

(2008) 03 BOM CK 0063

In the Bombay High Court

Case No : LPA No. 143 of 2005 in WP No. 2647 of 2003, LPA No. 164 of 2005 in WP No. 2644 of 2003, LPA No. 165 of 2005 in WP No. 2653 of 2003, LPA No. 167 of 2005 in WP No. 2875 of 2003, LPA No. 170 of 2005 in WP No. 2649 of 2003, LPA No. 175 of 2005 in WP No. 2651

Mahindra and Mahindra Ltd. and Others	APPELLANT
Vs	
Mr. Avinash D. Kamble and Others Etc. Etc.	RESPONDENT

Date of Decision : 03-03-2008

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 3(18), 35, 35(5), 40, 78
Bombay Sales Tax Act, 1959 — Section 33(6), 35
Constitution of India, 1950 — Article 112(3), 14, 16, 202(3), 21
Contract Act, 1872 — Section 23
Industrial Disputes Act, 1947 — Section 2
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 21(2), 27, 42, 7

Citation : (2008) 3 ALLMR 1 : (2008) 2 BomCR 497 : (2008) 110 BOMLR 805 : (2008) 4 MhLj 125

Hon'ble Judges : R.C. Chavan, J;K.J. Rohee, J

Bench : Division Bench

Advocate : R.B. Puranik, for the Appellant; S.D. Thakur and T.R. Kankale and A.M. Deshpande, AGPs, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Chavan, J.—Being aggrieved by the judgment dated 29-4-2005 rendered by a learned Single Judge dismissing the writ petitions filed by the appellant-employer and partially allowing the petitions by the respondent-employees, the employer has preferred these appeals.

2. The facts, in the context of which these proceedings have arisen and about which there is not much dispute, are as under:

3. Appellant M/s. Mahindra & Mahindra manufactures tractors, jeeps, auto components, etc., in its plant including one at Nagpur according to market needs.

For this purpose, apart from its regular work force, it also engages a large number of temporary workmen, who are employed and re-employed by issuing orders of appointments from time to time for fixed periods. These employees claimed to have completed 240 days of such employment and, therefore, demanded regularization and permanency. They complained that they were given deliberate breaks and other temporaries were employed in their place to prevent workmen so employed from completing 240 days of work in a calender year. They approached the Industrial Court by filing several complaints of unfair labour practice under Items 5, 6, 9 and 10 of Schedule IV to Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the MRTU & PULP Act).

4. The learned Member, Industrial Court, rejected two complaints by in all five employees on whose behalf no evidence was tendered. He allowed the complaints of the rest of the employees partly. By his judgment dated 19-3-2003, the learned Member held that the complainants had proved unfair labour practice under Item 9 of Schedule IV by establishing contravention of Clauses 4C, 4D and 4E of Model Standing Orders applicable to the Industry under the Bombay Industrial Relations Act. He, however, held that the complainants had failed to prove unfair labour practice under Items 5 and 10 of Schedule IV. As to unfair labour practice under Item 6, the learned Member held that the claims were not tenable as hit by Sub-section (2) of Section 21 of MRTU & PULP Act. The learned Member directed the employer to desist from indulging in unfair labour practice under Item 9 and to confirm 149 complainants named in Schedule-B with effect from the dates of their complaints. He also directed the employer to prepare a waiting list of complainants named in Schedule-A to his judgment.

5. Aggrieved by this judgment, both the employer and employees filed respectively 42 and 36 writ petitions. While the workmen assailed the judgment insofar as it did not grant regularization from the date of completion of 240 days and held that unfair labour practice under Item 5 was not proved, the Management assailed the judgments insofar as it directed regularization of 149 employees. The Management had, however, regularized 146 of 149 employees excluding the three, who did not at all report for duty. These petitions were heard and disposed of by the learned Single Judge by his impugned judgment dated 29-4-2005.

6. By this elaborate judgment, the learned Judge upheld most of the conclusions drawn by the learned Member of the Industrial Court. The learned Single Judge further held that the workmen had also proved unfair labour practice under Item 5 of Schedule IV and that contradictory conclusions by the learned Member, Industrial Court, were not correct. The learned Single Judge maintained the date of regularization awarded by the learned Member, Industrial Court to be the date of complaints. He also directed the employer to extend regular pay scales on par with the scales offered to permanent employees to the workmen whose services

were so regularized.

7. Aggrieved thereby, the employer has filed these Letters Patent Appeals involving several employees. During the pendency of these appeals, on 12-1-2008 an agreement was signed between the Management and representatives of employees, whereby it was agreed to grant permanency to 105 workmen named in Annexure-A to the agreement in a period spread over January 2008 to October 2008. Several temporary workmen signed in token of acceptance of this agreement. The employees who had accepted the agreement dated 12-1-2008, and the employer have filed joint pursis in the concerned Letters Patent Appeals, whereby these appeals have been disposed of.

8. We have heard Shri R.B. Puranik, learned Counsel for the appellant-Management, and Shri S.D. Thakur, learned Counsel for the workmen, at length. Both the learned Counsel commented upon the impugned judgment almost clause by clause, lacing their comments with copious extracts from various, rather numerous, reported judgments, including a recent reiteration on the value of judicial precedent by the Apex Court in *Sarva Shramik Sanghatana (K.V), Mumbai Vs. State of Maharashtra and Others*, . Before we touch the issues and contentions raised, we may usefully reproduce below for ready reference paragraphs 14 to 17 of the aforesaid judgment to indicate the parameters that would be followed by us in considering the numerous judgments cited before us.

14. On the subject of precedents Lord Halsbury, L.C., said in *Quinn v. Leatham* ALL ER p.7G-1. Before discussing *Allen v. Flood* and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before.that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

We entirely agree with the above observations.

15. In *Ambica Quarry Works v. State of Gujarat* (vide SCC p. 221, para 18) this Court observed:

18. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.

16. In *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.* (vide SCC p. 130, para 59) this Court observed:

59. ...It is also well settled that a little difference in facts or additional facts may

make a lot of difference in the precedential value of a decision.

17. As held in *Bharat Petroleum Corporation Ltd. v. N.R. Vairamani* a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed (SCC pp. 584-85, paras 9-12)

9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the decision is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* AC at p.761, Lord Mac Dermott observed (All ER p.14C-D)

The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge....

