IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5357 OF 2021
IN
REFERENCE (IT) NO. 81 OF 2005

The Commissioner,
Municipal Corporation of Greater Mumbai,
Mahapalika Marg, Mumbai – 400 001. .. Petitioner

Versus

Kachara Vahatuk Shramik Sangh
Shramik Bharti Chawl, Shanta Jog Marg,
Tilak Nagar, Chember,
Mumbai – 400 089. .. Respondent

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- Mr. A.Y. Sakhare, Senior Advocate a/w Mr. Carlos Joel, Mr. R.Y. Sirsikar and Mr. Santosh Parad for Petitioner – MCGM.
- Mr. Sanjay Singhvi, Senior Advocate a/w Ms. Rohini Thyagarajan for Respondent.

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CORAM : MILIND N. JADHAV, J.
DATE : NOVEMBER 08, 2023

JUDGMENT:

1. Heard Mr. Sakhare, learned Senior Advocate for Petitioner – MCGM and Mr. Singhvi, learned Senior Advocate for Respondent. Writ Petition is taken up for final hearing by consent of parties.

2. This Petition is filed to challenge the legality, validity and propriety of Award dated 22.03.2021 (Exh. 'W', at page Nos. 1175-1385 of Petition) passed by the Industrial Tribunal, Mumbai in Reference (IT) No. 81 of 2005. Petitioner before me is the Commissioner, MCGM (for short "**MCGM**") and Respondent is Kachara

Vahatuk Shramik Sangh (for short "**the Union**"). Union raised charter of demand for status of permanency in respect of 580 workers.

3. These workers are working in various wards of MCGM. These workers through the Union had filed Writ Petition No. 1334 of 1999 in this Court. In that Writ Petition, this Court directed that accrued rights of the workers are required to be protected and therefore if work is available and if it becomes necessary in future for the job or the work presently done by these workers, they should be given priority in employment. According to the Union, though rights of these workers were protected, however, MCGM has disregarded their services as a matter of policy decision. Hence Union filed Contempt Petition No. 118/2000 in this Court and demanded that these workers be given priority in work. Statement of MCGM was recorded that work will be provided to these workers on priority. This Court disposed of the Writ Petition while providing for raising dispute before the Appropriate Authority and for determination of the same within a time bound program. Accordingly, Union submitted Notice of demand on 26.11.2004 which was admitted in Conciliation proceedings. Conciliation failed and therefore by order dated 29.10.2005, the appropriate Government through Dy. Registrar referred the dispute for adjudication to the Industrial Tribunal under Section 10(1)(d) r/w Section 12(5) of the Industrial Disputes Act, 1947 (for short **"the said Act"**). Schedule to the reference is as under:-

"SCHEDULE

1. *That the workers performing the work of sweeping, cleaning the roads /gallies/ areas of Greater Bombay Municipal Corporation, collection and transportation of garbage and other refuse be declared to be the workers of BMC and every such workmen be extended the benefits and status of permanent workers of BMC on completion of 240 days of 1 services from the dates of joining of respective workers.*

2. *That the workers listed at Exhibit "A" concerned herewith who have been engaged in and have been working as sweepers, loaders etc. and are performing the work of sweeping, cleaning the roads/gallies/ areas/markets etc. of Greater Bombay Municipal Corporation, and performing the work of collection and transportation of garbage and other refuse be declared to be the workers of the BMC and every such workmen be extended the benefits and status of workers of the BMC retrospectively from the date joining of the respective workers."*

4. Upon Reference being made, Union filed Statement of Claim below Exh. "U3" which was amended by amended Statement of Claim below Exh. "U3A". According to Union, it represents a cross section of workers working in MCGM's various activities in the Solid Waste Management Department ("**SWM Department**"). These workers 580 in number carry out work activities like sweeping, cleaning roads / gullies, areas, markets, loading, unloading of garbage, etc. within the jurisdiction of MCGM, performing the work of collection, lifting and transportation of garbage and other refuse. Union prayed that since these workers belonged to the marginalized section of Society having no access to bare minimum facilities like water, sanitation, health etc and were victims of exploitation, it was statutory duty of MCGM to provide work to them. According to Union, MCGM is required to collect, transport and dispose of garbage, etc. within Mumbai.

Mumbai city is divided into 3 parts i.e. city, eastern suburbs and western suburbs. City consists of about 506.46 kms of roads, western suburbs consists of 927.65 kms of roads. There are various dumping grounds located in different locations in Mumbai at Deonar, Mulund, Malad Malwani, Kurla and Gorai which are used for dumping of garbage and allied refuse. Workers referred to in the Reference perform these statutory duties on behalf of MCGM and considering the nature of their work are *de-facto* and *de-jure* employees of MCGM and an employer-employee relationship exists between them. According to Union, MCGM's set up consists of a Ward Office. Each Ward is manned by an Assistant Engineer, Assistant Head Supervisor, Supervisor and other officers and staff. Each Ward has smaller offices known as "Chowkis". There are motor loading chowkis, sections / beat chowkis in each ward where a Junior Overseer and Mukadam and other MCGM officers supervise the work of these workers. That apart, there are different chowkies established for the purpose of supervising dumping activities at various dumping grounds. According to Union, these workers are working with MCGM for years together since decades (some of them from 1996 - 1997 onwards) without being given the benefit of social legislations like medical, health insurance, PF, equal pay for equal work etc and it is argued that MCGM did not recruit any work force in the normal manner under one pretext or the other and continued with the services of these workers. Another

feature of argument on behalf of Union is that there is gross violation of human rights and ILO conventions in so far as these workers are concerned. It is vehemently argued that similarly placed workers have already been extended benefit of permanency with Court's intervention on atleast two previous occasions and this is the last batch of workers remaining to be given permanent status. It is argued that discrimination is therefore writ large on the face of record in so far as these workers are concerned.

5. There is a history to the litigation between the parties which needs to be delineated. Union raised a dispute for identically placed 1200 workers by filing Writ Petition No. 1027 of 1997 in this Court. This Court took serious cognizance of the unfair, unjust and illegal policies of MCGM. The case travelled right upto the Supreme Court and was remanded back to the High Court. While the said Petition was pending, both parties namely MCGM and Union arrived at a settlement, as a consequence of which those 1200 similarly placed workers were regularized by MCGM and MCGM absorbed them as permanent workers in service. Present set of 580 workers, though working with MCGM at the same time were continued to be employed as casual workers denying them any benefit. Initially MCGM provided them work every 7 months with an artificial break in their service, but it is Union's case that these workers were infact continuously working all throughout, which is now an admitted position. Between 1996 and

upto 2004, despite the State Government granting benefit of permanency to such workers by curbing the tendencies of so-called contracting of sweeping and scavenging activities, MCGM has failed to take any steps. Thereafter, i.e. 2004 onwards Hyderabad pattern was introduced and MCGM started getting its work done under sham and bogus contractors. Hyderabad pattern contract covered the area from "G" ward onwards to the Central and Western suburbs. It had 3 sections : (i) day work, (ii) night work and (iii) transportation which include cleaning, transportation, motor loading, manning and moping. Necessary tools and equipment were provided by MCGM and these workers continued working with MCGM for several years without getting any weekly off, paid leave, accidental benefits, dearness allowance, proper salary, bonus, *ex gratia*, pension, compensation, other benefits etc. In effect, MCGM denied status of permanency and benefits to these workers and treated them as volunteers of NGOs / Societies despite they having continuously worked with MCGM and under MCGM since 1996-97. It is ironical that MCGM did not enter into any contract whatsoever with any contractor to show that these workers were engaged through the contractor but continued to engage them. According to Union this act amounted to gross violation of the provisions of Section 33 of the said Act as such action of MCGM amounted to unfair labour practices as defined under the said Act. Union prayed that despite there being permanent vacancies in MCGM,

these workers were not given benefit of permanency nor there was any kind of written agreement between the contractor and MCGM who was appointed through the alleged tender system and it was MCGM who decided the entire volume of work or area of work, scope of work, timing of work, etc. and the so called alleged contractor was never issued a licence nor registered with the Corporation. It is an admitted position according to Union that these workers continued working with MCGM much prior to the introduction of the third party contractor system in 2004 by MCGM. Over a period of time, these workers working in Solid Waste Management department increased to 7500. Out of these, 2700 similarly placed workers raised Reference (IT) No. 13/2007 which attained finality as a consequence of the Supreme Court order dated 07.04.2016. Another set of 1300 workers raised Reference (IT) No. 5/2014. Thereafter another set of 1100 workers raised Reference (IT) No. 29/2015. All these workers have been extended the benefit of permanency. The present set of 580 workers are the last batch of identically placed workers and therefore deserve the same status is what is passionately argued before me by Mr. Singhvi.

6. Union pleaded that there are large number of vacant posts. Vacancies are increasing due to large number of disabilities / death / casualty of workers as a consequence of work hazards. That there is continuous increase in generation of garbage and allied refuse and

workers work regularly for all activities supervised and carried out by MCGM. Union pleaded that these workers have long completed 240 days in the initial period of 8 to 9 months after their appointment by MCGM and are continuously working with MCGM for the past several years, rather decades. Union pleaded that in case of similarly placed 1200 workers, MCGM entered into a settlement with the Union. Thereafter, by the order dated 07.04.2016 pertaining to 2700 similarly placed co-workers before the Supreme Court, MCGM agreed to absorb and give them benefit of permanency. Hence it is pleaded that the case of these 580 workers also be considered on the same footing for benefit of permanency. Union pleaded that for the purpose of showing supervision and control of MCGM on these workers, their work is supervised by the Junior overseer and Mukadam of MCGM. It is stated that minute to minute work is supervised by the Mukadam and other officers stationed in the chowkis as well as offices of MCGM and entire record of work done by the workers is maintained by MCGM. That penalties are imposed if these workers are found without their uniform and fined for doing incomplete work or if they remain absent. That this clearly establishes that MCGM has complete control and supervision on the work done by these workers. It is pleaded by Union that the real principal and only direct employer of these workers is the MCGM and not any contractor. It is pleaded that these workers are also paid a quantum of bonus / ex-gratia which is decided by MCGM

though the said lumpsum amount paid to them is less than the minimum bonus prescribed under the statute applicable. For the purpose of paying bonus, attendance of these workers in the financial year ending on 31st March of every year is considered. It is pleaded that there are 28028 posts of workers in SWM Department and these posts are not filled up completely. That permanent workers of MCGM are working shoulder to shoulder with these workers doing the same work for the last several decades. These workers are not getting benefit of ESI even through their contributions are deducted. In the same manner, though provident fund deductions are made, these workers are not getting benefit of the same. Thus, these workers through the Union have prayed for arrears of wages and all other incidental benefits apart from the benefit and status of permanency to be granted by MCGM.

