

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3904 OF 2019

1. Marathwada Shikshan Prasarak Mandal
Aurangabad, Through Secretary,
Office at Deogiri College, Station Road,
Aurangabad
2. Deogiri College, Aurangabad.
Through Principal. Petitioner

Versus

Dattatraya Rangnath Kolte
Age : 35 years, occ : service
R/o House No. B-30, Opposite
Balaji Mangalkaryala, Balaji
Nagar, Aurangabad. Respondent

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Mr. N.B. Khandare, Advocate for the petitioners.
Mr. Y.I. Thole, Advocate for the respondent.

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WITH

WRIT PETITION NO. 4097 OF 2019

1. Marathwada Shikshan Prasarak Mandal
Aurangabad, Through Secretary,
Office at Deogiri College, Station Road,
Aurangabad
2. Deogiri College, Aurangabad.
Through its Principal.
Deogiri College, Aurangabad Petitioner

Versus

Manoj Baburao Sable
Age : 34 years, occ : service
R/o Wankhede Nagar, Hudco
N-13, Near Shankarraoji Kamble
High School, Aurangabad Respondent

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Mr. D.J. Choudhari, Advocate for the petitioners.
Mr. Y.I. Thole, Advocate for the respondent.

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WITH

WRIT PETITION NO. 4099 OF 2019

1. Marathwada Shikshan Prasarak Mandal
Aurangabad, Through Secretary,
Office at Deogiri College, Station Road,
Aurangabad.
2. Deogiri College, Aurangabad.
Through Principal. Petitioner

Versus

Ramchandra Nathrao Kulkarni
Age : 38 years, occ : service
R/o Shobha Sadan, Plot No.CL
2/10/2, Baravi Yojna, CIDCI,
Shivaji Nagar, Aurangabad. Respondent

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Mr. P.M. Shinde, Advocate for the petitioners.
Mr. P.L. Shahane and Mr. P.P. Shahane,
Advocates for the respondent.

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CORAM : N.J. JAMADAR, J.

Judgment reserved on : 17th March 2021.
Judgment pronounced on : 30th April 2021.

COMMON JUDGMENT :

Rule. Rule made returnable forthwith and with the consent of the Counsels for the parties, heard finally at the stage of admission.

2. The challenge in these petitions is to the identical orders passed by the learned Member, Industrial Court, Aurangabad in Complaint (ULP) No. 617/2015, Complaint (ULP) No. 393/2015 and Complaint (ULP) No. 394/2015 filed by the respondents – employees in each of the petitions.

3. The petitions arise in the backdrop of the following facts :

(The facts in Writ Petition No. 4099 of 2019 are taken as a representative case).

a) Petitioner No. 1 is a Public Trust registered under Maharashtra Public Trusts Act, 1950. It runs numerous schools and colleges at various places throughout Marathwada Region. Deogiri College – petitioner No. 2, is one of the colleges run by petitioner No. 1, at Aurangabad. Petitioner No. 2 gets grant-in-aid.

b) The respondent was appointed as a Peon – Lab Attendant in petitioner No. 2 college on daily wages basis w.e.f. 1st June 2003. The respondent was paid wages at the rate of Rs. 60/- per day.

c) The respondent/complainant lodged a complaint, being Complaint (ULP) No. 617/2015, alleging unfair labour practices by the petitioners-employers. The complainant claimed that he has been working as a Peon-Lab Attendant with the petitioners since the year 2003. The work entrusted to the

complainant was of permanent and perennial in nature. The complainant completed more than 240 days continuous service in each of the years from the date of his initial appointment. The petitioners had deducted the contribution from the salary of the complainant and deposited the same towards provident fund. Experience certificates were also issued, which vouch for the continuous employment of the complainant with the petitioners.

d) The petitioners, however, have not granted the benefit of permanency to the complainant and extracted the work from the complainant for years together with the object of depriving the complainant of the status and privileges of a permanent employee. The complainant was, in fact, called for interview to fill up the post of Peon – Laboratory / Library Attendant in the colleges run by petitioner No. 1 including petitioner No. 2 – College in the year 2014. However, the petitioners did not select the complainant. The similarly situated employees were, however, made permanent.

e) Hence the complaint alleging unfair labour practices as described in Item 5, 6 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (the Act 1971). The complainant also sought a direction to the petitioners employers to give permanency and consequential benefits to the complainant.

f) Mr. Dattatraya Rangnath Kolte, the respondent in Writ Petition No. 3904 of 2019 had filed complaint, being Complaint (ULP) No. 393/2015, with identical contentions. It was the claim of Dattatraya that he was appointed on 26th June 2006 on daily wage basis and was entrusted the work of Laboratory Attendant. The petitioners – employers have engaged in unfair labour practices by keeping him a temporary employee for years together.

g) Mr. Manoj Sable, the respondent in Writ Petition No.4097 of 2019 had filed complaint, being Complaint (ULP) No. 394/2015. It was claimed by Manoj that he was initially appointed as a daily wager on the post of Peon / Chaprashi w.e.f. 15th December 2005.

