

(2016) 07 BOM CK 0174

In the Bombay High Court

Case No : Writ Petition No. 5191 of 2004

The Municipal Council, Tirora

APPELLANT

Vs

Tulsidas Baliram Bindhade

RESPONDENT

Date of Decision : 22-07-2016

Acts Referred:

Industrial Employment Standing Orders Act, 1946 — Section 13A, 5
Maharashtra Municipal Councils Nagar Panchayats and Industrial Township Act, 1965
— Section 76
Maharashtra Recognition of Trade Unions and Prevention of Unfair

Citation : (2016) 5 AIRBomR 145 : (2017) 1 BCR 768 : (2016) 3 CLR 569 :
(2016) LIC 3954 : (2016) 6 MhLJ 867

Hon'ble Judges : B.P. Dharmadhikari and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Shri. A. Parihar, Advocate, for the Petitioner; Shri. M.P. Jaiswal with
Shri. B.M. Khan, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

B.P. Dharmadhikari, J.—The Hon'ble The Chief Justice has in view of the following orders dated 22.01.2015 passed by the learned Single Judge in Writ Petition Nos. 5191/2004, 5199 to 5205/2004, 5207 & 5520 of 2004, referred to this Division Bench the following question :

" 1. An unfortunate situation has arisen in the present matters. Writ Petition No.1209 of 2002 along with connected matters in respect of Class-IV employees of Municipal Council, Tumsar, were allowed by a common judgment and order delivered by the learned Single Judge of this Court (Smt. Vasanti A. Naik, J.) on 20-8-2011, and the common order passed by the Industrial Court directing regularisation on the basis of Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act read with Item 6 of Schedule IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, has been quashed and set aside and the complaints have been dismissed. Same is the view taken by me in respect of Class-IV employees of the

same Municipal Council in Writ Petition No.1207 of 2002 along with connected matters decided by common judgment and order dated 23-12-2013.

In another set of Writ Petition No.3087 of 2001 along with connected matters decided by me by common judgment and order dated 17-6-2013, same view is followed. In Writ Petition No.3436 of 2001 in respect of the employees from the same Municipal Council, a different view is taken by the learned Single Judge of this Court (Shri Z.A. Haq, J.) in the judgment and order dated 22-11-2014, and the writ petition filed by Municipal Council, Tumsar, has been dismissed, confirming the judgment and order passed by the Industrial Court, directing regularisation of the complainant in service, on the basis of Clause 4C of the Model Standing Orders. I do not find any distinction on facts in Writ Petition Nos.1209 of 2002, 1207 of 2002 and 3087 of 2001.

2. All these petitions arise out of the common order passed by the Industrial Court in the complaints under Section 28 read with Items 6 and 9 of Schedule IV of the Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 directing regularisation of the complainants in service upon completion of 240 days" continuous service as per Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act, 1946. It is an undisputed fact that all the complainants were appointed and working as daily wagers for years together. They were neither working as badli or temporary employees. There is neither any pleading nor any evidence to prove that all of them were appointed and working on the posts, which are sanctioned, as required by Section 76 of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965. It is also not the case either of the complainants or the employer Municipal Council that the proposal to create or sanction the posts of Class-IV employees to accommodate the complainants was forwarded to the Director of Municipal Administration under Section 76 of the said Act. Even if any such proposal is forwarded, no orders are passed to create or sanction the posts to accommodate the complainants as regular employees.

3. In the background of the aforesaid undisputed factual position, the Industrial Court has recorded the finding in all the matters that in terms of Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act, which are applicable to the employees working in the Municipal Council, the complainants have rendered 240 days" continuous service and hence they are entitled to regularization.

4. The facts stated in para 2 and the findings recorded by the Industrial Court are similar in all these decisions. There cannot be different view in the similar facts and circumstances. In the decision given in Writ Petition No.3436 of 2001, delivered by Shri. Z.A. Haq, J., I do not find any distinction on facts in Writ petition Nos.1209 of 2002, 1207 of 2002 and 3087 of 2001. The judicial discipline, therefore, requires all these matters to be placed before the Larger Bench to resolve the conflicting views and decide the following question of law so as to avoid a different view being taken in respect of Class-IV employees working

in the same Municipal Council :

Whether, in the absence of creation or sanction of the posts under Section 76 of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965, the complainants were entitled to claim permanency or regularisation in service on the basis of Clause 4C of the Model Standing Orders under the Industrial Employment (Standing Orders) Act, 1946?

5. The matters be, therefore, placed before Hon"ble the Chief Justice for constitution of appropriate Bench in terms of Rule 7 of Chapter I of the Bombay High Court Appellate Side Rules, 1960 to decide the aforesaid question of law."

