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LABOUR LAW—I
(LABOUR MANAGEMENT RELATIONS)

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I INTRODUCTION

THE THREE pre-Independence legislations, viz. the Trade Unions Act, 1926, the Industrial Employment (Standing Orders) Act, 1946 and the Industrial Disputes Act, 1947 which regulate industrial relations in India at the Central level till date, were not conceived as part of a well thought out and comprehensive industrial relations policy or strategy of the state; they were enacted to meet specific situations that arose around that time when these legislations were passed.

In the post-Independent India, the yearning for having a comprehensive legislation on industrial relations in India envisaging collective bargaining as the primary dispute resolution mechanism and envisioning a statutory provision for determination of the sole bargaining agent did not fructify. This was despite the concerted efforts made by the first Union Labour Minister, Jagjivan Ram and his successor, V.V. Giri of the Indian National Congress Party at the centre in the early fifties and later on by Ravinder Verma of the short-lived Janta Party regime. But for these sporadic but valiant attempts, no earnest effort was ever made in this direction with the result the industrial adjudication continues to be as the primary industrial dispute resolution mechanism inspite of long delays involved in the adjudicatory process. Even now no serious effort on the part of the central government to adopt a rational industrial relations policy in keeping with the challenges posed by globalization, leading to adoption of new economic policies both by the developed and the developing nations, is visible. The central governmental of the day and Parliament are showing no serious concern to replace industrial adjudication by collective bargaining.

The declaration made by the Supreme Court by majority in *Bharat Bank*[1] that under article 136 of the Constitution of India it was empowered to entertain the appeals directly against the awards of the industrial adjudication and, in appropriate cases, interfere with them gave the court an opportunity to shape the industrial jurisprudence of this country. It rose to the occasion from time to time and played a role compatible and complementary to the social policy

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1 *Bharat Bank Limited* v. *Employees of Bharat Bank*, AIR 1950 SC 188.

perceived by the framers of the Constitution and brought uniformity in the development of industrial law. However, in recent years there has been a disturbing trend perceivable in the areas of conceptual framework and the area of the scope of powers of industrial adjudicator in the disciplinary matters giving an impression, not without basis, that the courts have started adopting negative judicial activism.

In the year 2006, the Supreme Court has decided a number of cases in various important areas of industrial relations law. Most of the reported cases are under the Industrial Disputes Act, 1947 covering conceptual areas of 'industry', 'workmen', 'retrenchment', subject matter and scope of reference, new approach of the court towards 'reliefs' and 'disciplinary matters' etc. The court has handed down only one decision under the Trade Unions Act, 1926 and none directly under the Industrial Employment (Standing Orders) Act, 1946. The present survey also covers the new approach of the court towards issues relating to regularisation in public employment law, though the litigation did not reach the court *via* the provisions of the Industrial Disputes Act, 1947. This area has been added in the survey in view of the important distinction brought out by the court between private employment and public employment law.

II INDUSTRIAL DISPUTES ACT, 1947

Industry

Ever since the Supreme Court referred the decision in *Bangalore Water Supply*[1a] to a larger bench for reconsideration, managements have been making prayers before the respective benches of the court to adjourn their appeals till the larger bench finally disposes of the reference.

In *R.M. Yellatti* v. *Asstt. Executive Engineer*[2] the management made such a request and contended before the court that the dispute in the case at hand having arisen in the irrigation department of the State of Karnataka which, it submitted, was not an 'industry' and given the fact that a constitution bench of the court in *State of U.P.* v. *Jai Bir Singh*,[3] has required constitution of a

1a *Bangalore Water Supply & Sewerage Board* v. *A. Rajappa*, (1978) 2 SCC 213.

2 (2006) 1 SCC 106. Also see, *Umesh Korga Bhandari* v. *Mahanagar Telephone Nigam Ltd.*, (2005) 13 SCC 691. The court ordered that the present appeals must await the decision of the larger bench in *Jai Bir Singh* on the scope of the definition of 'Industry' and these appeals be placed on board for hearing after a decision is delivered in that case.

