

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

**WRIT PETITION NO.1284 OF 2002
WITH
CIVIL APPLICATION (STAMP) NO.20947 OF 2006
WITH
CIVIL APPLICATION NO.528 OF 2011
WITH
INTERIM APPLICATION (STAMP) NO.32663 OF 2024**

1. Dhairyasheel S. Phalake
(since deceased through LRs)
At-Padali, Post Satara,
District: Satara
- 1a. Deepa Dhairyasheel Phalke,
Adult,
Residing at 161/1, Amulya banglow,
Nalawade Colony, Shahunagar,
Satara, Maharashtra - 415001
- 1b. Trupti Amol Mohite,
Age: 46 years,
Residing at 9, Ajinkya Colony,
Near Kuber Vinayak, Sadar Bazar,
Satara, Maharashtra - 415001
- 1c. Yogesh Dhairyasheel Phalke,
Age: 44 years,
Residing at 161/1, Amulya banglow,
Nalawade Colony, Shahunagar,
Satara, Maharashtra-415001
- 1d. Nilesh Dhairyasheel Phalke,
Age: 42 years,
Residing at Serial no. 288 289/9,
Gulmohar Complex Shop No. 2,
New Radhika Road,
Satara, Maharashtra – 415001
2. Ravindra Ramchandra Sathe
116, Gangapuri, Wai Dist Satara
3. Shrimant Vishwashrao Honrao
61, Gangapuri, Wai Dist - Satara

4. Shrimati Savita Avinash Sathe
w/o Late Shri Avinash N. Sathe
1019, B- Brahmanshahi, Wai
Dist - Satara
5. Arvind Tukaram Herkal,
At: Menavli Post: Bhavdhan,
Taluka: Wai Dist - Satara
6. Shri. D. K. Jamdade,
212-6, Phulenagar, Wai
Dist – Satara
7. Shri. S. S. Kshirsagar,
449, Ganapati Ali, Wai
Dist- Satara
8. Shri. V. S. Jadhav..
479, Ganapati Ali, Wai
Dist - Satara
9. Shri. R. R. Jamdade,
2191, Phulengar, Wai
Dist- Satara
10. Shri. P. A. Jadhav,
1434, Raviwar Peth, Wai
Dist- Satara
11. Shri. S. S. Bodhale,
2166, Phulenagar, Wai
Dist- Satara
12. Sou. B. A. Pandit.
1548, Raviwar Peth, Wai
Dist - Satara
13. Shri. S. A. Waikar,
Near Kisanveer College, Wai
Dist Satara
14. Sou. S. S. Talegaonkar,
529, Ganapati Ali, Wai
Dist- Satara

15. Miss. P.B. Khandkar
since deceased
57, Gangapuri, Wai
Dist - Satara
- 15a. Mr. Kashinath Bapurao Khandkar
Age 81 years, residing at City
Survey No.59/A, Wai, Tal. Wai,
Dist. Satara
16. Miss. A.D. Ranganekar.
60, Gangapuri, Wai
Dist - Satara
17. Shri. M. B. Kadam,
At Post Bavdhan,
Tal. Wai Dist- Satara.
18. Shri. B. D. Sutar,
At Post. Kavath,
Taluka Wai Dist - Satara
19. Shri. R. L. Anapat,
117, Gangapuri, Wai
Dist Satara

....Petitioners

VERSUS

1. Shri. B. S. Bhadange
Member Industrial Court
Satara.
2. Pramukh Sampadak,
Marathi Vishwakosh, Wai
Dist - Satara
3. The Secretary,
Maharashtra Rajya Marathi
Vishwakosh Nirmitti Mandal,
'D' Block Ensahutment,
Azad Maidan, Bombay - 1.
4. The Secretary,
Education Department,
Government of Maharashtra,
Mantralaya. Bombay

5. Shri.R.K. Dalvi
1194, Ramdoha Ali,
Wai, Dist. Satara

....Respondents

Dr. Uday P. Warunjikar *for the Petitioners.*

Mr. S.S. Pakale, Senior Advocate with Ms. Vaishali Nimbalkar,
AGP for Respondents/State.

CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 23 JANUARY 2025.
PRONOUNCED ON: 04 FEBRUARY 2025.

J U D G M E N T:

1. Petitioners have filed this Petition challenging judgment and order dated 14 August 2001 passed by the learned Member, Industrial Court, Satara dismissing Complaint (ULP) Nos. 12 to 17 of 1990 and 156 to 169 of 1990. The Complaints were filed under Items 6, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (**MRTU & PULP Act**) seeking declaration that Petitioners have acquired status of permanent employees of Respondents with all consequential benefits.