7. Before the Industrial Court, MCGM filed its written statement below Exh. "C-23" denying the allegations made by Union, *inter alia,* reiterating that these workers were neither appointed, engaged nor employed by MCGM at any point of time. It is stated that these workers are engaged by the respective NGOs / Societies who pay them honorarium as volunteers who attend to work. That their attendance is earmarked by those respective NGOs / Societies and their work is supervised by supervisors appointed by NGOs / Societies. MCGM submitted that it being a statutory body and local authority, it

had its own policy for employment and recruitment process. That it created posts as per its requirement as provided under the MMC Act, 1888. For the purpose of filing up posts created for a specific purpose, procedure is prescribed as well as a separate budgetary provision is required to be made. That present workers are engaged by respective NGOs / Co-op. Societies directly. That without impleading them as party in the present Petition, no relief can be granted to these workers. It is pleaded that by following the Hyderabad pattern, the 3 schemes were introduced by MCGM through appointment of various NGOs / Co-op. Societies namely "Clean area scheme", "motor loaders scheme" and "manning moping scheme". It is pleaded that workers are appointed through the NGOs / Societies to these 3 schemes and MCGM has never issued appointment letter to them nor recruited any of them directly. It is pleaded that these workers are getting work only due to orders passed by this Court and they cannot have a legal right for the same. That there is no post available in the SWM Department for engaging these workers and they cannot seek benefit of permanency and Court cannot create posts for them. That in so far as the settlement dated 15.02.2003 relied upon by the Union is concerned, MCGM has argued that the said settlement was a one time settlement only and on the basis of such settlement, Union cannot claim any parity or relief for these workers. With reference to Reference (IT) No. 13/2007 which travelled right upto the Supreme

Court, it is MCGM's case that the order passed by the Supreme Court cannot be relied upon in the present Reference as the Supreme Court in the said order has clearly stated that it cannot be used as a binding precedent.

8. On the basis of the above contentions, learned Industrial Court framed the following issues:-

No.	*Issues*
1	*Whether the workers performing the work of sweeping, cleaning the roads / gallies / areas of the Greater Bombay Municipal Corporation, collection and transporation of garbage and other refuse, are entitled to the benefits and status of permanent workers of the BMC on completion of 240 days of services from the dates of joining respective workers ?*
2	*Whether the workers listed at Exhibit 'A' annexed herewith who have been engaged in and have worked as sweepers and have performed the work of sweeping, cleaning the roads/gallies/areas of the Greater Bombay Municipal Corporation, collection and transportation of garbage and other refuse, are entitled to the benefits and status of permanent workers of the BMC on completion of 240 days of services from the dates of joining respective workers ?*
3	*Whether Second Party proves that there exists employer-employee relationship between First Party Corporation and concerned person the present Reference?*
4	*What order?*

9. It is seen that on behalf of Union, 12 witnesses were examined whereas on behalf of MCGM, 8 witnesses were examined. What is significant to note is that in the present case, Investigation Officer was appointed to ascertain the work done by these workers and submit a report. The Investigation Officer conducted physical

verification of these workers for the period from 26.04.2016 to 15.07.2016 and submitted a detailed report on 30.08.2016 below Exh. "O-14". Incidentally, Investigation Officer was called as a witness by MCGM itself. Industrial Court in Reference proceedings passed order dated 21.01.2020 directing both parties to put their questions in writing to the Investigation Officer and he was directed to give his answers. He filed his answers and the same were taken on record below Exh. "O-33".

10. It is seen that Union in support of its case filed substantial documentary evidence viz; documents received from MCGM, other statutory authorities, from the Union, from the concerned workers, MCGM's own documents like resolutions of the Standing Committee fixing rates, tender documents, circulars, policy and notifications about service conditions, documents about fines imposed for various reasons / lapses on the part of workers, information obtained under RTI by the Union to show that the present set of 580 workers in the present Reference are alongside permanent workers in the SWM Department. That in respect of similarly placed 2700 workers the Supreme Court modified the Award on the basis of consent of both parties viz; MCGM and Union but stated that it shall not be treated as a precedent. It is the argument of the Union that two identical References were decided whereas the present Reference is identical to them and concerns similarly placed workers and therefore has to be

treated at par with the earlier two References. According to Union, there is no distinction or differences whatsoever of any nature between these 580 workers and the workers covered by the two earlier References who were bestowed with permanency benefits.

11. After analyzing the above submissions, evidence led and decisions of the Supreme Court and the High Courts relied upon by parties, learned Industrial Court held that it was important to note that these workers are working right from the year 1996-1997 with MCGM which is an admitted position. That though MCGM introduced the Hyderabad pattern in the year 2004, however, in so far as these workmen are concerned, right from the year 1996 till implementation of the Hyderabad pattern, MCGM did not place on record any material evidencing as to under which scheme or by virtue of which contract these 580 workers were appointed or engaged. That they continued to work since 1996-1997 is an undisputed position. Industrial Court in paragraph Nos. 56-57 analyzed as to whether on the basis of the evidence relied upon, whether procedure for engagement of any NGO / Co-operative Society was indeed followed, mode of payment, supervision and control and whether the said contract labour system was indeed permissible and genuinely operating in MCGM and whether the same was not sham and bogus and just a paper arrangement. Industrial Court however returned a positive finding in paragraph Nos. 57 and 58 while concluding that the process of issuing

tender has been a continuous practice for engaging these workers continuously for years together without mentioning the role of supervisors therein and the role of supervisor was cosmetic only. Thereafter Industrial Court has looked into the specific evidence led by the parties and analyzed the same from paragraph No. 59 onwards.

12. After analyzing the evidence led by parties, learned Industrial Court has returned findings in paragraph No. 91 of its Award answering the Reference in the affirmative and dismissing the case of MCGM comprehensively.

13. Mr. Sakhare, learned Senior Advocate appearing on behalf of the Writ Petitioner at the threshold without adverting to the evidence and merits of the present case has made the following submissions:-

13.1. He would submit that by virtue of the impugned Award a direction has been given to the Corporation to infact regularize the 580 workers in the present Reference resultantly meaning that the Corporation will have to create 580 posts for them since no vacant posts are available for their absorption. He would submit that rendering such a direction to regularize contractual workers and appoint them against permanent posts by giving them permanent status is contrary to various decisions of the Supreme Court.

13.2. Hence, at the outset he has drawn my attention to the following 4 judgments before embarking upon the challenge maintained to the impugned Award on merits:-

(i) ***Kunhayammed and Ors. Vs. State of Kerala and Anr.***[1];

(ii) ***Indian Drugs and Pharmaceuticals Ltd. Vs. Workmen, Indian Drugs and Pharmaceuticals Ltd.***[2] ;

(iii) ***Official Liquidator Vs. Dayanand and Ors.***[3]***;*** and

(iv) ***Shrirampur Municipal Council Vs. V. K. Barde and Ors.***[4]

13.2.1. In the case of *Kunhayammed and Ors. (1st supra)*, he has drawn my attention to paragraph No.28 of the said decision which reads thus:-

> ***"28.*** *Incidentally we may notice two other decisions of this Court which though not directly in point, the law laid down wherein would be of some assistance to us. In Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat [(1969) 2 SCC 74 : AIR 1970 SC 1] this Court vide para 7 has emphasised three preconditions attracting applicability of doctrine of merger. They are: (i) the jurisdiction exercised should be appellate or revisional jurisdiction; (ii) the jurisdiction should have been exercised after issue of notice; and (iii) after a full hearing in presence of both the parties. Then the appellate or revisional order would replace the judgment of the lower court and constitute the only final judgment. In Sushil Kumar Sen v.State of Bihar[(1975) 1 SCC 774 : AIR 1975 SC 1185] the doctrine of merger usually applicable to orders passed in exercise of appellate or revisional jurisdiction was held to be applicable also to orders passed in exercise of review jurisdiction. This Court held that the effect of allowing an application for review of a decree is*

1 (2000) 6 SCC 359
2 (2007) 1 SCC 408
3 (2008) 10 SCC 1
4 2011 (4) Mh. L.J. 875

> *to vacate a decree passed. The decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The distinction is clear. Entertaining an application for review does not vacate the decree sought to be reviewed. It is only when the application for review has been allowed that the decree under review is vacated. Thereafter the matter is heard afresh and the decree passed therein, whatever be the nature of the new decree, would be a decree superseding the earlier one. The principle or logic flowing from the abovesaid decisions can usefully be utilised for resolving the issue at hand. Mere pendency of an application seeking leave to appeal does not put in jeopardy the finality of the decree or order sought to be subjected to exercise of appellate jurisdiction by the Supreme Court. It is only if the application is allowed and leave to appeal granted then the finality of the decree or order under challenge is jeopardised as the pendency of appeal reopens the issues decided and this Court is then scrutinizing the correctness of the decision in exercise of its appellate jurisdiction."*

On the basis of the above, he would contend that as held by the Supreme Court, in the facts of the present case the decision of this Court dated 22.12.2016 passed in Writ Petition No. 11519 of 2014 has merged into the decision of the Supreme Court dated 07.04.2017 in SLP (Civil) No. 6202 of 2017 and thus the decision of the Supreme Court supersedes the decision of the High Court. He would therefore contend that reliance of the Tribunal on the decision of this Court dated 22.12.2016 in respect of granting permanent status to 2700 workers is completely misplaced and impermissible in law, in view of the the applicability of the doctrine of merger. Hence, he would emphasize that the decision of this Court dated 22.12.2016 cannot be considered and looked into at all for determination of the case of the present set of workers.

13.2.2. In the case of *Indian Drugs and Pharmaceutical Ltd. (2nd supra)*, he has drawn my attention to paragraph Nos. 14 to 17 which read thus:-

> *"**14.** The distinction between a temporary employee and a permanent employee is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only a permanent employee who has a right to continue in service till the age of superannuation (unless he is dismissed or removed after an inquiry, or his service is terminated due to some other valid reason earlier). As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Hence, it follows that no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation.*
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> ***15.** Similarly, no direction can be given that a daily-wage employee should be paid salary of a regular employee vide State of Haryana v. Tilak Raj [(2003) 6 SCC 123 : 2003 SCC (L&S) 828] .*
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> ***16.** We are afraid that the Labour Court and the High Court have passed their orders on the basis of emotions and sympathies, but cases in court have to be decided on legal principles and not on the basis of emotions and sympathies.*
>
> ***17.** Admittedly, the employees in question in court had not been appointed by following the regular procedure, and instead they had been appointed only due to the pressure and agitation of the union and on compassionate grounds. There were not even vacancies on which they could be appointed. As held in A. Umarani v. Registrar, Coop. Societies [(2004) 7 SCC 112 : 2004 SCC (L&S) 918 : AIR 2004 SC 4504] such employees cannot be regularised as regularisation is not a mode of recruitment. In Umarani case [(2004) 7 SCC 112 : 2004 SCC (L&S) 918 : AIR 2004 SC 4504] the Supreme Court observed that the compassionate appointment of a woman whose husband deserted her would be illegal in view of the absence of any scheme providing for such appointment of deserted women."*

On the basis of the above, he would contend that as held in this case, while relying upon the decision in the case of *Umarani reported in 2004 (7) SCC 112*, in the case of employees not appointed by following the regular procedure, their regularization is not a mode

of recruitment since a temporary employee has no right to be appointed to a permanent post.