10. In *Home Office v. Dorset Yacht Co. Ltd.* Lord Reid said,

Lord Atkin's speech...is not to be treated as if it were a statutory definition. It will require qualification in new circumstances." (ALL ER p. 297g)

Megarry, J. in *Shepherd Homes Ltd. v. Sandham* (No. 2), observed(All ER po.1274d)

One must not, of course, construe even a reserved judgment of even Russell, L.J. As if it were an act of Parliament;

And in *British Railways Board v. Herrington* Lord Morris said (All ER p. 761c)

There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

12. The following words of Lord Denning in the matter of applying precedents have become locus classicus: "Each case depends on its own facts and a close similarity between one case and Anr. is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should

avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

xxx xxx xxx

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.

(emphasis supplied)

9. We may also add limitations on the use of judicial precedent perceived by us. In England, from where we follow the Common Law tradition, there was not much of a statute law or codification in the past. Most of the legal principles, which later got codified or enacted in statute law evolved from judicial precedent and, therefore, it is said that common law developed "from precedent to precedent". Therefore, when a vacuum is left in a field by the absence of a governing statute, precedent would undoubtedly have a very important role to play. However, when the field is covered by a statute by a competent legislature, the role of judicial precedent would be obviously supportive and restricted. In areas where the statute is inadequate or does not provide for a situation, judicial precedent would have to be followed. Likewise, if there is a dispute about interpretation of statutory provisions and a precedent is readily available, it ought to be followed. However, in matters concerning appreciation of evidence and drawing factual conclusions, even by resorting to legal presumptions, there could be no precedent, because conclusions would have to be drawn by the adjudicator on the basis of his appreciation of evidence tendered. Likewise, in matters resting in the exercise of judicial discretion, there could be no precedent so long as the Judge is within the limits in which he can exercise his discretion.

10. With this caveat, we would proceed to examine the rival contentions, painstakingly amplified by both the learned Counsel. The first grievance of Shri Puranik, learned Counsel for the employer, was that the learned Single Judge had erred in concluding that it was proved that a set of temporaries were relieved and Anr. set engaged, though work was available. We may clarify that the learned Single Judge had in fact not entered the area of appreciation of evidence himself, though he had considered the arguments advanced with reference to the evidence which had been tendered before the Industrial Court. The learned Single Judge had not reached any conclusion diametrically opposed to those recorded by the learned Member, Industrial Court. After examining the conclusions reached, the learned Single Judge merely refined the manner in which the factual conclusions could be expressed.

11. Both the learned Counsel had read to us from the evidence of Shri Murli, who was examined on behalf of the employer and one Shri Rangari whose evidence

would be a typical example of evidence tendered on behalf of the workmen. This evidence, along with the relevant charts showing engagement of temporaries from time to time, would leave no doubt that through the mechanism of fixed time appointment, the employer used to relieve a temporary workman and engage another for the work which was available, either soon after the first workman was relieved or at times even in anticipation of such termination. Though the workman had not been able to establish that the employer had engaged two sets of temporaries employed alternatively, they have demonstrated that though the work was still available a temporary workman appointed for a fixed term was not re-employed or continued, but was given a break. Another temporary was appointed likewise for a fixed period and then again given a break.

12. Engaging two sets of temporaries alternatively would have been too obvious an attempt to circumvent the requirement to regularize the temporary workmen employed for a period of 240 days in a preceding calendar year. Therefore, the employer seems to have taken care to avoid such a gross attempt at violating legal requirements. The evidence of Shri Murli, and the chart showing number of permanent and temporary workmen employed, would all show that the workmen were relieved not for want of availability of work, but because the employer wanted to engage another temporary workmen for doing the same work.

13. Shri Puranik, learned Counsel for the appellant-employer, vehemently contended that such an inference could not be drawn from the evidence tendered and submitted that the temporaries fall in several categories like those working in the assembly section, plant mechanics, wiremen, painters, etc., and, therefore, it would have been necessary for the workmen to establish that upon discharge of workman of one category, another workman of the same category was engaged. In fact, this is the precise finding of fact recorded by the learned Member, Industrial Court and confirmed by the learned Single Judge. We see no reason to again demonstrate for the sake of satisfaction of Advocate Shri Puranik that the employer has indeed indulged in the practice of discharging a workman doing the same type of work for which another temporary workman was engaged, either in anticipation of the vacancy or soon thereafter. In any case, it would not be open to the employer to now contend that the work was not available after having entered into agreement with the employees' representative on 12-1-2008, whereby it has undertaken to grant permanency to 105 workmen. This has been done obviously because the work is available for those appointed temporarily and were relieved, not for want of work, but because the employer felt entitled to attempt to circumvent the 240-day rule, if it was legally permissible to do so, just like avoiding payment of taxes and not evading them.

14. Shri Puranik, learned Counsel for the employer, contended that there was nothing wrong in the employer appointing workmen for fixed periods on contractual basis, which appointments were voluntarily accepted by the

workmen. After having accepted such appointments, the workmen would not be heard to complain that any of their rights were trampled upon. He submitted that Section 2(oo)(bb) of the Industrial Disputes Act specifically recognizes appointments for a fixed period.

15. His learned adversary, Shri Thakur, for the workmen, rightly countered by submitting that it is not necessary to resort to Section 2(oo)(bb) of the Industrial Disputes Act for justifying a contractual appointment for a fixed term. Even in the absence of Section 2(oo)(bb), such an appointment could have been made. All that Section 2(oo)(bb) of the Industrial Disputes Act speaks of is that such appointment does not amount to retrenchment for the purpose of payment of retrenchment compensation and the other consequences of retrenchment prescribed in Chapter VA of the Industrial Disputes Act. It may be useful to quote the provision of Section 2(oo)(bb) of the Industrial Disputes Act for ready reference as under:

2. Definitions (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than a punishment inflicted by way of disciplinary action, but does not include-

(a) ...

(b) ...

