IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 17413 of 2005

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS JUSTICE SONIA GOKANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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GUJARAT POLLUTION CONTROL BOARD

Versus

RASIKLAL P DHANDHUKIA C/O B M MAVANI

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Appearance:
MR DG CHAUHAN for the PETITIONER(s) No. 1
MR TR MISHRA for the RESPONDENT(s) No. 1

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CORAM: HONOURABLE MS JUSTICE SONIA GOKANI

Date : 17/03/2017

ORAL JUDGMENT

1. Assailing the judgment and award of June, 2005, rendered by the Labour Court, Rajkot, while dealing with Reference (LCR) No.20 of 1995, the present petition under Articles 226 and 227 of

the Constitution of India, seeks the following main relief :

> *"13(a) Your Lordships be pleased to issue writ of certiorari and/or writ of Mandamus and/or appropriate writ of order or direction in the like nature to quash and set aside the impugned award of June 2005 passed by the Presiding Officer, Labour Court, Rajkot in Reference (LCD) No.20/1995."*

2. The factual score essential to be depicted is that the petitioner-Board is constituted and authorised under the Pollution Control laws. It is the statutory function assigned to it. The Board follows the Staff Regulations as applicable to the Government servants as per its Resolution dated March 28, 1997, for the purpose of employing the Staff members.

2.1 It also calls for names of candidates through the Employment Exchange as provided under the Government Resolution dated April 07, 1980 and also follows the regular process of recruitment for filling in various posts.

Some of the appointments were made on *ad hoc* basis to meet with the contingency and the daily rate basis for a particular project.

2.2 The respondent was appointed as a Peon-cum-Watchman for a fixed period of 29 days on a stop-gap arrangement. He resumed his duties on December 07, 1984 and worked for about nine months on the said posts. The office order indicates that his appointment in the scale of Rs.196-6-232 plus usual allowances, was also for 29 days for the period from August 31, 1985 and September 28, 1985 and he was posted in the regional office of the Gujarat Pollution Control Board, Rajkot, as a Peon-cum-Watchman under the Pollution Control Division.

2.3 His service came to be terminated after expiry of period of 29 days on September 29, 1985. He raised the industrial dispute bearing Reference No.1442 of 1986 before the Labour Court, Rajkot, claiming reinstatement with full back wages. After availing opportunities

to both the sides on June 12, 1991, the order of termination was quashed and set aside and the respondent has been reinstated in service to his original post with continuity and full back wages. This order was challenged by the Board by way of preferring Special Civil Application No.658 of 1992, wherein this Court granted interim relief against the back wages, however, no stay was granted against the reinstatement. Thus, for his termination in the year 1985, he was reinstated on February 27, 1992, after about seven years. Eventually, Special Civil Application No.658 of 1992, resulted in favour of the respondent-workman, wherein the reinstatement was confirmed and the back wages were reduced to 20%.

2.4 By an order dated January 01, 1993, the respondent was appointed on 29 days basis. He continued to serve as peon-cum-watchman. His last such order was dated December 29, 1995. He was granted regular pay-scale of Rs.750-940 from September 01, 1996 with all other

benefits. This is by virtue of Office Order dated September 18, 1996 of the Gujarat Pollution Control Board.

2.5 The respondent then was granted regular pay-scale of Peon-cum-Watchman of Rs.2550-3200 on November 17, 1998. He raised the claim of regularisation of service with all benefits vide his letter dated January 18, 1995. The demand was raised by the respondent of claiming regularisation with all benefits and the dispute was culminated into Reference bearing (LCD) No.20/1995.

2.6 The respondent filed his statement of claim contending *inter alia* that he was appointed on December 07, 1984, as Peon-cum-Watchman and once he was reinstated in service by virtue of the order of this Court confirming the award of the Labour Court. He was already given the time pay-scale and from day one, he was working against the sanctioned post.

2.7 The petitioner-Board *vide* its written statement denied every averment made in the

claim statement. It was maintained that the regular appointment of the Board had always been made in Reference to recruitment rules after following due procedure and thus, the Reference was not maintainable. The Union has no right to raise the industrial dispute in its name and the backdoor entry must not be entertained. The respondent examined himself and he also examined Nalinbhai Gordhanbhai Raval at Exhibit 45 and Mahipatsinh Laghuba Jadeja at Exhibit 46, in support of his case; whereas the petitioner-Board examined its Administrative Officer Shri K.M. Patel at Exhibit 55 and also produced necessary substantiating documents in support of the rival claim. It is the grievance of the petitioner that on wholly illegal and erroneous approach and under complete misconception of law, the award came to be passed allowing the Reference and directing the petitioner to make the respondent permanent with all the benefits and arrears,

since he has completed 240 days of service in a particular year.

