

(2013) 05 DEL CK 0530

In the Delhi High Court

Case No : Writ Petition (C.) No. 3702 of 2011

Indian Railway Finance Corp. Ltd.

APPELLANT

Vs

Rajendra Prasad and Others

RESPONDENT

Date of Decision : 01-05-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227, 32

Contract Labour (Regulation and Abolition) Act, 1970 — Section 10, 10(1)

Industrial Disputes Act, 1947 — Section 10, 10(4A), 11A, 2(ra), 20

Citation : (2013) 3 LLN 606

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Kailash Vasdev and Mr. Sunil K. Jain, for the Appellant; R.K. Saini, Gautam Awasthi and Mr. Ayush Chaudhary, for the Respondent

Judgement

Vipin Sanghi, J.—The petitioner-Indian Railway Finance Corporation Ltd. ("IRFC" or "Corporation"-for short) has preferred the present writ petition under Article 226 of the Constitution of India to assail the industrial Award dated 27.10.2010 passed by the Central Government Industrial Tribunal No. 1, Karkardooma Courts Complex, Delhi, (for short, "CGIT") in I.D. No. 1/2009. By the impugned Award, the CGIT has upheld the claim of the respondent/workman Shri Rajinder Prasad. The CGIT has awarded the relief of regularization in service, besides reinstatement in service with continuity, and 20% back wages from the date of his termination till the date of his reinstatement. According to the respondent, he was terminated by the petitioner on 30.01.2003. The petitioner is engaged in the business of collecting funds from the general public through fixed term bonds, and provides the fund so collected for procurement of rolling stock of the Indian Railways. The petitioner engages share transfer agents and retainer of accounts, who render services to it. Share transfer agents work as internal auditor, while the retainer of accounts handles accounts, registers and documents of the corporation. In 1996, M/s. Allied Computers Techniques Private Ltd. ("Allied" for short) was working as the share transfer agent with the corporation. During that

time, services of the respondent Rajinder Prasad were engaged-in January, 1996. The appointment, ostensibly, was made by the share transfer agent, i.e., Allied. With the passage of time, the share transfer agent was changed. M/s. Karvy Consultants Pvt. Ltd. ("Karvy" for short) and Shiva Associates were subsequently appointed as share transfer agents successively. However, the services of the respondent-Rajinder Prasad with the petitioner continued. He continued to serve the petitioner-though being shown as the employee of Karvy, and thereafter of Shiv Associates.

2. The respondent made representations for absorption in services of the petitioner corporation. However, his grievance was not redressed. He preferred a Writ Petition being WP (C) No. 1771/1999 before this Court to seek the said relief. The share transfer agents were also impleaded as party respondents. The writ petition was disposed of on 29.01.2003, while granting liberty to the respondent to approach the authorities under the Industrial Disputes Act, 1947 (the Act) for redressal of his grievance. Accordingly, he raised his claim before the Conciliation Officer, Govt. of NCT of Delhi. It transpired that the appropriate Government was the Central Government. He then filed his statement of claim before the Conciliation Officer (Central) raising his claims for absorption within the corporation and for regularization. The conciliation effort failed. Accordingly, the Central Government i.e. the appropriate Government referred the dispute to the CGIT for adjudication vide order dated 07.09.2007, with the following terms of reference:

Whether it is fact that Shri Rajinder Kumar is a workman of the Indian Railway Finance Corporation (IRFC)? If so, whether the action of the management in not regularizing the services of the applicant by the management is proper and justified? If not, what relief he is entitled to?

3. The issue, whether the respondent was the employee of the petitioner-Corporation, or that of the share transfer agent, squarely fell for determination by the CGIT.

4. The claim of the respondent was that he was the employee of the petitioner-corporation. He was employed as an Assistant in the Bond Section of the Corporation. He placed on record various correspondences exchanged by him with the officers of the Corporation to demonstrate his direct employment with the Corporation, i.e., the direct supervision of the corporation over his service. He claimed that with a view to circumvent their legal obligations towards him, the petitioner corporation did not directly appoint, and did not make direct payment to him. His salary was paid through the share transfer agent. The salary paid to the respondent was being disbursed by the petitioner to the share transfer agent. He claimed that this position continued till September, 1998. In October, 1998, the petitioner-corporation appointed Karvy as its share transfer agent in place of Allied and in May, 2000 Shiv Associates was appointed as the Share Transfer Agent. As aforesaid, the services of the respondent were, however, continued with the petitioner.

5. The petitioner contested the said claim. It was claimed that the petitioner had no privity of contract with the respondent, since he was never appointed by the petitioner. He was the employee of the share transfer agent. He was receiving his salary from the share transfer agent. It was also pleaded that the Corporation being an instrumentality of the State has to follow a transparent procedure for recruitment. The respondent had not claimed that he had applied for a job with the petitioner corporation, or that he was recruited for the post of Assistant in the Bond Transfer Section with the petitioner.