2. Briefly stated, facts of the case are that the Government of Maharashtra had declared a policy for encouraging studies in Marathi literature and other fields by taking suitable measures. In his speech made on 6 July 1960, the then Governor of Maharashtra had made an announcement that the State would declare policy for encouragement of research in the fields of literature, history and culture of Maharashtra. Accordingly, the State Government decided to establish State Board for Literature and Culture and accordingly issued Government Resolution dated 19 November 1960, by which State

Board of Literature and Culture was established for initial tenure of 5 years. The Government Resolution provided for functions of the State Board and various other related matters. One of the functions of the State Board was to initiate assist and undertake scheme for preparation and publication in Marathi language of different literature such as bibliographies, encyclopedia, dictionaries etc. Towards performance of its function for compiling encyclopedia, the State Board decided to compile a Marathi *Vishwakosha*. The State Government issued Government Resolution dated 6 June 1963 thereby authorizing the Secretary of the State Board to secure as Visiting Editors services of upto 6 senior professors, research scholars, etc. attached to various universities/colleges for expert writing and other work in the *Vishwakosha* Unit during vacation times or otherwise as may be available. The Government Resolution provided for payment of honorarium of Rs.25/- for each full day of actual work. It appears that the State Government later decided to reorganize the State Board and to bifurcate the same. Accordingly, Government Resolution dated 28 November 1980 was issued thereby establishing *Maharashtra Rajya Marathi Vishwakosha Nirmiti Mandal*, (***Vishwakosha Mandal***) with effect from 1 December 1980, with its headquarters at Wai, District Satara. The *Vishwakosha Mandal* was initially established for a period of three years. After separation of *Vishwakosha Mandal* from the ambit of State Board, the reorganized Maharashtra State Board for Literature and Culture was reconstituted by the same Government Resolution dated 28 November 1980.

3. For carrying out the activities of compilation of Marathi *Vishwakosha*, the *Vishwakosha Mandal* drew services of various personnel by engaging them as Visiting Editors from time to time. Such engagements were made on honorarium basis for the tenures

specified in each of the engagement letters. In the aforesaid manner, the Petitioners came to be engaged as Visiting Editors in the *Vishwakosha Mandal* on various dates. According to Petitioners they continued to work uninterruptedly and performed duties as if they were regular employees of *Vishwakosha Mandal*.

4. After rendering services for a substantial period of time as Visiting Editors, Petitioners instituted Complaints of unfair labour practices under Items 6, 9 and 10 of Scheduled IV of MRTP & PULP Act before Industrial Court, Kolhapur, seeking permanency in services. The Complaints were opposed by the Respondents by filing Written Statements denying existence of employer-employee relationship and contended that the *Vishwakosha Mandal* is a purely body of honorary reputed and learned persons nominated by the State Government and that Petitioners were never employed as employees. The Respondents also questioned the status of *Vishwakosha Mandal* as industry and contended that the Complaints were not maintainable. By order passed on Exhibit-U6 on 19 April 1991, the Industrial Court granted interim relief in favour of the Complainants protecting their services till decision of the Complaints on merits. Respondents filed applications for review of interim order dated 19 April 1991 and the review applications were dismissed by order dated 27 June 1994. The Industrial Court thereafter proceeded to decide the Complaints and by judgment and order dated 5 September 1994 the Complaints were allowed holding that Respondents have engaged in unfair labour practices under Item 6 of the Schedule IV of the MRTU and PULP Act. The Industrial Court directed the Respondents to grant status and privileges of permanent employees including regular pay-scales and further ancillary benefits to the Petitioners on completion of continuous services of five years.

5. Respondents challenged the judgment and order dated 5 September 1994 passed by the Industrial Court by filing Writ Petition No.3423 of 1995 in this Court. The Petition came to be partly allowed by order dated 23 February 2001 remanding the Complaints for fresh decision in accordance with law after giving opportunity to both the parties. This Court recorded a statement on behalf of the Respondents that it was not seriously disputing status of *Vishwakosh Mandal* as industry. However, this Court did not approve the finding of the Industrial Court that Petitioners are working journalists and held that the material produced before it was not considered while deciding the issue of their status as workmen. This Court therefore remanded the Complaints for fresh decision for re-examination of evidence on record.

6. After remand order was passed by this Court, the Complaints were heard afresh by the Industrial Court and by impugned judgment and order dated 14 August 2001, all the 20 Complaints have been dismissed holding that there is no employer-employee relationship between Petitioners and Respondents. Petitioners are aggrieved by the judgment and order dated 14 August 2001 passed by the Industrial Court dismissing their Complaints and are accordingly filed the present Petition. The Petition came to be admitted by this Court by order dated 28 March 2002. However interim relief in favour of the Petitioners was rejected. Petition is called out for final hearing.

7. Dr. Warunjikar, the learned counsel appearing for the Petitioners would submit that the Industrial Court has erred in dismissing the Complaints filed by the Petitioners. He would submit that once the status of Respondent-Board is accepted as industry, the status of Petitioners as workmen ought to have been upheld. He

would invite my attention to findings recorded by the Industrial Court in paragraph 5(ii) of the judgment that the work performed by the Petitioners conforms to the definition of the term 'workmen' under section 2(s) of the Industrial Disputes Act, 1947. He would submit that once Respondent Board is held as industry and Petitioners are held as workmen, the Industrial Court erred in holding that there is no employer-employee relationship between the parties. He would submit that Petitioners have been working continuously with the Respondent-Board since the year 1982 and it cannot be contended that they are not employees of the Board. That Petitioners performed work of regular nature thereby raising an inference that they are employees of the Respondent-Board. That the Industrial Court has erred in laying emphasis on the language in which the appointment orders are couched. That the Petitioners though labelled as Visiting Editors, performed work of stenographers, typists, tracers, etc. He would submit that mere nomenclature given by the Respondent-Board to wages paid to Petitioners cannot determine their status and even a person drawing honorarium can also be treated as an employee. He would submit that there is direct admission given by the witnesses of the Respondent-Board about completion of 240 days of service by Petitioners. He would also take me through various statements filed on record of the Industrial Court for demonstrating that Petitioners have completed more than 240 days of service in each of the years. He would therefore submit that Petitioners deserve to be treated as regular employees of the Respondent-Board considering continuous and uninterrupted services rendered by them with the Board during past several decades. He would submit that the *Vishwakosh Mandal* is still functioning as it is carrying on permanent work of compiling information and it has now undertaken the work of compiling encyclopedia for children (*Kumar Vishwakosh*). He would submit that