(bb) termination of the service of the workman as a result of the non renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein;

It would be clear that the provision is intended only to exclude termination of employment as a consequence of expiry of contractual appointment, from the rigours of retrenchment. Shri Thakur contended that the grievance of workmen in the present case is not about the appointment orders issued or termination on expiry of term in the appointment order, but about the violation of Model Standing Orders, which mandate that such a temporary workman would have to be preferentially provided work and granted permanency in accordance with a waiting list of temporaries maintained, as and when the work becomes again available. As the discussion to follow would show, the grievance is indeed about granting permanency. It is, therefore, not necessary to discuss at length *ratione* of *Shailendra Nath Shukla v. Vice Chancellor* reported at 1987 LIC 1607, *Dilip Shirke v. Z.P. Yeotmal* reported at 1989 Mh.L.J. 794, *M.P. Bank Karmachari Sangh v. Syndicate Bank* reported at 1996 LIC 1161, on which Shri Thakur, learned Counsel for the workmen, placed reliance. Likewise, it is not necessary to consider whether the judgment in *Dilip Shirke v. Z.P. Yeotmal* reported at 1989 Mh.L.J. , was in fact impliedly overruled by the judgment in *M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another* , as observed in *Maharashtra State Electricity Board v. Suresh Vaidyanath Pagar and Anr.* reported at 1995 II CLR 1046, as contended

by Shri Puranik, learned Counsel for the appellant-employer. The judgments in Harmohinder Singh Vs. Kharga Canteen, Ambala Cantt., , and Prakash v. Punjab and Sind Bank reported at 2007 II CLR 172, which relate to effect of Section 2(oo)(bb) of the Industrial Disputes Act too are unhelpful to resolve the controversy. Shri Thakur, learned Counsel for the respondent-workmen, submitted that reliance by the learned Counsel for the appellant-employer on the judgments by the learned Single Judges in Pepsico India Holdings P. Ltd. v. Noshir Elavia and Anr. reported at 2002 I CLR 953, Abhyudaya Co-op. Bank v. S.L. Mehendale reported at 2003 I CLR 1025, Manoj v. Member, Industrial Court reported at 2004 II CLR 952, and Shekoba Auto Private Ltd. v. B.D. Hajare and Ors. reported at 2006 II CLR 216, is misplaced, since the question in those cases pertained to challenging termination under Item 1 of Schedule-IV, which was cognizable by the Labour Court u/s 7 of MRTU & PULP Act, and not by the Industrial Court. First, the complainants in the appeals at hand had not filed complaints when they were terminated, but during the spells of employment. Secondly, what is challenged in the matters at hand was not termination but not making the workmen permanent. Therefore, we find that these decisions of the learned Single Judges on which Shri Puranik, learned Counsel for the employer places reliance, are utterly unhelpful.

16. Attempt of Shri Puranik, learned Counsel for the employer, to assail complaints on the ground of delay, by relying on the judgment in MIDC v. Baban reported at 2003(1) Bom LC 55, in our view, was rightly repelled by the learned Single Judge, since the contention arises out of a misplaced focus on termination. That case pertained to delay in making grievances about seniority. Here, the occasion had not yet arisen, since no waiting list was maintained.

17. Implications of Section 2(oo)(bb) cannot be stretched beyond what it is meant for, namely providing that termination as a sequel to expiry of term of contractual appointment would not amount to retrenchment.

18. Advocate Shri Puranik for the employer placed reliance on the judgment of the Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , and Gangadhar Pillai v. Siemens Ltd. reported in (2007) 1 SCC 534. In Gangadhar Pillai v. Siemens Ltd., the employer used to engage temporary personnel in the categories of skilled, semi-skilled and unskilled workers on a temporary basis for the duration of project or site work, and on completion of the work, the services of the workman used to be terminated. The workman, whose case came up before the Apex Court was, however, employed almost on regular basis since 1978. After the services of the workman came to an end by the last spell of appointment till 10-5-2000, he filed a complaint complaining that the employer resorted to unfair labour practice under Item 6, Schedule IV to MRTU & PULP Act. In this context, when the matter reached the Supreme Court, the Court observed in paragraphs 23 and 24 of the judgment as under:

23. The question as to whether an employee had intermittently been engaged as casual or temporary for a number of years is essentially a question of fact. The

issue as to whether unfair labour practices had been resorted to by the employer or not must be judged from the entirety of the circumstances brought on record by the parties..

24. Only because an employee has been engaged as a casual or temporary employee or that he had been employed for a number of years, the same by itself may not lead to the conclusion that such appointment had been made with the object of depriving him of the status and privilege of a permanent employee. Unlike other statutes, the employer does not have any statutory liability to give permanent status to an employee on completion of a period specified therein. What is, therefore, necessary to be considered for drawing an inference in terms of the said provisions would be to consider the entire facts and circumstances of the case.

The learned Counsel for the employer, therefore, submitted that the appointment of an employee for a fixed period in itself is not against public policy and cannot be equated to an unfair labour practice.

19. This takes us to the next judgment on which Shri Puranik, learned Counsel for the appellant-employer, placed reliance. In *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, , a Constitution Bench of the Supreme Court was considering whether the workmen temporarily engaged on daily wages in Government Departments were entitled to have their services regularized, and in this context, the Court made the following observations:

36. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person 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 eyes open. It may be true that he is not in a position to bargain. not at arms 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.

38. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only

by following a proper procedure for selection and in concerned cases. In consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

39. ...The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

42. The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognize that an appointment to a post in Government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the

context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The Directive Principles of State Policy have also be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.

44. ...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 case 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 sub judice, 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.

It may be seen from the judgment that it is in fact not a bible for the concept of "hire and fire", which some enterprising employers want their advocates to attempt to establish in judicial proceedings.

20. Shri Thakur, learned Counsel for the workmen, submitted that inequity of bargaining power and accepting appointments on such terms as are offered as fait accompli has been recognized by the Apex Court as far back as in 1986 in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . Observations in paragraphs 89 and 100 of the said judgment may be usefully quoted as under (though the employees in that case were not workmen but officers, since the plight of the workmen will be worse still):

89. Should then our courts not advance with the times ? Should they still continue to cling to outmoded concepts and outworn ideologies ? Should we not adjust our thinking caps to match the fashion of the day ? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories ? Should the strong be permitted to push the weak to the wall ? Should they be allowed to ride roughshod over the weak ? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak ? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law

and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.

100. The Corporation is a large organization. It has offices in various parts of West Bengal, Bihar and Assam, as shown by the said Rules, and possibly in other States also. The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said Rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as Clause (i) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality of bargaining power. Rule 9(i) is a term of the contract between the Corporation and all its officers. If affects a large number of persons and it squarely falls within the principle

formulated by us above. Several statutory authorities have a clause similar to Rule 9(i) in their contracts of employment. As appears from the decided cases, the West Bengal State Electricity Board and Air India International have it. Several government companies apart from the Corporation (which is the first appellant before us) must be having it. There are 970 government companies with paid-up capital of Rs. 16,414.9 crores as stated in the written arguments submitted on behalf of the Union of India. The Government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void u/s 23 of the Indian Contract Act.