6. The parties led their respective evidence. From the Award itself it is seen that exhaustive evidence was led by the parties on the said issue. The respondent-claimant examined seven witnesses. The petitioner led the evidence of one witness. After considering the evidence, the Tribunal reached the conclusion that the respondent-claimant worked as an employee of the petitioner corporation, i.e., that the relationship of employer and employee existed between the claimant and the corporation. The Corporation took the services of the claimant and routed his salary through the successive share transfer agents, which modus operandi was deprecated by law. The Tribunal also took note of the fact that the services of the respondent were continued by virtue of the order dated 24.03.1999 passed in the aforesaid writ petition of the respondent. The said order continued to operate till 29.01.2003 when his writ petition was disposed of, as aforesaid. Thereafter, the petitioner did not allow the respondent to work by preventing his entry into its premises. Consequently, the termination of the respondent's services took place with effect from 30.01.2003.

7. The Tribunal then proceeded to hold the termination of the respondent's service to be in breach of Section 25F of the Act. The Tribunal also takes note of the respondent's claim that one Shri M. Kannon, who was claimed to be junior to the respondent, was retained in service while discontinuing the services of the respondent-thereby breaching Section 25G of the Act. The services of M. Kannon were regularized, whereas those of the respondent were discontinued. On this basis, the Tribunal not only directed the reinstatement with 20% back wages and continuity of service, but also the regularization of the respondent.

8. The submission of learned Senior Counsel for the petitioner, firstly, is that the finding that the respondent was the employee of the petitioner is contrary to the record. He submits that not an iota of evidence was led by the respondent to show that he was directly appointed by the petitioner or that he ever received his salary directly from the petitioner. No appointment letter was ever issued by the petitioner in favour of the respondent appointing him as an Assistant in the bond section of the petitioner. Learned counsel for the petitioner has sought to make elaborate submission to dislodge the finding of fact as aforesaid recorded by the Tribunal.

9. Mr. Vasudev sought to place reliance on another award passed by the same Tribunal in the case of Smt. Jaspreet Kaur, who also claimed that she had similarly been engaged through a contractor and she too had laid a claim for

reinstatement and regularization against the petitioner herein. Mr. Vasudev submits that the Tribunal has taken a diametrically opposite view in the said award, even though the fact situation was the same.

10. Mr. Vasudev next submits that the reference in the present case was limited to the issue whether the respondent was a workman of the petitioner, and if so, whether the action of the management in not regularizing the services of the respondent by the management is proper & justified. He submits that the issue of reinstatement in service was never referred to the Tribunal. He submits that the Tribunal derives its jurisdiction from the reference and cannot go beyond the same. Consequently, the relief of reinstatement in service awarded by the Tribunal is without jurisdiction. In this regard, he places reliance on paragraph 23 of the decision of the Supreme Court in *Mukand Ltd. Vs. Mukand Staff and Officers' Association*, . The Supreme Court in this decision has held that the Tribunal being a creature of the reference cannot adjudicate himself the disputes not within its jurisdiction by the order of reference. In the facts of that case the Tribunal could not adjudicate the issue of salaries of the employees who were the workman under the Act nor could it have covered such employees by its award. It was observed that even assuming, without admitting, that the reference covered the non-workman, the Tribunal, acting within the jurisdiction under the Act, could not have adjudicated the dispute insofar as it related to the non-workman. On the same aspect, he has also placed reliance on the decision of the Supreme Court in *State Bank of Bikaner and Jaipur Vs. Om Prakash Sharma*,

11. Mr. Vasudev next submitted that the Tribunal has placed reliance on the judgment of the Supreme Court in *U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others*, so as to negate the petitioner's reliance on the decision of the Supreme Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, . He submits that the decision in *Pooran Chandra Pandey (supra)* has been expressly overruled in the subsequent decision of the Supreme Court in *Official Liquidator Vs. Dayanand and Others*, in paragraph 92, which reads as follows:

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judge Bench in *U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others*, should be read as obiter and the same should neither be treated as binding by the High Courts, tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.

12. Mr. Saini appearing on behalf of the respondent has placed reliance on the evidence led before the Tribunal to show that the respondent was under the direct control and supervision of the petitioner while working in the Bond Section. His attendance was being marked and maintained by the petitioner and he was receiving instructions from, and corresponding with the officers of the petitioner. He has also referred to evidence to show that it was the petitioner who was instructing the share transfer agent with regard to the amount to be paid to the

respondent as salary. He has referred to a proposal dated 20.02.1997, wherein the petitioner-keeping in view the embargo imposed by the Cabinet Committee on Accommodation, proposed to engage two officials of the level of Section Officers, one Clerk-cum-Typist and one Messenger from an agency, on the same lines of M/s. Indrani & Company Chartered Accountants, who were looking after the finance and account activities, and Allied. Mr. Saini submits that the engagement of the respondent was also made on the same basis. He has also relied upon the communication dated 20.02.1997 issued by Allied to the petitioner, wherein they stated that they are not acting as transfer agent of any of the bond series, and that all the minutes/computer records are maintained by the petitioner at its premises. He submits that the respondent was working in the Bond Section. When Allied was not managing the bond series as transfer agents, there was no question of the respondent being posted in the Bond Section, had he been an employee of Allied, and serving on their behalf in the petitioner's organization. He further submits that the petitioner has not been able to point out from the impugned award any perversity, or consideration of irrelevant evidence, or non-consideration of relevant evidence, by the Tribunal.