2.8 The affidavit-in-reply of the respondent is on record, wherein he has given the entire history, which has been narrated hereinabove, which would not require any reiteration. He has maintained that *vide* order dated September 18, 1996, he was appointed in the time pay-scale of pay of Rs.750-940 as per the 4th Pay Commission and the wages were revised as per the 5th Pay Commission on November 19, 1998 and he has been working since day one on a sanctioned post. He has, therefore, urged that his regularisation may not be interfered.

3. This Court has heard Shri D.G. Chauhan, learned counsel appearing for the petitioner-Board, who has also given in brief his written submissions. His main emphasis is that the Labour Court has no jurisdiction to grant regularisation *de hors* the recruitment rules. The daily wager has no right to get regularisation of service in absence of any sanctioned vacant post. It is his

say that the findings of the Labour Court are based on no evidence or the findings are against the settled legal position and, therefore, the impugned order deserves quashment.

3.1 In support of his submissions, he has relied upon the following authorities :

(i) ***Amreli Municipality v. Gujarat Pradesh Municipal Employees Union***[1]**.**

(ii) Mahendra L. Jain v. Indore Development Authority[2]**.**

(iii) State of Karnataka v. Uma Devi[3]**.**

(iv) Indian Drugs and Pharmaceuticals Ltd. v. Workmen[4]**.**

(v) Dr.Chachal Goyal v. State of Rajasthan[5]**.**

(vi) Official Liquidator v. Dayanand[6]**.**

(vii) Satyaprakash v. State of Bihar[7]**.**

1 *(2004) 2 GLH 962*

2 *(2005) 1 SCC 639*

3 *(2006) 4 SCC 1*

4 *(2007) 1 SCC 408*

5 *(2003) 3 SCC 485*

6 *(2008) 10 SCC 1*

7 *(2010) 4 SCC 179*

(viii) State of Rajasthan v. Dahyalal[8].

(ix) Nandkumar v. State of Bihar[9].

(x) Renu v. District and Session Judge, Tishajari Court, Delhi[10].

4. *A contrario sensu*, Shri T.R. Mishra, learned counsel appearing for the respondent-workman, has also given his brief note and has urged that the respondent is getting the benefit of 5th Pay Commission, however, he is not getting the incremental benefit though he has been working since the year 1984 with the petitioner-Board. He has further urged that except the basic salary and Dearness Allowance, he does not get any other benefits. Even for attending the Court for a day or in emergency, he does not get a leave, but it will be "*leave without pay*". He has further urged that although it had been a long battle for the respondent to fight all these years, he continued to serve on the sanctioned post and also when the time scale was

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

9 ***(2014) 5 SCC 300***

10 ***(2014) 4 SCC 50***

given to him after this Court confirmed the award of the Labour Court and reinstated him in service, with 50% back wages.

4.1 The learned counsel Shri T.R. Mishra has further urged that the decisions which had been relied upon by the petitioner in his written statement were also pressed into service before the Coordinate Bench of this Court (*Coram : Paresh Upadhyay, J.*) in the decision rendered on August 08, 2013, in the case of ***Junagadh Agricultural University (Erstwhile Gujarat Agri.Uni.) v. Maltiben Dave***, while dealing with Special Civil Application No.1756 of 2005. This Court (*Coram : Paresh Upadhyaya, J.*) has, however, partly allowed the said petition and the award of the Industrial Tribunal was modified where the respondent was found entitled to the arrears prospectively only i.e. with effect from April 01, 2004, and not from earlier date.

5. Having thus heard both the sides, some of the aspects which are glaringly emerging in this

petition are that the respondent from the beginning was working on a sanctioned post. Of course, initially he was working as a stop-gap arrangement on the post of Peon-cum-Watchman in the pay-scale of Rs.194-222 along with usual allowance as per the Rules with a clear mentioning that it was a stop-gap arrangement liable to be terminated at any point of time. However, by an artificial break, the said arrangement continued without any interruption and without any direction from the Court. His service came to be terminated on September 29, 1985, and therefore, he raised industrial dispute in the year 1986. The said dispute bearing Reference No.1442 of 1986 resulted in his favour, whereby the Labour Court held that the workman since had completed 240 days of service in the preceding 12 months from the date of his termination, he was entitled to protection under section 25F of the Industrial Disputes Act, 1947. This judgment and award was when challenged before this Court by way of Special Civil Application No.658 of 1992, it was

decided by the Division Bench (*Coram : G.T. Nanavati and M.S. Parikh, JJ.*), wherein it noted that the name of the respondent was not sent from Employment Exchange, but there were many vacant posts of peon-cum-watchman on the establishment of the petitioner. The Court deemed it fit not to disturb that part of the award which noted that his appointment was initially by way of a stop-gap arrangement. He was reinstated in service with 50% back wages. Thus, not only he continued to work on a sanctioned post, but when the action of the petitioner-Board was challenged of terminating his service being in violation of provisions of the Act, it was scrutinised by both the *fora* i.e. the Labour Court and the Division Bench of this Court, which also noted that non-calling of the names of candidates from the Employment Exchange should not be a ground not to grant reinstatement to the petitioner therein.

