

(2006) 09 BOM CK 0064
In the Bombay High Court
Case No : Writ Petition No. 164 of 2006

Mahindra and Mahindra Ltd.	Vs	APPELLANT
Shri Manoj Deshpande and Another		RESPONDENT

Date of Decision : 19-09-2006

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 28, 35
Industrial Disputes Act, 1947 — Section 11A
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 21, 21(2), 28, 32, 5

Citation : (2007) 1 ALLMR 800

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : R.B. Puranik, S.G. Zinjarde, A.V. Desai and S.P. Kolarkar, for the Appellant; M.V. Mohokar and P.A. Gedam and The learned Assistant Government Pleader, for the Respondent

Judgement

B.P. Dharmadhikari, J.—The respective respondent No. 1 in all these petitions filed separately 38 U.L.P. Complaints u/s 28 of Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971, (hereinafter referred to as MRTU Act) for declaration that their employer M/s. Mahindra and Mahindra has indulged in unfair labour practice falling under item 5 and item 9 of Schedule IV thereof by not making them permanent in service and by engaging the juniors and other employees in their place. These complaints have been registered as Complaint (ULPN) Nos. 416 to 438 of 2004, 440 to 451 & 454 of 2004, 22/2005 and 26/2005. The learned member of Industrial Court has disposed of all these complaints by common order on 25th November 2005 and while partly allowing the complaints, gave declaration that employer has indulged in unfair Labour practice under items 5 and 9 of Schedule IV and directed employer to give confirmation to all complainants under Clause 4-C of Model Standing Orders from the date of institution of Complaints. Present petitions are filed by employer challenging said order. The matter has been admitted on 13/2/2006 and this

Court while granting interim relief imposed condition that employer shall not provide unskilled work to any other person or even employees under Employment Promotion Programme (EPP) and such work shall first be offered to present respondents (employees) as and when available. It appears that on 7/4/2006 this Court directed that writ petitions should be listed for final hearing in 2nd week of July 2006 at the request of respondents & accordingly, the matter is before this Court for final hearing.

2. Writ petition 6427 of 2005 is filed by employee/complainant Sudhakar Narad challenging the order dated 25/11/2005 passed by very same Industrial Court in Complaint U.L.P. No 703/2003 partly allowing the same. Industrial Court found that employer indulged in unfair Labour practice falling under item 5 and item 9 and also issued directions to cease from it. However prayer of employee Sudhakar for regularisation from date of completion of 240 days with consequential benefits has been found to be not maintainable and therefore rejected. Writ Petition 6427 of 2005 is directed against this rejection.

3. Brief statement of facts involved is necessary. U.L.P. complainants file u/s 28 individually by all employees are more or less identical. The complainants state that they have been the appointed for unskilled work on daily wage basis in temporary capacity either from 1998 or from 1999 and paid salary every month. They have stated that their employer is an engineering industry which manufactures tractors and the establishment is governed by Bombay industrial Relations Act, Industrial Disputes Act and Industrial Employment Standing Order Act, 1946. However it is admitted position between parties that the model Standing Orders framed u/s 35 of Bombay Industrial Relations Act govern their service conditions and Industrial Employment Standing Order Act, 1946 has no application. Each complainant has given period of his service along with period of break between two appointments and has also given the number of days on which he was given artificial break. He has thereafter given certain names to point out that during break period another employee Junior to him was provided said work. There is reference to working days list prepared as on 30/ 9/2000 by employer and effort is to demonstrate from it that persons whose names appear below name of complainant were either provided work or retained and break was given to complainant. It is further stated that this is in violation of provisions of model Standing Orders 3(2) (g), 4C and 4D of model Standing Orders. It is contended that after completion of 240 days of continuous service each complainant became permanent but employer violated these requirements of model Standing Orders and continued to employ new or junior employees. It is further stated that complainants were not given permanent status, privileges and wages or pay scale of permanent employee along with consequential benefits and allowances attached to the post of permanent employee. It is contended that large number of employees were appointed on temporary basis periodically though work of permanent nature was always available and artificial breaks were given to one batch by following rotation. Grievance is again made that apprentices were engaged as helpers and regular production work was extracted

from them. It is further stated that new employees were recruited for similar work by disguising them as EPP trainees. It was further stated that the complainants had earlier filed a U.L.P. complaint in 2003 but in view of subsequent development it was withdrawn with liberty to file Complaint individual capacity. All complainants except Shri Sudhakar Narad, petitioner in writ petition 6427/2005 (complainant in Complaint 703/2003) stated that they were at the time of filing of complaint engaged in temporary capacity from September 2004 till 31/12/2004. They contended that cause of action arose when they completed 240 days of service and it is recurring and continuous one. They therefore prayed for declaration that there is unfair Labour practice under item 5 and item 9 of Schedule IV of MRTU & requested for its withdrawal and for grant of consequential benefits. These complaints were opposed by employer who denied any rotation or artificial breaks. It is further stated that though employer has 528 permanent workers in its employment, it is required to engage services of temporary workers as and when there is temporary increase in demand of tractors. They pointed out that on account of increase in work, complainants were appointed by giving them Orders for fixed duration. They gave the period of Employment of each complainant and stated that in any case the complaints as filed were hopelessly time-barred. They pointed out that from 1/4/2003 they did not engage even a single temporary worker and from March 2004 they were required to engage temporary workers due to sudden increase in demand of tractors in the market. They further stated that even as temporary employees, complainants were given benefits available to permanent employees like dearness allowance, ESI facility, provident fund, Conveyance allowance, house rent allowance etc. It is further stated that after expiry of last appointment orders of respective complainant, though employer was ready to give further appointment to them, they did not contact the employer and hence next order was given to them when they reported for work. The entitlement of complainants to wages/pay scales of permanent employees along with their benefits and allowances was denied. The Employment in batches was denied and it was stated that apprentices were engaged as per directions of Apprentice Adviser. It was further stated that EPP trainees were engaged as per list forwarded by Employment change. It was also stated that earlier about 207 employees engaged on temporary basis filed complainants before Industrial Court and in those complaints seniority list as on 30/9/2000 came to be filed. The Employer further contended that there were elected representatives functioning u/s 28 of Bombay Industrial Relations Act and they represented even complainants. It was pleaded that Section 21(2) of MRTU Act therefore did not permit filing of such individual complaints and complainants were in fact seeking permanency by invoking item 6 of Schedule IV of that Act. Objection was taken that the complainants could not claim permanency by invoking item 5 and item 9 of Schedule IV. In case of Sudhakar, in written statement plea was taken that Sudhakar was not in service on the date of institution of complaint and he never challenged his termination. Therefore in any case his complaint for regularisation and grant of permanency was not tenable.

4. Two employees entered the witness box on behalf of all complainants and employer examined its Deputy General Manager (Tractor Assembly) Shri G. Murali in defence. In complaint of Sudhakar, he examined himself while management tendered affidavit of one Shri Mohod, Deputy General Manager (Employee Relations and Development) but he was not made available for cross-examination. After hearing the arguments, the learned member of Industrial Court has passed the Orders already mentioned above.

5. I have heard Advocate Puranik for Employer, Advocate S.P. Dharmadhikari for employees/respondents, Advocate Mohokar for Sudhakar and learned AGP for respondent No 2 respectively.

A. Advocate Puranik for employer has invited attention to chart to point out the initial date of joining services as claimed by complainants before Industrial Court and also the last date mentioned therein and thereafter to the fact that they were given employment for the first time in last week of September or first week of October 2004. He states that after the last date mentioned by complainants either of year 2000 or 2001, they have not worked with employer till September/October 2004. All of them had filed joint U.L.P. complaint 657/2003 for regularisation in the meanwhile and after joining, they withdrew their respective names from this common complaint with liberty to file fresh complaints. Accordingly, Industrial Court granted them liberty and present U.L.P. complaints in which impugned order has been passed came to be filed. Advocate Puranik, learned Counsel states that no notice of earlier U.L.P. complaint was served upon employer because the employees did not pay process fee for that purpose. The complainants in U.L.P. complaint 416 to 422/2004 and 448/2004 claimed that they had completed 240 days of continuous service. Complainants in U.L.P. complaint 442/2004, 446/2004 and 447/2004 pleaded that they were not allowed to complete 240 days deliberately by employer and also pleaded that they have completed 240 days. Reason put forth by all for claiming permanency is that they were given artificial breaks by employer by either appointing juniors in their place or by appointing new persons or by resorting to rotation.

B. With this background he has invited attention to pleadings in complaint to point out that complainants claimed that they were appointed initially on daily wages as temporary employee. He further states that they also pleaded that they were receiving wages monthly and while giving period of their earlier service i.e. service prior to 2004, in chart given in paragraph 3 and 4 all days, whether working or holidays or absent days are included to demonstrate completion of 240 days. He further states that breaks between two appointments have been mentioned as artificial breaks and then it is mentioned in paragraph 5 that during period of six months from 1/4/1999 to 22/9/1999 other employees were appointed and continued in their places. The dates of joining of these other employees are also mentioned and he points out that joining date of one employee Shri A.C. Murhekar is not during this breaks period and other employee Shri N.B. Shirpurkar mentioned therein is himself complainant with

others in present matters. It is further stated that all these employees are shown to have joined in first 10 days of April 1999 and have worked for sufficiently long period and hence, they did not substitute anybody. It is further stated that the names of juniors mentioned therein are taken from seniority list prepared by employer and his grievance that there is no seniority list or waiting list is incorrect. It is further stated that grievance made in paragraph 7 of complaint in fact falls under item 6 of Schedule IV of MRTU & PULP Act and Industrial Court could not have taken its cognizance as complaint was not filed by elected representatives. He further states that reference to Industrial Employment Standing Orders Act or to Model Standing Orders framed thereunder is erroneous & misconceived. He further argues that the cause of action did not accrue continuously and in the facts of present cases it arose when artificial breaks were given as alleged and hence U. P. complaints were all time-barred.

C. He thereafter invites attention to written statement filed by employer before Industrial Court to point out that the defence that complaint was time-barred and it ought to have been filed within 90 days of alleged junior joining the service and nonjoinder of such junior person was specifically raised and non maintainability of complaint under item 6 was also pointed out. He states that there was specific defence that no artificial break was given to any complainant and not a single temporary worker was engaged by employer from 1/4/2003. He further points out the actual breakup of days put in by each complainant by pointing out their respective absent days, weekly of or holidays, present days and total number of working days. It is argued that even if weekly of or holidays are added, the complainants do not complete 240 days. He points out that it was specific case of employer that during period of six months from 1/4/1999 to 20/9/1999 employer was ready to give further appointment to complainant that complainant did not contact till 20/9/1999 and this defence which is proved before Industrial Court is not looked into by it. He points out that the instances given by complainants only show simultaneous working of other workers and not substitution.

D. According to him, Industrial Court has overlooked the defence as also the pleadings in complaint and framed issues which are much wider and were uncalled for. He states that there was no grievance that juniors of complainants were regularised first or of any unfair labour practice by appointing EPP trainees. He states that these trainees are required to be employed as per scheme and do not form part of permanent workforce and this defence in written statement is not at all considered by Industrial Court. He argues that non application of mind is apparent because learned Industrial Court has answered point No 3 and point number 4 as "partly proved" when no such answer is feasible in relation to those questions. He states that learned member has encroached upon facts relevant under item 6 of Schedule IV in ignoring the difference between item 6 and item 9 and this has resulted in vitiating its entire order. He further points out that there was no case of discrimination on account of any difference in payment of wages to complainants and other employees and still Industrial Court has recorded a

finding in this respect against employer holding it to be unfair labour practice under item 5 and item 9 of Schedule IV.