13. Mr. Saini points out that the petitioner took advantage of the disposal of the writ petition 1771/1999 on 29.01.2003, and from the very next day, did not permit the respondent to render his services. He submits that before the Labour Commissioner-on 13.10.2005, the respondent had raised his grievance with regard to his illegal removal from service. Even in the statement of claim the respondent had specifically raised his grievance with regard to his illegal removal from service in paragraphs 13 & 14 of the statement of claim. He submits that the relief of regularization is much larger than the relief of reinstatement in service. Consequently, the Tribunal did not go beyond its jurisdiction in directing the reinstatement of the respondent in service and also his regularization in service.

14. In support of his submission that the relief of regularization could be granted by the Tribunal and that the decision in Umadevi (supra) did not come in the way of grant of such relief by the Industrial Tribunal, Mr. Saini has placed reliance, firstly, on the decision of a Division Bench of this Court in Indian Oil Corporation Ltd. Vs. Union of India (UOI) and Others, and the decision of the Supreme Court in Maharashtra State Road Transport Corporation and Another Vs. Casteribe Rajya P. Karmchari Sanghatana,

15. He submits that the Supreme Court in Steel Authority of India Ltd. and Others etc. etc. Vs. National Union Water Front Workers and Others etc. etc., , has held that where an industrial dispute is brought before the Industrial Adjudicator and it is found that the labour contract is a mere rose/camouflage to avoid compliance with various beneficial legislations-so as to deprive all the workers the benefit thereunder, the so-called contract labour will have to be treated as employees of the principal employer, who shall be directed to be regularized in the service of the establishment concerned, subject to the

conditions as may be specified by it for the said purpose. The relevant extract in paragraph 125 of the judgment in Steel Authority of India (supra), including sub-para (5) of para-125 on which the respondent places reliance reads as follows:

125. The upshot of the above discussion is outlined thus:

(1) x x x

(2) x x x

(3) Neither Section 10 of the CLRA Act nor any other provision in the Act, whether expressly or by necessary implication, provides for automatic absorption of contract labour on issuing a notification by the appropriate Government under sub-section (1) of Section 10, prohibiting employment of contract labour, in any process, operation or other work in any establishment. Consequently the principal employer cannot be required to order absorption of the contract labour working in the establishment concerned.

(4) x x x

(5) On issuance of prohibition notification u/s 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 with 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 regularize the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose in the light of para 6 hereunder.

(6) If the contract is found to be genuine and prohibition notification u/s 10(1) of the CLRA Act in respect of the establishment concerned has been issued by the appropriate Government, prohibiting employment of contract labour in any process, operation or other work of any establishment and where in such process, operation or other work of the establishment the principal employer intends to employ regular workmen, he shall give preference to the erstwhile contract labour, if otherwise found suitable and, if necessary, by relaxing the condition as to maximum age appropriately, taking into consideration the age of the workers at the time of their initial employment by the contractor and also relaxing the condition as to academic qualifications other than technical qualifications.

(emphasis supplied)

16. Mr. Saini submits that the Act invests the Industrial Adjudicator with the

power to grant regularization in appropriate cases, where it finds the labour contract to be a mere rouse or sham. He has referred to the provisions contained in Sections 7, 7-A, 10 and 11-A of the Act in support of the submissions.

17. It is well settled that while undertaking judicial review of an order passed by a Quasi-Judicial Tribunal, this Court does not sit as an appellate forum. This Court is primarily concerned with the aspect of compliance of principles of natural justice and procedure by the Tribunal. This Court also examines submissions relating to lack of jurisdiction, and obvious and patent perversities in the orders that may be passed by the Tribunal.

18. The submissions of the petitioner on the merits have no force. The Tribunal has, in depth, examined the entire evidence led before it. It cannot be said that the findings returned by the Tribunal are perverse, or that they are not based on the evidence led before the Tribunal. They are supported by substantial and germane evidence brought on record. It also cannot be said that any relevant evidence has been overlooked by the Tribunal, or irrelevant evidence has been taken into consideration. The manner in which the Tribunal has proceeded to discuss the evidence itself demonstrates due application of mind to the evidence before the Tribunal. Even if it could be said that another plausible view exists that, by itself, is not sufficient for this Court to dislodge the view taken by the Tribunal, since the said view is also a plausible view.

19. I consider it appropriate to produce a brief summary of the manner in which the Tribunal has examined the evidence led before it, which show due application of mind and consideration of the relevant evidence by the Tribunal.

