IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF DECEMBER, 2022

BEFORE

THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO. 28392 OF 2018 (L-RES)

BETWEEN:

TUMAKURU CITY CORPORATION,
(EARLIER TUMKUR TOWN MUNICIPALCORPORATION
TUMAKURU 572 102.
REPRESENTED BY ITS COMMISSIONER

…PETITIONER

(BY SRI. SUBRAMANYA R., ADVOCATE)

AND:

1. TUMKURU POURA KARMIKARA SANGHA (REGD.)
   JAI BHEEM ROAD, SHANTHINAGAR,
   TUMAKURU – 572 102
   REPRESENTED BY ITS SECRETARY

2. SRI D. GANESH SHANKAR
   S/O. LATE SRI. CHINNA VENKANNA
   AGED ABOUT 76 YEARS
   R/AT "SRIHARI NILAYA"
   NO.37, 8TH CROSS,
   KJE LAYOUT, RMV 2ND STAGE,
   BENGALURU – 560 094.

3. SRI M VENKATESH
   (FATHER'S NAME NOT KNOWN
   TO THE PETITIONER)

AGED MAJOR
R/AT 24TH MAIN, 13TH CROSS,
HSR LAYOUT, AGARA,
BENGALURU – 560 102.

4. STATE OF KARNATAKA
URBAN DEVELOPMENT DEPT.,
VIDHANA SOUDHA
B. R. AMBEDKAR VEEDHI
BENGALURU 560 001
REP. BY ITS PRINCIPAL SECRETARY

5. DEPUTY COMMISSIONER
TUMAKURU DISTRICT
TUMAKURU 572 102.

…RESPONDENTS

(BY SRI. T. S. ANANTHARAM, ADVOCATE FOR R1;
SRI. R. KRISHNA MURTHY, ADVOCATE FOR R2 & R3;
SRI. ARUN SHYAM, AAG FOR R4 & R5)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED JUDGMENT AND AWARD PASSED IN INDUSTRIAL DISPUTE.NO.251/2002 DTD 26.09.2017 ON THE FILE OF COURT OF INDUSTRIAL TRIBUNAL BENGALURU, (PRODUCED AS ANNEXURE-A) AND ETC.

THIS PETITION HAVING BEEN HEARD THROUGH VIDEO CONFERENCING AND RESERVED FOR ORDERS ON 04.11.2022, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

1. The petitioner – Tumkur City Corporation is before this Court seeking for the following reliefs:

   i. Issue a writ of certiorari quashing the impugned judgment and award passed in Industrial Dispute.No.251/2002 dated 26.09.2017 on the file of the Court of Industrial Tribunal, Bengaluru, (produced as Annexure-A) and/or

   ii. Issue such other writ or order or directions, the Hon'ble Court deems fit to grant in the facts and circumstances of the case in the interest of justice and equity.

2. The Government of Karnataka by order No.LD 156 IDM 2002 dated 08/15.11.2002 had referred an Industrial Dispute existing between the workmen and Commissioner of the Town Municipal Council, Tumakur under Section 10(1)(d) of the Industrial Disputes Act, 1947 ('the ID Act', for brevity), for adjudication of the following points:

   ೨.೧. ಆಡಳಿತವರ್ಗದವರಾದ ಆಯುಕ್ತರು, ನಗರಸಭೆ ತುಮಕೂರು ಇವರು ತಮ್ಮ ಕಾರ್ಮಿಕರಾದ ೨೫೦ ಕೆಲಸಗಾರರಿಗೆ (ಅನುಭಂದ–೧ರ ರೀತ್ಯಾ ನಿಯಮಾನುಸಾರ ಲ. ೧೦ ವರ್ಷಗಳಿಂದ ಕೆಲಸ ಮಾಡುತ್ತಿರುವ ದಿನಗೂಲಿ ನೌಕರರಿಗೆ ಖಾಯಂಗೊಳಿಸದೆ ಕೆಲಸ ಮಾಡಿಸಿಕೊಳ್ಳುವುದು ಹಾಗೂ ಸಮಾನ ಕೆಲಸಕ್ಕೆ ಸಮಾನ ವೇತನ ನೀಡದೇ ಇರುವುದು ನ್ಯಾಯಸಮ್ಮತವೇ?

೨.೨. ಪೌರ ಕಾರ್ಮಿಕರಿಗೆ ಪ್ರತಿ ವರ್ಷ ಸಮವಸ್ತ್ರ, ಪಾದರಕ್ಷೆ, ಸುರಕ್ಷಿತ ಕವಚ ನೀಡದೆ ಇರುವುದು ನ್ಯಾಯಸಮ್ಮತವೇ?

೨.೩. ಹಾಗಿಲ್ಲದಿದ್ದಲ್ಲಿ ಈ ಕಾರ್ಮಿಕರು ಯಾವ ಪರಿಹಾರಕ್ಕೆ ಅರ್ಹರು?

3. The Industrial Tribunal, Bangalore (hereinafter referred to as 'the Tribunal', for brevity) after hearing the parties allowed the claim petition and answered the points above as under:

3.1. Point No.1 was answered in the negative holding that the Corporation was not justified in not regularizing the services of 250 daily wager workmen.

3.2. Point No.2 was answered in the negative holding that the Corporation was not justified in denying uniforms, chappals and safety devices every year to Pourakarmikas.

3.3. The workman were entitled for regularization of service from the date of their joining.

3.4. The Tribunal directed the Corporation to regularize the services of 250 daily wage workmen (whose names are shown in the annexure to the points for reference) by paying equal pay for equal work from the date of their joining and extend all statutory benefits, emoluments and facilities as available under law as that of permanent workmen in the similar cadre/post.

3.5. The Corporation was directed to make payment of arrears of pay and emoluments to the 250 workmen from the date of joining to the date of regularization.

3.6. The Corporation was directed to provide protection measures to the workmen like providing hand gloves, boots, uniforms, jackets, helmets and other protective instruments while the workmen are carryout

out the works like cleaning, scavenging, transportation of garbage and dead animals etc., and other allied nature of work.

3.7. In the event of any of the workman having retired on superannuation, the Corporation was directed to extend all monetary benefits as if he is entitled being in service and pay arrears of each retired workman from the date of their joining till their retirement.

3.8. The arrears were directed to be paid to the workmen within three months from the date of publication of the award, failing which the Corporation was directed to pay arrears with interest at the rate of 12%, till realization.

4. It is aggrieved by the same that the Corporation is before this Court challenging the said award passed by the Industrial Tribunal.

5. **Facts:**

5.1. The Corporation is a statutory body constituted and established under the provisions of the Karnataka Municipal Corporation Act, 1976, prior to being declared as a Corporation, it was a City Municipal Council, Tumkur governed under the provisions of Karnataka Municipality Act, 1964.

5.2. The 1st respondent - Union had submitted a representation to the Government of Karnataka seeking for regularization of 250 Pourakarmikas working with the City Municipal Council for the past 8 to10 years, on the ground that they were discharging the same duties as that of Pourakarmikas and as such, were entitled to equal pay for equal work with all statutory benefits.

5.3. The dispute having been raised, the Government of Karnataka referred the matter for adjudication to the Tribunal vide Reference dated 08/15.11.2002.

5.4. The Union filed its claim statement before the Tribunal. The Corporation filed its statement of objections.

5.5. Initially the Tribunal was of the view that the 1st respondent - Union was not entitled for any relief and the Reference was answered in the negative by an award dated 04.07.2006. The Tribunal at that point of time held that the workmen being employed through Contractors, there is no employer–employee relationship between the erstwhile City Municipal Council, Tumkur and the workmen.

5.6. The 1st respondent - Union challenged the said award by Writ Petition No.20530/2007 before this Court, which came to be dismissed on 18.02.2009.

5.7. Am intra court appeal in Writ Appeal in W.A.No.3358/2009 having been filed, the Division Bench of this Court was of the opinion that the evidence led in the matter had not been properly appreciated by the Tribunal. The Division Bench observed that the Pourakarmikas cannot be expected to keep the records since all the records would be maintained by the Corporation and not by the workmen or Union, all of them being ill-literate and from the downtrodden section of the Society.

5.8. It is in that background that the Division Bench held that it was the duty of the Labour

Court (Tribunal) to find out how many workmen are working under the Corporation and how many of them were working under the Contractors and whether the Contractor was paying wages on par with the regular Pourakarmikas or not.

5.9. The Division Bench also directed the Tribunal to ascertain the effect of registration and/or otherwise of the Contractor under Sections 7 and 12 of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter referred to as 'the CLRA', for brevity) and how it would affect the rights of the workmen.

5.10. With the above observations, the matter was remitted to the Tribunal with an opportunity to the parties to lead any further evidence

and reserved liberty to implead all necessary parties for proper adjudication of the matter.

5.11. On such remittal, the Contractors were impleaded as party respondents (a) and (b), who are respondents No.2 and 3 herein.

5.12. The statement of objections were filed by the said respondents No.2 and 3 and it is in furtherance thereof that the Tribunal framed two issues and one additional issue as under:

i. Whether the Management of the 2nd Party is justified in regularizing the services of the 250 Daily Wage Workmen, who are working for and on behalf of the Corporation for the past 8 to 10 years by denying them the equal pay for equal work?

ii. Whether the 2nd party is justified in denying the uniforms, chappals and safety devices every year to Pourakarmikas?

Additional Issue

iii. Whether the 1st party proves that its members are the Pourakarmikas of the 2nd party?

5.13. Further evidence was led. Union marked 41 documents as Exs.W1 to W41 and examined four witnesses as WW1 to WW4. The Corporation marked 23 documents as Exs.M1 to M23 and examined 4 witnesses as M1 to M4 and it is after considering the said evidence on record that the aforesaid order came to be passed by the Tribunal which is impugned herein.

6. Sri. R. Subramanya, learned counsel for the petitioner submits that:

6.1. The award passed by the Tribunal is arbitrary, illegal and unsustainable in the eyes of law. The Tribunal has not taken into consideration several aspects of the matter including the Government Order/Circular and Rules framed relating to appointment of Pourakarmikas.

6.2. The Urban Development Department has issued a notification on 13.01.2011 relating to Karnataka Municipalities (Recruitment of Officers and Employees) Rules, 2010 and in terms of Rule 7 thereof, the recruitment of Group D employees and Pourakarmikas being vested with the Deputy Commissioner, no such recruitment having been made by the Deputy Commissioner in terms of the Recruitment Rules, the workmen being members of the Union could not claim any relief in terms of equal pay for equal work as that of Pourakarmikas recruited under the relevant rules.

6.3. The workmen working under a Contractor and there being no recruitment by the corporation, there is no employer-employee relationship and unless there is an employer-

employee relationship, no relief can be claimed against the Corporation, if aggrieved and if any reliefs have to be sought for, such reliefs have to be sought for against the Contractor. The Contractor making payment of same remuneration to all the workmen engaged by him, the principle of equal pay for equal work is satisfied and as such, no claim could also be made against the Contractor.

6.4. If the rules relating to recruitment are applied, the aspect of qualification, reservation etc., would come into picture, none of these aspects have been considered by the Contractor while engaging the workmen.

6.5. The question of workmen, who do not satisfy the relevant recruitment rules, now claiming

for regularization would be contrary to applicable rules and as such, if the award passed by the Industrial Tribunal is implemented, the Corporation would be constrained to violate the said recruitment rules.

6.6. The power to recruit being vested with the Deputy Commissioner of the District, the Deputy Commissioner not being the party, the Commissioner of the Corporation cannot either recruit or regularize any of the workmen, who are members of the respondent Union, since the Commissioner of the Corporation does not have any such powers.

6.7. The award passed directing the person who has no powers to regularize the workmen, is non-est and cannot be implemented.

6.8. He reiterates that the appointing authority for group D employees being the Deputy Commissioner of the District and the Commissioner of the Corporation having no role to play in the same, the order is ineffective.

6.9. He relies upon the notification dated 17.04.2017 issued by the Secretary to the Government of Karnataka delegating the power to appoint group D employees to the Deputy Commissioner in their respective districts.

6.10. In terms of the notification dated 04.12.2017 issued by the Government of Karnataka, Urban Development Department relating to Karnataka Municipalities (Recruitment of Pourakarmikas in CMCs TMCs and TPs) Special Rules, 2017, there are certain

eligibility criteria and restrictions which have been prescribed, which would have to be made before the Deputy Commissioner appoints any Pourakarmikas.

6.11. The contract to the Contractors for providing workmen was issued inviting public participation tenders being for cleaning work, it is on the basis of a commercial bid submitted by the various Contractors and the same being analysed that the contract was awarded to the concerned Contractors. It was for the Contractors to provide the workmen with adequate remuneration, which has been provided by the Contractor, the Contractor having engaged the workmen for cleaning purposes and wages being directly paid by the Contractor to the workmen,

there is no employer–employee relationship between the Corporation and the workmen.