2. We find that the controversy already answered by at least two Division Benches of this Court in 2006 & in 2008 in 2 LPAs and by at least two learned Single Judges S/Shri S. J. Vazifdar J. & B.P. Dharmadhikari J, after appreciating the binding precedents of the Hon"ble Apex Court. We have therefore rejected the request of Adv. M.P. Jaiswal to place the reference before Full Bench. Judgments of the Division Benches of this Court in LPA 37 of 2006 in case of Pune Municipal Corporation v. Dhananjay Prabhakar Gokhale, (2006) 7 LJ Soft page 107 : (2006) 4 Mah. L.J. page 66 (RMS Khandeparkar J. & Roshan Dalvi J.) & in LPA 14 of 2008 dated 31-7-2008 reported at 2008 (5) All M.R. 497 : 2008 (10) LJ SOFT 53 State of Maharashtra and Anr. v. Pandurang Sitaram Jadhav (Swatanter Kumar, C.J., A.P. Deshpande, J.) as also of Single Judge (S.J. Vazifdar, J.) in Ramesh Vitthal Patil & Ors. v. Kalyan Dombivali Municipal Corporation & Ors. 2010 (6) Bom. C.R. 661 : 2010 (8) LJ SOFT 39 and another judgment of a Single Judge (One of us B.P. Dharmadhikari J.) reported at 2011 (2) CLR 336 : 2011 (4) Mh. L.J. 875 Shrirampur Municipal Council v. V.K. Barde, Member, Industrial Tribunal & Ors., are helpful here. In fact, the respective learned Single Judges whose concurring orders lead to this reference have also taken note of this legal position. Though Shri. Jaiswal made request to place the matter before the Full Bench, he did not invite our attention to any contrary view of the Division Bench in the matter of public employment reached after considering the binding precedents. The third learned Single Judge to whom these two concurring views have been pointed out, noted the difference in facts presented to him and therefore, arrived at a different conclusion. As a question of law not requiring factual investigation is before us, respective Counsel have avoided to comment on merits of any of these orders and we also do not find it necessary to delve into it.

3. Before proceeding further, it will be proper to reproduce the relevant legal provisions here:

Section 76 Appointment of other officers and servants-

"(1) A Council may, with the sanction of the Director, create such posts of officers and servants other than those specified in subsections (1) and (2) of section 75 as it shall deem necessary for efficient execution of its duties under this Act.

(2) Subject to the provisions of subsection (3), the qualifications, pay, allowances and other conditions of service and the method of recruitment of any such officers and servants, excluding the posts equivalent to Class IV posts in the State Government, shall be determined by general or special order made by the Director in this behalf. In case of posts equivalent to Class IV posts in the services of the State Government, the qualifications, pay, allowances and other conditions of service and method of recruitment shall be determined by bye-laws made by the Council in this behalf.

(3) Subject to any general or special orders, which may, from time to time, be made by the State Government in this behalf, appointments to the posts created under subsection (1), shall be made by the Chief Officer from the list of the candidates selected by such selection authority or such other body, as the State Government may, by general or special order, specify.

(4) No Council shall employ any person, who has not completed fifteenth year, to serve as a member of its sanitary staff.

" Clause 4C of the Model Standing Orders (MSO) reads thus:

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

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

Clause 32 of the MSO reads as under :

"Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment."

4. It is apparent that a pure and simple question of law not dependent upon or requiring any answer to the disputed question of facts is placed before us. Hence, without touching any finding on facts or examining correctness thereof and without prejudice to the rival contentions in relation thereto, We complete this exercise.

5. Adv. Parihar on behalf of the respective Municipal Councils has relied upon the

judgment of the Hon"ble Apex Court reported at AIR 2015 SC 3473 Vice chancellor, Lucknow University v. Akhilesh Kumar Khare & Anr. He has also urged that view taken by the learned Judge passing the order of reference on 23.12.2011 in WP 1207/2012 and view of other learned Single Judge dated 02.08.2011 followed by him are correct. The cause for reference i.e. the order dated 11.11.2014 passed by the Hon. Single Judge noted as taking a different view in fact does not disturb the legal position but reaches a finding of fact and accordingly finds the settled law not applicable. He adds that in present matter the posts are not created or vacancies are not available. Hence, no recruitment process could have been initiated and persons working on daily wages do not acquire any right to post. Section 76 of the Maharashtra Municipal Councils, Nagar Panchayats & Industrial Townships Act, 1965 (hereinafter referred to as 1965 Act) as also the provisions of Maharashtra Civil Service Rules (hereinafter referred to as MCSR) govern the recruitment as also employment, hence, the provisions of MSO framed under Industrial Employment Standing Orders Act, 1946 (IE Act) cannot and do not apply. In absence of sanctioned posts, no relief of regularisation or permanency can be granted to the workmen.

6. Adv. M.P. Jaiswal for the workmen submits that no disputed question of fact needs answer here and hence, this Court after resolving the question referred, should also decide the writ petitions on merit. In all complaints filed under Section 28 r/w Sch. IV of Maharashtra Recognition of Trade Unions & Prevention of Unfair Labour Practices Act, 1971 hereinafter 1971 Act, entitlement to benefit of Clause 4C of MSO was specifically added by amendment and the respondent Municipal Councils have also replied to it. Their only defence as MCSR applies, Clause 4C of MSO cannot apply. He contends that MCSR does not apply to municipalities here of its own but as concerned Municipal Councils have adopted it. He invites attention to Clause 32 of MSO to plead that by such adoption of MCSR, applicability of Clause 4C is not defeated. To substantiate this, he draws support from Western India Match Company Ltd. and Workmen 1973 Lab. I.C. 1602 : 1973 (II) L.L.J. 403 (para 2), judgment of learned Single Judge reported at 1990 (1) C.L.R. 88 The Indian Tobacco Company Ltd. v. The Industrial Court and Ors. (para 17,19) which is affirmed by the Hon. Apex Court and judgment of Single Judge of this Court at 2010 (6) Mah. L.J. 178 (para 7) Raymond UCO Denim Private Ltd. v. Praful Warade & Ors. which follows the same line.