? On the aspect of whether employer-employee relationship existed, the claimant examined Shri K.R. Menon, Vice President of Karvy who were working as registrar and share transfer agent for the Corporation since 19th August, 1998. He unfolded that as per Ex. WW1/1, which was an agreement entered into between the Petitioner and Karvy to undertake the petitioner's work, there was no stipulation regarding the share transfer agent employing any person with the Petitioner. The Tribunal observed that the petitioner was unable to make the witness concede that the claimant was an employee of Karvy.

? The next witness examined by the claimant was Shri Shakul Puri, Vice President of Karvy. The said witness had filed an affidavit in the High Court in the writ petition filed by the respondent, i.e., W.P. (C) No. 1771/1999, wherein Karvy was a party. The Tribunal having perused this affidavit, being WW 2/1, observed that the Petitioner had requested Shri Puri to route the salary bill of 9 employees employed by the Petitioner through its record around October 1998, prior to which the salary was being routed through Allied-the erstwhile share transfer agent. In his cross examination, Shri Puri denied that the claimant was employed with Karvy. He, however, admitted that the claimant was being paid by Karvy in pursuance of a friendly arrangement to route the salary and that such money was reimbursed by the petitioner to Karvy.

? The claimant placed on record Ex. WW 5/1 to WW5/4 which were records of payments made by the petitioner directly to him. He also placed on record a copy of the salary list of the staff of the petitioner containing his name for the month of June and July 1999, the same bearing the signature of the accountant of Karvy and the manager, as well as Company Secretary, of the petitioner. These were exhibited as Ex. WW5/14 and WW5/15. Attendance sheets for the months of July 97, August 97 and June 98 were exhibited by him as Ex. WW 5/9 to WW5/11 to show that he regularly worked for the petitioner. He also deposed during his cross examination that he was interviewed by C.S. Verma, Group Manager of the petitioner on 21.01.1996. Reliance was also placed by him on Ex WW 6/16 to WW5/23 to show that he was an employee of the petitioner.

? Shri Harish Chand Sondh, deputy manager of the petitioner corporation who retired in 2002, admitted that the claimant was appointed in the petitioner corporation by Shri C.S. Verma who interviewed the claimant. The said witness, during the course of his cross examination also deposed that the claimant was working in the Bond Section under him and that the wages of the claimant were being paid by Karvy.

? The Tribunal observed that on a perusal of the facts unfolded by the witnesses of the claimant as well as Shri Radhakrishnan, witness of the petitioner corporation, it came to light that there was an arrangement between the corporation and share transfer agents to route the salary of 9 employees employed by the petitioner corporation through the share transfer agents. The Tribunal also observed that as deposed by Shri Menon, WW1, the share transfer agents were not to employ any person for rendering of services to the petitioner. As per the affidavit filed by Shri Puri, WW2, in the High Court, it was evident that nine employees appointed by the petitioner corporation were shown as employees of the share transfer agents.

? The Tribunal observed that the findings recorded above were reaffirmed from documents such as Ex. WW 5/1 to Ex. WW 5/4 which were cheques issued by the petitioner in favour of the claimant. The Tribunal observed that no explanation was offered as to why the petitioner issued these cheques to the claimant and in respect of what services, whereas the claimant asserted that these cheques were issued to him because he was an employee of the corporation. Furthermore, it was observed that Ex. WW 5/6 was a letter received by the petitioner from Surinder Kaur Bajaj wherein she expressed her annoyance for the time taken in transfer of bonds. The said letter was marked to the claimant by Shri Ajmani who enquired from the claimant as to what the problem with transfer of bonds was.

? Similarly, Shri Piyush Aggarwal seeking redemption of 100 bonds invited the attention of the claimant in the fax Ex. WW 6/7. Ex WW 5/17 was the list of employees for release of arrears from April to November 1996 and salary for the month of February. Ex. WW5/19 was the document issued by Shri S.K. Ajmani commanding Shri Harish Chand Sondhi and the claimant to visit the office of

Karvy on 19th of September, 1998 to assess progress of computerization of 3rd series data. Ex. WW4/13 was the document wherein the claimant dealt with the bills presented by M/s. Shiva Associate for payment. He recommended that the payment of Rs. 5650/- may be made to M/s. Shiva Associates. His recommendations were dealt with by Shri S.K. Ajmani and by Shri C.S. Verma. Ex. WW4/15, Ex. WW4/17, Ex. WW4/21 and Ex. WW4/22 were documents dealt with by the officers of the Corporation after recommendations recorded by the claimant. Ex. WW4/25 was a note sheet presented by Shri Rajinder Singh to his superiors and ultimately it was dealt with by Shri S.K. Ajmani and General Manager (bonds) and Company Secretary.

? A perusal of all these documents led the Tribunal to conclude that the claimant was an employee with the petitioner. Furthermore, the unequivocal testimony of Shri Harish Chand Sondhi to the effect that the claimant worked under him and was interviewed and appointed by Shri C.S. Verma led to the conclusion that employer-employee relationship between the claimant and corporation existed.