4. The petitioners – employers resisted the complaint by filing written statement. It was denied that the employers engaged in any unfair labour practices. Petitioner No. 2 – Principal of the College did not have the authority to appoint employees. Only the petitioner No.1 could appoint permanent employees. The service conditions of the employees are governed by the provisions of University Standard Code and Maharashtra Civil Services Rules. The respondents were appointed through a Contractor. There was no employer-employee relationship between the petitioners and the respondents. It was specifically denied that the respondents

were in continuous employment with the petitioners. They were not appointed against a sanctioned post. The complainants were engaged on fixed pay depending on the availability of the work; which was of temporary nature. On these, amongst other grounds, the petitioners – employers prayed for dismissal of the complaints.

5. The learned Member, Industrial Court, after appraisal of evidence led by the parties and documents tendered for his perusal, was persuaded to allow the complaints. The learned Member recorded findings that the complainants proved that they were the direct employees of the petitioners. They had completed 240 days continuous service in each of the years and the petitioners – employers have deliberately avoided to give the status of permanency to the complainants. The learned Member Industrial Court, thus, declared that the employers committed unfair labour practices under Item 5 and 6 of Schedule IV of the Act 1971; directed the employers to cease and desist from engaging in such unfair labour practices and further directed the employers to submit proposals of the complainants for getting sanction from the Government and to obtain the sanction within three months of the impugned judgment with further direction to the employers to give all permanency benefits to the complainants from the date of the filing of complaints post sanction from the Government.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and order, the petitioners – employers have invoked the writ jurisdiction of this Court.

7. I have heard Mr. Shinde, the learned Counsel for the petitioners in Writ Petition No. 4099 of 2019, Mr. D.J. Choudhary, the learned Counsel for the petitioners in Writ Petition No. 4097 of 2019 and Mr. N.B. Khandare, the learned Counsel for the petitioners in Writ Petition No. 3904 of 2019. I have also heard Mr. Y.I. Thole, learned Counsel for the respondents - complainants in Writ Petition No. 3904 of 2019 and Writ Petition No. 4097 of 2019, and Mr. P.L. Shahane, learned Counsel for the respondent – complainant in Writ Petition No. 4099 of 2019. With the assistance of the learned Counsels for the parties, I have also perused the material on record including the deposition of witnesses before the Industrial Court and the impugned judgments.

8. Mr. Shinde, the learned Counsel for the petitioners in Writ Petition No. 4099/2019 would urge that the impugned judgment and order is singularly perverse. The learned Industrial Court transgressed the jurisdiction in directing the employer to obtain the sanction for the post from the Government. The said direction is beyond the province of the authority of the Industrial Court as the question of sanction of the post is in the exclusive domain of the competent authority.

It was further submitted that even the grievance regarding unfair labour practice, allegedly engaged in by the employers, is not borne out by the record. The employers had successfully established that the respondents/complainants were employed through the Contractor. In the absence of pleading and finding that the contract was a sham, the Industrial Court could not have arrived at a finding that there was direct employer-employee relationship between the petitioners and the respondents. The Industrial Court, according to Mr. Shinde, committed a manifest error in arriving at a finding that the service conditions of the respondents were changed without notice envisaged by Section 9A of the Industrial Disputes Act.

9. Mr. Choudhari, the learned Counsel for the petitioners – employers in Writ Petition No. 4097 of 2019 submitted that the service conditions of the employees appointed in a college are governed by the Standard Code. Elaborate provisions have been made in Rule 4 of the Maharashtra Non-Agricultural Universities and Affiliated Colleges Standard Code (Terms and Conditions of Service of Non – teaching employees) Rules, 1984. It envisages a regular recruitment process and selection of candidates by a duly constituted Selection Committee. Thus, the provisions of the Industrial Disputes Act are not at all attracted. Resultantly, there was no question of issuance of notice of change in

conditions of service under Section 9A of the Industrial Disputes Act. It was further submitted that the appointment of the respondent – complainant was not on a sanctioned post. Nor the respondent – complainant was appointed by following a regular selection process. Nor the respondent had completed 10 years of service. Thus, on all parameters prescribed in the case of *Secretary, State of Karnataka vs. Umadevi and others, (2006) 4 SCC 1*, the services of the respondent – complainant did not deserve to be regularized.