6. The Apex Court in the case of ***Ajaypal Singh v. Haryana Warehousing Corporation***[11] was considering

11 **(2007) 9 SCC 748**

the case of the appellant-workman who was working with the respondent-Haryana Warehousing Corporation, whose service came to be terminated though he had completed 240 days of service in the preceding year of his termination without prior notice or pay in terms of section 25F of the Act.

On a Reference, the termination of service was held to be not justified and he was reinstated in service with full back wages by the Labour Court. This was when challenged before the High Court, the learned Single Judge held that the appointment was made in violation of Articles 14 and 16 of the Constitution of India and the said order was even confirmed by the Division Bench in the intra-Court appeal.

This since had aggrieved the employee, he approached the Apex Court on the ground that the Industrial Disputes Act is a beneficial legislation and the employer of an industry cannot escape from the mandatory provisions of sections 25F and 25H of the Act and on the non-est ground that the appointment was illegal and

also taking a ground that those who were appointed through back door, were not entitled to reinstatement. The Apex Court considered the decision of ***M.P. Administration v. Tribhuban***[12], which laid down that while taking into account the doctrine of public employment involving public money and several other facts, the question that would arise is as to whether the Court should direct the reinstatement with full back wages.

Apt it would be to reproduce the relevant observations of the said decision in the case of Ajaypal Singh (supra), which read as under :

> *"16. This Court in the case of M.P. Administration v. Tribhuban, (2007) 9 SCC 748 while taking into account the doctrine of public employment involving public money and several other facts observed as follows:*
>
> *"6. The question, however, which arises for consideration is as to whether in a situation of this nature, the learned Single Judge and consequently the Division*

12 ***(2007) 9 SCC 748***

Bench of the Delhi High Court should have directed reinstatement of the respondent with full back wages. Whereas at one point of time, such a relief used to be automatically granted, but keeping in view several other factors and in particular the doctrine of public employment and involvement of the public money, a change in the said trend is now found in the recent decisions of this Court. This Court in a large number of decisions in the matter of grant of relief of the kind distinguished between a daily wager who does not hold a post and a permanent employee. It may be that the definition of "workman" as contained in Section 2(s) of the Act is wide and takes within its embrace all categories of workmen specified therein, but the same would not mean that even for the purpose of grant of relief in an industrial dispute referred for adjudication, application of constitutional scheme of equality adumbrated under Articles 14 and 16 of the Constitution of India, in the light of a decision of a Constitution Bench of this Court in Secy., State of Karnataka v. Umadevi (3) and other relevant factors pointed out by the Court in a catena of decisions shall not be taken into consideration.

7. The nature of appointment, whether there existed any sanctioned post or whether the officer concerned had any authority to make appointment are relevant factors. (See M.P. Housing Board v. Manoj Shrivastava (2006)2 SCC 702, State of M.P. v. Arjunlal Rajak (2006)2 SCC 711 and M.P. State Agro Industries Development Corpn. Ltd. v. S.C. Pandey, 2006 (2) SCC 716.)"

6.1 The Apex Court has, thus, held that the decision in the case of ***State of Karnataka v. Uma Devi***[13], is an authoritative pronouncement for the proposition that the Supreme Court under Article 32 of the Constitution of India and the High Court under Article 226 of the Constitution of India should not issue directions of absorption, regularisation or or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme. It is further held that adherence to the rule of equality in public employment is a basic feature of our Constitution and since

13 ***(2006) 4 SCC 1***

the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution of India.

Apt it would be reproduce relevant observations of the Apex Court in the said decision, which read as under :

> *"46. Learned Senior Counsel for some of the respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial Taxes Department, should be directed to be regularized since the decisions in Dharwad (supra), Piara Singh (supra), Jacob, and Gujarat Agricultural University and the like, have given rise to an expectation in them that their services would also be regularized. The doctrine can be invoked if the decisions of the Administrative Authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be*

permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn {See Lord Diplock in Council of Civil Service Unions V. Minister for the Civil Service (1985 Appeal Cases 374), National Buildings Construction Corpn. Vs. S. Raghunathan, (1998 (7) SCC 66) and Dr. Chanchal Goyal Vs. State of Rajasthan (2003 (3) SCC 485). There is no case that any assurance was given by the Government or the concerned department while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the Commissioner of the Commercial Taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after the Dharwad decision.

