Maharashtra State Road Trans.Corp. ... vs Casteribe Rajya P. Karmchari ... on 28 August, 2009

Author: R.M. Lodha

Bench: R. M. Lodha, Tarun Chatterjee

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3433 OF 2007

Maharashtra State Road Transport
Corporation & Anr. ...Appellants

Versus

Casteribe Rajya P. Karmchari Sanghatana ...Respondents
With
Civil Appeal No. 3434/2007
Civil Appeal No. 3435/2007
Civil Appeal No. 3436/2007
Civil Appeal No. 3437/2007

JUDGMENT

R.M. Lodha, J.

Principally, two questions which this Court is called upon to determine in this group of five civil appeals by special leave are:

> (one) : Whether a direction to the Maharashtra State Road Transport Corporation (for short, "Corporation") by the Industrial Court, and confirmed by the High Court of giving status, wages and all other benefits of permanency, applicable to the post of Cleaners to the complainants is justified?
>
> (two) : Whether the two complaints filed by Casteribe Rajya Parivahan Karmchari Sanghatana (for short, "Union"), an unrecognised union under Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 (for short, "MRTU & PULP Act"), alleging unfair labour practice on the part of the employer under item No. 6 of Schedule IV are maintainable?

2. The Union, although a registered union under the Trade Union Act, but unrecognised under MRTU & PULP Act, filed two complaints, namely, complaint (ULP) No. 542/1991 and complaint (ULP) No. 574/1991 before the Industrial Court, Bombay alleging that the Corporation has indulged in unfair labour practice under item nos. 5,6,9 and 10 of Schedule IV of MRTU & PULP Act. The names of the affected employees were mentioned in the annexures annexed with the complaints. All these affected employees were engaged by the Corporation as casual labourers for cleaning the buses between the years 1980-85. According to the complainants, these employees are required to work everyday at least eight hours at the concerned depot of the Corporation; the work done by these employees is of permanent nature but they are being paid a paltry amount; and that the posts of sweepers/cleaners are available in the Corporation yet these employees have been kept on casual and temporary basis for years together denying them the benefit of permanency.

3. Another complaint (ULP No. 442 of 1992) was filed by 19 individual employees before Industrial Court, Thane, raising the identical dispute.

4. The Corporation resisted these complaints on diverse grounds. Insofar as the complaints by the Union were concerned, the Corporation raised the plea that these were not maintainable as the Union was unrecognised Union under MRTU & ULP Act. The Corporation stated that the complainants were engaged for cleaning the buses on contract basis @ 1.50 paise per bus and they were not employed as `badlis', casual or temporary workers; that the engagement of these workers on contract basis is purely of casual nature; that prior to 1980, the Corporation buses were being cleaned by regular helpers but some problems arose amongst the employees later on and, it was decided not to compel the qualified helpers to clean and sweep the buses; that since the Corporation was facing acute problem regarding cleaning of the buses and the negotiations were going on with the respective unions, it was decided that those who volunteer their services by reporting at the respective depot may be allowed to clean the buses on contract basis. The Corporation stated that these workers cannot be provided with the status of permanency on par with the other permanent cleaners.

5. The parties led oral as well as documentary evidence before the Industrial Court, Bombay in Complaint ULP nos. 542 and 574 of 1991 and before Industrial Court, Thane, in Complaint ULP no. 442/1992.

6. The Industrial Court, Bombay in the two complaints filed by the Union held that the complaint regarding unfair labour practice against the Corporation under item 6 of Schedule IV was not maintainable. However, the complaints were maintainable in respect of unfair labour practice under item nos. 5,9 and 10. The Industrial Court held that the Corporation committed unfair labour practice under items 5 and 9 of Schedule IV of MRTU & PULP Act and vide order dated May 2, 1995 the Corporation was directed to pay equal wages to the concerned employees which are paid to Swachhak and pay arrears of wages to them from the date of filing of the complaints. The Industrial Court, Thane decided complaint ULP No. 442/1992 vide its order dated February 6, 1997 and held that the Corporation indulged in unfair labour practice under item 6 of Schedule IV by continuing the complainants as temporary/casual/daily wage workers for years together and thereby depriving them the benefits of permanency. The Industrial Court, Thane, accordingly, directed the

Corporation to cease and desist from the said unfair practice within one month from the date of the order by giving status, wages and all other benefits of permanency applicable to the post of cleaners to the complainants w.e.f. August 3, 1982.