3 (2005) 5 SCC 1. A constitution bench of the Court in *Jai Bir Singh* required the appeal before it and other connected appeals be placed before the Chief Justice of India for constituting a suitable larger bench for reconsideration of the judgement in *Bangalore Water Supply* for the reasons given therein including the reason that there was an apparent conflict between the decisions of the two benches of the court in *Chief Conservator of Forests* v. *Jaganath Maruti Kondhare* (1996) 2 SCC 293 of three judges and *State of Gujarat* v. *Pratamsingh Narsingh Parmar* (2001) 9 SCC 713 of two judges on the question whether 'social forestry department' of the state would be covered by the definition of 'industry' under section 2(j) of the Act. For detailed discussion on *Jai Bir Singh* see, Bushan Tilak Kaul, Labour Law-I, XLI *ASIL* 433 at 433-40 (2005).

suitable larger bench for reconsideration of the judgment of the court in *Bangalore Water Supply*, the matter be adjourned *sine die*. The court rightly did not agree to adjourn the matter *sine die* pending the decision of the larger bench particularly in view of the fact that there was nothing on record to indicate that the management had argued the point in question before the high court.

Workman

Test for determining who is a 'workman'

The Supreme Court in *Anand Regional Coop. Oil Seedgrowers' Union Ltd.* v. *Shaileshkumar Harshadbhai Shah*,[4] observed that it is now a well settled legal position that for determining whether a person employed in an 'industry' is a 'workman' or not, the two relevant considerations are the nature of work performed by him and the terms of his appointment. While determining the nature of work, undue importance should not be given to the designation of the employee, the name assigned to, and the class to which he belongs. What is required to be ascertained is the primary or predominant duties he performs. For treating a person as employed mainly in the 'supervisory' category it is necessary to prove that there are some persons working under him and he is required to supervise their work. It has to be seen whether the employee concerned was predominantly entrusted with the function of the direction and control as supervision contemplates 'direction' and 'control'. The court made it clear that being in-charge of a section alone and that too of a small one relating to quality control would not answer the test. A person indisputably carries on supervisory work if he has power of control or supervision in regard to recruitment, promotion and the work involves exercise of tact and independence. Judged on these standards the court held that the employee who was an assistant engineer in the quality control department of the society was a 'workman' and he did not come within the purview of the exclusionary clause of the definition of 'workman'.

'Retainers' are not 'workman': legitimacy to contractual appointments

In *Electronics Corpn. of India Ltd.* v. *Service Engineers Union*[5] the court was called upon to decide whether engagement of the claimants (30 in number) as technicians initially for a period of four years on contract basis and thereafter as 'retainers' by the appellant company, engaged in the business of manufacturing, selling and servicing of electronic items, conferred on them the status of 'workman' under the Act. These 30 claimants had obtained employment after responding to an advertisement issued by the company for engaging service engineers on retainer basis. They were selected pursuant to a written test and oral interviews. After selection they were required to undergo practical training which was imparted by the company for a period of

4 (2006) 6 SCC 548.
5 (2006) 7 SCC 330.

three months. After the training was completed contracts were entered into between the company and each of these 30 technicians and they were engaged as retainers.

Earlier, the appellant had made some of such technicians permanent in various positions as either tradesmen or scientific assistants or assistant technical officers. These claimants raised a demand that they be also permanently absorbed in employment and they be given service conditions which were applicable to other employees. The company did not accept this demand. These claimants, through their union, approached the high court seeking such reliefs but their petition was dismissed on the ground that the petitioner had an alternative remedy of approaching the machinery provided under the Industrial Disputes Act.