7. To point out that a beneficial provision made in MSO prevails over even clauses in certified Standing Orders and sanctity of the arrangement in the Standing Orders, he relies upon Raymond UCO Denim Private Ltd. v. Praful Warade & Ors. (supra), May & Baker Ltd. v. Kishore Jaikishandas Ichchaporia 1991 II CLR 176 (para 7) and Full Bench judgment reported at 2007 (1) CLR 460 : 2007 (1) Mah. L.J. 754 Gangadhar Balgopal Nair v. Voltas Limited & Anr.. Therefore, he stresses that Section 76 of 1965 Act cannot be used to defeat the welfare measure in Clause 4C of MSO. He substantiates his stance by inviting attention to AIR (1979) SC 65 : (1978) 4 SCC 16 U.P. State Electricity Board v. Harishankar Jain. In addition, Adv. Jaiswal has placed heavy reliance upon the

Division Bench judgment in LPA reported at 2016 (3) Mah. L.J. 183 Ballarpur Industries Limited v. Maharashtra Lok Kamgar Sanghatana and the judgment of learned Single Judge upheld therein reported at Maharashtra Lok Kamgar Sanghatana v. Ballarpur Industries Limited reported at 2011 (1) Mah. L.J. 93.

8. Adv. B.M. Khan invites attention to Section 2 (I) of the Minimum Wages Act to show how the work of employees is classified into either manual/clerical or then technical type for their wages and they are graded as skilled, semiskilled or unskilled for determination thereof. Under the IE Act, 1946 the model standing orders are separately framed for these categories. Availability of the workload for 240 days is found by law as sufficient indication of availability of a full time post. Clause 4C does not envisage any post or vacancy and its object gets defeated when it is attempted to be correlated with existence of a post or vacancy. He also relies upon various judgments cited by Adv. Jaiswal.

9. We can begin the discussion by pointing out an old judgment which considers legal mode & manner of recruitment in public employment. In 1972 Mah. L.J. 874 Uttam v. Municipal Council, Darwha, Division bench of this court in relation to recruitment of teachers in municipal council held that provisions of Article 14 of the Constitution of India made it mandatory to provide an opportunity to all eligible aspirants to compete for said posts. Comparatively recent judgment of this Court in case of Priyadarshini Education v. Ratis Bano 2007 (9) LJ SOFT 18 : 2007 (6) Mah. L.J. 667 again reiterated same law in relation to employment of teachers/staff in private aided schools. As these schools received grants from public exchequer, contention that as there is no express provision for public advertisement in statute, the public invitation for filling in vacancies was not necessary has been rejected. The Constitution bench judgment of Hon"ble Apex Court in case of Secretary, State of Karnataka v. Umadevi AIR 2006 SC 1806 is relied upon.

10. Other leading judgment of Hon"ble Apex Court relevant in the matter is Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, 2009 (12) LJ SOFT (SC) 306 : (2009) 8 SCC 556. There at page 574, Hon"ble Apex Court states :

"36. Umadevi (3) does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practise on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi (3) cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practise on the part of the employer under Item 6 of Schedule IV is established."

Little earlier Apex Court has, in this judgment observed that:

" 29. In the cases of irregular appointments (not illegal appointments) and their regularisation as onetime measure, however, the Constitution Bench referred to

earlier decisions of this Court in *State of Mysore v. S.V. Narayanappa, R.N. Nanjundappa v. T. Thimmiah and B.N. Nagarajan v. State of Karnataka* and said: (*Umadevi* (3) case1, SCC p.42, para 53)

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

"37. There cannot be any quarrel with the proposition that courts cannot direct creation of posts. In *Mahatma Phule Agricultural University v. Nasik Zilla Sheth Kamgar Union* this Court held: SCC pp 35253, paras 1214 "

12. Mrs Jaising, in support ?... in undergoing any such exercise."

"13. To be seen that, ?..... benefits payable to other permanent workmen."

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

6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees." The complaint was against the Universities. The High Court notes that as there were no posts the employees could not be made permanent. Once it comes to the conclusion that for lack of posts the employees could not be made permanent, how could it then go on to hold that they were continued as "badlis", casuals or temporaries with the object of depriving them of the status and privileges of permanent employees? To be noted that the complaint was not against the State Government. The complaint was against the Universities. The inaction on the part of the State Government to create posts would not mean that an unfair labour practise had been committed by the Universities. The reasoning given by the High Court to conclude that the case was squarely covered by Item 6 of Schedule IV of the MRTU and PULP Act cannot

be sustained at all and the impugned judgment has to be and is set aside. It is however clarified that the High Court was right in concluding that, as per the law laid down by this Court, status of permanency could not be granted. Thus all orders wherein permanency has been granted (except award dated 1-4-1985 in IT No.27 of 1984) also stand set aside."

"38. In *State of Maharashtra v. R.S. Bhonde* this Court relied upon an earlier judgment in *Mahatma Phule Agricultural University* and reiterated the legal position thus: (SCC p 754, para 7)

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

"39. In *Indian Drugs & Pharmaceuticals Ltd. v. Workmen* this Court stated that courts cannot create a post where none exists. In para 37 of the Report, this Court held: (SCC p. 426)

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

11. In *Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana*, (supra) Hon''ble Apex Court also observes

" 42. However, the factual matrix of the present controversy reveals that it was an admitted position before the Industrial Court, Thane in Complaint (ULP) No.442 of 1992 that the posts of cleaners in the Corporation were in existence....."