7. The aforesaid two orders passed by the Industrial Court, Bombay as well as Industrial Court, Thane came to be challenged by the Union, the employees and the Corporation before the High Court of Judicature at Bombay (appellate side) in five separate writ petitions. The learned single Judge of the High Court heard these five writ petitions together and disposed of them by a common judgment on August 2, 2001. The learned single Judge held that the complaints by the unrecognized union under item 6 of Schedule IV of MRTU & PULP Act were maintainable and that Corporation indulged in unfair labour practice under item 6 of Schedule IV. The learned single Judge also held that there is unfair labour practice on the part of the Corporation under item no. 5 of Schedule IV as well. The single Judge, accordingly, directed that employees mentioned in the two complaints filed by the Union be given benefit of permanency including salary and allowances from the date of filing the respective complaints.

8. Aggrieved by the judgment of the single Judge passed on August 2, 2001, the Corporation preferred five Letters Patent Appeals which came to be dismissed on May 6, 2005. Hence, these five appeals by special leave. re: question (one)

9. Mr. Altaf Ahmad, learned Senior Counsel for the Corporation, heavily relied upon General Standing Order No. 503 dated 19th June, 1959 and the decision by the Constitution Bench of this Court in the case of Secretary, State of Karnataka and Others vs. Umadevi and Others1 in assailing the direction (2006) 4 SCC 1 of giving status, wages and other benefits of permanency applicable to the post of cleaners. The learned Senior Counsel would submit that granting permanent status to employees who were working as casual workers/daily wagers and whose appointments were made without following the procedure prescribed in General Standing Order 503 on non-existent posts is unsustainable in law. He extensively referred to the Constitution Bench decision in Umadevi1. The learned Senior Counsel submitted that no direction could be given by the Court for creation of posts. In this regard, he relied upon two decisions of this Court viz.: Mahatma Phule Agricultural University and Others vs. Nasik Zilla Sheth Kamgar Union & Ors.2 and Karnataka State Road Transport Corporation and Anr. vs. S.G. Kotturappa and Anr.3

10. Mr. Shekhar Naphade, learned Senior Counsel for the employees and Mr. Vinay Navare, learned counsel for the Union stoutly defended the direction given to the Corporation in according permanency and consequential benefits to the affected employees.

(2001) 7 SCC 346 (2005) 3 SCC 409

11. We deem it appropriate to notice the relevant provisions of MRTU & PULP Act first. But before we do that it is important to notice that MRTU & PULP Act was enacted with an object to provide for the recognition of trade unions for facilitating collective bargaining for certain undertakings; to state their rights and obligations; to confer certain powers on unrecognized unions; to provide for declaring certain strikes and lockouts as illegal strikes and lockouts; to define and provide for the

prevention of certain unfair labour practices; to constitute courts (as independent machinery) for carrying out the purposes of according recognition to trade unions and for enforcing the provisions relating to unfair labour practices; and to provide for matters connected with the purposes aforesaid.

12. A "recognized union" under Section 3(13) means a union which has been issued a certificate of recognition under Chapter III of the Act.

13. "Unfair labour practice" means those defined in Section 26. Section 26 defines them to mean the practices listed in Schedules II, III and IV. Schedule II deals with unfair labour practices on the part of the employers; Schedule III deals with unfair labour practices on the part of trade unions and Schedule IV deals with general unfair labour practices on the part of the employers.

14. Section 21 confers a right upon the recognized union to appear or act in the proceedings relating to certain unfair labour practices. It reads thus:

> "21. Right to appear or act in proceedings relating to certain unfair labour practices (1) No employee in an undertaking to which the provisions of the Central Act for the time being apply, shall be allowed to appear or act or allowed to be represented in any proceedings relating to unfair labour practices specified in items 2 and 6 of Schedule IV of this Act except through the recognized union:
>
> Provided that, where there is no recognized union to appear, the employees may himself appear or act in any proceeding relating to any such unfair labour practices.
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> (2) Notwithstanding anything contained in the Bombay Act, no employee in any industry to which the provisions of the Bombay Act, for the time being apply, shall be allowed to appear or act or allowed to be represented in any proceeding relating to unfair labour practices specified in items 2 and 6 of Schedule IV of this Act except through the representative of employees entitled to appear under Section 30 of the Bombay Act."

