March 1986 – 17

April 1986 – 20

may 1986 – 17

June 1986 – 20

July 1986 – 23

August 1986 – 21

September 1986 – 20

October 1986 – 18

November 1986 – 20

December 1986 – 22

August 1988 – 31

September 1988 – 30

October 1988 – 31

November 1988 – 30

December 1988 – 31

January 1989 – 31

February 1989 – 28

March 1989 – 31

April 1989 – 30

May 1989 – 31

June 1989 – 30

July 1989 – 7

August 1989 – 15

September 1989 – 27

(Though, for some strange reason, the details of daily wages paid to the respondent are silent regarding the period January 1987 to July 1988, the earlier communications, already referred to hereinabove, clearly indicate that the respondent was working during the said period as well.) A holistic and conjoint reading of the communications referred to hereinabove make it clear that, during each year from 1984 till September 1989, the respondent did, in fact, worked, in the office of the petitioner, for more than 240 days.

(v) Circular Nos. DTN/O & M/Genl/26, dated 28th November, 1984, and DTN/O & M/Genl/26, dated 14th November, 1986, issued by the Office of the Director Telecom (Northern Area), Bareilly, which set out the distribution of various functions amongst employees in the office of the Director Telecom (Northern Area), clearly refer to the respondent as “typist”.

(vi) Certificate, dated 16th April, 1986, issued by the Assistant Director Telecom, (Northern Area), Bareilly, reads as under:

“ It is certified that Km. Shashi Kanta Rishi D/O Shri Atam Prakash Rishi *has been serving as Typist* (English and Hindi) on daily wages since 23rd of January, 1984 in the office of Director Telecom (Northern Area) Bareilly.

She is an efficient, hard-working and responsible typist. She also knows Shorthand (English).

I wish her every success.”

(Emphasis supplied)

(vii) Letter No PTEN/Indie/Meeting/87-88, dated 9th of May, 1989, issued by the Assistant Director Telecom (Northern Area), Bareilly, which refers to a quarterly Hindi Pragati meeting, held on 4th May, 1989, and to the participation of various employees therein, also refers to the respondent as “typist”.

17. In the face of the above documents/correspondence, regarding which no explanation is forthcoming, from the petitioner, I find no reason, in exercise of the jurisdiction vested in me under Article 227 of the Constitution of India, to differ with the finding, of the Tribunal, that the petitioner did, in fact, extract, from the respondent, the work of a typist, during the entire period for which she remained with the petitioner, without regularly employing her in the said capacity, and keeping her on daily wages. This finding of fact, as returned by the

Tribunal, is an entirely plausible one, given the facts and evidence before it. The brief of this Court, while examining the Award of the Industrial Tribunal or Labour Court, is constricted and circumscribed by the limits of *certiorari* jurisdiction, and does not extend to sitting in appeal over the decision under challenge. It is only where the decision is *ex facie* perverse, or totally discordant with the facts available, that interference would be justified. Given this limited sphere of my jurisdiction, I am unable to find any justification to interfere with the finding, of the Tribunal, that, during her entire tenure under the petitioner, the respondent did, indeed, work as a typist.

18. There is no dispute that the petitioner qualifies to be regarded as an “industry”, within the meaning of the expression as defined in clause (j) of Section 2 of the ID Act. Neither is there any dispute that the respondent satisfies the definition of “workman”, as contained in clause (s) of Section 2. The termination of the respondent from service, not having been effected as a punishment by way of disciplinary action, and not being on account of voluntary retirement of the respondent, retirement of the respondent on reaching superannuation, termination of service of the respondent on account of non-renewal of the contract of employment between her and the petitioner, or on the ground of continued ill health, would amount to “retrenchment”, within the meaning of the expression as defined in clause (oo) of Section 2 of the ID Act.

19. The march of Section 25-F of the ID Act is absolute, and inexorable. It reads as under:

“25F. Conditions precedent to retrenchment of workmen.

– No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until –

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

20. Learned counsel before me are *ad idem* regarding the fact that, while intimating the respondent, on 4th November, 1989, that her services were no longer required, the procedure prescribed by Section 25-F of the ID Act was not followed.

21. The retrenchment of the respondent from service, on 4th November, 1989 was, therefore, clearly in contravention of the mandate of Section 25-F of the ID Act, and I find, consequently, no infirmity whatsoever, in the declaration, by the Tribunal, of the said retrenchment as wholly illegal and unjustified.

22. I am constrained to observe, here, that the attitude, of the petitioner, towards the respondent, has been obnoxious. She has been treated like chattel, not only before her summary removal from service, but even thereafter during the proceedings, in the present writ petition, before this Court. She was inducted into service, without even issuing an appointment order, and work was extracted from her for five long years. Without affording the respondent the stability of a regular employment as typist, she was made to work as a typist, for over five years, on daily wages. The various communications referred to, in para 16 supra, unequivocally belie the assertion, of the petitioner, that the respondent was a casual labourer, who was occasionally entrusted with typing work. It is not the case of the respondent that, during the said period, her work or conduct was ever found wanting in any respect. No memorandum or other communication was issued, to the respondent, by the petitioner, expressing any dissatisfaction regarding the manner in which she was discharging duties. Interestingly, para 4.3 of the writ petition reads thus:

“That the respondent got married sometime in July 1989 and her in-laws residence was not in Bareilly. *It is for this reason that the claimant was very irregular in attending to her office* and for this she was cautioned on 29.09.1989.”