Thus because of this finding that posts of cleaner were in existence and there was no violation of any statutory provision while providing work to members of the respondent union and MSRTC itself had power to create post or fill in vacancies, the Hon. Apex Court upheld the relief granted by the Industrial Court. It also found that MSRTC could not have taken advantage of its own lapse which itself amounted to an unfair labour practise. These distinguishing features must be born in mind while considering grievance of such nature.

12. Case of *Punjabrao Krishi Vidyapeeth, Akola v. General Secretary, Krishi Vidyapeeth Kamgar Union* and Anr. 1993 (2) Mah. L.J. 1394, is also important here. Therein the employer was an Agricultural University and question was, whether in the absence of any power in the employer to create/sanction posts,

the object of depriving badlies or casuals or temporaries of status and privileges of permanent employees can be gathered. This Court found that unless and until availability of the power with the employer to create a new post is established, the unfair labour practise cannot be proved. The establishment was a State within the meaning of Article 12 of the Constitution of India and employment with it was public employment. In the case of Gangadhar Pillai v. M/s. Siemens Ltd. (2007) 1 SCC 533, Item 6 of Schedule IV of the Act of 1971 has been looked into by Hon. Apex Court and in paragraph 24, it has been noticed that intermittent engagement as a casual or temporary for number of years is essentially a question of fact. It is further noted by the Hon. Apex Court that such long service for number of years by itself may not lead to conclusion that such appointment has been made with the object of depriving him of status and privileges of permanent employee. It is also noted by the Hon. Apex Court that unlike other statutes, employer before it did not have statutory liability to give permanent status to an employee on completion of period specified. The said judgment of the Hon. Apex Court further shows that burden to prove unfair labour practise was upon workmen and there was a finding that the breaks given were not artificial. Looking to the nature of establishment and its activity, the Hon"ble Apex Court found that requirement of engaging employees on temporary basis was writ large. The nature of work/activity of that employer was engineering and field service, undertaking jobs of industrial project installation, erection, commissioning of electrical/electronic equipments supplied by it or then purchased by clients on various projects and sites. Observations in paragraph 27 also show that period of employment had all along been commensurate with the period of work undertaken by employer under respective contracts. The object behind granting temporary employment was, therefore, found to be bona fide and not actuated with any intention to deprive workman from benefits of permanency. The Hon"ble Apex Court has also considered the earlier judgment delivered by it and reported in the case of Chief Conservator of Forests and another v. Jagannath Maruti Kondhare and Ors. (1996) 2 SCC 293, and distinguished it after noticing that the 25 workmen in that matter were kept as casuals for long years. The other judgment reported at 2005 (1) CLR 604 SC, in the case of Union of India and others v. Ramchander and Anr., is also considered in paragraph 34 to note that sufficient work was shown to be available. It has also been held in paragraph 35, that the Hon. Apex Court did not lay down any law having any universal application in the matter.

13. In W.P. No. 4557 of 2005 Municipal Council Savada, Savada, v. Madhusudhan Narayan Patil, with W.P. No. 4558 & 4559 of 2005 decided on 1st February, 2011, Single Judge (B.P. Dharmadhikari J) has held :

" 14. The judgment, therefore, clearly holds that Constitution Bench Judgment of Hon"ble Apex Court can not curtail powers of Labour Court or Industrial Court in relations to unfair labour practise under Items 6 and 9 of Schedule IV of the M.R.T.U. & P.U.L.P. Act. However, the relief has been given by the Hon"ble Apex Court to the respondents before it after noticing that post of cleaners were in

existence. The question, therefore, which falls for consideration in the present matter is, whether any such posts are shown to be in existence by the present respondents. It is admitted position before me that Industrial Court has not recorded any finding about availability of any posts with petitioner-Municipal Council."

"15. The judgment of the Industrial Court briefly noted above proceeds on the basis that work essential for administration of petitioner-Municipal Council and of permanent nature is available. The learned Counsel for the respondents-complainants has also urged that availability of said work itself shows that post is also available. However, work and post are two different things. The complainants before Industrial Court were working on daily wages and they have nowhere pleaded that any post for their absorption was available or vacant. The Judgment in the case of "Maharashtra State Road Transport Corporation and Anr v. Casteribe Rajya P. Karmchari Sanghatana (Supra)" shows the important distinction noticed in this respect by the Hon'ble Apex Court. When employer himself has power to create or sanction post, the finding of indulgence in unfair labour practise under Item 6 can be readily reached. When Hon'ble Apex Court noted that University as employer had no power to create or sanction posts, it has found that it can have no "object" of depriving casuals or Badlis of their status as permanent workmen. This position applies with same vigour in present facts. The Municipal Council itself does not have power either to create or sanction the posts."