Though, there is a case that the State had made regularizations in the past of similarly situated employees, the fact remains that such regularizations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this Court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature.

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

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage

that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have

never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

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53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant

sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

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

6.2 In yet another decision in the case of ***Maharashtra State Road Transport Corporation and another v. Casteribe Rajya Parivahan Karmchari Sanghatana***[14], the Apex Court has held that the provisions of MRTU Act (Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act,

14 ***(2009) 8 SCC 556***

1971) have not been denuded of their statutory status by the Constitution Bench decision in ***Umadevi (supra)***. Power given to Industrial and Labour Courts under section 30 is very wide and affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV and power of Industrial and Labour Courts under section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench. The Court, of course, has held that there cannot be equilibrium with proposition that the Court cannot direct for creation of posts. The Apex Court also held further that the status of permanency cannot be granted by the Court where the post does not exist. The Court cannot create posts where none exists. It further held that it cannot direct absorption

of the respondent or continue him in service, or pay him salaries of regular employee, as these are purely executive functions. It also held that the 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 act within its limits.

Apt it would be reproduce relevant observations of the Apex Court in the said decision, which read as under :

"37. There cannot be any quarrel to the proposition that courts cannot direct creation of posts. In Mahatma Phule Agricultural University and others vs. Nasik Zilla Sheth Kamgar Union and others (2001 AIR SCW 3105), this Court held :

"12. Mrs. Jaising, in support of Civil Appeal Nos. 4461-70 and 4457-60 [arising out of SLPs (C) Nos. 418-21 of 1999 and SLPs (C) Nos. 9023-32 of 1998] submitted that the workmen were entitled to be made permanent. She, however, fairly conceded that there were no sanctioned posts available to absorb all the workmen. In

view of the law laid down by this Court the status of permanency cannot be granted when there are no posts. She, however, submitted that this Court should direct the Universities and the State Governments to frame a scheme by which, over a course of time, posts are created and the workmen employed on permanent basis. It was, however, fairly pointed out to the Court that many of these workmen have died and that the Universities have by now retrenched most of these workmen. In this view of the matter no useful purpose would be served in undergoing any such exercise.

13. To be seen that, in the impugned judgment, the High Court notes that, as per the law laid down by this Court, status of permanency could not be granted. In spite of this the High Court indirectly does what it could not do directly. The High Court, without granting the status of permanency, grants wages and other benefits applicable to permanent employees on the specious reasoning that inaction on the part of the Government in not creating posts amounted to unfair labour practice under Item 6 of Schedule IV of the MRTU and PULP Act. In so doing the High Court erroneously ignores the fact that approximately 2000 workmen had not even made a claim for permanency

before it. Their claim for permanency had been rejected by the award dated 20-2-1985. These workmen were only seeking quantification of amounts as per this award. The challenge, before the High Court, was only to the quantification of the amounts. Yet by this sweeping order the High Court grants, even to these workmen, the wages and 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 practice 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 the case of State of Maharashtra and another vs. R.S.Bhonde and Ors. (2005 AIR SCW 4497), this Court relied upon earlier judgment in the case of Mahatma Phule Agricultural University (2001 AIR SCW 3105) and reiterated the legal position thus :

"Additionally, as observed by this Court in Mahatma Phule Agricultural University v. Nasik Zilla Sheth Kamgar Union (2001) 7 SCC 346, the status of permanency cannot be granted when there is no post. Again in

Gram Sevak Prashikshan Kendra v. Workmen (2001) 7 SCC 356, 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 the case of Indian Drugs and Pharmaceuticals Ltd. vs. Workmen, Indian Drugs and Pharmaceuticals Ltd. (2006 AIR SCW 5994), this Court stated that courts cannot create a post where none exists. In paragraph 37 of the report, this Court held:

"37. Creation and abolition of posts and regularisation are purely executive functions vide P.U. Joshi v. Accountant General (2003) 2 SCC 632. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of powers under the Constitution, and the judiciary, too, must know its limits."

40. In yet another case of Divisional Manager, Aravali Golf Club and another vs. Chander Hass and another(2008 AIR SCW 406), this Court said :

"15. The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and the first appellate court to create the posts of tractor driver and regularise the services of the respondents against the said posts cannot be sustained and are hereby set aside."