E. He invites attention to written notes of argument filed by employer before Industrial Court to state that only in case of one employee i.e. Mr. Landge employer accepted that he has put in 240 days of continuous service and this admission of employer also is overlooked by Industrial Court by placing Mr. Landge in category of employees who were not permitted to complete 240 days as alleged by complainants. He has thereafter invited attention to paragraph 14 of impugned order to demonstrate that Industrial Court has made unnecessary observations about recognised union when it was not the case of any of parties that such union existed. He states that the finding about negligence of elected representatives to espouse the cause of complainants is again unwarranted because the complainants have not made any such grievance in their affidavit evidence before Industrial Court. He argues that observations made in paragraph 14 of its judgment by Industrial Court are totally unnecessary and superfluous. He argues that issue is concluded by judgment of this Court dated 29/4/2005 and mere existence of elected representatives is sufficient to bar complaint in relation to item 6 of Schedule IV. He further invites attention to observations of Industrial Court in paragraph 15 and states that "permanency" is matter of collective bargaining and item 6 of Schedule IV is special provision in relation thereto and hence, it has to prevail over unfair Labour practices described in item 5 and item 9 which are of general nature. According to him in fact the complainants had tried to prove unfair Labour practice which squarely falls under item 6 and hence, their complaints were not maintainable. Paragraph 7 in U.L.P. complaint number 416 of 2004 is pointed out to show plea of malafides because of large difference in pay scales and other allowances and benefits. He argues that judgment cited-- Pandurang Kashinath Wani Vs. Divisional Controller, M.S.R.T.C., Dhule and Others, has not been even properly appreciated and according to him all this again supports his argument of total non application of mind. The period of limitation and argument in relation thereto are not considered and erroneously it has been held to be a continuous cause of action. He argues that when grievance about grant of employment to any third person in supersession of any right of complainant is made, the complaint must be filed within 90 days of such supersession and such third person/beneficiary must necessarily be joined as party respondent. He argues that in facts of present case last spell of employment expired either in year 2000 or 2001 and as the termination or act of not providing work was not challenged then, it could not have been made the basis of any claim in 2004. He further states that complainants nowhere pleaded that names of workers were not displayed on notice board for calling them back to work and also there was no specific plea that EPP workers or WST workers were given their work. He argues that there was no grievance about disparity in payment of salary & employer was never called upon to meet any such case by complainants. He invites attention to writ petition 162/2004 to state that respondent therein made grievance before

Industrial Court that he was not permitted to complete 240 days. He points out that period of service given by said respondent in his complaint in paragraph 3 is not entirely accepted by Employer and in written statement petitioner employer has given the correct period of his employment. Said respondent has not disclosed name of any EPP workers or WST workers and his complaint itself reveals that he made grievance about only temporary employees. However Industrial Court has not recorded any finding in relation to his period of employment pleaded and proved by employer. He fairly states that complainant in U.L.P. 26/2005 (WP 157/2006) only pleaded about his replacement by either EPP workers or WST workers but he could not stand cross examination. According to him, Industrial court could not have recorded finding of unfair labour practice under item 5 or under item 9 without finding out who replaced the complainant in alleged artificial break period claimed by him. He states that finding that some other persons were engaged by employer during break period reached by Industrial Court in paragraph 23 of its orders is not supported by any discussion of evidence and hence unsustainable. He further argues that the Industrial Court has only considered cross examination of witness of petitioner Employer by name Shri G. Murali ignoring the fact that burden was upon complainants. He states that evidence of complainants is totally overlooked. He further states that nowhere defence made out by employer or break up pleaded and proved by employer has been considered and commented upon by Industrial Court. He points out that in relation to instance of employee Manoj Deshpande considered by Industrial Court in paragraph 24, if records are perused, it will become clear that he had rendered only 227.5 days service including weekly of & holidays. Period of seven days added by Industrial Court to his service was unwarranted but even the same is allowed to be added, according to Advocate Puranik employee completes only 234.5 days service and finding that he completed 240 days continuous service on 30/3/1999 is perverse. He states that similar instances can be given in relation to all other employees where Industrial Court has committed similar error. He further argues that chart given by complainants in their complaint and denied by present petitioner/employer has been mechanically accepted by Industrial Court without recording any finding about the stand of employer and correctness there of.

F. While dealing with findings of Industrial Court in relation to points No 3 and 4 framed by it, he argues that concept of "quarter" has not been properly understood and appreciated by the court below. He states that erroneously Industrial Court has found that because there was no action by employer for unauthorised absence of any employee, such absence is condoned by employer and therefore can be taken into account for finding out uninterrupted service. He states that it has been wrongly recorded in paragraph 33 of judgment by Industrial Court that employer has not denied actual working days of complainants. He points out that no documentary proof about nonavailability of work between two appointment orders given to complainants could be produced because occasion to produce it arose after about five years. He further states

that burden in this respect was upon complainants and Industrial Court has acted with material irregularity in placing it upon employer. He further argues that reliance upon documents exhibit 39 and exhibit 40 to hold that EPP workers or WST workers did work in place of complainants is totally misconceived because those documents pertain to year 2004. He further states that mere working of EPP workers or WST workers in shift does not mean that they worked in place of complainants because industry of employer itself functions in various shifts. He argues that burden to justify absence from duty was upon complainants and complainants in their affidavit evidence came out with specific case that they were having sanctioned leave for their absence. He invites attention to affidavit of employee Deshpande and employee Sharma for this purpose and states that there is no finding of Industrial Court in this respect. He states that Industrial Court has acted on mere surmises ignoring requirement of law. He points out that Clause 3 (g) of Model Standing Orders requires certificate of medical practitioner from ESI Corporation because admittedly industry of petitioner Employer is covered under said enactment. He further states that plea and evidence of complainant about alleged rotation has been overlooked. He further states that entire data about existing strength of employees with employer, required strength & number of trainees was all supplied but has not been look into. He states that finding in paragraph 47 of impugned judgment about absence being treated as leave period is totally misconceived and also perverse and contrary to pay slips at exhibit 49 to 55. He begs to argue that specific and concrete evidence available on record has been sidetracked and only general observations and comments are made by Industrial Court without recording any specific finding on any specific instance and matter has been decided only on pleadings of parties.

G. It is his argument that the specific pleading and evidence of employer about imaginary theory of complainants, about increase in workload and hence providing work after three to four years to complainants briefly stated in paragraph 20 of its order by Industrial Court has not been answered any where. It is further argued that specific case that between and during period of six months from 1/4/1999 to 20/9/1999 complainants did not report for work for about six months, is also totally lost sight of by Industrial Court.

H. He thereafter invites attention to judgment by me in writ petition 2638/2003 between Vinod Bhagat v. Industrial Court, Nagpur in which similar grievance between other set of employees and present employer has been considered by this Court to point out how distinction has been made between scope of item 6 and item 9 of Schedule IV and it is argued that Industrial Court has overlooked the same and has not conducted inquiry accordingly.

I. He also invites attention to judgment of Hon Apex Court reported at Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others, , particularly paragraph 9 and 10 about the strict requirement of pleadings and caution to be taken by Courts while appreciating the plea of victimisation.

J. Inviting attention to earlier judgment of this Court dated 29/4/2005 in case of Vinod Bhagat (Writ Petition 2386/2004 with connected writ petitions), he states that the employer has challenged said judgments in L.P.As. which are admitted for final hearing and without prejudice to the contentions raised therein, he is making reference to this judgment. He tries to distinguish said judgment by pointing out that the position considered in said judgment is entirely different because of finding of this Court that the employees were recruited against permanent work & post right from beginning and hence, in view of provisions of Standing Orders they could not have been treated as either temporary or on daily wages. He further points out that there the arguments advanced by Advocate Thakur for employees raised entirely different plea of unconscionable contract and this Court accepted it. He further points out that application of mind in that judgment by this Court or by Industrial Court reveal that necessity of holding inquiry into individual grievances was not felt and he states that said conclusion is drawn only in the facts of those cases. He argues that these conclusions are therefore peculiar to those writ petitions and not available for extension or application in present matters. He contended that when this Court in its judgment in case of Vinod Bhagat (supra) found that the employees were in fact permanent employees right from day one, the other observations and findings in said judgment are totally unwarranted & by way of obiter only and hence not binding. He further points out that the period of break between two appointments in earlier judgment is treated as "involuntary unemployment" because of finding that during said period other batch of employees replaced the complainants therein. Here, this aspect of substitution or replacement by other batch has not at all been decided after considering the pleadings of parties and evidence adduced by them. He invites attention to application of mind in this respect by this Court or by Industrial Court to contend that this Court has demonstrated how said period of "involuntary unemployment" is useful to employees to further their case. In present matter, he invites attention to case of complainant Shri Manoj Deshpande to point out how Industrial Court has not taken into account his spells of employment and also unauthorised absence to find out completion of aggregate and uninterrupted service. According to him if such an application and exercise would have been undertaken by Industrial Court in present matters, it would have become apparent that 24 complainants did not complete uninterrupted service of 240 days in aggregate. He invites attention to findings recorded in earlier judgment to emphasize that the conclusions are again in the facts & circumstances of earlier matters. In present cases there is overlapping between and item 5 and item 9 with item 6 because of contention that preference has been given to juniors and alleged violation of Standing Orders 4E. He further states that for item 5, in earlier judgment this Court has found necessity of existence of two groups and no such two sets or groups are demonstrated in present matter. According to him in present cases, all complainants are pointing fingers at each other to show that such other person is favoured and no "hostile mindset" or bias on part of employer is either pleaded or proved. He further points out that in earlier judgment, this Court has found

that seniority list or waiting list was not made available by Employer to employees and hence, that advantage has been given to employees. In present cases, complainants have used seniority list made available by employer to prepare their pleading and hence, that advantage is not available to present complainants. He further states that in any case such individual grievance could not have been examined by trying all complainants together and by delivering common order.

K. In an attempt to demonstrate that theory of continuous wrong or cause of action applied in earlier judgment of this Court is not available here, he points out that without any application of mind service rendered prior to three to four years of joining in 2004, has been utilised to hold that the respective complainant has completed 240 days during such earlier service. He further argues that all complainants in earlier cases, were in employment when they approached Industrial Court and they remained in service throughout i.e. during pendency of complainant and during pendency of earlier writ petitions. All employees/ complainants in present matters were out of employment for about 3 to 4 years and said period has not been treated as artificial break by Industrial Court. He argues that there is no evidence before Industrial Court to demonstrate that work was given to juniors and there was any violation of Standing Orders. He points out specific stand of employer that from 1/5/2003 till 31/3/2004 there was no temporary employee in its employment and hence, the alleged injury even if presumed to be legally within reach, cannot continue beyond 1/5/2003. He pleads "ouster" on 1/5/2003 and its non-consideration by Industrial Court. Termination of all complainants which had taken place either in 2000 or 2001 because of efflux of time was not challenged and hence, said service could not have been connected with employment provided in 2004 and finding that complainants completed 240 days of service before 2000 or 2001 could not have been legally given. According to him, such finding has no relevance or significance while considering the present grievance. He points out that claim for regularisation or permanency could not have been filed when complainants were not in service and therefore, could not have been granted for period which could not have been clubbed with existing employment of complainants. He points out that in U.L.P. complaint filed by one Sudhakar Narad (petitioner in W. P. 6427/2005) very same Industrial Court on very same day has dismissed that U.L.P. complaint because employee was not in service on the date of filing of complainant and was provided work by Employer during its pendency.

L. He relies upon judgments reported at Himachal Pradesh Housing Board Vs. Om Pal and others, , 1996 (75) FLR 154 : AIR 1999 S.C. 1543 i.e. Ramchander v. Addl. Dist. Magistrate, 1998 (2) CLR 504 and 1994 (1) CLR 1022 to buttress his argument that regularisation cannot be granted to terminated employee. He also relies upon judgments of Hon Apex Court reported at The Range Forest Officer Vs. S.T. Hadimani, argues that initial burden to show that they have rendered 240 days uninterrupted aggregate service is upon complainant/ employee and here, complainants have failed to discharge it. He further points

out judgment of Hon Apex Court reported at In Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , particularly paragraph 19 to submit that judgments of Court are not to be interpreted as statutes and he begs to state that Industrial Court has in present case interpreted earlier judgment of this Court as if it is statute and therefore there is failure to exercise jurisdiction on its part in accordance with law.