6.12. The Government of Karnataka has permitted the Municipalities and Municipal Corporations to outsource some of its work by inviting tenders and entrusting the cleaning work through the Contractors, the above process of inviting the tenders and award of tenders is in terms of the policy of the Government of Karnataka, which could not have been faulted with by the Industrial Tribunal. There is no privity of contract between the Corporation and the Workmen. The workmen are not equally placed as that of the regular employees/Pourakarmikas, since such regular employee perform various other activities which are not performed by the workmen members of the Union.

6.13. The Hon'ble Apex Court has categorically stated that the courts should not issue any mandamus directing the State or its instrumentalities to absorb temporary employees in permanent service or to allow them to continue in service.

6.14. Essentially the workmen of the respondent – Union are employees of the Contractor and the contract being temporary, the said workmen are temporary employees. In this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***State of Karnataka Vs. Umadevi***[1] more particularly paragraphs 19, 33, 43, 45 & 48, which are extracted below:

> *19. In Dharwad case, this Court was actually dealing with the question of 'equal pay for equal work' and had directed the State of Karnataka to frame a scheme in that behalf. In paragraph 17 of the judgment, this Court stated that the*

[1] **(2006) 4 SCC (1)**

precedents obliged the State of Karnataka to regularize the services of the casual or daily/monthly rated employees and to make them the same payment as regular employees were getting. Actually, this Court took note of the argument of counsel for the State that in reality and as a matter of statecraft, implementation of such a direction was an economic impossibility and at best only a scheme could be framed. Thus a scheme for absorption of casual/daily rated employees appointed on or before 1.7.1984 was framed and accepted. The economic consequences of its direction were taken note of by this Court in the following words.

> *"We are alive to the position that the scheme which we have finalized is not the ideal one but as we have already stated, it is the obligation of the court to individualize justice to suit a given situation in a set of facts that are placed before it. Under the scheme of the Constitution, the purse remains in the hands of the executive. The legislature of the State controls the Consolidated Fund out of which the expenditure to be incurred, in giving effect to the scheme, will have to be met. The flow into the Consolidated Fund depends upon the policy of taxation depending perhaps on the capacity of the payer. Therefore, unduly burdening the State for implementing the constitutional obligation forthwith would create problems which the State may not be able to stand. We have, therefore, made our directions with judicious restraint with the hope and trust that both parties would appreciate and understand the situation. The instrumentality of the State must realize that it is charged with a big trust. The money that flows into the*

> *Consolidated Fund and constitutes the resources of the State comes from the people and the welfare expenditure that is meted out goes from the same Fund back to the people. May be that in every situation the same tax payer is not the beneficiary. That is an incident of taxation and a necessary concomitant of living within a welfare society."*

With respect, it appears to us that the question whether the jettisoning of the constitutional scheme of appointment can be approved, was not considered or decided. The distinction emphasized in R.N. NANJUNDAPPA Vs T. THIMMIAH & ANR. (supra), was also not kept in mind. The Court appears to have been dealing with a scheme for 'equal pay for equal work' and in the process, without an actual discussion of the question, had approved a scheme put forward by the State, prepared obviously at the direction of the Court, to order permanent absorption of such daily rated workers. With respect to the learned judges, the decision cannot be said to lay down any law, that all those engaged on daily wages, casually, temporarily, or when no sanctioned post or vacancy existed and without following the rules of selection, should be absorbed or made permanent though not at a stretch, but gradually. If that were the ratio, with respect, we have to disagree with it.

33. In the earlier decision in Indra Sawhney Vs. Union of India [1992 Supp. (2) S.C.R. 454), B.P. Jeevan Reddy, J. speaking for the majority, while acknowledging that equality and equal opportunity is a basic feature of our Constitution, has explained the exultant position of Articles 14 and 16 of the Constitution of India in the scheme of things. His Lordship stated:-

> *"6. The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions*

'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18

7. Inasmuch as public employment always gave a certain status and power --- it has always been the repository of State power --- besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1), expressly declares that in the matter of public employment or appointment to any office under the state, citizens of this country shall have equal opportunity while clause (2) deciares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same time, care was taken to, declare in clause (4) that nothing in the said Article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizen which in the opinion of the state, is not adequately represented in the services under the state.."

(See paragraphs 6 and 7 at pages 544 and 545) These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment.

43. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent

service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

45. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

48. C.A. Nos. 3520-24 of 2002 have also to be allowed since the decision of the Zilla Parishads to make permanent the employees cannot be accepted as legal. Nor can the employees be directed to be treated as employees of the Government, in the circumstances. The direction of the High Court is found unsustainable.

6.15. The contract labour cannot be absorbed into regular service. There is no aspect of automatic absorption of contract labour as a consequence of issuance of notification under Section 10(1) of the CLRA and in this regard, he relies upon the decision of the Hon'ble Apex Court in the case of ***Steel Authority of India Ltd., Vs. National Union Waterfront Workers***[2]. The relevant paragraph 105 is extracted below:

> *105. The principle that a beneficial legislation needs to be construed liberally in favour of the class for whose benefit it is intended, does not extend to reading in the provisions of the Act what the legislature has not provided whether expressly or by necessary implication, or substituting remedy or benefits for that provided by the legislature. We have already noticed above the intendment of the CLRA Act that it regulates the conditions of service of the contract labour and authorizes in Section 10(1) prohibition of contract labour system by the appropriate Government on consideration of factors enumerated in sub- section (2) of Section 10 of the Act among other relevant factors. But, the*

[2] (2001) 7 SCC 1

> *presence of some or all those factors, in our view, provide no ground for absorption of contract labour on issuing notification under sub-section (1) of Section 10. Admittedly when the concept of automatic absorption of contract labour as a consequence of issuing notification under Section 10(1) by the appropriate Government, is not alluded to either in Section 10 or at any other place in the Act and the consequence of violation of Sections 7 and 12 of the CLRA Act is explicitly provided in Sections 23 and 25 of the CLRA Act, it is not for the High Courts or this Court to read in some unspecified remedy in Section 10 or substitute for penal consequences specified in Sections 23 and 25 a different sequel, be it absorption of contract labour in the establishment of principal employer or a lesser or a harsher punishment. Such an interpretation of the provisions of the statute will be far beyond the principle of ironing out the creases and the scope of interpretative legislation and as such clearly impermissible. We have already held above, on consideration of various aspects, that it is difficult to accept that the Parliament intended absorption of contract labour on issue of abolition notification under Section 10(1) of CLRA Act.*

6.16. The workmen of the respondent No.1 Union are not the employees of the petitioner, but the workmen engaged by the Contractor. There is no direct employer-employee

relationship between the petitioner and the said workmen and in this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***Bharat Heavy Electricals Ltd., Vs. Mahendra Prasad Jakhmola***.[3] The relevant paragraphs 19, 20, 21, 25 and 26 are extracted below:

> *19. Equally, the review judgment apart from being cryptic, draws an unsustainable conclusion after setting out paragraph 3 of the written statement of BHEL in the Labour Court. What was stated by BHEL in paragraph 3 was that the workmen were only engaged by the Contractor and were not their employees. The written statement then goes on to be speculative in stating that it appears that a workman might have been engaged as an employee by a particular Contractor. A plain reading of this written statement would certainly not suggest that BHEL is not sure as to whether workmen were or were not supplied by a Contractor, or engaged by BHEL. What is clear from the written statement is that BHEL has denied that the workmen were engaged by BHEL or that the workmen were BHEL's workmen. From this to conclude that the transaction seems to be 'sham', is again wholly incorrect. Apart from this, it is also incorrect to state that BHEL has not*

[3] 2019 SCC Online SC 382

placed on record any material to demonstrate that under the alleged labour contract, payment was ever made in favour of Madan Lal, the alleged Contractor.

20. It has been correctly pointed out by learned counsel appearing on behalf of BHEL that in the very first sentence of the cross examination of the workmen, before the labour court, the workmen admitted that payments of their wages were made by four Contractors including Shri Madan Lal. Also, the fact that Madan Lal was paid under the agreement with BHEL was never disputed. Indeed, Ms. Jain's argument that Madan Lal only derived a 10 per cent profit from the agreement with him presupposes payment to Madan Lal by BHEL under the agreement with him. This finding again is wholly incorrect.

21. We, now come to some of the judgments cited by Shri Sudhir Chandra and Ms. Asha Jain. In 'General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon v. Bharat Lala and Another' *[2011 (1) SCC 635], it was held that the well recognised tests to find out whether contract labourers are direct employees are as follows: (SCC p.638, para 10)*

> *"10. It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the Contractor to be a sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-*

recognized tests to find out whether the contract labourers are the direct employees of the principal employer are: (i) whether the principal employer pays the salary instead of the Contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that the first respondent is a direct employee of the appellant"

25. However, Ms. Jain has pointed out that Contractors were frequently changed, as a result of which, it can be inferred that the workmen are direct employees of BHEL. There is no such finding of the Labour *Court or any reference to the same by the High Court. Consequently, this argument made for the first time in this Court together with judgments that support the same, is of no consequence.*

26. Ms. Jain also pointed out three judgments of this Court in 'Calcutta Port *Shramik Union v. Calcutta River Transport Association and Others [1988 (Supp) SCC 768], Pepsico India Holding Private Limited v. Grocery Market and Shops Board and Others [2016 4 SCC 493] and 'Harjinder Singh v. Punjab State Warehousing Corporation' [(2010) 3 SCC 192] for the proposition that judicial review by the High Court under Article 226, particularly when it is asked to give relief of a writ of certiorari, is within well recognised limits, and that mere errors of law or fact are not sufficient to attract the jurisdiction of the High Court under Article 226. There is no doubt that the law laid down by these judgments*

is unexceptionable. We may only state that these judgments have no application to the facts of the present case. The Labour Court's Award being perverse ought to have been set aside in exercise of jurisdiction under Article 226.

6.17. It is for the workmen to have averred and proved that the salary was paid by the corporation as their employer directly to the workmen and not the Contractor. It is also for the workmen to establish that they were discharging their duties or were working under the direct control and supervision of the petitioner. In this case, the salary having been paid by the Contractor and it is the Contractor deputing the workmen to work with the corporation, the workers are working under the supervision of the Contractor and not under the supervision of the Corporation. In this regard, he relies upon the decision of the Hon'ble Apex Court

in the case of ***Bengal Nagpur Cotton Mills Vs. Bharat Lal***.[4] The relevant paragraphs 10, 11, 12 and 13 are extracted below:

> *10. It is now well-settled that if the industrial adjudicator finds that contract between the principal employer and Contractor to be sham, nominal or merely a camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labour are the direct employees of the principal employer are (i) whether the principal employer pays the salary instead of the Contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that first respondent is a direct employee of the appellant.*
>
> *11. On a careful consideration, we are of the view that the Industrial Court committed a serious error in arriving at those findings. In regard to the first test as to who pays the salary, it placed the onus wrongly upon the appellant. It is for the employee to aver and prove that he was paid salary directly by the principal employer and not the Contractor. The first respondent did not discharge this onus. Even in regard to second test, the employee did not establish that he was working under the direct control and supervision*

[4] (2011) 1 SCC 635

of the principal employer. The Industrial Court misconstrued the meaning of the terms `control and supervision' and held that as the officers of appellant were giving some instructions to the first respondent working as a guard, he was deemed to be working under the control and supervision of the appellant.

12. The expression `control and supervision' in the context of contract labour was explained by this court in International Airport Authority of India v. International Air Cargo Workers Union [2009 (13) SCC 374] thus: (SCC p.388, paras 38-39)

> *"38….. if the contract is for supply of labour, necessarily, the labour supplied by the Contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by Contractor, if the right to regulate employment is with the Contractor, and the ultimate supervision and control lies with the Contractor.*
>
> *39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the Contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the Contractor, the ultimate supervision and control lies with the Contractor as he decides where the employee will work and how long he will*

> *work and subject to what conditions. Only when the Contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the Contractor."*
>
> *13. Therefore we are of the view that the Industrial Court ought to have held that first respondent was not a direct employee of the appellant, and rejected the application of the first respondent.*

6.18. The relationship of a employer and employee has to exist for the purpose of even considering a representation for absorption and regularization. Even in a case where a workmen was a workmen under an employer and on a de-merger of the employer his services having been transferred to a resulting company/transferee company, once such transfer having occurred the employer-employee relationship ceased to exist, disentitling the workmen from seeking to

come back to work under the employer. In this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***Tata Iron and Steel Company Ltd., Vs. State of Jharkhand and Ors.***[5] The relevant paragraphs 9, 10, 12 and 16 are extracted below:

> *9. At the outset, we would like to observe that the High Court is right in holding that the Industrial Dispute has arisen between the parties in as much as the contention of the workers is that they are entitled to serve the appellant as they continued to be the workers of the appellant and were wrongly "transferred" to M/s. Lafarge. On the other hand, the appellant contends that with the hiving off the cement division and transferring the same to M/s. Lafarge along with the workers who gave their consent to become the employees of the transferee company, the relationship of employers and employees ceased to exist and, therefore, the workmen have no right to come back to the appellant. This obviously is the "dispute" within the meaning of Section 2(k) of the Industrial Disputes Act.*
>
> *10. Section 2 (k) of the Industrial Disputes Act which defines Industrial Dispute reads as under:*

[5] 2014 (1) SCC 536

> ***"2(k) "industrial dispute"*** *means any dispute or difference between employers and employers, between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."*
>
> *No doubt, as per the aforesaid provision, industrial dispute has to be between the employer and its workmen. Here, the appellant is denying the respondents to be its workmen. On the other hand, respondents are asserting that they continue to be the employees of the appellant company. This itself would be a "dispute" which has to be determined by means of adjudication. Once these respective contentions were raised before the Labour Department, it was not within the powers of the Labour Department/ appropriate Government decide this dispute and assume the adjudicatory role as its role is confined to discharge administrative function of referring the matter to the Labour Court/ Industrial Tribunal. Therefore, this facet of dispute also needs to be adjudicated upon by the Labour Court. It cannot, therefore, be said that no dispute exists between the parties. Of course, in a dispute like this, M/s. Lafarge also becomes a necessary party.*

12. We would hasten to add that, though the jurisdiction of the Tribunal is confined to the terms of reference, but at the same time it is empowered to go into the incidental issues. Had

the reference been appropriately worded, as discussed later in this judgment, probably it was still open to the appellant to contend and prove that the Respondent workmen ceased to be their employees. However, the reference in the present form does not leave that scope for the appellant at all.