(Emphasis supplied)

There is not a whisper of an averment, anywhere in the petition, that the respondent was ever irregular in her work, or otherwise remiss in the manner in which she discharged her duties, prior to her marriage in July 1989. The “caution” issued to her on 29th September, 1989, was, even as per the writ petition, provoked by her being “very irregular” in attending office after her marriage – for the supposedly long period of two months. Even so, the petitioner has been less than forthcoming regarding the details of the “irregularity” in work, on the part of the respondent, between July and September, 1989. Having extracted work from her, paying her a pittance therefor, the petitioner took advantage of the fact that between 3rd October, 1989 and 4th November, 1989, the petitioner sought leave, on medical grounds, for which requisite medical certificates were attached. The petition does not aver, mercifully, that the said medical certificates were not acceptable, or that the respondent was fraudulently seeking leave. In the absence of any such averment, it is difficult to comprehend how, or why, the petitioner chose to treat the period of one month’s absence, of the respondent, from duty, on medical grounds, as so serious as to justify terminating her from service. It is also significant, in this regard, to note that the petitioner did not, apparently, reject any

of the leave applications submitted by the respondent, or question the genuineness or veracity thereof. The Statement of Claim, filed by the respondent before the Tribunal, clearly avers that the petitioner never rejected, or even questioned, any of the leave applications submitted by her, or issued any communication, to her, requiring her to appear before any medical board in this regard. She has further stated that it was only when she reported for duty, at the office of the petitioner on 19th December, 1989, that she was informed, verbally, that her services stood terminated w.e.f. 4th November, 1989, on the ground of alleged unauthorised absence. To these assertions, the only response, by the petitioner, in its submissions before the Tribunal, is by way of a *non sequitur*, stating, without any corroborating evidence, that the respondent had been informed, on 4th November, 1989, itself, that her services were no longer required by the petitioner. The asseveration, by the respondent, that none of her leave applications had been rejected, or their genuineness questioned by the petitioner, is not traversed by the petitioner in its submissions before the Tribunal. It is impossible to comprehend how, without responding to, leave alone rejecting, a single one of the leave applications submitted by the respondent, it can be said that the services of the respondent deserved to be discontinued, as she had remained unauthorisedly absent from duty. *Prima facie*, the act of the petitioner, in discontinuing the services of the respondent, suffers from malice in fact as well as in law.

23. It is not possible, therefore, to fault the Tribunal for having directed reinstatement, of the respondent, in service, with full back wages. The passage of time, since then has, however, made it necessary to modify this dispensation; that, however, is a matter which would be addressed towards the conclusion of this judgement.

24. The impugned Award, of the Tribunal, however, goes a step further, and directs regularisation, of the respondent, as “typist”. As a sequel to the said direction, the Tribunal has directed that the respondent be paid the salary of a regular typist, along with all benefits consequent thereupon. Mr Leekha, appearing for the petitioner, seriously questioned the propriety of this direction, asserting that regularisation was not a matter of right, and that it was only a person who was regularly recruited, who could be treated as a regular employee. He places reliance, for this purpose, on the well-known decision of the Constitution Bench of the Supreme Court in *Secretary, State of Karnataka vs Umadevi, (2006) 4 SCC 1*.

25. Mr Leekha’s submission merits consideration.

26. *Umadevi (supra)*, penned by P.K. Balasubramanian, J. on behalf of the Constitution Bench of the Supreme Court, has fast evolved into the employers’ Bible. It is vigorously pressed into

service, in nearly every case in which a casual labourer, or an ad hoc or temporary employee, seeks regularisation of her or his, services, to repudiate the claim.

27. The extent to which *Umadevi (supra)* applies, in the arena of industrial adjudication, and affects the jurisdiction and power of Labour Courts or Industrial Tribunals to direct regularisation, are issues which have proved to be prickly and thorny in equal measure.

28. The first significant decision, on the issue, appears to be *U.P. Power Corporation Ltd vs Bijli Mazdoor Sangh, (2007) 5 SCC 755*, by a two Judge bench of the Supreme Court, speaking through Pasayat, J. The respondents, in the said case, were appointed as *chowkidars*, on muster-roll basis, and were being paid daily wages. Consequent to a decision, of the Corporation, that no casual workers would be engaged, the services of the respondents were terminated. The respondents moved the Industrial Tribunal, alleging infraction of Section 25-F of the ID Act, and succeeded. The Industrial Tribunal directed reinstatement of the workmen, but did not consider the issue of their regularization, though it was raised. The second respondent, in the said case, thereafter, raised another industrial dispute, seeking, inter alia, regularisation of his services. He also filed a writ petition, challenging the earlier award of the Industrial Tribunal, complaining that the issue of regularization had not been considered therein.

Ultimately, the High Court remanded the matter to the Industrial Tribunal, to decide the issue of regularization of the said workmen. The Tribunal, adjudicating the remand, held that the workmen were deemed to have been regularised, on completion of three years of service with the Corporation. The Corporation moved the writ Court, thereagainst, but the High Court dismissed the writ petition, holding that the workmen were entitled to regularization. The Corporation appealed, further, to the Supreme Court, citing, in its support, *Umadevi (supra)*. The workmen, per contra, sought to contend that *Umadevi (supra)* did not deal with the jurisdiction of the industrial adjudicator, which was a species sui generis. The Supreme Court, while accepting the fact that the powers of the industrial adjudicator were not in issue in *Umadevi (supra)*, held, nevertheless, that “the foundational logic” in *Umadevi (supra)* was based on Article 14 of the Constitution of India. Having said that, the Supreme Court merely held, in conclusion, that “the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in *Umadevi case* about the regularization.” It is not possible to understand this judgment as categorically pronouncing on the issue of the power of the Industrial Tribunal to direct regularization, this way or that.

29. In *Maharashtra State Road Transport Corporation vs Casteribe Rajya Parivahan Karmchari Sangathana*, (2009) 8 SCC 556, a two Judge Bench of the Supreme Court (speaking through R.M.

Lodha, J., as he then was) was concerned with employees, such as sweepers, cleaners, etc, who had been engaged on casual basis by the appellant-Corporation in that case, allegedly on contract. The Industrial Court directed grant of permanency, to the said employees/workmen, with all consequential benefits in the form of status, wages, and the like. The Corporation appealed, thereagainst, to the Supreme Court. The very first question, framed by the Supreme Court as arising for its consideration, read thus:

“Whether the direction to Maharashtra State Road Transport Corporation (for short “the Corporation”) by the Industrial Court, and confirmed by the High Court of giving status, wages and all other benefits of permanency, applicable to the post of cleaners to the complainants is justified?”