Accordingly, the union raised a dispute against the company which was referred by the appropriate government for adjudication to an industrial tribunal. The union filed the statement of claim justifying the demands made by it for their absorption, permanency and wage rise etc. The union demonstrated through evidence before the tribunal that in fact these employees were workmen of the company and the company had been exercising due control and supervision over them and had wrongly treated them as retainers. The company led neither oral nor documentary evidence before the tribunal. On consideration of the documents as well as the oral evidence, the tribunal decided as a preliminary issue that there existed no employee-employer relationship between the claimants and the corporation and rejected the reference as not maintainable.

The award of the tribunal was assailed before the high court by the union on the ground that the tribunal had erred in law in accepting an erroneously prepared paper arrangement by the management as reality when the fact of the matter was that there subsisted master and servant relationship between them and the corporation. The high court allowed the writ petition holding that it was for the company to establish that there was no master-servant relationship between the parties and that the members of the union were not 'workman' within the meaning of section 2(s) of the Industrial Disputes Act. The corporation assailed the judgment of the high court in the Supreme Court.

The Supreme Court held that it was a peculiar conclusion arrived at by the high court that since the preliminary issue was raised by the employer the onus had shifted on it even when the high court on its own accepted that the onus was on the person claiming to be 'workman' under the Act. The court observed that it was an admitted position between the parties that the corporation retained the claimants for a long period of time on the basis of a contract entered into between them and the corporation. But the dispute here having been raised belatedly, the court observed that the claim appeared to be an afterthought. In its opinion the claimants had not adduced or set out any reason as to why such belated demand was raised. The court took the view that this was indicative of the fact that the persons concerned were of the opinion that they were retainers and did not have any master-servant relationship with the company. The court felt that the tribunal had found that

there were no regular posts like service engineers, licensees or retainers in the company and such contracts were entered into by the company with these retainers to attend to additional work as and when required. Therefore, the question of designating the claimants as tradesmen or technical officers on permanent basis in the company did not arise as they had neither requisite qualifications for holding any of the said posts nor were they employees of the corporation and that they had not been employed after following the procedure required for appointment of the personnel of the corporation. Further, the technical officers could not claim to be workmen under the Act as they did mainly supervisory duties and drew wages exceeding Rs.1600/- per month. The corporation had entered into individual contracts with its retainers and there were no compulsion whatsoever to enter into the contract year after year. This agreement was on-job contract basis. In the agreement there was a provision for arbitration under the Arbitration Act. In the opinion of the Supreme Court the tribunal was right in its view that no employer-employee relationship existed. The court held that the observations of the high court to the contrary were clearly untenable because the findings and reasons given by the tribunal had not been discussed. No reasons had been given by the high court as to how these conclusions of the tribunal were erroneous and perverse.

It is submitted that if the conclusion of the high court that onus was on the company to prove that the claimants were not 'workmen' under the Act was erroneous, the reasons given by the Supreme Court for not holding the claimants as 'workmen' are equally erroneous. The court has completely failed to appreciate that in this case the management had led no evidence to disprove the claim of the claimants that there existed master and servant relationship between the two. It decided to deny them the status of employees on wrong premises that they had accepted their position as retainers and had raised the present dispute belatedly. These reasons are hardly cogent or convincing. Further, the approach of the court is clearly contrary to the one adopted by it in *Indian Banks Association* v. *Workmen of Syndicate Bank*[6] where the court held that deposit collectors appointed by the bank were 'workmen' even when they were not entitled to be appointed as regular employees of the bank under the Banking Regulations Act, 1949 having been employed on commission basis. It is one thing to deny the very existence of employer-employee relationship and another thing to examine the matter on merits, and, if the relationship is established, to further examine if they stood excluded on the ground that the nature of the work performed by them was predominantly 'supervisory' falling in the excluding clause of section 2(s) of the Act which the court has, unfortunately, only assumed without actually examining whether the work performed by them was essentially 'supervisory' at all.

6 (2001) 3 SCC 36. For detailed discussion on *Indian Bank Association*, see Bushan Tilak Kaul, Labour Law-I, XXXVII *ASIL* 395 at 406-08 (2001).