6.19. The dispute which had been referred to the Tribunal being limited in terms of the points of reference, in the present case the Tribunal has exceeded the reference, which it had no authority to do so. The Tribunal is required to restrict and confine its adjudication only to the points that are referred. The Tribunal having exceeded the points of reference, the order of the Tribunal is required to be set aside. In this regard, he relies upon the decision of the Hon'ble Apex Court in the case of ***Oshiar Prasad and Ors. Vs. Employers in relation to Management of Sudamdih Coal Washery of M/s. Bharat***

Coking Coal Ltd, Dhanbad, Jharkhand[6]

reported in**.** The relevant paragraphs 19, 20 and 22 are extracted below:

> *19. Mitter, J., speaking for the Bench, held as under: (Delhi Cloth and General Mills case, AIR p.472 paras 8-9)*
>
> > *"8…….. Under section 10(1)(d) of the Act, it is open to the appropriate Government when it is of opinion that any industrial dispute exists to make an order in writing referring*
> >
> > *"the dispute or any matter appearing to be connected with, or relevant to the dispute,.....to a Tribunal for adjudication'*
> >
> > *Under Section 10(4):*
> >
> > *'**10.(4)** Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Tribunal, as the case may be, shall confine its adjudication to those points and matters incidental thereto.'*
>
> *9. From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto.*

[6] **(2015) 4 SCC 71**

In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word 'incidental' means according to Webster's New World Dictionary :

> *'happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated :'*
>
> *'Something incidental to a dispute' must therefore mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct [to it]."*

20. The same issue came up for consideration before three Judge Bench in a case reported in Pottery Mazdoor Panchayat vs. Perfect Pottery Co. Ltd. and Another, (1979) 3 SCC 762. Justice Y.V. Chandrachud - the learned Chief Justice speaking for the Court laid down the following proposition of law:

> *"10. Two questions were argued before the High Court: Firstly, whether the tribunals had jurisdiction to question the propriety or justification of the closure and secondly, whether they had jurisdiction to go into the question of retrenchment compensation. The High Court has held on the first question that the jurisdiction of the Tribunal in industrial disputes is limited to the points specifically referred for its adjudication and to matters incidental*

thereto and that the Tribunal cannot go beyond the terms of the reference made to it. On the second question the High Court has accepted the respondent's contention that the question of retrenchment compensation has to be decided under Section 33-C(2) of the Central Act.

11. Having heard a closely thought out argument made by Mr. Gupta on behalf of the appellant, we are of the opinion that the High Court is right in its view on the first question. The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were expressed to say whether the proposed closure of the business was proper and justified. In other words, by the references, the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management. The references [pic]being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management."

22. It is thus clear that the appropriate Government is empowered to make a reference under Section 10 of the Act only when "Industrial dispute exists" or "is apprehended between the parties". Similarly, it is also clear that the Tribunal while answering the reference has to confine its inquiry to the question(s) referred and has no

jurisdiction to travel beyond the question(s) or/and the terms of the reference while answering the reference. A fortiori, no inquiry can be made on those questions, which are not specifically referred to the Tribunal while answering the reference.

6.20. The part time employees are not entitled to seek for regularization since they are not working as against any sanctioned post. They have been appointed on a temporary basis to discharge certain functions without the rigor of the recruitment process being followed. A temporary employee who has not been appointed to a sanctioned post cannot seek for regularization. In this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***Union of India and Ors. Vs. Ilmo Devi and Another.***[7] The relevant paragraphs 28 and 29 are extracted below for easy reference:

[7] 2021 SCC Online SC 899

> *28. Thus, as per the law laid down by this Court in the aforesaid decisions part-time employees are not entitled to seek regularization as they are not working against any sanctioned post and there cannot be any permanent continuance of part-time temporary employees as held. Part-time temporary employees in a Government run institution cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work.*
>
> *29. Applying the law laid down by this court in the aforesaid decisions, the directions issued by the High Court in the impugned judgment and order, more particularly, directions in paragraphs 22 and 23 are unsustainable and beyond the power of the judicial review of the High Court in exercise of the power under Article 226 of the Constitution. Even otherwise, it is required to be noted that in the present case, the Union of India/Department subsequently came out with a regularization policy dated 30.06.2014, which is absolutely in consonance with the law laid down by this Court in the case of Umadevi (supra), which does not apply to the part-time workers who do not work on the sanctioned post. As per the settled preposition of law, the regularization can be only as per the regularization policy declared by the State/Government and nobody can claim the regularization as a matter of right dehors the regularization policy. Therefore, in absence of any sanctioned post and considering the fact that the respondents were serving as a contingent paid part-time Safai Karamcharies, even otherwise, they were not entitled for the benefit of regularization under the regularization policy dated 30.06.2014.*

6.21. He submits that the Hon'ble Apex Court has held that the High Court cannot issue directions or regularize absorption or

permanent continuance unless such employees had been arrayed in pursuance of the regular recruitment by following the relevant rules in an open competitive process. He submits that the Hon'ble Apex Court has held that regularization, if any, ordered would be in violation of the constitutional scheme and permit back door entries by the appointing persons contrary to the constitutional scheme. In this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***State of Rajasthan Vs. Daya Lal.***[8] The relevant paragraphs 11, 12 and 21 are extracted below for easy reference:

> *11. Two questions therefore arise for consideration in these appeals :*
>
> *(i) Whether persons appointed as Superintendents in aided non-*

[8] **(2011) 2 SCC 429**

governmental Hostels are entitled to claim absorption by way of regularization in government service or salary on par with Superintendents in Government Hostels?

(ii) Whether part-time cooks and chowkidars appointed temporarily by Mess Committees of Government Hostels, with two or three years service, are entitled to regularization by framing a special scheme?

12. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While 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 regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim

orders of the court, would not confer upon him any right to be absorbed into service, as such service would be `litigious employment'. Even temporary, ad hoc or daily- wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

(See : Secretary, State of Karnataka vs. Uma Devi - 2006 (4) SCC 1, M. Raja vs.

CEERI Educational Society, Pilani - 2006 (12) SCC 636, S.C. Chandra vs. State of Jharkhand - 2007 (8) SCC 279, Kurukshetra Central Co-operative Bank Ltd vs. Mehar Chand - 2007 (15) SCC 680, and Official Liquidator vs. Dayanand - 2008 (10 SCC 1)

21. The decision relied upon by the High Court namely the decision in Anshkalin Samaj Kalyan Sangh of the High Court no doubt directed the state government to frame a scheme for regularization of part-time cooks and chowkidars. It is clear from the said decision, that such scheme was intended to be an one-time measure. Further said decision was rendered by the High Court prior to Uma Devi, relying upon the decision of this Court in Daily Rated Casual Labour vs. Union of India [1988 (1) SCC 122], Bhagwati Prasad vs. Delhi State Mineral Development Corporation [1990 (1) SCC 361] and Dharwad District PWD Literate Dalit Wage Employees Association vs. State of Karnataka [1990 (2) SCC 396]. These directions were considered, explained and in fact, overruled by the Constitution Bench in Uma Devi. The decision in Anshkalin Samay Kalyan Singh is no longer good law. At all events, even if there was an one time scheme for regularisation of those who were in service prior to 1.5.1995, there cannot obviously be successive directions for scheme after scheme for regularization of irregular or part-time appointments. Therefore the said decision is of no assistance.

6.22. He submits that the workmen members of the respondent Union have been engaged for a short purpose taking into consideration the exigencies of administration, they being employed on a casual/temporary basis, being aware of the nature of the employment to be that under a Contractor, they could not seek for regularization and/or absorption. In this regard, he relies upon the decision of the Hon'ble Apex Court in the case of ***State of Tamilnadu vs. A. Sigamuthu.***[9] The relevant paragraphs 8, 16 and 18 are extracted below for easy reference:

> *8. Part-time or casual employment is meant to serve the exigencies of administration. It is a settled principle of law that continuance in service long period on part-time or temporary basis confers no right to seek regularisation in service. The person who is engaged on temporary or casual is well aware of the nature of his*

[9] (2017) 4 SCC 113

employment and he consciously accepted he same at the time of seeking employment. Generally, while directing that temporary or part-time appointments be regularised or made permanent, the s are swayed by the long period of service rendered by the employees. However, this may not be always a correct approach to adopt especially when the scheme of regularisation is missing from the rule book and regularisation as huge financial implications on public exchequer.

16. In State of Rajasthan v. Daya Lal, this Court has considered the scope of regularisation of irregular or part-time appointments in all possible eventualities and this Court clearly laid down that part-time employees are not entitled to seek regularisation as they do not work against any sanctioned posts. It was also held that part-time employees in government-run institutions can in no case claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Relevant excerpt from the said judgment is as under: (SCC pp. 435-36, para 12)

> *"12. We may at the outset refer to the following well-settled principles relating to regularisation and parity in pay, relevant in the context of these appeals:*
>
> *(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular*

recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularisation of services of an employee which would be violative of constitutional scheme. While 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, back door entries, appointments contrary to the constitutional scheme and/ or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or d wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a b cut-off date (that is a scheme providing that persons who had put in a specified

number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut- c off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full-time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

[See State of Karnataka v. Uma Devi (3), M. Raja v CEERI Educational Society, S.C. Chandra v. State of Jharkhand. Kurukshetra Central Coop. Bank Ltd. v. Mehar Chand and Official Liquidator v. Dayanand 10"

(emphasis supplied)

> *18. The learned Single Judge erred in extending the benefit of GOMS No. 22 dated 28-2-2006 to the respondent that too retrospectively from the date of completion of ten years of service of the respondent. The respondent was appointed on 1-4-1989 and completed ten years of service on 31-3-1999, As rightly contended by the learned Senior Counsel for the appellants, if the ten years of service, that is, from 1-4-1999 till the date of his regularisation, that is, 18-6-2012, the financial commitment to the State would be around Rs.10,85,113 (approximately) towards back wages apart from pension which Counsel for the appellant submitted that in respect of Registration Department, about 172 persons were regularised under various G.Os. and if the impugned is to be given monetary benefits from the date of completion of respondent will have a huge impact on the State exchequer. That apart, the learned Senior order is sustained, the Government will have to pay the back wages to all those persons from the date of completion of ten years in service and this will have a huge impact on the State exchequer. Since the impugned order directing regularisation of the respondent from the date of completion of their ten years would adversely affect the State exchequer in a huge manner, the impugned order cannot be sustained on this score also.*

6.23. Mere employment on a temporary or daily wages in a contingency requiring the additional hands would not confer any right

on such persons to continue in service or to get regular pay. There is no right vested in any daily wager to seek regularization and regularization can only be done in accordance with the rules and not dehors the rules. He submits that the court cannot create a post where none exists or a direction cannot be issued to absorb the respondent to continue them in service or pay them salaries of regular employees as these are purely executive functions which the courts ought not to get involved in. In this regard he also relies upon the judgment of the Hon'ble Apex Court in the case of ***Indian Drugs & Pharmaceutical Ltd. Vs. Workmen.***[10] The relevant paragraphs 31, 32, 33, 34 and 37, 40, 41 are extracted below for easy reference:

[10] **(2007) 1 SCC 408**

31. No doubt, there can be occasions when the State or its instrumentalities employ persons on temporary or daily wage basis in a contingency as additional hands without following the required procedure, but this does not confer any right on such persons to continue in service or get regular pay. Unless the appointments are made by following the rules, such appointees do not have any right to claim permanent absorption in the establishment.

