

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

CONTEMPT PETITION NO.490 OF 2022

Sarva Shramik Sangh Neelkanth Apartment ... Petitioner
Versus
City and Industrial Development
Corporation Ltd. Thr. Manager & Ors. ... Respondents

**WITH
WRIT PETITION NO.4694 OF 2022**

City and Industrial Development
Corporation Ltd. Thr. Manager & Ors. ... Petitioners
Versus
Sarva Shramik Sangh & Anr. ... Respondents

...

Mr. Sanjay Singhvi, i/b. Mr. Rahil Fazelbhoy for Petitioner in Contempt
Petition No.490 of 2022 and for Respondent No.1 in Writ Petition
No.4694 of 2022.

Mr. G. S. Hegde, Sr. Advocate i/b. Ms. P. M. Bhansali for Respondent in
Contempt Petition No.490 of 2022 and for Petitioner in Writ Petition
No.4694 of 2022.

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CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 01 NOVEMBER 2023
PRONOUNCED ON : 10 NOVEMBER 2023

JUDGMENT :

Rule. Rule is made returnable forthwith. With the consent of
learned counsels appearing for the parties, petitions are taken up for final
hearing.

2. City and Industrial Development Corporation of Maharashtra Limited (**CIDCO**) has filed Writ Petition No.4694 of 2022 challenging Judgment and Order dated 07 May 2021 passed by the Industrial Court, Maharashtra at Thane in Complaint (ULP) No.56 of 2017. By that Order, the Industrial Court has held that CIDCO has engaged in the unfair labour practices under item No.5, 9 and 10 of Schedule-V of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (**MRTU & PULP Act**). Industrial Court has further directed CIDCO to absorb employees reflected in Annexure-A of the complaint as permanent employees from the effective date of Award in the Reference (IT) No.39 of 2005. The Industrial Court has further directed CIDCO to pay those employees minimum scales payable to the lowest category of permanent employees of CIDCO with effect from the date of Award in Reference (IT) No.39 of 2005 and pay salary regularly as per other permanent employees.

3. Facts of the case, in nutshell are that CIDCO is a New Town Development Authority constituted under the provisions of the Maharashtra Regional and Town Planning Act 1966 (**MRTP Act**). It is also a Government Company incorporated under the provisions of the Companies Act 1956. It's share capital is subscribed wholly and exclusively by the State of Maharashtra and it's all nominees. It exercises statutory powers of New Town Development Authority as well as Special

Planning Authority under the MRTP Act. The State Government has acquired vast tract of land in the notified area of Navi Mumbai and handed over to CIDCO which has developed Navi Mumbai and has disposed the developed land from time to time as per the Land Disposal Regulations.

4. CIDCO has employed vast number of employees and officers to carry out its statutory functions and duties. CIDCO established a canteen in the year 1989 for providing food, snacks, beverage, etc. to its employees, visitors and guests. While CIDCO contends that canteen was always run and operated by various contractors appointed from time to time, it is the case of canteen employees that furniture, utensils, etc. meant for the canteen belongs to CIDCO, which also supplied water, electricity and gas for the canteen in addition to paying taxes and other charges in respect of the premises where the canteen is being run. It is also the case of canteen employees that the workers employed in the canteen are supervised by CIDCO. It is admitted position that though successive contractors have changed over the period of years, some employees continued to work in CIDCO's canteen.

5. Sarva Shramic Sangha, a union representing 19 employees engaged in the CIDCO's canteen raised demands for confirmation of status and benefit of permanency from the dates of their initial

engagement. The demand was referred for adjudication in terms of reference made by Additional Commissioner-Labour, Mumbai to the Industrial Tribunal, Maharashtra at Thane which was numbered as Reference (IT) No.39 of 2005. Industrial Court, Thane rendered Award dated 23 December 2011 *inter alia* holding that it was not possible to give permanent appointment or to direct CIDCO to pay wages of regular employees to canteen workmen. However since CIDCO took a stand that it cannot make appointments without sanction of posts by the Government, the Industrial Court directed that CIDCO must take initiative to move the Government for absorption of the canteen employees in service of CIDCO. It was observed that in the event of Government approved absorption of such employees, CIDCO shall take necessary steps for their absorption. The Industrial Court further directed CIDCO not to discontinue the services of canteen employees except by following due process of law and without justifiable reason even if the contractor changes. Except this limited relief, Industrial Court did not award any other relief in favour of the 19 canteen employees.