15. Section 28 reads thus:

> "28. Procedure for dealing with complaints relating to unfair labour practices (1) Where any person has engaged in or is engaging in any unfair labour practice, then any union or any employee or any employer or any Investigating Officer may, within ninety days of the occurrence of such unfair labour practice, file a complaint before the Court competent to deal with such complaint either under Section 5, or as the case may be, under Section 7 of this Act.

Provided that, the Court may entertain a complaint after the period of ninety days from the date of the alleged occurrence, if good and sufficient reasons are shown by the complainant for the late filing of the complaint.

2. The Court shall take a decision on every such complaint as far as possible within a period of six months from the date of receipt of the complaint.

3. On receipt of a complaint under sub-section (1), the Court may, if it so considers necessary, first cause an investigation into the said complaint to be made by the Investigating Officer, and direct that a report in the matter may be submitted by him to the Court, within the period specified in the direction.

4. While investigating into any such complaint, the Investigating Officer may visit the undertaking, where the practice alleged is said to have occurred, and make such enquiries as he considers necessary. He may also make efforts to promote settlement of the complaint.

5. The Investigating Officer shall, after investigating into the complaint under sub-Section (4) submit his report to the Court, within the time specified by it, setting out the full facts and circumstances of the case, and the efforts made by him in settling the complaint. The Court shall, on demand and on payment of such fee as may be prescribed by rules, supply a copy of the report to the complainant and the person complained against.

6. If, on receipt of the repot of the Investigating Officer, the Court finds that the complaint has not been settled satisfactorily, and that facts and circumstances of the case require, that the matter should be further considered by it, the Court shall proceed to consider it, and give its decision.

7. The decision of the Court, which shall be in writing, shall be in the form of an order. The order of the Court shall be final and shall not be called in question in any civil or criminal court.

8. The Court shall cause its order to be published in such manner as may be prescribed. The order of the Court, shall become enforceable from the date specified in the order.

9. The Court shall forward a copy of its order to the State Government and such officers of the State Government as may be prescribed."

16. Section 30 sets out the powers of Industrial and Labour Courts as follows:

> "30. Powers of Industrial and Labour Courts (1) Where a Court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order -
>
> (a) declare that an unfair labour practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice;
>
> (b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the

employee or employees with or without back wages, or the payment of reasonable compensation) as may in the opinion of the Court be necessary to effectuate the policy of the Act;

(c) where a recognized union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled or that all or any of its rights under sub-section (1) of Section 20 or its right under Section 23 shall be suspended.

(2) In any proceeding before it under this Act, the Court, may pass such interim order (including any temporary relief or restraining order) as it deems just and proper (including directions to the person to withdraw temporarily the practice complained of, which is an issue in such proceeding), pending final decision:

Provided that, the Court may, on an application in that behalf, review any interim order passed by it.

(3) For the purpose of holding an enquiry or proceeding under this Act, the Court shall have the same powers as are vested in Courts in respect of -

(a) proof of facts by affidavit;
(b) summoning and enforcing the attendance of any person, and examining him on oath.
(c) Compelling the production of documents; and
(d) Issuing commissions for the examination of witnesses.

(4) The Court shall also have powers to call upon any of the parties to proceedings before it to furnish in writing, and in such forms as it may think proper, any information, which is considered relevant for the purpose of any proceedings before it, and the party so called upon shall thereupon furnish the information to the best of its knowledge and belief, and if so required by the Court to do so, verify the same in such manner as may be prescribed."

17. Section 32 provides that the Court shall have the powers to decide all connected matters arising out of any application or a complaint referred to it for the decision under any of the provisions of this Act.

18. Having surveyed the relevant provisions of MRTU & PULP ACT, it is now time to consider the Constitution Bench decision in Uma Devi1. In paragraph 10, the Constitution Bench has quoted the order of reference which reads:

"1. Apart from the conflicting opinions between the three- Judge Bench decisions in Ashwani Kumar v. State of Bihar; ((1997) 2 SCC 1, State of Haryana v. Piara Singh; (1992)4 SCC 118 and Dharwad Distt. PWD Literate Daily Wage Employees Assn. v.