32. A perusal of the record of the present case shows that the respondents were appointed on purely casual and daily rate basis without following the relevant service rules. Thus they had no right to the post at all, vide State of U.P. vs. Kaushal Kishore 1991 (1) SCC 691.

33. In Delhi Development Horticulture Employees' Union vs. Administration, Delhi and others AIR 1992 SC 789 while deprecating the tendency of engaging daily wagers without advertisement this Court held the same to be back door entries in violation of Article 16 of the Constitution. As such this Court refused to give any direction to regularize the petitioners.

34. Thus, it is well settled that there is no right vested in any daily wager to seek regularization. Regularization can only be done in accordance with the rules and not de hors the rules. In the case of E. Ramakrishnan & others vs. State of Kerala & others 1996 (10) SCC 565 this Court held that there can be no regularization de hors the rules. The same view was taken in Dr. Kishore vs. State of Maharashtra 1997(3) SCC 209, Union of India & others vs. Bishambar Dutt 1996 (11) SCC 341. The direction issued by the services tribunal for regularizing the services of persons who had not been appointed on regular basis in accordance with the rules was set aside although the petitioner had been working regularly for a long time.

37. Creation and abolition of posts and regularization are a purely executive function vide P.U. Joshi vs. Accountant General, Ahmedabad & others 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.

40. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularization, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in Rama Muthuramalingam vs. Dy. S.P. AIR 2005 Mad 1, and we fully agree with the views expressed therein.

41. No doubt, in some decisions the Supreme Court has directed regularization of temporary or ad hoc employees but it is well settled that a mere direction of the Supreme Court without laying down any principle of law is not a precedent. It is only where the Supreme Court lays down a principle of law that it will amount to a precedent. Often the Supreme Court issues directions without laying down any principle of law, in which case, it is not a precedent. For instance, the Supreme Court often directs appointment of someone or regularization of a temporary employee or payment of salary, etc. without laying down any principle of law. This is often done on humanitarian considerations, but this will not operate as a precedent binding on the

High Court. For instance, if the Supreme Court directs regularization of service of an employee who had put in 3 years' service, this does not mean that all employees who had put in 3 years' service must be regularized. Hence, such a direction is not a precedent. In Municipal Committee, Amritsar vs. Hazara Singh, AIR 1975 SC 1087, the Supreme Court observed that only a statement of law in a decision is binding. In State of Punjab vs. Baldev Singh, 1999 (6) SCC 172, this Court observed that everything in a decision is not a precedent. In Delhi Administration vs. Manoharlal, AIR 2002 SC 3088, the Supreme Court observed that a mere direction without laying down any principle of law is not a precedent. In Divisional Controller, KSRTC vs. Mahadeva Shetty 2003 (7) SCC 197, this Court observed as follows:

> *"..The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle, upon which the case was decided."*

6.24. Relying upon the above decisions, he submits that non-licensed worker engaged by non-licensed Contractors cannot claim to be employees of the Corporation and the Corporation cannot treat such workmen

working under the Contractors as employees of the Corporation. Therefore, the finding of the Tribunal that, since the Contractors did not have license as per Sections 11 and 12 of the CLRA, 250 workmen were employees of the Corporation is not correct. The Corporation being only concerned with getting cleaning work done tenders were issued and all other responsibilities are that of the Contractor including providing safety equipment, namely, hand gloves, boots, uniforms, jackets and helmets etc., and the Corporation cannot be made responsible for the same.

6.25. In terms of statistics, he submits that, as per the directives of the State Government, the Municipal Corporation is permitted to appoint one Pourakarmika for every 700 citizens in

the Corporation as on the year 2018. The population coming within the jurisdiction of the Corporation was 3,55,058, which would require appointment of 507 Pourakarmikas. The sanctioned strength in terms of the Cadre and Recruitment Rules being 254, the Corporation recruited 254 Pourakarmikas and remaining requirement of 253 Pourakarmikas not having been sanctioned, the services of contract employees under Contractors are engaged by making payment of monies to the Contractor.

6.26. On enquiry as regards the current status, he submits that, out of 254 Pourakarmikas, the working strength is 107 and there are 147 posts which are laying vacant as the Corporation did not receive sufficient applications for the posts reserved from Ex-

Servicemen, category-I, catetory-2A, category-2B, Handicapped etc., and these posts being specifically reserved for the said categories, the same could not be filled up from the persons belonging to other categories. He submits that, as and when the applications are received, the vacant posts would be filled up.

6.27. The last recruitment drive was conducted in the year 2018 when though 205 posts were notified, the Corporation could only appoint 96 persons.

6.28. Insofar as Annexure to the claim petition containing claims of 250 workmen, he submits that, out of the said 250 Pourakarmikas, 157 are presently working in the Corporation under direct payment of the Corporation, 18 are reported dead and 47

are already working as permanent Pourakarmikas, who come within the working strength of 107 Pourakarmikas employed by the Corporation and the payments made to these are similar to that made to other Pourakarmikas directly employed by the Corporation.

6.29. He therefore submits that the Tribunal not having taken into consideration the above factors, the said award is required to be set aside.

7. Sri.Arun Shyam learned Addl. Advocate General supports the submissions made by Sri. R. Subramanya, learned counsel for the petitioner Corporation. He reiterates that:

7.1. In terms of the various notifications which had been issued, it is only the Deputy Commissioner who can recruit

Pourakarmikas and as such, the award passed by the Tribunal directing the Commissioner, Corporation to regularize the workmen could not have been granted.

7.2. He submits that it is for the Corporation to work out the modalities in which it would take care of its workers and discharge its statutory duties. The State per se does not get involved in the day to day working of the Corporation. It is for the elected representatives of the Corporation as also the Officers who are appointed to discharge their responsibilities as required under law to perform their duties.

7.3. There is no vested right of any employee/worker to seek for regularization of services merely because he is discharging

similar work as that discharged by the direct employee.

7.4. Whether the employer wants to engage contract labour and/or direct labour is left to the employer and the employee cannot insist that a person is recruited as a direct employee and not engaged through a Contractor.

7.5. Regularization is not a right vested in a workman and no such claim could be made by a workman. Insofar as the claim for equal pay for equal work is concerned, he submits that there is work which is performed by the workers engaged through the Contractor is part time, inasmuch as they discharge their work only in the morning period collecting the garbage from houses coming within the jurisdiction of the

Corporation. They are not full time employees. Therefore, the aspect of equal pay for equal work would not apply.

7.6. He again reiterates the requirement of Section 7 of the CLRA as contended by Sri.R. Subramanya.

7.7. In support of his above submission, he relies upon the judgment in the case of ***Union of India and Others Vs. Ilmo Devi and Another(supra).***[7] The relevant paragraphs 27 and 28 are extracted below:

> *27. In the case of Daya Lal & Ors. (supra) in paragraph 12, it is observed and held as under:-*
>
> > *"12. We may at the outset refer to the following well- settled principles relating to regularisation and parity in pay, relevant in the context of these appeals:*
> >
> > *(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent*

continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While 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, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees.

The right to claim a particular salary against the State must arise under a contract or under a statute.

[See State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1], M. Raja v. CEERI Educational *Society [(2006) 12 SCC*

> *636], S.C. Chandra v. State of Jharkhand [(2007) 8 SCC 279], Kurukshetra Central Coop. Bank Ltd. v. Mehar Chand [(2007) 15 SCC 680] and Official Liquidator v. Dayanand [(2008) 10 SCC 1.]*
>
> *28. Thus, as per the law laid down by this Court in the aforesaid decisions part-time employees are not entitled to seek regularization as they are not working against any sanctioned post and there cannot be any permanent continuance of part-time temporary employees as held. Part-time temporary employees in a Government run institution cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work.*

7.8. He submits that a daily rated or casual worker or temporary employee had no right to permanency of post and as such, no direction could be issued by this Court. In this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***Indian Drugs & Pharmaceutical Ltd., v. Workmen(supra)***[10]***.*** The relevant

paragraphs 13, 15, 17, 23, 24, 31, 34, 37, 41, 42, 43 and 47 are extracted below:

> *13. It may be mentioned that a daily rated or casual worker is only a temporary employee, and it is well settled that a temporary employee has no right to the post vide State of Uttar Pradesh & Anr. vs. Kaushal Kishore Shukla 1991(1) SCC 691. The term 'temporary employee' is a general category which has under it several sub-categories e.g. casual employee, daily rated employee, ad hoc employee, etc.*
>
> *15. Similarly, no direction can be given that a daily wage employee should be paid salary of a regular employee vide State of Haryana vs. Tilak Raj 2003 (6) SCC 123.*
>
> *17. Admittedly, the employees in question in Court had not been appointed by following the regular procedure, and instead they had been appointed only due to the pressure and agitation of the union and on compassionate ground. There were not even vacancies on which they could be appointed. As held in A. Umarani vs. Registrar, Cooperative Societies & Ors. 2004(7) SCC 112, such employees cannot be regularized as regularization is not a mode of recruitment. In Umarani's case the Supreme Court observed that the compassionate appointment of a woman whose husband deserted her would be illegal in view of the absence of any scheme providing for such appointment of deserted women.*
>
> *23. We have underlined the observations made above to emphasize that the Court cannot direct continuation in service of a non-regular appointee. The High Court's direction is hence contrary to the said decision.*
>
> *24. Thereafter in paragraph 33 it was observed:*

"33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non- available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment". (emphasis supplied)

The underlined observation in the above passage makes it clear that even if an ad hoc or casual appointment is made in some contingency the same should not be continued for long, as was done in the present case.

31. No doubt, there can be occasions when the State or its instrumentalities employ persons on temporary or daily wage basis in a contingency as additional hands without following the required procedure, but this does not confer any right on such persons to continue in service or get regular pay. Unless the appointments are made by following the rules, such appointees do not have any right to claim permanent absorption in the establishment.

33. In Delhi Development Horticulture Employees' Union vs. Administration, Delhi and others AIR 1992 SC 789 while deprecating the tendency of engaging daily wagers without advertisement this Court held the same to be back door entries in violation of Article 16 of the Constitution. As such this Court refused to give any direction to regularize the petitioners.

34. Thus, it is well settled that there is no right vested in any daily wager to seek regularization. Regularization can only be done in accordance with the rules and not de hors the rules. In the case of E. Ramakrishnan & others vs. State of Kerala & others 1996 (10) SCC 565 this Court held that there can be no regularization de hors the rules. The same view was taken in Dr. Kishore vs. State of Maharashtra 1997(3) SCC 209, Union of India & others vs. Bishambar Dutt 1996 (11) SCC 341. The direction issued by the services tribunal for regularizing the services of persons who had not been appointed on regular basis in accordance with the rules was set aside although the petitioner had been working regularly for a long time.

37. Creation and abolition of posts and regularization are a purely executive function vide P.U. Joshi vs. Accountant General, Ahmedabad & others 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.

38. The respondents have not been able to point out any statutory rule on the basis of which their claim of continuation in service or payment of regular salary can be granted. It is well settled that unless there exists some rule no direction can be issued by the court for continuation in service or payment of regular salary to a casual, ad hoc, or daily rate employee. Such directions are executive functions, and it is not appropriate for the court to encroach into the functions of another organ of the State. The courts must exercise judicial restraint in this connection. The tendency in some courts/tribunals to legislate or

perform executive functions cannot be appreciated. Judicial activism in some extreme and exceptional situation can be justified, but resorting to it readily and frequently, as has lately been happening, is not only unconstitutional, it is also fraught with grave peril for the judiciary.