6. It appears that in pursuance of the Award dated 23 December 2011, CIDCO entered into correspondence with the State Government seeking approval for regularization of the 19 employees. CIDCO felt that Government's approval is necessary for creation of posts for absorption of the canteen employees. However the State Government finally communicated vide letter dated 16 July 2016 that its approval need not

be granted by the state government and CIDCO should take appropriate action at its own level.

7. Since the CIDCO failed to take any decision with regard to absorption of the 19 canteen employees, their Union 'Sarva Shramik Sangha' once again approached Industrial Court Thane, this time filing a Complaint under provisions of the MRTU and PULP Act which was numbered as Complaint (ULP) No.56 of 2017. They demanded absorption as permanent employees of CIDCO with effect from date of Award dated 23 December 2011 in Reference (IT) No.39 of 2015. They have also sought for the relief of payment of minimum scale of pay applicable to the lowest category of permanent employee from the date of said Award as well as minimum salary of unskilled employee.

8. Industrial Court passed an interlocutory Order at Exh.U-2 declaring that *prima facie* CIDCO is engaged in unfair labour practices under provisions of Item-1 of Schedule-IV of MRTU and PULP Act and directed the canteen contractor to submit bills regarding wages of 19 canteen employees to CIDCO with further direction to CIDCO to reimburse those bills during pendency of the Complaint. CIDCO was also directed to pay special allowance as declared by the Government under the Minimum Wages Act from time to time. The said interlocutory Order was challenged both by CIDCO as well as by the Union by filing

Revision Nos.9200 of 2019 and 1194 of 2019. By Order dated 17 January 2020, this Court disposed of both the Revisions on the ground that agreement prevailing between both the parties and directed that the interlocutory Order of the Industrial Court be stayed without prejudice to the rights and contentions of the parties in Complaint (ULP) No.56 of 2017 however clarified that the Industrial Court's findings in the Award dated 23 December 2011 about making of appointments only against the vacant sanctioned post by State Government shall not be treated as *res judicata* while deciding Complaint (ULP) No.56 of 2017. CIDCO was however granted liberty to contend before Industrial Court that sanction of the posts is indeed a pre-requisite for appointment in CIDCO.

9. The Industrial Court thereafter proceeded to hear and decide Complaint (ULP) No.56 of 2017 by its Judgment and Order dated 07 May 2021. The Industrial Court has proceeded to partly allow the Complaint and it has permitted CIDCO to absorb 19 employees included in Annexure-A of the Complaint as permanent employees with effect from date of Award in Reference (IT) No.39 of 2005 i.e. 23 December 2011. CIDCO is directed to pay them minimum scale payable to the category of its permanent employees as well as to pay salary regularly as per permanent employees. CIDCO is aggrieved by the Judgment and Order dated 07 May 2021 and has filed the present petition.

10. When the present petition came up before this Court on 19 April 2022, this Court directed CIDCO to comply with paragraph No.4 of the operative part of the Order dated 07 May 2021 within a period of 04 weeks subject to final outcome of the petition. The Union of canteen employees complained that CIDCO has violated the Order passed by this Court on 19 April 2022 and has accordingly filed Contempt Petition No.490 of 2022.

SUBMISSIONS :-

11. Mr. Hegde, the learned counsel appearing on behalf of CIDCO in support of Writ Petition No.4694 of 2022 would submit that Industrial Court has erred in directing absorption of canteen employees in CIDCO's service. He would submit that appointment in CIDCO's service can only be made in accordance with rules and regulations and prescribed procedure. That canteen employees are engaged by the various contractors without following due process of selection. That there has never been any employer-employee relationship between CIDCO and canteen employees. That they are employees of the contractor and therefore cannot be absorbed in services of CIDCO. He would submit that canteen employees did not seek a declaration from Industrial Court that the contract executed by CIDCO with the contractor is bogus or sham and that in absence of any such declaration sought or granted, employees of the contractor cannot be directed to be absorbed in services

of the principal employer. In this regard he would place reliance on Judgment of the Apex Court in *Kirloskar Brothers Limited Vs. Ramcharan and Ors.*, 2003 1 SCC 463.