10. Mr. Choudhari further submitted that the complainant also suffered from the vice of suppression of facts. It was deliberately suppressed that, when the complaint was lodged, the complainant was working through the Contractor. In the face of the material on record to show that since July 2015 the respondent – complainant was on the roll of the Contractor, the respondent – complainant was not entitled to any relief. As a second limb of the submission, it was urged that the services of the respondent – complainant were deemed to be terminated w.e.f. July 2015 by invoking the provisions contained in Rule 51 of the Rules 1984. The learned Member Industrial Court thus committed an error in law in holding that the change of employer, under the terms of the said contract, was in breach of the provisions contained in Section 9A of the Industrial Disputes Act. Mr. Choudhari professed to lend support to the submission

of Mr. Shinde that a direction for creation of post and making the respondent – complainant permanent after obtaining the sanction is beyond the jurisdiction of the Industrial Court.

11. Mr. Khandare, the learned Counsel for the petitioners in Writ Petition No. 3904 of 2019 would urge that the Industrial Court had constructed a new case than the one asserted by the complainant in the complaint. There was no pleading regarding the breach of the provisions contained in Section 9A of the Industrial Disputes Act. Yet, the learned Member, Industrial Court premised its finding on the alleged breach of the provisions of Section 9A of the Industrial Disputes Act. Laying emphasis on the fact that there was no employer – employee relationship between the petitioners and the respondent, Mr. Khandare would urge that the entire approach of the learned Industrial Court was vitiated by not correctly appreciating the nature of jural relationship between the parties. Lastly it was urged that the impugned judgment and order is based on no evidence and, thus, warrants interference at the hands of the writ Court.

12. Mr. Shahane, the learned Counsel for the respondent in Writ Petition No. 4099 of 2019 submitted that the facts of the case are so glaring that no other view than that of the employers having been engaged in unfair labour practices is plausible. There is evidence to indicate that the respondent – complainant

had completed almost 12 years of service by 30th June 2015. Yet, surreptitiously record was prepared by the employers to indicate that the respondent – complainant was working through a Contractor. A subterfuge was employed with an oblique motive to deny permanency to the respondent – complainant, canvassed Mr. Shahane. The failure of the petitioners to place on record documents like muster and pay register of the Contractor speaks volumes about the fact that the said contract was a sham, urged Mr. Shahane.

13. In order to lend support to this submission, Mr. Shahane placed a strong reliance on a judgment of the Supreme Court in the case of *Bhilwara Dugdh Utpadak Sahakari Sangh Vs. Vinod Kumar Sharma Dead by LRs, (2011) 15 SCC 209*.

14. Mr. Thole, the learned Counsel for the respondents in Writ Petition No.4097 of 2019 and Writ Petition No. 3904 of 2019 stoutly supported the impugned judgment. It was urged that the exploitation of the respondents by the petitioners is established beyond the pale of controversy. The respondents were made to work on a partly sum of Rs. 60/- per day for more than a decade. It is trite law that changing an employer amounts to unfair labour practice. In the case at hand, the petitioners-employers are also guilty of employing dubious mean to ease off the employees. The alleged contract executed between the petitioners-employers and the contractor to provide manpower is

a subterfuge.

15. Laying emphasis upon the manner in which the Principal of petitioner No.2 – College, Mr. Shivajirao Thore fared in the cross-examination, especially the clear and explicit admissions to the effect that the name of the respective complainant is shown in the muster roll (Exhibit C-15), the sanctioned strength of the Peons (25) was not sufficient and additional 25 Peons were required, Mr. Thole urged that no fault can be found with the impugned direction to obtain sanction for the additional posts and give the benefit of permanency to the complainants.