In *B. Srinivasa Reddy* v. *Karnataka Urban Water Supply & Drainage Board Employees' Assn.*[7] the court held that where the statute specifies that the appointment is one of sure tenure, the appointing authority has absolute discretion to make appointment on contract basis. Further, the court held that an appointment, which is temporary, remains temporary and does not become permanent with the passage of time.

Retrenchment

Concept of retrenchment and exclusionary clauses: pedantic approach

In *Kishore Chandra Samal* v. *Orissa State Cashew Development Corpn. Ltd*.[8] the approach of the court in denying the benefit of retrenchment provisions to the workman even when he had worked for more than seven years in the office of the respondents has clearly been erroneous and pedantic. It is this approach of the court which has made people to believe that the court has of late been adopting, not without basis, negative judicial activism.

The main case of the workman before the court was that the high court had failed to notice that fixed term appointments given to him was a camouflage to avoid regularisation. Reliance was placed by him on the earlier decision of the court in *S.M. Nilajkar* v. *Telecom District Manager*[9] where it was held that mere mention about the engagement being temporary or on daily wage basis without indication of any period attracts section 25F of the Act if it was proved that the workman concerned had worked continuously for more than 240 days. Unfortunately, the court without considering the contention of the workman on merits simply held that the decision in *S.M. Nilajkar* had no application to the case at hand. The court held that the instant case was a case of engagement for specific period. It is important to state here that the court has overlooked the fact in the instant case. The initial appointment order specified no fixed period of appointment. In the narration of the facts of the case the court itself has stated that his appointment as junior typist on non-muster roll basis by the respondent was w.e.f. 12.07.1982 and he continued in the said post for more than one year when all of a sudden another order was issued appointing him for fixed period of 44 days w.e.f. 01.10.1983 and in all he was allowed to work for more than seven years.

It is submitted that in the present case the management as an afterthought converted an otherwise indefinite appointment into a fixed term to escape compliance under section 25F of the Act. The entire matter deserved serious consideration on merits by the court before giving a finding that the case of the appellant was outside the definition of 'retrenchment' and thus did not attract section 25F. It was also not the case of the respondent corporation that he did not fulfil the eligibility conditions under the recruitment rule for

7 AIR 2006 SC 3106.

8 (2006) 1 SCC 253. Here the court was dealing with the appointment of a managing director in a statutory corporation.

9 (2003) 4 SCC 27.

appointment as junior typist.

A similar approach has been adopted by the court in *Punjab SEB* v. *Darbara Singh*.[10] Here the board appointed the workman as peon on daily wage basis for a fixed term but at the same time it was indicated in the appointment letter that the appointment was against a vacant post, which was temporary in character. The appointment was further extended from time to time. Thereafter when the post was filled on regular basis by appointing another person on permanent basis his services were terminated in terms of the conditions of his initial appointment without following the provisions of section 25F. The workman sent a demand notice questioning the order of disengagement after a lapse of eight years. The labour court on reference held that the order of disengagement was illegal and that he was entitled to reinstatement. However, taking note of delayed demand, back wages were restricted. The Punjab & Haryana High Court upheld the award. The Supreme Court again without appreciating the merits of the case set aside the decision of the labour court and the high court holding that the appointment was a specific period appointment and conditional appointment. Therefore, the pre-conditions laid down in section 25F were not attracted in the present case.