41. No doubt, in some decisions the Supreme Court has directed regularization of temporary or ad hoc employees but it is well settled that a mere direction of the Supreme Court without laying down any principle of law is not a precedent. It is only where the Supreme Court lays down a principle of law that it will amount to a precedent. Often the Supreme Court issues directions without laying down any principle of law, in which case, it is not a precedent. For instance, the Supreme Court often directs appointment of someone or regularization of a temporary employee or payment of salary, etc. without laying down any principle of law. This is often done on humanitarian considerations, but this will not operate as a precedent binding on the High Court. For instance, if the Supreme Court directs regularization of service of an employee who had put in 3 years' service, this does not mean that all employees who had put in 3 years' service must be regularized. Hence, such a direction is not a precedent. In Municipal Committee, Amritsar vs. Hazara Singh, AIR 1975 SC 1087, the Supreme Court observed that only a statement of law in a decision is binding. In State of Punjab vs. Baldev Singh, 1999 (6) SCC 172, this Court observed that everything in a decision is not a precedent. In Delhi Administration vs. Manoharlal, AIR 2002 SC 3088, the Supreme Court observed that a mere direction without laying down any principle of law is not a precedent. In Divisional Controller, KSRTC vs. Mahadeva Shetty 2003 (7) SCC 197, this Court observed as follows:

> *"..The decision ordinarily is a decision on the case before the Court, while the*

principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle, upon which the case was decided"

42. In Jammu & Kashmir Public Service Commission vs. Dr. Narinder Mohan AIR 1994 SC 1808, this Court held that the directions issued by the court from time to time for regularization of ad hoc appointments are not a ratio of this decision, rather the aforesaid directions were to be treated under Article 142 of the Constitution of India. This Court ultimately held that the High Court was not right in placing reliance on the judgment as a ratio to give the direction to the Public Service Commission to consider the cases of the respondents for regularization. In that decision this Court observed:

"11. This Court in Dr. A.K. Jain vs. Union of India 1988 (1) SCR 335, gave directions under Article 142 to regularize the services of the ad hoc doctors appointed on or before October 1, 1984. It is a direction under Article 142 on the particular facts and circumstances therein. Therefore, the High Court is not right in placing reliance on the judgment as a ratio to give the direction to the PSC to consider the cases of the respondents. Article 142 power is confided only to this Court. The ratio in Dr. P.C.C Rawani vs. Union of India 1992 (1) SCC 331, is also not an authority under Article 141. Therein the orders issued by this Court under Article 32 of the Constitution to regularize the ad hoc appointments had become final. When contempt petition was filed for non implementation, the Union had come

forward with an application expressing its difficulty to give effect to the orders of this Court. In that behalf, while appreciating the difficulties expressed by the Union in implementation, this Court gave further direction to implement the order issued under Article 32 of the Constitution. Therefore, it is more in the nature of an execution and not a ratio under Article 141. In Union of India v Gian Prakash Singh, 1993(5) JT (SC) 681 this Court by a Bench of three Judges considered the effect of the order in A.K. Jain's case and held that the doctors appointed on ad hoc basis and taken charge after October 1, 1984 have no automatic right for confirmation and they have to take their chance by appearing before the PSC for recruitment. In H.C. Puttaswamy v Hon'ble Chief Justice of Karnataka, AIR 1991 SC 295: (1991 Lab 1 C 235), this Court while holding that the appointment to the post of clerk etc. in the subordinate courts in Karnataka State without consultation of the PSC are not valid appointments, exercising the power under the Article 142, directed that their appointments as regular, on humanitarian grounds, since they have put in more than 10 years' service. It is to be noted that the recruitment was only for clerical grade (Class-III post) and it is not a ratio under Article 141. In State of Haryana v Piara Singh, (1992 AIR SC 2130), this Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, an ad hoc or temporary appointment may be made. In such a situation, this Court held that efforts should always be made to replace such ad hoc or temporary employees by regularly selected employees, as early as possible. Therefore, this Court did not appear to have intended to lay down as a general rule that in every

category of ad hoc appointment, if the ad hoc appointee continued for long period, the rules of recruitment should be relaxed and the appointment by regularization be made. Thus considered, we have no hesitation to hold that the direction of the Division Bench is clearly illegal and the learned single Judge is right in directing the State Government to notify the vacancies to the PSC and the PSC should advertise and make recruitment of the candidates in accordance with the rules".

43. In view of the above observations of this Court it has to be held that the rules of recruitment cannot be relaxed and the court/Tribunal cannot direct regularization of temporary appointees de hors the rules, nor can it direct continuation of service of a temporary employee (whether called a casual, ad hoc or daily rate employee) or payment of regular salaries to them.

47. We are of the opinion that if the court/tribunal directs that a daily rate or ad hoc or casual employee should be continued in service till the date of superannuation, it is impliedly regularizing such an employee, which cannot be done as held by this Court in Secretary, State of Karnataka vs. Umadevi (supra), and other decisions of this Court.

7.9. He seeks to make a distinction between the Government servant and a workman /employee in an Industrial establishment or private employment. Insofar as the

Government servant is concerned, there needs to be master and servant relationship which is governed by the statutory rules, since such government servant would have a permanent tenure and continue in service till superannuation unlike private employees, who may lose their jobs on account of certain contingencies and as such, he submits that courts ought not to direct absorption, regularization, continuance of service or pay salaries as that of regular employees. In this regard he relies upon the decision in the case of ***Hindustan Aeronautics Ltd., Vs. Dan Bahadur Singh and Others.***[11] The relevant paragraphs 12, 13, 14, 16, 18, 19 and 20 are extracted below:

[11] (2007) 6 SCC 207

12. We have considered the submissions made by learned counsel for the parties. The position of a government servant is entirely different from that of a workman who is working in an industrial establishment like the appellant Company. A government servant enjoys a status and a security of tenure on account of certain constitutional provisions. In Union Public Service Commission v. Girish Jayanti Lal Veghela & Ors. (2006) 2 SCC 482 it was held as under (SCC pp.483-84)

> *"In the case of a regular government servant there is undoubtedly a relationship of master and servant but on account of constitutional provisions like Articles 16, 309 and 311 his position is quite different from a private employee. Thus, employment under the Government is a matter of status and not a contract even though the acquisition of such a status may be preceded by a contract, namely, an offer of appointment is accepted by the employee. The rights and obligations are not determined by the contract of the two parties but by statutory rules framed by the Government in exercise of power conferred by Article 309 of the Constitution and the service rules can be unilaterally altered by it."*

13. An appointment in government may be on probation or in temporary capacity or permanent in nature. A permanent government servant has a right to hold the post and he cannot be dismissed or removed or reduced in rank unless the requirements of Article 311 of the Constitution or the Rules governing his service are complied with.

14. The appellant, Hindustan Aeronautics Ltd., is a government company within the meaning of Section 617 of the Companies Act. What will be the legal position of a Government Company and whether its employees can be treated to be

government servants was examined in Heavy Engineering Mazdoor Union v. State of Bihar and Ors. (1969) 1 SCC 765 and it was held as under in para 4 of the reports: (SCC p.768)

> *".....It is an undisputed fact that the company was incorporated under the Companies Act and it is the company so incorporated which carries on the undertaking. The undertaking, therefore, is not one carried on directly by the Central Government or by any one of its departments as in the case of posts and telegraphs or the railways....."*

15. In A.K. Bindal v. Union of India (2003) 5 SCC 163 the difference between an employee of a government and an employee of a Government Company was pointed out and it was held : (SCC p.175, para 17)

> *"17. The legal position is that identity of the Government Company remains distinct from the government. The Government Company is not identified with the Union but has been placed under a special system of control and conferred certain privileges by virtue of the provisions contained in Sections 619 and 620 of the Companies Act. Merely because the entire share holding is owned by the Central Government will not make the incorporated company as Central Government. It is also equally well settled that the employees of the Government Company are not civil servants and so are not entitled to the protection afforded by Article 311 of the Constitution (See Pyare Lal Sharma v. Managing Director (1989) 3 SCC 448)."*

16. An employee working in an industrial establishment enjoys a limited kind of protection. He may lose his employment in various contingencies which are provided under

the Industrial Disputes Act such as lay off as provided in Section 25-C, retrenchment as provided in Section 25-F, transfer of industrial establishment or management of an undertaking as provided in Section 25-FF, closure of undertaking as provided in Section 25-FFF. He may be entitled to notice or wages in lieu of notice and monetary compensation depending upon the length of service put in by him. But the type of tenure of service normally enjoyed by a permanent employee in Government Service, namely, to continue in service till the age of superannuation, may not be available to an employee or workman working in an industrial establishment on account of various provisions in the Industrial Disputes Act where his tenure may be cut short not on account of any disciplinary action taken against him, but on account of a unilateral act of the employer. Therefore, the claim for permanency in an industrial establishment has to be judged from a different angle and would have different meaning.

18. The next question which requires consideration is whether completion of 240 days in a year confers any right on an employee or workman to claim regularization in service. In Madhyamik Shiksha Parishad v. Anil Kumar Mishra & Ors. (2005) 5 SCC 122 it was held that the completion of 240 days' work does not confer the right to regularization under the Industrial Disputes Act. It merely imposes certain obligations on the employer at the time of termination of the services. In M.P. Housing Board & Anr. v. Manoj Shrivastava (2006) 2 SCC 702 (paragraph 17) after referring to several earlier decisions it has been reiterated that it is well settled that only because a person had been working for more than 240 days, he does not derive any legal right to be regularized in service. This view has been reiterated in Gangadhar Pillai v. Siemens Ltd. (2007) 1 SCC 533. The same question has been examined in considerable detail with reference to an employee working in a

Government Company in Indian Drugs and Pharmaceuticals Ltd. v. Workman, Indian Drugs & Pharmaceuticals Ltd. 2007(1) SCC 408 and paragraphs 34 and 35 of the reports are being reproduced below:-

> *"34. Thus, it is well settled that there is no right vested in any daily wager to seek regularization. Regularization can only be done in accordance with the rules and not de hors the rules. In the case of E. Ramakrishnan and Ors. v. State of Kerala and Ors. (1996) 10 SCC 565 this Court held that there can be no regularization de hors the rules. The same view was taken in Dr. Kishore v. State of Maharashtra (1997) 3 SCC 209 and Union of India and Ors. v. Bishambar Dutt (1996) 11 SCC 341. The direction issued by the Services Tribunal for regularizing the services of persons who had not been appointed on regular basis in accordance with the rules was set aside although the petitioner had been working regularly for a long time.*
>
> *35. In Dr. Surinder Singh Jamwal and Anr. v. State of Jammu & Kashmir and Ors. AIR 1996 SC 2775, it was held that ad hoc appointment does not give any right for regularization as regularization is governed by the statutory rules.*

19. In the judgment under challenge the High Court has issued a direction to absorb the members of the respondent union as regular employees or such of them as may be required to do the quantum of work which may be available on perennial basis and has issued a further direction that they will be paid the wages of regular employees. It has also been directed that such of the members of the respondent union who are not absorbed as regular employees shall not be disengaged and shall be allowed to

continue as per settlement dated 26.7.1995 and shall be regularized as and when the perennial work is available. The direction issued by the High Court in effect has two components i.e. creation of posts and also payment of regular salary as in absence of a post being available a daily wager cannot be absorbed as a regular employee of the establishment. This very question has been considered in Indian Drugs & Pharmaceuticals Ltd. (supra) and, therefore, we do not consider it necessary to refer to the various reasons given and decisions cited therein. Paras 37, 38 and 47 of the reports, wherein the Bench recorded its conclusions read as under :-

> *"37. Creation and abolition of posts and regularization are a purely executive function vide P.U. Joshi v. Accountant General, Ahmedabad and Ors. (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.*
>
> *38. The respondents have not been able to point out any statutory rule on the basis of which their claim of continuation in service or payment of regular salary can be granted. It is well settled that unless there exists some rule no direction can be issued by the court for continuation in service or payment of regular salary to a casual, ad hoc, or daily rate employee. Such directions are executive functions, and it is not appropriate for the court to encroach into the functions of another organ of the State. The courts must exercise judicial*

> *restraint in this connection. The tendency in some courts/tribunals to legislate or perform executive functions cannot be appreciated. Judicial activism in some extreme and exceptional situation can be justified, but resorting to it readily and frequently, as has lately been happening, is not only unconstitutional, it is also fraught with grave peril for the judiciary.*
>
> *47. We are of the opinion that if the court/tribunal directs that a daily rate or ad hoc or casual employee should be continued in service till the date of superannuation, it is impliedly regularizing such an employee, which cannot be done as held by this Court in Secretary, State of Karnataka v. Umadevi (2006) 4 SCC 1, and other decisions of this Court."*
>
> *20. In view of the discussion made above, the impugned judgment of the learned Single Judge which was affirmed in appeal by the Division Bench cannot be sustained and has to be set aside. The respondents are not entitled to the relief claimed by them.*

7.10. Equal pay for equal work would not be applicable where persons are employed on a temporary basis and in this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***Kendriya Vidyalaya Sangathan and Others v. L. V.***

Subramanyeshwara and Another.[12] The relevant paragraphs 12, 13, 14, 16, 17 and 18 are extracted below:

> *12. It is true that they had continued in service for such a long time, but they have been thrust upon the appellant by reason of interim orders passed by the High Court. The Constitution Bench of this Court in Umadevi (supra) held:-*
>
> > *"15. Even at the threshold, it is necessary to keep in mind the distinction between regularisation and conferment of permanence in service jurisprudence. In State of Mysore v. S.V. Narayanappa this Court stated that it was a misconception to consider that regularisation meant permanence. In R.N. Nanjundappa v. T. Thimmiah this Court dealt with an argument that regularisation would mean conferring the quality of permanence on the appointment. This Court stated: (SCC pp. 416-17, para26)*
> >
> > *"Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner*

[12] (2007) 5 SCC 326

which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

16. In B.N. Nagarajan v. State of Karnataka this Court clearly held that the words "regular" or "regularisation" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This Court emphasised that when rules framed under Article 309 of the Constitution are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognised therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. 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.