16. To begin with, in the context of the controversy on facts, it may be apposite to consider the submissions in the light of the observations of the Supreme Court in the case of ***Bhilwara Dugdh Utpadak Sahakari Sangh*** (supra). The observations in para Nos. 4 to 9 are material and hence extracted below :-

"4. In order to avoid their liability under various labour statutes employers are very often resorting to subterfuge by trying to show that their employees are, in fact, the employees of a contractor. It is high time that this subterfuge must come to an end.

5. Labour statutes were meant to protect the employees/workmen because it was realised that the employers and the employees are not on an equal bargaining position. Hence, protection of employees was required so that they may not be exploited. However, this new technique of subterfuge has been adopted by some employers in recent years in order to deny the rights of the workmen under various labour statutes by showing that the concerned workmen are not their

employees but are the employees/workmen of a contractor, or that they are merely daily wage or short term or casual employees when in fact they are doing the work of regular employees.

6. This Court cannot countenance such practices any more. Globalization/liberalization in the name of growth cannot be at the human cost of exploitation of workers.

7. The facts of the case are given in the judgment of the High Court dated 23.08.2004 and we are not repeating the same here. It has been clearly stated therein that subterfuge was resorted to by the appellant to show that the workmen concerned were only workmen of a contractor. The Labour Court has held that the workmen were the employees of the appellant and not employees of the contractor. Cogent reasons have been given by the Labour Court to come to this finding. The Labour Court has held that, in fact, the concerned workmen were working under the orders of the officers of the appellant, and were being paid Rs 70/- per day, while the workmen/employees of the contractor were paid Rs. 56/- per day.

8. We are of the opinion that the High Court has rightly refused to interfere with this finding of fact recorded by the Labour court.

9. The Judgment of this Court in Steel Authority of India vs. National Union Waterfront Workers (2001) 7 SCC 1 has no application in the present case. In that decision the question was whether in view of Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 the employees of contractors stood automatically absorbed in the service of the principal employer. Overruling the decision in Air India Statutory Corporation vs. United Labour Union, (1997) 9 SCC 377 this Court held that they did not".
(emphasis supplied)

17. An endeavour was made on behalf of the petitioners – employers to draw home the point that the respondents – complainants were working through the Contractor and there was no employer – employee relationship. The Industrial Court,

on analysis of the evidence, found that the petitioners had entered into an agreement (Exhibit C-16) to provide manpower for the period 1st July 2015 to 30th June 2016. The services of the respondents – complainants were shown to be availed through the Contractor. At the same time, the Industrial Court recorded a categorical finding that the respective respondents – complainants were continuously working with the petitioners from their initial date of appointment till June 2015. The employers had paid the wages to the complainants. The employers had also deducted the contribution towards the provident fund. This finding of fact was based on the muster rolls and wage registers from August 2007 to February 2015 (Exhibit C-15).

18. It would be contextually relevant to note that Mr. Shivajirao Thore, the Principal of the College, conceded in the cross examination that the name of the complainant in the respective complaint was shown in the muster roll (Exhibit C-15). In the face of this material, the submission on behalf of the respondents- complainants that the employers had adopted the subterfuge of contract is well merited.

19. In the backdrop of the material of unimpeachable probative value to indicate that the respondents – complainants were employed with the petitioners for years prior to execution of the contract to provide manpower, under which the

respondents – complainants were shown to be working, the bare denial on the part of the petitioners that the respondents – complainants were not working with the petitioners continuously, was rightly discarded by the learned Member, Industrial Court. The antecedent relationship of the employer and employee between the petitioners and respondents, before the Contractor came in the frame, is established to the hilt. Thus, no fault can be found with the finding of the Industrial Court that the respondents- complainants had succeeded in establishing that there was direct employer – employee relationship between the petitioners and the respondents.

20. In this state of affairs, the pronouncement of the Supreme Court in the case of *Bhilwara Dugdh Utpadak Sahakari Sangh* (supra) appears to be on all fore with the facts of the instant case. Reliance placed by Mr. Choudhari on the pronouncement of the Supreme Court in the cases of *Cipla Ltd Vs Maharashtra General Kamgar Union and others, AIR 2001 (SC) 1165* and *Vividh Kamgar Sabha vs Kalyan Steels Limited and another, AIR 2001 SC 1534* does not advance cause of the petitioners as in the said cases, the jural relationship of employer – employee was itself in question. In that backdrop, it was enunciated that unless it is undisputed or indisputable that there is employer – employee relationship between the parties, the question of unfair practice cannot be inquired into at all. In

the case at hand, there is overwhelming evidence in support of the claim of the complainants that they were continuously working with the petitioners for years before they were shown to be transferred on the roll of the Contractor.