information relating to encyclopedia requires updation of information and it cannot be contended that the activities of the *Vishwakosh Mandal* can come to an end. He would also submit that the Respondent-Board has several other regular employees on establishment and that therefore Petitioners also deserve to be made permanent. Dr. Warunjikar accordingly pray for setting aside the impugned judgment and order of the Industrial Court and for allowing the Complaints filed by the Petitioners.

8. The Petition is opposed by Mr. Pakale, the learned Senior Advocate appearing for the Respondents. He would submit that the Industrial Court has rightly dismissed the Complaints by holding that there is no employer-employee relationship between the parties. Inviting my attention to the appointment orders, he would submit that Petitioners were merely invited to volunteer as Visiting Editors as per their convenience. That there were no fixed duty hours for them and that they had choice of attending the office as per their convenience. That there is no contract of service under which Petitioners were employed. That they were paid honorarium on per day basis for voluntary services rendered by them for compilation of *Vishwakosh*. That the Industrial Court has rightly taken into consideration the arrangement by not treating Petitioners as employees of the Board.

9. Mr. Pakale would further submit that the Industrial Court otherwise did not have jurisdiction to decide the issue of existence of employer-employee relationship. He would further submit that even if Petitioners were to be treated as employees of the Respondent-Board, they do not have any right to seek permanency in the services of the Board merely on the strength of completion of 240 days of service. He

would submit that conferring status of permanent employees to Petitioners would tantamount to creation of posts which is impermissible as held by Division Bench of this Court in ***Municipal Council, Tirora vs. Tulsidas Baliram Bindhade***¹. He would also rely upon judgments of this Court in ***Mukhyadhikari, Nagar Parishad Tuljapur vs. Vishal Vijay Amrutrao and others***², and ***Medical Superintendent, Rural Hospital and another vs. Rajashree Laxman Yadav***³.

10. Mr. Pakale would submit that the activities of *Vishwakosha Mandal* have otherwise come to an end after preparation of *Vishwakosha* and it is otherwise not possible to accommodate Petitioners in services. He would pray for dismissal of the Petition.

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

12. The manner in which *Vishwakosha Mandal* came to be established has been discussed above. Its establishment has its seeds in Government Resolution dated 19 November 1960, whereby initially State Board for Literature and Culture was established for a tenure of five years and one of the functions it was supposed to perform was compilation of encyclopedia. It appears that the State Board for Literature and Culture undertook the task of compilation of *Vishwakosha* and accordingly State Government permitted the Board to secure services of senior professors, research scholars etc. from various Universities and Colleges as Visiting Editors for expert writing and other work for compilation of *Vishwakosha*. However, procuring services of Visiting Editors was not to be confused with

1 2016 (6) Mh.L.J. 867

2 2016 (3) AllMR 113

3 Writ Petition No.8801 of 2003 decided on 26 June 2024

appointments as employees, as their engagement was to be done only during vacation times or otherwise as per their availability. This is clear from paragraph 2 of the Government Resolution dated 6 June 1963 which reads thus:

"State Board for Literature & Culture
Provision of Visiting Editors for the
Vishwakosha Unit of the ---

GOVERNMENT OF MAHARASHTRA
General Administration Department,
Resolution No. VKU 1963(f)-BLC,
Sachivalaya, Bombay-32, 6th June, 1963.

RESOLUTION: The question of securing the services of senior Professors, research scholars attached to various Universities/ Colleges for specific writing and other expert assignments in connection with the compilation of the proposed vishwakosha by the State Board for Literature and Culture was engaging the attention of Government for some time past. The Government has carefully considered the question and feels that the services and knowledge of these professors/research Scholars can be gainfully utilised for the Vishwakosha work by inviting them to work in the Vishwakosha Unit, Wai for short periods during vacation times and by paying them a suitable honorarium.

2. Government accordingly authorises the Secretary of the State Board for Literature and Culture to secure as Visiting Editors, the services of senior professors, research scholars etc. not exceeding six at any time, attached to various Universities/Colleges, for expert writing and other work in the Vishwakosha Unit during vacation times or otherwise as may be available. In consultation with the Chairman of the State Board for Literature and Culture. Government further directs that each such Visiting Editor should be paid an honorarium of Rs.25/- for each full day of actual work and professor, research scholars from Government colleges who may be invited to work as Visiting Editors at the Vishwakosha Unit would be allowed to retain the full amount of honorarium that may be payable to them at the above rate. These Visiting Editors will not be entitled to any Travelling Allowance and Daily Allowance for any journey undertaken to and from the office of the Vishwakosha Unit, at Wai. Government also directs that University/College professors/research scholars who have already worked as Visiting Editors in the Vishwakosha Unit during the academic year 1962-63 should be entitled to the honorarium that may be admissible to them at the rate sanctioned above.