(emphasis supplied)

A jobless person in a shrinking job market has little or no choice but to accept what is offered to him. He does not thereby opt for negation of even the statutory protection, which may be available to him. The learned Counsel submitted that the observations of the Apex Court in Umadevi's case even regarding the inequality of bargaining power have to be read in the context of the facts of that case. He pointed out that the Apex Court had to apply a corrective to a situation, where by misapplying judicial precedent, the bureaucracy had contributed to a burgeoning work force in the Government, with a bulging pressure on the scarce finances of the State for developmental activities. Judicial precedent was hijacked for sanctifying back-door entries in public employment. In fact this was the refrain in the judgment in Umadevi. Umadevi was not intended to do away with such protections as may be statutorily available to the employees concerned, but only refused regularization, in the particular context of back door entries in public employment. Such is not the present case. Judicial precedent cannot be stretched beyond what it decides.

21. Public employment is regulated by financial allocation approved by the Legislature. The only way to by-pass restrictions placed in Finance Bill on expenditure to be incurred is via orders of the Court. Article 112(3)(f) and Article 202(3)(e) of the Constitution create a charge on consolidated fund of Union or State with sums required to satisfy the decrees and orders of the Courts. A section of executive would encourage irregular employment. These employees in turn would knock the door of the Courts and taking advantage of the prevailing climate of industrial atmosphere, got orders from the Courts to have their services regularized and made permanent, thus throwing an unanticipated burden of a permanent and recurring nature on the finances of the State. The judgment in Umadevi's case has put an end to these unscrupulous attempts to inflate wage bill on unproductive employment. It does not place public services at any premium as compared to employment in the private sector. Nor does it exempt employers in the Government from compliance with the requirements of

Industrial Labour Law. It would have been always open to such employer to resort to cutting the flak by axing the employees, who were surplus by retrenching them. But since relief in respect of such remedies was not questioned in Umadevi's case, the Apex Court has only stopped regularization and grant of permanency to such back door entrants in public service.

22. It has to be noticed that by making the right type of noise about the globalization, liberalization, etc., the bureaucracy and a segment of employers are trying to create an impression as if labour and industrial law has undergone a sea-change because of globalization or liberalization. Such arguments are pushed through enterprising members of the legal fraternity to secure a shift in the law through judicial pronouncements, possibly under the mistaken belief that judiciary would bite the bait, forgetting that changes in law of this magnitude are brought about by appropriate legislative instruments or subordinate legislation and not through speeches of Ministers or bureaucrats before Chambers of Commerce. No such change is seen to have been brought about by legislation in the law applicable in the present case. Even while talking of globalization or liberalization, these drummers of liberalization never take the trouble of pointing out as to which treaty obligation of India is sought to be invoked in order to justify a shift in the applicable law. To our mind, neither the United Nations nor the International Labour Organization have abdicated their concern in the well-being of the world citizen, for protecting the world citizen from exploitation. When the executive or legislature, who are the voice of people, are unwilling to usher changes in law, which would expose vulnerable segments of population, like labourers to exploitation by money power, it would improper to expect the judiciary, which has always aligned itself with the weak, the poor, the deprived, to align itself against the poor man. If the Legislature or the executive should so desire, they would undoubtedly bring in changes in law to bring it in tune with the assumed expectations of liberalization. There is no need to be "more executive minded than the executive. Therefore, judgment in Umadevi's case cannot be read to have brought about any revolutionary change in law. It only corrected aberrations which had crept in due misapplication of judicial precedent.

23. To revert to the issue raised by the appellant, suffice it to say that there is no dispute about the appellant's right to make appointments for a fixed term on contractual basis. While terminations, as a sequel to the expiry of the period of appointment, have been excluded from the purview of retrenchments in view of Section 2(oo)(bb) of the Industrial Disputes Act, such appointments have not been totally immunized to the operation of all other laws regulating employee-employer relations.

24. Section 35 of the Bombay Industrial Relations Act, 1946, which provides for standing orders, which governing relationship between the employees and employer, reads as under: Settlement of Standing Orders by Commissioner of Labour

(1) Within six weeks from the date of the application of this Act to an industry,

every employer therein shall submit for approval to the Commissioner of labour in the prescribed manner draft standing orders regulating the relations between him and his employees with regard to the industrial matters mentioned in Schedule I:

Provided that where an undertaking in an industry is started after the application of this Act to such industry, the draft standing orders shall be submitted within six months of the starting of the undertaking.

(2) On receipt of the draft standing orders the Commissioner of Labour shall, after consulting in the prescribed manner the representatives of employees and employers and such other interests concerned in the industry and making such inquiry as he deems fit, settle the said standing orders.

(3) The Commissioner of Labour shall forward a copy of the standing orders so settled to the Registrar who shall within fifteen days of their receipt record them in the register kept for the purpose.

(4) Standing orders so settled shall come into operation from the date of their record in the register under Sub-section (3).

(5) Until standing orders in respect of an undertaking come into operation under the provisions of subsection (4), model standing orders, if any, notified in the Official Gazette by the State Government in respect of the industry shall apply to such undertaking.

Section 40 of the said Act prescribing that these standing orders shall be determinative of the relations between the employees and employer, is to the following effect:

40. Standing orders to be determinative

(1) Standing orders in respect of an employer and his employees settled under this Chapter and in operation, or where there are no such standing orders, model standing orders, if any, applicable under the provisions of Sub-section (5) of Section 35 shall be determinative of the relations between the employer and his employees in regard to all industrial matters specified in Schedule I. (2) Notwithstanding anything contained in Sub-section (1) the State Government may refer, or an employee or a representative union may apply in respect of any dispute of the nature referred to in Clause (a) of paragraph A of Section 78, to a Labour Court.

It is not disputed that the industry in question is governed by the provisions of the Bombay Industrial Relations Act.

25. It is also not in dispute that there are no certified standing orders governing the relations of the appellant and its workmen. Therefore, the Model Standing Orders, which have been framed and notified by the State, hold the field. The provisions of these Model Standing Orders notified on 11-7-1967 for the first time and amended from time to time, which are relevant for the purpose of the

present case, could be reproduced as under:

1(g) "Uninterrupted Service" includes service interrupted or account of any of the following reasons, namely:

- (i) ...
- (ii) ...
- (iii) ...
- (iv) ...
- (v) ...
- (vi) ...
- (vii) ...
- (viii) involuntary unemployment.