21. In the face of the aforesaid record, which unequivocally indicates that the petitioners-employers had kept the respondents – complainants as temporary employees despite the work being of perennial nature, justifies drawing an inference about the object with which the said action of the employers was animated. The Industrial Court, in the circumstances of the case, was justified in drawing an inference that the said action of the employers was actuated by the design of depriving the respondents – complainants of the status and privileges of permanent employees. On proof of such facts, the object of the employer is a matter of an inference.

22. A useful reference, in this context, can be made to a three Judge Bench judgment of the Supreme Court in the case of *Chief Conservator of Forest and another vs Jagannath Maruti Kondhare and others, (1996) 2 SCC 293* wherein a submission was advanced that the burden was on the workmen to establish that the object of the employer fell within the mischief of Item 6 of the Schedule IV of the Act 1971. The Supreme Court did not approve of the said submission and enunciated the legal position as regards the inference to be drawn regarding the object of the

employer when it is shown that the employees were continued on temporary basis for a length of time, in the following words :

"22. We have given our due thought to the aforesaid rival contentions and, according to us, the object of the State Act, inter alia, being prevention of certain unfair labour practices, the same would be thwarted or get frustrated if such a burden is placed on a workman which he cannot reasonably discharge. In our opinion, it would be permissible on facts of a particular case to draw the inference mentioned in the second part of the item, if badlis, casuals or temporaries are continued as such for years. We further state that the present was such a case inasmuch as from the materials on record we are satisfied that the 25 workmen who went to Industrial Court of Pune (and 15 to Industrial Court, Ahmednagar) had been kept as casuals for long years with the primary object of depriving them the status of permanent employees inasmuch as giving of this status would have required the employer to pay the workmen at a rate higher than the one fixed under the Minimum Wages Act. We can think of no other possible object as, it may be remembered that the Pachgaon Parwati Scheme was intended to cater to the recreational and educational aspirations also of the populace, which are not ephemeral objects, but par excellence permanent. We would say the same about environment-pollution-care work of Ahmednagar, whose need is on increase because of increase in pollution. Permanency is thus writ large on the face of both the types of work. If, even in such projects, persons are kept in jobs on casual for years the object manifests itself; no scrutiny is required. We, therefore, answer the second question also against the appellants".

(emphasis supplied).

23. The aforesaid enunciation of law, in the backdrop of the proved facts in the case at hand, also constitutes a complete answer to the submission on behalf of the employers that the respondents – complainants had suppressed the fact that w.e.f. 1st July 2015 they were working through a Contractor.

Antecedent relationship of employer – employee would justify no other inference than that of the employers having resorted to a device of employment through the Contractor. In fact, the endeavour on the part of the employers to deny the fact that the complainants were working with the employers for years before they were transferred on the roll of the Contractor and brazenly assert that the complainants were working through the Contractor, as if the complainants came to be appointed through the Contractor for the first time, works out retribution of the contention of the employers that the complainants were guilty of suppression of facts. In the circumstances of the case, the learned Member, Industrial Court was within his rights in peering the veil of contract employment. And thus the criticism that the Industrial Court constructed a new case for the complainants does not merit acceptance.

24. Mr. Choudhari, the learned Counsel would urge that the case of the complainants does not fall within the parameters prescribed by the Supreme Court in the case of *Umadevi* (supra). Therefore, the Industrial Court could not have passed the impugned order, which, in essence, orders regularization of the services of the complainants. To lend support to this submission, Mr. Choudhari placed reliance on a judgment of the Supreme Court in the case of *Upendra Singh vs The State of Bihar and others, 2018 (3) SCC 680*.

25. Mr. Shahane, the learned Counsel joined the issue by canvassing a submission that the aforesaid submission based on the Constitution Bench Judgment of the Supreme Court in the case of *Umadevi* (supra) is wholly misconceived. The judgment of the Supreme Court in the case of *Umadevi* (supra) does not apply to the proceedings under MRTU & PULP Act, urged Mr. Shahane. To bolster up this submission, Mr. Shahane placed a strong reliance on the judgment of the Supreme Court in the case of *Maharashtra State Road Transport Corporation and others vs. Casteribe Rajya P. Karmchari Sanghatana, (2009) 8 SCC 556*, wherein the Supreme Court was confronted with the question: have the provisions of MRTU & PULP Act denuded of the statutory status by the Constitution Bench decision in Umadevi (2006) 4 SCC 1.