14. Adv. Jaiswal has placed strong reliance upon Maharashtra Lok Kamgar Sanghatana v. Ballarpur Industries Limited (supra). There the learned Single Judge (B.P. Dharmadhikari, J.) has considered the provision in Clause 4C of the Model Standing Orders & observed -

"29. The Standing Orders on additional matter i.e. item 10C in Schedule to Central Act are inserted on 28.09.1977. Clause 4A states that every probationer who has completed three months service uninterruptedly in the post in which he is provisionally employed, is to be made permanent. It is, therefore, apparent that after completion of such service, Respondent No. 1 has no option but to make him permanent workman. Even as per definition of probationer, he ceases to be a probationer if he completes three months of service in aggregate on such post. The management can terminate services if found unsatisfactory after or during such period of probation but in present matter, there is no such termination. Clause 4B dealing with Badli workers or Badli system is not relevant here. Clause 4C stipulates that a Badli or temporary workman completed 240 days uninterrupted service during preceding 12 months is to be made permanent. Its interpretation by this Court in the case of Rashtriya Mill Mazdoor Sangh v. S.L. Mehendale and Ors., (supra) and Gangadhar Balgopal Nair v. Voltas Limited, (supra) has already been considered above by me. This Court has found that by virtue of said clause, a Badli or Temporary gets permanency automatically and post stands created for him. Standing Orders in Clause 3(2)

(b) uses the words vacancy or post. This requirement of vacancy or post is also specified in Clause 4A. However, Clause 4C does not use these words because a Badli may be employed against a permanent post, temporarily vacant while temporary workman is not employed against any post or vacancy. Thus, as per Clause 3 itself, their employment and engagement is of limited duration. Clause 4C steps in only when these provisions are sought to be abused by unduly continuing such Badli or temporary workman for longer periods. The Rule making authority has found 240 days in a calendar month a period sufficiently long to draw inference of availability of permanent workload and, therefore, a post or vacancy. In view of this position only, the post or vacancy is automatically presumed to be created under that provision. The reliance upon the judgment of the Hon''ble Apex Court in the case of *M.S.R.T.C. and Anr. v. Casteribe Rajya P. Karmachari Sanghatana*, (supra) by Respondent No. 1 to contend that permanency cannot be granted until and unless there is a vacancy is, therefore, misconceived in present facts. The Hon''ble Apex Court there has found existence of vacancies and, therefore, has maintained the order of regularization. The observations in para 33 can be looked into for this purpose. The argument that recruitment of workers was not in conformity with Standing Order 503 did not find favour with the Hon''ble Apex Court as it found that General Standing Order 503 applicable to MSRTC services is contractual in nature and does not have any statutory force. It has noticed that breach of Standing Orders by Corporation is itself an unfair labour practise and MSRTC exploited concerned employees. Here also, violation of Model Standing Order 4C has been established and exploitation of daily wagers going on for various periods ranging from five years to 26 years has been established."

This judgment is recently upheld at 2016 (3) Mah. L.J. 183 Ballarpur Industries Limited v. Maharashtra Lok Kamgar Sanghatana, by the Division Bench while dismissing the LPA. Thus the change in perspective when the posts are vacant or the employer itself has right to create such posts & fill it in, depending upon the nature of employment as in public domain or private one, is brought out therein. Section 76 of the 1965 Act does not permit the employer Municipal Council either to create the posts or to fill it. The Municipal Councils can not of its own create posts or proceed to fill it in. It has to obtain sanction of the Director & after the posts are sanctioned, candidates for appointment against it are to be selected by such selection authority or such other body, as the State Government may specify. In any case, procedure for recruitment prescribed in bye-laws made by the Council in this behalf, must be followed. The fact that Municipal Council can not create the posts of its own is not in dispute. Such procedure in any case must be in conformity with mandate of Article 14 of the Constitution of India. Obligation cast upon the Employer by Clause 4C of MSO shows that the Manager or the person authorised is duty bound to issue an order in writing making any workman, who had completed 240 days of uninterrupted service in the previous 12 calendar months, permanent. Thus, law envisages a Manager or authorised person having power to appoint. When the employer is denuded of this power by

the Legislature vide Section 76 of 1965 Act, this clause 4C itself can not apply. It is also important to note that as per clause 32 of the Model Standing Orders, nothing therein can derogate from the legal provisions like Section 76. Section 76 of the 1965 Act prevails over clause 4C of the Model Standing Orders.

15. The Learned Single Judge of this Court in *Ramesh Vitthal Patil & Ors. v. Kalyan Dombivali Municipal Corporation & Ors.* (supra), had an occasion to consider similar controversy. Impact of clause 32 of the MSO and the Constitution of India is also examined in this precedent. In paragraph 31 of the judgment, it is found that benefits of M.S.O. 4C would apply only in cases where the concerned duly qualified person was appointed in accordance with the rules and so long as a permanent post exists. The right conferred by M.S.O. 4C is not absolute. Clause 4C does not operate either independently or in derogation of other laws. In fact it is the converse. Said clause 32 is already reproduced above by us. Its first part expressly provides that nothing contained in the Standing Orders shall operate in derogation of any law for the time being in force. In this judgment in case of *Ramesh Vitthal Patil* the provisions of the B.P.M.C. Act are therefore held to be not affected by the Standing Orders. Second part of Clause 32 providing that nothing contained in the Standing Orders operates to the prejudice of any right under a contract of service, custom or usage or any agreement, settlement or award applicable to the establishment has nothing to do with first part. In the event of a workman being entitled to any higher or better rights under a contract of service, agreement, settlement etc. than that provided in the Standing Orders, the Standing Orders do not deprive the workman of the same. The judgment of a learned single Judge of this Court in *The Indian Tobacco Co. Ltd. v. The Industrial Court & Ors.* (supra) relied upon by Adv. Jaiswal is an authority only for the second part of clause 32 and not the first. Paragraph 19 of the said judgment in *The Indian Tobacco Co. Ltd. v. The Industrial Court & Ors.* (supra) reveals that what fell for the consideration there was not the conflict between a clause in M.S.O. and a legislation but with a contractual condition. It does not lay down that the model standing orders operate in derogation of any existing Enactment. The judgment of a Division Bench of this Court in *Pune Municipal Corporation v. Dhananjay Prabhakar Gokhale*, (supra), after referring to the judgment of the Supreme Court, in paragraphs 8 and 9 observes that merely because an employee continued to render service for 240 days in a year, that by itself will not be sufficient for him to claim permanency in the post, unless he is able to establish that such a permanent post duly approved by the competent authority is vacant and the claimant is duly eligible for being appointed in such post. Mere completion of 240 days of service by itself is not a carte blanche to an employee to claim permanency in the service of his employer. In paragraph 9 of its judgment, this Division Bench notes that under the valid and lawful settlement of September, 1989, the employees had agreed with the appellant Municipal Corporation that their claim for permanency would be available only on completion of five years of continuous service and depending upon the availability of permanent vacant post