4C. Confirmation of badli or temporary operatives. A badli or temporary operative who has put in 190 days uninterrupted service in the aggregate in any undertaking of seasonal nature or 240 days uninterrupted service in the aggregate in any other undertaking during a period of preceding twelve calendar months shall be made permanent in that undertaking by an order in writing signed by the Manager or any person authorised in that behalf by the Manager irrespective of whether or not his name is on the muster roll of the undertaking throughout of the said twelve calendar months.

Explanation. For purposes of this clause any period of interrupted service, caused by cessation of work which is not due to any fault of the operative concerned shall not be counted for the purpose of computing 190 days or 240 days as the case may be for making a badli or temporary operative permanent.

4D. Waiting list--(1) The Manager shall maintain a waiting list of all temporary operatives whose services have been terminated on account of the completion of the work for which they were appointed or on account of the expiry of the period for which they were employed, containing the following particulars namely:

- (i) their names and addresses,
- (ii) the nature of work or occupation in which they were employed,
- (iii) the wages paid to them during employment, and
- (iv) the dates of termination of their services.

(2) Wherever any vacancies in the undertaking are required to be filled the persons included in the waiting list maintained under Sub-clause (1) shall be given preference after taking into consideration the nature of work done by them while in employment or the occupation in which they were employed and on the basis of their aggregate services in the undertaking prior to the termination of

their services.

4E. Persons in waiting list to be given priority.No person whose name is not entered in the waiting list maintained under Clause 4D shall be appointed in the undertaking as a badli or temporary operative, unless all persons included in that list have been provided with the employment in the undertaking.

26. It may be seen that even Clause 4D specifically provides for a situation where service of a workman is terminated on the expiry of the period for which such workman was employed, implying that such appointments could be made. Clause 4D, however, further requires the Management to maintain a waiting list containing the particulars prescribed in the said clause. Sub-clause (2) of Clause 4D specifically provides that whenever any vacancies in the undertaking are required to be filled in, the persons included in the waiting list shall be given preference after considering factors, such as nature of work, etc., and aggregate service rendered prior to termination. Clause 4E entails that a person whose name is not entered in the waiting list shall not be appointed as badli or temporary employee unless all the persons included in the list have been provided with the employment in the undertaking. The question of compliance with Clauses 4D and 4E by the appellant-employer would have to be examined first before going to implications of Clause 4C.

27. Shri Puranik, learned Counsel for the appellant, did not explicitly question applicability of these Standing Orders or even the necessity to comply with these Orders. In fact, he was at pains to explain as to how the employer had complied with requirements of Clause 4D(ii) of these Model Standing Orders by preparing a list on the basis of aggregate service rendered by the workmen. Yet, he contended that the Model Standing Orders are directory in nature and are not required to be mandatorily followed. However, he could not place for our perusal any authority for the proposition that the Model Standing Orders are not required to be mandatorily followed, possibly because no such authority could exist in face of explicit provisions of Sections 35 and 40 of the Bombay Industrial Relations Act. On the other hand, Shri Thakur, learned Counsel for the workmen, relied on a number of decisions to support his contention that the Model Standing Orders are mandatory in nature, like *Management Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. Vs. S.S. Railway Workers' Union*, , *The Management of Travancore Titanium Products Ltd. v. Their Workmen* 1970 II LLJ 1 , *Western India Match Company Ltd. Vs. Workmen*, , *Glaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court, Meerut and Others*, , *Mill Manager, Savatram Ramprasad Mills Vs. Industrial Court and Another*, , *D.K. Yadav Vs. J.M.A. Industries Ltd.*, , *New Hind Textile Mills Unit of N.T.C. Ltd. , Mumbai v. Rashtriya Mill Mazdoor Sangh* 2003 III CLR 332 , etc. In view of this, there can be no doubt that the Model Standing Orders quoted above have to be mandatorily followed by the appellant as well as the workmen.

28. The learned Counsel for the employer next submitted that Clause 31 of the Model Standing Orders applicable to operatives or Clause 29 of the said Orders

applicable to employees other than operate provides that nothing contained in the Model Standing Orders shall operate to the prejudice of any right under a contract of service and, therefore, saves the contractual fixed time appointments. There can be no doubt that these clauses would ensure that terms of contract of appointment would have to be respected. It, however, does not follow that the contract has to be read to mean that it overrides all other protections available to the workmen. In any case, it is not shown that the contract of service in these cases specifically or by implication excludes application of Clauses 4C to 4E of the Model Standing Orders.

29. This takes us to the question whether requirements of Clauses 4D and 4E of the Model Standing Orders have been complied with as claimed by the appellant. The appellant claims that it has arrayed the workmen in descending order of the aggregate service rendered by them in different spells and, therefore, the requirement of keeping a waiting list under Clause 4D is duly complied with. As rightly countered by his learned adversary, preparing a waiting list years after the process of appointments and terminations commenced and then arraying the workmen according to the aggregate service rendered would be violative of the requirement of Clause 4D of the Model Standing Orders. The clause requires that whenever the services of a workman are terminated, his name would be placed in a waiting list. Now this would imply that the moment the first temporary workman of a category is terminated, his name would appear first in the waiting list for that category, and, should work be available, he would have to be employed again before bringing any person whose name is not so entered, because there will be none whose services have been terminated except the first one. When there is a need to employ two workmen, a second temporary will join the list upon his termination and so on. Therefore, a situation where the first workman whose services were terminated, being out of employment, while someone else employed after him, is working, is not contemplated by Clauses 4D and 4E of the Model Standing Orders. As a natural corollary, the person whose services have been terminated first would have the maximum aggregate service if he were not denied the opportunity to be employed, in preference to others, as is mandated by Clause 4D and 4E of the Model Standing Orders. Therefore, the waiting list prepared by the appellant has rightly been assailed by the workmen.

30. We are told that this question of position of various workmen in the waiting list has already been agitated by appropriate proceedings before appropriate forum. Further, this would have an implication amongst the workmen themselves, rather than between the employees on one hand and the employer on the other. Therefore, we would stop at indicating that the waiting list has not been prepared in accordance with the requirements of Clauses 4D and 4E of the Model Standing Orders and observe that the waiting list would have to be prepared in accordance with the date of first termination of the workmen.