26. The Supreme Court answered the question in the negative by observing as under :

"26. The question that arises for consideration is: have the provisions of MRTU & PULP Act denuded of the statutory status by the Constitution Bench decision in Umadevi (2006) 4 SCC 1. In our judgment, it is not. The purpose and object of MRTU & PULP AIR 1967 SC 1071 (1972) 1 SCC 409 (1979) 4 SCC 507 Act, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedule II, III and IV. MRTU & 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 policy of the Act. 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. The provisions of MRTU & PULP Act and the powers of Industrial and Labour Courts provided therein were not at all under consideration in the case of Umadevi (2006) 4 SCC 1. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred, considered or decided in Umadevi (2006) 4 SCC 1. Unfair labour practice on the part of the employer in engaging employees as badlies, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in item 6 of Schedule IV and the power of Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench. It is true that the case of Dharwad District PWD Literate Daily Wage Employees Assn.⁷ arising out of industrial adjudication has been considered in Umadevi (2006) 4 SCC 1 and that decision has been held to be not laying down the correct law but a careful and complete reading of decision in Umadevi (2006) 4 SCC 1 leaves no manner of doubt that what this Court was concerned in Umadevi 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 recognized by the rules or procedure and yet orders of their regularization and conferring them status of permanency have been passed. Umadevi (2006) 4 SCC 1 is an authoritative pronouncement for the proposition that Supreme Court (Article 32) and High Courts (Article 226) should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad-hoc employees unless the recruitment itself was made regularly in terms of constitutional scheme. Umadevi (2006) 4 SCC 1 does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of MRTU & PULP Act to order permanency of the workers who have been victim of unfair labour practice on the part of the employer under item 6 of Schedule IV where the posts on which they have been working exists. Umadevi cannot be held to have overridden the powers of Industrial and Labour Courts in passing appropriate order under Section 30 of MRTU & PULP Act, once unfair labour practice on the part of the employer under item 6 of Schedule IV is established”.

27. In view of the aforesaid pronouncement, the challenge to the impugned order based on the judgment of the Supreme Court in the case of Umadevi (supra) does not deserve countenance.

28. The position which, thus, obtains is that to the extent of the finding and declaration by the Industrial Court that the employers indulged in unfair labour practices, no fault can be found with the impugned judgment. The controversy now revolves around the legality and propriety of the relief granted by the Industrial Court. The learned Member, Industrial Court was of the view that the petitioner No. 2 being an Educational Institution, was required to obtain sanction for posts from the

Government before making a substantive appointment. There were 25 sanctioned posts. All sanctioned posts were filled in. However, since the Principal – petitioner No.2 conceded that 25 more Peons were required, the learned Member, Industrial Court held that there are requirements of employees, and, therefore, it was thought necessary to give directions to the employers to submit the proposal for sanction of the posts to the Government, so as to regularize the services of the complainants and, after obtaining sanction, grant them benefit of permanency.

29. The learned Counsels for the petitioners were in unison in assailing this part of the direction by the Industrial Court. It was urged that the direction for obtaining sanction for the posts is impregnated with a direction for creation of posts, which is beyond the province of the authority of the Industrial Court and squarely falls within the executive domain.

30. The learned Counsels for the petitioners placed a strong reliance on the judgment of a learned Single Judge of this Court in the case of *Khadi and Village Industries Commission, Thane vs. Jagdish Balkrishna Patil, 2009 (1) Mh.L.J. 621*. In the said case the Industrial Court had passed the following directions:-

"The respondents are hereby directed to consider the claim of the complainants on priority and if at any time in near future the posts on which they are working are sanctioned and if not it is further directed that the respondents should take necessary

positive steps to submit proposal to the appropriate authority of the concerned for getting sanctioned posts on which the complainants are working, so that the same needs to be get sanctioned within the stipulated period of three months from the date of this order and thereafter the workers concerned be awarded all the monetary and consequential benefits arising out of the same".