6. Adv. S.P. Dharmadhikari for Complainants/Employees has stated that

A. the grievance of employer that there was no pleading about disparity in payment of wages by present complainants in their complaint before Industrial Court is misconceived. He states that relevant facts like temporary employee, daily wages and monthly payment are mentioned in complaint and grievance can be found in paragraph 1, 2 and 6 thereof. He further states that Employer has also understood it correctly and invites attention to paragraph 11 of written statement filed by Employer before Industrial Court. According to him in any case, the pleadings need to be construed more liberally. He further states that the Industrial Court has reached finding of grant of employment by rotation or in batches by Employer and in view of this finding, finding as to actual number of working days was neither required to be recorded nor relevant. He also invites attention to the position as mentioned in written statement by Employer by taking illustration of complaint of Manoj Deshpande and states that difference in days calculated is only about one day and according to him, employer has wrongly treated "days of alleged absence" as interrupted service. He states that Industrial Court has in fact considered chart of employer himself.

B. He has taken the Court through evidence of Shri G. Murali, Deputy General Manager (Tractor Assembly) of employer Mahindra and Mahindra to point out defence that till 1990 strength of permanent workmen corresponding to the set and formulated volume of work was ascertainable and latter on, due to fluid market condition, this could not be done. He points out that said witness pointed out that complainants were temporarily appointed on account of temporary increase in work of permanent nature. He points out that 155 employees were made permanent as per agreement dated 26/4/2003 with elected representatives. He further points out that none of the complainants were given appointment after their last spell in 2000 or 2001 because this witness stated that employees on temporary basis were appointed till May 2003 and thereafter from March 2004 onwards. He argues that complainants were not appointed till 1/5/2003 and admittedly, employer gave employment to others during said period after last spell of complainants. He has also invited attention to cross examination of witness for employer at various pages to point out certain admissions and also non production of record by Employer. Seniority list produced is as on 30/9/2000 and according to him therefore not relevant because it does not contain details and names of employees who were regularised between 1998 to 2000. This data is not sufficient to verify supersession. He points out that 155 employees have been made permanent and

even that data cannot be verified. He invites attention writ petition 162 of 2006 for this purpose. He points out that employee Shri Pache was in fact an EPP. He has also taken Court through cross-examination of management witness in detail to point out how he has been falsified and how management did not produce material record to justify its stand or defence. It is contended that this witness for management has admitted certain vital facts and his evidence is sufficient to allow all complainants. The alleged fluctuation in production during relevant period has also not been proved and number of temporary employees engaged after September 2004 is also not justified by producing any data or production records. Contention is in this background the finding on rotation recorded by Industrial Court, absence of any waiting list as per Standing Orders and difference in rate of wages paid to temporary employees like complainant and permanent employees speaks volumes of the bona fides of Employer and demonstrate unfair labour practice. By inviting attention to impugned judgment it is contended that all 38 cases have been individually considered and thereafter only relief has been granted. It is stated that Industrial Court has used list at exhibit 36 prepared by Employer only to note who replaced complainants and it is stated that if artificial break period is added in 7 cases considered by Industrial Court , it is apparent that everybody has completed 240 days.

C. He has also invited attention to various paragraphs of judgment in case of Vinod Bhagat (supra) to point out how chart at exhibit 36 in present case shows that those findings are equally applicable to the facts of present case. He has also stated that finding on limitation in said case is also applicable here. He argues that said contract has been revived in 2004 by providing work to present employees/complainants.

7. Advocate Mohokar appearing for employee Sudhakar Narad-petitioner in W.P No. 6427 of 2005 and complainant in Complaint U.L.P. 703 of 2003, has stated that learned member of Industrial Court inadvertently lost sight of the fact that employee is in service and therefore only, after noticing error, it protected his service and thereafter this Court has protected him and hence, employee Shri Narad is in service. He further states that no order of termination was issued to this employee at any point of time and he was never retrenched. Provisions of item 5 of item 9 of MRTU & P.U.L.P. Act does not require an existing employment for operation and even employee who has ceased to be in employment can be given declaration and relief under it. He states that in present case Employer has not entered witness box at all and their witness one Shri Mohod did not remain present for cross-examination. He further points out that Industrial Court also did not frame any issue to decide whether existing employment is essential for grant of relief by it. He argues that judgments cited by Employer were not under any Labour or Industrial Law and in all cases there was written order of termination and the findings therefore need to be understood in that background. He states that the learned Member lost sight of the fact of existing employment on the date when it delivered judgment and thus there is failure to exercise jurisdiction. He relies upon provisions of Standing order Clause 4C to state that it

is not necessary to have name on the roll to claim its benefit. Clause 4D requires only two contingencies for preparing waiting list and employee Shri Narad satisfied those requirements. He argues that the name of petitioner was included in waiting list and therefore his lien in this respect was accepted and recognised. This was the position on 23/12/2003 when U.L.P. complaint was filed and Employer filed its written statement on 17/3/2004 and immediately thereafter Employer provided complainant Narad with work on 27/3/2004. He relies upon judgment reported at 1999 (I) LLJ 275 between Neeta Kaplish v. Presiding Officer, Labour Court to contend that when employer has not adduced evidence, employee is to be given relief as claimed. He has also relied upon judgment of this Court reported at 1990 (1) C. L. R. 88, particularly paragraph 12 to state that judgments delivered under Service Law are not relevant while considering similar issues under Labour Laws. He is further relied upon the judgment of Hon apex court reported at Collector of Central Excise, Calcutta Vs. Alnoori Tobacco Products and Another, to point out that the judgments are not to be followed blindly without noticing the facts in which the particular view therein has been reached.

8. While making his submissions in reply in writ petition 6427/2005, Advocate Puranik has stated that because of admitted facts in this complaint of Sudhakar, it was not necessary for Employer to lead any evidence in defence. He states that Standing order Clause 4 C does not require name of employee in muster for all 12 months. However Clause 4D thereof requires name in seniority list and Employer has to call such employee whenever work again becomes available. He states that here in appointment order itself nature of appointment and its duration was communicated to complainant and therefore it was not necessary to issue any termination order or any advance intimation thereof. He further states that grievance about not framing of issues by Industrial Court is not proper because the point was very much raised in defence and also in arguments and necessary case law in support was also submitted and complainant Sudhakar was aware of all this and his advocate has responded to the arguments in this respect before Industrial Court. In support he invites attention to paragraph 7 of the impugned judgment. He further states that specific case of Sudhakar before Industrial Court was that of providing employment to his juniors and of not issuing appointment order to him after 3/1/2000 deliberately. No such case has been established and there is absolutely no evidence by Sudhakar in this respect. He points out that in cross examination Sudhakar admitted that persons made permanent were ordered to be made permanent by Industrial Court. He further states that witness for management Gajanan did not turn of for cross-examination at all and hence, his evidence could not have been looked into by Industrial Court. He further distinguishes the cases cited by Advocate Mohokar and invites attention to Division Bench judgment of this Court reported at 2001 (2) C. L. R. 982 -Bajaj Auto v. R.P. Savant to state that there relief of restitution was given because of amendment in view of termination. He points out that in present matter there is no prayer to set aside termination and hence no relief

can be granted to Sudhakar.

9. Submitting his reply to the arguments of Advocate Dharmadhikari, Advocate Puranik states that there are no pleadings in U.L.P. complaint about equivalence between posts of Temporary employees and Permanent employees. He further states that the dispute involved before Industrial Court was not only in relation to days of absence but also about actual period of engagement and finding of rotation delivered by that Court is perverse. According to him, Industrial court ought to have applied its mind to facts of each case before delivering such finding or before applying case of Vinod Bhagat i.e. earlier judgment by me in similar case of Mahindra & Mahindra only. He argues that the order of Industrial Court shows non application of mind and he states that effort of learned Counsel for employees is indirectly to call upon this Court to consider said evidence on record. Such exercise cannot be undertaken in writ jurisdiction and matter must be remanded back Industrial Court for this purpose. He points out that Industrial Court has even expected document for proving negative fact like absence of work. He argues that there is no positive evidence by Complainants about engagement of temporary workers during 1/5/2003 to 11/3/2004. He points out the admission given by complainants in this respect and further explains the meaning of "on job training" given to EPPs. He further states that Industrial Court did not consider fluctuating production and violation of Standing order Clause 4E. He further states that "waiting list" and "seniority list" are synonymous and complainants nowhere pleaded that there was no waiting list at all. On the contrary complainants accepted the list prepared as on 30/9/2004. He further states that lapses found by Industrial Court in waiting list are superfluous and inviting attention to paragraph 32 of impugned judgment, it is contended that there was separate list prepared for each occupation and not mention of wages or address is not sufficient to hold that there was no compliance with standing orders. He states that there was substantial compliance there with. He further states that relevant evidence in individual cases is already adduced before Industrial Court but said aspect has been lost sight of by Industrial Court. He invites attention judgment of this Court in case of Vinod Bhagat to point out tests laid down under item 6 and item 9.

Taking up the plea of limitation, he states that arguments advanced by complainants/respondents are self-defeating as there is no revival. He states that it was never the case of complainants that their appointment in September 2004 was contrary to Standing Orders. He states that there is no break given after September 2004 and hence there is no violation of standing order and no fresh cause of action in favour of any complainant. He therefore urges this Court to allow his petitions and to dismiss petition of employee Sudhakar.

10. Advocate Mohokar for employee Sudhakar states that permanency given was on account of private settlement dated 26/8/2003 between those employees and management. He states that no permanency is granted because of orders of Industrial Court. According to him therefore all other petitions filed by Advocate

Puranik need to be dismissed while petition filed by employee Sudhakar needs to be allowed.

11. In view of the argument that Industrial Court has not considered individual facts in each complaint and such examination was essential as unfair Labour practice under item 5 and under item 9 of Schedule IV is necessary against individual and not of general nature, it will be appropriate to refer to & appreciate the impugned order of Industrial Court. The first point framed by Industrial Court for determination is about tenability of individual complaint. Individual complaints are held that to be maintainable and employer has not challenged that finding in arguments insofar as it relates to unfair Labour practice under item 5 and 9 is concerned. Attempt is only to show that Industrial Court has while recording finding of indulgence in unfair labour practice under item 5 and 9 has considered material which was relevant only under item 6 of Schedule IV. Employer attempted to demonstrate that there is no individual consideration and application of mind by Industrial Court. The second point answered by Industrial Court is about limitation and complaints are held to be well within limitation. The third point answered is about completion of uninterrupted service of 240 days and showing of artificial breaks by Employer. Industrial Court has found it to be partly proved. Point number 4 is about appointing new persons and disguising them as EPP trainees and this is also found to be partly proved. Point number 5 is about extracting work of permanent worker from complainants but paying them less salary and this is answered in favour of complainants. Last and 6th point is whether unfair labour practice under item 5 and 9 is established, and it is answered in affirmative.

In para 15 of its judgment, Industrial Court has found that individual complaint under item 5 and 9 of Schedule IV of MRTU Act pointing out the breach of Clauses 3 and 4 of Model Standing Orders is very much maintainable. This finding cannot be and has not been demonstrated to be either perverse or erroneous.