It is submitted that the court has once again failed to appreciate the fact that the post against which the workman had been engaged on contractual basis was actually a permanent post which factual position is also clearly stated in the narration of facts by the court itself. It is admitted position that the appointment made on permanent basis on 12.05.1989 led to his disengagement. The claim of the appellant was not for absorption on permanent basis but that he was not paid retrenchment compensation prior to his disengagement which was a condition precedent before validly disengaging him and the failure to comply with the said condition made him entitled to the consequential reliefs which is a settled legal position. It is unfortunate that the court has adopted purely black letter law approach without appreciating the legal position already settled in respect of section 2(oo)(bb) earlier.[11]

Again, the same approach is discernible in *Municipal Council, Samrala* v. *Raj Kumar*.[12] Here, the respondent/workman had worked intermittently in the past. Thereafter, his appointment was made on contractual basis with a stipulation therein that his services could be terminated as and when the council deemed necessary. Subsequently, his services were terminated in pursuance thereof.. He raised a dispute about his termination for non-compliance of section 25F of the Industrial Disputes Act. The labour court

10 (2006) 1 SCC 121.

11 See *State of Rajasthan* v. *Ramesh Lal Gahlot*, (1996) 1 SCC 595.

12 (2006) 3 SCC 81. Also see *Municipal Council, Samrala* v. *Sukhwinder Kaur*, (2006) 6 SCC 516; *Haryana State Agricultural Marketing Board* v. *Subhash Chand*, (2006) 2 SCC 794; *State of M.P.* v. *Arjunlal Rajak*, (2006) 2 SCC 711; *Nagar Mahapalika* v. *State of U.P.*, (2006) 5 SCC 127; *Haryana Electronics Development Corpn. Ltd.* v. *Mamni*, (2006) 9 SCC 434.

ordered his reinstatement with 25% back wages overruling the contention of the management that Section 25F was not attracted as the appointment was on contract basis with a stipulation in the contract that it could be terminated as and when the council deemed it necessary. The high court upheld the award of the labour court.

In the Supreme Court, the council argued that the termination in this case did not amount to retrenchment as the case fell in the second part of the exception in sub-clause (bb) of section 2(oo) of the Industrial Disputes Act. The court observed that sub-clause (bb) is one of the exceptions to the definition of 'retrenchment' which is in two parts. The first part contemplates termination of service of the workman as a result of non-renewal of contract of employment on its expiry; while the second part postulates termination of such contract of employment in terms of the stipulation contained in this behalf. In the present case, the court held that the labour court as well as the high court had arrived at the respective findings that the case was not covered by the exception upon taking into consideration the first part of section 2(oo)(bb) and not the second part thereof. It was necessary for them to have appreciated the circumstances in which the respondent/workman had been appointed. The court observed that the appointment of the employees in the municipal council were governed by the provisions of the relevant Municipal Act and the rules framed thereunder. The offer made to the workman/employee was on the basis of the resolution of the municipal council pending appointment against a vacant post and the appointment was in view of the exigency of the situation. The respondent/workman himself in his affidavit had understood that his appointment would be short lived. The court held that there was neither any doubt nor any dispute that the terms and conditions contained in the offer of appointment were clear. The workman was not appointed on a permanent or temporary basis. It was not the case of the workman that while making an offer of appointment the municipal council complied with the requirements laid down in the statute or statutory rules or even otherwise the same was in conformity with the articles 14 and 16 of the Constitution. The court held that the instant case was covered by the second part of section 2(oo)(bb) of the Act and accordingly set aside the award of the labour court and also the judgment of the high court.

It is submitted that the analysis of the section 2(oo)(bb) of the Act as made by the court in this case is in order. But the application of the underlying principle to the facts of the case does not appear to be free from doubt. Mere stipulation in the rules of contract of employment that the services of an employee are liable to be terminated with or without notice will not necessarily bring a case within second part of section 2(oo)(bb) of the Act. It is common knowledge that in government services or services in statutory bodies it is not uncommon to find a rule in service rules providing termination of service of even an employee having permanent or quasi-permanent status by giving one month or three months notice, as the case may be. Would such a stipulation in the service rules or contract of employments necessarily bring the case under second part of sub-clause of section 2(oo) of the Act? A mere look at

the resolution of the municipal council would clearly show that there was one vacant post of clerk and two other leave vacancies available when the respondent/workman was given an offer of appointment on contract basis with a stipulation that his appointment was till it was deemed necessary by the municipal council to continue him in its employment. The court has not appreciated the distinction between claim of regularisation and the claim of a workman complaining non-compliance with section 25F.