12. Mr. Hegde would then take me through various findings recorded by the Industrial Court in its Award dated 23 December 2011 in Reference (IT) No.39 of 2015. He would submit that the canteen employees comprehensively lost in the Reference as Industrial Court specifically rejected their prayer for absorption. That the Reference Court answered each of the issues against the canteen employees. That it was specifically held that the canteen employees are not entitled to the benefits of permanency by answering issue No.1 in the Complaint. That they have comprehensively lost in Reference (IT) No.39 of 2015, it was not open for the canteen employees once again litigate for the same cause of action. Mr. Hegde would submit that since the CIDCO succeeded in Reference (IT) No.39 of 2005, it was not necessary for CIDCO to challenge Order dated 23 December 2015.

13. Mr. Hegde would further submit that there are no posts of canteen employees on the establishment of CIDCO. That CIDCO cannot employ any person in excess of the sanctioned strength. That running of canteen is not a part of predominant functions of CIDCO and therefore it is not necessary to create any posts of canteen workers. That

CIDCO is not a factory and therefore does not carry any obligation to maintain a canteen. Therefore, it is not at all incumbent on CIDCO either to employ or absorb canteen employees in its services.

14. Mr. Hegde would further submit that the canteen employees cannot be permitted to derive any benefit out of correspondence made by CIDCO with the State Government. That such correspondence was made with a view to examine whether it was possible for CIDCO to absorb the canteen employees. CIDCO never sought permission to create posts on its establishment for absorption of the canteen employees. That the government left it to the discretion of CIDCO and CIDCO has decided not to absorb canteen employees. That Courts or Tribunals cannot force CIDCO to create posts and absorb employees on such newly created posts.

15. Mr. Hegde would place strong reliance on the Judgment of Constitution Bench of the Apex Court in ***Secretary, State of Karnataka Vs. Umadevi*** (2006) 4 SCC 1 which according to him is a final word on the subject of regularization. That CIDCO is bound by the principles enunciated in ***Umadevi*** by Apex Court and mere long continuation of service cannot be a ground for absorption of employees in services. He would pray for setting aside the Order passed by the Industrial Court.

16. *Per Contra* Mr. Singhvi, the learned advocate appearing for Respondent-Union representing the canteen employees would oppose the petition and support the Order passed by the Industrial Court. He would submit that the concerned workers have put in service ranging from 16 to 29 years in CIDCO canteen and that they deserve the benefit of absorption. Mr. Singhvi would submit that CIDCO had factually admitted right of workers for absorption in service by seeking approval from the State Government for their absorption in pursuance of the Award dated in 23 December 2011 passed in Reference (IT) No.39 of 2005. He would submit that CIDCO itself presented before the Industrial Court in the Reference that it could not regularize canteen employees in absence of sanction of posts by the State Government. It is on the CIDCO's submission that the Industrial Court deferred the issue of absorption of the canteen employees and directed CIDCO to obtain necessary approval from the State Government for their absorption. He would submit that CIDCO acted under said directives of Industrial Court. It did not challenge the Award dated 23 December 2011. That since the CIDCO has accepted Award dated 23 December 2011, it is now estopped from questioning right of employees to seek absorption in services. Mr. Singhvi would then take me through various correspondence that CIDCO entered with State Government on the issue of absorption of services of the canteen employees. He would submit that CIDCO was willing to absorb the canteen employees in services if the State Government was to sanction the proposal for creation of posts. That

ultimately it was revealed that sanction of the State Government was not even necessary for creation of posts. That CIDCO misguided Industrial Court in believing that sanction of the State Government was necessary for absorption of canteen employees in service.