duly approved by the Government. Hence, in the light of clause 32 of MSO, the Division Bench holds that no claim under Clause 4C of the Standing Orders ignoring the settlement arrived at could have been entertained.

16. The Learned Single Judge of this Court in *Ramesh Vitthal Patil & Ors. v. Kalyan Dombivali Municipal Corporation & Ors.* (supra) also considers the submission that this judgment of the Division Bench is per incuriam as it did not consider the judgment of the Supreme Court in *Western India Match Co. Ltd. v. Workmen*, (1974) 3 SCC 330. We agree with the finding of the learned Single Judge that this judgment of the Supreme Court is of no assistance to the workmen (before us in this reference also) as it dealt with an entirely different challenge. In that case, the workman's letter of appointment stated, he would be on probation for a period of six months. He however, continued to serve even after the expiry of said period. Thereafter he came to be discharged for the reason that his services were no longer required by the Company. The Workers Union contended that his employment on probation for six months was in contravention of the Standing Order which provided only a two month probation period and that he automatically became permanent thereafter. According to the Standing Order, the workman could not to be kept on probation for more than two months. If he had worked during it to the satisfaction of the Company, he became permanent. Thus, when the Standing Orders stipulated "confirm him on the expiry of two months", the agreement stated, "no, wait till the expiry of six months." There was thus a conflict between the agreement and the Standing order. The Hon'ble Apex Court held that the two could not coexist and that the agreement was inconsistent with the Standing Order to the extent of prescription of an additional four months of probation. The Hon'ble Supreme Court held that the terms of the employment specified in the Standing order prevail over the corresponding terms in the contract of service in existence on the date of the enforcement of the Standing order. It was however, held that while the Standing orders were in force, it would not be permissible to the employer to seek statutory modification of them so that there may be one set of Standing Orders for some employees and another set for the rest of the employees. The Hon. Supreme Court was not called upon to consider the effect of the Standing Orders qua any legislative enactment.

17. We also find that the submission that the judgment of the Division Bench in *Pune Municipal Corporation v. Dhananjay Prabhakar Gokhale*, (supra) and the judgments of the Supreme Court referred to therein are not good law and are per incuriam as the judgment of the Supreme Court in *U.P. State Electricity Board v. Harishankar Jain*, (1978) 4 SCC 16 : (1978) 2 LLJ 399, is not looked into, is also rightly rejected. The question which arises in the present reference and which arose before the Division Bench did not arise for the consideration of the Supreme Court in *U.P. State Electricity Board v. Harishankar Jain*. In that case the Respondent was originally employed by partners who were licensees for the distribution of electricity under the Indian Electricity Act, 1910. There were certified standing orders for this industrial establishment which did not prescribe

any age of superannuation. The electricity undertaking of the firm was purchased by the Appellant under the Electricity (Supply) Act, 1948, as a result whereof the workmen became the employees of the U.P.S.E.B. It was conceded that the Standing Orders as applicable to the said firm continued to apply to the U.P.S.E.B. The U.P.S.E.B. itself did not have certified Standing Orders. Thereafter the Governor of U.P. notified under Section 13B of the Industrial Employment Standing Orders Act, a regulation under Section 79(c) of the Electricity (Supply) Act, 1948 fixing the age of superannuation at 55 years. Thus whereas the Standing Orders fixed no age of superannuation permitting a contention that the workmen could continue to work as long as they were fit and able to discharge their duties, this notification fixed the age of superannuation at 55 years. The Hon. Apex Court held that the Industrial Employment Standing Orders Act is a special law in regard to the matters enumerated in the Schedule and regulations made by the Electricity Board with respect to any of those matters are of no effect unless such regulations are either notified by the Government under Section 13B or are certified under the Industrial Employment Standing Orders Act. The Learned Single Judge of this Court in *Ramesh Vitthal Patil & Ors. v. Kalyan Dombivali Municipal Corporation & Ors.* (supra) holds that this judgment of Hon'ble Apex Court in *U.P. State Electricity Board v. Harishankar Jain* is not relevant in matter before him. While endorsing it, we find that reliance upon said judgment of the Supreme Court in *U.P. State Electricity Board v. Harishankar Jain* by Adv. M.P. Jaiswal is misconceived even in this case. There is no conflict between the provisions of the 1965. Act and M.S.O. 4C. M.S.O. 4C does not contain the provision for recruitment. M.S.O. 4C, as held above, can not & does not operate in derogation of any other law. Moreover, the impact of clause 32 of the MSO did not arise for consideration before the Hon'ble Apex Court.

