Oil And Natural Gas Corporation vs Krishan Gopal on 7 February, 2020

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Bench: Ajay Rastogi, Dhananjaya Y Chandrachud

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 1878 of 2016

Oil and Natural Gas Corporation …Appellant

Versus

Krishan Gopal & Ors. …Respondents

With

Civil Appeal Nos 935-937 of 2020
SLP(C) Nos. 10478-10480/2016

With

Civil Appeal Nos 938-939 of 2020
SLP(C) Nos. 30854-30855/2017

With

Civil Appeal No 934 of 2020
SLP(C) No. 16455/2018

And With

Civil Appeal Nos 669-696 of 2020

SLP(C) Nos. 15971-15998/2018

JUDGMENT

Dr Dhananjaya Y Chandrachud, J.

1 This batch of appeals arises from the judgments of the High Courts of Andhra Pradesh, Delhi, Madras and Uttarakhand. A judgment of a two judge Bench of this Court in Oil and Natural Gas Corporation Limited v Petroleum Coal Labour Union1 ("PCLU") has assumed focus since the decisions of the High Courts in four of the present appeals have relied on the judgment of this Court in coming to the conclusion that the workmen were entitled to regularisation in service. In one of the five appeals, however where the prayer for regularisation was rejected, the decision in PCLU has been distinguished. Hence on either end of the spectrum, the judgment in PCLU has a significant bearing on the outcome of the appeals.

2 The manner in which the present appeals arise is indicated, for convenience of reference, in the following tabulation:

Sl. Nos.	Particulars	Remarks
1	Civil Appeals @ SLP (C) Nos. 15971-15998/2018 ONGC & Ors. v ONGC Field Operators Union & Ors.	The appeals arise out of a judgment dated 5 January 2018 of the Andhra Pradesh High Court in 24 Writ Appeals and 4 Writ Petitions. The High Court directed regularisation of 450 workmen who moved the High Court under Article 226 of the Constitution without seeking a reference before the Industrial Tribunal under the Industrial Disputes Act 19472. The judgment of the High Court has relied upon the decision of this Court in PCLU (supra).
2	Civil Appeal @ SLP (C) Nos. Renumbered as C.A. ONGC v Krishan Gopal & Ors.	The appeal arises out of a judgment dated 12 December 2015 of the High Court of Delhi. Allowing a Letters Patent Appeal, the High Court directed regularisation of 24 workmen who had instituted proceedings under Article 226 without seeking a reference to the Industrial Tribunal under the Industrial Disputes Act 1947. The High Court relied upon the decision of this Court in PCLU (supra).
3	Civil Appeal @ SLP (C)	The appeal arises from a judgment of the

	No. 10478/2016 M Rajan & Ors. v ONGC & Ors.		Madras High Court dated 20 November 2015 in Writ Appeals. The High Court rejected the prayer for regularisation made by the workmen who had proceedings under Article 226. The High Court held that the remedy under the Industrial Disputes Act 1947 could not be bypassed. The High Court distinguished the decision of this Court in PCLU (supra).
4	Civil Appeal @ SLP (C) No. 10479/2016 ONGC v Tel Prakartik Gas Karmchari Sangh	AVM	The appeal arises from a decision of the High Court of Uttarakhand dated 3 August 2017 in writ proceedings under Article 226, as a consequence of which, nine workmen have been directed to be regularised. The High Court set aside the award of the Industrial Tribunal which had held in favour of ONGC, the employer. The High Court relied on the decisions of this Court in PCLU and in State of Haryana v Piara Singh3 (“Piara Singh”). (The decision in Piara Singh has been overruled b Constitution Bench of this Co Secretary, State of Karnatak Umadevi4).

“ID Act”

5	Civil Appeal @ SLP (C) The Management of ONGC v Petroleum Employees Union	The appeal arises from the judgment of the Madras High Court dated 29 January 2018 by which the services of messengers and three sanitary cleaners have been regularised by the High Court. The award of the Industrial Tribunal has been set aside. The High Court has relied on the judgment of this Court in PCLU (supra).