13.2.3. In the decision in the case of *Official Liquidator (3rd supra)*, he has drawn my attention to paragraph Nos. 68 to 72 of the said decision to drive home the point of employment made through backdoor methods as dealt with by the Supreme Court. Paragraph Nos. 68 to 72 of the said decision read thus:-

> ***"68.*** *The above noted judgments and orders encouraged the political set-up and bureaucracy to violate the soul of Articles 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity and the spoils system which prevailed in the United States of America in the sixteenth and seventeenth centuries got a firm foothold in this country. Thousands of persons were employed/engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher and lower levels managed to get the cake of public employment by trampling over the rights of other eligible and more meritorious persons registered with the employment exchanges. A huge illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system. This was recognised by the Court in Delhi Development Horticulture Employees' Union v. Delhi Admn. [(1992) 4 SCC 99 : 1992 SCC (L&S) 805 : (1992) 21 ATC 386] in the following words: (SCC pp. 111-12, para 23)*
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> > *"23. Apart from the fact that the petitioners cannot be directed to be regularised for the reasons given above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is an Employment Exchange Act which requires recruitment on the basis of registration in the employment exchange, it has become a common practice to ignore the employment exchange and the persons registered in the employment exchanges, and to employ and get employed directly those who are either not registered with the employment exchange or who though registered are lower in the long waiting list in the employment register. The courts can take judicial notice of the fact that such employment is sought and*

given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the employment exchanges for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

69. *The menace of illegal and backdoor appointments compelled the courts to rethink and in a large number of subsequent judgments this Court declined to entertain the claims of ad hoc and temporary employees for regularisation of services and even reversed the orders passed by the High Courts and Administrative Tribunals —Institute of Management Development v. Pushpa Srivastava [(1992) 4 SCC 33 : 1992 SCC (L&S) 767 : (1992) 21 ATC 377] , M.A. Haque (Dr.) v. Union of India [(1993) 2 SCC 213 : 1993 SCC (L&S) 412 : (1993) 24 ATC 117] , J&K Public Service Commission v. Dr. Narinder Mohan [(1994) 2 SCC 630 : 1994 SCC (L&S) 723 : (1994) 27 ATC 56] , Arundhati Ajit Pargaonkar (Dr.) v. State of Maharashtra [1994 Supp (3) SCC 380 : 1995 SCC (L&S) 31 : (1994) 28 ATC 415] , Union of India v. Kishan Gopal Vyas [(1996) 7 SCC 134 : 1996 SCC (L&S) 468 : (1996) 32 ATC 793] , Union of India v. Moti Lal [(1996) 7 SCC 481 : 1996 SCC (L&S) 613 : (1996) 33 ATC 304] , Hindustan Shipyard Ltd. v. Dr. P. Sambasiva Rao [(1996) 7 SCC 499 : 1996 SCC (L&S) 619 : (1996) 33 ATC 309] , State of H.P. v. Suresh Kumar Verma [(1996) 7 SCC 562 : 1996 SCC (L&S) 645 : (1996) 33 ATC 336] , Surinder Singh Jamwal (Dr.) v. State of J&K [(1996) 9 SCC 619 : 1996 SCC (L&S) 1296] , E. Ramakrishnan v. State of Kerala [(1996) 10 SCC 565 : 1997 SCC*

(L&S) 331] , Union of India v. Bishamber Dutt [(1996) 11 SCC 341 : 1997 SCC (L&S) 478] , Union of India v. Mahender Singh [(1997) 1 SCC 245 : 1997 SCC (L&S) 717] , P. Ravindran v. UT of Pondicherry [(1997) 1 SCC 350 : 1997 SCC (L&S) 731] , Ashwani Kumar v. State of Bihar [(1997) 2 SCC 1 : 1997 SCC (L&S) 267] , Santosh Kumar Verma v. State of Bihar [(1997) 2 SCC 713 : 1997 SCC (L&S) 751] , State of U.P. v. Ajay Kumar [(1997) 4 SCC 88 : 1997 SCC (L&S) 902] , Patna University v. Dr. Amita Tiwari [(1997) 7 SCC 198 : 1997 SCC (L&S) 1619] and Madhyamik Shiksha Parishad v. Anil Kumar Mishra [(2005) 5 SCC 122 : 2005 SCC (L&S) 628] .

70. *The shift in the Court's approach became more prominent in A. Umarani v. Coop. Societies [(2004) 7 SCC 112 : 2004 SCC (L&S) 918] , decided by a three-Judge Bench, wherein it was held that the State cannot invoke Article 162 of the Constitution for regularisation of the appointments made in violation of the mandatory statutory provisions.*

71. *In State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] the Constitution Bench again considered the question whether the State can frame scheme for regularisation of the services of ad hoc/temporary/daily wager appointed in violation of the doctrine of equality or the one appointed with a clear stipulation that such appointment will not confer any right on the appointee to seek regularisation or absorption in the regular cadre and whether the Court can issue mandamus for regularisation or absorption of such appointee and answered the same in negative. The Court adverted to the theme of constitutionalism in a system established on the rule of law, expanded meaning given to the doctrine of equality in general and equality in the matter of employment in particular, multifaceted problems including the one relating to unwarranted fiscal burden on the public exchequer created on account of the directions given by the High Courts and this Court for regularisation of the services of persons appointed on purely temporary or ad hoc basis or engaged on daily wages or as casual labourers, referred to about three dozen judgments including R.N. Nanjundappa v. T. Thimmiah [(1972) 1 SCC 409] ,Daily Rated Casual Labour v. Union of India [(1988) 1 SCC 122 : 1988 SCC (L&S) 138 : (1987) 5 ATC 228] , Bhagwati Prasad v. Delhi State Mineral Development Corpn. [(1990) 1 SCC 361 : 1990 SCC (L&S) 174] , Dharwad Distt. PWD Literate Daily Wage Employees Assn. v. State of Karnataka [(1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902] , State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] and State of Punjab v. Surinder Kumar [(1992) 1 SCC 489 : 1992 SCC (L&S) 345 : (1992) 19 ATC 345] and held: [Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] , SCC pp. 39-40, paras 47-49]*

> *"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 recognised 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 cases concerned, 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 department concerned 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.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution."

72. *In para 26 the Constitution Bench specifically referred to the conclusions recorded in paras 45 to 50 of the judgment in State of Haryana v. Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] and observed: [Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] , SCC p. 29]*

"26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent—the distinction between regularisation and making permanent, was not emphasised here—can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in para 50 (of SCC) of Piara Singh [(1992) 4 SCC 118 : 1992 SCC (L&S) 825 : (1992) 21 ATC 403] is to some extent inconsistent with the conclusion in para 45 (of SCC) therein. With great respect, it appears to

> *us that the last of the directions clearly runs counter to the constitutional scheme of employment recognised in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent."*
>
> *In para 54, the Constitution Bench [in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753]] clarified that the earlier decisions which run counter to the principles settled by it will stand denuded of their status as precedents."*

On the basis of the above, he would submit that if temporary employees are given permanent status without following the due process of recruitment, it is not in public interest. He would submit that when a person enters temporary employment as a casual worker, his engagement is not based on a proper selection as recognized by the relevant rules or procedure. He would submit that such a temporary employee is aware of the consequences of his appointment which is purely temporary, casual or contractual and not permanent. Hence he would submit that such a worker like the workers in the present case therefore cannot invoke the theory of legitimate expectation for being confirmed in the post without following the recruitment procedure. He would go to the extent of submitting that it cannot also be held that the Corporation has held out any promise while engaging these workers as casual workers either to continue them forever or to make them permanent and infact the Corporation is debarred from constitutionally making such a promise.

13.2.4. In the case of *Shrirampur Municipal Council (4th supra)* of this Court, he has drawn my attention to paragraph Nos. 23 and 28 of the said decision which read thus:-

> ***"23.*** *In present matters, the respondent trade union itself accepts absence of posts and inability of Municipal Council to create it. By demand 1, it sought increase in number of posts on establishment schedule and by demand 2, relief of grant of permanency has been asked. Thus absence of permanent posts or vacancies in sanctioned strength to accommodate its members is/ was never in dispute. Respondent Union was aware of the bar on powers of its employer due to section 76 of 1965 Act and had contended that prior approval of proposals therefor by State Government was a time consuming process. It is apparent that this statutory requirement of prior approval therefore could not have been dispensed with by the Industrial Court. Its consideration in from paragraph 37 onwards shows scrutiny of evidence about additional posts required and in para 38, a finding of absence of specific evidence about exact number thereof as required in various departments. Its entire application of mind therefore reveals absence of any evidence about number of sanctioned posts already available in concerned department or then about workload expected to be shouldered by permanent holders thereof. Continuation of large number of workmen on daily wages is no doubt prima facie indication of increased workload and need of additional man power. But then this principle which may hold good for private employer cannot always be extended to public employment. Exercise undertaken while sanctioning a particular number of posts in any compliment earlier needs to be reviewed in the light of alleged additional load and also capacity of such public employer/State to incur expenditure therefor. Merely because daily wagers are being employed in public employment like present one, it may not warrant additional posts in all cases. Not only this, when salary is to come from public exchequer, ability to bear this extra burden either in full or in part, also assumes significance. The Government may even if satisfied with additional workload, due to other constraints, may not grant approval to creation of any post orsome posts. The task essentially consists of a decision on executive side. Admittedly, State Government is releasing grants for paying DA to workmen within sanctioned strength and also for various municipal developments. What expenditure should be viewed as on establishment and when it should be treated as for development work or towards rendering service is therefore within province of State, provided it applies those accounting norms on uniform basis. Industrial Court has not recorded a finding that the said treatment in present case is contrary to such norms or discriminatory. Opinion of Industrial Court that expenditure on wages of field staff cannot be accepted as*

establishment expenditure is therefore unsustainable. Similarly when Municipal Council is required to pay less amount as daily wage, finding that after grant of permanency, it will start receiving 85% grants towards DA and its burden gets reduced is erroneous. Municipal Council has to release more amount towards basic salary as also pay other allowances to such incumbent. It also has to shoulder 15% of the DA. The conclusion that as workmen on daily wage already working are being given permanency, there is no new recruitment or creation of new posts is equally unsustainable. Without verifying the mode and manner in which these 198 workmen got the work and their eligibility for the same, a blanket direction for grant of permanency to one and all is unconstitutional. Respondent trade union has not brought on record necessary material On record and effort before this Court is to justify the allotment of work contending that no statutory provisions regulate it. Thus constitutional scheme as noticed above is being ignored. Not only this, but stand that as per settled practice, first a direction like impugned direction is to be obtained from Industrial Court and then State Government is to be approached seeking required "prior approval" also overlooks mandate of Art. 14 and other eligible aspirants who lose an important opportunity in their life.

24. *.....*
25. *.....*

26. *.....*

27. *.....*

28. *It is apparent that work provided to members of respondent trade union is not after conducting any competitive and open selection process. It is not against any sanctioned post or vacancy. Hence, their continuance in employment is not irregular but illegal. Even State Government cannot regularize it as one time measure. The workmen cannot contend that they were/are not aware of constitutional requirements or statutory provisions in this respect. Stand that they have to first obtain suitable direction from Industrial Court and then Municipal Council has to approach State Government for creation of requisite number of new posts is misconceived. These members had no right to post and hence, cannot legitimately expect permanency or pension or then compassionate employment for their dependents. Whatever benefits they could derive till now do not and cannot clothe them with any better right either in law or equity. Arguments to show sympathy or to take lenient view and not to disturb the status-quo prevailing since long are misplaced and cannot be accepted."*

On the basis of the above, he would submit that as held by this Court even in the present case, the work provided to these 580

workers is not after conducting any competitive and open selection process nor their appointment is against any sanctioned post or vacancy. He would submit that these workers therefore cannot contend discrimination and that they were not aware of the Constitutional requirements or statutory provisions with respect to their appointment.