18. Reference to *Mahendra L. Jain v. Indore Development Authority and Ors.*, (2005) 1 SCC 639, is warranted here in some details. The Petitioners before the Hon. Apex Court learnt of the existence of the vacancies in the Respondent Authority and applied although no advertisement was issued. They were appointed and posted to an overseas project implemented through the Overseas Development Authority on daily wages. The Respondent deducted the provident fund and also granted them benefit of leave. As their services were not being regularized, they raised an industrial dispute which was referred for adjudication to the Labour Court. It was contended on behalf of the Petitioners that as the vacancies were available and as the Petitioners had worked for more than six months, they became permanent employees in terms of the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 and the rules framed thereunder known as the M.P. Industrial Employment (Standing Orders) Rules, 1963. Clause 2(4) of the Standard Standing Orders provided that in case a temporary employee is required to work continuously for more than six months, he shall be deemed to be a permanent employee within the meaning of that term in clause 1 thereof. The Respondent Authority had been constituted under the Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973. Section 47 thereof,

provides that all the appointments to the posts of officers and servants, specified therein which included the Petitioners' posts, must be made by the State Government and the appointments to the posts of officers and servants included in the local cadre in the said services by the Town and Country Development Authority concerned. The proviso to Section 47 mandates that no posts shall be created by any authority without the prior sanction of the State Government. In this backdrop, the Hon'ble Apex Court has held as under :"

"18. The posts of Sub-Engineers in which the appellants were appointed, it is nobody's case, were sanctioned ones. Concededly, the respondent Authority before making any appointment neither intimated the employment exchange about the existing vacancies, if any, nor issued any advertisement in relation thereto. Indisputably, the conditions precedent for appointment of the officers and servants of the Authority, as contained in the Service Rules had not been complied with. The appointments of the appellants were, therefore, void ab initio being opposed to public policy as also violative of Articles 14 and 16 of the Constitution."

"27. No notification has been brought to our notice that the Standard Standing Orders had been made applicable to the appellants. It is furthermore not in dispute that the Adhiniyam came into force in 1973. The statute, rules and regulations framed by the State govern the terms and conditions of service of the employees of the respondent. The terms and conditions of service contained in the 1973 Act and the 1987 Rules are not in derogation of the provisions contained in the Schedule appended to the 1961 Act."

"28. The 1961 Act provides for classification of employees in five categories. The 1973 Act, as noticed hereinbefore, clearly mandates that all posts should be sanctioned by the State Government and all appointments to the said cadre must be made by the State Government alone. Even the appointments to the local cadre must be made by the Authority. The said provisions were not complied with. It is accepted that no appointment letter was issued in favour of the appellants. Had the appointments of the appellants been made in terms of the provisions of the Adhiniyam and the Rules framed thereunder, the respondent Authority was statutorily enjoined to make an offer of appointment in writing which was to be accepted by the appellants herein. Who made the appointments of the appellants to the project or other works carried on by the Authority is not known. Whether the person making an appointment had the requisite jurisdiction or not is also not clear. We have noticed hereinbefore that in the case of Om Prakash Mondloi, the CEO made an endorsement to the effect that he may be tried in daily wages and should be entrusted with the work of progress collection of ODA work. The said order is not an "offer of appointment" by any sense of the term."

"33. For the purpose of this matter, we would proceed on the basis that the 1961 Act is a special statute visavis the 1973 Act and the Rules framed thereunder. But in the absence of any conflict in the provisions of the said Act, the conditions

of service including those relating to recruitment as provided for in the 1973 Act and the 1987 Rules would apply. If by reason of the latter, the appointment is invalid, the same cannot be validated by taking recourse to regularisation. For the purpose of regularisation which would confer on the employee concerned a permanent status, there must exist a post. However, we may hasten to add that regularisation itself does not imply permanency. We have used the term keeping in view the provisions of the 1963 Rules."

We find the following exposition of law by the Hon"ble Apex Court apt in present proceedings :

" 31. The Standing Orders governing the terms and conditions of service must be read subject to the constitutional limitations wherever applicable. Constitution being the *suprema lex*, shall prevail over all other statutes. The only provision as regards recruitment of the employees is contained in Order 4 which merely provides that the manager shall within a period of six months, lay down the procedure for recruitment of employees and notify it on the notice board on which Standing Orders are exhibited and shall send copy thereof to the Labour Commissioner. The matter relating to recruitment is governed by the 1973 Act and the 1987 Rules. In the absence of any specific directions contained in the Schedule appended to the Standing Orders, the statute and the statutory rules applicable to the employees of the respondent shall prevail."

19. In this reference, the position emerging before us is similar. There is no conflict between the provisions of M.S.O. 4C and the provisions of the Section 76 of the 1965 Act. In the event of the appointment having been made validly, it may be possible to invoke the provisions Clause 4C of M.S.O. A view to the contrary would result in regularizing/validating a void act. Clause 4C neither permits nor contemplates the same. As held in the above judgments, if the appointment is not made in accordance with the constitutional scheme, it is void *ab initio* and, therefore, there can be no claim to its regularisation or for grant of permanency in any manner. This is all the more so as Clause 32 of the M.S.O. clarifies that the Standing Orders are not to operate in derogation of any other law i.e. Section 76 of 1965 Act. Definitely any interpretation of Clause 4C conducive to defeating the Constitutional mandate is unwarranted. Violation of Clause 4C of the MSO may tantamount to an unfair labour practise under item 9 of Sch. IV of the 1971 Act but unless & until, other additional factors are proved on record, finding of indulgence in an unfair labour practise under item 6 of Sch. IV thereof can not be reached. As explained by the Hon. Apex Court in case of Maharashtra SRTC v. Casteribe Rajya Parivahan Karmchari Sanghatana, (*supra*), existence of a legal vacancy must be established & as discussed above, the power to recruit with the employer must also be demonstrated. In absence thereof, workman can not succeed in proving the commission of unfair labour practise under item 6 by the employer. These two ingredients, therefore, also must be established when benefit of Clause 4C is being claimed. Unless availability of a vacancy is shown or then power with the employer to create the