3. The expenditure on account of the proposal sanctioned in para 2 above should be debited to the Head "19-General Administration-C-Secretariate and Attached Offices K-Civil Secretariate K-18-Schemes in the Third. Five Year Plan-(1) State Board for Literature and Culture" and should be met from the provision made hereunder in the current year's-Budget.

4. This Resolution issues with the concurrence of the Finance Department (vide that Department unofficial reference No.726 V dated the 29th May, 1963)

By order and in the name of the Governor of Maharashtra.

Sd/-
(D.S. KASBEKAR)
Assistant Secretary to the Govt. of Maharashtra
General Administration Department.”

13. As the activities of compilation of *Vishwakosha* gathered speed, the State Government decided to carve out functions related to compilation of *Vishwakosha* from State Board of Literature and Culture and to form separate Board dedicated for compilation of the *Vishwakosha*. This is how *Marathi Vishwakosha Nirmiti Mandal* was established by Government Resolution dated 28 November 1980. Establishment of *Vishwakosha Mandal* was initially for a period of three years from 1 December 1980 and eminent authors and persons engaged in Marathi literature were appointed as its members. By that Government Resolution, only one post of Secretary was created in the pay-scale of Rs.1000-50-1500 which was Class-I Gazetted post.

14. After establishment of *Vishwakosha Mandal* vide Government Resolution dated 28 November 1980, the Board decided to procure services of various personnel for completing large volume of work relating to compilation of *Vishwakosh*. This is how services of the Petitioners came to be procured by the Respondent-Board. Petitioners were apparently invited to participate in compilation of encyclopedia and invitation letters were issued to them. In this regard the first invitation letter issued to one of the Petitioners' Shri Avinash Sathe was on 28 December 1981 reads thus:

"१. आपणास मराठी विश्वकोश कार्यात खाली नमूद केलेल्या विषयाच्या लेखन, संपादन वा चित्रकामाकरिता अभ्यागत संपादक या श्रेणीत काम करण्यासाठी या पत्राने निमंत्रण दिले जात आहे. या कामाबद्दल कामाच्या प्रत्येक दिवसास खाली निर्दिष्ट केल्याप्रमाणे मानधन मिळेल. अभ्यागत संपादकांना प्रवासभत्ता दिला जात नाही.

२. आपण उपस्थित राहणाऱ्या तारखेस संबंधित कक्षप्रमुख तसे कळवावे. लेखन, संपादन वा चित्रकामासंबंधीचे पुढील मार्गदर्शन संबंधित कक्षप्रमुख करतील. संबंधित कक्षप्रमुख आपणाकडे जे काम सोपवतील ते पूर्ण होणे आवश्यक आहे.
३. अभ्यागत संपादकांनी आपले काम संपवून जाताना विश्वकोश ग्रंथालयातून घेतलेली पुस्तके नियतकालिके इत्यादी साहित्य ग्रंथालयात परत करणे आवश्यक आहे.
४. तरी आपण खाली दर्शविलेल्या मुदतीत वाई येथील मराठी विश्वकोश कार्यालयात अभ्यागत संपादक या श्रेणीत काम करावे ही विनंती. आपण येत असल्याची कृपया पूर्वसूचना द्यावी.
५. तपशील :
- अ) विषय : नकाशाकाम
- ब) मुदत : दिनांक १ ते ३१ मे १९८८ अखेर कोणतेही २२ दिवस.
- क) मानधन (प्रत्येक दिवसास) : ₹. ३५/- (रु. पस्तीस फक्त) कळावे.”

(emphasis added)

15. In similar manner invitation letters were issued to all the Petitioners to volunteer as Visiting Editors. Perusal of the letter dated 28 December 1981 issued to Shri Avinash Sathe would indicate that he was merely ‘invited’ to work as Visiting Editor on payment of daily honorarium of Rs.25/-. The engagement was from 1 January 1982 to 28 February 1982 and during that period, he was to work on any of the 20 days of his choice. At the end of first month tenure, fresh order was issued on 30 January 1982 containing similar terms. This is how invitation letters were issued to Shri Avinash Sathe for each month. It appears that Shri Avinash Sathe was also asked to volunteer in the work of compilation of encyclopedia during 1975 to 1994. The details of his volunteering is as under:

1982	212,	1983	183,	1984	213,
1985	223,	1986	201,	1987	148,
1988	197,	1989	190,	1990	156,
1991	149,	1992	85,	1993	24,
1994	02				

16. The above details of engagement of Shri Avinash Sathe would indicate that the services rendered by him towards compilation of

Marathi Vishwakosh were not continuous or regular in any manner. He actually did not complete even 240 days of service in any calendar year and relied upon services rendered between August 1984 to July 1985 to claim completion of 240 days of service.

17. When the Petitioners filed complaints of unfair labour practices, Respondents adopted specific defence that Petitioners were not their employees. In this regard relevant pleadings in the Written Statement are as under:

“(1) At the outset the respondent Nos.1 and 2 state that the complaint made by the complainant hereinabove is without jurisdiction as complainant is not “employee” of the respondents. Complainant was requested to give his assistance on “honorarium” and the complainant has given his assistance purely on the payment of “honorarium”. He is not “employee” of the respondents and therefore this complaint itself is not tenable and it is liable to be dismissed with cost.”