As in the present case, *Umadevi (supra)* was pressed, into service, by the Corporation, before the Supreme Court. Though the said decision revolved around the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as “the Maharashtra Act”), the principles laid down, therein, would apply, equally, to the ID Act, and proceedings thereunder. The Supreme Court, after extracting, in extenso, several passages from *Umadevi (supra)*, squarely answered the issue arising for it, as framed by it and as extracted hereinabove, thus (in para 30 of the report):

“The question that arises for consideration is: have the provisions of the MRTU and PULP Act being denuded of

the statutory status by the Constitution Bench decision in *Umadevi*? In our judgement, it is not.”

Paras 31 to 36 of the report, thereafter, merit reproduction, in full, as under:

“31. The purpose and object of the MRTU and PULP Act, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedules II, III and IV. The MRTU and PULP Act empowers the Industrial and Labour Courts to decide that the person named in the complaint has engaged in or is engaged in unfair labour practice and if the unfair labour practice is proved, to declare that an unfair labour practice has been engaged in or is being engaged in by that person and direct such person to cease and desist from such unfair labour practice and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act.

32. *The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue*

preventive as well as positive direction to an erring employer.

33. *The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in **Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]** . As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in **Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]** . Unfair labour practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.*

34. *It is true that **Dharwad Distt. PWD Literate Daily Wages Employees' Assn. [(1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902]** arising out of industrial adjudication has been considered in **Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]** and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in **Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]** leaves no manner of doubt that what this Court was concerned in **Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]** was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.*

35. ***Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]*** is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation 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.

36. ***Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]*** does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. ***Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]*** cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established.”

(Emphasis supplied)

Maharashtra State Road Transport Corporation (supra), therefore, categorically *excepted* the applicability, of ***Umadevi (supra)***, to cases of industrial adjudication, and *limited* such applicability to cases where the High Court, or Supreme Court, in exercise of extraordinary original jurisdiction, under Article 226 or Article 32 of the Constitution of India, was directing such regularisation.

30. In *B.S.N.L. vs Bhurumal*, (2014) 7 SCC 177, again by a two Judge bench of the Supreme Court, the respondent-workman raised an industrial dispute, alleging wrongful termination by the appellant-BSNL. BSNL contended, in opposition, that no appointment /engagement letter had been issued, to the workman, by it, and that the workman was, in fact, not even paid daily wages, and had no employer-employee relationship with it. The Industrial Tribunal, however, held that there was clear evidence to the effect that the workman was working directly under the administrative control of BSNL as a lineman, and that his services had been illegally terminated. The Tribunal, therefore, directed reinstatement of the workman along with back wages. BSNL approached the writ Court, and, thereafter, the Division Bench of the High Court, but failed at both stages. The Supreme Court was, therefore, petitioned in the matter. The Supreme Court, in the first instance, clearly held that the findings of fact, returned by the Industrial Tribunal, resulting in the award of reinstatement with back wages, were not amenable to interference, by the High Court, under Article 226 of the Constitution, or even by the Supreme Court under Article 136 thereof, in the absence of the said findings being vitiated by total perversity or being based on no evidence whatsoever. Para 20 of the report is instructive, in this regard:

“It is apparent that the aforesaid findings are findings of fact. Such findings are not to be interfered with by the High Court under Article 226 of the Constitution or by

this Court under Article 136 of the Constitution. Interference is permissible only in case these findings are totally perverse or based on no evidence. Insufficiency of evidence cannot be a ground to interdict these findings as it is not the function of this Court to reappreciate the evidence. It was because of this reason that the learned counsel for the appellant made frontal attack on the findings of the Courts below and endeavoured to demonstrate that there was perversity in the fact-finding by CGIT which was glossed over by the High Court as well.”

(Emphasis supplied)

The Supreme Court, thereafter, went on to hold that, on facts, it was clear that the respondent-workman had worked, with the BSNL, as a lineman. It was also found that there was no evidence to indicate that the services of the respondent-workman had been engaged on contract basis; consequently, the Supreme Court affirmed the finding, of the Industrial Tribunal, as upheld by the High Court, that the respondent had worked with BSNL on daily wage basis. Equally, the Supreme Court affirmed the finding, of the Industrial Tribunal, that the termination of the respondent was illegal. Having so held, however, the Supreme Court went on to opine that reinstatement did not always follow as an inevitable sequitur to the termination, of the workman, being held to be illegal. ***Umadevi (supra)*** was invoked, for the said purpose, in para 34 of the report, which reads thus:

“The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment

of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. *Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularisation [see State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]]. Thus when he cannot claim regularisation and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.*

(Emphasis supplied)

Though this case did not directly involve any dispute relatable to regularization of the workman, the Supreme Court did enter the observations italicized hereinabove, relying, for the said purpose, on *Umadevi (supra)*.

31. ***Hari Nandan Prasad vs Employer I/R to Management of Food Corporation of India, (2014) 7 SCC 190***, decided by the same two Judge Bench of the Supreme Court (speaking through Sikri, J.) -which decided ***Bhurumal (supra)***, struck, however, a note contrary to that struck in ***Maharashtra State Road Transport Corporation (supra)***.

The appellant-workmen, in that case, had been engaged on casual basis, with the Food Corporation of India (hereinafter referred to as “FCI”), and their services were dispensed with, after some time. They raised industrial disputes alleging wrongful termination. The Industrial Tribunal, *vide* two awards, held the termination of the said workmen to be illegal and, consequently, directed their reinstatement, as also regularization in service. Writ petitions, thereagainst, were dismissed by the learned Single Judge of the High Court, but LPAs, preferred thereagainst by FCI, were allowed by the Division Bench. The workmen, consequently, appealed to the Supreme Court. As always, *Umadevi (supra)* was invoked, by FCI. The workmen, on the other hand, equally predictably, relied on *Maharashtra State Road Transport Corporation (supra)*. The Supreme Court noted the fact that the Division Bench of the High Court, adjudicating the LPAs, had held that there had, in fact, been infraction, by FCI, of Section 25-F of the ID Act. Interestingly, after quoting the above extracted passage from *Bhurumal (supra)*, the Supreme Court clarified that the said observations were returned, by it, in the context of a dispute involving termination alone, and no question of regularization had arisen therein. The question of entitlement to regularization was, however, addressed in the passages that followed.