> State of Karnataka (1990) 2 SCC 396 on the one hand and State of H.P. v. Suresh Kumar Verma; (1996) 7 SCC 564, State of Punjab v. Surinder Kumar; (1992) 1 SCC 489 and B.N. Nagarajan v. State of Karnataka; (1979) 4 SCC 507 on the other, which have been brought out in one of the judgments under appeal of the Karnataka High Court in State of Karnataka v. H. Ganesh Rao; (2001) 4 Kant LJ 466 (DB), decided on 1-6-2001 the learned Additional Solicitor General urged that the scheme for regularisation is repugnant to Articles 16(4), 309, 320 and 335 of the Constitution and, therefore, these cases are required to be heard by a Bench of five learned Judges (Constitution Bench).

2. On the other hand, Mr M.C. Bhandare, learned Senior Counsel, appearing for the employees urged that such a scheme for regularisation is consistent with the provisions of Articles 14 and 21 of the Constitution.

3. Mr V. Lakshmi Narayan, learned counsel appearing in CCs Nos. 109-498 of 2003, has filed the GO dated 19-7- 2002 and submitted that the orders have already been implemented.

4. After having found that there is conflict of opinion between the three-Judge Bench decisions of this Court, we are of the view that these cases are required to be heard by a Bench of five learned Judges.

5. Let these matters be placed before the Hon'ble the Chief Justice for appropriate orders."

19. The Constitution Bench in Umadevi1 considered a long line of cases; constitutional scheme in public employment; powers of the High Courts under Article 226; powers of this Court under Articles 32; other constitutional provisions viz.; Articles 14, 16, 21 and 309 of the Constitution and laid down that the High Court acting under Article 226 of the Constitution could not ordinarily issue directions for regularization and permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. The Constitution Bench observed thus:

> "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."

20. Pointing out the difference between the concept of "equal pay for equal work" and the concept of conferring "permanency" for those who have been appointed on ad hoc basis/ temporary basis and without any process of selection as envisaged in the Rules, the Court held:

> "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."

21. The Court deprecated the issuance of directions by the Court for regularization or making the temporary or casual employees permanent on the ground that such a person has worked for a considerable length of time. It was observed:

> "45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain--not at arm's length--since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he

> first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

22. The earlier decisions of this Court in Dharwad District PWD Literate Daily Wage Employees Assn. vs. State of Karnataka4, State of Haryana vs. Piara Singh5, Jacob M. Puthuparambil vs. Kerala Water Authority6 and Gujarat (1990) 2 SCC 396 (1992) 4 SCC 118 (1991) 1 SCC 28 Agricultural University vs. Rathod Labhu Bechar7 were held to be not laying down correct law and it was held that the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment. The Constitution Bench went on to hold:

> "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."

23. The argument based on Articles 14 and 16 of the (2001) 3 SCC 574 Constitution of India was also negatived by holding:

> "48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages

> or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled."

24. The Constitution Bench did not accept the argument that the right to life protected by Article 21 of the Constitution would include the right to employment. The Court said:

> "51. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution."

25. In the cases of irregular appointments (not illegal appointments) and their regularization as one time measure, however, the Constitution Bench referred to earlier decisions of this Court in the case of State of Mysore vs. S.V.Narayanappa8, R.N. Nanjundappa vs. T. Thimmiah9 and B.N. Nagarajan vs. State of Karnataka10 and said:

> "53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (AIR 1967

SC 1071), R.N. Nanjundappa (1972) 1 SCC 409 and B.N. Nagarajan (1979) 4 SCC 507 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. 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."

26. The question that arises for consideration is: have the provisions of MRTU & PULP Act denuded of the statutory status by the Constitution Bench decision in Umadevi1. In our judgment, it is not. The purpose and object of MRTU & PULP AIR 1967 SC 1071 (1972) 1 SCC 409 (1979) 4 SCC 507 Act, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedule II, III and IV. MRTU & PULP Act empowers the Industrial and Labour Courts to decide that the person named in the complaint has engaged in or is engaged in unfair labour practice and if the unfair labour practice is proved, to declare that an unfair labour practice has been engaged in or is being engaged in by that person and direct such person to cease and desist from such unfair labour practice and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate policy of the Act. The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years , with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer. The provisions of MRTU & PULP Act and the powers of Industrial and Labour Courts provided therein were not at all under consideration in the case of Umadevi1. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred, considered or decided in Umadevi1. Unfair labour practice on the part of the employer in engaging employees as badlies, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in item 6 of Schedule IV and the power of Industrial and Labour Courts under Section 30 of the Act did not fall