13.3. After referring to the aforesaid four decisions, he has next drawn my attention to the decision of the Supreme Court dated 07.02.2020 in the case of ***Oil and Natural Gas Vs. Krishan Gopal and Ors.*** *in Civil Appeal No. 1878 of 2016*. He would submit that the Supreme Court while considering the decisions relating to the jurisdiction of the Tribunal to direct regularization of services of workmen in the posts as valid or otherwise and after referring to the decision of ***Oil and Natural Gas Ltd. Vs. Petroleum Coal Labour Union*** *reported in 2015 (6) SCC 494* has held that the said decision did not consider the earlier judgment in the case of ***Engineering Mazdoor Sangh*** (2007 (1) SCC 250) with respect to conferring an absolute right to regularization of casual workers merely on completion of 240 days of continuous service and has therefore held that the decision in the case of *Oil and Natural Gas Ltd. Vs. Petroleum Coal Labour Union* case would require consideration and has by the above order called upon the Hon'ble the Chief Justice of India to consider placing the said

Appeal before an appropriate bench. He would therefore submit that following issues having been referred to a larger bench preclude this Court or Tribunal to pass any judgment and this Court should await any decision that will be passed by the larger bench:-

(i) Wide as they are the powers of the Labour Court and the Industrial Court cannot extend to a direction to order regularization where such a direction would in the context of public employment offend the provisions contained in Article 14 of the Constitution;

(ii) The statutory power of the labour Court or Industrial Court to grant relief to workmen including the status of permanency continues to exist in circumstances where the employer has indulged in an unfair labour practice by not filling up permanent posts even though such posts are available and by continuing to employ workmen as temporary or daily wage employees despite they performing the same work as regular workmen on lower wages;

(iii) The power to create permanent or sanctioned posts lies outside the judicial domain and where no posts are available, a direction to grant regularization would be impermissible merely on the basis of the number of years of service;

(iv) Where an employer has regularized similarly situated workmen either in a scheme or otherwise, it would be open to workmen who have been deprived of the same benefit at par with the workmen who have been

regularized to make a complaint before the Labour or Industrial Court since the deprivation would amount to a violation of Article 14....”

He would submit that the issue of the powers and scope of the learned Tribunal to grant regularization, permanency and creation of posts is an issue now pending before the larger bench of the Supreme Court. Therefore for the respondents to submit that the order dated 22.12.2016 passed by this Court in Writ Petition No. 11519 of 2014 (Coram: N.M. Jamdar J.) is a binding precedent on this issue as held by the Tribunal would not be a correct position in law.

13.4. In respect of the order dated 07.04.2017 of the Supreme Court passed in SLP (C) no. 6202 of 2017 arising from the judgment dated 22.12.2016 passed by this Hon'ble Court in WP no. 11519/2014 (Coram: N.M. Jamdar J.), he would submit that, it is necessary to refer to the Order dated 07.04.2017 in which the Supreme Court has granted leave and partly allowed the Appeal filed by the MCGM. He would submit that it is not in dispute that the order of this Hon'ble Court upholding a similar direction of the Industrial tribunal granting permanency was in challenge before the Hon'ble Supreme Court wherein the Apex Court has not dismissed the SLP of the MCGM *in limine* but has in fact interfered with the judgment of the lower Court and has substituted the same. He would draw my attention to paragraph No. 4 of the said judgment wherein the Supreme Court

observes that 'as posts are required to be created' which means that the Supreme Court is aware that the Court below has directed creation of posts and it further observes that, 'it would be appropriate to grant monetary relief' therefore clearly negating the aspect of creation of posts. He would submit that the Supreme Court infact modifies the relief from permanency to that of a monetary benefit and hence the argument that the judgment dated 22.12.2016 passed by this Court in Writ Petition No. 11519 of 2014 (Coram: N.M. Jamdar J.) holds the field and the aspect of permanency has not been interfered is not a correct interpretation of the said order. He has also drawn my attention to the last line of paragraph No. 7 of the said order which observes and states that (with respect to the workers who are yet to be verified by the Investigating officer), *'In case he has not served, he will not be paid for that period'*, thus making it clear that the relief granted is monetary and therefore even the consequences are monetary. He would submit that the Supreme Court at no place refers to the issue of permanency or creation of posts as the said issue is infact given up by the Union before the Apex Court.

13.5. He would submit that if the Supreme Court did not consider it fit to grant relief of permanency it has to be presumed that the Supreme Court was aware of the binding precedent and therefore has not agreed with the findings in the order dated 22.12.2016 passed by this Hon'ble Court in Writ Petition No. 11519 of 2014 (Coram: N.M.

Jamdar J.). Hence according to him, the judgment dated 22.12.2016 passed by this Court in Writ Petition No. 11519 of 2014 (Coram: N.M. Jamdar J.) cannot be held to be a binding precedent.

13.6. He would submit that the Governments, both the Central and State have been engaging workers on a temporary basis and after some time regularizing their services but this practice has been held to be bad and contrary to the law of the land by the Supreme Court. He would submit that the temporary workers have no right of regularisation of their services. That the Union and the State Governments and their instrumentalities cannot make appointment *dehors* the constitutional scheme of public employment / recruitment as held by the Constitution Bench of the Supreme Court in the case of *State of Karnataka Vs. Umadevi reported in 2006 (4) SCC 1*. In that decision it is held that appointment by the State and its instrumentalities should only be in accordance with the rules and procedure relating to regular recruitment and the Court reasoned that public employment in a sovereign socialist secular democratic republic has to be as set down by the Constitution and the laws made thereunder. He would submit that our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a set recruitment procedure established in that behalf. That equality of opportunity is its hallmark and the Constitution has provided for affirmative action to ensure that equals are not treated as unequals.

Hence, any public employment has to be in terms of the constitutional scheme.

13.7. He would submit that the power of a State or for that matter MCGM as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily and it is also well acknowledged that Court cannot countenance appointments to public office which have been made against the constitutional scheme. He would submit vehemently that in the backdrop of the constitutional philosophy, it would be improper for Court to give directions for regularization of services of persons working either as daily-wager, on *ad hoc* basis, probationer, temporary or contractual employee and those not appointed by following the procedure laid down under Articles 14, 16 and 309 of the Constitution. He would emphasize that in our Constitutional scheme, there is no room for back door entry in the matter of public employment. He would draw my attention to the *pursis* dated 09.02.2022 filed by the Municipal Commissioner pursuant to the order dated 01.02.2022 passed by this Court which states that at present there are 29192 Nos. (27592 Nos. of scheduled / permanent posts plus 1600 Nos. of temporary posts for labourers absorbed in MCGM as per IT-13 of 2007) in MCGM's SWM department which are sufficient to cater to the day to day SWM services of MCGM. Out of these scheduled posts, 2347 nos. of post are vacant, which are filled by process of Preferential

Treatment (PT) by following guidelines issued by the Lad – Page (लाड - पागे) Committee and hence it is a committed liability which has to be fulfilled through the rules of Varasa Hakka (वारसा हक्क) recommended by the said Committee. As per guidelines these PT cases are to be filled up by giving priority to the immediate legal heir of an ex-employee who has superannuated, voluntarily retired, has become medically unfit or has expired while in service.

13.8. He would submit that equality of opportunity in public employment is the basic feature of the Constitution, which MCGM has to honour while making recruitment. That in the case of *Umadevi*, the Constitution Bench while drawing upon the principle of equality in public employment as enshrined under the Constitution has opined that:- *'In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment.'*

13.9. He would draw my attention to Article 335 which provides for special consideration in the matter of claims of the members of the Scheduled Castes and Scheduled Tribes for employment. He would submit that there are Acts, rules or regulations for implementing the above constitutional guarantees and any recruitment to the service governed by such Acts, rules and regulations which the MCGM must follow. That the Constitution does not envisage any employment

outside this constitutional scheme and without following the requirements set down therein. That any act of the MCGM or of its officers contrary to the statutory rules and any infraction by such officers would not confer a benefit on temporary workers.

13.10. He would argue that mere long continuance in service whether under the protection of interim orders passed by Courts or Tribunals or even otherwise confers no right on temporary workers to claim regularization.

13.11. He has also drawn my attention to the decision in the case of *U.P. SEB v. Pooran Chandra Pandey* wherein a two-Judge Bench of the Supreme Court directed regularization of workers overlooking the decision in the case of *Umadevi* . This judgment came up for consideration before a three Judges' Bench of the Supreme Court in the case of *Official Liquidator* (supra) wherein while heavily advocating judicial discipline, the Supreme Court held observations made in *Pooran Chandra Pandey* to be treated as obiter and not as binding by the High Courts, tribunals and other judicial foras. He would submit that in addition to the above, on facts, one notable feature should be considered by the Court and that is none of the 580 workers have been appointed by the Corporation through any recruitment process. Hence, applying the statutory law and decisions of the Supreme Court, these workers cannot be regularized and

granted status of permanency. Therefore the Award passed in the Reference has to be set aside and quashed.

14. In his detailed response, Mr. Singhvi, learned Senior Advocate for Respondent Union has taken me through the history of litigation referred to in the facts delineated hereinabove and thereafter relied upon the following decisions:-

(i) ***Western India Automobile Association Vs. Industrial Tribunal, Bombay and Ors.***[5]***;***

(ii) ***Bharat Bank Limited Vs. Employees of Bharat Bank Ltd.***[6]

(iii) ***Municipal Corporation of Gr. Mumbai, Vs. Kachara Vahtuk Shramik Sangh***[7]***;***

(iv) ***Maharashtra State Road Transport Corporation and Anr. Vs. Castetribe Rajya Parivahan Karamchari Sanghatana***[8]*; and*

(v) ***Hari Nandan Prasad and Anr. Vs. Employer i/r. To Management of Food Corporation of India***[9]***.***

14.1. He would submit that the case of the present 580 workers is squarely covered by the decision of this Court in case of MCGM Vs. Kachara Vahtuk Shramik Sangh (supra) and the decision of Supreme Court in the case of MCGM Vs. Kachara Vahtuk Shramik Sangh (supra). He would submit that Settlement dated 12.02.2003 in respect of 1200 similarly placed workers also clearly aids and attributes support to the cause of the Union in support of the Award in

5 FCR Federal Court Reports 321
6 1950 SCC 470
7 2016 SCC OnLine Bom 10035
8 (2009) 8 SCC 556
9 (2014) 7 SCC 190

the present case. He has drawn my attention to the issue of litigious employment as decided by this Court in its order dated 12.04.2006 in Writ Petition No. 1862 of 2006 and 2207 of 2006 concerning the same set of workers. Next he has addressed the Court on completion of 240 days admittedly by all these workers and their continuous work per calendar year about which there is no ambiguity. In support thereof, he has relied upon the order dated 24.06.2021 passed by the Industrial Tribunal, Mumbai as also affidavit dated 06.08.2019 sworn by Jaywant R. Parhyad, Head Supervisor, Solid Waste Management Department witness on behalf of the MCGM about the record maintained by MCGM of the length of service for calculation of bonus of these workers and the internal memo dated 04.06.2015 issued by the Solid Waste Management Department with respect to completion of 240 days of service for all these workers. Finally in respect of supervision and control, he has placed reliance on the following documents in support of the Award:-

(i) Circular dated 03.06.2009 of the MCGM in respect of payment of PF, gratuity etc. to the present workers;

(ii) Record maintained by MCGM of fines imposed in February 2014 on present workers;

(iii) Extract of MCGM's tender setting out rates of payment to present workers and NGO supervisors;

(iv) Internal Memo dated 20.06.2015 of the Solid Waster Management Department, MCGM, assigning workers' shifts;

(v) A sample tender document issued by the Solid Waste Management Department, MCGM on 13.09.2017 and

(vi) Screenshots of instructions set to the workers by MCGM officers through Whatsapp.