32. The Supreme Court first addressed, empirically, the issue of whether, in matters concerning industrial adjudication, *Umadevi (supra)* would, or would not, apply. After extracting certain passages

from *U. P. Power Corporation (supra)*, the judgement goes on to hold as under (in para 25 of the report):

“It is clear from the above that the Court emphasised the underlying message contained in *Umadevi (3) case [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]* to the effect that *regularisation of a daily-wager, who has not been appointed after undergoing the proper selection procedure, etc. is impermissible as it was violative of Article 14 of the Constitution of India and this principle predicated on Article 14 would apply to the Industrial Tribunal as well inasmuch as there cannot be any direction to regularise the services of a workman in violation of Article 14 of the Constitution. As we would explain hereinafter, this would mean that the Industrial Court would not issue a direction for regularising the services of a daily-wage worker in those cases where such regularisation would tantamount to infringing the provisions of Article 14 of the Constitution. But for that, it would not deter the Industrial Tribunals/Labour Courts from issuing such direction, which the industrial adjudicators otherwise possess, having regard to the provisions of the Industrial Disputes Act specifically conferring such powers. This is recognised by the Court even in the aforesaid judgment.*”

(Emphasis supplied)

The Supreme Court, thereafter, examined *Maharashtra State Road Transport Corporation (supra)*, and distilled, in paras 31 to 33 of the report, the manner in which the law laid down in the said judgement was to be understood, thus:

“31. The Court in *Maharashtra SRTC case [Maharashtra SRTC v. Casteribe Rajya Parivahan*

Karmchari Sanghatana, (2009) 8 SCC 556 : (2009) 2 SCC (L&S) 513] also accepted the legal proposition that Courts cannot direct creation of posts, as held in ***Mahatma Phule Agricultural University v. Nasik Zilla Sheth Kamgar Union[(2001) 7 SCC 346 : 2001 SCC (L&S) 1180]*** . Referring to this judgment, the Court made it clear that inaction on the part of the State Government to create posts would not mean an unfair labour practice had been committed by the employer (University in that case) and as there were no posts, the direction of the High Court to accord the status of permanency was set aside. The Court also noticed that this legal position had been affirmed in ***State of Maharashtra v. R.S. Bhonde [State of Maharashtra v. R.S. Bhonde, (2005) 6 SCC 751 : 2005 SCC (L&S) 907]***. The Court also reiterated that creation and abolition of post and regularisation are purely executive functions, as held in a number of judgments and it was not for the Court to arrogate the power of the executive or the legislature by directing creation of post and absorbing the workers or continue them in service or pay salary of regular employees. This legal position is summed up in para 41 which reads as under: ***(Maharashtra SRTC case [Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556 : (2009) 2 SCC (L&S) 513] , SCC p. 576)***

“41. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the Courts.”

32. However, the Court in ***Maharashtra SRTC case [Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556 : (2009) 2***

SCC (L&S) 513] found that the factual position was different in the case before it. Here the post of cleaners in the establishment were in existence. Further, there was a finding of fact recorded that the Corporation had indulged in unfair labour practice by engaging these workers on temporary/casual/daily-wage basis and paying them paltry amount even when they were discharging duties of eight hours a day and performing the same duties as that of regular employees.

33. In this backdrop, the Court in ***Maharashtra SRTC case [Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556 : (2009) 2 SCC (L&S) 513]*** was of the opinion that the direction of the Industrial Court to accord permanency to these employees against the posts which were available, was clearly permissible and within the powers, statutorily conferred upon the Industrial/Labour Courts under Section 30(1)(b) of the MRTU and PULP Act, 1971 which enables the industrial adjudicator to take affirmative action against the erring employer and as those powers are of wide amplitude abrogating (*sic* including) within their fold a direction to accord permanency.”

33. Following on the above analysis, it was held, by the Supreme Court in ***Hari Nandan Prasad (supra)***, that there was no real contradiction between ***U. P. Power Corporation (supra)*** and ***Maharashtra State Road Transport Corporation (supra)***, in the following words (in para 34 of the report):

“A close scrutiny of the two cases, thus, would reveal that the law laid down in those cases is not contradictory to each other. In ***U.P. Power Corpn. Ltd. v. Bijli Mazdoor***

Sangh, (2007) 5 SCC 755 : (2007) 2 SCC (L&S) 258 , this Court has recognised the powers of the Labour Court and at the same time emphasised that the Labour Court is to keep in mind that there should not be any direction of regularisation if this offends the provisions of Article 14 of the Constitution on which the judgment in ***State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753*** is primarily founded. On the other hand, in ***Food Corporation of India v. Union of India, (2005) 106 FLR 1171 : 2005 AIR Jhar R 1962*** , the Court has recognised the principle that having regard to the statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the judgment in ***State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753*** . It is clear from the reading of this judgment that *such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up permanent posts even when available and continuing to employ workers on temporary/daily-wage basis and taking the same work from them and making them do some purpose which was being performed by the regular workers but paying them much less wages. It is only when a particular practice is found to be unfair labour practice, as enumerated in Schedule IV of the MRTP and PULP Act, and it necessitates giving direction under Section 30 of the said Act, that the Court would give such a direction.*”

(Emphasis supplied)

34. This judgment, too, therefore, acknowledges the authority, of the Industrial Tribunal, to direct permanency, or regularization, provided (i) unfair labour practice is found to have been practiced by

the employer, (ii) the workman has been discharging the duties of the regular post while being paid lesser wages and (iii) a regular vacancy exists, in which he can be accommodated.