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

that executive functions and powers with regard to the creation of posts cannot be arrogated by the Courts."

6.3 In the case of ***Durgapur Casual Workers Union and others v. Food Corporation of India and others***[15], the Apex Court held that in absence of any plea taken by the respondent-Corporation either before the State Government or before the Tribunal that the initial appointments of workmen were illegal or they were appointed through back door means, it was not open to the Division Bench to come to a finding of fact that initial appointments of workmen were in violation of Articles 14 and 16 of the Constitution of India. The Court further held that it was open to the High Court to deny the benefit to which the workmen were entitled under Item 10 of Part I of the Fifth Schedule of the Industrial Disputes Act. Having accepted that there was unfair trade practice, it was not open to the Division

15 ***AIR 2015 SC (Supp) 574***

Bench of the High Court to interfere with the impugned award.

This Court notices that the award which is impugned in this case is of June, 2005. The decision in the case of ***Uma Devi (supra***) was not available at the relevant point of time, which came to be delivered on April 10, 2006.

6.4 Reliance is also placed on the decision of a Division Bench of this Court (*Coram : Ravi R. Tripathi and K.M. Thaker, JJ.*) in the case of ***Gujarat Maritime Board and others v. Ashokkumar Ijjatrai Anjaria and another***[16], wherein the Division Bench of this Court has held that the Apex Court delivered the judgment in the case of ***Uma Devi (supra***) on April 10, 2006, which would not be available for consideration to the concerned Court and ruling would be prospective in nature unless it is otherwise provided that after the initial termination of service in the year 1985, it was challenged by way of a Reference,

16 ***2008 (3) GLH 767***

which resulted in favour of the present respondent-workman before the Labour Court and also before this Court.

6.5 In the case of ***State of Karnataka v. M.L. Kesari***[17], the Apex Court held that the true effect of the direction given in the case of ***Umadevi (supra)*** is that all persons who have worked for more than ten years as on April 10, 2006 [i.e. the date of decision in ***Umadevi (supra)***] without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The Apex Court further observed that the fact that the employer has not undertaken such exercise of regularization within six months of the decision in ***Umadevi (supra)*** or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the

17 ***(2010) 9 SCC 247***

above directions in ***Umadevi (supra***) as a one-time measure.

7. Adverting to the facts of the present case, it is a matter of record as detailed in paragraph 5 of this judgment that in the case of the present respondent, initially he did challenge the order of termination and it was decided on the ground that there is no violation of the provisions of the Industrial Disputes Act, particularly section 25F of the said Act. The employer had at no stage thereafter terminated his service and he continued to work till date on a sanctioned post. In the decision rendered in the case of ***M.L. Kesari (supra***), the Apex Court has permitted regularisation as one-time measure by holding that after the said decision, each department would prepare the list of casual, daily waged or *ad hoc* employees who have been working for more than 10 years without the intervention of the Courts and Tribunals and subject them to a process verification as to whether, they were working against the vacant

sanctioned post and possess requisite qualification qua such vacant post.

8. In various departments, when the Apex Court found that such process had not been started, a direction had been given to consider the case for regularisation. No process of one time regularisation had been initiated by the department of the present respondent. The Labour Court having found the unfair trade practice, had directed for regularisation of the respondent. Going by even the fact that the decision in the case of ***Uma Devi (supra***) was not there for the Labour Court to consider, when it directed to regularisation, noticing glaring facts and circumstances of the case, no interference is necessary and even going by the decision in the case of ***Uma Devi (supra), M.L. Kesari (supra)*** and other decisions, which have been cited and discussed hereinabove, with no one time measure having been initiated by the petitioner-Board, on the ground of the respondent having worked for all these years, any Court would have directed the petitioner to

regularise his service. In such view of the matter, when the challenge is made by the petitioner-Board to the award of regularisation, this Court sees no justification in interfering with the impugned award.

9. This Court is conscious of the fact that the powers under Articles 226 and 227 of the Constitution of India are to be exercised sparingly. This Court notices that the respondent was from the very beginning working against a sanctioned post. So there was no question of creating any new post or interfering with the jurisdiction of the executive of deciding the aspect of creation of posts.

10. For the foregoing reasons, the present petition fails and the same is, accordingly, dismissed. Rule is discharged. There shall be, however, no order as to costs.

It is clarified that all the benefits to the respondent be accrued from the date of the impugned award. The service of the respondent shall be counted from the date of his

appointment. He shall be given increments from the date of the impugned award and not from the date of his appointment. The period for which the respondent has not served the petitioner-Board, shall be treated as dies non.

Disposed of accordingly.

Direct Service is permitted.

(MS SONIA GOKANI, J)

Aakar