14.2. In the case of *Maharashtra State Road Transport Corporation (10th supra)*, he has drawn my attention to paragraph Nos. 36 to 39 of the said decision of the Supreme Court which read thus:-

> ***"36.*** *Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] 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 practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi (3) (2006) 4 SCC 1 : 2006 SCC (L&S) 753] 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 practice on the part of the employer under Item 6 of Schedule IV is established.*
>
> ***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 [(2001) 7 SCC 346 : 2001 SCC (L&S) 1180] this Court held: (SCC pp. 352-53, paras 12-14)*
>
> > *"12. Mrs Jaising, in support of Civil Appeals 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 State of Maharashtra v. R.S. Bhonde [(2005) 6 SCC 751 :*

2005 SCC (L&S) 907] this Court relied upon an earlier judgment in Mahatma Phule Agricultural University [(2001) 7 SCC 346 : 2001 SCC (L&S) 1180] 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 [(2001) 7 SCC 346 : 2001 SCC (L&S) 1180] the status of permanency cannot be granted when there is no post. Again in Gram Sevak Prashikshan Kendra v. Workmen [(2001) 7 SCC 346] , 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 [(2007) 1 SCC 408 : (2007) 1 SCC (L&S) 270] 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 [(2003) 2 SCC 632 : 2003 SCC (L&S) 191] . 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.""*

On the basis of the above he would submit that as held by the Supreme Court assuming for the sake of argument if no posts are available, however if it is found that similarly situated workmen are regularized by the employer under some scheme or otherwise and if the workmen in question who have approached the Industrial Court are on par with them, directions for regularization in such cases may be legally justified, otherwise it would be violative of Article 14 of the Constitution of India and would amount to invidious discrimination qua those workers in such cases.

15. I have heard Mr. Sakhare, learned Senior Advocate for the Petitioner - MCGM and Mr. Singhvi, learned Senior Advocate for the Respondent – Union and with their able assistance perused the pleadings and record of the case. Submissions made by the parties have received due consideration of the Court.

16. In the present case, it is seen that it is the statutory duty of the Corporation to collect, transport and dispose of the garbage and solid waste etc. within the limits of MCGM in Mumbai city which comprises a total road area of 437.71 sq. km. The statutory provisions applicable for such governance are the Mumbai Municipal Corporation Act, 1888 (for short "**MMC Act**"), the Environment Protection Act, 1986; the Air (Prevention and Control of Pollution) Act, 1981 and the Municipal Solid Wastes (Management and Handling) Rules, 2000 framed by the Central Government. The garbage, solid waste and refuse collected by the workers is admittedly the property of the Corporation. It has come on record and is an admitted fact in evidence of which judicial notice has been taken in the the past by this Court that the structure and set-up for implementation of the above works consists of a Ward office helmed by the Assistant Engineer, Assistant Head Supervisor, Supervisor and other Clerical staff and smaller offices known as 'Chowkis' helmed by Junior Overseer, Mukadam and other Officers/clerks which regulate and supervise the work undertaken by these workers. Thus it is established that the

Corporation is the principal *de facto* and *de jure* employer of these 580 workers leading to a master and servant relationship.

17. In the above background, it is seen that the similarly placed workers have been granted the benefit of permanent status. It is further seen that the State Government while adopting various policy decisions for the welfare of such workers has issued circular dated 26.04.1985 directing to extend benefit of permanent status to these workers. It is clearly borne out from the evidence, both oral and documentary that these workers have admittedly been working continuously for several years and they have longer working hours and are denied the benefit of weekly off, paid leave, accidental benefits, dearness allowance, ESI coverage, HRA, bonus, *ex gratia*, pension, medical facilities, etc. It is an admitted position that though these workers have worked continuously for years together, they are shown in the MCGM's record to have worked under various schemes.

18. It is seen that even the Commissioner of Labour has also intimated the Corporation that the nature of work performed by these workers is identical and similar to that performed by the permanent workers. Admittedly, it is a fact which cannot be denied even by the Corporation that each of these workers have completed 240 days of continuous employment with the Corporation several decades ago and are continuing to work even today. Another facet of the argument of

the Union is that once there is an order in respect of 2700 similarly placed workers made by the Supreme Court and agreed by the Corporation; that once the Corporation has entered into a settlement with the Union for similarly placed 1200 workers; not extending the benefit to these 580 workers is clearly discriminatory on the face of the record and violative of Article 14 and therefore the impugned Award dated 22.03.2021 is a well reasoned Award which needs to be upheld.

19. It is seen that before the learned Tribunal, the Corporation filed its Written Statement below Exhibit "C-23" and in that Written Statement, all that the Corporation has stated is mere denial of the submissions and contentions raised by the Union. Therefore, the learned Tribunal framed the issues as widely as possible in order to adjudicate the Reference. The following issues were framed by the learned Tribunal for adjudication:-

Sr. No.	*Issues*	*Findings*
1.	*Whether the workers performing the work of sweeping, cleaning the roads/gallies/ areas of the Greater Bombay Municipal Corporation, collection and transportation of garbage and other refuse, are entitled to the benefits and status of permanent workers of the BMC on completion of 240 days of service from the date of joing respective workers?*	*In affirmative.*
2.	*Whether the workers listed at Exhibit 'A' annexed herewith who have been engaged in and have worked as sweepers and have performed the work of sweeping, cleaning the roads/gallies/areas of the Greater*	*In affirmative.*

	Bombay Municipal Corporation, collection and transportation of garbage and other refuse, are entitled to the benefits and status of permanent workers of the BMC on completion of 240 days of services from the dates of joining respective workers?	
3.	*Whether Second Party proves that there exists employer-employee relationship between First Party Corporation and concerned persons in the present Reference?*	*In affirmative.*
4.	*What order?*	*As per final order.*

20. It is seen that evidence was led by the Union of 9 witnesses. The Union led the evidence of Mr. Dadarao Patekar under "U-196" and "U-305" on all the issues affecting the workers. Evidence of Mr. Kailash Kale was led under Exhibit "U-293" to prove that the work done by the 2700 workers to whom benefit of permanent status was extended was the same as that carried out by the present 580 workers. Evidence of Mr. Sahebrao Gorakh Yadav was led under Exhibit "U-310" to prove the working condition and existence of the supervisor of the alleged society / NGO and this particular witness of the Corporation was a permanent workman and party to Writ Petition No.1339 of 1999 who worked shoulder to shoulder and under a common tender with similarly placed workers. Evidence of Mr. Kiran Waghela was led under Exhibit "U-303" to prove that the Junior Overseer of the Corporation had total supervision and control on behalf of the MCGM over these workers. Evidence of Mr. Sahebrao Bhikaji Yede was led

under Exhibit "U-299" to prove and show that there was no supervision whatsoever by any NGO or Society over these workers and also to prove that the salary drawn by the supervisor of the alleged NGO / Society was less than 50% of the salary drawn by these workers. Evidence of Mr. Ganesh Tanaji Yadav was led under Exhibit "U-289" in respect of all issues in the Reference. Evidence of Mr. Sanjay Ughade was led under Exhibit "U-292", he being one of the worker from the previously similarly placed 1200 workers who were regularized by virtue of the settlement between the Corporation and the Union and was granted permanent status. Evidence of Mr. Vijay Bhivsane was led under Exhibit "U-391" to prove and show the nature of duties performed and transfers of these workers from one ward to another and from one NGO / Society to another NGO / Society being done by the Corporation for penalizing these workers, if there was dereliction in their duties. Evidence was led of Mr. Milind Ranade under Exhibit "U-394" who is the General Secretary of the Union on all issues including dust / pollution and duties & responsibilities of the Corporation.

21. That apart, the Union has filed certified copies of oral evidence of 3 witnesses namely; Mr. Vijaykumar Ganpat Kasar – Municipal Officer, Mr. Dinkar Laxmanrao Waskar – Head Supervisor SWM Department and Mr. Bhalchandra Pandarinath Patil – Chief Engineer, who are employees of the Corporation in Reference IT No.

13 of 2007 below Exhibit "U-212 Collectively" in support of the Union's case seeking permanent status for these 580 workers.

22. The Tribunal appointed an Investigation Officer to verify the contentions of the parties and submit the Report. It is seen that Investigation Officer conducted physical verification of the workers on 26.04.2016 and 15.07.2016 and submitted his detailed Report dated 30.08.2016. This Report was taken on record below Exhibit "O-14". This Investigation Officer was called as a witness by the Corporation. It is seen that by order dated 21.01.2020, the Tribunal directed the Corporation and the Union to put their questions in writing to the Investigation Officer and sought his answers, which were taken on record below Exhibit "O-33".

23. Apart from the above oral evidence, the Union filed substantial documentary evidence also. This documentary evidence comprised of Corporation owned documents viz. Resolutions of the Standing Committee, fixed rate tender documents, policy circulars and notifications about service conditions, documents about fines imposed for various lapses by Corporation on these workers, documents obtained under Right to Information Act, entire correspondence relating to the service conditions of these workers, record maintained by the Corporation like log sheets, settlement documents, arbitration proceedings, agreements etc.

24. As against the aforesaid evidence led by the Union in great detail, the Corporation led evidence of 8 witnesses, out of which the first 5 witnesses were the employees of the Corporation namely Mr. Jaywant Ramesh Parhyad – Head Supervisor (Exhibit "C-51"), Mr. Ravindra Toraskar – Junior Overseer (Exhibit "C-55"), Mr. Chandanshive – Executive Engineer (Exhibit "C-53"), Mr. Prakash Gaikar – Executive Engineer (Exhibit "C-58") and Mr. Sunil Sardar – Chief Engineer (Exhibit "C-76"). The other 3 witnesses of the Corporation were representatives of three societies namely; Mr. Babasaheb Gacche (Exhibit "C-101") of Kirti Mahila Mandal, Mr. Santosh Jadhav (Exhibit "C-109") of Kranti Mahila Mandal and Mr. Vilas Karbhari Wahul (Exhibit "C-105") of Berojgar Seva Sahakari Sanstha. It is seen that in addition to the above, the Corporation filed limited documentary evidence like copies of bills raised by some NGOs/ Societies, bills, tender documents, bye-laws of the concerned NGOs/ Societies in support of the Corporation's case.