for adjudication or consideration before the Constitution Bench. It is true that the case of Dharwad District PWD Literate Daily Wage Employees Assn.7 arising out of industrial adjudication has been considered in Umadevi1 and that decision has been held to be not laying down the correct law but a careful and complete reading of decision in Umadevi1 leaves no manner of doubt that what this Court was concerned in Umadevi was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual, temporary or casual workers not based on proper selection as recognized by the rules or procedure and yet orders of their regularization and conferring them status of permanency have been passed. Umadevi1 is an authoritative pronouncement for the proposition that Supreme Court (Article 32) and High Courts (Article 226) should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad-hoc employees unless the recruitment itself was made regularly in terms of constitutional scheme. Umadevi1 does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of MRTU & PULP Act to order permanency of the workers who have been victim of unfair labour practice on the part of the employer under item 6 of Schedule IV where the posts on which they have been working exists. Umadevi cannot be held to have overridden the powers of Industrial and Labour Courts in passing appropriate order under Section 30 of MRTU & PULP Act, once unfair labour practice on the part of the employer under item 6 of Schedule IV is established.

27. There cannot be any quarrel to the proposition that courts cannot direct creation of posts. In Mahatma Phule Agricultural University and Others vs. Nasik Zilla Sheth Kamgar Union and Others11, this Court held:

> "12. Mrs Jaising, in support of Civil Appeals Nos. 4461- 70 and 4457-60 [arising out of SLPs (C) Nos. 418-21 of 1999 and SLPs (C) Nos. 9023-32 of 1998] submitted that the workmen were entitled to be made permanent. She however fairly conceded that there were no sanctioned posts available to absorb all the workmen. In view of the law laid down by this Court the status of permanency cannot be granted when there are no posts. She however submitted that this Court should direct the Universities and the State Governments to frame a scheme by which, over a course of time, posts are created and the workmen employed on permanent basis. It was however fairly pointed out to the Court that many of these workmen have died and that the Universities have by now retrenched most of these workmen. In this view of the matter no useful purpose would be served in undergoing any such exercise.
>
> 13. To be seen that, in the impugned judgment, the High Court notes that, as per the law laid down by this Court, status of permanency could not be granted. In spite of this the High Court indirectly does what it could not do directly. The High Court, without granting the status of permanency, grants wages and other benefits applicable to permanent employees on the specious reasoning that inaction on the part of the Government in not creating posts amounted to unfair labour practice under Item 6 of Schedule IV of the MRTU & PULP Act. In so doing the High Court erroneously (2001) 7 SCC 346 ignores the fact that approximately 2000 workmen

> had not even made a claim for permanency before it. Their claim for permanency had been rejected by the award dated 20-2-

1985. These workmen were only seeking quantification of amounts as per this award. The challenge, before the High Court, was only to the quantification of the amounts. Yet by this sweeping order the High Court grants, even to these workmen, the wages and benefits payable to other permanent workmen.

14. Further, Item 6 of Schedule IV of the MRTU & PULP Act reads as follows:

> "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."

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 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."

28. In the case of State of Maharashtra and Another vs. R.S.Bhonde and Ors.12, this Court relied upon earlier judgment in the case of Mahatma Phule Agricultural University (2005) 6 SCC 751 and reiterated the legal position thus:

> ". Additionally, as observed by this Court in Mahatma Phule Agricultural University v. Nasik Zilla Sheth Kamgar Union (2001) 7 SCC 346 the status of permanency cannot be granted when there is no post. Again in Gram Sevak Prashikshan Kendra v. Workmen (2001) 7 SCC 356, it was held that mere continuance every year of seasonal work obviously during the period when the work was available does not constitute a permanent status unless there exists post and regularisation is done."

29. In the case of Indian Drugs & Pharmaceuticals Ltd. vs. Workmen, Indian Drugs & Pharmaceuticals Ltd.13, this Court stated that courts cannot create a post where none exists. In paragraph 37 of the report, this Court held:

> "37. Creation and abolition of posts and regularisation are purely executive functions vide P.U. Joshi v. Accountant General (2003) 2 SCC 632. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of powers under the Constitution, and the judiciary, too, must know its limits."

30. In yet another case of Divisional Manager, Aravali Golf Club and Another vs. Chander Hass and Another14, this (2007) 1 SCC 408 (2008) 1 SCC 683 Court said:

> "15. The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and the first appellate court to create the posts of tractor driver and regularise the services of the respondents against the said posts cannot be sustained and are hereby set aside."

31. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the Courts. However, the factual matrix of the present controversy reveals that it was an admitted position before the Industrial Court, Thane in Complaint (ULP) No. 442/92 that the posts of cleaners in the Corporation were in existence. The Industrial Court, Thane recorded the following findings:

> "9. Undisputedly, there are posts of cleaners in the Corporation and not only these employees but the other regularly appointed are working under the supervision and control of the Corporation's officers and Supervisors. The Respondent Corporation has filed the statement showing attendance of these Complainants in different depots showing the day from which the work was allotted during the period from 1992 to 1994. It is at Ex.C-9. This document is already referred above. Therefore, the case of the complainants that they are working in different depots is not a disputed one. It is for the corporation to point out how many posts are in the depot and how many persons are working in those depots. Therefore, it cannot be said that for want of any material on record that all these persons cannot be absorbed in permanent posts. When there is deliberate attempt on the part of the corporation not to employ them as regular employees in the posts of cleaners for years together the intention is very clear and in my opinion, this is the fit case where the declaration under item 6 of Schedule V of the Act will have to be given."

32. The Industrial Court at Bombay in its order dated May 2, 1995 while dealing with Complaint (ULP) Nos. 542 and 574/1991 on the basis of the evidence on record recorded the findings thus:

> ".....the employees covered by the complainants are doing the job of washing, cleaning buses and, the work was done round the clock. The work at washing, cleaning buses was previously done by the helpers, who in the 4th category, and their salaries grade begins from Rs. 875-12-1055-15-1145, whereas the grade of Swachak, which is also in 4th category begins from 750-12-970-14-940. These categories are mentioned in Maharashtra S.T. Samachar. It is the publication of the M.S.R.T.C. and, the said document is filed in comp. (ULP) No. 574/91 along with complaint below Ex. U-4. Schedule-A gives salary grades of various employees. The category of Swachhak is at Sr. No. 1, and category of helper is at Sr. No. 15. Therefore, it is very clear that, the rest of Swachhak was already mentioned in the 4th category of the schedule. Witness examined by the Corporation Mr. Deekar has admitted in his evidence that, "examination" previously job which was being done by the helper is now being done by the employees covered by these complainants. "No further admits that, " the helpers who were doing the job previously were the regular and permanent employees of the respondent Corporation work round the clock. He also admits that, since the depots of the respondent corporation work round the clock, these Swachhaks are also required to work around the clock, and therefore, they are divided in three shifts. He admits that, even as on today, there are some employees in the Respondent Corporation that, they are designated as Swachhak, and they are getting such higher salary than the employees covered by the complaint. The employees covered by the complaints were previously paid Rs. 10.50 per day, and the same mode of payment was converted in the piece rate basis. "The witness further admitted that, cleanliness of the bus is incidental and part and parcel of plying, and the buses have to run regularly." It is further admitted position that, these employees have been in the employment of the Respondent for last several years, and they have been paid much less salary when so called regular employees working as Swachhak. They have also been deprived the benefits of settlements and other facilities. The Respondents claim that they were appointed as time gap arrangement, the Respondents have failed to show as to how the helpers legitimately did not do the job of Swachhak. Therefore, those employees were appointed on piece rate basis. Presuming that, it was the right of the respondents to appoint the Swachhak on piece rate basis, then also, it is admitted position that, they were asked to do the same work, which Swachhak employed by the Corporation were doing. Therefore, point at discrimination has been made very much clear by the complainants. In respect of dates of appointment and, number of years of service, the witness of the complainants has stated firmly that, they are working since long time, and then the fact regarding appointment was never disputed by the Corporation. The Respondent has admitted record regarding the appointments of employees but, they have neither produced any record, nor contradicted the statements made by the witness of the complainants except giving some suggestion that, they have not worked on regular basis. Therefore, evidence of the witness remained unchallenged. Hence it is very

> much clear that, the complainant has established that, the employees covered by the complaints are doing the job of regular nature, and their work continued round the clock, which were divided; in each shift being 8 hours. It is also already proved that, the employees covered under this complaint doing identical job as that of regular Swachhak appointed by the Respondent Corporation, and these Swachhak got much higher salary and other benefits than, the employees covered by this complaint."