31. This Court held that the aforesaid direction was in excess of the jurisdiction vested in the Industrial Court. The observations in para - 10 are material and hence extracted below :

"10. The Central Government which has the power and jurisdiction to sanction posts in the establishment of the Commission was not a party to the complaint. There is merit in the submission which was urged on behalf of the Petitioner that the Industrial Court has acted in excess of its jurisdiction in directing that the posts should be got sanctioned within three months by the Central Government. The jurisdiction to sanction posts does not vest with the Petitioner, but with the Central Government. The Central Government was not before the Industrial Court. A direction that the posts should be got sanctioned within a period of three months could not have been passed in proceedings to which the sanctioning authority was not a party. That apart, the fundamental point is that the question as to whether a particular post should be sanctioned or otherwise is entirely a matter which has to be determined by the Central Government in its discretion, having regard to the financial and administrative implications of creating additional posts. It is no part of the jurisdiction of the Court to intercede in this area. Recruiting additional manpower impinges on budgetary provisions. Granting permanency similar affects the financial position of the organization which government funds. Judicial orders of the nature which the Industrial Court has passed will only hasten the process of rendering a disfunctional organization defunct. Courts, including Industrial Courts, wide as their jurisdiction may be, must be

conscious of the clear line which demarcates judicial review from matters which lie within the province of government. Sanctioning posts is an instance of a power which is the realm of the executive. There is merit in the submission which has been urged on behalf of the Petitioner that having regard to the precarious financial position, particularly of the workshop at Dahanu, there is no need for additional man power, particularly in the context of a situation where even the regular employees do not have adequate work. The Petitioner has continued the Respondents in service in pursuance of the order passed by the Labour Court following the earlier termination in the year 1992, which was challenged. That however, cannot confer upon the Respondents a right to regularization. The direction which was issued by the Industrial Court to the Petitioner to move the Central Government for sanction and to get the posts sanctioned within a period of three months is, in the circumstances, unsustainable and will have to be quashed and set aside. The Petition has to be allowed and is accordingly allowed. Rule is made absolute in terms of prayer clause (a). In the circumstances of the case, there shall be no order as to costs".

(emphasis supplied)

32. The legal position that the Courts cannot direct creation of the posts is well settled. This position was enunciated in the case of ***MSRTC vs Casteribe Rajya P. Karmchari Sanghatana*** (supra) as well. The Supreme Court after adverting to the previous pronouncements in the cases of ***Mahatma Phule Agricultural University and another vs Nasik Zilla Sheth Kamgar Union and others***, (2001) 7 SCC 346, ***State of Maharashtra and another vs. R.S. Bhonde and others***, (2005) 6 SCC 751, ***Indian Drugs and Pharmaceuticals Ltd vs. Workmen, Indian Drugs and Pharmaceuticals Ltd.***, (2007) 1 SCC 408 and ***Divisional Manager, Aravali Golf Club vs. Chander Hass and another***, (2008) 1 SCC

683, ruled that, "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".

33. This propels me to the question of the relief to be granted to the respondents – complainants. Indisputably, the complainants have been employed by the petitioners for years for discharging the functions of Peon / Laboratory Attendant which were of perennial and permanent nature. There is evidence to indicate that the complainants were called for the interview in the selection process held in the year 2014 for the post of Peon / Laboratory Attendant /Library Attendant. Further more, though the complainants were not selected in the said selection process, their services were continued albeit on temporary basis, till they were shown to have been transferred on the roll of the Contractor. This fact further fortifies the claim of the Principal – petitioner No. 2 that in addition to 25 posts, there are requirements of 25 more posts of Peons. It was elicited in the cross-examination of Shivaji Thore (DW-1), the Principal, that there were about 13,000 students who were then taking education in the petitioner No. 2 – College. There were 180 permanent and 100 temporary Professors. In this backdrop,

the requirements of the persons to discharge the functions of Peon / Laboratory Attendant /Library Attendant can hardly be gainsaid. The work is available. The fact that after putting in almost 10 years of service, the complainants were surreptitiously transferred on the roll of the Contractor and they were made to discharge the very same duties, underscores the requirements of their services. It is not the case that the complainants do not possess the requisite qualification.

34. At the same time, the fact that the recruitment and conditions of service of the employees are governed by the provisions contained in the Maharashtra Non-Agricultural Universities and Affiliated Colleges Standard Code (Terms and Conditions of Service of Non – teaching employees) Rules, 1984 cannot be lost sight of. Indisputedly, the complainants were not appointed by following a regular selection process under the Rules. A direction for granting permanency to the complainants *de hors* the procedure prescribed in the Rules for selection and appointment of employees, cannot be issued.