post and to fill it is brought on record, mere continuation of 240 days can not and does not enable the workman to claim permanency by taking recourse to Clause 4C read with item 9 of Sch. IV of 1971 Act. Clause 4C does not employ word "regularisation" but then it is implicit in it as no "permanency" is possible without it. Conversely, it follows that when a statutory provision like Section 76 disables the employer either from creating or filling in the posts, such a claim can not be sustained. This also nullifies the reliance upon the judgment of learned Single Judge in case of Maharashtra Lok Kamgar Sanghatana v. Ballarpur Industries Limited (supra) where the employer was a private Company not subjected to such regulatory measures by any Statute and enjoyed full freedom to create the posts and to recruit. One of us (B.P. Dharmadhikari, J.) is party to the judgment of this Court in Raymond UCO Denim Private Ltd. v. Praful Warade & Ors. (supra) which again needs to be distinguished for the same reasons. The judgment of learned Single Judge in case of Indian Tobacco Company Ltd. v. The Industrial Court and Ors. (supra), judgment of Hon"ble Apex Court affirming it or then judgment of Hon"ble Apex Court reported at Western India Match Company Ltd. and Workmen are all considered therein & are distinguishable as the same do not pertain to the province of public employment or consider inherent Constitutional restraints (the *suprema lex* - see Mahendra L. Jain v. Indore Development Authority and others (supra) and Clause 32 of the MSO. For same reasons, law laid down by the Full Bench judgment of this Court in 2007 (1) CLR 460 : 2007 (1) Mah. L.J. 754 Gangadhar Balgopal Nair v. Voltas Limited & Anr. does not advance the cause of workmen. The Division Bench of this Court in May & Baker Ltd. v. Kishore Jaikishandas Ichchaporla (supra) while construing Section 10A(3) held that the expression "other law" would not refer to the model standing orders or the certified standing orders since they are laws made under the provisions of parent act itself and not under any other law. The Model Standing Orders and Certified Standing Orders, held the Division Bench, "are laws no doubt but they are laws made under the provisions of the Act". They were held not to be provisions under any other law. This discussion therefore shows how these words "in derogation of any law for the time being in force" in Clause 32 of MSO need to be understood & does not help Adv. Jaiswal or Adv. Khan.

20. In Vice-chancellor, Lucknow University v. Akhilesh Kumar Khare & Anr. (supra) relied upon by Adv. Parihar, Hon. Apex Court follows its Constitution Bench in Umadevi (III) and while rejecting relief of regularisation to the daily wagers who were engaged in public employment without proper procedure, grants them compensation of Rs. 4 Lakh each by way of compassion. This judgment does not consider any welfare labour legislation and, therefore, can not provide direct answer to the reference made. Judgment of this Court taking similar view in the light of 1971 Act in the case of Punjabrao Krishi Vidyapeeth, Akola v. General Secretary, Krishi Vidyapeeth Kamgar Union & Anr. (supra) is already considered above. The Division Bench of this Court in State of Maharashtra and Anr. v. Pandurang Sitaram Jadhav (supra) finds that the

respondents before it were employed as daily wagers in the establishment of the Government milk dairy for a longer period of 12 to 20 years. There were no sanctioned posts and vacancies in existence in the concerned department. Respondents failed to demonstrate that their appointments were made in accordance with the procedure prescribed for selection. The Division Bench finds it wholly unjust to direct the appellant State Government to grant permanency to the respondents. It points out that the provisions of Model Standing Orders are subject to the Rules regulating selection and appointment so also subject to the constitutional scheme of public employment. Respondents Daily wagers are declared to possess no legal right to claim permanency. Order passed by the learned Single Judge to the contrary have been quashed. State Government is held obliged to make appointments in adherence to the constitutional scheme of Public employment. Respondents Daily Wagers appointed without following the prescribed procedure for selection by passing public participation did not acquire any legal right to claim permanency. It is apparent that no inconsistency exists and cannot be worked out in State of Maharashtra & Anr. v. Pandurang Sitaram Jadhav as also Pune Municipal Corporation v. Dhananjay Prabhakar Gokhale (supra) on one hand and Ballarpur Industries Limited v. Maharashtra Lok Kamgar Sanghatana (supra) on the other hand. Status of employer, nature of employment and inherent Constitutional limitation on public employer or absence of such fetters on any private employer or absolute freedom available to it to create post/s and recruit, are some of the distinguishing features which prohibit this exercise.

21. Thus, in the light of this discussion, it follows that in absence of vacant sanctioned posts with the Municipal Council, a workman who has put in continuous service of 240 days or more in span of 12 months, can not invoke Clause 4C of the MSO to claim either permanency or regularization. We accordingly answer the question referred. Registry to place the writ petitions before the learned Single Judge as per roaster assignment for further consideration.