17. Mr. Singhvi would then submit that powers of Industrial Court are vast and would encompass even power to direct creation of a contract or creation of posts. That the Judgment of the Apex Court in *Umadevi* does not circumscribe the power of the Industrial Court in directing creation of posts, wherever the same is found necessary. That once Industrial Court noticed that there is a need for creation of posts against which an employee is found to be exploited for a long period of time, Industrial Court has necessary jurisdiction in directing even creation of posts. That so long as there is no violation of right to equality enshrined under Article 14 of the Constitution of India, Industrial Court can always direct even creation of posts for absorption. In support of his contention Mr. Singhvi would rely upon Judgment of the Apex Court in *Hari Nandan Prasad and another Vs. Employer I/R to Management of Food Corporation of India and another*, (2014) 7 SCC 190 and *Nihal Singh and others Vs. State of Punjab and others* (2013) 14 SCC 65. In support of his contention that canteen employees have right to seek regularization, he would also place reliance on the Judgment of the Apex Court in *Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers Union and Anr.*, (2000) 4 SCC 245.

18. In support of his Contempt Petition Mr. Sanghvi would contend that CIDCO has knowingly violated interim Order dated 19 April 2022 by not paying requisite arrears of pay to the concerned canteen employees for which the contemnors deserve to be punished.

19. Rival contentions of the parties now fall for my consideration.

20. No discussion on the issue of regularization of services of temporary / ad-hoc / casual / contract employees can be complete without reference to the landmark Judgment of the Apex Court in *Umadevi* which marks a watershed moment on the law of regularization of employees in government services. In *Umadevi* the Apex Court has expressed disagreement with its previous decision in *State of Haryana Vs. Piara Singh* (1992) 4 SCC 218 in which it was held that long continuance service on ad-hoc / temporary employee creates presumption for need of regular appointment. It held that mere continuance of employees for a long period does not create any right of regularization in their favour. The Apex Court however has carved out one exception in respect of employees whose appointments are made in irregular manner against sanctioned vacant posts who held eligibility criteria for such appointment and who had worked for 10 years or more without interim orders of Courts/Tribunals should be regularized in service as one time measure.

The Apex Court has recorded following findings in paragraph 43, 44, 47, 49 and 53 as under :-

43. Thus, it is clear 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. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of

paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

44. The concept of “equal pay for equal work” is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after Dharwad decision the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be Justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot

invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the

State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

21. It must be observed here that despite authoritative ruling of the Constitution Bench in *Umadevi*, a bench of two learned judges of the Supreme Court in *U.P. State Electricity Board vs Pooran Chandra Pandey & Others*, (2007) 11 SCC 92 struck a sort of discordant note. However, it did not take a bench of three learned judges of the Apex Court too long to hold in *Official Liquidator vs Dayananad & Ors.*, (2008) 10 SCC 1 that the binding effect of *Umadevi* cannot be diluted and that decision in *Pooran Chandra Pandey* would not be treated as a binding precedent.

22. Thus as per the sound exposition of law by the Constitution Bench in *Umadevi*, regularization of services of only those ad-hoc/temporary/casual/contract employees is permissible who are irregularly appointed (without following prescribed process) but against regularly sanctioned posts possessing prescribed eligibility criteria and who had completed 10 years' of services. Thus, one of the essential

criteria for regularization of service, post *Umadevi* era, is appointment against sanctioned vacant post. In the present case undoubtedly appointments of the canteen employees are not against sanctioned vacant posts. In fact they were never appointed on the establishment of CIDCO. They were appointed by contractors, outside the sanctioned strength of CIDCO. This Court therefore inquired with Mr. Singhvi as to whether regularization of employees whose appointments are not made against sanctioned posts is permissible after judgment in *Umadevi*. Mr. Singhvi answers the query with a response that the power of an industrial adjudicator to direct regularization/absorption by creation of posts is not circumscribed by the Constitution Bench Judgment in *Umadevi*. I therefore proceed to examine this contention raised by Mr. Singhvi.