(1992) 4 SCC 118

(2006) 4 SCC 1

3 In the appeals which are listed out at serial Nos 1, 2, 4 and 5 of the table,

ONGC, as the appellant seeks to challenge the judgments of the High Courts directing or, as the case may be, upholding the plea for regularisation on the basis of the decision in PCLU. In the appeal at serial No 3, the workmen are before this Court against the judgment of the High Court declining to grant the relief which was granted to the workmen in PCLU on the ground that they had initiated proceedings under Article 226 without availing of the remedy under the ID Act.

4 Appearing on behalf of the appellant, ONGC, in four appeals in the above batch of appeals5, Mr P S Narasimha and Mr J P Cama, learned Senior Counsel have formulated the following points for determination:

> (i) Whether the decision of the two judge Bench of this Court in PCLU is per incuriam on the ground that it did not consider the binding precedents on the interpretation of Item 10 of Schedule V of the ID Act, particularly those in :
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> Mahatma Phule Agricultural University v Nasik Zilla Sheth Kamgar Union6;
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> Serial Nos 1, 2, 4 and 5 (2001) 7 SCC 346 Regional Manager, State Bank of India v Raja Ram7;

Regional Manager, SBI v Rakesh Kumar Tewari8; and Oil & Natural Gas Corpn. Ltd v Engg. Mazdoor Sangh9.

(ii) Whether the interpretation which has been placed in PCLU on clause 2(ii) of the Certified Standing Orders for contingent employees of ONGC to the effect that a temporary workman who has put in 240 days of attendance in any period of twelve consecutive months and possesses the minimum qualifications is entitled to regularisation, is correct in view of the fact that the standing order only provides that the „workman "may be considered for conversion as regular employee";

(iii) Whether the view of the High Court of Andhra Pradesh that the principles enunciated in the judgment of the Constitution Bench in Secretary, State of Karnataka v Umadevi10 ("Umadevi") are not applicable to labour law, is correct;

(iv) What are the ingredients of an unfair labour practice under Item 10 of Schedule V of the ID Act; and

(v) Whether a finding of an unfair labour practice can be rendered in a proceeding under Article 226 of the Constitution without the workmen leading evidence in a reference under the ID Act.

(2004) 8 SCC 164 (2006) 1 SCC 530 (2007) 1 SCC 250 (2006) 4 SCC 1 5 Section 25(T) of the ID Act contains a prohibition against employers, workmen and trade unions resorting to unfair labour practices. It provides:

> "25 (T). Prohibition of unfair labour practice – No employer or workman or a trade union, whether registered under the Trade Unions Act, 1926 (16 of 1926) or not, shall commit any unfair labour practice." The expression "unfair labour practice has been defined in Section 2(ra):
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> "2(ra) "unfair labour practice" means any of the practices specified in the Fifth Schedule." Among the unfair labour practices set out in the Vth Schedule, Item 10 provides as follows:
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> "10. To employ workmen as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen." The decision in PCLU

6 ONGC was in appeal against an award of the Industrial Tribunal directing it to regularise the services of security guards and supervisors with effect from the date on which they had completed 480 days. ONGC had a project in Cauvery Basin, Karaikal in the Union Territory of Puducherry. It employed contract workmen as security guards and supervisors. On 8 December 1976, contract labour was abolished for watch and ward, dusting and cleaning jobs by the Government of India under Section 10(1) of the Contract Labour (Regulation and Abolition) Act 1970. Under an agreement with the trade unions, the management of ONGC utilized the services of the erstwhile contract workmen through a labour cooperative society which was formed for the welfare of the

contract workmen. Subsequently, security work was entrusted to the Central Industrial Security Force to protect the installations. The workmen were later on appointed as part of watch and ward security on a term basis subject to the condition that the Certified Standing Orders would not apply to them. On a demand by the workmen, a reference was made to the Industrial Tribunal to adjudicate on whether the management was justified in not regularising the workmen and in failing to pay equal wages to the workmen, at par with the regular workmen. The dispute about the payment of equal wages was resolved by a settlement. The Industrial Tribunal made an award directing ONGC to regularise the services of the workmen. This was challenged by ONGC before the High Court in writ proceedings on the ground that the workmen had been originally selected without following any selection procedure, in violation of the decision in Umadevi (supra). The workmen claimed that ONGC was guilty of an unfair labour practice in continuing them on a temporary basis since 1988. The Writ Petition was dismissed by a learned Single Judge. The Division Bench of the High Court having dismissed a Writ Appeal, ONGC moved this Court in order to challenge the judgment of the High Court.