35. The next judgment to be considered is *Ajaypal Singh vs Haryana Warehousing Corporation*, (2015) 6 SCC 321, again of a bench of two learned Judges of the Supreme Court. The services of the appellant-workman, in that case, were terminated in contravention of Section 25-F of the ID Act. The Labour Court directed his reinstatement with full back wages. The Single Judge of the High Court, when moved in the matter, opined that the appointment of the appellant-workman having been made in violation of Articles 14 and 16 of the Constitution of India, he was not entitled to be reinstated, but granted him lump-sum compensation of Rs 20,000/-. The Division Bench affirmed the order. The workman appealed to the Supreme Court. The Supreme Court, at the outset of its discussion, framed the issue for consideration thus, in para 7 of the report:

“The issue that is to be determined herein is: whether the validity of initial appointment of a workman can be questioned in a case in which Court/tribunal has to determine whether the termination of service of the workman which comes within the meaning of ‘retrenchment’, is violative of Section 25-F of the Industrial Disputes Act?”

On the issue of applicability of *Umadevi (supra)* in such cases, the Supreme Court, relying on *Maharashtra State Road Transport Corporation (supra)*, held thus (in paras 17 to 24 of the report):

“17. In *Umadevi case (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]* this Court held that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution of India. *The provisions of the Industrial Disputes Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in Umadevi case (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]*. *The issue pertaining to unfair labour practice was neither the subject-matter for decision nor was it decided in Umadevi case (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753]*.

18. We have noticed that the Industrial Disputes Act is made for settlement of industrial disputes and for certain other purposes as mentioned therein. *It prohibits unfair labour practice on the part of the employer in engaging employees as casual or temporary employees for a long period without giving them the status and privileges of permanent employees.*

19. Section 25-F of the Industrial Disputes Act, 1947 stipulates conditions precedent to retrenchment of workmen. A workman employed in any industry who has been in continuous service for not less than one year under

an employer is entitled to benefit under the said provision if the employer retrenches the workman. Such a workman cannot be retrenched until he/she is given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice apart from compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. It also mandates the employer to serve a notice in the prescribed manner on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette. *If any part of the provisions of Section 25-F is violated and the employer thereby, resorts to unfair trade practice with the object to deprive the workman with the privilege as provided under the Act, the employer cannot justify such an action by taking a plea that the initial appointment of the employee was in violation of Articles 14 and 16 of the Constitution of India.*

20. Section 25-H of the Industrial Disputes Act relates to re-employment of retrenched workmen. Retrenched workmen shall be given preference over other persons if the employee proposes to employ any person.

21. We have held that the provisions of Section 25-H are in conformity with Articles 14 and 16 of the Constitution of India, though the aforesaid provisions (Articles 14 and 16) are not attracted in the matter of re-employment of retrenched workmen in a private industrial establishment and undertakings. *Without giving any specific reason to that effect at the time of retrenchment, it is not open to the employer of a public industrial establishment and undertaking to take a plea that initial appointment of such workman was made in violation of Articles 14 and 16 of the Constitution of India or the workman was a back door appointee.*

22. *It is always open to the employer to issue an order of “retrenchment” on the ground that the initial appointment of the workman was not in conformity with Articles 14 and 16 of the Constitution of India or in accordance with rules. Even for retrenchment on such ground, unfair labour practice cannot be resorted to and thereby workman cannot be retrenched on such ground without notice, pay and other benefits in terms of Section 25-F of the Industrial Disputes Act, 1947, if continued for more than 240 days in a calendar year.*

23. *However, in other cases, when no such plea is taken by the employer in the order of retrenchment that the workman was appointed in violation of Articles 14 and 16 of the Constitution of India or in violation of any statutory rule or his appointment was a back door appointment, while granting relief, the employer cannot take a plea that initial appointment was in violation of Articles 14 and 16 of the Constitution of India, in absence of a reference made by the appropriate Government for determination of question whether the initial appointment of the workman was in violation of Articles 14 and 16 of the Constitution of India or the statutory rules. Only if such reference is made, a workman is required to lead evidence to prove that he was appointed by following procedure prescribed under the Rules and his initial appointment was legal.*

24. *In the present case, the services of the appellant was not terminated on the ground that his initial appointment was made in violation of Articles 14 and 16 of the Constitution of India. No such reasons were shown in the order of retrenchment nor was such plea raised while reference was made by the appropriate Government for adjudication of the dispute between the employee and the employer. In absence of such ground, we are of the opinion that it was not open for the High Court to deny the*

benefit for which the appellant was entitled on the ground that his initial appointment was made in violation of Articles 14 and 16 of the Constitution of India.”

(Emphasis supplied)

36. The Court, thereafter, proceeded to conclude, in para 39 of the report, as under:

“On a harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularisation only because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularisation would be impermissible. In the aforesaid circumstances giving of direction to regularise such a person, only on the basis of number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service which is an anathema to Article 14 of the Constitution. Further, such a direction would not be given when the worker concerned does not meet the eligibility requirement of the post in question as per the recruitment rules. However, wherever it is found that similarly situated workmen are regularised by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularisation in such cases may be legally justified, otherwise, non-regularisation of the left-over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. Thus, the industrial adjudicator

would be achieving the equality by upholding Article 14, rather than violating this constitutional provision.”

37. *Ajaypal Singh (supra)*, therefore, reiterates the legal position enunciated in *Hari Nandan Prasad (supra)*, but adds, thereto, an important rider, viz. that the legality of the method of appointment of the workman can be questioned by the employer, *only where the workman is retrenched on that ground*, and not otherwise.