25. The aforesaid evidence led by the parties has been looked into with reference to the appropriate Statute. The provisions of Contract Labour (Regulation and Abolition) Act, 1970 are directly relevant for the purpose of deciding the present dispute. The term 'contract labour', 'contractors', 'establishment' and 'principal employer' are defined under Sections 2(b), 2 (c), 2(e) and 2(g) respectively of the said statute. The said Statute applies to every establishment and to

every contractor in which 50 or more workmen are employed or were employed. The provisions of this Statute contemplate a contract system. Chapters III and IV provide for registration of establishment and licensing of contractors. Under chapter V, requirement of the contractor to provide welfare and health facilities to the workers is provided.

26. While relying upon the decision of the Supreme Court in the case of ***International Airport Authority of India Vs. International Airport Cargo Union***[10] **,** it is held that the remedy of such workers is to approach the Industrial Adjudicator for adjudication of their dispute and such adjudication can be done if the contract between the principal employer and the contractor is found to be sham and bogus and merely a camouflage to deny employment benefit to the workers which would ultimately prove that the workers are in direct employment.

27. In the above background, the basic facts of the present case are required to be considered which are proved in evidence. These 580 workers have been working with the Corporation from the year 1996 – 1999 onwards continuously till date. They raised the dispute and have been agitating for their rights since then. It is seen that the Corporation introduced the Hyderabad pattern scheme only in the year 2004 while continuing the employment of these workers. By virtue of

10 AIR 2009 (13) SC 374

the Hyderabad pattern certain NGOs / Societies were engaged by the Corporation and it is now contended that these workers are/were employed by the NGOs / Societies who were engaged by the Corporation. On the face of record and after considering the oral and documentary evidence, the contention of the Corporation is proven to be false. Therefore, Corporation's allegation that these workers are engaged and employed by the NGOs / Societies engaged by the Corporation has to be rejected outrightly.

28. There is evidence on record in the form of specimen tenders filed below Exhibits "U-373" to "U-379" which prove that prior to 2004 i.e. introduction of the Hyderabad pattern, tenders were issues centrally for various purposes namely for cleaning, mopping under the Swachh Mumbai Abhiyaan, road cleaning, motor loading, road sweeping etc. Perusal of these tenders which are filed by the Union and are also admitted by the Corporation's witnesses show that the nature of work specified in these tenders was required to be undertaken and carried out by the workers under the supervision of the Corporation. It has further come on record that the process of issuing tenders was continuous and was continued for years together wherein the role of the supervisors is not mentioned in those tenders and surprisingly, the supervisor received salary which is much less than the salary of each of these worker. Thus it is proved that the role of the supervisor and the appointment of the supervisor is only for

namesake.

29. The next important piece of evidence is under Exhibit "U-197". This exhibit placed on record by Mr. Dadadrao Patekar – witness on behalf of the Union gives the details of each of the workers alongwith their date of joining work with the Corporation; completion of 240 days; workers continuously working thereafter till date and those workers who have expired in the interregnum. This witness of the Union, himself has been working with the Corporation as *safai kamgar* from the year 1996 till date. The details of the work done by these workers of collection of garbage, supervision, mode, method and practice followed by the Corporation, utilization of these workers, control of the supervisor has been placed on record. The Corporation has infact accepted the entire evidence, and there is virtually no cross examination to dislodge or discredit this evidence. This particular witness has been extensively cross-examined by the Corporation but in the entire cross-examination there is nothing which can come to the aid and assistance of the Corporation's case. Under exhibits "U-307", "U-308" and "U-309", this witness has proved the manner in which supervision is exercised by the Corporation over the work done by the workers which is not be denied by the Corporation. The Union has led the evidence of Mr. Sanjay Ughade, Mr. Sahebrao Bhikaji Yede and Mr. Kailash Kale who are part of the earlier set of 2700 workers who have been granted the benefit of permanent status by the Corporation.

These 3 witnesses have proved the nature of work undertaken by the workers being identical to the earlier set of 2700 workers who were granted permanent status.

30. The evidence of Mr. Sahebrao Yede below Exhibit "U-310" led by the Union is also crucial as the said evidence clearly proves that there is no supervision whatsoever by any NGO or society over these workers as he himself is one of the worker in the present group of workers. He has also proved by documentary evidence that the salary of the supervisor of the NGO / Society is almost 50% of the salary of the workers and hence the supervisor is only for namesake whereas the entire supervision and distribution of work is done by the Corporation's staff even today.

31. The learned Tribunal has come to a conclusive finding that there is no iota of evidence to show that the alleged NGOs / Societies who are supposed to obtain a license for undertaking the cleaning works so as to employ and supervise the workers under them have been granted licence. Rather, this fact has been accepted by the witness of the Corporation itself.

32. Another important piece of evidence is by Mr. Vijay Bhivsane under Exhibit "U-391" relating to supervision and control and issuance of punitive action like transfers of the workers. One such transfer order received by this witness of the Union is exhibited below

Exhibit “U-392”. It is a transfer order issued by the Corporation and not by any NGO / Society. In this transfer order, this particular worker is transferred from the S Ward to N Ward alongwith 3 other workers. What is important to be noted here is that on 06.11.2009, a written order is also given for effecting the said transfer by the Corporation. Such overwhelming documentary evidence cannot be denied but it is seen that in their reply the Corporation has merely denied its own orders.

33. The most clinching evidence is the fact that the Corporation's own witness Mr. Jaywant Ramesh Parhyad – Head Supervisor when confronted with these very transfer orders has below Exhibit “C-51” admitted that the transfer orders were issued by the Corporation. This itself proves to the hilt, that it is the Corporation which supervises and exercises control over the workers and not any alleged NGO / Society. Such evidence cannot be neglected and needs to be considered appropriately which has been done by the Industrial Tribunal while passing the Award.

34. Another witness of the Corporation namely Mr. Kiran Waghela has deposed under Exhibit “U-303” that the entire sweeping and cleaning work of the roads in the city of Mumbai though is assigned and done by the permanent workers of the Corporation, the said number of workers are not enough to undertake the entire work

and therefore the present workers are assigned the said work, though they are not on the muster of the Corporation. He has infact deposed that it is impossible to carry out the entire cleaning work of the city of Mumbai without the present tender workers virtually in all departments. The deposition of this witness is crucial wherein he has deposed about the details of the works undertaken by these workers and the payment made to them by the Corporation. It is seen that witness Mr. Kiran Waghela in his cross examination has stated that he was promoted as a Junior Overseer in the year 2010 and thereafter he was supervising the work of the workers. The result of deposition of this witness was such that he was immediately suspended by the Corporation for his deposition after his witness action was over. Though this issue is not relevant and germane to the present case, the evidence of this witness is such that the Corporation cannot deny the same. Two crucial facts have been stated by this witness in his evidence namely; that despite being a Junior Overseer he has never seen the alleged NGOs/ Societies or their supervisors alloting work to the workers. He has also deposed that salary and wages are not decided by the alleged NGOs / Societies and he has also in his cross examination clearly denied that the attendance of the workers is recorded by the the alleged NGOs / Societies.

35. The evidence of Mr. Milind Ranade, General Secretary of the Union is also relevant. Apart from deposing on the nature and duty

of the work undertaken by the workers, he has been able to depose and prove that these workers are utilized by the Corporation day in and day out for doing the same work as permanent workers for years together without granting the benefit of permanent status. This witness of the Union has been subjected to extensive cross-examination. In his cross examination he has deposed that the salary of these workers is now directly transferred to their bank accounts. He has deposed that the case of the 2700 workers who were granted permanent status by virtue of the Supreme Court order and the Corporation agreeing to the same is identical to the present set of workers.

36. As against the evidence led by the Union, the deposition of the Corporation's witnesses is merely superficial and peripheral. All that the Corporation witnesses have stated in their evidence is about introduction of the Hyderabad pattern and under that pattern, work having been given to NGOs and Societies. There is a stray reference to introduction of mechanical power sweeping being introduced. Mr. Sakhare, during his submissions has emphasized on this aspect arguing that due to mechanized power sweeping being introduced there is no demand for workers and more specifically there are no posts available for granting them permanent status. However, this submission is only made across the bar, without any facts or figures. Rather, the Corporation's witness has agreed and deposed that since 1990

onwards the generation of garbage has increased manifold in various forms from households, shops, hotels, factories etc. in Mumbai City and it is the responsibility of the Corporation to collect garbage everyday and the said work is done in three shifts round the clock which is supervised by the Junior Overseer and the Mukadam in the chowkis and the officers of the Corporation. The Junior Overseer of the Solid Waste Management department, Mr. Ravindra Toraskar was examined as Corporation's witness by the Corporation. Below Exhibit "C-55" he has himself deposed of having done the work of Overseer and having done the work of cleaning activity and motor loading activity. The technical details of the work undertaken are deposed by this witness. He has deposed that workers are employed in three shifts. The deposition of this witness proves one thing namely that the work undertaken by the permanent workers and the present set of workers is one and the same but their status is different. The remaining witnesses of the Corporation have repeated and reiterated the Corporation's stand.

37. One of the Corporation's witness namely Mr. Babasaheb Gacche, a representative of Kirti Mahila Mandal has deposed below Exhibit "C-101" that the rate of wages paid to the workers is fixed by the Corporation, Corporation fixes leave encashment of monthly wages, Diwali bonus and *ex gratia* amount for festivals which is paid by the Corporation, attendance of the workers is recorded by biometric

system and biometric machines are fixed in the chowkis which belong to the Corporation. This witness has filed a copy of the work order issued to a society, but has deposed that the society has no right to make any change in the mode, method and manner of working . He has deposed that the entire supervision is done by the Junior Overseer and Officers of the Corporation, the attendance is verified by the Junior Overseer, and most surprisingly and shockingly this witness has deposed that he is not even an office bearer of the Kirti Mahila Mandal which is a society run by women and it is only on the insistence of the Assistant Engineer Shri Gangane that he came to the Court for collecting summons as his wife and daughter-in-law are members of the Kirti Mahila Mandal.

38. The other witness Mr. Santosh Jadhav of Kranti Mitra Mandal examined by the Corporation has also made startling revelations in his deposition. In his cross-examination he has deposed that biometric attendance is recorded by the Corporation and the same is in possession of the Corporation. He has deposed that though the tendering party i.e. NGO / Society may keep on changing, the workers remain common and they end up working continuously under different tendering parties on paper.

39. From the aforementioned evidence and the submissions made by the learned Senior Advocates, it is clear that the Corporation

exercises entire supervisory control over the workers and necessarily so that it has to pay them not only their salary but also bonus, *ex gratia*, leave encashment, equipments and articles etc. Another facet which stands proven is that these workers have been engaged continuously since their date of appointment which cannot be denied. The next most important and crucial fact which stands proved is that these concerned workers who work shoulder to shoulder with the permanent workers and there is no difference between the two categories of workers.

40. It is pertinent to note that all three witnesses of the Corporation examined on behalf of the NGOs / Societies have unequivocally in their cross-examination admitted that all necessary and relevant documents like attendance register pay slips, salary slips, documents relating to *ex gratia* / bonus, documents relating to ESI bonus and information pertaining to tenders allotted are all available only with the Corporation and despite this the Corporation has not produced these documents. This is the categorical finding in paragraph no.84 and 85 of the Award by the Tribunal.