18. Thus, there was specific denial of existence of employer-employee relationship between the Petitioner and the Respondent-Board and the Board raised the plea that Petitioners were mere invitees to volunteer as Visiting Editors.

19. By now it is well settled position of law that existence of employer-employee relationship is a *sine qua non* for maintaining complaint of unfair labour practice before Industrial Court. Once the employer-employee relationship is disputed, the Industrial Court loses jurisdiction and it becomes incumbent for person claiming status of employee to first get the said dispute adjudicated in a reference made under section 10 of the Industrial Disputes Act and thereafter file a Complaint of unfair labour practice. The law in this regard is well settled by the judgments of the Apex Court in ***Cipla Limited vs. Maharashtra General Kamgar Union and others***⁴, ***Sarva***

4 2001 (3) SCC 101

Shramik Sangh vs. Indian Smelting & Refining Co. Ltd. and others⁵. Following the law enunciated by the Apex Court in judgments in ***Cipla Limited (supra) and Indian Smelting & Refining Co. Limited and others*** (supra) the Industrial Court in fact could not have undertaken an enquiry into the issue of existence of employer-employee relationship. True it is that in ***Hindustan Coca Cola Bottlings S/W (Private) Ltd. vs. Bharatiya Kamgar Sena and others***⁶, Division Bench of this Court has held that existence of employer-employee relationship at some point of time would confer jurisdiction on Industrial Court to entertain complaint of unfair labour practice, such is not the case here. At no point of time Respondents have ever acknowledged existence of employer-employee relationship. This is not the case where Petitioners were initially treated as employees and were later converted as mere invitees as Visiting Editors. Right since inception, the Respondent-Board always treated Petitioners as mere invitees to volunteer as Visiting Editors. In my view therefore, it was impermissible for Industrial Court to conduct an enquiry into employer-employee relationship.

20. Faced with the position that Industrial Court lacked jurisdiction to enquire into existence of employer-employee relationship, Dr. Warunjikar would rely upon order passed by this Court while remanding the proceeding on 23 February 2001. According to him, this Court directed such an enquiry to be conducted and that therefore it would be unfair to criticize the Industrial Court for undertaking an enquiry into existence of employer-employee relationship. The relevant findings recorded by Single Judge of this Court (*His Lordship Justice A.M. Khanwilkar, as he then was*) in order dated 23 February 2001 read thus:

5 2003 (10) SCC 455

6 2002 (3) Bom. C.R. 129

“4. In so far as the conclusion reached by the Industrial Court that the Petitioners No.1 is an industry, Mr. Gursahani appearing for the Petitioners has not taken serious objection thereto. According to him, the said conclusion is based on the consistent view taken by the Apex Court and, therefore, it is not possible to successfully assail the said conclusion.

5. Mr. Naik appearing for the Respondents fairly concedes that the conclusion reached by the Industrial Court that Respondents were employed as Working Journalists within the meaning of section 2 (f) of the Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 cannot be sustained. According to him, the Respondents were not employed as working Journalists and were in fact discharging duties which were mainly of clerical nature.

6. Both the counsel have addressed this Court at length and referred to various materials in support of their respective stand. However, on going through the judgment under challenge, I find that none of the material has been considered by the Court below while arriving at the conclusion that the Respondents were workmen within the meaning of the said Act. The Industrial Court has dealt with the said issue in paras 16 to 24 of the Impugned Judgment. Both the counsel agree that the materials that are referred to before this Court during arguments are relevant for decided the issue as to whether the complainants are workmen, but the same have not been referred to in the judgment under appeal. Without analysing the relevant materials, particularly the pleadings and the evidence adduced by both the sides, it was inappropriate for the Court below to record a finding that Respondents were workmen within the meaning of the said Act. In this context, it would be relevant to note that whether a person is workman or not would much depend on the evidence with regard to the nature of duties of the said person. If the nature of duties of each of the complainants was separate and not common, it was imperative for the Industrial Court to have recorded a clear finding with regard to the nature of duties of each of the complainants. It is only thereafter that the Industrial Court could have arrived at a conclusion as to whether the Respondents are workmen within the meaning of the said Act. It is contended on behalf of the Respondents that out of 20 complainants 10 were working as Tracers, 1 as Artist, 2 as Stenographers and 7 as Proof Readers and clerical work. If this be so, it was necessary to analyse the nature of duty of each category of employees to find out whether they would fit into the definition of workmen. It is well settled that whether the person is workman or not can be answered after looking to the nature of his duties. The Tribunal obviously has failed to examine the matter of each of the category in this context. Mr. Gursahani has relied on the decisions to buttress his contention that the Respondents cannot be held to be workmen. In my view, the Tribunal ought to have examined all this aspects in details before reaching a clear finding as to whether the Respondents are workmen or not. Further, the basis on which the Tribunal has proceeded that the Respondents were Working Journalists and therefore workmen is misdirected. Now the Respondents counsel concedes that the Respondents are not claiming to be Working Journalists as held by the Tribunal. Naturally, therefore, the reasoning of the Tribunal for recording that the Respondents are workmen is washed out. Even for this reason, the conclusion of the Tribunal on this issue cannot be sustained.