In paragraph 18 onwards of its judgment, Industrial Court has considered whether complainants before it were deliberately denied the benefits of permanency. It has grouped complaints into two groups depending upon assertions in their complaints. It has found that some complainants stated that they have already completed 240 days continuous service in one calendar year while the other group contended that they were not allowed to complete 240 days and artificial breaks were given to them by employer. It has found that though these complainants contended that they were replaced by daily wagers, EPP workers or W.S.Ts. and though they named certain workers, all complainants gave common names and employer therefore had contended that it was imaginary case. In paragraph 21 of judgment, Industrial Court has given name of each complainant with his ticket number. It has found that complainants in complaint 416 to 422/2004 were engaged in 1998 while the others were engaged in 1998 and 1999. It found that ticket number of each complainant

revealed their respective seniority as one with earlier ticket number has entered the service earlier. This application of mind by Industrial Court is not even argued to be perverse or erroneous. It has found that from evidence of Shri Deshpande and Shri Shende it was obvious that various appointment orders were issued to all complainants by employer and in between period of two appointment orders there was gap during which other persons were engaged by employer. Though, Industrial Court has not expressly mentioned the names of persons engaged during this gap/break, it has mentioned that details are mentioned in each complaint by each complainant. In view of the discussion in this judgment elsewhere, I find that identification of such individual who replaced each complainant during such period of break or gap is not essential.

In paragraph 24 of its judgment, Industrial Court has made reference to evidence of respondent's witness i.e R.W. 1 Shri G. Murali and found that appointment orders issued in favour of complainants were not in dispute. It has found that Manoj Deshpande worked as per appointment orders between 5/6/1998 till 30/3/1999 and he rendered 236 days service (working days) during this period. It further found that there was total gap of seven days between these 4 appointment orders and hence it has added those seven days to 236 days and concluded that Deshpande completed 240 days service on 30/3/1999. It found that thereafter there was long gap and then fresh appointment orders were issued to him up to 2001 and then he was given employment again in 2004. In paragraph thereafter, the Industrial Court has considered the details of working mentioned by each employee and it has even added the days of gap between two appointment orders to conclude that employees in U.L.P. complaints 416 to 422/2004 completed 240 days. The material available on record in this respect appears to have been considered. These details are considered by it in paragraph 30.

The objection of employer about including the days of gap between two appointment orders as artificial breaks or days of absence as uninterrupted service needs to be looked into and will be considered little latter. In very same paragraph it has also considered similar details in relation to services rendered by other complainants. For the present I will refer to admitted position on record in relation to employment provided to Shri Shende and Shri Deshpande. The position emerging along with other discussion below will reveal that insistence of employer for individual consideration on these lines is totally misplaced here. The Industrial Court has correctly appreciated the position in the background of material produced before it. Ticket number of Shri Shende is 1857 while ticket number of Shri Deshpande is 1273. Obviously, Shri Deshpande joined prior to Shri Shende and hence his senior. Whenever work is available, it must first be provided to Shri Deshpande. Shri Deshpande has given details of his working in paragraph 3 of his complaint. One period therein is from 5/6/1998 to 30/3/1999. After four appointment orders during this period, he has again been given work on 23/9/1999 and up to 7/4/2001. These details are given by him in paragraph 4 of his complaint and he has stated that he worked for total 178 plus 175 days

during this period. Employer has not denied this employment in his written statement. The said periods are all -- 23/9/1999 to 29/11/1999 (68 working days), 5/12/1999 to 31/1/2000 (58 working days), 12/2/2000 to 4/4/2000 (52 working days), 9/10/2000 to 15/12/2000 (67 working days), 18/12/2000 to 6/2/2001 (51 working days) and 10/2/2001 to 7/4/2001 (57 working days). Similarly, Shri Shende has given details of his appointments in paragraph 3 of his U.L.P. complaint. First four appointments between 15/5/1999 to 13/12/1999 are not disputed by employer. No work has been provided by employer to Shri Deshpande after 30/3/1999 till 23/9/1999 and there is dispute between parties in this respect. It is to be noted that Shri Shende has worked during this period and when work was available, it ought to have been first given to Shri Deshpande. Even if this period is ignored because of alleged dispute, employment provided to Shri Deshpande after 23/9/99 is not in dispute. Work is not provided to Shri Deshpande on 30/11/99 till 4/12/1999 while Shri Shende has actually worked during this period. Similarly the defence of employer in written statement about contention of Shri Deshpande that break given to him from 1/4/1999 to 23/9/1999 is artificial does not appear to be genuine. Employer has stated that temporary employees appointed for fixed duration were given reappointment after reassessing the manpower requirement. It is stated that respondent used to put up notices on noticeboard & accordingly employees used to come and collect their appointment orders. It is stated that after 30/3/1999, though respondent was ready to give further appointment to Shri Deshpande, he did not contact respondent till 20/9/1999. It is not understood why employer could not substantiate this defence by producing any document.

In any case reason for not providing work to Shri Deshpande from 30/11/1999 to 4/12/1999 is not explained by employer. If the employer was maintaining waiting list or seniority list, Shri Deshpande being senior should have been provided work on 30/11/1999 and Shri Shende ought to have been sent back. But actually he has worked from 15/11/1999 till 13/12/1999. Thus, not sending him back and allowing him to work as also not providing work to Shri Deshpande though work was available clearly demonstrate intention on part of respondent to rotate employees to see that none of them completes 240 days uninterrupted service. The learned member of Industrial Court has in paragraph 30 given 5 more instances while considering case of Shri Deshpande on same lines. The 5 employees, admittedly Junior of Shri Deshpande got work during period when it was not given to him. Similar instances are given by Industrial Court in relation to all other complainants. Though, certain names are repeated, it does not in any way affect the application of mind by Industrial Court because authentic data in this respect is in custody of employer and employer has not made it available. The employees produced the material available to them and Industrial Court has appreciated the same correctly. The defence of employer that appointments are for temporary increase in work also needs to be looked into. In his cross examination witness for employer Shri G. Murali was put the question in this respect and that portion, particularly paragraph 51 of his cross examination is

important. The said paragraph is: --

51. Attention of witness is brought to appointment orders from exhibit 20 to exhibit 30. It is true that similar orders are issued to each complainant. All these appointment orders are speaking and in them the period of appointment is mentioned. The contents of this appointment orders in regard to "requirement for quarter" that is correct. All these appointment orders were for the requirement for quarter. (Note --the next portion is recorded in question-and-answer form by Industrial Court)

Question: When the requirement was for three months why the appointment orders they were issued only for a stipulated period of two months.

Answer: PPC Mumbai it used to send us the budgetary plan for the year.

Then the budgetary plan is broken down into quarter and from quarters into months and even it is revised on a 8th and 23rd of every month.

Perusal of next paragraph of cross examination reveals that this was sought to be justified by continuous fluctuation in market but the witness admitted that no document in support were placed on record. In this background, even if this reason is presumed to be true, the engagement or discontinuation of temporary employee should take place on 9th or 24th of each month or within short period from such assessment. But then the dates of joining of complainants or their exit from employment do not support this stand. Comparison of these dates in the year 1998-1999 or 2000-2001 or even in 2004 does not lend support to this evidence. Joining dates of all complainants and the period of service, overlapping in said period, break received by seniors in the process all show a systematic rotation of employees only at behest of Employer. No supervening circumstance or its effect is established before Industrial Court to lend credibility to this evidence.

12. Employers have harped again and again that the employees have not cross-examined their witness in relation to statement made by him in first sentence of paragraph 16 of deposition which is "I say and submit that the respondent did not engage even a single temporary worker from May 2003 to March 2004". The employer has in paragraph 15 stated that the 38 complainants were given appointments from time to time till middle of 2001. It is therefore clear that from middle of 2001 till May 2003 temporary workers were engaged and they were also engaged from March 2004 till September 2004 till these complainants were again provided work. It is difficult to accept contention of employer that these employees/complainants suddenly stopped reporting for work & then again suddenly reported in September, 2004. The employer ought to have produced notices displayed by him allegedly after middle of 2001 containing names of these complainants and asking them to join back the work. Admittedly that has not been. In cross examination, this witness has admitted that documents revealing fixation of any production target are not placed on record. He has further stated norms of revised/increased production were settled in every

settlement between employer and elected representatives. He is further stated that in every settlement, production norms were increased and has further denied that company acquired more manpower because of increase in production norms. He further stated that in every settlement wages of permanent employee were increased. Though in chief he deposed about changes in design of components and consequential changes in manpower, in cross he admitted that no documents were produced to substantiate the same. He also accepted that settlements effected in the year 1998 (1988?), 1992, 1996 and 2001 were not applicable to complainants. He accepted that the appointment orders did not show the name of department in which complainants were engaged. He also accepted that no documents were produced to show strength of employees required in supply module. He further stated that whenever there was increase in work, it was conveyed by production planning and control, Mumbai to Nagpur. He further stated that one more cell by name Mahindra Production System calculated requirement of manpower, direct as also indirect and then said data came to him. He then conveyed it to personnel and Industrial relations department which then issued appointment orders. He stated that he used to take the decision whether temporary increase can be handled by existing manpower or not and communicate it to department of personnel and Industrial relations. However he accepted that no documents are produced to show this. In his cross examination in paragraph 53 witness for employer accepted that appointment orders at exhibit 20 to 22 were for three successive quarters and he also accepted that if any employee worked continuously for nine months, he would complete 240 days continuous service. He also accepted that no documents were placed the report to show that work was not available for respective complainant during the break period between two appointment orders. This assumes importance because as discussed above, juniors have been continued and break has been given to senior. He also accepted that copy of notice calling employees back to work allegedly published on notice board is not produced on record. He accepted that there is possibility that employer appointed other employees during the period mentioned in the appointment orders of complainants. He further admitted as under --"We continued the new persons is a fact, probably we ought to have continue the old employee too, but I'm not sure". Thereafter this witness stated that old employees were continued only when work was available and denied the suggestion that break in service was given to old employees to deny them benefit of permanency. He stated that list at exhibit 36 is not waiting list but seniority list. He has further stated that Employment Promotion Programme is of government and if employee forwarded to Employer under scheme was skilled, work of skilled nature was assigned to him and if he was unskilled, work of unskilled nature was given to him. He also accepted that no documents to show sending of apprentices by Apprenticeship Adviser were produced on record. He further accepted that agreement entered into with apprentice is not produced on record. Though learned Counsel for complainant employees have tried to contend that work of permanent nature is being taken from these employees disguising them as apprentice, as there is no

further cross examination in this respect, the nature of agreement with apprentice is not clear and in the absence of any express suggestion to witness on these lines, I'm not inclined to give any importance to this stray sentence. He also admitted possibility of mentioning name of EPP trainee or Working Supervisor Trainee (WST) in shift schedules maintained by employer in relation to Supply Module. These documents are at exhibit 40 to 42. Such admission is also given in relation to name in list exhibit 39. One thing is thus clear that the defence taken in written statement is not substantiated by this witness. The year in which these documents are prepared is totally irrelevant when effort is to find out the modus operandi of Employer. The gap period between two appointment orders is admitted position and burden to show that the increased work of permanent nature was only temporary, was available only during period mentioned in the appointment orders and was not available during said period of gap was definitely on employer. Definitely only employer possessed material to show this. If the alleged increase was foreseen as contended and quarterly requirement of manpower was worked out, the documents could have been easily produced to show bona fides by employer. Normally there could not have been any fresh appointment in the middle of quarter in such circumstances and also there could not have been any termination before end of quarter. New appointments in the middle of quarter and termination of existing appointments also in middle thereof does not support the stand of employer at all. It has already been demonstrated above that senior like Shri Deshpande was given break while junior like Shri Shende is permitted to continue. These aspects clearly falsify the defence of employer.