(SCC pp.24-25)

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in

S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one- time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.
(SCC p.42)"

(emphasis in original)

13. It is therefore, not correct to contend that in the aforementioned backdrop of events, respondents satisfy the tests of equality, reservation or rule of law as adumberated in Umadevi (supra). Reliance placed on paragraph 53 of Umadevi (supra) is also mis-placed. What would be meant by the term irregularity must be understood in the context of the decision of this Court in Punjab Water Supply and Sewerage Board v Ranjodh Singh & Ors [2006 (13) SCALE 426]. The said paragraph has been explained by this Court in Punjab State Warehousing Corp., Chandigarh v Manmohan Singh & Anr. [2007 (3) SCALE 401].

14. Furthermore, the respondents even did not complete the period of 10 years without intervention by the Court, they would not have been in service for more than 10 years but for intervention of the High Court, they had been continued in service in terms of the interim order passed by the High Court.

16. Direction to regularize the services of the respondents in view of the authority by Constitution Bench in Umadevi (supra), therefore cannot be said to be of any significance so as to deny the relief to the appellant.

17. Ashwani Kumar (supra) has also been noticed by the Constitution Bench. A distinction furthermore must be noted in mind between regularisation and permanency, the regularisation does not mean permanency. In A. Umarani v Registrar, Cooperative Societies and Others [(2004) 7 SCC 112,], this Court had made the distinction, it was furthermore held:-

> *"34. Sub-rule (25) of Rule 149 provides that the principle of reservation of appointment for Scheduled Castes/Scheduled Tribes and Backward Classes followed by the Government of Tamil Nadu for recruitment to the State shall apply.*

> *35. No appointment, therefore, can be made in deviation of or departure from the procedures laid down in the said statutory rules.*
>
> *36. The terms and conditions of services are also laid down in the said rules."*
>
> *18. For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained. The Appeals are allowed. The impugned judgment is set aside. In the facts and circumstances of this case, there shall be no order as to costs.*

8. Sri. T. S. Anantharam, learned counsel for respondent No.1 would submit as under:

8.1. The judgment and order passed by the Tribunal is proper and correct and does not require any interference.

8.2. He submits that the Pourakarmikas as engaged by the Contractor provide the same service as that of the Pourakarmikas employed directly by the Corporation. The nature of work which is done is identical in terms of cleaning, scavenging, collection and

transportation of garbage and dead animals etc.,

8.3. He submits that, when the employer has engaged the services of workmen for number of years and they have rendered services for such number of years, they have a legitimate claim for status and full wages and benefits at par with regular employees, since they are also discharging the same work as that discharged by the regular employees. In this regard, he relies upon the decision of this Court in the case of ***The Management of National Aerospace Laboratories Vs. Engineering & General Workers Union & Others.***[13] The relevant paragraphs 30 and 31 are extracted below:

> *30. The very fact that the workmen concerned herein were actually named for being employed*

[13] ILR 2015 Kar 349

under a new contract only for carrying out a work package (Ex.M-20) clearly proved that the petitioner chose and wanted many of the workmen concerned to work on their projects. It is unbecoming and unfair on the part of the management to set up a technical defence in an industrial dispute with the workmen, who were chosen by the management to work for them for years on end, that they would not have fulfilled the requirements of qualification under their recruitment rules. Therefore, the last-ditch attempt at depriving the workmen concerned of their legitimate claim for status and full wages and benefits at par with the regular employees, has to be spurned. It has however also to be mentioned in fairness to the petitioner that they have agreed to the list of the workmen concerned, which was submitted as an annexure to the submissions of the respondent, in so far as it gives in a tabulated form, the posts which each of the workmen should have been holding and the pay-scale to which each such workmen would have been entitled as on the date of reference, if their demand were to be accepted. That table is reproduced hereunder for ready reference and avoiding any further litigation or complication.

(xxxxxxxxxxxxxx TABLE xxxxxxxxxxxxx)

31. In the facts and circumstances discussed hereinabove, the petition is dismissed with the consequential additional directions that the workmen concerned shall be treated at par with regular employees in their eligible posts as per the above table and paid the difference of wages and benefits from the date of reference. The arrears due to the workmen as on the date of the impugned award from the date of reference shall be paid with interest at the rate of 9% per annum. The arrears on account of difference of wages for the period subsequent to the date of the award shall be capitalized at the end of each year and shall be paid with 9% interest per annum from the date of the end of each such

year. The payment of interest on arrears of difference of wages from the date of the award is necessary and justified by the fact of inflation and constantly corroding purchasing power of money Besides that, withholding of the benefits due to the workmen since the impugned award has to be duly compensated. There is no order as to costs.

8.4. When the duly sanctioned posts are got vacant and workmen are engaged without filling up the sanctioned post, the same would amount to a subterfuge employed by the employer. This Court would have to look through such subterfuge and come to the rescue of the workmen who have been denied permanent employment as also equal pay for equal work. In this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***Secretary, State of Karnataka & Others Vs. Umadevi (supra)***[1]***.*** The relevant paragraph 53 is extracted below:

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal

appointments) as explained in S.V NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 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 courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize 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 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 regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

8.5. The promulgation of various labour statutes is with the intention to protect the interest of the labour and there is no bargaining of

position between the employer and employee/workmen. This Court ought not to permit the petitioner to make use of its dominant position to deprive the workmen of their just pay when they are actually doing the same work as that done by regular employees. He alleges that the petitioner had made use of the subterfuge of contract labour only to avoid its liabilities and various labour statutes. Such avoidance has resulted in injustice to the members of the respondent Union. In this regard, he relies upon the decision of the Hon'ble Apex Court in the case of ***Bhilwara Dugdh Utpadak Sahakari Samiti Ltd., Vs. Vinod Kumar Sharma & Others.***[14] The relevant paragraphs 3, 6 and 7 are extracted below:

3. Labour statutes were meant to protect the employees/workmen because it was realised that the

[14] **2011 (15) SCC 209**

employers and the employees are not on an equal bargaining position. Hence, protection of employees was required so that they may not be exploited. However, this new technique of subterfuge has been adopted by some employers in recent years in order to deny the rights of the workmen under various labour statutes by showing that the concerned workmen are not their employees but are the employees/workmen of a Contractor, or that they are merely daily wage or short term or casual employees when in fact they are doing the work of regular employees. This Court cannot countenance such practices any more. Globalization/liberalization in the name of growth cannot be at the human cost of exploitation of workers.

6. In the present case that is not the question at all. Here the finding of fact of the Labour Court is that the respondents were not the Contractor's employees but were the employees of the appellant. The SAIL judgment (Supra) applies where the employees were initially employees of the Contractor and later claim to be absorbed in the service of the principal employer. That judgment was considering the effect of the notification under Section 10 of the Act. That is not the case here. Hence, that decision is clearly distinguishable.

7. Mr. Puneet Jain, learned counsel for the appellant submitted that the High Court has wrongly held that the appellant resorted to a subterfuge, when there was no such finding by the Labour Court. The Labour Court has found that the plea of the employer that the respondents were employees of a Contractor was not correct, and in fact they were the employees of the appellant. In our opinion, therefore, it is implicit in this finding that there was subterfuge by the appellant to avoid its liabilities under various labour statutes.

8.6. In the present case, the Contractors have been only interposed to obtain workers to carry out work in the Corporation, there is no service as such offered by the Contractor except for providing labour. The workmen provided by the Contractor act under the direct supervision and instructions of the Corporation and there are no instructions received from the Contractor. The Contractor himself does not have any qualification and/or specialization in the works to be done. The Contractor is only interposed so as to enable the Corporation to make use of subterfuge/ruse/camouflage, violating the applicable labour laws. This Court ought not to permit such violation by the petitioner, more so when the petitioner is an instrumentality of the State, who is required to implement the constitutional

scheme and the protection granted under various labour statutes. In this regard he relies upon the decision of the Hon'ble Apex Court in the case of ***Steel Authority of India Ltd., & Others (supra)***[2]. The relevant paragraph 125(5) is extracted below:

> 125. The upshot of the above discussion is outlined thus:
>
> (1) xxxxxxxxx
> (2) xxxxxxxxx
> (3) xxxxxxxxx
> (4) xxxxxxxxx
>
> (5) O*n issuance of prohibition notification under Section 10(1) of the CLRA Act prohibiting employment of contract labour or otherwise, in an industrial dispute brought before it by any contract labour in regard to conditions of service, the industrial adjudicator will have to consider the question whether the Contractor has been interposed either on the ground of having undertaken to produce any given result for the establishment or for supply of contract labour for work of the establishment under a genuine contract or is a mere ruse/camouflage to evade compliance of various beneficial legislations so as to deprive the workers of the benefit thereunder. If the contract is found to be not genuine but a mere camouflage, the so-called contract labour will*

have to be treated as employees of the principal employer who shall be directed to regularise the services of the contract labour in the concerned establishment subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

8.7. The members of the first respondent Union have been rendering service to the Corporation on a perennial nature for number of years and as such, the Tribunal has rightly come to a conclusion that their interest have to be protected and this court ought not to intercede in the well-reasoned judgment passed by the Tribunal. In this regard he has relied on the decision of the Hon'ble Apex Court in the case of ***Tamil Nadu Terminated Full Time Temporary LIC Employees Association Vs. Life Insurance Corporation of India &***

Another.[15] The relevant paragraphs 48 and 49 are extracted below:

48. The relevant paragraphs of the above said case are extracted hereunder: (D.J.Bahadur case, SCC pp.385-86, paras 138-39)

> *"138. The court then proceeded to consider specifically the situation that would obtain in the 3rd period in relation to an award and held:*
>
> > *"Quite apart from this, however, it appears to us that even if an award has ceased to be in operation or in force and has ceased to be binding on the parties under the provisions of Section 19(6) it will continue to have its effect as a contract between the parties that has been made by industrial adjudication in place of the old contract. So long as the award remains in operation under Section 19(3), Section 23(c) stands in the way of any strike by the workmen and lock-out by the employer in respect of any matter covered by the award. Again, so long as the award is binding on a party, breach of any of its terms will make the party liable to penalty under Section 29 of the Act, to imprisonment which may extend to six months or with fine or with both. After the period of its operation and also the period for which the award is binding have elapsed Section 23 and Section 29 can have no operation. We can however see nothing in the scheme of the Industrial Disputes Act to justify a conclusion that merely because these special provisions as regards prohibition of strikes and lock-outs and of penalties for breach of award cease to be effective the new contract as embodied in the award should also cease to be effective. On the contrary, the very purpose for which*

[15] (2015) 9 SCC 62

industrial adjudication has been given the peculiar authority and right of making new contracts between employers and workmen makes it reasonable to think that even though the period of operation of the award and the period for which it remains binding on the parties - in respect of both of which special provisions have been made under Sections 23 and 29 respectively - may expire, the new contract would continue to govern the relations between the parties till it is displaced by another contract. The objection that no such benefit as claimed could accrue to the respondent after March 31, 1959 must therefore be rejected."

139. It is the underlined portion of this paragraph which impelled the High Court to come to the conclusion that even a notice under Section 19(6) of the ID Act would not terminate a settlement (which, according to the High Court, stands on the same footing as an award and, in fact is indistinguishable there from for the purpose of Section 19) but would have the effect of merely paving the way for fresh negotiations resulting ultimately in a new settlement - a conclusion which has been seriously challenged on behalf of the Corporation with the submission that Chacko case has no application whatsoever to the present controversy inasmuch as the special law comprised of Sections 11 and 49 of the LIC Act fully covers the situation in the 3rd period following the expiry of the 1974 settlements. The submission is well based. In Chacko case this Court was dealing with the provisions of the ID Act alone when it made the observations last extracted and was not concerned with a situation which would cover the 3rd period in relation to an award (or for that matter a settlement) in accordance with a specific mandate from Parliament. The only available course for filling the void created by the Sastry Award was a continuation of its terms till they were replaced by something else legally

enforceable which, in the circumstances before the court, could only be another contract (in the shape of an award [pic]or a settlement), there being no legal provision requiring the void to be filled otherwise. In the present case the law intervenes to indicate how the void which obtains in the 3rd period shall be filled and, if it has been so filled, there is no question of its being filled in the manner indicated in Chacko case wherein, as already pointed out, no such law was available. The observations in that case must thus be taken to mean that the expired award would continue to govern the parties till it is displaced by another contract or by a relationship otherwise substituted for it in accordance with law."

In view of the statement of law laid down by this Court in the above referred case, the reliance placed upon para 43 and 47 of D. J. Bahadur case and other cases relied upon by the learned senior counsel for the Corporation are misplaced and the same do not support the case of the Corporation.