23. Mr. Singhvi has placed strong reliance on the Judgment of the Apex Court in *Hari Nandan Prasad* (supra) in which the Apex Court took note of its judgments in *UP Power Corporation* (2007) 5 SCC 755 and in *Maharashtra SRTC Vs. Casteribe Rajya Parivahan Karmachari Sanghatana*, (2009) 8 SCC 556 for essentially holding that in absence of post, regularization cannot be directed. The Apex Court however has carved out certain exceptions to this general principle. Before advertng to the exposition of law in *Hari Nandan Prasad*, it would be first apposite to refer to the law declared in *MSRTC* judgment about scope of powers of Industrial/Labour Courts. In *MSRTC* the Apex Court has held in paragraph 32, 33 and 36 as under :-

“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).** 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). Unfair labour practice on the 9 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.

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 the PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established.”**

(emphasis supplied)

24. Thus in *MSRTC*, the Apex Court held that *Umadevi* 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 where the posts on which they have been working exist. It further held that the provisions of MRTU and PULP Act enables an industrial adjudicator to give preventive as well as positive direction to an erring employer. After taking into consideration the Judgments in *UP Power Corporation*, and *MSRTC* the Apex Court in *Hari Nandan Prasad* proceeded hold in paragraph 34, 35, 39 and 40 as under :-

34 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.⁸, 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 Umadevi (3) ⁴ is primarily founded. On the other hand, in Bhonde cas * e ²⁶ 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 Umadevi (3) case. 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.

35. We are conscious of the fact that the aforesaid judgment is rendered under the MRTP and PULP Act and the specific provisions of that Act were considered to ascertain the powers conferred upon the Industrial Tribunal/ Labour Court by the said Act. At the same time, **it also hardly needs to be emphasised that the powers of the industrial adjudicator under the Industrial Disputes Act are equally wide.** The

Act deals with industrial disputes, provides for conciliation, adjudication and settlements, and regulates the rights of the parties and the enforcement of the awards and settlements. Thus, by empowering the adjudicator authorities under the Act to give reliefs such as reinstatement of wrongfully dismissed or discharged workmen, which may not be permissible in common law or justified under the terms of the contract between the employer and such workmen, the legislature has attempted to frustrate the unfair labour practices and secure the policy of collective bargaining as a road to industrial peace.

39. **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.

40. **The aforesaid examples are only illustrative. It would depend on the facts of each case as to whether the order of regularisation is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights.**

25. Thus in ***Hari Nandan Prasad*** the Apex Court ruled that if

posts are not available, issuance of directions for regularisation would be impermeable and that such directions cannot be issued only on the basis of number of years put in by a daily wager. However the Apex Court did carve out some exceptions i.e. where similarly situated workmen are regularised in terms of a scheme. It thus held that by ordering regularization of similarly placed employee the industrial adjudicator would be achieving the equality by upholding Article 14, rather than violating this constitutional provision. Treating such an example only as illustrative, the Apex Court held it would be depend on facts of each case as to whether regularisation should be directed to advance justice or it has to be denied so as to avoid infringement of employer's right.

26. Mr. Sanghvi has also relied upon Judgment of the Apex Court in ***Nihal Singh***. The case involved appointment of Special Police Officers by State of Punjab to tackle large scale disturbance in the State in 1980s to handle prevailing law and order situation with the available police personnel. The Special Police Officers were appointed under section 17 of the Police Act, 1861 outside the sanctioned strength. They approached the High Court of Punjab and Haryana seeking regularisation of their services. Their prayers were rejected by the High Court and this is how the matter travelled before the Apex Court in ***Nihal Singh***. The Apex Court encountered a situation where the appointment of such police officers was in excess of the sanctioned strength and they were seeking regularization of their services. The Apex Court held in

paragraph Nos.32 to 38 as under :-

32. Coming to the other aspect of the matter pointed out by the High Court that in the absence of sanctioned posts the State cannot be compelled to absorb the persons like the appellants into the services of the State, we can only say that posts are to be created by the State depending upon the need to employ people having regard to various functions the State undertakes to discharge.

“Every sovereign government has within its own jurisdiction right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration.”