35. In these peculiar circumstances, in my considered view, it would be appropriate to direct the employers to continue the services of the complainants on temporary basis till the complainants are provided an opportunity to participate in the selection process, as and when the vacancies arise. It is hereby made clear that each of the complainant should get at least one

chance to compete against one vacancy. It implies that the services of these complainants are to be continued on temporary basis till selection process for filling in three vacancies of the post of Peon / Laboratory Attendant / Library Attendant is conducted. The employers shall have due regard to the numbers of years of service put in by the complainants and the experience they possess, while considering the candidature of the complainants for regular appointment.

36. This leads me to the question of the wages to be paid to the complainants till the time they work on temporary basis. Having regard to the fact that the complainants were discharging the same duties as performed by regular employees and the years of service put in by the complainants, in my considered view, it would be just and proper to direct that the complainants be paid at the minimum scale of pay prescribed for the post of Peon / Laboratory Attendant / Library Attendant.

37. A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of *Hargurpratap Singh vs State of Punjab and others, (2007) 13 SCC 292*, wherein the Supreme Court directed payment of wages at the minimum of the pay scale. Para 3 of the said judgment reads as under :

"We have carefully looked into the judgment of the High Court and other pleadings that have been put forth before this Court. It is clear that though the

appellants may not be entitled to regular appointment as such it cannot be said that they will not be entitled to the minimum of the pay scale nor that they should not be continued till regular incumbents are appointed. The course adopted by the High Court is to displace one ad hoc arrangement by another ad hoc arrangement which is not at all appropriate for these persons who have gained experience which will be more beneficial and useful to the colleges concerned rather than to appoint persons afresh on ad hoc basis. Therefore, we set aside the orders made by the High Court to the extent the same deny the claim of the appellants of minimum pay scale and continuation in service till regular incumbents are appointed. We direct that they shall be continued in service till regular appointments are made on minimum of the pay scale. The appeals shall stand allowed in part accordingly".

(emphasis supplied).

38. In the case of ***State of Punjab and others vs Jagjit Singh and others, (2017) 1 SCC 148***, the Supreme Court, while expounding the principle of "equal pay for equal work", made the following pertinent observations :

"57. There is no room for any doubt, that the principle of 'equal pay for equal work' has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court, and constitutes law declared by this Court. The same is binding on all the courts in India, under Article 141 of the Constitution of India. The parameters of the principle, have been summarized by us in paragraph 42 hereinabove. The principle of 'equal pay for equal work' has also been extended to temporary employees (differently described as work-charged, daily-wage, casual, ad-hoc, contractual, and the like). The legal position, relating to temporary employees, has been summarized by us, in paragraph 44 hereinabove. The above legal position which has been repeatedly declared, is being reiterated by us, yet again.

58. In our considered view, it is fallacious to determine artificial parameters to deny fruits of

labour. An employee engaged for the same work, cannot be paid less than another, who performs the same duties and responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so, to provide food and shelter to his family, at the cost of his self respect and dignity, at the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate, constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation".

(emphasis supplied).

39. The upshot of the aforesaid consideration is that interference is warranted with the impugned judgment and order to the extent of the direction to submit proposal to get sanction for the posts and thereafter confer permanency on the complainants. The relief granted by the Industrial Court is required to be substituted with a direction to the employers – petitioners to continue to employ the complainants on temporary basis and pay them wages at the minimum of the scale of pay prescribed for the post of Peon / Laboratory Attendant / Library Attendant till the complainants get an opportunity to participate in the selection process for the said post as and when the posts become available, either by accrual of the vacancies or creation of additional posts.

40. The petitions, thus, deserve to be partly allowed. Hence, the following order.

ORDER

- (i) The petitions stand partly allowed.
- (ii) Directions contained in Clause (d) of the impugned judgment and order to submit proposal and obtain sanction for the posts and thereafter give permanency benefits to the complainants stand quashed and set aside.
- (iii) The petitioners – employers are directed to continue to employ the complainants on temporary basis on the post which they held till the complainants get an opportunity to participate in the selection process for the said post, in accordance with governing Rules, as and when the posts become available, either by accrual of vacancies or creation of additional posts.
- (iv) The selection process shall be in conformity with the observations in para 35 of this judgment
- (v) The petitioners – employers shall pay wages to the complainants at the minimum scale of pay for the post, which a permanent employee draws, till the complainants remain temporary employees.
- (vi) The aforesaid directions be implemented and given effect to from 1st June 2021.

Rule made absolute in aforesaid terms.

No order as to costs.

(N.J. JAMADAR, J.)