In view of the judgment in *Umadevi*[13] the court might be well within its right to deny regularisation in the statutory body of the respondent/workman on the ground that the same would be violative of rules governing appointment as also the rights of others envisaged in articles 14 and 16 of the Constitution. But here the complaint was one of non-compliance with the statutory obligation of payment of retrenchment compensation; the workman here having worked against a vacancy which was continuing in the organisation, though his appointment was on contract basis with stipulation of terminating the same at the will of the council. But given the fact that the vacancy still continued and his termination was not on account of a regular appointee having been appointed or having joined. Therefore, it was not a case where the workman could have been deprived of the benefit of the provisions of section 25F and the consequences flowing from non-compliance thereof. The decision in the present case is not in consonance with the earlier judgments of the court where it has been held that if it is shown that the vacancy still continued, an appointment though on contract basis with a stipulation that the council could terminate his services as and when it deemed fit, the termination in question would still fall within the definition of section 2(oo) of the Act and the exception contained in sub clause (bb) of section 2(oo) would not apply and section 25F would be attracted.[14]

The effect of these decisions of the court is that the managements are bound to feel assured that even against permanent post they can make fixed term appointments or make a stipulation in the contract of employment to the effect that the engagement was liable to be terminated at any time and escape the liability under section 25F. This is not a correct approach in such matters and is contrary to the letter and spirit underlying the retrenchment compensation law. Section 2 (oo) (bb) was intended to exclude pure and simple fixed term appointment and appointment of short duration only from the definition of 'retrenchment' and not appointment made against regular and permanent vacancies or appointments which are of indefinite durations or camouflages thereof.

Burden of proof relating to continuous service of one year on workman

Although the provisions of the Evidence Act do not strictly apply to the proceedings under section 10 of the Industrial Disputes Act, however, the

13 *Secretary, State of Karnataka* v. *Umadevi* (3), (2006) 4 SCC 1.
14 *Supra* note 11.

Supreme Court has in recent years consistently taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year.[15] This burden is discharged only upon the workman stepping in the witness box and upon adducing cogent evidence, both oral and documentary. Since in most of the cases of termination of service of daily wage earners no letters of appointment or termination orders or receipt or proof of payments are issued to the workers, daily wage worker can only call upon the employer to produce before the courts nominal muster roll for the given period, letter of appointment or termination, if any, the wage register and the attendance register etc. Drawing adverse inference ultimately would depend thereafter on the facts of each case. Mere affidavits or self-serving statements made by the claimant/workman will not suffice in the matter of discharge of burden placed by law on the workman to prove that he had worked for 240 days in a given year.[16] Mere non-production of muster roll *per se* without any plea of suppression by the claimant/workman would not be ground for the tribunal to draw an adverse inference against the management.[17] The high courts under section 226 of the Constitution will not interfere with the findings of fact recorded by the labour court unless they are perverse.[18] This exercise will depend upon the facts of each case.

In *Municipal Council, Sujanpur* v. *Surinder Kumar*,[19] the respondent/ workman worked for more than two years on daily wages basis and his services were terminated by issuing a notice of termination. He questioned the validity and legality of said termination by raising an industrial dispute which culminated into a reference. The labour court held that though the respondent/ workman was designated as a supervisor but he was discharging the duties of a workman and since there was non-compliance with section 25F, his termination was illegal. It ordered his reinstatement with full back wages. The said award was upheld by the high court. The Supreme Court held that both the labour court and the high court had proceeded on the wrong premise that the burden of proof to establish that the workman had worked 240 days was on the management. The court reiterated that the legal position is well settled that it was for the workman to prove that he had put in for 240 days of service. The court further observed that it was also equally well settled that the burden of proof was on the workman to prove that he had not been gainfully employed having regard to the analogous principle stated in section 106 of the Evidence Act. The court also observed that it was also a trite law that only because some documents had not been produced by the management an adverse