31. This question assumes importance because of a finding by the learned Single Judge that periods between termination of service and reemployment would have

to be counted as uninterrupted service being "involuntary unemployment" under Clause 1(g)(viii) of the Model Standing Orders. As to the interpretation of "uninterrupted service" under Clause 1(g) of the Model Standing Orders, Shri Puranik, learned Counsel for the appellant, submitted that Item (viii) thereof has to be read in the context of Items (i) to (vii), which precede it, by applying ejusdem generis rule referred to in *Management of Kairbetta Estate, Kotagiri Vs. Rajamanickam and Others*, . In that case, the Court was considering the provisions of Section 2(kkk) of the Industrial Disputes Act, which define "lay-off". It was argued that the expression "any other reason" mentioned in the definition need not be similar to the preceding reasons and could include any other reason. In this context, the Court observed that it was unable to see as to how the clause was inconsistent with the view that "any other reason" must be similar to the preceding reasons. We do not see as to how this judgment would help the appellant, since the expression used in Clause 1(g) of the Model Standing Orders is quite different from Section 2(kkk) of the Industrial Disputes Act. For the purpose of ready reference, it may be useful to reproduce Clause 2(kkk) of the Industrial Disputes Act as u/s 2(kkk) lay-off (with its grammatical variations and cognate expression) means the failure, refusal or inability of an employer on account of shortage of coal, power or raw materials or the accumulation of stocks or the break-down of machinery or on account of discontinuance or reduction of the supply of power to the industrial establishment for contravention of any provisions of the Bombay Electricity (Special Powers) Act, 1946, or of any orders or directions issued thereunder or natural calamity or for any other connected reason to give employment to a workman whose name is borne on the muster rolls of his industrial establishment and who has not been retrenched;

It may be seen that the definition begins with the words "lay-off means" as contrasted with the definition of "uninterrupted service", which reads "uninterrupted service includes". Further the use of expression "any of the following reasons" in Clause 1(g) of the Model Standing Orders clearly indicates the disjunctive nature of each of the clauses and their unrelatedness. Therefore, the argument that involuntary unemployment in Item (viii) therein has to be of the same genre as the first seven Items, has to be rejected.

32. The learned Counsel for the appellant next submitted that it could not be said that the workmen had been subjected to involuntary unemployment, on their term of appointment came to an end. As we have already indicated, had the waiting list been maintained as mandated by Clause 4D of the Model Standing Orders, and had priority been given to the person first fired, the question of this involuntary unemployment would not have arisen, since, if the work was available, the person ousted first would have been engaged first. The appellant has created a situation where it terminated the services of a senior temporary workman and engaged another in his place. Then it terminated the services of the second one and engaged a third one and so on. Thus the unenviable situation in which the employer may now find itself has been its own creation, for which it

must blame itself. It cannot be said that an employee whose services were terminated, though the work was available (for which another temporary was engaged) was out of employment of his volition. This period has been rightly computed by the learned Single Judge as involuntary unemployment for the purpose of counting uninterrupted service.

33. At the cost of repetition, we may point out that had the employer followed the healthy practice of keeping a waiting list according to Clause 4D and given priority as required under Clause 4E of the Model Standing Order, it would not have had so many persons to whose actual service, notional periods of involuntary unemployment were required to be added. Since it is appellant's own doing, it has to suffer the addition of periods of such involuntary unemployment for computation of 240 days of uninterrupted service for the purpose of confirmation under Clause 4C of the Model Standing Orders. In view of this, it has to be held that not confirming such temporary operatives on completion of 240 days, would amount to violation of Clause 4C of the Model Standing Orders.

34. The learned Counsel for the appellant next submitted that confirming a large number of workmen upon completion of 240 days of such notionally computed uninterrupted service would result in an inflated number of permanent employees. He submitted that such increase in the number of permanent workmen amounts to a change and though the change may be favourable to the workmen, still such a change cannot be effected without giving a notice of change. He, therefore, submitted that the directions issued by the learned Single Judge in fact amounted to directing the employer to effect an illegal change. He submitted that even a change in favour of the employees cannot be effected without giving a notice of change u/s 42(1) of the Bombay Industrial Relations Act, as held by this Court in *Co-op. Bank Employees Union v. Yeshwant Sahakari Bank Ltd. and Ors.* reported at 1992 II CLR 840. Shri Puranik, learned Counsel for the appellant, submitted that permanent or semi-permanent increase in the number of persons to be employed is covered by Item 2 of Schedule-II of the Bombay Industrial Relations Act and, therefore, a notice of change u/s 42 of the said Act would be necessary. Such a change would not be brought about by mere operation of the Model Standing Orders, because this Item is not covered by Section 40 of the Bombay Industrial Relations Act, which prescribes that the Model Standing Orders shall be determinative of matters specified in Schedule-I, whereas the question of permanent increase in number of workmen is covered in Schedule-II. The argument is indeed attractive. Yet, it would be necessary to harmoniously construe the provisions of the two Sections. When Section 40 prescribes that the Model Standing Orders shall be determinative of matters in Schedule-I, which provides for classification of employees like permanent and temporary, an increase in number of employees classified as permanent as a consequence of operation of Clause 4C of the Model Standing Orders would be an involuntary act resulting from operation of law and, therefore, beyond the changed procedure. Therefore, there is nothing wrong in the findings of the learned Single Judge and it cannot be said that the learned Single Judge's order

amounts to direction to effect an illegal change.

35. This takes us to the question as to whether the Industrial Court or the learned Single Judge could have held that the workmen had established unfair labour practice under Item 9, after having held that complaint in respect of Item 6 of Schedule-IV could not have been filed by the workmen. Section 27 of the MRTU & PULP Act prohibits employer and employees from indulging in unfair labour practice. Section 21 of the said Act provides that an employee shall not be allowed to appear or act in proceedings relating to unfair labour practices specified in Items 2 and 6 of Schedule-IV except through recognized union. Both the learned Single Judge as well as the learned Member, Industrial Court, have, therefore, refused to entertain complaints of employees in respect of Item 6. Item 6 of Schedule-IV, as also Items 5 and 9 may be usefully reproduced as under:

5. To show favouritism or partiality to one set of workers, regardless of merits.

6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.