13. One more defence of employer needs to be looked into. It is of recruiting additional manpower & reducing it due to fluctuating markets. The break period between two appointments in case of different complainants is also self revealing. If any increase in market demand or production target was noticed in this break, the corresponding documentation looking to the process involved (as alleged by employer) was essential. If case of Employer is accepted then man power is being decided in consultation with Bombay office in advance & there is quarterly review. Local review is twice in a month. That has not been shown to Industrial Court. If any decline in market or rise in market was noticed in the middle of quarter, the new employment ought to have been provided to next senior who is out and if it was necessary to reduce manpower, the junior most ought to have been sent out. Obviously this has not been done and the only idea seems to be to rotate the employees. Employer has not demonstrated that it was effecting recruitment of temporary workers for any particular process or particular product and when it found necessary to discontinue that process or product, such workers were terminated. Temporary increase in any such permanent manufacturing process or product has in fact not been demonstrated at all. There are bound to be written records to establish each such factor.

14. In para 29 of judgment, Industrial Court has added break period to find completion of 240 days while in paragraph 30 it has also added period of gaps

between appointment orders for that purpose. Look at paragraph 30 of the judgment of Industrial Court is sufficient to find out this rotation. Complainant B.G. Malghati (ULP 417/2004) with ticket number 1269 has joined on 25/5/1998 and worked till 24/7/1998. Similarly, complainant Manoj Deshpande, ticket number 1273 (ULP 416/2004) joined on 5/6/1998 and has worked up to 4/8/1998. Thus Deshpande is junior to Malghati and hence, if work was not available after 24/7/1998, Shri Malghati could not have been given break and the break ought to have been given to Shri Deshpande. It is to be noticed that no break was given to Shri Deshpande and he continued to work till 4/8/1998. Shri Malghati was given break on 25/7/1998, 26/7/1998 and was again taken back on 27/7/1998. Thus giving him break only of two days and then taking him back cannot be understood. It is also to be noticed that Shri Deshpande worked up to 4/8/1998 and was then provided no work till 8/8/1998. Complainant Narendra Ambalkar, ticket number 1276 (ULP 418/2004) a person junior to Shri Deshpande however was continued up to 10/8/1998. He was in fact continued even in break period of Shri Malghati. Some more instances in this respect are required to be considered little later in this judgment. All this material is perused by Industrial Court & mentioned in its judgment and hence, it cannot be accepted that Industrial Court has not considered individual cases. Several such instances are available on record itself and employer has deliberately practised this rotation and has failed to explain the same. Some of them are also being mentioned here little later. In fact it's witness has at one place admitted that work should have been provided to senior instead of junior. It is therefore clear that employer cannot be permitted to take advantage of its own mischief and wrong. This is definitely in violation of provisions of standing orders and hence, a grievance individual to each complainant. One thing is obvious that of when break was given to senior, work was very much available and if employer wanted to show that work was not available for senior and it was available only for junior, production of documents like seniority list and list of employees in employment on the date of commencement of such break to senior was essential. The witness for respondent has accepted in cross examination that he had no documentary proof about nonavailability of such work and this aspect is considered by Industrial Court in paragraph 33 of judgment. In view of this application of mind, providing work to EPP workers or WST workers or dispute about unauthorised absence during period of employment of complainants pales into insignificance. Even if the days of employment and breaks admitted by Employer in his written statement in relation to each complainant are compared same inference follows. The Employer has produced before Industrial Court the records in relation to advice by Doctor asking employee to proceed on leave for half day. The written statement and the cross examination conducted by Employer leaves no manner of doubt that all records are available with Employer. It is therefore obvious that Employer could have produced in the court the overall position on the date on which break was given to any complainant pointing out that no employee junior than him was then retained and also pointing out that no employee junior than him was made permanent. Failure to produce this

material speaks volumes against the bonafides of Employer. The complainants no doubt were not in position to point out exactly who replaced them but they have proved that they were not continued and their juniors were allowed to continue. In cross examination of employees it has been attempted to show that services of each complainant came to end because of his time bound appointment. It has also been shown that the pleading that breaks were deliberate is also admitted by employee to be not in existence in complaint. Employee also admitted that pleadings are silent about weekly of, national holidays, paid holidays and absence from duty etc. Witness/employee also accepted correctness of attendance and it has been brought on record that though the employee tried to contend that it was not correctly recorded, in cross examination it has been shown that there were no pleadings about incorrect recording of attendance by employer. It was also pointed out that in some cases there was contradiction in pleading and in proof about completion of 240 days continuous service. Even existence of mutually inconsistent stand in this respect in U.L.P. complaint 442, 446, 447/2004 is also demonstrated. Employee Shri Deshpande was unable to state who was exactly appointed in his place during his break period. The Employer has demonstrated that some of such named persons were working along with complainants. However, date on which they got work & when they were asked to quit are relevant. The position of their seniors on these dates must be considered. Working together of seniors & juniors for some time can not be an answer here in defence. The question of break is considered by Industrial Court in paragraph 43 onwards of its judgment and nothing has been pointed out to enable this Court to hold that said consideration is in any way perverse.

15. In cross examination of Shri Deshpande, he admitted that Complainants used to go to collect further appointment orders and for that he used to get the gate pass. In his crossexamination in paragraph 63 employer suggested to him that after tenure of appointment orders expired, employer used to forward telegrams to such persons to resume duty again.

However, none of these facts show that grievance could not have been made under item 9 of Schedule IV of MRTU Act and, as already discussed above, artificial breaks have been given to individual by Employer. The argument of Employer before this Court is also that such individual grievance could not have been examined jointly by Industrial Court. Fallacy in this argument is apparent from the rotation of employees in batches as considered above and corresponding violation of provisions of Model Standing Orders which definitely is individual grievance. It is not an unfair Labour practice of nature which could be gone into only under item 6 of MRTU Act. Such an argument is not available merely because large number of employees have come together to file their complaints together. Item 6 of Schedule IV of MRTU Act is not the licence given to Employer to violate provisions of Standing Orders against several individuals at a time. The learned member of Industrial Court has rightly concluded that the bar u/s 21 Of MRTU Act is not attracted and judgment of Hon Apex Court reported at 1995 1 CLR 607 (Shramik Utkarsha Sabha v. Raymond Woolen Mills

Ltd.) has no application. Similarly distinguishing the judgment of Hon Apex Court in case of The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, by Industrial Court, though not for proper reasons, has not affected its judgment on merit.

16. Next question is whether any challenge to termination was necessary. It is therefore necessary to understand what this termination or break is. As already discussed above and also latter, between two appointments of each complainant there is gap of few days. The story of employer about publishing the need of temporary workforce on notice board and calling upon employees to collect appointment orders in this respect is important. During cross of complainants, suggestion of sending telegrams to such employees is also given. If the complainants did not report in spite of notices being published or telegrams being issued, the employer could have very well produced those notices or telegrams. If the senior employee did not make himself available, the employer was expected to make that work available to next junior person and those details could have been produced before Industrial Court. After middle of 2001, work is provided to complainants for the first time in September 2004. How in September 2004 number of complainants were again reached and they were required to be called back for work has not been demonstrated by employer. Had employer demonstrated that this employment in September 2004 was on account of any temporary increase in work of permanent nature, effort & arguments not to connect their current employment with previous employment could have been understood. However, as this employment provided September 2004 is itself again repetition of earlier unfair labour practice, the employees are justified in pointing out that same unfair labour practice is being repeated again and claim relief about it. It is apparent that employer recognised claim of employee for the employment in September 2004 and hence they were recalled. In present facts and background, when employer has not proved that this recall was on account of any temporary increase in work of permanent nature, it is apparent that absence of any grievance by employee about their last termination in middle of 2001 or about not providing them work will September 2004 is not relevant at all. The design of employer to subject them to unfair labour practice further and again is established and their entitlement to relief flows from it. Supersession of claim of complainants till May 2003 and thereafter from March 2004 till September 2004 stands proved on record. The employer could have very well disclosed names of all permanent employees who were earlier temporary and made permanent after 1999 with their ticket numbers and could have demonstrated that no employee junior than present 38 complainants has been made permanent. Employer could have also produced its record from middle of 2001 till September 2004 to show that no contingencies arose in the meanwhile to provide work to these complainants. It is therefore clear that unfair labour practice to which these complainants were subjected earlier is sought to be perpetrated further after September 2004. The approach of Industrial Court in this respect is perfectly justified and it cannot be said that burden has been

placed upon employer. The case of employer is specific and it has been stated that as complainants did not turn up, they did not get the work. In other words, somebody else junior than these complainants got said work. Definitely employer is better placed and equipped to prove this stand. As there was definite material before Industrial Court to indicate that juniors were given work by sidetracking claim of complainants the stand of employer that it did not engage any temporary worker between 1/5/2003 to 31/3/2004 by itself is not sufficient to show ouster of claim of complainants. It has come on record that complainants were also pursuing their claim and had filed U.L.P. complaint in 2003 against employer. However after they entered the service again in September 2004, they have withdrawn from this earlier U.L.P. complaint with leave of Court with liberty to file present complaints. Thus their desire to seek justice from Court against employer always existed. It is more than clear that by adding period of artificial break between two appointments to the period of service disclosed in written statement 240 days are completed by everybody. Hence non consideration by Industrial Court about admitted position of completion of 240 days by one Shri Landge or dispute about period of absence being treated as unauthorised absence or leave are all really not required to be gone into.

Let us find out the length of service of some of complainant pointed out by employer in written statement before Industrial Court. The duration of each employment mentioned in bracket by me will reveal that there was systematic gaps given by employer regularly without looking to the aspect of industry seniority of such daily wage/temporary employees.

Nandkishore Rajankar is complainant in U.L.P. complaint 428/2004 and respondent in writ petition 139/2006. His ticket numbers is 1859. According to employer's written statement, he has worked from 17/5/1999 to 15/11/1999 (roughly for six months) and then from 24/6/2000 to 23/12/2000 (for six months). Thereafter he has been given work on 28/9/2004.

Keshao Sawarbandhe is complainant in U.L.P. complaint 436/2004 and respondent in writ Petition 145/2006. His ticket number is 1832 and as per employer he has worked from 8/4/1999 to 9/10/1999 (for six months) with breaks and then from 8/4/2000 to 6/11/2000 (for seven months) with breaks and thereafter from 30/9/2004 onwards. His junior Nandkishore Rajankar with ticket number 1859 continue to work beyond 9/10/1999 and thereafter beyond 6/11/2000.

Narendra Shirpurkar is complainant in U.L.P. complaint 423/2004 and respondent in writ petition 149/2006. His ticket number is 1829. According to employer he has worked from 1/4/1999 to 28/9/1999 (for about 6 months) with breaks and thereafter from 22/4/2000 to 30/10/2000 (for about six months) with breaks. He got employment again on 3/10/2004. His juniors viz. Nandkishore Rajankar (ticket number 1859) & Keshao Sawarbandhe (1832) continued to work beyond 28/9/1999 and thereafter beyond 30/10/2000.

Sunil Nagpure is complainant in U.L.P. complaint 432/2004 and respondent in writ petition 144/2006. His ticket number is 1860. According to written statement of employer he worked from 16/5/1999 to 15/11/1999 (for six months) and then from 4/3/2000 to 12/6/2000 (three months) and then from 17/8/2000 to 8/12/2000 (4 months) and thereafter from 3/10/2004. It is apparent that he was provided with work prior to his seniors and was continued after break was given to them. Prabhakar Raipure is complainant in U.L.P. complaint 454/2004 and respondent in writ petition 143/2006. His ticket number is 1808. According to employer he worked from 11/12/98 to 18/6/1999 (for six months) with breaks and thereafter from 26/12/1999 to 9/5/2000 (about 5 months) with breaks and then from 16/6/2000 to 18/8/2000 (2 months) with breaks and thereafter from 21/12/2000 to 11/5/2001 (for six months)) with breaks and thereafter got work on 28/9/2004. He is thus not on work after 18/6/1999 till 26/12/1999.