38. Four months after *Ajaypal Singh (supra)*, came *Sudarshan Rajpoot v U.P. State Road Transport Corporation, (2015) 2 SCC 317*, authored by V. Gopala Gowda, J., on behalf of C, Nagappan, J. and himself. The appellant-workman, in that case, suffered an accident, as a result of which he was hospitalized and was unable to attend work. On his reporting for work consequent on his discharge from hospital, he was informed that his name had been struck off the rolls of the respondent and that he had been removed from service. The workman raised an industrial dispute, contending that he had continuously worked for more than 240 days in a calendar year and that, therefore, his termination was illegal. The respondent contended, *per contra*, that the workman had been engaged on contract basis. It was also alleged, in the order of termination of the workman, that the accident suffered by him was on account of his own negligence. The

Labour Court returned a finding that the workman was a permanent employee, and that, therefore, his termination was illegal; consequently, the respondent was directed to reinstate him in service with full back wages and all consequential benefits. The direction for reinstatement with consequential benefits was, however, set aside by the High Court, which held the workman to be eligible to consolidated damages/compensation. The workman, consequently, approached the Supreme Court. The Supreme Court found that the respondent-Corporation had not produced any evidence to indicate that the workman had been appointed on contract basis, and, on the contrary, held that the fact of deposit, by the workman, of Rs.2,000/- towards security with the corporation, indicated that he was a permanent employee. Noticing the fact that engaging of a workman as daily, casual or temporarily employee and, extracting from him, work on permanent basis, amounted to an unfair labour practice (under the U.P. Industrial Disputes Act, 1947, which was in issue in the said case and which is, to that extent, *in pari materia* with the ID Act), it was held that the act of the respondent-corporation in engaging the workman on contractual basis, during which he had rendered more than 240 days of service, for three years, was statutorily prohibited, and amounted to “unfair labour practice”. The Supreme Court, therefore, held that the workman was eligible to be considered as permanent. It was also noted, in this connection, that the first witness of the employer (EW1) had admitted, in evidence, the fact that the workman was appointed on permanent basis as Driver. In the circumstances, the termination of the respondent was held to amount to “retrenchment”, in violation of the

provisions of U.P. Industrial Disputes Act. The reliance on *Uma Devi (supra)* was, it was held, misguided in view of the law laid down enunciated in *Maharashtra State Transport Corporation (supra)*. The Supreme Court also took notice of the decision in *Hari Nandan Prasad (supra)*, and held that, even as per law laid down in the said decision, the termination of the workman's services was not legal and valid, in the absence of any evidence to show that he had been appointed on contract basis. It was held that, even if the plea of contract appointment was accepted, the extracting of work on permanent nature, workman, for more than three years, was wholly impermissible. Accordingly, the Supreme Court upheld the award of the Labour Court and reversed the judgment of the High Court.

39. Less than a month after *Sudarshan Rajpoot (supra)*, comes the judgment of another two Judge Bench of the Supreme Court in *Durgapur Casual Workers Union vs FCI, (2015) 5 SCC 786*. The workmen, in that case, were initially working as contract labourers in the rice mill of the FCI, which was closed in 1990-1991. Consequent, thereupon, the workmen were directly employed upon by FCI in June, 1991, as casual employees on daily wage basis, for performing jobs as sweeping, covering infected stocks, cutting grass, etc. Claiming regularization of their services, the workmen raised an industrial dispute. The term of reference, as drawn up by the Ministry of Labour while referring the dispute for adjudication to the Industrial Tribunal, read as under:

“Whether the demand of Durgapur Casual Workers Union for absorption of 49 casual workmen as per list enclosed by the management of FCI, Durgapur is justified? If not, what relief they are entitled to?”

The Tribunal answered the reference in favour of the workmen, holding, *vide* its award dated 9th June 1999, that continued casualisation of services of the workmen amounted to an unfair labour practice, and that social justice demanded that the workmen be absorbed in service. A writ petition, preferred thereagainst by the FCI, was dismissed by a learned Single Judge of the High Court. The Division Bench of the High Court, which was approached in appeal, by the FCI, however, reversed the judgment of the Single Judge, holding that, as the workmen were illegal appointees, any direction to regularise them in service was impermissible in law, in view of ***Uma Devi (supra)***. It was further held that, even assuming any “unfair labour practice” to have taken place, that could not justify directing permanent absorption of the workmen. The aggrieved workmen moved the Supreme Court.

40. The Supreme Court, speaking through Sudhanshu Jyoti Mukhopadhyay, J., examined ***Uma Devi (supra)*** in detail, and also took stock of the decisions in ***Maharashtra State Road Transport Corporation (supra)*** and ***Ajaypal Singh (supra)***. The Supreme Court allowed the appeal of the workmen, reasoning thus:

23. This Court in *Ajaypal Singh [Ajaypal Singh v. Haryana Warehousing Corpn., (2015) 6 SCC 321]* held that the provisions of Section 25-H are in conformity with Articles 14 and 16 of the Constitution of India, though, the aforesaid provisions (Articles 14 and 16) are not attracted in the matter of re-employment of retrenched workmen in private industrial establishment and undertakings. In that view of the matter it can be safely held that the workmen who were retrenched, were rightly taken in the services of Corporation. Admittedly, no plea was taken by the Corporation either before the State Government or before the Tribunal that the initial appointments of workmen were illegal or they were appointed through back door means.

24. In this background, we are of the view that it was not open to the Division Bench of the High Court, particularly in absence of any such plea taken by the Corporation before the Tribunal to come to a finding of fact that initial appointments of workmen were in violation of Articles 14 and 16 of the Constitution of India, nor was it open to the High Court to deny the benefit to which the workmen were entitled under Item 10 of Part I of the Fifth Schedule of the Act, the Tribunal having given specific finding of unfair trade practice on the part of the management of the Corporation.

25. Having accepted that there was unfair trade practice, it was not open to the Division Bench of the High Court to interfere with the impugned award.

41. Journeying four months more in time, we come across *ONGC Ltd. v. Petroleum Coal Union Labour and Ors. (2016) 6 SCC 494*, again authored by V.Gopala Gowda, J., on behalf of C.Nagappan, J. and himself, which directly addressed the issue of competence, of the

Industrial Tribunal, to direct regularisation. The workmen, in that case, were inducted as security personnel, with the Oil and Natural Gas Corporation (ONGC), for the term 13th January, 1988 to 12th February, 1988 on a monthly salary. After completion of the said term, the workmen were continued by the ONGC, in their respective posts, as a stopgap measure, without any formal written orders, as a result whereof the workmen, who had initially been engaged through contractors, became employees of ONGC on temporary basis. The workmen raised an industrial dispute, claiming regularisation, which was referred to the Tribunal. The Tribunal directed regularisation of the services of the said workmen, whereagainst ONGC moved a learned Single Judge of the High Court, by filing a writ petition. Reliance was, predictably, placed, therein, on *Uma Devi (supra)*. The workmen contended, *per contra*, that *Uma Devi (supra)* had no application to industrial adjudication.