33. It is no doubt that the assessment of the need to employ a certain number of people for discharging a particular responsibility of the State under the Constitution is always with the executive government of the day c subject to the overall control of the legislature. **That does not mean that an examination by a constitutional court regarding the accuracy of the assessment of the need is barred.**

34. This Court in S.S. Dhanoa v. Union of India' did examine the correctness of the assessment made by the executive government. It was a case where the Union of India appointed two Election Commissioners in addition to the Chief Election Commissioner just before the general elections to the Lok Sabha. Subsequent to the elections, the new Government abolished those posts. While examining the legality of such abolition, this Court had to deal with an argument¹⁰ whether the need to have additional Commissioners ceased subsequent to the election. It was the case of the Union of India that on the date posts were created there was a need to have additional Commissioners in view of certain factors such as the reduction of the lower age-limit of the voters, etc. This Court categorically held that: (SCC p. 585, para 27)

“27... The truth of the matter as is apparent from the record is that there was no need for the said appointments....”

35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. **In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the**

creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden a on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the E State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is- the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.

37. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. **Umadevi (3) judgment cannot become a licence for exploitation by the State and its instrumentalities.**

38. For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside.

27. Thus under special circumstances prevailing in the State of Punjab, the Apex Court held that the Constitutional Court is empowered to examine accuracy of assessment made by the employer to employ certain number of people for discharging particular responsibility. It held

that in case before it there was need for creation of posts and that the failure of the executive to apply its mind and to take a decision to create posts was an arbitrary action. The Court proceeded to hold that judgment in *Umadevi* cannot become a licence for exploitation by the State and its instrumentalities.

28. Having examined the law expounded by the Apex Court in its judgment in *UP State Government Power Corporation, MSCRTC, Hari Nandan Prasad and Nihal Singh*, it appears that though there is broad acceptance of principle that the Industrial/Labour Courts should not issue directions for regularisation in absence of existence of post, in exceptional circumstances they can either do so or even to go to the extent of directing creation of posts, if situation so demand. However, it must be observed here that the directions to create posts cannot be issued in a routine manner and the same can be done in very exceptional circumstances as is done by the Apex Court in light of special circumstances prevailing in the State of Punjab in *Nihal Singh*.

29. Having discussed the law on the subject of power of industrial adjudicator to direct regularisation of employees in absence of availability of posts, I proceed to examine whether direction of that nature could have been granted by the Industrial Court in light of the facts of the present case. There is no doubt to the position that 19 canteen

employees have rendered long services ranging from 16 to 29 years. It would be appropriate to reproduce Annexure-A to the Complaint (ULP) No. 56 of 2017 as under :-

Sr. No.	Name of the employees	Length of service	Designation	Wages per month Rs.
1	Baburam Nanda Jena	29	Cook	12776
2	Shyam Janba Misal	28	Cook	12776
3	Madhusudan Baldar Nanda	24	Waiter	10576
4	Basanta Manicharan Behera.	28	Waiter	10576
5	Tanaji Janba Kamble	26	Waiter	10576
6	Bharkatkar Panchannan Sahu	26	Waiter	10576
7	Ananda Balu Behera	26	Counter	10576
8	Makunda Charan Nayak	26	Waiter	10576
9	Rajendra Yeshwant Mohite	26	Waiter	10576
10	Tukaram Keshav Kamble	25	Cleaner	10576
11	Anand Dharma Jadhav	26	Waiter	10576
12	Natwar Radheshyam Behera	24	Cleaner	10576
13	Kailash Bastm Patra	26	Waiter	10576
14	Surendra Natwar Jena	22	Waiter	10576
15	Kamalakant B. Mohanty.	21	Waiter	10576
16	Sanjay madhukar Madhavi	16	Waiter	10576
17	Ganesh Shyam Gawand	16	Waiter	10576
18	Uday Baidur Jena	26	Tea Maker	10576
19	Dadu bhariso Misal	22	Waiter	10576

30. Mr. Singhvi had submitted 2 of the 19 employees have unfortunately passed away during pendency of the litigation. It must be

borne in mind that the length of service indicated in Annexure-A was at the time of filing Complaint (ULP) No. 56 of 2017 on 17 February 2017. Therefore 5 more years need to be added in total length of services put in by them. The issue is whether canteen employees, who have put in the entire length of their services in CIDCO's canteen can now be denied regularisation on the plea of non-availability of regular posts for their absorption.