Nandkishore Rajankar with ticket number 1859 is provided work between 17/5/1999 to 15/11/1999. He does not get work from 18/8/2000 to 21/12/2000 while Nandkishore Rajankar is provided work from 24/6/2000 to 23/12/2000.

Raju Shende is complainant in U.L.P. complaint 445/2004 and respondent in writ petition 137/2006. His ticket number is 1272. According to employer he worked from 5/6/1998 to 25/1/1999 (about seven months) and then from 30/9/1999 to 31/3/2000 (six months) and thereafter from 12/10/2000 to 9/4/2001 (six months). Thus he did not get work from 26/1/1999 to 29/9/1999, 1/4/2000 to 11/10/2000. Keshao Sawarbandhe (1832) has worked from 8/4/1999 to 9/10/1999 and then from 8/4/2000 to 6/11/2000.

Pramod Nikule is complainant in U.L.P. complaint 420/2004 and respondent in writ petition 138/2006. His ticket number is 1809. As per employer, he has worked from 10/12/1999 till 30/6/2000 (6 months) with breaks and then from 3/7/2000 till 14/8/2000 (more than one month) with breaks. In paragraph 1 of his complaint he has that he started working from 12/12/1998 and this is admitted to be correct by employer. However details of his work from 12/12/1998 till 10/12/1999 are not given in written statement. His ticket number shows that he is senior to Sunil Nagpure(1860) who worked from 16/5/1999 to 15/11/1999 (for six months) and then from 4/3/2000 to 12/6/2000 (three months) and then from 17/8/2000 to 8/12/2000 (4 months) and thereafter from 3/10/2004. Thus when Pramod was not given work after 14/8/2000, Sunil was given work from 17/8/2000 till 8/12/2000.

Prashant Bire is complainant in U.L.P. complaint 442/2004 and respondent in writ petition 167/2006. His ticket number is 1274. As mentioned in its written statement by employer, he has worked from 13/6/1998 till 11/12/1998 (for six months), from 1/2/1999 till 30/3/1999 (2 months), 9/12/1999 to 21/4/2000 (4 months) and then from 28/9/2004. Raju Shende (number 1272) his senior did not get work from 26/1/1999 till 29/9/1999. Prashant Bire did not get work between 31/3/1999 to 8/12/1999 while his junior Nandkishore Rajankar with

ticket number 1859 is provided work between 17/5/1999 to 15/11/1999.

Suresh Waghmare is complainant in U.L.P. complaint 447/2004 and respondent in writ petition 135/2006. His ticket number is 1295. According to employer he has worked from 30/10/1998 till 31/5/1999 (seven months) with breaks and then from 5/12/1999 to 5/2/2000 (2 months), from 3/3/2000 to 6/5/2000 (2 months), from 24/6/2000 to 7/8/2000 (about 1 and half month), from 18/12/2000 to 16/3/2001 and thereafter from 27/9/2004. Sunil Nagpure (1860) is his junior who worked from 16/5/1999 to 15/11/1999 (for six months) and then from 4/3/2000 to 12/6/2000 (three months) and then from 17/8/2000 to 8/12/2000 (4 months).

Shriram Joshi is complainant in U.L.P. complaint 446/2004 and respondent in writ petition 13/2006. His ticket number is 1845. As per employer he has worked from 23/4/1999 to 18/10/1999 (about six months), 27/4/2000 till 30/12/2000 (about 8 months) and then from 28/9/2004. Thus he has worked during the period when Suresh Waghmare was given break.

Cases of complainants Shri Surendra Shende and Shri Deshpande are already considered above.

Thus, above scrutiny of about "1/3" complaints reveal that the Employer has resorted to systematic rotation. Remaining written statements filed by Employer also show same state of affairs. Thus Employer has not maintained any waiting list or seniority list and has provided work to employees in batches and has rotated them only with a view to see that they do not complete continuous service of one-year. Precaution has not been taken to see that junior employee should go out if work was not available or senior employee should be first called back if work was available. The defence of Employer about study of man power requirement for every quarter and its review at local level on 8 and 23rd of each month is falsified by this state of affairs. There is no point in mentioning position emerging from comparative study of all written statements on record because the Employer has deliberately avoided to produce on record the seniority/waiting list of employees for period prior to 30/9/2000. If any such seniority list of 1998 or 1999 would have been produced or had Employer produced the record of 155 employees selected by it for grant of regularisation/permanency, such an exercise could have been undertaken more effectively. The learned member of Industrial Court has considered the cases of complainants as pleaded by them in their complaints and I do not find anything wrong with it. The breaks or gaps between two employments are not occasioned naturally due to market fluctuations but are manipulated and hence, deserve to be ignored. Employer possesses material which will demonstrate its malafides in the matter. In view of position emerging from written statement as discussed above and also from evidence on record of Industrial Court, the case of employees is sufficiently established. If Employer wanted Industrial Court to take any other view, burden was upon employer to explain above state of affairs by producing authentic documents. I do not find any perversity or jurisdictional error in application of

mind and appreciation of evidence by Industrial Court. The contention that defence of Employer is not considered or about non application of mind by Industrial Court is without any basis. The controversy about "leave" and whether it was sanctioned or not becomes totally insignificant because of the findings above. The alleged unauthorised absence is again stated to be treated as break in service by employer. However, from cross of employees it appears that in certain cases employees were checked by medical practitioner of Employer and thereafter they were sent back. It is not shown by Employer that these employees were covered under employees state insurance scheme and any ESI card was issued to them. However, as the breaks or gap between two appointments cannot be treated as voluntary unemployment, it is apparent that the employees completed 240 days earlier and period of such absence is inconsequential.

17. The defence of Employer is that after expiry of last appointment order, respective complainant did not come for work at all and hence there is gap between his last appointment and the appointment which followed thereafter. From crossexamination of employees conducted by Employer it is apparent that Employer has taken dual stand in this respect. The first stand is that it used to display the list of employees for whom work was available and it was duty of such employee to report for work. The other stand is it used to forward telegrams intimating such employee about a availability & accordingly it was their responsibility to report for work. This inconsistency in the stand is apparent & it is on account of afterthought. It cannot be lost sight of that the list produced by Employer as waiting list or seniority list is as on 30/9/2000. If the employer was really systematic in recalling employees back for duty/work, the employer could have produced the waiting list or seniority list as maintained on any date in 1998 or 1999 or even 2000. The periods of employment disclosed in written statement with details of off days, absent days, leave, Doctor's certificate all indicate deliberate with-holding of the lists used by Employer to rotate employees. Further, the defence of Employer that need for additional manpower was worked out on the basis of requirement for each quarter depending upon market demand for tractors also becomes material in this background because no documents showing any application of mind by any department of employer on these lines in any quarter are produced before Industrial Court. Industrial Court has considered this issue in paragraphs 43 to 49 of its judgment and I do not find any perversity or jurisdictional error on its part in the matter. Though Industrial Court has, in express terms not said that the defence of Employer about his always being ready and willing to provide work to complainants and about complainants not turning up to claim it, is incorrect, from its judgment it is apparent that it was satisfied that there was no substance in it. In paragraphs 50 and 51, Industrial Court has found that names of certain EPP trainees and W.S.T. workers appear in shift schedules at exhibit 40 to 42. The shift schedules contain the name of employees with whom employer has employer-- employee relationship. No such relationship can exist between any trainee and they cannot form part of any shift

schedule. Industrial Court has also found that these names are also appearing in documents like exhibit 76, 82 to 84 etc. and production work was obtained from these trainees. It cannot be forgotten that from middle of 2001 till March 2004, Employer alleges that it did not engage any temporary worker. Again this statement is not substantiated by producing any document to explain any market situation or other position /circumstance which did not require Employer to recruit temporary workers. In fact the responsible officer for Employer admitted in cross that every type of work is obtained from these trainees. Reliance by Employer on Bharat Iron Works Vs. Bhagubhai Balubhai Patel and Others, to contend that pleadings of employees are incomplete or cryptic is misconceived. In this case, the Hon Apex Court notes that ordinarily a person is victimised, if he is made a victim or a scapegoat and is subjected to persecution, prosecution or punishment for no real fault or guilt of his own, in the manner, as it were, of a sacrificial victim. It is also noted that victimisation is a serious charge by an employee against an employer, and, therefore, it must be properly and adequately pleaded giving all particulars upon which the charge is based to enable the employer to fully meet them. The fact that there is a union espousing the cause of the employees in legitimate trade union activity and an employee is a member or active office-bearer thereof, is, per se, no crucial instance. The onus of establishing a plea of victimisation will be upon the person pleading it. Mere allegations, vague suggestions and insinuations are not enough. All particulars of the charge brought out, if believed, must be weighed by the Tribunal and a conclusion should be reached on a totality of the evidence produced. A proved misconduct is antithesis of victimisation as understood in industrial relations. This is not to say that the Tribunal has no jurisdiction to interfere with an order of dismissal on proof of victimisation. These observations of Hon Apex Court do not help the employer because here it i.e. in present case deliberate design of employer to defeat welfare measures contained in Standing Orders in favour of complainants is pleaded and has been established.

18. Thus grievance of Employer that individual cases are not considered by Industrial Court is misconceived. Grievance of each complainant in his complaint is individual and the same is considered by Industrial Court together because of common evidence produced by both the parties. It was not necessary for each complainant to enter witness box. The Employer did not produce any material warranting such individual examination. All complainants were denied protection of welfare measures of Standing Orders because of manipulation practiced by employer. The violation of Standing Order 4C has been proved and hence, unfair labour practice under item 9 is also proved. The alternate stand of Employer that it was at the most unfair Labour practice under item 6 of Schedule IV of MRTU Act of which no cognizance could have been taken by Industrial Court in such individual complaint is therefore erroneous. Merely because Employer succeeded in denying benefit of Standing Orders to large number of employees, it will not lose its individual nature to amount to an unfair labour practice under item 6 of Schedule IV.

19. In paragraph 17 of its judgment, Industrial Court has found that the complainants before it were doing same work which the permanent employees were doing and hence it has found that they were entitled to same wages as were being paid to regular/permanent employees. It has compared the pay slips to find that complainants were being paid less. The Employer has not questioned this finding of fact. Only contention is there was no such plea in U.L.P. Complaint. However, the argument is misconceived. In para 1 of complaint itself it is stated that complainants are temporary employees paid monthly on daily wage basis. It is further stated in paragraph 2 that work of complainants is of permanent and regular nature. In paragraph 6 it is pleaded that complainants are entitled to grant of permanency status, privileges and wages/pay scale of permanent employee. In paragraph 11 of their written statement in each complaint, Employer denied this entitlement. It is therefore clear that the respondent understood the grievance and no prejudice whatsoever has been caused to it even otherwise. In this respect, existence of two groups i.e. one of permanent employees and the other of temporary employees (complainants) is already established and preferential treatment to permanent employees totally disregarding the merits has also been established. The hostile mindset of Employer in this respect has come on record. Observations of Industrial Court about elected representatives in paragraph 14 of its judgment are not really very relevant for deciding the controversy. The finding that employees placed their grievance before elected representatives and said elected representatives did not pay any attention to it, also seems to be incorrect. Shri Deshpande, employee in his cross-examination in paragraph 68 has admitted that employees never contacted elected representatives and never asked them to put forth their claim before management or before the court. However, as already observed nothing much turns upon it in this matter.