9. Failure to implement award, settlement or agreement.

Failure to comply with the Model Standing Orders amounts to failure to implement award, settlement or agreement, as contemplated in Item 9 of Schedule-IV, as held by a Division Bench of this Court in para 73 of the judgment in R.P. Sawant v. Bajaj Auto reported at 2001 II CLR 982. The facts in that case are quite similar to those in case at hand. The question before the Court principally was, however, whether the provisions of MRTU & PULP Act stood impliedly repealed by the provisions of Chapter VC of the Industrial Disputes Act inserted by amendment in 1982. The Court held in paras 73 and 77 of the judgment as under:

73. The contention that the contravention of Model Standing Orders is not an unfair labour practice is also no longer *res integra* before this Court in view of the judgment of our High Court in *The Premier Automobiles Ltd. v. The Engineering Mazdoor Sabha and Ors.* 1976 ICR 206 (supra) and 1982 LIC 1759, where it has been clearly laid down that the word "agreement" used in Item 9 of Schedule IV is wide enough to contemplate a Standing Order which, though not an instrument arrived at by consensus, is directly imposed on parties by statute. The judgment of the Supreme Court in *S.G. Chemical & Dyes Trading Employees' Union v. S.G. Chemicals & Dyes Trading Ltd.* and Anr. 1986 I CLR 360, also supports this proposition. Notwithstanding the brave attempt on the part of Mr. Cama to distinguish the judgment of the Supreme Court in *S.G. Chemical* case (supra) on facts, we remain unimpressed. *S.G. Chemical* (supra) lays down that every contract of employment of necessity includes a term to give the benefit of all applicable statutory provisions and this would include a Model Standing Order of the nature of Model Standing Orders 4C and 4D also. Hence, contravention of

Model Standing Order was clearly an unfair labour practice within the meaning of Item 9 of Schedule IV in respect of which the Industrial Court was competent to grant relief.

77. We, therefore, find that:

(a) The Industrial Court was fully justified in holding that unfair labour practices under items 6 and 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act, 1971 had been proved against the employer on the basis of the material before it.

(b) The Industrial Court was fully justified in granting relief to the Complainants before it on these findings.

(c) The Industrial Court erred in holding that it had no jurisdiction to grant relief to 301 number of temporaries whose services had been terminated during the pendency of the Complainants.

(d) The learned Single Judge erred in interfering with the order of the Industrial Court in Writ Petition No. 5550 of 1998 and in not interfering with the order made in Writ Petition No. 5536 of 1998.

In view of this, it has to be held that unfair labour practice described in Item 9 was established.

36. Further by not maintaining waiting list as mandated by Clause 4D of the Model Standing Orders, the employer has indulged in favouritism by employing some temporaries, who came on the scene after temporaries earlier employed were discharged, and who had a right to be re-employed when work was available. Though the object of the employer was to hurt the interests of both such sets of temporaries, it would still amount to favouritism by denying employment to one, who was entitled to it, and providing it preferentially to another, who was not entitled at the relevant time. Therefore, factually unfair labour practice under Item 5 of Schedule-IV has also been rightly held to have been established.

37. Advocate Shri Puranik questioned whether after having held that complaint by the workmen in respect of unfair labour practice under Item 6 was not tenable, the learned Single Judge could have allowed the complaints by categorizing the same act as unfair labour practice under Item 9, which allegedly is akin to residuary or general clause. It was urged by Shri Puranik, learned Counsel for the appellant, that the principal grievance of the complainants against the employer was that the employer employed them as temporaries and continued them as such for years with the object of depriving them of the status and privileges of permanent employees. According to him, this grievance squarely fell under Item 6 of Schedule-IV.

38. Shri Puranik, learned Counsel for the appellant, submitted that when a situation is covered by a provision, which is specifically applicable, as also a general provision, the special provision would prevail over the general provision.

For this purpose, the learned Counsel for the appellant drew our attention to a judgment of the Supreme Court in *The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others*, . In that case, the Court was considering the provisions of Clauses 5 and 23 of the U.P. Government Order under the U.P. Industrial Disputes Act for enquiry into industrial disputes. In this context, the Court observed in paragraphs 9 and 10 of the judgment as under:

9. There will be complete harmony however if we hold instead that Clause 5(a) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of Clause 23. We reach the same result by 50 applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney- General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and Anr. to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty v. Solly* 1859 53 ER 1032 quoted in *Craies on Statute Law* at p. 206, 6th Edition) Romilly, M.R., mentioned the rule thus:

The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

10. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that Clause 5(a) has no application in a case where the special provisions of Clause 23 are applicable.

Similar observations were made by the Apex Court in paragraph 26 of the judgment in *State of Gujarat and Another Vs. Patel Ramjibhai Danabhai and Others*, , in respect of the provisions of Sections 33(6) and 35 of the Bombay Sales Tax Act. These observations may be usefully quoted as under:

26. ...*Generalia specialibus non derogant* is a cardinal principle of interpretation. It means that the general provisions must always yield to the special provisions. Construed in accordance with this fundamental principle, the special class of unregistered dealers covered by Section 33(6) must be taken to have been excluded from the purview of the general provisions in Section 35. Thus

considered, it is clear that the case of an unregistered dealer who evades tax by committing the double default specified in Section 33(6), action can be taken only under that Section and not u/s 35.

It is not necessary to reproduce similar observations in Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, , or The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another, , on which the learned Counsel for the appellant placed reliance. Shri Puranik, learned Counsel for the appellant, therefore, concluded that if recourse to complaint in respect of Item 6 of Schedule-IV was not open to the workmen, their complaints under general Item 9 of Schedule-IV could not have been entertained.

39. Shri Thakur, the learned Counsel for the respondent- employees, questioned whether it would open to categorize Item 6 as special provision or Item 9 as general provision applicable to the situation at hand. He submitted that in fact Item 6 is of a general nature where the practice of employing employees as badlis or casuals or temporaries and continuing them as such for years has been categorized as unfair labour practice, whereas Item 9 would cover specific infringement of award, settlement or agreement. He submitted that violation of Clauses 4C, D and E of the Model Standing Orders is a grievance of a specific nature and though the wider grievance under Item 6 could also remedy it, it could not be said that it was remediable only with reference to Item 6. He submitted that Item 6 merely enables a union of workmen to raise a demand, which would then be adjudicated upon, and it would be decided whether employing badlis for years together has actually occurred and whether it amounted to unfair labour practice, which was to be stopped. On the other hand, the grievance about breach of Model Standing Orders can be raised only under Item 9 and not under Item 6. He further submitted that if the representatives of the employees or their union do not raise the question of breach of Model Standing Order and also do not make a complaint of unfair labour practice under Item 6 of Schedule-IV, the workmen would suffer. He wondered as to whether the Model Standing Orders could be allowed to turn into sleeping orders, simply because a union fails to insist upon their implementation. He submitted that an individual workman has a right to insist upon compliance to the Model Standing Orders and such right cannot be negated by indulging in a jugglery of a special or general provision.