41. The learned Tribunal has held that the Corporation despite having these records has not produced the same in Court and have merely filed affidavits of its officers stating that these documents are not available. There is no doubt that there is acute inadequacy and

requirement of these workers. It has come on record that there were about 28028 sanctioned posts in the year 1997 but around 6000 – 9000 additional workers were working with the Corporation on contract basis. It has also come on record that Corporation employs these workers initially on contract basis and thereafter by way of settlement they are regularized.

42. It is seen that it is the Corporation which provides all cleaning materials and articles to these works for the purpose of undertaking their duty and work and the Contractor has virtually no role whatsoever in this regard.

43. It is seen that in the facts and circumstances of the present case and more specifically on the basis of the evidence led by the Union as also the documentary evidence referred to and alluded to herein above, the six basic tests as suggested by the Supreme Court in the case of ***Balwant Rai Saluja Vs. Air India Limited***[11] for establishing employer–employee relationship in paragraph No.65 of the said decision have been thoroughly complied with in my opinion. Though only in respect of first test namely "who appoints the workers", it is the case of the Corporation that none of these workers were given any appointment letter by the Corporation or were recruited under any selection process conducted by the Corporation, however, the moot point needed for satisfaction is not the test of "**who appoints the**

11 (2014) 9 SCC 407

workers?" but it is to see if there is adequate evidence on record to indicate that the Corporation has engaged and appointed these workers directly in their service and I have no doubt whatsoever to give a positive finding in this regard. As seen above, almost all these 580 workers have been recruited directly by the Corporation on contract basis. The Corporation has pleaded that these workers were governed by the NGOs / Societies, but once again it has come on record that these NGOs and Societies were introduced by the Corporation only after introduction of the Hyderabad pattern in the year 2004 and thereafter. Hence, the basic requirement as to "**who appoints the workers?**" in my opinion stands proved, considering that these workers have admittedly worked continuously from 1996 – 1997 with the Corporation shoulder to shoulder with the permanent workers of the Corporation and have admittedly being doing the same work as that of the permanent workers.

43.1. The second test described is "**who pays the salaries and remunerations?**" to these workers. There is adequate evidence on record to prove that the salaries of these workers are paid and received by them in their bank accounts by the Corporation alongwith all remuneration that they are entitled to as temporary workers while continuing their services. Though a lame is attempted made by the Corporation to introduce the Contractor in between as a conduit, the evidence led by the Corporation is however to the contrary on this

count, since it is an admitted position that the entire supervision and allocation of duty / work, penalizing the workers for dereliction, biometric attendance, etc. is all controlled and regulated by the permanent employees of the Corporation.

43.2. The next two tests are namely; "**who has the authority to dismiss?**" and "**who can take disciplinary action?**". In the present circumstances is clearly proven that it is only the Corporation who has the Authority to disengage and dismiss these workers and take disciplinary action. Positive findings in this regard have been proved on record from the evidence of the witness of the Union to show that penalties have been levied by the Corporation for dereliction of duty on these very workers.

43.3. The next test is "**whether there is continuity of services?**". There can be no argument about continuity of services which is an admitted position that in the present case the services of these 580 workers have been continued since their appointment on 1996 - 1997 by the Corporation. Hence even this test is completely satisfied.

43.4. The last test pertains to **extent of control and supervision over the work performed by** these 580 workers which is exercised and supervised by the Corporation. Supervisors and the alleged contractors i.e. NGOs / Societies are merely figure heads in the present scheme of things. This is not a case where the Corporation has engaged a

contractor to collect, transport and dispose of the solid waste generated within its jurisdiction. This is not a case where the said contractor has directly employed these 580 workers for the said work. This is a clear case where these 580 workers have been appointed by the Corporation itself and supervision of performance of their work is also regulated and exercised by the Corporation.

44. In the decision of the Supreme Court in the case of ***Kirloskar Brothers Limited Vs. Ramcharan and Ors.***[12], the Supreme Court has recently held that these tests are included to mean "who can tell the employee the way in which the work should be done?".

45. In the facts and circumstances of the present case, the Corporation's Supervisors namely the Mukadam and the Junior Overseer are the persons who exercise such direct control over these workers and therefore it is the Corporation itself which exercises full, complete or direct control or supervision over the workers of the contractor.

46. In view of the above, I am of the clear opinion that in the facts and circumstances of the present case and on the basis of the oral and documentary evidence, an employer - employee relationship between Corporation and these 580 contract workers is clearly established and stands clearly proven.

12 (2023) 1 SCC 463

47. Considering the evidence led and the fact that the nature of work involved being on the rise with every passing day, the stand adopted by the Corporation that in future, contract workers will not be required anymore is simply unacceptable. Even if the Corporation takes such a stand, the existing contractual workers who have worked for decades cannot be left out of their jobs or even for that matter continued for ever as casual workers. In the present case, it is seen that the entire degree of control over these workers is of the Corporation which is the principal employer. The Corporation not only assigns them work but even transfers them, maintains their record for every reason, imposes penalties, etc. In that view of the matter, I am of the clear opinion that the case of the Corporation that these workers are employed by the NGOs / Societies cannot be accepted at all. It stands to be rejected. Even assuming that the NGOs / Societies exist, it would only be merely as a conduit without any control. In that view of the matter, it is crystal clear the Corporation is the principal employer of these workers.

48. Though Mr. Sakhare has vehemently argued that the order of the Supreme Court dated 07.04.2017 passed in Civil Appeal No.4929 of 2017 **c**annot be treated as a precedent as stated in the order, however, it is clearly seen that the Supreme Court has not set aside the judgment dated 23.12.2016 passed by this Court in Writ Petition No.11519 of 2014 and only the relief is modified by consent of

the parties. In that view of the matter, the ratio of the decision of this Court in Writ Petition No. 11519 of 2014 is not only squarely applicable but also binding on the Corporation in the present case. The said ratio supports the case of the Union in its entirety. That apart, the evidence led by the Corporation in the present case also independently rejects all contentions of the Corporation.

49. Similarly, the settlement arrived at between the Corporation and the Union in respect of 1200 workers on 15.02.2003, though argued by Mr. Sakhare that it was a one time settlement, the fate of the present 580 workers is clearly determinable by taking recourse to the provisions of Article 14 of the Constitution of India. It is an admitted fact that the present 580 workers are infact identically placed just like the 1200 workers who were part of the settlement dated 15.02.2003.

50. In so far as the submission of Mr. Sakhare that there are no vacant posts available is concerned, that argument cannot be acceptable. If no vacant posts are available, merely under that reason the Corporation cannot continue to exploit these workers. It would amount to revisiting slavery in today's modern and advanced times. The need to have these workers has existed for long on the basis of the work done by them. Not having vacant posts can be no reason to continue their exploitation. Chapter XX of the MMC Act provides for

control of the State Government by virtue of which the State Government is empowered to make orders. In default of the Municipal Authorities, the State Government can issue general instructions even as to matters of policy to be followed by the Corporation in respect of duties and functions in the larger public interest. In the present case, the work done by these workers is only in the larger public interest which cannot be denied. Hence, the submission that there are no vacant posts and therefore the Corporation is helpless is a sham argument .

51. In view of the above, reliance is placed on the decision of this Court in Writ Petition No.11519 of 2014 and the findings returned therein in paragraph Nos.53 to 58 of the said decision to defeat the argument of the Corporation that it is helpless and due to inadequacy and unavailability of vacant posts it cannot grant permanency benefit to these workers. Paragraph Nos. 53 to 58 of the said decision are reproduced below:-

> *"**53.** This section lays down that the Commissioner shall prepare and bring before the Standing Committee a schedule setting forth the designation and grades of the officers and servants. The Commissioner shall also prepare and bring before Education committee a similar schedule. Section 80 lays down that no permanent officer shall be employed in department unless he is appointed under Section 60A, 73A, 74 as per the provisions of the Act or his office emoluments are included in the schedule at the time in force. Section 80A lays down as to whom the power of appointment vests. Section 80A reads thus:*
>
> > *"80A (1) The power of appointing municipal officers, whether temporary or permanent, [to the posts which rank equivalent to, or higher than, the post of Executive*

Engineer set forth in a schedule for the time being in force prepared and sanctioned under Section 79], shall vest in the Corporation.

[Provided that, temporary appointment to such posts for loan works may be made for a period of not more than six months by the Commissioner with the previous sanction of the Standing Committee; or in the case of works undertaken of the purposes of clause (q) of Section 61, of the Education Committee; and the Commissioner shall, forthwith report every such appointment, when made, to the Corporation. No such appointment shall be renewed on the expiry of the said period of six months without the previous sanction of the Corporation].

(2) Save as otherwise provided in this Act, the power of appointing municipal officers and servants [whether temporary or permanent, shall] vest in the Commissioner]

[Provided that such power in respect of permanent appointments shall be subject to the schedule for the time being in force prepared and sanctioned under Section 79.

Provided further that no temporary appointment shall be made by the Commissioner for any period exceeding six months and no such appointment [to a post] [to a post which ranks higher than the post of a Registration Assistant set forth in a schedule for the time being in force prepared and sanctioned under Section 79] shall be renewed by the Commissioner on the expiry of the said period of six months without the previous sanction of the [Standing Committee or of the Education Committee, as the case may be].

[Explanation - For the purposes of this section, subsection (1) of Section 80B and Section 460U, a post shall be deemed to rank equivalent to, or higher than, the post if the minimum of the pay-scale of the former is equivalent to, or higher than, the minimum of the pay-scale of the latter.]"

54. *Section 80B lays down the manner of making appointments. Chapter XX of the Act of 1888 provides for control of the State Government. Section 518 empowers State Government to enforce in performance of duties in default of the municipal authorities. Section 518 is reproduced as under:*

"518. (1) If, upon complaint being made to (it) and after such inquiry as (it) thinks fit to make, it shall at any time appear to the State Government that any of the provisions of Sections 61, 62, [62C, 62D, [62E], 89F) 134, 225, [381, 381A] 434, [438 and 513A] have not been or are not being duly carried out or enforced, the [State Government] may make an order prescribing a period within which such provision shall be carried out or enforced.