49. In view of the law laid by this Court in the case referred to supra, both the Award of Justice Tulpule reiterated by way of clarification Award by Justice Jamdar are still operative as the same are not terminated by either of the parties as provided under Section 19(6) of the Act. The compromise between the parties in LIC v. Workmen (SLP No. 14906 of 1988, order dated 1-3-1989) and the Scheme formed in E. Prabhavathy & Ors. and G. Sudhakar & Ors. (supra) do not amount to substitution of the Awards passed by Justice R. D. Tulpule and by Justice S. M. Jamdar. Hence, in view of the aforesaid reasons, the submissions made by Mr. Naphade, learned amicus curiae, in justification of the Award passed by the CGIT is based on the terms and conditions laid down in the Awards passed by the NIT (by Justice Tulpule and Justice Jamdar) in favour of the workmen for absorption as they have been rendering their service to the Corporation in the perennial nature of work for a number of years and hence, the High Court was not justified in interfering with the said Award passed by the CGIT.

The said contention urged by the learned amicus curiae is accepted by us, as the impugned judgment and order of the High Court is contrary to the Awards referred to supra, the provisions of the Industrial Disputes Act and the law laid down by this Court in the aforesaid cases."

9. In reply Sri. R. Subramanya, submits that

9.1. The benefit of regularization cannot be extended to the members of the respondent Union and there cannot be any automatic absorption or regularization.

9.2. The same would be in violation of Sections 10, 11 and 12 of the CLRA, which have been reproduced hereunder for easy reference:

10. Prohibition of employment of contract labour.—

(1) Notwithstanding anything contained in this Act, the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit, by notification in the Official Gazette, employment of contract labour in any process, operation or other work in any establishment.

(2) Before issuing any notification under sub-section (1) in relation to an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment and other relevant factors, such as—

(a) whether the process, operation or other work is incidental to, or necessary for the industry, trade, business, manufacture or occupation that is carried on in the establishment;

(b) whether it is of perennial nature, that is to say, it is of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation carried on in that establishment;

(c) whether it is done ordinarily through, regular workmen in that establishment or an establishment similar thereto;

(d) whether it is sufficient to employ considerable number of whole time workmen.

Explanation.—If a question arises whether any process or operation or other work is of perennial nature, the decision of the appropriate Government thereon shall be final.

11. Appointment of licensing officers.—*The appropriate Government may, by an order notified in the Official Gazette,—*

(a) appoint such persons, being Gazetted Officers of Government, as it thinks fit to be licensing officers for the purposes of this Chapter; and
(b) define the limits, within which a licensing officer shall exercise the powers conferred on licensing officers by or under this Act.
12. Licensing of Contractors.—(*1) With effect*

from such date as the appropriate Government may, by notification in the Official Gazette, appoint, no Contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer.

(2) Subject to the provisions of this Act, a licence under sub-section (1) may contain such conditions including, in particular, conditions as to hours of work, fixation of wages and other essential amenities in respect of contract labour as the appropriate Government may deem fit to impose in accordance with the rules, if any, made under section 35 and shall be issued on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed.

9.3. The respondents are not employees of the Corporation. There is no relationship of employees and employers between the Corporation and the workmen, since the salary is not paid directly.

10. Based on the above submissions, the points that would arise for consideration are:

10.1. ***Whether the members of the 1st respondent Union have been engaged by the Corporation for working on perennial nature and have been working for a long period of time?***

10.2. ***Whether the employment of the workmen is purely on temporary adhoc basis or is there any permanency in such employment?***

10.3. ***Whether the work carried out by the workmen is identical to that carried out by regular workmen of the petitioner Corporation?***

10.4. ***Whether the workmen would be entitled for absorption and regularization of their services?***

10.5. ***Whether the workmen would be entitled to the same benefits as that provided to the regular employees based on the concept of equal pay for equal work?***

10.6. ***Whether the order passed by the Tribunal suffers from any legal infirmities requiring interference at the hands of this Court.***

10.7. ***What order?***

11. I answer the above points as under:

12. **<u>Answer to Points No.1 and 2:</u>** ***Whether the members of the 1st respondent Union have***

been engaged by the Corporation for working on perennial nature and have been working for a long period of time?

Whether the employment of the workmen is purely on temporary adhoc basis or is there any permanency in such employment?

12.1. Points No.1 and 2 are connected and related to each other. Hence both the points are answered together.

12.2. Exhibit M7 is the agreement entered into between the petitioner Corporation and the service provider/Contractor. Under the said agreement it is stated that:

12.3. The management of Municipal Solid Waste (MSW) is an obligatory function of the Corporation under the Karnataka Municipal Corporation Act, 1976. The Corporation invited competitive proposals from eligible builders to carry out various activities in

accordance with the Municipal Solid Waste (Management and Handling) Rules, 2000 namely;

(a) Sweeping of roads, streets, footpath and pavements, cleaning of open road side drains, uprooting of vegetation, collection of MSW and construction debris from its source and transportation of the same to designated locations.

(b) Collection of MSW from the bulk waste generators and its transportation in the treatment facility/landfill.

12.4. In response, the CMC received proposals from several bidders and after evaluation thereof, accepted the proposal submitted by the Service Provider.

12.5. The applicable laws were stated to be the Municipal Solid Waste Management (Management and Handling) Rules 2000, Minimum Wages Act 1948, Workmen's Compensation Act 1923, Contract Labour (Regulation & Abolition) Act, 1970, Child

Labour (Prohibition and Regulation) Act, 1986 and it was for the Contractor to secure all permits, authorizations, consents and approvals from the concerned authorities.

12.6. In terms of the clause 2.2.1, the Service Provider had to carry out activities in terms of the Management Plan as set out in Schedule 2 thereto, including:

a. Within 10 days of the date of signing of the Agreement obtain license under the provisions of Contract Labour (Regulation and Abolition) Act, 1970 for works to be carried out in accordance with this Agreement. Upon issue of such license by the Department of Labour, the Service Provider shall submit a copy thereof to the CMP, CMC shall then issue the Letter of Commencement of work;

b. Sweeping of all the roads, streets, footpaths and pavements as per A.B and C type Roads, cleaning of roadside drains (all storm water drains) and mouth of shoulder drains from one end of the other end;

c. Transport the MSW to the disposal site (will be intimated later)

d. Uproot all the vegetation and weeds on the road, footpaths, and pavements on a regular basis and dispose off the same along with street sweepings;

e. Transport all the sweepings and silt collected on the same day to designated locations;

f. Clean the kerbs and scrub the medians on regular basis;

g. Collect and transport construction debris, loose stones and other such small quantities from its source to low lying areas identified by CMC; or as per direction of CMC.

h. Collect MSW from the bulk generators in a segregated manner (wet and dry) and transport the same closed tipper lorries to the designated locations;

i. At its cost and expense, purchase and maintain insurance policies in respect of its employees and equipment and vehicles from time to time and promptly pay insurance premiums in respect of the policies, which shall be kept in force and valid throughout the period of this Agreement and furnish copies thereof to the CMC;

j. Be responsible for the operations and maintenance of the equipment and vehicles per conditions set out in schedule 3 of this Agreement;

k. During the Contract Period, the service provider shall ensure that.

i. There is no spillage of MSW during collection and transportation and the waste collected from different waste generations is not mixed.

ii. *The sweeping actitivity doesn't cause any hindrance to the traffic flow.*

iii. *The silt collected by cleaning of road side drains/moth of shoulder drains is not dumped back in the drains.*

iv. *The collected MSW is not burnt or disposed off at any other locations.*

v. *The employees of the Service Provider maintain good relations with the public.*

vi. *Adequate measures are adopted to meet health and safety standards of its employees by providing safety gear as set out in Schedule-3.*

l. *CMC obtains compliance Certificate from the designated CMC officials on a monthly basis in respect of its obligations to sweeping of roads, cleaning of drains and transport MSW in accordance with this Agreement as per the format set out in Schedule-4.*

m. *Make the payments to its employees by way of cheque only unless the employee has worked for a period less than eight (8) days.*

n. *The Service Provider shall at his cost and expense provide the equipment and vehicles for carrying out of activities set out in Clause 2.1.1 herein above.*

12.7. In terms of Clause (a) of Clause 2.3, the Service Provider was to provide Management Plan within 10 days of receiving approval

containing various details about workers (number of workers, their name, age, allocation of work etc.) to be employed for the purpose of Contract, deployment of workers and vehicles etc.

12.8. In terms of said clause (b) of Clause 2.3, it was the obligation of the Service Provider to open Savings Bank accounts for all the workers in a nearest Nationalized Bank and submit the statement of bank accounts to the Corporation and the monthly wages for all the workers shall be remitted through cheques only. The Contractor was also to maintain a register of details of the workers for the purpose of various labour enactments.

12.9. It is in the background of the above terms that it has to be seen whether the work

being carried out is of a perennial nature and for a long period of time.

12.10. Exhibit M7 was an agreement entered into in the year 2012. The proceedings which had been initiated on the basis of a Reference was in the year 2002. Thus this is an agreement which was entered into with the Contractor subsequent to the Reference.

12.11. The contention of Sri. R. Subramanya, learned counsel for the petitioner is that, similar agreements have been entered into by the Corporations with the Contractors for providing of service and under such similar agreements, it is the responsibility of the Contractor to make payments of the amounts to the workmen.

12.12. From the above it would be clear that, despite the reference being made in the year

2002, the Corporation continued to award contracts even until 2012. On enquiry if similar contracts have been awarded as on today, learned counsel for the petitioner submitted that, indeed such similar contracts have been entered into and that the services are being rendered by the workmen engaged by the Contractors.

12.13. In the above circumstances, at least for a period of 20 years it appears that the Corporation is engaging the services of Contractors for the purpose of cleaning and/or handling Municipal Solid Waste (MSW) as detailed hereinabove. A period of 20 years in my considered opinion cannot be said to be a temporary period, but would have to be considered perennial in nature, since apparently Corporation would continue

to engage such Contractors in future for providing similar services.

12.14. The members of the first respondent Union having been engaged by the Contractor for the purpose of providing services. It is seen that irrespective of who the Contractor is, it is the said members of the first respondent who have been engaged to provide services. It is not that the workmen change from time to time on the basis of the Contractor changing, but irrespective of the Contractor changing, it is same workmen who continue to render services.

12.15. Thus, the workmen being engaged on a perennial basis, mere change of a Contractor cannot be said to make such engagement temporary. The period of contract being limited to 11 months would have no role to

play so long as the members of the first respondent Union are engaged by different Contractors.

12.16. Hence, I answer points No.1 and 2 by holding that the members of the first respondent Union have been engaged by the Corporation through the Contractor for carrying out works which are perennial in nature and that they have been working for a sufficiently long period of time, which period cannot be said to be temporary, but would have to be considered to be permanent.

13. **Answer to point number 3:** ***Whether the work carried out by the workmen is identical to that carried out by regular workmen of the petitioner Corporation?***

13.1. The contention of the learned counsel for the Corporation is that, the workmen members

of the first respondent Union are engaged for a short period of time during the day and do not work throughout the day.

13.2. A perusal of the services which are required to be rendered by the service provider would indicate that, the said workmen are required to clean the roadside drains, collect municipai solid waste and construction debris, transport them to designated locations, collect municipal solid waste from bulk generators and transport them to the designated locations etc.,

13.3. Reading of the entire agreement does not disclose any particular time period in which this said services are required to be rendered, nor does the agreement restrict the time period and state that no work

should be carried out beyond a particular time period.

13.4. Thus, I am of the considered opinion that, there being no such identification or demarcation of time period for the work and/or there is no restriction as to when the work can be carried out and fixing the same to the nature of services to be rendered, the workmen would be required to render services through out the day and the services are not restricted to a particular time frame.

13.5. Apart from the above, it is contended by the learned counsel for the petitioner that the Pourakarmikas engaged by the petitioner Corporation perform other duties and obligations, apart from that which are

performed by members of the first respondent Union.

13.6. On enquiry as to what are those works, vague submissions are made that they deal with office work and carry out office functionalities. What is required to be seen is the nature of work done by Pourakarmikas.

13.7. A Pourakarmika by very definition would mean a person who deals with Municipal Solid Waste and/or cleaning activities of that particular area. It may be that there is lot of cleaning to be done one day and another day iesser cleaning to be done, but that does not deviate from the principle that Pourakarmika is concerned with cleaning activities and not office duties. Merely because the Corporation makes use of Pourakarmikas appointed by it to carry out administrative

and/or office functions, the same does not take away the role and responsibilities of Pourakarmikas.

13.8. Whether the Corporation could use the Pourakarmikas to carry out an administrative and official function is not a matter which this Court is required to go into in the present matter. But it is something that the Corporation has to consider taking into consideration the deficiency in the number of Pourakarmikas working in the Corporation as also the need to maintain safety and hygiene within the jurisdiction of the Corporation.

13.9. **Hence I answer point No.3 by holding that the work carried out by the workmen is more or less identical to that carried out by regular workmen of the petitioner Corporation. The Union**

having shown from the agreement the nature of work performed by them, the Corporation has not placed any materiai on record which would indicate that the work carried out by the permanent employees is different than that carried out by the members of the Respondent No.1 Union.