7 In appeal, one of the issues was:

> "Whether jurisdiction of the Tribunal to direct the Corporation to regularise the services of the workmen concerned in the posts is valid and legal?".
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> Answering the above issue, this Court held that
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> (i) All the workmen (except for one) possessed the qualifications required for regularisation; and
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> (ii) The workmen had been employed prior to 1985 in posts through irregular means.

8 The Court held that the Industrial Tribunal had the jurisdiction to adjudicate upon the dispute and had rightly passed an award directing regularisation of the services of the workmen.

9 The second issue which was dealt with in the judgment in PCLU was:

> "Whether the appointment of the workmen concerned in the services of the Corporation is irregular or illegal?"

10 On behalf of the Management, it was urged that the initial selection of the workmen was not in accordance with the recruitment rules and was illegal in view of the judgment of the Constitution Bench in Umadevi. This plea was rejected, following the decision in Ajaypal Singh v Haryana Warehousing Corporation11 and it was held that the management could not deny the rights of the workmen by contending that their initial employment was contrary to Articles 14 and 16 of the Constitution. The provisions contained in clause 2(ii) of the Certified Standing Orders for contingent employees of ONGC were in issue, the management contending that there was no right of regularisation merely on the completion of 240 days in twelve consecutive months.

(2015) 6 SCC 321 11 Clause 2 of the Certified Standing Orders provides thus :

> "2. (i) Classification of workmen The contingent employees of the Commission shall hereafter be classified as:
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> (a) Temporary, and
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> (b) Casual
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> (ii) A workman who has been on the rolls of the Commission and has put in not less than 180 days of attendance in any period of 12 consecutive months shall be a temporary workman, provided that a temporary workman who has put in not less than 240 days of attendance in any period of 12 consecutive months and who possesses the minimum qualifications prescribed by Commission may be considered for conversion as regular employee.
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> (iii) A workman who is neither temporary nor regular shall be considered as casual workman."

12 Justice V Gopala Gowda, speaking for the two judge Bench of this Court rejected the submission that clause 2(ii) of the Certified Standing Orders does not confer a right to regularisation since it employs the words "may be considered for conversion as regular employee". This submission which was based on the language of clause 2(ii) was rejected with the following observations:

> "In any case, it is clear that the workmen concerned have clearly completed more than 240 days of services subsequent to the memorandum of appointment issued by the Corporation in the year 1988 in a period of twelve calendar months, therefore, they are entitled for regularisation of their services into permanent posts of the Corporation as per the Act as well as the Certified Standing Orders of the Corporation." (Emphasis supplied) The Court further held:
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> "45. The legal contention urged on behalf of the Corporation that the statutory right claimed by the workmen concerned under Clause 2(ii) of the Certified Standing Orders of the Corporation for regularising them in their posts as regular employees after rendering 240 days of service in a calendar is not an absolute right conferred upon them and their right is only to consider their claim. This plea of the learned Senior Counsel cannot again be accepted by us for the reason that the Corporation is bound by law to take its decision to regularise the services of the workmen concerned as regular employees as provided under Clause 2(ii) of the Certified Standing Orders after their completion of 240 days of service in a calendar year as they have acquired valid statutory right. This should have been positively considered by the Corporation and granted the status of regular employees of the Corporation for the reason that it cannot act arbitrarily and unreasonably deny the same especially it being a corporate body owned by the Central Government and an instrumentality of the State in terms

> of Article 12 of the Constitution and therefore, it is governed by Part III of the Constitution." ONGC was accordingly directed to regularise the services of the workmen on their completing 240 days of service in a calendar year under clause 2(ii) of the Certified Standing Orders, to grant regular pay scale and absorption against regular posts. PCLU arose from an adjudication in an industrial reference whereas the present proceedings arise from a writ petition under Article 226.