33. In view of the findings recorded by the Industrial Court, Thane as well as Industrial Court, Bombay, it can be safely held that the posts of cleaners exist in the Corporation. No factual foundation has been laid by the Corporation that the posts of cleaners do not exist in the Corporation, rather the evidence on record reflects otherwise.

34. The question, now, remains to be seen is whether the recruitment of these workers is in conformity with Standing Order 503 and, if not, what is its effect? No doubt, Standing Order 503 prescribes the procedure for recruitment of Class IV employees of the Corporation which is to the effect that such posts shall be filled up after receiving the recommendations from the Service Selection Board and this exercise does not seem to have been done but Standing Orders cannot be elevated to the statutory rules. These are not statutory in nature. We find merit in the submission of Mr.Shekhar Naphade, learned Senior Counsel that Standing Orders are contractual in nature and do not have a statutory force and breach of Standing Orders by the Corporation is itself an unfair labour practice. The concerned employees having been exploited by the Corporation for years together by engaging them on piece rate basis, it is too late in the day for them to urge that procedure laid down in Standing Order No. 503 having not been followed, these employees could not be given status and principles of permanency. The argument of the Corporation, if accepted, would tantamount to putting premium on their unlawful act of engaging in unfair labour practice. It was strenuously urged by the learned Senior Counsel for the Corporation that industrial court having found that the Corporation indulged in unfair labour practice in employing the complainants as casuals on piece rate basis, the only direction that could have been given to the Corporation was to cease and desist from indulging into such unfair labour practice and no direction of according permanency to these employees could have been given. We are afraid, the argument ignores and overlooks the specific power given to the Industrial/Labour Court under Section 30(1)(b) to take affirmative action against the erring employer which as noticed above is of wide amplitude and comprehends within its fold a direction to the employer to accord permanency to the employees affected by such unfair labour practice.

35. Seen thus, the direction of giving status, wages and all other benefits of permanency applicable to the post of cleaners to the complainants, in the facts and circumstances, is justified and warrants no interference. Question (one) is answered accordingly.

re. : question (two)

36. A recognised union is a union which has been issued a certificate of recognition under Chapter III of MRTU & PULP Act. In terms of Section 2, no employee in an undertaking to which the provisions of Industrial Disputes Act apply, shall be allowed to appear or act or be represented in

the proceedings relating to unfair labour practices specified in items 2 and 6 of Schedule IV except through the recognized union. Schedule IV deals with general unfair labour practices on the part of the employers. Item 6 covers unfair labour practice on the part of the employer to employ badlis, casual or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees. Section 28 is a procedural provision with regard to complaints relating to unfair labour practices.

37. In the case of Shramik Uttakarsh Sabha vs. Raymond Woollen Mills Ltd. and Others.15 this Court after extensively surveying the provisions of MRTU & PULP Act and on consideration of the judgments in Girja Shankar Kashi Ram vs. Gujarat Spg. & Wvg. Co. Ltd.1916 , Santuram Khudai vs. Kimatrai Printers & Processors(P) Ltd,17 Workers' Union V. Balmer Lawrie and Co. Ltd.18 and Crescent Dyes and Chemicals Ltd. vs. Ram Naresh Tripathi19 held thus:

> "14. Section 21 of the MRTU & PULP Act, upon which emphasis was laid on behalf of the appellants, states that no employee in an undertaking to which the provisions of the Industrial Disputes Act applies shall be allowed to appear or act or be allowed to be represented in any proceeding relating to the unfair labour practices specified in Items 2 and 6 of Schedule IV except through the recognised union. It is important to note that the reference is to employees in an undertaking to which the Industrial Disputes Act applies and not to employees in an undertaking to which the BIR Act applies. Apart therefrom, the section permits an employee, not a union other than the recognised union, to so appear. The provisions of Section 21 do not, therefore, lead to the conclusion that a union other than a representative union can appear in proceedings relating to all unfair labour practices other than those specified in Items 2 and 6 of Schedule IV."