20. Pertinently, the respondent continued to work with the petitioner despite the repeated changes of the Share Transfer Agents from time to time between January 1996 and January 2003. It is not the petitioner's case that the successive contractors posted any other workman to serve in place of the respondent at any point of time during this period, or that the respondent was posted by any of the said Share Transfer Agents to work at any other location(s). The petitioner gave instructions to the Share Transfer Agents with regard to the salary payable to the respondent and work was taken from him in the Bond Section, which did not fall within the purview of the Share Transfer Agent. All these aspects are a clear pointer to the fact that the contract between the petitioner and the Share Transfer Agent qua the respondents service was a sham, and the respondent was, in fact, an employee of the petitioner and not the Share Transfer Agents.

21. In the light of the aforesaid, I find no infirmity in the finding returned by the Tribunal to the effect that the respondent was the direct employee of the petitioner.

22. The next question to be considered is with regard to the jurisdiction of the Tribunal to deal with the issue of reinstatement in service of the respondent workman. The reference made by the appropriate government stands extracted hereinabove. The said reference was made on 07.09.2007. By then the respondent's services were terminated, i.e., w.e.f. 30.01.2003. Though the respondent sought to raise the said dispute in his claim filed before the Labour Commissioner, in the reference that came to be made, a specific reference in relation to the reinstatement was not explicitly made. However, the reference deals with the aspect of grant of regularization in service to the respondent. The question of regularization in service can possibly arise only in a case where the employee is serving the employer. The relief of regularization is a much larger relief than that of reinstatement. Therefore, in my view, the reference of

regularization took within its fold the reference of the validity of the termination and the relief of reinstatement. Even otherwise, the issue of wrongful termination and reinstatement could have been raised by the respondent by filing a direct petition u/s 10(4A). The mere absence to invoke the said provision in its claim statement could not take away the right of the respondent to directly raise the dispute about his termination and to claim reinstatement and, correspondingly, the jurisdiction of the Industrial Tribunal to deal with such a claim. Consequently, I am of the view that the issue of termination, and grant of the relief of reinstatement in service to the respondent, cannot be said to be beyond the jurisdiction of Industrial Tribunal.

23. Turning to the submissions of the parties with regard to grant of the relief of regularization, in my view, the award of the Tribunal directing the respondent's regularization in service cannot be sustained in view of the decision of the Supreme Court in *Umadevi* (supra).

24. The decision of Supreme Court in *Steel Authority of India* (supra) was rendered at a time when it was common place to direct regularization in service of persons appointed de-hors the recruitment rules, and without due regard to transparency required to be maintained in the matter of public employment. The petitioner is an instrumentality of the State and could not have taken in its employment-either directly or through a bogus contractor, any person without resorting to a transparent process of recruitment, wherein the recruitment rules, if any, were followed and equal opportunity was afforded to all eligible persons to participate in the said selection process. The observations made in the aforesaid extract from paragraph 125 in *Steel Authority of India* (supra), therefore, need to be read in the light of the subsequent decision in *Umadevi* (supra). Even otherwise, the decision in *Steel Authority of India Limited* (supra) cannot be read or understood to mean that in every case where the contract between the principal employer and the labour contractor qua the labour contract is found to be a sham or a ruse, in every such case, the Court shall direct automatic absorption of the contract labour into the service of the principal employer. This is clearly evident from a perusal of para 125(3) of the decision in *Steel Authority of India Limited* (supra) as extracted above. Even in sub-para (5) of para 125 of the aforesaid decision, on a careful reading along with sub para (6), does not mean that upon the contract in question being found to be a mere ruse/camouflage to evade compliance with various beneficial legislations so as to deprive the workers of the benefit thereunder, the so-called contract labour would be treated as employees of the principal employer and shall be entitled to a direction of regularization of their services in the establishment of the principal employer. Pertinently, the Supreme Court was careful in qualifying the said guideline in sub para (5) by observing that the same is "subject to conditions as may be specified by it for that purpose in the light of para 6 hereunder". A perusal of sub para (6) of para 125 shows that the condition regarding suitability and technical qualifications were held to be not negotiable/relaxable for grant of regularization.

25. The observations of the Division Bench in Indian Oil Corporation (supra) in paragraphs 13 and 14, relied upon by the respondent, read as follows:

13. According to Mr. V.N. Kaura, in the light of the decision in Umadevi's case, the earlier decision in Steel Authority of India's case would be confined only to private sector and contract workers in State or public sector undertaking will not be entitled to claim regularization even if the contract was sham and bogus and as such the order of reference ought to be set aside.

14. We are afraid that the contention is completely injudicious. In Umadevi's case the Court was concerned with public employment and Court's power under Articles 226 /227 to grant relief of regularization. In Umadevi's case the Court was not concerned with the provisions of the Contract Labour (Regulation and Abolition) Act and the power of the industrial adjudicator to grant appropriate relief in a reference under the Industrial Disputes Act. The case does not even deal with the judgment in the Steel Authority of India's case. Both operate in different fields and the decision in Umadevi's case does not deal with the question of reference and forum where rights will have to be adjudicated. Umadevi's case is concerned with relief and the industrial adjudicator is required to examine the said question. The respondent workmen cannot be denied reference at this stage. As to what relief will be granted is uncertain and depends upon the number of facts. This position is also clear from at least three Supreme Court judgments, which are discussed hereinafter.