14. **Answer to point number 4.** ***Whether the workmen would be entitled for absorption and regularization of their services?***

14.1. The contention of Sri R. Subramanya, learned counsel for the petitioner and Sri. Arun Shyam, learned AAG for respondents No.4 and 5 is that, no absorption or regularisation can be ordered by this Court. In this regard they have relied upon the decision in the ***State Of Karnataka Vs. Uma Devi (supra)***[1], ***Steel Authority of***

India Ltd., Vs. National Union Waterfront Workers(supra)[2] and ***Bharat Heavy Electricals Ltd., Vs. Mahendra Prasad Jakhmola(supra)***[3].

14.2. Relying on the said decisions, it is submitted that the Courts cannot impinge upon the executive power and order for absorption and/or for regularisation of services.

14.3. The Tribunal having considered that no notification having been produced under Section 12 of the CLRA, there is no proof of the contract having been accepted being a genuine one and as such came to a conclusion that it was a sham transaction which was violative of the constitutional guarantee under Article 39(d) of the Constitution of India and had directed regularisation of the services by their

absorption as also payment of wages from the time that they have been engaged on par with the regular Pourakarmikas engaged by the Corporation.

14.4. The Hon'ble Apex Court in ***Uma Devi's*** case(supra)[1] has held that, unless a scheme for absorption of casual or daily rated employees is framed and accepted, the court of law is to exhibit judicial restraint and leave it to the state to decide what is to be done, since there are financial implications.

14.5. Again In ***Steel Authority of India (SAIL)*** case (supra)[2], it was held that there is no automatic absorption of contract labour on issuance of notification under Section 10(1) of the CLRA.

14.6. In ***Ilmo Devi's*** case(supra)[7] the Hon'ble Apex Court has held that, the workers

having been engaged on temporary basis to discharge certain duties and recruitment rules having been violated and the workmen not having been appointed to a sanctioned post, cannot seek for regularization.

14.7. In ***Daya Lal***'s case (supra)[8], it has been held that an order of regularization by a Court would permit back door entry appointing persons contrary to the constitutional scheme.

14.8. In ***Indian drugs and pharmaceutical***'s case (supra)[10]**,** it is said that there is no right vested in any daily wager to seek regularisation and regularisation can only be done in accordance with rules and not dehors the rules and court cannot create a post where none exists.

14.9. These being the important decisions on this issue, merely because the workmen have been working for a long period of time, they would not as a matter of right, be entitled for regularisation.

14.10. Both Sri. R. Subramanya, learned counsel for the petitioner and Sri. Arun Shyam, learned Addl. Advocate General, contended that;

14.10.1. In terms of notification issued by the Urban Development Authority dated 13.01.2011, the recruitment of Group-D employees and Pourakarmikas would be made by the Deputy Commissioner and as such, the Commissioner of the Corporation cannot be directed to regularize the Pourakarmikas.

14.10.2. They also submit that, in terms of notification dated 04.12.2017 issued by the Government of Karnataka, Urban Development Department, under the Karnataka Municipalities Recruitment of Pourakarmikas in CMS, TMS, TPs, Special Rules, 2017, there are certain eligibility criteria and restriction which have been prescribed, which the members of respondent No.1 Union do not comply.

14.10.3. It is on that basis they contend that, if any order is passed by this Court, the same would be contrary to the aforesaid notification. The notification which has been issued by the Public Departments of the

Government of Karnataka are for the purpose of administrative convenience and methodology of working, in this case the methodology of recruitment.

14.11. The mere fact that it is the Deputy Commissioner who has been vested with the right to recruit cannot take away the right of regularization and/or equal pay for equal work on account of the Commissioner of the Corporation entering into agreements with private contractors for contractual labour. If that be so, even those contracts would have had been entered into by the Deputy Commissioner.

14.12. Be that as may, irrespective of whether the contracts are entered into by the Deputy Commissioner or Commissioner of the

Corporation, I am of the considered opinion that the State cannot take up these kind of technical objections to the detriment of the substantial rights of the citizens of the Country. The State cannot take umbrage under these technicalities to deny the benefit to the members of the first respondent Union or the like.

14.13. In the present case, the facts are little different. In as much as even as per the submission made by Sri. R. Subramanya, learned counsel appearing for the Corporation, the State Government has directed that the Municipal Corporation to appoint one Pourakarmika for every 700 citizens in the Corporation. According to the Corporation, the population coming within the Corporation is 3,55,058. That would

mean that Corporation had to employ about 507 Pourakarmikas.

14.14. In the written statement which have been filed, it has been categorically averred that sanctioned strength in terms of Cadre and Recruitment Rules of Pourakarmikas in the Corporation is 254 and as such, 254 Pourakarmikas can be recruited.

14.15. This I find to be anomalous in that, if 507 Pourakarmikas are required, then the Cadre and Recruitment Rules should also sanction 507 Pourakarmikas. Sanction of 254 is nearly half of the required Pourakarmikas. It is for this reason Sri.Subramanya submitted that 253 Pourakarmikas not being sanctioned, service of contract employees under the contractors are being engaged.

14.16. In the said circumstances. it is merely because the sanction has not been provided that the contract labour is used. However, it is clear that there is a requirement of 507 Pourakarmikas which ought to have been sanctioned by the State.

14.17. Even as regards the 254 sanctioned strength, Sri.R. Subramnya on enquiry, had submitted that the working strength is only 107 and 147 posts are lying vacant. This is ostensibly for the reason of sufficient applications for the posts reserved from Ex-servicemen, Category-I, Category-2A, Category-2B, handicapped etc., were not received.

14.18. Thus, the status as per the submissions made is that, 507 Pourakarmikas are required, 254 posts are sanctioned, out of

which only 117 are working. This breakup would clearly give the reasons why the cities in our Country are not maintained in a clean manner. The 'Swachh Bharat Abhiyan' requires that sufficient number of Pourakarmikas, who are involved in such cleaning activities are employed. There being a guideline by the State Government itself that there has to be one Pourakarmika for 700 citizens, considering that each family has 5 members, the same would amount to one Pourakarmika for nearly 150 families/households. For one Pourakarmika to collect all the Municipal Solid Waste, vegetable waste, household waste, etc., to keep the roads and surroundings clean, would require him/her to work for sufficiently long period of time.

14.19. Be that as it may, the government itself has come up with a calculation of one Pourakarmika is required for 700 citizens. It was therefore required that sufficient number of posts as per the said direction was to be sanctioned and recruitment to be held for such posts. Once sanctioned posts increases the number of persons who can apply for different categories would also increase. Thereby probably resulting in enough and more number of applications being received for all the posts.

14.20. In the above background, when there are 147 posts which are already lying vacant out of the sanctioned posts, the engagement of contractors to provide labour in terms of Pourakarmikas to discharge the functions which would have normally been discharged

by paurakarmikas regularly employed, in my considered opinion would not attract the embargo and/or the gravities expressed by the Hon'ble Apex Court in ***Umadevi's*** case(supra)[1], ***SAIL's*** case(supra)[2], ***Daya Lal's*** case(supra)[8], ***Ilmo Devi's*** case (supra)[7] etc.,.

14.21. The fact situation here being completely different, the contractors being engaged for more than 20 years and continue to be engaged, since the Reference in the present matter itself was made in the year 2002 and now we are in the year 2022 indicates that, the work being perennial in nature, the Corporation is in requirement of Pourakarmikas to discharge its functions. The sanctioned post not having been filled and the required posts not having been

sanctioned, it is for the Corporation to write to the Government seeking for exemption, if any, available and permission to fill up the vacant posts with the persons who have applied and are qualified even though they may be of different category. Merely because the persons of a particular category for whom the posts have been reserved do not apply despite repeated notifications, the said posts cannot be left vacant in perpetuity resulting in the present situation.

14.22. Therefore, apart from the reasons given by the Tribunal, I am of the considered opinion that in the present case the requirement of Pourakarmikas being established, the sanctioned posts being vacant and the requirement being in excess of the sanctioned posts, necessary steps would

have to be taken by the government for regularisation of the services of the members of the first respondent Union.

15. ***Answer to Point No.5: Whether the workmen would be entitled to the same benefits as that provided to the regular employees based on the concept of equal pay for equal work?***

15.1. The contention of Sri. T. S. Anataram, learned counsel, is that the Pourakarmikas who are employed by the Corporation and the members of the first respondent Union would discharge the work of Pourakarmikas on contract basis, perform the similar functions, discharge the same obligations and the obligations vested with the Corporation has been transferred to the contractor. Thus, he submits that the work being carried out by the Contract Labour as also Labour engaged by the Corporation

performing similar duties, they are entitled to equal pay for equal work and non-payment of such amounts results in violation of Article 14 of the Constitution of India.

15.2. In that regard he relies the decision of the this Court in ***The Management of National Aerospace Laboratories***' case(supra)[13] and decision of Hon'ble Apex Court in ***Uma Devi's*** case(supra)[1] and ***Vinod Kumar's*** case (supra)[14].

15.3. In ***National Aerospace Laboratories'*** case (supra)[13], this Court held that, when the employee had employed the workmen for sufficient period of time and had allocated the specific work for each of the employees, it could not, on the basis of defence of contract labour, make payment of differential amounts and therefore directed the

employer to make payment on the basis of equal pay for equal work.

15.4. The reference made to Para 53 by Sri.Anantram is an exception created in ***Uma Devi's*** case (supra)[1] where workmen have been engaged for 10 years or more to discharge the work to be so discharged by qualified workmen duly sanctioned vacant post. In the present case, the workmen who are members of the first respondent Union are discharging the same work which would have been discharged by workmen if at all recruited towards sanctioned posts as referred to answering point number 4 (supra).

15.5. Thus the sanctioned post being vacant and recruitment not having been made, which led to Contract Labour being engaged, I am

of the considered opinion that, in terms of the exception created in ***Umadevi's*** case (supra)[1] itself, the Corporation is required to set in motion a process to regularise the workmen towards the sanctioned posts by following the duly applicable law and procedure, if required, by taking permission and/or exemption from the Government.

15.6. In ***Vinod Kumar's*** case (supra)[14], the Hon'ble Apex Court took note of the subterfuge being adopted by the employers to deny rights of workmen by engaging the workmen through a Contractor. The Hon'ble Apex Court held that, the circumstances indicate that the workmen are not employees of contractor per se, but subterfuge was used both to both

regularization and for equal pay for equal work would be ordered.

15.7. In the present case, as can be seen, though the contractors have changed the workmen remained the same and in fact, as per Sri.Anantharam, the said workmen having discharged the very same functions for large number of years, many of them for decades.

15.8. From the analysis of the agreement(supra), it is seen that the Corporation directed for bank accounts to be opened in nationalised bank near the Corporation and on enquiry as to why this was done, it was submitted that this was to enable payment of moneys. Many a time the payments were done through the Contractor and many a time the payments were made directly by the Corporation to the workmen. If that was so, I am of the

considered opinion that payments being made albeit on few occasions to the workmen directly by the Corporation would constitute employer-employee relationship. The Contractors have also deposed that they did not receive the amounts due and many a time they could not pay the workmen which resulted in friction. It appears that, to avoid the situation payments were sometimes made by the Corporation directly to the workmen.

15.9. Be that as it may, the contractor per se does not appear to have any particular expertise in handling Municipal Solid Waste (MSW) and/or to discharge the obligations under the contract except having participated and succeeded in the bidding process there is no particular qualification on the part of the

Contractor. Thus it is on the regular instructions being given by the Administrative Officers of the Corporation that the workmen have been working and discharging their duties.

15.10. Even on this ground I am of the considered opinion that the employer-employee relationship is established and it is only the subterfuge which has been used by the Corporation to engage the workmen on contract basis so as so make lesser payment.

15.11. In that background I am of the considered opinion that the subterfuge cannot be allowed to work and the same would be violative of Article 14 of the Constitution of India. The workmen engaged through contractor would have to be paid same

emoluments as that paid to the regular employees based on the concept of equal pay for equal work as held by the Tribunal

16. ***Answer to point No.6:Whether the order passed by the Tribunal suffers from any legal infirmities requiring interference at the hands of this Court.***

16.1. Having considered the arguments advanced by the Sri. R. Subramanya, Sri. Arun Shyam, learned AAG and Sri. Anantharam and having answered the above points, I am of the considered opinion that the order passed by the Tribunal does not suffer from any legal infirmities requiring interference at the hands of this Court.

17. ***Answer to point No.6: What Order?***

17.1. The above writ petition stands dismissed.

17.2. The time for compliance fixed by the Tribunal is extended by a period of 3 months from the

date of receipt of a copy of this order by the respondents. Petitioner is permitted to apply for and serve a copy of the order on the Respondents.

17.3. The respondents shall act on the print out of the uploaded copy of this order, without insisting on a certified copy. In the event of there being any doubt, the QR code on the judgment could be scanned to visit the Website of the High Court to verify the authenticity thereof.

Sd/-
JUDGE

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List No.: 19 Sl No.: 1