7. Besides, the discussion on the said issue of workmen is cryptic and unintelligible, in the sense that it does not advert to all the relevant materials, even the issue whether the Respondents have worked for more than 240 days, there is no satisfactory discussion in the impugned judgment. With regard to the said aspect, the only discussion appears to be in para 25 of the impugned judgment. There is no clear finding recorded with regard to each of the complainants.

8 In the circumstance, I find no other option but to remand the matter to the Industrial Court to re-examine the evidence on record and after analysing the relevant materials to record a clear finding on the issue whether the Respondents are employees /workmen within the meaning of the said Act and further whether each of them has worked for more than 240 days continuously as required so as to entitle them to the relief claimed in the complainants.”

21. It appears that while passing order dated 23 February 2001, this Court did not have benefit of considering the ratio of judgment of the Apex Court in ***Cipla Limited*** (supra) and ***Indian Smelting & Refining Co. Ltd.*** (supra) as well as ***Vividh Kamgar Sabha vs. Kalyani Steels Ltd. and another***⁷. The judgment in ***Cipla Limited*** (supra) was rendered by the Apex Court on 21 February 2001 i.e. two days before passing of order dated 23 February 2001 by this Court. Similarly, the judgment in ***Vividh Kamgar Sabha vs. Kalyani Steels Ltd.*** (supra) was rendered by the Supreme Court on 9 January 2001. It appears that attention of this Court was not invited to the judgments in ***Vividh Kamgar Sabha vs. Kalyani Steels Ltd.*** (supra) and ***Cipla Limited*** (supra) at the time of passing order dated 23 February 2001. Be that as it may. Since this Court has directed Industrial Court to conduct enquiry into the issue as to whether Petitioners are employees/workmen within the meaning of the Act, in my view, it would be too iniquitous at this stage to dismiss the present Petition only on the ground of impermissibility of Industrial Court to decide the issue of existence of employer-employee relationship and to relegate them to the remedy of seeking reference

⁷ 2001 (2) SCC 381

under section 10 of the Industrial Disputes Act to the Labour Court for establishment of the relationship. Therefore an unusual course of action is being adopted in the peculiar facts and circumstances of the case by examining correctness of finding recorded by the Industrial Court on the issue of existence of employer-employee relationship.

22. The Industrial Court has recorded following findings for holding that the employer-employee relationship does not exist between the parties:

“5. REASONS:

i) It is the case of the complainants that they have worked more than 240 days continuously in each year, so they are entitled for permanency. They were appointed as temporary employees on daily-wage basis, so they are employees of the Respondents. Though these complainants are entitled for permanency, still with an intention to deprive all these complainants from the benefits of the permanency such as provident fund, gratuity, pension etc; these complainants are kept years together as temporary employees. To the contrary, it is the defence of the Respondent that these complainants are not employees of the respondents. They were not appointed as temporary or daily wage employees. These complainants are experts in their fields. These complainants were requested to extend their cooperation in compilation of Vishwakosh. They were issued request letters. No fixed wage scale was given to them. No fixed days in each month were specified. They were allowed to do the work for the days mentioned in their request letters in each month as per their convenience. They were paid honorarium, so due to completion of 240 days continuous service, these complainants are not entitled for permanency. To adjudicate the above controversy, I have gone carefully through the oral and documentary evidence adduced by the parties. The complainants have not approached with correct and true facts by way of narrating in their complaints. These complainants have stated in their complaints that they were appointed as daily-wager employees and as temporary employees. They have suppressed material facts. They have not mentioned in their complaints that they were getting honorarium, though they were knowing that these complainants were paid honorarium for the work done by them. The alleged appointment orders are filed on record. This is an admitted document by both the parties. The alleged appointment letter which is as per the say of the Respondent is a request letter will throw much light on the fact of the engagement of these complainants to do the work. It is evident from this request letter that it is not an appointment order, it is a request letter sent to the complainants. This letter starts such as “S. N. V. V.” (Saprem Namaskar Vinanti Vishesh). This opening of the letter shows that it was a request from the respondents to these complainants to extend their assistance for compilation of Vishwakosha. It was a discretion of the Complainant to accept or reject the request of the respondents. From the

above wording of the above letter the intention of the Respondent was not to appoint the complainants as an employee. An inference cannot be drawn that by such above referred invitation, these complainants were appointed as employees of the Respondent as temporary or daily-wage employees. These complainants cannot become as daily-wage employees because these complainants were not paid daily-wage or rate of the daily wage was not fixed. They were paid only honorarium, so also these complainants cannot be treated as daily-wage employees. Furthermore facts also clearly indicate that the contract of the employer and the employee between the present respondents and the present complainants was not in existence. It is evident from these request letters in pursuance to which the services of these complainants were availed, that no fixed days of working were prescribed in these request letters. They were requested to extend their cooperation to do the work for ten to twenty days in each month. No days were fixed in each month. It means that these complainants were requested to do the work for the days on which it was possible for them to make themselves available to the respondents for doing the work for the respondents. It is also evident that the voluminous work for the respondents. It is also evident that the voluminous work such as publication of twenty parts having thousands of pages is to be done with the help of thousands of experts. This Encyclopedia requires help of thousands of the experts from every field. For publication of this Encyclopedia so many experts about the thousands have worked as Visiting Editors on honorarium basis. The complainants in their evidence have admitted that they were paid honorarium and as like them other several persons have worked as Visiting Editors. The respondents have filed list of other Visiting Editors who have worked on honorarium basis. The terms and the conditions for other Visiting Editors were also same and similar to the terms and the conditions of these complainants. All these persons who have worked as Visiting Editors cannot be given permanency. From the above discussion, I come to the conclusion that these complainants and respondents are not having relationship as employee and employer.