42. The learned Single Judge of the High Court held that the workmen were victims of unfair labour practice, on the part of the ONGC, in retaining them on temporary basis, for several years, and that, therefore, they were entitled for regularization even if they had not been appointed by following the regular recruitment procedure. The Division Bench of the High Court dismissed the appeal preferred by ONGC, against which ONGC approached the Supreme Court. *Uma Devi (supra)*, needless to say, was the sheet-anchor of ONGC's case before the Supreme Court as well.

43. The Supreme Court addressed, as the first issue arising before it, the question of whether the Tribunal acted within jurisdiction, in directing ONGC to regularise the services of the workmen in the posts occupied by them. The Supreme Court, in no uncertain terms, rejected the stand of the ONGC in para 27 of the report, which reads as under:

“27. The Central Government in exercise of its powers under Section 10 of the Act referred the existing industrial dispute between the workmen concerned and the Corporation to the Tribunal which rightly adjudicated Point (i) of the dispute (supra) on the basis of the facts, circumstances and evidence on record and passed an award dated 26-5-1999 directing the Corporation that the services of the workmen concerned should be regularised with effect from the date on which all of them completed 480 days, subsequent to their appointment by the memorandum of appointment. The contention urged on behalf of the Corporation that the Tribunal has no power to pass such an award compelling the Corporation to regularise the services of the workmen concerned is wholly untenable in law. Even if we consider the same, the said contention is contrary to the legal principles laid down by this Court in *Hari Nandan Prasad v. Food Corpn. of India*, (2014) 7 SCC 190, wherein the decisions in *U.P. Power Corpn. Ltd.v. Bijli Mazdoor Sangh*, (2007) 5 SCC 755 and *Maharashtra SRTC v. Casteribe Raja Parivahan Karmchhari Sanghatana*, (2009) 8 SCC 556 and *State of Karnataka v. Umadevi* (3), (2006) 4 SCC 1 were discussed in detail.”

It was held, in this regard, that the Tribunal had “every power to adjudicate an industrial dispute and impose upon the employer new

obligations to strike a balance and secure industrial peace and harmony between the employer and workmen and ultimately deliver social justice which is the constitutional mandate as held by the Constitution Bench of this Court in a catena of cases.” Following thereupon, the Supreme Court categorically ruled that the Tribunal had “rightly passed an award directing the corporation to regularise the services of the workmen concerned”. The specific plea, of ONGC, that the workmen concerned were appointed without following due procedure under the recruitment rules was also repelled, by the Supreme Court, in the following words (occurring in para 31 of the report):

“ The plea of the Corporation that the reason for not regularising the workmen concerned under the Certified Standing Orders of the Corporation is allegedly due to the fact that the appointment of the workmen concerned was made without following due procedure under the Recruitment Rules and that their appointments were illegal. This plea cannot be accepted by us in view of the legal principle laid down by this Court in the above decision, wherein it is clearly laid down that the Corporation cannot deny the rights of the workmen by taking the plea that their initial appointment was contrary to Articles 14 and 16 of the Constitution.”

In view of the fact that the workmen had completed more than 240 days of service in twelve calendar months, it was held that they were entitled for regularisation.

44. Significantly, in a somewhat more recent decision, a Three Judge Bench of the Supreme Court, speaking through Dr. D. Y. Chandrachud, J., impliedly endorsed the view expressed in *Maharashtra's State Road Transport Corporation (supra)*, even though the case before it did not pertain to an industrial dispute, by observing as under (in para 13 of the report):

“Dealing with the issue of whether Labour Courts are denuded of authority to direct regularisation pursuant to labour enactments, this Court in *Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchhari Sanghatana*, (2009) 8 SCC 556 : (2009) 2 SCC (L&S) 513 , held thus: (SCC pp. 573-74, paras 34-36)

“34. It is true that *Dharwad District PWD Literate Daily Wages Employees' Assn. v. State of Karnataka*, (1990) 2 SCC 396 : 1990 SCC (L&S) 274 arising out of industrial adjudication has been considered in *State of Karnataka v. Umadevi* (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753 and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in *Umadevi* (3) leaves no manner of doubt that what this Court was concerned in *Umadevi* (3) was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.

35. *Umadevi (3)* is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation 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.

36. *Umadevi (3)* does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. *Umadevi (3)* cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established.”

The labour legislation in that case was the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971.”

45. Rendered, as it is, by a bench of three learned judges of the Supreme Court, *State of J & K (supra)* has to be accorded precedential priority over all earlier two-judge bench decisions. Thus, the legal position, as it exists today, would be that endorsed in para 13 of *State of J & K (supra)*, viz., that *Umadevi (supra)* would apply only where the High Court, under Article 226, the Supreme Court,

under Article 32, of the Constitution of India, exercises original jurisdiction in matters of public employment, and not to industrial adjudications under the ID Act, or statutes pari materia thereto. This is underscored by the fact that the tenor of *State of J & K (supra)*, otherwise, is that regularisation cannot be claimed as a matter of right, by daily rated, casual or temporary workers. The specific and pointed reference to *Maharashtra State Road Transport Corporation (supra)* would, therefore, obviously be with the intention of excepting industrial disputes from the principles enunciated in *State of J & K (supra)*.

46. Even so, a holistic and juxtaposed reading of the authorities cited hereinabove would reveal that the jurisdiction, of the Industrial Tribunal, to direct regularisation or permanency of workmen, can legitimately be exercised only where two conditions are cumulatively satisfied, viz., firstly, that the employer is guilty of an “unfair labour practice”, qua the workman, or workmen concerned and, secondly, that there exist vacancies, against which the said workmen could be regularised or permanently appointed/absorbed. In the absence of such vacancies being available, any direction to the employee to regularize the services of the workman, would require creation of posts, which cannot, ordinarily, be ordained by judicial fiat, as held, *inter alia*, in *Maharashtra State Road Transport Corporation (supra)*.