20. Issue that the Complaints are time-barred now needs to be examined. The scheme of Model Standing Orders in this respect is important. Standing order 4D contemplates Maintenance of waiting list of all temporary operatives whose services have been terminated on account of completion of work for which they were appointed or on account of expiry of the period for which they were employed. The list has to contain his name and address, nature of his work or occupation, the wage paid to him and date of termination. Whenever any permanent vacancy becomes available such employee in waiting list is to be given preference. Standing order 4E requires employer not to appoint any new person either as badli or temporary unless all persons included in the list are provided work in the undertaking. It is therefore apparent that person who is senior because of his standing in seniority list is to be given preference while providing work even of temporary nature. It conversely follows that if there is any reduction in temporary work of permanent nature, junior most temporary employee will be required to go out and not senior employee. The list is required to be maintained with some purpose and obviously to avoid any discrimination in the matter. Names of all 38 complainants continued in this list and hence they

were recalled in September 2004. In the circumstances it is apparent that though their services were not utilised for about three to four years before September 2004, that by itself is not sufficient to defeat their rights under the Model Standing Orders. It is apparent that even as per Employer, their termination was not finale and they were not permanently out. Hence arguments that complainants did not challenge their termination or their complaints filed in year 2004 are timebarred, are all misconceived and unsustainable. The complainants have correctly pleaded that the cause of action to file complaint accrued after completion of 240 days of continuous service and it subsists or survives. The learned member of Industrial Court has considered this grievance in paragraph 16 of its judgment and answered it in favour of employees. I do not find anything wrong with said application of mind.

21. Another contention related to this point and raised by Employer is that the complainant should have been filed within 90 days of supersession of claim by appointing new person or junior. It is also argued that such new person or junior should have been impleaded as party respondent before Industrial Court. When the employer is not maintaining any waiting list and is not producing any such list for period prior to 2000, this argument cannot be accepted. All the complainants have shown that they were given artificial breaks and were subjected to rotation only to deny them the advantages of standing order. They are not concerned with any other employee who has been given permanency by Employer. The Employer cannot be allowed to take advantage of his own wrongful act. Industrial Court has rightly concluded this aspect in paragraph 57 of its judgment.

22. Even the act of Employer of providing work to these employees suddenly after three or four years in September 2004 has not been explained. What was the market fluctuation or contingency which necessitated grant of such employment has neither been pleaded nor proved. The said employment therefore is again the repetition of earlier unfair Labour practice of rotation and hence, has revived the grievance of employees afresh. Their U.L.P. Complaints therefore cannot be held to be time-barred.

23. The seniority list or waiting list at exhibit 36 does not contain names of employees who have been regularised or made permanent prior to 30/9/2000. Thus Complainants/employees are in position to compare their case with names of temporary employees appearing in that list. Discussion in this judgment clearly shows that employer could have produced such list even for earlier years i.e. 1999 or 1998 to enable employees to demonstrate their grievance more effectively. The Employer could have himself shown to Industrial Court from ticket numbers and other data that no junior of any of the complainants was made permanent. The mandate of Standing Orders in this respect is very clear. The contention of employer that there is no plea about juniors as mentioned in exhibit 36 being made permanent before complainants is misconceived in view of assertion in paragraph 6 of U.L.P. Complaint. In any case, it is also irrelevant.

Similarly the argument that learned member of Industrial court could not have answered point No 3 and 4 as "partly proved" is again half-hearted and misconceived. The list at exhibit 36 is before Industrial Court and persons who were made permanent are known to Employer. The Industrial Court has only applied law and hence no exception can be taken to the approach of Industrial Court in the matter. Consideration in paragraph 43 and para 49 of its judgment by Industrial Court cannot be faulted with. Similarly, point No 3 and point No 4 are dealt with in extenso by Industrial Court and hence, when in paragraph 11 of judgment briefly mentioning the conclusion as "partly proved" does not in any way affect the consideration on merits. In fact in paragraph 63 of judgment, Industrial Court has expressly stated that it answers point No 3 and 4 "in affirmative".

24. Learned Counsel for Employer relied upon Rajasthan State Ganganagar S. Mills Ltd. Vs. State of Rajasthan and Another, to contend that employees have failed to show continuous service. Hon Apex Court has observed that burden to show completion of 240 days is on employee and has refused to draw adverse inference only because muster roll was not produced. Following observations in paragraph 6 and 7 are important: --

6. It was the case of the workman that he had worked for more than 240 days in the concerned year. This claim was denied by the appellant. It was for the claimant to lead evidence to show that he had in fact worked upto 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that in fact the claimant had worked for 240 days in a year. These aspects were highlighted in The Range Forest Officer Vs. S.T. Hadimani, . No proof of receipt of salary or wages for 240 days or order or record in that regard was produced. Mere non-production of the muster roll for a particular period was not sufficient for the Labour Court to hold that the workman had worked for 240 days as claimed. Even if that period is taken into account with the period as stated in the affidavit filed by the employer the requirement prima facie does not appear to be fulfilled. The following period of engagement which was accepted was 6 days in July 1991, 15? days in November 1991, 15? days in January 1992, 24 days in February 1992, 20? days in March 1992, 25 days in April 1992, 25 days in May 1992, 7? days in June 1992 and 5? days in July 1992. The Labour Court demanded production of muster roll for a period of 17-6-1991 to 12-11-1991. It included this period for which the muster roll was not produced and came to the conclusion that the workman had worked for more than 240 days without indicating as to the period to which period these 240 days were referable.

7. In our view the Labour Court and the High Court have failed to consider the statutory requirements in their proper perspective. One of the stands taken by the employer was that the engagement was made keeping in view the temporary needs and it was seasonal in character. No definite finding was recorded by the

Labour Court or the High Court in that regard.

Here, from the facts disclosed above it is apparent that the Industrial Court has considered period of forced unemployment and finding of completion of 240 days is reached by adding said period to the period of employment admitted by Employer.

Hence this ruling has no application.

The totality of circumstances considered above clearly establish that Employer could have & ought to have produced all documents on record to show its bona fides. Its failure to do so necessarily results in drawing adverse inference which is again neither unwarranted nor incorrect. The approach of Industrial Court in this respect cannot be faulted with.

25. In U.L.P. complaint of employee Sudhakar with ticket number 4350, in paragraph 23 Industrial Court has found that employees junior to him with ticket number 4405 (Shri Bhurey), ticket number 4413 (Shri Dadilwar), 4415 Shri Dhande, ticket number 4410 Shri Londe, ticket number 4351 Shri Chavare, ticket number 4352 Shri Bisne, ticket number 4453 Shri Gotmare and ticket number 4374 Shri Borkar were made permanent. Though Industrial Court has granted declaration of unfair labour practice under item 5 and item 9, because he was not in service on the date on which the file the complaint, he was found not entitled to any relief. The fact that he was in service again from 27/3/2004 or that his name continued in Law in waiting list and therefore, he had right to claim back service as per his standing therein are all lost sight of. It is clear that Standing order 4D or 4E cannot and does not require presence of employee actually in service whenever vacancy for his absorption or employment arises. The application of mind by Industrial Court is therefore apparently erroneous & unsustainable. His subsequent engagement back in service is again part of unfair labour practice complained of before Industrial Court and, in order to avoid its repetition, Industrial Court could have very well granted him relief as he was in service on that day. In such circumstances, presence of employee in employment is fortuitous circumstance and cannot take away the right of employee to point out that though he's kept out of employment, his juniors are provided work and hence, he should also be provided work. No distinction could have been made between him and other employees or complainants to whom Industrial Court granted relief on very same day. Such employee is not a challenging his termination and he is only trying to enforce right provided to him by Standing Order 4D. The moment he succeeds in showing violation of that provision or violation of provision of Standing Order 4E, he is entitled to be provided with work and he need not be on the duty for that purpose. The defence of Employer that juniors were made permanent because of directions of Industrial Court in their favour cannot be an answer to such better claim of senior employee like complainant Sudhakar. 2001 (2) C. L. R. 982 --R.P. Sawant v. Bajaj Auto relied on by Advocate Puranik considers entirely different situation. Taking advantage of the stay granted by the Division Bench of the order of the learned Single Judge

dated 1st December 1997 granting interim relief, during the period 20th December 1997 to 27th February 1998, the Bajaj Auto Ltd. terminated the services of all 301 Complainants who were concerned in Letters Patent Appeals Nos. 210 of 1997, 211 of 1997 and 212 of 1997. Division Bench has noted that strangely, during the period January and February 1998, the Company went ahead and appointed 65 new temporary workmen despite removing the aforesaid 301 temporary workmen. The Hon Division Bench there noted that a" conjoint reading of Sections 5, 7 and 32 of the 1971 Act would make it clear that, though, for the purpose of exercising initial jurisdiction into a substantive Complaint, the jurisdictions have been compartmentalised inasmuch as the Labour Court has no jurisdiction to entertain Complaints other than Complaints falling under Item 1 of Schedule IV of the 1971 Act and conversely, the Industrial Court has been given powers to entertain Complaints in all other matters, it does not mean that the Industrial Court, while exercising jurisdiction within the sphere legitimately assigned to it, cannot pass an order which is required to be done in the interest of justice. It cannot be forgotten that Section 32 starts with a non-obstante clause "Notwithstanding anything contained in this Act" and provides that the Court trying the matter shall have the power to decide "all matters arising out of any Application or Complaint referred to it for the decision under any of the provisions of this Act." It also found that -"A substantive Complaint can be entertained by the Court (Labour Court or Industrial Court) only with regard to the matters provided in Sections 5 or 7. If a complaint is substantively made to the Industrial Court, then by reason of Section 5(b), it has no jurisdiction to entertain a Complaint relating to unfair labour practices falling under Item 1 of Schedule IV of the 1971 Act; conversely, a Complaint of unfair labour practice falling only under Item 1 of Schedule IV can be entertained by the Labour Court, but not any other Complaint. This does not, however, mean that while trying a substantive Complaint legitimately falling within its jurisdictional purview, the Labour Court or Industrial Court is precluded from moulding the relief as required by the facts of the case." It is also important to note that the Division Bench observed in para 49 that "For these reasons, we are unable to read the two judgments, namely, National General Mazdoor Union (supra) and A-Z (Industrial) Premises Co-op. Society Ltd. (supra), as excluding the jurisdiction of the Industrial Court to grant relief of interfering with termination of service of an employee even in a Complaint other than one falling under Item 1 of Schedule IV of the 1971 Act before the Industrial Court. If the said judgments are to be so read, then they would not be good law." Further in paragraph 53, Hon Division Bench observed "This doctrine of restitution also supports the case of the workmen that pending hearing and disposal of their Complaints invoking, inter alia, Item 6 of Schedule IV of the 1971 Act, their Complaints could not have been scuttled by their unceremonious removal from service and, therefore, the Industrial Court should have exercised jurisdiction to interfere with the orders of termination of their services." Merely because doctrine of restitution has been applied by Hon Division Bench in case before it, here in this situation, that does not mean that in all cases where such doctrine cannot be applied, no relief can

be given. In the facts of this case as observed above, reliance upon this judgment is totally misconceived.

26. Adv. Mohokar relied on Neeta Kaplish Vs. Presiding Officer, Labour Court and Another, , to urge that Complaint of Sudhakar Narad deserved to be allowed as there was no evidence adduced by Employer in defence. It is the case in which the Hon''ble Apex Court considered scope of right of employer to lead fresh evidence before Labour Court when domestic inquiry conducted by him is found to be vitiated in the light of Section 11A of Industrial Disputes Act. The proposition canvassed by learned Counsel is in following paragraph: --

27. Having regard to the findings recorded by the Labour Court that the domestic enquiry was not properly and fairly held and an effective opportunity of hearing was not given to the appellant, the Labour Court was right in calling upon the Management to lead fresh evidence. Since the Management did not lead any fresh evidence on merits, the appellant was well within her right to say that she, too, would not lead any fresh evidence. But, for that reason, her claim could not be rejected. Rather, she was entitled to be granted relief then and there. However, having regard to the entire circumstances of the case particularly when the Labour Court had itself found that the enquiry was not fairly and properly held, we allow the appeal, set aside the judgment of the High Court and that of the Labour Court and remand the case back to the Labour Court to decide the case afresh after requiring the parties to lead fresh evidence on merits in pursuance of its order dated 21- 11-1995. Having regard to the fact that the appellant was removed from service on 4-4-1987, we direct that the Labour Court shall dispose of the whole matter within three months from the date on which the certified copy of this judgment is produced before it. There will be no order as to costs.