[Emphasis supplied]

26. In my view, the said decision is of no avail to the respondent for a couple of reasons. Firstly, the Division Bench did not grant the relief of regularization or permanency to the workman. The Division Bench left it to the Industrial Adjudicator to grant the relief, depending on the facts of the case. In paragraphs 17 of the judgment, the Division Bench observed: "It is thus clear that it is for the Industrial Adjudicator to decide whether the relief of regularization can be granted to the workman and if not, what further relief can be granted to the workman" (emphasis supplied). Therefore, the issue whether the relief of regularization could be granted, or not, was left to be decided by the Industrial Adjudicator and the Division Bench did not grant the said relief of its own. Secondly, the Supreme Court in U.P. Power Corporation Ltd. and Another Vs. Bijli Mazdoor Sangh and Others, specifically dealt with the issue whether an Industrial Adjudicator is bound by the decision in Umadevi (supra). The Supreme Court rejected the contention of the respondent in that case that in Umadevi (supra), the power of the Industrial Adjudicator were not under consideration. It was contended before the Supreme Court that there is a difference between a claim raised in a Civil Suit or a Writ Petition, and one adjudicated by the Industrial Adjudicator. It was argued that the Labour Court can alter the terms existing in the contract to maintain industrial peace. Rejecting these submissions, the Supreme Court observed as follows:

6. It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in Umadevi (3) case. But the foundational logic in Umadevi (3) case is based on Article 14 of the Constitution of India. Though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularization, the same cannot be viewed differently.

7. The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in *VZ Secretary, State of Karnataka and Others Vs. Umadevi and Others*, was not rendered is really of no consequence. There cannot be a case for regularization without there being employee-employer relationship. As noted above the concept of regularization is clearly linked with Article 14 of the Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, about the regularization.

27. I may note that the fact situation referred to in paragraph 45 of *Umadevi (supra)* was the one where temporary or casual appointments were made and continued for years together. The Supreme Court held that in such cases, the employees do not have the right to claim regularization, as they accepted their appointments being fully aware of the nature of their appointments. Paragraph 45 of the judgment in *Umadevi (supra)* reads as follows:

45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain--not at arm's length--since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of

employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

28. Unfortunately, the earlier decision of the Supreme Court in U.P. Power Corporation Ltd. (supra) was not brought to the notice of the Division Bench when it made the aforesaid observations in Indian Oil Corporation (supra). The view of the Division Bench appears to run contrary to that of the Supreme Court. Since the Supreme Court has held that Uma Devi (supra) applies to individual adjudication just as it applies to other civil or writ adjudication, I am bound to follow the said view in preference to the view of the Division Bench in Indian Oil Corporation (supra), particularly, since the Division Bench has not taken note of the view of the Supreme Court.

29. The decision in Maharashtra State Road Transport Corporation (supra) is also of no avail to the respondent. That was a decision which, inter-alia, dealt with the issue whether a direction given to the Maharashtra State Road Transport Corporation by the Industrial Court (which was confirmed by the High Court), of giving status, wages and all other benefits of permanency-as applicable to the post of cleaners, to the complainants, was justified. The Trade Union in question preferred complaints before the Industrial Court, Bombay alleging that the appellant Corporation had indulged in unfair labour practice under Items, 5, 6, 9 & 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act 1971 (MRTU and PULP Act). The appellant Corporation placed reliance on Umadevi (supra), as well as the General Standing Order No. 503 dated 19.06.1959 to assail the direction given by the Industrial Tribunal to grant the status, wages and other benefits of permanency, as applicable to posts of Cleaners, to the complainants. It was argued that the grant of permanent status to all the complainants, who were working as casual workers/daily wagers, and whose appointments were made without following the procedure prescribed in General Standing Order No. 503, on non-existent posts is unsustainable in law, in view of the decision of the Supreme Court in Umadevi (supra).

30. The Supreme Court examined the provisions contained in the MRTU & PULP Act. I consider it appropriate to reproduce the following extract from this decision:

14. We deem it appropriate to notice the relevant provisions of the MRTU and PULP Act first. But before we do that it is important to notice that the MRTU and PULP Act was enacted with an object to provide for the recognition of trade unions for facilitating collective bargaining for certain undertakings; to state their rights and obligations; to confer certain powers on unrecognized unions; to provide for declaring certain strikes and lockouts as illegal strikes and lockouts; to define and provide for the prevention of certain unfair labour practices; to constitute courts (as independent machinery) for carrying out the purposes of according recognition to trade unions and for enforcing the provisions relating to unfair labour practices; and to provide for matters connected with the purposes aforesaid.

x x x

17. Section 28 reads thus:

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

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

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

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

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

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

complainant and the person complained against.