> *(2) Provided that, except in any case which appears to the [State Government] to be one of emergency, no such order shall be made until after the expiry of one month from the date of service of a written notice on the Corporation, and if the [State Government] shall think fit, on the Commissioner, requiring cause to be shown why such order should not be made, nor until the cause, if any so shown has been considered by the [State Government].*
>
> *(3) If, within the period prescribed in any order made under Sub-section (1) the provision is not carried out or enforced, the [State Government] may appoint some person to carry out or enforce the same and may direct that the expense of carrying out or enforcing such provision together with such reasonable remuneration to the persons carrying out or enforcing the same as the [State Government] shall determine and the cost of the proceedings under this Section shall be paid out of the municipal fund."*

55. *Section 520C empowers the State Government to issue instructions and directions. Section 520C reads thus : -*

> *"520C Notwithstanding anything contained in this Act, the State Government may issue to the Corporation general instructions as to matters of policy to be followed by the Corporation in respect of its duties and functions, and in particular it may issue directions in the larger public interest or for implementation of the policies of the Central Government or the State Government and the National or the State level programmes, projects and schemes. Upon the issue of such instructions or directions, it shall be the duty of the Corporation to give effect to such instructions or directions:*
>
> *Provided that, the State Government shall, before issuing any instructions or directions under this section, give an opportunity to the Corporation to make representation within fifteen days as to why such instructions or directions shall not be issued. If the Corporation fails to represent within fifteen days or, after having represented, the State Government, on considering the representation, is of the opinion that issuing of such instructions or directions is necessary, the State Government may issue the same."*

56. *This section lays down that notwithstanding anything contained in the Act, State Government may issue to the Corporation general instructions as to matters of policy to be followed by Corporation in respect of its duties and functions and it may issue directions in larger public interest. Thus, as per the scheme of the Act, the Commissioner of the Corporation and the Standing Committee can sanction creation of posts. The State*

Government can issue rules prescribing the procedure. No recruitment rules have been placed on record by the Corporation. The power to enter into a contract also lies with the Municipal Commissioner, with consultation of the Standing Committee under Section 69 of the Municipal Corporation Act. The contracts in question have been entered into by following the requisite procedure and inconsonance with all statutory provisions. Section 63-A of the Act deals with performance of functions by agencies. It states that where any duty is imposed or any function has been assigned to the Corporation, the Corporation may either discharge the said duty or perform such functions or implement such scheme by itself or through an agency subject to such directions that may be issued and the terms and conditions as may be determined by the State Government. No such directions are placed on record. It is also provided that Corporation may also specify terms and conditions not inconsistent. The terms and conditions can be determined by the State Government for such agency agreements.

57. *Under Section 520C of the Act, the State of Government can issue general directions and the Municipal Corporation is under mandate to give effect to the same. By Circular dated 26 April 1985 the State Government has issued directions to the Municipalities to stop the system of contract labour for Safai Mazdoor and to create posts so that Safai Mazdoor who have completed 240 days can be given benefit of permanency. The English version of Circular dated 26 April 1985, which is placed on record, reads thus :-*

> *"Various organizations institutions based in and outside the state time and again send their complaints demands about Bhangi Mukti (Prevention of Scavenging) to the State Govt. The tone of these complaints is that the Govt. does not take due measures to redness their grievances. As regards to Bhangi/Safai workers demands, various departments of the Govt. take action on the related subjects. This department concerns with Municipal Corporations and Municipalities which are self-governing bodies. The govt. had appointed the Lad Committee to suggest various measures to redress the grievance of the Bhangi/Safai workers employed in the service of Municipal Corporations and Municipalities. To implement its suggestion, the Dept. of Industry, Energy and Labour had already issued orders vide GR No. 1075/1792/Labour-5, dt. 12 Aug. 1975. The Govt. orders were sent to all Municipal corporations and the Municipal Administration. The said Directorate time and again issued clarificatory circulars to that effect.*
>
> *2) Demands, beyond the preview of the terms and conditions of the lad committee, were submitted to the State Govt. and to the various committees of legislative. The Govt. feels that in such cases action to be taken by the local self bodies, i.e. Municipal Corporations and Municipalities should be on the following lines.*

3) These from Meheter Community who have built houses by forming Co-operative Housing Societies, be paid 50% cost as per individual housing scheme. The Govt. had already issued directions to Municipalities to earmark 5/0 of their revenue for upliftment/betterment of backward classes. Municipalities should consider to extend financial assistance from the earmarked fund to Bhangi/Safai workers, who have undertaken housing project on cities by forming Co-op. Housing Societies. Though no Govt. orders are issued in respect of earmarking 5/0 of the net revene the Govt. feels that M.Cs should make budgetary provision to that effect from giving financial assistance for the upliftment of the backward classes and also examine whether they can utilise such a fund for extending financial assistance to Bhangi/Safai workers housing scheme.

4) M.Cs should build residential quarters in cities for Safai workers. The essential duties of M.C.s have been incorporated in clause 63 of the Bombay Provincial Municipal Corporation Act provision listed at serial No. 23 under clause 63 of the said Act states that construction of residential quarters for Safai workers and its implementation is one of the essential duties of M.Cs. As such M.Cs should take necessary action for compliance of their essential duties.

5) Provide Churches and Ashram schools for the children of women Safai workers serving in Municipalities.

6) The Social Welfare Dept. of the state govt. gives all sorts of financial assistance to the voluntary organizations for running a church. Subject to the condition that 10% of the expenditure on this account is borne by the concerned institution considering the number of women workers the local self bodies feel it necessary to have a church or where there is a demand for it in such instructions are that the local self bodies should constitute the above mentioned 10% share from the funds made available to them under the scheme of upliftment of backward classes. As regards this matter the concerned institution should contact the Directorate of social welfare."

58. *The above circular was issued by the State Government on 26 April 1985 in respect of the safai workers employed by the Corporation. It was noted that time and again complaints were received regarding the demands of the safai workers. The State Government had appointed a Committee known as Lad Committee to suggest various measures to redress the grievance of the safai workers. In pursuant to its suggestions, Department of industry and Labour had issued certain orders. Circular dated 26 April 1985*

> *laid down welfare measures including the direction to municipalities to earmark part of their revenue for upliftment and betterment of this backward class. It was also suggested that residential quarters be constructed for safai kamgars as it is one of the essential duties of the Municipal Corporation to keep the city clean. A circular was also issued on 10 September 1985 by the Urban Development Departments that many safai workers are working for more than three years on temporary basis and no steps are being taken to make them permanent. Information was called for in respect of such safai workers. A circular was also issued on 1 October 2003, making reference to Lad and Page Committees in respect of welfare measures of the safai kamgars. It was directed that the protection in services be given to such safai kamgars, if necessary by relaxing the rules of recruitment. The power under which the circulars are issued by the State Government is traceable to its power to issue requisite direction to the Corporation under section 520 C of the Act of 1888."*

52. Attention is also drawn to paragraph No.76 in the above decision which is directly relevant in the present context in order to drive home the point that in view of existence of the work performed by these workers, their engagement on contract basis at the inception and their continuance thereafter till today for decades cannot be equated or stated to be without following the due process of law. Rather it would amount to exploitation of such workers at the hands of a public body or State. Paragraph No.76 of the said decision reads thus:-

> *"**76.** As regard the question whether the Court can compel the State to create posts, in Nihal Singh, the Apex Court examined the ratio of Umadevi (3) and observed that the Constitution bench was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution in view of the fact that instrumentalities of the State had resorted to irregular appointments, especially in the lower rungs of the service, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. The Apex court observed that in Umadevi (3) the entire issue pivoted around the fact that the State initially*

made appointments without following any rational procedure envisaged under the scheme of the Constitution in the matters of public appointments and the Constitution Bench while recognizing the authority of the State to make temporary appointments engaging workers on daily wages, declared that the regularization of the employment of such persons, which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments, cannot become an alternate mode of recruitment to public appointment. Commenting on the facts of the case before it, the Apex Court observed that the initial appointment of the Appellants could never be categorized as an irregular appointment. It was held that the initial appointment of the Appellants was made in accordance with the statutory procedure contemplated under the Act and the decision to resort to such a procedure was taken at the highest level of the State by a conscious choice. As regards the creation of posts and need to employ workforce it was observed by the Apex Court that the assessment of the need to employ a certain number of people for discharging a particular work is with the executive but that does not mean that an examination by a Constitutional Court regarding the accuracy of the assessment of the need, is barred. It was held that the facts before the Apex Court demonstrated that there was need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts and stop extracting work from persons such as the Appellants therein itself would be arbitrary action/inaction on the part of the State. Apex Court concluded by observing that the decision of Umadevi (3) cannot become a licence for exploitation by the State and its instrumentalities. Facts in the present case are similar. The Municipal Commissioner and the Standing Committee have taken a conscious decision. Engagement of the concerned workers is not a back door entry. The work exists, which even the witnesses of the Corporation have admitted. The concerned workers are working full time. There is no question of creation of posts. It is a facade put up by the highest authorities in the Corporation to mask the real terms of engagement by introducing a paper intermediary. Industrial adjudicator is fully empowered to stop such exploitation of workforce at the hands of a public body."

53. By the Award dated 22.03.2021, Reference is answered by the Industrial Tribunal in the affirmative and stands allowed directing the Corporation to declare the workers concerned in the Reference as permanent workers and extend all benefits and status of permanent workers to them retrospectively from the date of completion of 240

days of their service from the date of their joining work.

54. In view of the above observations and findings, these concerned 580 workers in the present Reference will therefore have to be given the benefits on par with other permanent workers as also those permanent workers who have been extended the permanent benefits pursuant to the order dated 07.04.2017 of the Supreme Court in Civil Appeal No.4979 of 2017 as also those permanent workers with whom they work day in and day out in keeping Mumbai City clean and habitable.

55. By the Award, the concerned workers are declared to be permanent workers of the Corporation. They will have to be given benefits on par with the other permanent workers. These 580 workers are working shoulder to shoulder with the 28000 odd permanent workers engaged in keeping Mumbai City clean. While the permanent workers are accorded all the facilitates and security of tenure, the working and living conditions of the concerned workers, are pitiable. The way they have to live, the manner in which they are made to work, is below human dignity. Many have no permanent shelter, hardly any access to medical treatment, washrooms, toilets, changing rooms, which facilities the permanent workers enjoy. Many workers get injured on duty while handling the garbage, develop illnesses, and are left to fend for themselves, with almost no medical care. They have

to manually remove excrement, rotting animals, ride on the trucks carrying garbage, rotting carcasses. These workers work throughout the year, barring four days. One does not have to go through years of such sub-human existence to complain of exploitation. The various ameliorative measures contemplated by the State for this class, their extreme backwardness tied up with the caste system, the lowly menial work they are forced to engage into by a public body which is bound to follow the ideals of the Constitution of India, makes the case of the concerned workers *sui generis* and cannot be compared to any other contract labour dispute. The Corporation is under a mandate to keep the City clean. Residents of the City have a fundamental right to a clean environment. They pay taxes. This fundamental right and the mandatory duty cannot be achieved by subjugating the fundamental rights of the workers to basic human dignity. The anxiety to find innovative ways to maintain a clean city can be understood, but in a welfare state, cleanliness for one class of citizens cannot be achieved by engaging in 'slavery' of the others. These 580 workers, working round the year, provide the foundation on which the City functions. Instead of acknowledging this importance and giving them stability of permanent tenure to improve their living conditions, the Corporation, a public body, has taken advantage of its dominant position to exploit this lowest strata of the community, disregarding various welfare measures suggested by the State. In the circumstances, setting aside

the award in the equity jurisdiction of this court, will be a travesty of justice. The Award is therefore upheld and confirmed. The Award shall be implemented by the Corporation within 2 months from the date of uploading this judgment.

56. Resultantly the Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

57. After the operative order was pronounced in open Court of dismissing the Writ Petition and upholding the Reference Award passed by the Industrial Tribunal, learned Senior Advocate on behalf of the Corporation sought for stay of the judgment for a period of 8 weeks. Mr. Singhavi, learned Senior Advocate opposed grant of stay of the order since no stay was granted by this Court. In view of the judgment delivered and the time for implementation of the Award given to the Corporation, the application for stay of this judgment is rejected.

[MILIND N. JADHAV, J.]

Amberkar