(1995) 3 SCC 78 1962 Supp (2) SCR 890 (1978) 1 SCC 162 1984 Supp. SCC 663 (1993) 2 SCC 115

38. It is important to bear in mind that the concept of recognition of unions has been introduced in MRTU & PULP Act with a view to facilitate the collective bargaining for the employees in certain undertakings. In respect of unfair labour practices specified in items 2 & 6 of the Schedule IV, it is provided in Section 21 that in respect of such items no employee in an undertaking to which the provisions of Industrial disputes Act applies shall be allowed to appear or act or be allowed to be represented except through the recognized union. The expression, " to appear or act or allowed to be represented" in Section 21(1) is of wide import, comprehensive and embraces within itself the act of filing complaint, leading evidence, examination and cross examination of witnesses and audience before the Industrial Court/Labour Court. There is nothing to control the expression, " to appear or to act or allowed to be represented" as used in Section 21(1). It is referable to all kinds of acts by the recognized union in the proceedings relating to unfair labour practices specified in items 2 and 6 of the Schedule IV. Section 21(1) excludes individual employees, unrecognized union or any other form of association or union other than recognized union under MRTU & PULP Act to appear or act or be represented in the proceedings relating to unfair labour practices specified in items 2 and 6 of Schedule IV. It is only recognized union which has been empowered to espouse the cause relating to unfair labour practices specified in items 2 and 6 of Schedule IV in the proceedings before

Industrial/Labour Court. Section 21(1) is a special provision in respect of appearance, act and representation in respect of the complaints filed under Section 28 relating to unfair labour practices specified in items 2 and 6 of Schedule IV. Section 21, thus, creates a bar on unrecognized union from acting, appearing or representing any employee(s) in a proceeding relating to unfair labour practices under items 2 and 6 of Schedule IV. The right to represent the employee(s) in matters relating to unfair labour practices in items 2 and 6 of Schedule IV of the Act under Section 21 is exclusively available to the recognised union and none else.

39. Learned Counsel for the unrecognized union, however, relied upon a decision of the Bombay High Court in the case of Petroleum Employees Union vs. Bharat Petroleum Corporation Ltd. and Another20.

40. In the case of Petroleum Employees Union, the learned Single Judge (S.P.Bharucha, J. as his Lordship then was) interpreted Section 21 in the following manner:

> "5. The correct interpretation to place upon section 21 is this: Where there is a recognised union only that recognized union can be allowed, on behalf of an employee, to appear or; act or be represented in proceedings relating to unfair labour practices specified in Items 2 and 6 of the fourth schedule. Where there is no recognized union an employee may himself appear or act in any proceeding relating to such unfair labour practice. This does not mean that an unrecognized union cannot; act or appear in a proceeding relating to such unfair labour practice. It can represent an employee or the employee may appear himself if he so chooses."

41. The interpretation of Section 21 in Petroleum Employees Union is not a correct interpretation and, with respect, we are unable to find ourselves in agreement with that interpretation. As a matter of fact, the learned Judge (S.P. Bharucha, J. as his Lordship then was) while adorning the bench of this Court in the case of Raymonds Wool Mills Ltd. took exactly diametrically opposite view with regard to Interpretation of Section 21 that we have already noticed in the earlier part of our judgment. We respectfully agree with the 1983 MJ 618 view of this Court in Raymonds Wool Mills Ltd. We hold, as it must be, that the unrecognized union is not competent to file a complaint in so far as unfair labour practices under Item nos. 2 and 6 of Schedule IV of MRTU & PULP Act is concerned.

42. In what we have held above, the affected employees in the two complaints filed by the unrecognized union may not be entitled to the benefits of permanency to the post of cleaners as these complaints are not maintainable. But in the present fact situation, in our judgment, it would be travesty of justice if at this stage because of non-maintainability of the complaints at the instance of the unrecognized union, these employees are deprived of the benefits of status, wages and permanency applicable to the post of cleaners when similarly situated employees who had filed the complaint individually would get benefits of permanency applicable to the post of cleaners. In view of this exceptional situation, for doing complete justice between the parties, in exercise of our plenary power under Article 142 of the Constitution of India, although we have answered question(two) in favour of the Corporation that the two complaints filed by Casteribe Rajya P.

Kararmchari Sanghthans are not maintainable in so far as unfair labour practices under item 6 of Schedule IV is concerned yet in the facts and circumstances of the case, we direct that the employees in these two complaints would also get the status, wages and other benefits of permanency applicable to the post of cleaners as the employees in complaint (ULP) No. 442/92.

43. In what we have discussed above, all these five appeals must fail and are dismissed with no order as to costs.

.....J (Tarun Chatterjee) .....J (R. M. Lodha) New Delhi August 28, 2009.