47. The Tribunal has found the petitioner to be guilty of unfair labour practice, insofar as the respondent is concerned.

48. “Unfair labour practice” is defined, in clause (ra) of Section 2 of the ID Act, as meaning “any of the practices specified in the Fifth Schedule”. Serial No. 10 of the 5th Schedule to the ID Act reads thus:

“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 privileges of permanent workmen.”

49. Quite clearly, the manner in which the legislature has chosen to word Serial No 10 of the 5th Schedule to the ID Act, indicates that mere employment of workmen as casual labourers, and continuing them as such for years, does not, *ipso facto*, tantamount to an “unfair labour practice”. Adopting such a view – which is what the Industrial Tribunal, with respect, appears to have done – would result in reducing the latter part of the entry, reading “with the object of depriving them of the status and privileges of permanent workmen”, to a redundancy. The legislature, it is trite, is presumed not to indulge in tautology and surplusage. It is only, therefore, where cogent evidence exists, to the effect that the continuance, by the employer, of the workman as *badlis*, casual or temporaries, is with the object of depriving the workmen of the status and privileges of permanent

workmen, that the employer could be alleged to have indulged in an “unfair labour practice”. [*Regional Manager, State Bank of India vs Raja Ram, (2004) 8 SCC 164*] Of course, there may, conceivably, be situations in which the services of the employee/employees have been continued, on casual/daily wage basis, for such an inordinate length of time, or other circumstances exist, which would justify an inference of intention, on the part of the employer, to exploit the employee and deprive her, or him, of regular wages. The Tribunal, in the present case, has not, however, approached the issue from that angle, and I, too, am unable to subscribe to the view that, howsoever discredibly the petitioner may have treated the respondent, in the facts of the present case, the engagement, of the respondent by the petitioner, on daily wage basis, was necessarily with the objective of denying, to her, regular wages of typist. The words, “with the object of depriving them of the status & privileges of permanent workmen” are strong words, encompassing, within them, pernicious intent. Invocation, thereof, exposes the employer to criminal liability under Section 25-T of the Industrial Disputes Act; consequently, they have to be strictly construed, with no room for surmise or conjecture. Para 10 of the judgement in *Regional Manager, SBI vs Mahatma Mishra, (2006) 13 SCC 727*, may usefully be reproduced, in this context, thus:

“Unfair labour practice is not to be readily inferred. Before a conclusion in that behalf is drawn, the conditions precedent therefor must be satisfied. The Labour Court failed to show as to how the appellant can be said to have taken recourse to unfair labour practice. It was not a case where the respondent was being appointed consistently for

a number of years with artificial breaks. It was also not a case where the purport and object for such appointment was to violate the provisions of the Industrial Disputes Act.”

Mahatma Mishra (supra), it may be noted, relied on *Raja Ram (supra)*, and also noticed the fact that *Raja Ram (supra)* had been followed in *Regional Manager, SBI vs Rakesh Kumar Tewari, (2006) 1 SCC 530*.

50. It is not possible, therefore, to endorse the view, of the Tribunal, that the petitioner had indulged in “unfair labour practice”, qua the respondent.

51. Though, in view of the legal position as adumbrated hereinabove, the direction, of the Tribunal, to regularise the respondent in service, would be unsustainable even for this reason, there is, additionally, no evidence to indicate that any vacancy of typist existed in the office of the petitioner. Rather, the avowed stand of the petitioner, before the Tribunal, has been that there was no vacancy of typist, in its office, and the said stand has gone unrebutted and unchallenged. In the absence of any evidence to indicate that a vacancy of typist, against which the respondent could regularly be adjusted, was available in the office of the petitioner, the direction, in the impugned Award of the Tribunal, to regularise the respondent as

typist, would necessarily require the petitioner to create a post of typist – which, as the judgements already stated hereinabove clearly hold, could not, ordinarily, be directed judicially. It is also important to note, in this regard, that there is no evidence, either, to indicate that the respondent had been appointed, on casual/daily wage basis, against a sanctioned post of typist. The charm of regularisation must, therefore, necessarily elude the respondent.

52. Having said that, given the fact that respondent was, apparently, discharging the duties of a typist, she would, in view of the law laid down in the decisions cited hereinbefore, be entitled to be paid the minimum of the regular pay scale of typist in the office of the petitioner (as revised from time to time), till the date of her superannuation, i.e. 2nd August, 2016. As I am not upholding the direction, of the Tribunal, to regularise the respondent in service, the grant, to the respondent, of the minimum of the regular pay scale of typist, till superannuation, would not entail, in its wake, proportionate retiral benefits.

Conclusion

53. As a result of the above analysis and discussion, the present writ petition is partly allowed, in the following terms:

(i) The finding, in the impugned Award dated 12th February, 2004, that the termination of the services of the respondent, by the petitioner, was illegal, is affirmed.

(ii) The direction, by the Tribunal, to reinstate the respondent in service, is also affirmed; however, as the respondent has crossed the age of superannuation, the Award is modified by directing the petitioner, to disburse, to the respondent, the minimum of the pay scale of regular typist, in the office of the petitioner, as revised from time to time, till 2nd August, 2016, being the date when the respondent would have reached the age of superannuation. The amounts paid to the respondent, under Section 17-B of the Industrial Disputes Act, 1947, shall be adjusted therein. Payment, as directed, shall be made, by the petitioner to the respondent, within four weeks of receipt of a certified-copy of this judgement.

(iii) The direction, by the Tribunal, to regularise the respondent as typist, and grant her all benefits consequent upon such regularisation, is set aside.

(iv) No opinion is expressed, regarding the application of the respondent, under Section 25-C of the Industrial Disputes Act, stated to be pending before the Industrial Tribunal, which would proceed on its own merits.

54. In the facts of the case, there shall be no order as to costs.

**C.HARI SHANKAR
(JUDGE)**

MARCH 08, 2018
HJ