40. Shri Thakur, learned Counsel for the respondent-workmen, further submitted that the employer is all along trying to shift focus from not making the workmen permanent to permissibility of making contractual fixed time appointments. He submitted that the workmen had not challenged the manner in which they had been appointed and yet the whole stress of arguments advanced on behalf of the employer was to show as to how contractual appointments were permissible in law. Item 6, as already recounted, is about employing temporaries. Whether this practice is right or wrong, healthy or unhealthy is an independent issue, which

the workmen have not been permitted to raise, and rightly so. What the workmen have sought to raise is the question of not making them permanent in accordance with their seniority, as mandated by Clauses 4C to E of the Model Standing Orders, and thereby indulging in unfair labour practice under Items 5 and 9.

41. We have carefully considered the rival contentions and do find that while a union alone could be entitled to raise a general grievance about employing casuals or temporaries covered under Item 6 of Schedule-IV, individual employees undoubtedly have a right to complain about failure to implement award, settlement or agreement, which include a Model Standing Order. Though a grievance about breach of Model Standing Orders under Item 9 may achieve a similar result as a complaint about unfair labour practice under Item 6 of Schedule-IV, they are grievances of different kinds emanating from different rights. The judgments in *The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others*, or *State of Gujarat and Another Vs. Patel Ramjibhai Danabhai and Others*, or *Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others*, or *The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another*, , on which the learned Counsel for the appellant placed reliance, reiterate a well-known principle of construction, but this cannot be mechanically applied to the facts of the present case. We may recall judgment of the Supreme Court in *Sarva Shramik Sanghatana (K.V), Mumbai Vs. State of Maharashtra and Others*, , referred to in the earlier part of this judgment, where Lord Halsbury was quoted with approval, as under.

The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

Therefore, since the learned Counsel for the appellant could not show any authority for the proposition that Item 6 of Schedule-IV is a special provision, whereas Item 9 of the said Schedule is a general provision or that, therefore, Item 6 would prevail over Item 9, the proposition advanced by him has to be rejected.

42. We have also carefully considered the contention of Shri Thakur, learned Counsel for the workmen, that the employer has been unnecessarily trying to shift the focus from non-confirmation to appointment as temporaries in order to negate the claim of the workmen. This contention is well-founded and it is not at all necessary to have recourse to Item 6 of Schedule-IV to decide the grievances made out by the workmen, though they may have incidentally also complained of unfair labour practice under Item 6 when they first approached the Industrial Court. In view of this, we hold that the learned Single Judge rightly held in favour of the workmen that unfair labour practice under Items 5 and 9 of Schedule-IV to MRTU & PULP Act has been established.

43. Shri Puranik, learned Counsel for the appellant, next submitted that the learned Single Judge had transgressed the jurisdiction by directing payment of wages equal to other permanent employees. He submitted that the question of equal pay for equal work could not have been raised and such equal pay could not have been ordered to be paid by the learned Single Judge. The question whether the workmen were performing work of equal nature, is one of fact and the Industrial Court held on facts that no evidence was tendered to show equal nature of work. Relying on the judgments in *Randhir Singh Vs. Union of India (UOI) and Others*, , and *State of Haryana and Others Vs. Charanjit Singh and Others*, etc. etc., , the learned Counsel also submitted that the doctrine for equal pay for equal work emanates from Article 14 of the Constitution and is, therefore, unenforceable against a private enterprise, like the appellant. He submitted that the learned Single Judge was wrong in placing burden on the appellant as regards the claim about the duties and responsibilities being dissimilar.

44. His learned adversary submitted that Sub-section (18) of Section 3 of the Bombay Industrial Relations Act transcends even Article 14 of the Constitution when it mandates that "industrial matter" means any matter relating to employment, work, wages, hours of work, privileges, rights of duties of employers and employees, and the mode and terms and conditions of employment, and includes all questions of what is fair and right in relation to any industrial matter having regard to the interest of the person immediately concerned and of the community as a whole. He submitted that the duty to ensure fairness itself implies equal treatment to workmen discharging similar duties.

45. We have carefully considered the rival contentions. There can be no doubt that ordinarily an employee claiming parity in pay with another employee would have to establish similarity in the work and responsibilities. However, as rightly contended by Shri Thakur, learned Counsel for the workmen, it is not the case of the employer that temporaries are doing any different or lesser work or work of lesser responsibilities as compared to permanent employees. He submitted that while even temporaries are subjected to increased targets or output whenever there is a settlement between the union and the employer, the temporaries do not get the benefit of any wage revision. They merely bear the additional burden. Therefore, the learned Single Judge had rightly held that the workmen were entitled to parity in pay as well. We may also observe that the employer has not shown as to how the directions of the learned Single Judge are not correct by pointing out any actual difference in the work and responsibilities performed by temporaries vis-a-vis permanent employees of the same class. Therefore, even on this count, the conclusions drawn by the learned Single Judge cannot be faulted.

46. To sum up, we hold that the learned Single Judge rightly concluded that the complainants were entitled to be employed in preference to those not in the

waiting list when work was available and, therefore, they were rightly held to have been subjected to involuntary unemployment, which was to be counted in uninterrupted service. We also hold that the learned Single Judge rightly concluded that there was violation of Clauses 4C to 4E of the Model Standing Orders and consequently unfair labour practice as contemplated in Items 5 and 9 of Schedule-IV of MRTU & PULP Act. We hold that merely because the grievances of complainants could have been incidentally redressed under Item 6 also, it does not make Item 6 a special provision or Item 9 a general provision. But, on the other hand, Item 9 is a special provision, which alone could fully redress the grievances. We also hold that the learned Single Judge rightly directed that temporaries, who were to be made permanent, would have to be treated on par with permanent employees for all purposes, particularly wages.

47. In view of the foregoing reasons, we hold that the learned Single Judge rightly held in favour of the workmen and against the appellant while disposing of the petitions before him. The findings and order passed by the learned Single Judge do not call for any interference.

48. The appeals are, therefore, dismissed. Rule stands discharged.