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

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

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

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

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

30. Powers of Industrial and Labour Courts.--

(1) Where a court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order--

(a) declare that an unfair labour practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice;

(b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act;

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

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

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

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

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

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

(Emphasis supplied)

31. Thereafter, the Supreme Court extensively referred to various passages from the Constitution Bench decision in *Uma Devi* (supra). In para 29 of the judgment, the Supreme Court quoted para 53 of the decision in *Uma Devi* (supra) which reads as follows:

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore and Another Vs. S.V. Narayanappa, R.N. Nanjundappa Vs. T. Thimmiah and Another, B.N. Nagarajan and Others Vs. State of Karnataka and Others*, 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 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 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 regularization, 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 regularizing or making permanent, those not duly appointed as per the constitutional scheme.

32. The Supreme Court then considers the question whether the provisions of the MRTU and PULP Act have been denuded of their statutory status by the decision of the Constitution Bench in *Uma Devi* (supra), and answers that it is not so. Paras 31 to 34 of the Supreme Court judgment are relevant and reads as

follows:

31. The purpose and object of the MRTU and PULP Act, inter alia, is to define and provide for prevention of certain unfair labour practices as listed in Schedules II, III and IV. The MRTU and PULP Act empowers the Industrial and Labour Courts to decide that the person named in the complaint has engaged in or is engaged in unfair labour practice and if the unfair labour practice is proved, to declare that an unfair labour practice has been engaged in or is being engaged in by that person and direct such person to cease and desist from such unfair labour practice and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the court be necessary to effectuate the policy of the Act.

32. The power given to the Industrial and Labour Courts u/s 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer.

33. The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in *Umadevi (3) Secretary, State of Karnataka and Others Vs. Umadevi and Others*,]. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in *Umadevi (3) Secretary, State of Karnataka and Others Vs. Umadevi and Others*,]. Unfair labour practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts u/s 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.

34. It is true that *The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc.*, arising out of industrial adjudication has been considered in *Umadevi (3) Secretary, State of Karnataka and Others Vs. Umadevi and Others*,] and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, leaves no manner of doubt that what this Court was concerned in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees

have been engaged as contractual, temporary or casual workers not based on proper selection as recognized by the rules or procedure and yet orders of their regularization and conferring them status of permanency have been passed.

[Emphasis supplied]

33. After taking note of the decision of the Supreme Court in *Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd.*, wherein it had been held that courts cannot create a post where none exists, as also the decision to the same effect in *VZ Divisional Manager, Aravali Golf Club and Another Vs. Chander Hass and Another*, the Supreme Court observed as follows:

Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the courts.

34. The Supreme Court observed in the facts of the case before it that the posts of cleaners in the corporation were in existence. For this purpose, it extracts the relevant finding from the industrial award. In para 44, the Supreme Court observed that in view of the findings recorded by the Industrial Court, Thane as well as by the Industrial Court, Bombay, it could be safely held that the posts of cleaners exist in the corporation. The argument of the corporation that even if the finding was returned with regard to the indulgence of an unfair labour practice in employing the complainants as casual on piece rate basis, the only direction that could have been given to the corporation was to cease and desist from indulging in such unfair labour practice, and no direction of according permanency to these employees could have been given, was rejected by observing that the said argument ignores and overlooks "the specific power given to the Industrial/Labour Court u/s 30(1)(b) to take affirmative action against the erring employer" which is wide amplitude and comprehends within its fold a direction to the employer to accord permanency to the employees affected by such unfair labour practice. On this basis, the Supreme Court held that the direction to grant permanency to the complainants on the post of cleaners is justified and warrants no interference.

35. From the above discussion, it becomes clear that it was in the light of the specific powers vested in the Court by virtue of section 30(1)(b) of the MRTU and PULP Act, that the direction to grant permanency to the complainants in the posts of cleaners was held to be justified, since vacancies were found to exist against which they could be granted permanency. The words used in section 30(1)(b) to the effect "where a court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order direct all such persons to take such affirmative action, as may in the opinion of the Court be necessary to effectuate the policy of the Act",

were interpreted to be wide enough to empower the industrial tribunal to grant permanency or regularization to the complainants upon it being established that the employer was resorting to an unfair labour practice of engaging persons as casual on piece rate basis. The Supreme Court, being conscious of its earlier decisions in *Indian Drugs and Pharmaceuticals Ltd.* (supra) and *Aravali Golf Club* (supra), also examined whether the vacancies in the post of cleaners were available against which the complainants could be made permanent, and only after finding that vacancies existed, upheld the direction given by the industrial tribunal in this regard.