13 From the above extract of the decision of this Court in PCLU, it is evident that clause 2(ii) of the Certified Standing Orders has been construed to confer a right to regularisation on the completion of 240 days of service in a calendar year. While construing the provisions of clause 2(ii), an earlier decision of a two judge Bench of this Court in Oil and Natural Gas Corporation Limited v Engineering Mazdoor Sangh12 ("Engineering Mazdoor Sangh") was evidently not brought to the notice of the Court. The decision in Engineering Mazdoor Sangh construed clause 2 of the Certified Standing Orders specifically in the context of (2007) 1 SCC 250 ONGC itself. The decision related to the engagement of seasonal workmen who were employed between November and May of the following year for carrying out surveys for the exploration of petroleum. The demand of the workmen for regularisation on the completion of 240 days was referred to Central Government Industrial Tribunal. While the reference was pending, the Union filed a complaint under Section 33-A alleging that ONGC was allotting work to contractors in preference to the casual/contingent/temporary workmen resulting in the alteration of the terms of service. The complaint was adjudicated upon by the Tribunal upon which ONGC filed an application seeking permission to terminate the service of the workmen. The Tribunal allowed ONGC to terminate some of the workmen. The order of the Tribunal directed ONGC to regularise the workmen as an when any vacancy arose in a regular post, subject to their completing 240 days work and possessing the minimum qualifications. The High Court modified the award of the Industrial Tribunal by directing that all employees who completed 240 days and possessed the minimum qualifications would be considered at par with regular employees. They would be given the status of regular appointees without requiring them to compete with other employees drawn from the employment exchange. In appeal, this Court observed that regularising the services of all the seasonal workmen would create various difficulties and hence the Tribunal had found a via media in directing that 153 workmen who had admittedly completed 240 days and had acquired a temporary status be regularised against vacancies as and when such vacancies became available. Thus, this Court found that the directions of the Tribunal were reasonable and should prevail instead of the directions issued by the High Court. The judgment of the High Court was set aside and that of the Tribunal was restored.

14 Apart from the above decision which arose specifically in the context of ONGC, it has been submitted that the decision in PCLU would require reconsideration in view of earlier decisions of this Court which have not been noticed.

15 In Mahatma Phule Agricultural University v Nasik Zilla Sheth Kamgar Union13 ("Mahatma Phule Agricultural University"), a Bench of two learned judges of this Court construed the provisions of Item 6 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 197114, which is in the following terms :

"14...

6. To employ 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." Construing the above provisions, this Court held :

"14...The complaint was against the Universities. The High Court notes that as there were no posts the employees could not be made permanent. Once it comes to the conclusion that for lack of posts the employees could not be made permanent, how could it then go on to hold that they were continued as "badlis", casuals or temporaries with the object of depriving them of the status and privileges of permanent employees? To be noted that the complaint was not against the State Government. The complaint was against the Universities. The inaction on the part of the State Government to create posts would not mean that an unfair labour practice had been committed by the Universities. The reasoning given by the High Court to conclude that the case was squarely covered by Item 6 of Schedule IV of the MRTU & PULP Act cannot be sustained at all and the impugned judgment has to (2001) 7 SCC 346 "MRTU and PULP Act" be and is set aside. It is however clarified that the High Court was right in concluding that, as per the law laid down by this Court, status of permanency could not be granted. Thus all orders wherein permanency has been granted (except award dated 1-4-1985 in IT No. 27 of 1984) also stand set aside." There could, in other words, be no regularisation in the absence of posts. Hence, there was no unfair labour practice.