31. It has to be observed here that CIDCO was willing to create 19 posts for absorption of the 19 canteen employees. It would be necessary to examine the correspondence that CIDCO made with the State Government after decision of Reference (IT) No. 39 of 2015. The same is as under:

- i) After Industrial Tribunal's Order dated 23 December 2011, CIDCO wrote to the Urban Development Department of the State Government stating therein that though CIDCO employed different contractors, same canteen employees were continued for several years. For implementing the Award of the Industrial Tribunal, CIDCO requested the State Government to grant approval for creation posts for 19 canteen employees. Referring to pressure put by the employees from different sources, CIDCO requested for issuance of appropriate directions from the State Government.

- ii) It also appears that the canteen employees had approached the Assistant Labour Commissioner complaining about non-implementation of Industrial Tribunal's Award. CIDCO wrote to Assistant Labour Commissioner on 7 September 2012 informing him that it was seeking approval from State Government for absorption 19 canteen employees in CIDCO's services.
- iii) On 15 July 2017, CIDCO sent a reminder to the State Government once again seeking approval for creation of 19 posts for absorption of canteen employees.
- iv) On 9 May 2014, State Government raised a query with CIDCO as to whether CIDCO had obtained approval of the State Government for creation of posts or for appointments on its establishments.
- v) On 16 June 2014 CIDCO responded to the State Government's query stating that it had never obtained approval of the State Government for any appointment on its establishment.
- vi) On 11 August 2014 the State Government stated that the proposal for sanction of 19 posts is not at the level of Ministry (Personnel) and inquired whether the original proposal had been approved by the Vice Chairman and Managing Director of CIDCO.
- vii) On 05 May 2015 CIDCO responded to the State

Government's query clarifying that the proposal was sent as per the directives of Vice-Chairman and Managing Director of CIDCO.

- viii) The State Government thereafter clarified by its letter dated 16 July 2016 that State Government does not give approval for appointments on establishment of CIDCO and no such approval was sought by CIDCO in the past. Accordingly, CIDCO was directed to take appropriate action as per prevalent rules in respect of canteen employees for implementing the Award of the Industrial Tribunal.

32. The above correspondence would show that CIDCO was seeking approval of the State Government for creation of 19 posts for absorption of the canteen employees. It was also seeking State Governments approval for their absorption. However, the State Government was apparently surprised at CIDCO's requests and raised a query as to whether CIDCO has sought similar approval from it either for creation of posts or for effecting appointments. This query was raised possibly because CIDCO had never sought any such permission from State Government in the past. CIDCO was thus making an exception in the present case possibly on account of the representation that it made before the Industrial Tribunal. Be that as it may. The State Government finally clarified that its approval is not necessary either for creation of posts or for absorption of canteen employees.

33. Thus, now it is admitted position by both the parties that State Government's approval is not necessary either for creation of posts on the establishment of CIDCO or for appointment of any employee by CIDCO. The CIDCO is however now showing resistance for creation of any post for absorption of 19 canteen employees. It is CIDCO's contention that since appointments are made by contractors in absence of existence of corresponding posts on sanctioned strength of CIDCO, there is no question of regularizing canteen employees in view of the law laid down by the Apex Court in Constitution Bench Judgment of *Umadevi*.

34. The correspondence between CIDCO and State Government would leave no manner of doubt that CIDCO was willing to create 19 posts for absorption of the canteen employees. If the State Government indeed had power to sanction creation of posts and if it was to grant approval of creation of 19 posts, CIDCO would have created posts and would have absorbed the canteen employees in service. It therefore quite incomprehensible as to why CIDCO, which was willing to create posts for absorption of 19 canteen employees during the years 2012 to 2014, is now showing resistance both for creation of posts and for absorption of employees.