It is therefore apparent that the context in which these observations are made cannot be lost sight of & no such proposition of law emerges from this paragraph.

27. As far as Himachal Pradesh Housing Board Vs. Om Pal and others, is concerned, following paragraph is sufficient to hold that it has no application in the facts of present case: -

8. On a perusal of the impugned order dated July 31, 1995 it appears that the Tribunal has finally disposed of O.A. No. 43 of 1991 filed by the respondents and has given directions regarding regularisation of the said respondents without examining the legality of the termination of their services with effect from December 1, 1990. The question of regularisation of the respondents could arise only, if the termination of their services with effect from December 1, 1990 was found to be invalid. The claim of the respondents in their application before the Tribunal that the termination of their services was illegal had been refuted by the Board in its reply. Without holding that the termination of the services of the respondents with effect from December 1, 1990 was invalid and that the respondents continued in service, the Tribunal was in error in giving directions

regarding their regularisation and payment of enhanced wages to the respondents with effect from January 1, 1994 as per the judgment of this Court in Mool Raj Upadhyaya Vs. State of H.P. and Others, . The impugned judgment dated July 31, 1995 and the order dated November 17, 1995 cannot, therefore, be upheld and have to be set aside and O.A. No. 43 of 1991 has to be remitted to the Tribunal for consideration of the question regarding validity of the termination of the services of the respondents with effect from December 1, 1990.

Hence, the fact of termination was admitted by employees who approached Tribunal challenging the very order of termination and without pronouncing upon its validity or otherwise, Tribunal directed regularisation. Facts at hand are entirely different and no such termination severing relationship once for all has been pointed out at any point of time before Industrial Court. What is contended is automatic termination due to efflux of time. Again, the fact that name of employee was retained by Employer on some roll with it and he was offered the work again on 27/3/2004 as per his position therein according to Employer. Hence above ruling has no relevance here. In AIR 1999 S.C. 1543 i.e. Ramchander v. Addl. Dist. Magistrate, Hon Apex Court considers provisions of Rule 4, Rule 9 of U.P. Regularisation of Ad hoc Appointments (On posts outside the purview of Public Service Commission) Rules (1979) and it is found that as per said rules benefit of regularisation of service is available only if ad hoc employee is in service. As service of petitioners ad hoc appointees was terminated before date on which Rule 9 came to be introduced, they did not therefore satisfy condition in Rule 4(i) & also relief of setting aside termination was not claimed by them, the petitioners were found not entitled to be regularised. It is therefore clear that the fact of termination from services existed and hence, in view of language of Rule 9 which required continuation in service, this view has been taken. Here, the fact of such termination i.e. putting an end to relationship itself has not been demonstrated to be in existence. Similarly Dattatraya Shankarrao Kharde v. Executive Engineer, Chief Gate Election Unit Number 2, Nagpur reported at 1994 (1) C.L.R. 1022, the Division Bench ruling of this Court is cited to state that as termination which had taken place either in year 2000 or 2001 was not challenged, there cannot be reinstatement and hence there can be no regularisation. In paragraph 9 of this ruling, Division Bench of this Court found that reference to termination of temporary service again and again in paragraph 4 of that complainant was intended to highlight the unfair Labour practice under item 6 of Schedule IV and there was no substantive challenge to termination of service as such. It was found in paragraph 10 that even prayer Clause 4 revealed relief claimed that after re-employment from September 15, 1984 their services should not be discontinued pending decision of U.L.P. complaints. The said prayer was to enable them to complete requisites service so that they could attain the status of permanent employee and get privileges accordingly. In the circumstances, in view of actual termination which came into effect from 15/10/1984 and which was not challenged, it was held that

such relief of declaration could not have been granted. However it cannot be ignored that in paragraph 12, Division Bench found that the employees would at the most be entitled to get only 15 days wages till their next appointment on 15/9/1984. In present circumstances also, it is therefore apparent that declaration of unfair Labour practice under item 5 or item 9 with consequential directions to release corresponding benefits for the period admittedly spent in service can be issued by Industrial Court. Considering the fact that, employees are in service when complaint was filed and when it was being decided, Industrial Court was justified also in granting further relief in present matters. Even otherwise there is no question of challenging the termination here as Employer himself, in view of name of employee Sudhakar appearing in list prepared by him, has provided the work back to him. He was on duty when the Industrial Court decided his U.L.P. Complaint. Writ petition filed by this employee vide Writ Petition number 6427 of 2005 therefore deserves to be allowed.

28. In Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , Hon"ble Apex Court has stated in paragraph 19 that judgments of Courts of law are not to be interpreted like any statutory provision. There can be no debate about this proposition. However, perusal of impugned judgment of Industrial Court reveals that it has not interpreted in any way the earlier judgment of this Court in case of Vinod Bhagat (supra). On the contrary, after reaching the findings on facts, the law as explained has been applied. In Vinod Bhagat v. Mahindra & Mahindra (supra) i.e. W.P. 2638 of 2003 D/O 29/04/2005 identical U.L.P. has been looked into. All Counsel have also made extensive reference to this judgment because it is delivered practically in similar circumstances in case of this very Employer and only employees were different. Advocate Puranik for employer has tried to distinguish the findings recorded therein by urging that facts at hand are different. As against this Advocate Dharmadhikari and Advocate Mohokar have urged that there is no such distinguishing feature and learned member of Industrial Court has rightly applied the law identical facts. I will like to make brief reference to this judgment as the facts of present Complaints are already mentioned above.

Simultaneously the alleged distinguishing feature pressed in service by Employer can also be looked into. There is one more argument by Employer and it is that after recording of finding in this earlier judgment that the employees ought to have been recruited as permanent employees from day one itself, all subsequent findings recorded by this Court were not necessary for decision of those cases and hence are obiter. I have in said case found that by MRTU Act restrictions have been placed upon an individual to approach directly in the matters pertaining squarely to unfair Labour practices falling under item 2 and 6 of Schedule IV. However it is further observed that if there is any other unfair Labour practice covered by other items like item 5 or 9 of Schedule IV, merely because part of adjudication to be undertaken by the Industrial Court also requires consideration of facts which are relevant for purposes of item 2 or item 6, Industrial court cannot avoid its obligation to grant relief in relation to such

other unfair Labour practices. In said judgment, it is also noted that bare perusal of Schedule IV of MRTU Act demonstrates that entries therein cannot be mutually exclusive. It is also observed that employees of Mahindra & Mahindra can independently point out violation of any of the provisions of Standing Orders to establish unfair Labour practice under item 9 of Schedule IV. Such grievance is held to be individual grievance. It is also observed that cases under item 6 of Schedule IV does not require any specific instance or case of an individual for its application and it is general unfair Labour practice operating on uniform basis against all as opposed to an unfair Labour practice which operates against any particular individual. It has been held that in latter case it is unfair Labour practice falling under item 9 and it requires examination of individual facts of each case before it is so declared. Capitalising on these observations, learned Counsel for Employer has contended that in present case Industrial Court has not applied its mind individually to each case. However, this Court has also observed that if employees are rotated in batches and are recruited intermittently, the individuals who suffer on account of such rotation can definitely make grievance of violation of provisions of Standing Orders in individual cases. Merely because large number of employees make such individual grievance that will not make it unfair Labour practice of general nature. It is also recorded in said judgment that it was not necessary for Industrial Court to record separate finding in each case that complainant was employed for specific period and thereafter was given the gap and was substituted by some other employee and thereafter such substitute employee was terminated to create the vacancy to accommodate complainant as violation of Standing Orders 4D and 4E was found to be apparent. The scheme of these Standing Orders with their binding & conclusive character are all discussed at length in it. The position of present cases is not different. In earlier judgment is also observed that if the record shows engagement of substantial number of employees as temporaries consistently over a long period, need to terminate services of any individual stands negated as instead of bringing in a new similar recruit, such individual could have been continued further. The scrutiny of about one-third of total cases before Industrial Court undertaken in the body of this judgment again supports the same view and finding. This Court has also found that requirement of proving uninterrupted service of 240 days would be applicable only when the employer shows that employees were temporary employees in terms of provisions of Standing Order 3 (1) (d). Employer has to establish that employees were appointed for limited period of work which is of an essential temporary nature or employed temporarily as an additional operative in connection with the temporary increase in work of permanent nature. In relation to breaks given between two appointment orders, I have observed that such breaks are given against wish of employee and there is no contract of employment during it and Sub clauses (7) and (8) of Standing Order 3-g are not mean to occupy the field already occupied by its earlier subclauses. The use of these subclauses with word "service" in the definition has been construed to indicate the intention to include & count as service the period of breaks between two employments and these observations also apply here. The said period of

break between two employments is to be treated as period of "involuntary unemployment" even in present cases. It is also held that the phrases viz. "In the aggregate" in Clause 4C of Model Standing Orders and phrase "during a period of preceding 12 calendar months" itself show that some breaks/gaps in the employment of subject i.e. temporary worker are envisaged. Mahindra and Mahindra were not permitted to take advantage of their own omission to maintain waiting list as contemplated by Standing Order 4D. Different tests which apply while finding out unfair Labour practice under item 5 on one hand and under item 6 or item 9 on the other hand are also considered in said judgment and it is also recorded that unless and until the two groups are identified and some hostile mindset in Employer is established, it cannot be said that unfair Labour practice under item 5 is proved. The distinguishing features sought to be pressed into service by Advocate Puranik are therefore not at all available and that argument is misconceived. The findings reached are not only on account of finding of unconscionable contract in earlier writ petitions. No prejudice whatsoever has been caused to Employer because of consolidated/common trial and common order by Industrial Court.

29. Argument of limitation is also considered by me in this judgment i.e. Vinod Bhagat v. Mahindra & Mahindra (supra). It was noticed that item 5 was invoked there not only because of favourable treatment extended to juniors but also on account of disparity in wages payable to permanent employees and temporary employees. It was observed that the discrimination continued even till date and hence complaint was not time-barred. It was also observed that provisions of Standing Orders were violated and said violation was also going on till the decision of those complaints by Industrial Court. It was therefore held to be continuous cause of action by making reference to Full Bench judgment of this Court reported at Maharashtra State Road Transport Corporation Vs. Premalal Gajbhiye, . I find that those observations and conclusions apply with full vigour even in the facts of present cases. As already observed above, there is no "ouster" on account of termination or long unemployment of complainant employees in the matter. Joining of third person i.e. junior who has been favoured by Employer as party respondent or filing of U.L.P. complaint within 90 days of such supersession is therefore not essential. In said judgment I have found that temporary workers do not have backing of even elected representatives and are performing the same job at wages which are less by Rs. 4,000/- per month on an average than permanent workers. These observations hold good even in relation to present cases.

30. Accordingly Writ Petition No. 6427 of 2005 filed by employee Shri Sudhakar Narad is hereby allowed. The ULP Complaint No. 703 of 2003 filed by him stands allowed as per operative order dated 25.11.2005 passed by the Member, Industrial Court, Nagpur, in ULP Complaint Nos. 416 of 2004 to 432 of 2004, 440 of 2004 to 451 of 2004 and 454 of 2004, 22 of 2005 and 26 of 2005. The respondent employer is directed to give him confirmation from the date of institution of complaint with all consequential benefits.

All other Writ Petitions filed by employer challenging the order dated 25.11.2005 delivered by the Member, Industrial Court in ULP Complaint Nos. 416 of 2004 to 432 of 2004, 440 of 2004 to 451 of 2004 and 454 of 2004, 22 of 2005 and 26 of 2005 are hereby dismissed. However, in the circumstances of the case, there shall be no order as to costs.