16 In Regional Manager, State Bank of India v Raja Ram15 ("Raja Ram"), another two judge Bench of this Court construed the provisions of Item 10 of Schedule V to the ID Act and observed:

"9...In other words, before an action can be termed as an unfair labour practice it would be necessary for the Labour Court to come to a conclusion that the badlis, casuals and temporary workmen had been continued for years as badlis, casuals or temporary workmen, with the object of depriving them of the status and privileges of permanent workmen. To this has been added the judicial gloss that artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice. However, it is the continuity of service of workmen over a period of years which is frowned upon. Besides, it needs to be emphasised that for the practice to amount to unfair labour practice it must be found that the workman had been retained on a casual or temporary basis with the object of depriving the workman of the status and privileges of a permanent workman. There is no such finding in this case. Therefore, Item 10 in List I of the Fifth Schedule to the Act cannot be said to apply at all to the respondent's case and the Labour Court erred in coming to the conclusion that the respondent was, in the circumstances, likely to acquire the status of a permanent employee." (Emphasis supplied) The above decision was followed in Regional Manager, SBI v Rakesh Kumar (2004) 8 SCC 164 Tewari16.

17 The decision of the two judge Bench in PCLU has placed a construction on the provisions of clause 2(ii) of the Certified Standing Orders which prima facie does not appear to be correct. Besides, the fact that the decision in PCLU has not noticed the earlier judgment in Engineering Mazdoor Sangh (supra) which pertained to ONGC s Certified Standing Orders, we are of the considered view that the principles of law which have been expounded in PCLU would require to be revisited. The decision in PCLU holds that the workmen upon completion of 240 days service in a period of 12 calendar months "are entitled for regularisation of their services into permanent posts of the corporation". The Court further held that under clause 2(ii), upon the completion of 240 days of service in a calendar year, the workmen have "acquired valid statutory right" and ought to have been "granted the status of regular employees" of the corporation on the ground that the corporation which is an instrumentality of the State under Article 12 cannot act arbitrarily or unreasonably. Whether the provisions of clause 2(ii) confer an absolute right to regularisation merely on the completion of 240 days of service in a calendar year is a point which needs to be reconsidered both having regard to the express language of the provision as well as the earlier decisions of this Court including that in the case of Engineering Mazdoor Sangh.

18 The second aspect on which we are of the view that the present appeals would require to be placed before a larger Bench for consideration is in regard to (2006) 1 SCC 530: at paragraph 25, page 538 the applicability of the principles set out and formulated by the Constitution Bench in Umadevi in the context of industrial adjudication. In Umadevi, the Constitution Bench made a distinction between appointments or selections which are merely irregular and those which are illegal. The Court observed:

> "16...We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised and that it alone can be regularised and granting permanence of employment is a totally different concept and cannot be equated with regularisation." In this context, the Court held :
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> "43...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." In paragraph 53 of the judgment, the Court made a one-time exception, for the regularisation of the irregularly appointed persons, who had worked for ten years or more in duly sanctioned posts:

> "53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa [(1967) 1 SCR 128 : AIR 1967 SC 1071] , R.N. Nanjundappa [(1972) 1 SCC 409 : (1972) 2 SCR 799] and B.N. Nagarajan [(1979) 4 SCC 507 : 1980 SCC (L&S) 4 : (1979) 3 SCR 937] 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 abovereferred 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."

19 The applicability of the decision in Umadevi in the context of labour adjudication was considered in UP Power Corporation Ltd. v Bijli Mazdoor Sangh17 ("Bijli Mazdoor Sangh"). This Court held that the law propounded in Umadevi was applicable also to Industrial Tribunals and Labour Courts. The Court held:

> "6. It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . But the foundational logic in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] is based on Article 14 of the Constitution of India. Though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularisation, the same cannot be viewed differently.
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> 7. The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] was not rendered is really of no consequence. There cannot be a case for regularisation without there being employee-

employer relationship. As noted above the concept of regularisation is clearly linked with Article 14 of the (2007) 5 SCC 755 Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] about the regularisation." 20 Subsequently, in Maharashtra State Road Transport Corporation v Casteribe Rajya Parivahan Karmchari Sanghatana18 ("Maharashtra SRTC"), it was held that the Industrial and Labour Courts under Section 30(1)(b) of the MRTU and PULP Act have wide powers to direct the employer to take

affirmative action in a case of unfair labour practice including the power to order regularisation or permanency. The decision in Umadevi was held to limit the scope of the powers under Articles 32 and 226 to issue directions for regularisation in a matter of public employment. However, the power to take affirmative action under Section 30(1)(b) was held to be intact even after the judgment of the Constitution Bench. This Court held :