35. In my view therefore this is an exceptional circumstance where CIDCO acted on the Industrial Tribunal's direction by sending a

proposal to the State Government for creation of posts and for approval to absorb the canteen employees. It was willing to create the posts but erroneously assumed that State Government's approval was needed. If State was to grant approval, it would have created posts. Therefore this is an exceptional case where CIDCO needs to be directed to act on its own action of creation of posts. It cannot approbate and reprobate. Having agreed for creation of posts on its establishment and sent a proposal for that purposes, it cannot now be permitted to wriggle out of its promise.

36. In my view therefore canteen employees deserve to be granted justice for the long battle they have fought with CIDCO for seeking absorption in service. Though in ordinary circumstances, this Court would be loathe in directing absorption against non-existent of posts, in view of exceptional circumstances, where CIDCO itself was willing to create posts for absorption of 19 canteen employees, the Industrial Court has rightly issued directions to CIDCO to absorb them in service. To my mind, there can be two solutions to the problem faced by CIDCO. One solution is where CIDCO can absorb canteen employees against available vacant Group-D posts and their regularisation need not be as canteen employees. The second solution is where CIDCO can create posts of canteen employees for their absorption. Thus, either CIDCO can create necessary number of posts for absorption of the canteen employees or it can absorb them against other available Group-D posts. The CIDCO can take a decision in this

regard, as it suits its policy and administrative convenience.

37. Mr. Hegde has strenuously sought to contend that the contract employees cannot be permitted to be absorbed in the services of principal employer in absence of declaration of contract as sham or bogus. In my view it is not necessary to go into the issue of nature of contract in view of CIDCO's conduct in sending proposal to the State Government for absorption of the 19 canteen employees. When CIDCO itself was willing to absorb them in service but for alleged hurdle of sanction of State Government for creating posts, it cannot now be permitted to take a *volte-face* and contend that the employees will now be treated as contract employees in absence of declaration that the contract is sham or bogus. Therefore reliance of Mr. Hegde on the Judgment of the Apex Court in ***Kirloskar Brothers Ltd.*** (supra) would not assist his case.

38. Perhaps one of the reasons for hesitation on the part of CIDCO is precedent being formed for other contract workers to seek similar right of absorption. To my mind, this apprehension of CIDCO can be taken care by expressly clarifying that the directions in the present Writ Petition are being issued in the light of existence of exceptional and rare circumstances and that said directions are not to be treated as precedent for any other case for absorption of contract employees.

39. Considering overall conspectus of the case, in my view, Industrial Court has not committed any patent error in directing absorption of employees. Writ Petition accordingly must fail.

40. Coming to the Contempt Petition No. 490 of 2022, the same is filed essentially to seek implementation of the interim Order dated 19 April 2022 passed by this Court directing implementation of directions in paragraph No.4 of the Industrial Court's Order, which envisaged payment of minimum scale to the canteen employees. In my view, since the Order of the Industrial Court directing absorption with effect from 23 December 2011 is upheld, it would be appropriate if CIDCO undertakes the exercise of implementation of the entire Order dated 07 May 2021 passed by the Industrial Court. In Order to enable CIDCO to do so, the Contempt Proceedings need to be closed, reserving liberty in favour of the canteen employees to file appropriate proceedings in the event of non-implementation of Order of the Industrial Court dated 07 May 2011 or the present Judgment and Order.

41. Accordingly, Writ Petition No.4694 of 2022 filed by CIDCO is dismissed upholding the Judgment and Order dated 07 May 2021 passed by the Industrial Court. CIDCO shall proceed to implement directions issued by the Industrial Tribunal within a period of 04 months from today. CIDCO shall pay all consequential benefits arising out of

grant of permanency to the canteen employees with effect from 23 December 2011 within the period so specified. Arrears arising out of grant of such absorption and pay scale shall also be paid to the canteen employees within a period so specified. Contempt Petition No. 490 of 2022 is closed reserving liberty in favour of canteen employees as observed above. As observed above, absorption of canteen employees in CIDCO's service is directed as an exceptional measure considering the unique facts and circumstances of the case. Rule in Writ Petition is discharged.

SANDEEP V. MARNE, J.