36. The said decision, in my view, would have no application to a case covered by the Act, as the Act does not contain a provision *pari materia* with Section 30(1)(b) of the MRTU and PULP Act. Section 7 of the Act provides that the appropriate government may constitute one or more labour courts for the adjudication of industrial disputes "relating to any matters specified in the second schedule". Section 7A empowers the appropriate government to constitute one or more industrial tribunals for adjudication of industrial disputes "relating to any matter, whether specified in the Second Schedule or the Third Schedule... .." Section 10 empowers the appropriate government to make a reference of an industrial dispute, *inter alia*, to the Labour Court if the dispute is in respect of a matter specified in the Second Schedule, or to an industrial tribunal if it is a matter specified in the Second Schedule or the Third Schedule. The jurisdiction of the Labour Court and the industrial tribunal is, therefore, limited to determination of disputes which fall within their respective defined areas. The Labour Courts and Industrial Tribunals cannot travel beyond their jurisdictions. The matters within the jurisdiction of the Labour Courts as delineated in the Second Schedule are the following:

1. The propriety or legality of an order passed by an employer under the standing orders;
2. The application and interpretation of standing orders;
3. Discharge or dismissal of workmen including reinstatement of, or grant of relief to, workmen wrongfully dismissed;
4. Withdrawal of any customary concession or privilege;
5. Illegality or otherwise of a strike or lock-out; and
6. All matters other than those specified in the Third Schedule.

37. The matters which fall within the jurisdiction of the industrial tribunals are those specified in the Second Schedule and additionally in the Third Schedule. The Third Schedule reads as follows:

1. Wages, including the period and mode of payment;
2. Compensatory and other allowances;

3. Hours of work and rest intervals;
4. Leave with wages and holidays;
5. Bonus, profit sharing, provident fund and gratuity;
6. Shift working otherwise than in accordance with standing orders;
7. Classification by grades;
8. Rules of discipline;
9. Rationalization;
10. Retrenchment of workmen and closure of establishment; and
11. Any other matter that may be prescribed.

38. Unfair Labour Practices have been defined in the Act in Section 2(ra) to mean any of the practices specified in the Fifth Schedule. Unlike the jurisdiction vested by the MRTU and PULP Act to deal with issues regarding adoption of unfair labour practice, neither the Labour Court nor the Industrial Tribunal is vested with jurisdiction to deal with matters concerning unfair labour practices.

39. In the present case, the dispute has been adjudicated by the industrial tribunal. Therefore, the jurisdiction of the tribunal was confined to determination of the disputes referred to it which fell within the second and third schedule of the Act. The Act does not contain any provision similar to section 30(1)(b) of the MRTU and PULP Act, which was interpreted by the Supreme Court to be wide enough to empower it to direct grant of permanency/regularization to the complainants by the industrial tribunal.

40. The submission of the respondent also is that the workman, who was employed through a contractor, under a contract which is found to be a camouflage or a ruse, stands on a higher footing, than those who may have been directly engaged on casual basis as badli, and continued for a long period of time. This submission has no merit. The engagement of casual workers as badli workers on daily wages for long period of time itself may amount to an unfair labour practice, just like the engagement of contract labour through a sham contract. There is no reason to make a distinction between the two kinds of workers when it comes to grant of relief of regularization. The former cannot be regularized in view of the exposition of the law by the Supreme Court in Uma Devi (supra). There is no reason why the same logic would not apply in the case of contract labour who are engaged through sham contracts. Just as the casual/badli workers are aware of the fact that they are not being regularly recruited and engaged, and therefore cannot entertain any legitimate expectation of being regularized, similarly, the contract labour engaged through contractors also cannot entertain the legitimate expectation that they would be absorbed and directly engaged by the employer and also regularized on a future date.

41. I also find merit in the petitioner's submission that the tribunal while

granting the relief of regularization, has relied upon Pooran Chandra Pandey (supra) which expressly stands overruled by the Supreme Court in the subsequent decision in Official Liquidator (supra). In para 92 of the said decision, the Supreme Court held that the comments and observations made by the two Judge Bench in Pooran Chandra Pandey (supra) should be read as obiter and the same should neither be treated as binding by the High Courts, tribunals and other judicial foras, nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench in Umadevi (supra).

42. In the present case, the respondent did not lead any evidence to show that any regular vacancies existed in the petitioner corporation in the post of Assistant in the bond section. This aspect has not been adverted to in the impugned award. Only on account of the fact that the services of Sh. Kannon-who had joined the management on 29.09.2000 i.e. after the respondent had started working for the management through a contractor had subsequently been regularized, was no basis for the tribunal to conclude that the services of the respondent could justifiably be regularized. Sh. Kannon was not similarly placed as the respondent. The services of Sh. Kannon were directly engaged by the petitioner corporation and he was not engaged through a contractor. He was working as a daily wager since 29.09.2000 as a care taker and was granted temporary status on a vacant post till it was filled up-vide office order No. 3/2003 dated 09.06.2003. It would, therefore, be seen that the appointment of Sh. Kannon was against a regular vacancy directly by the petitioner, whereas the services of the respondent were engaged through a contractor against no specified vacancy. The reason for engagement of the respondent through a contractor has been pointed out by the respondent itself, by placing reliance on a note dated 20.02.1997 made by the Deputy Manager. For all the aforesaid reasons, the writ petition is partly allowed to the extent that the direction for grant of regularization in service to the respondent is set aside, while otherwise maintaining the impugned award. Petition stands disposed of on the aforesaid terms. The respondent shall be entitled to costs quantified at Rs. 10,000/-.