> "35. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.
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> 36. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and (2009) 8 SCC 556 PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established." The Court however clarified that there is no doubt that the creation of posts does not lie within the domain of judicial functions "which obviously pertains to the executive" and the status of permanency cannot be granted by the Court where no posts exist. In Maharashtra SRTC, the two judge Bench was construing the provisions of the MRTU and PULP Act 1971. In holding that the creation of posts could not be directed by courts, the judgment in Maharashtra SRTC relied upon the decisions in Mahatma Phule Agricultural University (supra) and State of Maharashtra v R S Bhonde19.

21 The divergence between the decisions in Bijli Mazdoor Sangh and Maharashtra SRTC was sought to be reconciled in a two judge Bench decision of this Court in Hari Nandan Prasad v Employer I/R to Management of Food Corporation of India20 ("FCI"). Justice A K Sikri, speaking for the two judge Bench held:

> "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 (2005) 6 SCC 751 (2014) 7 SCC 190 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."

22 In FCI, the grievance of the appellants was that in terms of a scheme contained in a circular, similarly placed workmen had been regularised on the completion of 240 days service. While dealing with the case of two workmen, it was found that one of them had been dispensed with four years prior to the date of the circular as a result of which the workman would only be entitled to monetary compensation. On the other hand, the second workman was in service on the date of the circular and completed 240 days of service within a few months. The Court held that the failure to regularise his services was discriminatory.

23 The following propositions would emerge upon analyzing the above decisions:

> (i) Wide as they are, the powers of the Labour Court and the Industrial Court cannot extend to a direction to order regularisation, where such a direction would in the context of public employment offend the provisions contained in Article 14 of the Constitution;
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> (ii) The statutory power of the Labour Court or Industrial Court to grant relief to workmen including the status of permanency continues to exist in circumstances where the employer has indulged in an unfair labour practice by not filling up permanent posts even though such posts are available and by continuing to employ workmen as temporary or daily wage employees despite their performing the same work as regular workmen on lower wages;
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> (iii) The power to create permanent or sanctioned posts lies outside the judicial domain and where no posts are available, a direction to grant regularisation would be impermissible merely on the basis of the number of years of service;
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> (iv) Where an employer has regularised similarly situated workmen either in a scheme or otherwise, it would be open to workmen who have been deprived of the same benefit at par with the workmen who have been regularised to make a complaint before the Labour or Industrial Court, since the deprivation of the benefit would amount to a violation of Article 14; and

(v) In order to constitute an unfair labour practice under Section 2(ra) read with Item 10 of the Vth Schedule of the ID Act, the employer should be engaging workmen as badlis, temporaries or casuals, and continuing them for years, with the object of depriving them of the benefits payable to permanent workmen.

24 The decision in PCLU needs to be revisited in order to set the position in law which it adopts in conformity with the principles emerging from the earlier line of precedent. More specifically, the areas on which PCLU needs reconsideration are:

(i) The interpretation placed on the provisions of clause 2(ii) of the Certified Standing Orders;

(ii) The meaning and content of an unfair labour practice under Section 2(ra) read with Item 10 of the Vth Schedule of the ID Act; and

(iii) The limitations, if any, on the power of the Labour and Industrial Courts to order regularisation in the absence of sanctioned posts. The decision in PCLU would, in our view, require reconsideration in view of the above decisions of this Court and for the reasons which we have noted above.

25 We accordingly request the Registry to place the proceedings before the Hon ble Chief Justice of India so as to enable His Lordship to consider placing this batch of appeals before an appropriate Bench.

……J. [DR DHANANJAYA Y CHANDRACHUD]
.....J. [AJAY RASTOGI] New Delhi;

February 07, 2020.