ii) It is argued on behalf of the complainants that the nature of the work done by these Complainants proves the fact that they are workmen as defined in I. D. Act, 1947. Some of the Complainants were working as Tracers, some of the Complainants were working as Clerks and some of the Complainants were working as clerks and some of the Complainants were working as Stenographers. If the nature of the duties discharged by the Complainants is taken into consideration then it is evident that they are workmen as defined in section 2 (S) of I. D. Act, 1947. It is true that after considering the nature of the duties discharged by these Complainants, it is evident that the work done by these Complainants amounts to is as like the definition given in Section 2 (S) of I. D. Act, 1947 in respect of the workmen, but this is not sufficient claim the relationship such as 'employees-employer' between the complainants and the respondents."

23. I do not find any element of perversity in the above findings recorded by the Industrial Court. Perusal of invitation letters issued

by the Board to the Petitioners would leave no manner of doubt, that they have merely volunteered to work for compilation of *Marathi Vishwakosha*. No employer invites any persons to work with him. For existence of employer-employee relationship, there needs to be 'appointment' and not 'invitation'. The invitation issued to Petitioners did not create any contract of employment. It was open for the Petitioners not to act on the said invitation. Furthermore, the invitation was not to work continuously as an employee, but to merely volunteer on honorarium of Rs.25/- per day by attending the office as per Petitioner's convenience. Out of 30/31 days in a month, Petitioners were granted liberty to contribute to the work of compilation of *Vishwakosha* on any of the 20 days of their choice. It is inconceivable that a person appointed as employee can choose the days on which he would work.

24. Perusal of the statement of work performed by Shri Avinash Sathe would indicate that he has volunteered for few days in some of the months. To illustrate, in December 1982 he volunteered only for 12 days, in October 1983 for 11 days. Except rendering 20 days of voluntary services for six months during the year 1982, he mostly volunteered for less than 20 days in subsequent months. What is most glaring in position that though his invitation was for 20 days for some of the months, he did not attend office for those 20 days. To illustrate, though he was invited for 20 days in each of the months from March 1982 to December 1982, he volunteered for less than 20 days in most of the months. In December 1982 despite being invited to volunteer for 20 days, he attended office only for 12 days.

25. The convenience offered to the Petitioners while volunteering their services for compilation of *Vishwakosha* would clearly take them

out of the concept of 'employment'. Petitioners volunteered as per their convenience and might have been engaged in other earning activities as there was no impediment for them from working elsewhere. I am therefore of the view that the Industrial Court has rightly drawn the inference of absence of employer-employee relationship in the facts and circumstances of the present case.

26. As rightly contended by Mr. Pakale, even if existence of employer-employee relationship was to be inferred in the present case, mere completion of 240 days of service at any point of time otherwise did not create any right in favour of Petitioners to claim permanency in service. *Vishwakosha Mandal* is an instrumentality of State. Therefore, granting the benefit of permanency in service would require existence of sanctioned vacant posts. It is not even the case of the Petitioners that they were engaged against any sanctioned vacant posts. There is nothing to indicate that any post of Visiting Editor was created or sanctioned at any point of time. The ratio of judgment of the Division Bench of this Court in ***Municipal Council, Tirora*** (supra) would apply to the present case. Division Bench of this Court, while resolving conflict of opinions expressed by two learned Single Judges of this Court about applicability of clause 4C of the Model Standing Orders under the Industrial Employees (Standing Orders) Act, held in paragraphs 19, 20 and 21 as under:

“19. In this reference, the position emerging before us is similar. There is no conflict between the provisions of M.S.O. 4C and the provisions of the section 76 of the 1965 Act. In the event of the appointment having been made validly, it may be possible to invoke the provisions Cl. 4C of M.S.O.A. view to the contrary would result in regularizing/validating a void act. Cl. 4C neither permits nor contemplates the same. As held in the above judgments, if the appointment is not made in accordance with the constitutional scheme, it is void ab initio and, therefore, there can be no claim to its regularization or for grant of permanency in any manner. This is all the more so as Cl. 32 of the M.S.O. clarifies that the Standing Orders are not to operate in derogation of any other law i.e. section 76 of 1965 Act.

Definitely any interpretation of Clause 4C conducive to defeating the Constitutional mandate is unwarranted. **Violation of Clause 4C of the MSO may tantamount to an unfair labour practice under item 9 of Sch. IV of the 1971 Act but unless and until, other additional factors are proved on record, finding of indulgence in an unfair labour practice under Item 6 of Sch. IV thereof cannot be reached.** As explained by the Hon'ble Apex Court in case of Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (supra), existence of a legal vacancy must be established and as discussed above, the power to recruit with the employer must also be demonstrated. In absence thereof, workman cannot succeed in proving the commission of unfair labour practice under Item 6 by the employer. These two ingredients, therefore, also must be established when benefit of Cl. 4C is being claimed. **Unless availability of a vacancy is shown or then power with the employer to create the post and to fill it is brought on record, mere continuation of 240 days cannot and does not enable the workman to claim permanency by taking recourse to Cl. 4C read with Item 9 of Sch. IV of 1971 Act.** Clause 4C does not employ word "regularisation" but then it is implicit in it as no "permanency" is possible without it. Conversely, it follows that when a statutory provision like section 76 disables the employer either from creating or filling in the posts, such a claim cannot be sustained. This also nullifies the reliance upon the judgment of learned Single Judge in case of Maharashtra Lok Kamgar Sanghatana v. Ballarpur Industries Limited (supra) where the employer was a private Company not subjected to such regulatory measures by any Statute and enjoyed full freedom to create the posts and to recruit. One of us (B.P. Dharmadhikari, J.) is party to the judgment of this Court in Raymond UCO Denim Private Ltd. v. Praful Warade (supra) which again needs to be distinguished for the same reasons. The judgment of learned Single Judge in case of Indian Tobacco Company Ltd. v. Industrial Court (supra), judgment of Hon'ble Apex Court affirming it or then judgment of Hon'ble Apex Court reported at Western India Match Company Ltd. and Workmen are all considered therein and are distinguishable as the same do not pertain to the province of public employment or consider inherent Constitutional restraints (the *suprema lex*-see Mahendra L. Jain v. Indore Development Authority (supra) and Cl. 32 of the MSO. For same reasons, law laid down by the Full Bench judgment of this Court in 2007 (1) Mh.L.J. (F.B.) 754: 2007 (1) CLR 460 Gangadhar Balgopal Nair v. Voltas Limited does not advance the cause of workmen. The Division Bench of this Court in May and Baker Ltd. v. Kishore Jaikishandas Ichchaporla (supra) while construing section 10A(3) held that the expression "other law" would not refer to the Model Standing Orders or the Certified Standing Orders since they are laws made under the provisions of Parent Act itself and not under any other law. The Model Standing Orders and Certified Standing Orders, held the Division Bench, "are laws no doubt but they are laws made under the provisions of the Act". They were held not to be provisions under any other law. This discussion therefore shows how these words "in derogation of any law for the time being in force" in Cl. 32 of MSO need to be understood and does not help Adv. Jaiswal or Adv. Khan.

20. In Vice-chancellor, Lucknow University v. Akhilesh Kumar Khare (supra) relied upon by Adv. Parihar, Hon'ble Apex Court follows its

Constitution Bench in Umadevi (III) and while rejecting relief of regularization to the daily wagers who were engaged in public employment without proper procedure, grants them compensation of? 4 Lakh each by way of compassion. This judgment does not consider any welfare labour legislation and, therefore, cannot provide direct answer to the reference made. Judgment of this Court taking similar view in the light of 1971 Act in the case of Punjabrao Krishi Vidyapeeth, Akola v. General Secretary, Krishi Vidyapeeth Kamgar Union (supra) is already considered above. The Division Bench of this Court in State of Maharashtra v. Pandurang Sitaram Jadhav (supra) finds that the respondents before it were employed as daily wagers in the establishment of the Government Milk Dairy for a longer period of 12 to 20 years. There were no sanctioned posts and vacancies in existence in the concerned department. Respondents failed to demonstrate that their appointments were made in accordance with the procedure prescribed for selection. The Division Bench finds it wholly unjust to direct the appellant State Government to grant permanency to the respondents. It points out that the provisions of Model Standing Orders are subject to the Rules regulating selection and appointment so also subject to the constitutional scheme of public employment. Respondents daily wagers are declared to possess no legal right to claim permanency. Order passed by the learned Single Judge to the contrary have been quashed. State Government is held obliged to make appointments in adherence to the constitutional scheme of Public employment. Respondents Daily Wagers appointed without following the prescribed procedure for selection by passing public participation did not acquire any legal right to claim permanency. It is apparent that no inconsistency exists and cannot be worked out in State of Maharashtra v. Pandurang Sitaram Jadhav as also Pune Municipal Corporation v. Dhananjay Prabhakar Gokhale(supra) on one hand and Ballarpur Industries Limited v. Maharashtra Lok Kamgar Sanghatana (supra) on the other hand. Status of employer, nature of employment and inherent Constitutional limitation on public employer or absence of such fetters on any private employer or absolute freedom available to it to create post/s and recruit, are some of the distinguishing features which prohibit this exercise.

21. **Thus, in the light of this discussion, it follows that in absence of vacant sanctioned posts with the Municipal Council, a workman who has put in continuous service of 240 days or more in span of 12 months, cannot invoke Clause 4C of the MSO to claim either permanency or regularization.** We accordingly answer the question referred. Registry to place the writ petitions before the learned Single Judge as per roaster assignment for further consideration.”

27. In my view therefore grant of permanency to the Petitioners was otherwise impermissible even if they were to be treated as employees of the Respondent-Board.

28. Considering overall conspectus of the case, I am unable to trace any palpable error in the impugned judgment and order passed by the

Industrial Court. Writ Petition is devoid of merits. It is accordingly **dismissed** with no order as to costs.

29. In view of dismissal of the Petition, nothing would survive in the Civil Applications and Interim Application, and the same are accordingly **disposed of**.

(SANDEEP V. MARNE, J.)

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