15 *Supra* note 2 at 116; also see *Municipal Corporation, Faridabad* v. *Sri Niwas*, (2004) 8 SCC 195; *M.P. Electricity Board* v. *Hariram*, (2004) 8 SCC 246; *Rajasthan State Ganganagar S. Mills Ltd.* v. *State of Rajasthan*, (2004) 8 SC 161. Also see *HUDA* v. *Jagmal Singh*, (2006) 5 SCC 765.

16 *Rajasthan State Ganganagar S. Mills Ltd.* v. *State of Rajasthan*, (2004) 8 SCC 161.

17 *Supra* note 2 at 116.

18 *Ibid*.

19 (2006) 5 SCC 173.

inference could be drawn against the management.[20] Further, apart from the aforesaid errors of law, the labour court and consequently the high court had completely misdirected themselves in so far as they failed to take into consideration that the relief to be granted in terms of section 11A being discretionary in nature, the labour court could not have granted the same without considering the facts of each case. Merely because relief by way of reinstatement with full back wages would be lawful, it could not mean that the same could be granted automatically. For the said purpose the nature of appointment, the purpose for which such appointments had been made, the duration/tenure of work, the question whether the post was a sanctioned one, being relevant facts, ought to have been taken into consideration. The court held that the appointment of the respondent/workman being not against a sanctioned post, the council, as a model employer, was bound to follow the recruitment rules. Any recruitment made in violation of such rules as also in violation of constitutional scheme enshrined under articles 14 and 16 of the Constitution would be void in law.[21] Given the fact that the appointment of the respondent/workman was at the instance of a member of the legislative assembly, who was the minister at the relevant time, *dehors* the rules, his appointment was illegal keeping in view the above legal position. The court held that in the facts and circumstances of the case the grant of monetary compensation would subserve the interest of justice. It set aside the direction of the labour court as upheld by the high court and directed that in place of the respondent/workman being reinstated with back wages the appellant council should pay monetary compensation to him quantified at Rs.50, 000/-.

Some imaginative approach in retrenchment law

The approach of the court in *R.M. Yellatti* v. *Asstt. Executive Engineer*[22] gives a ray of hope that there is still some judicial imagination and objectivity left in the court while dealing with labour matters even when the court has held in a number of cases that the burden of proof is on the workman to prove that he has put in one year of continuous service to be eligible for the benefit of section 25-F of the Act.

The court here was concerned with the case of the workman who had been appointed on daily wage basis for more than five years when his services were terminated. His claim was for reinstatement with consequential benefits for not complying with section 25-F before disengaging his services. The labour court and the single judge of the high court upheld the claim of the workman but the division bench of the high court in writ appeal held that the worker had failed to prove that he had rendered 240 days of continuous service prior to the order of termination of his service. The division bench held that

20 See *Manager, Reserve Bank of India* v. *S. Mani*, (2005) 5 SC 100; Also see *supra* note 15.

21 See *M.P. Housing Board* v. *Manoj Srivastava*, (2006) 2 SCC 702; also see *Haryana State Agricultural Marketing Board* v. *Subhash Chand*, (2006) 2 SCC 794.

22 *Supra* note 2.

he had failed to produce either the letter of appointment, the letter of termination or the receipts indicating payment of monthly salary. It further held that except self-serving statement of the appellant in the witness box there was nothing on record to support his case of having worked for 240 days. The bench, therefore, following the decision of the Supreme Court in *Range Forest Officer* v. *S.T. Hadimani*[23] quashed the award passed by the labour court and the order of the single judge upholding the award.

The Supreme Court in appeal reiterated the settled legal position that the question of burden of proof as to the completion of 240 days of continuous work in a year is on the workman. Coming to the facts of the case, the court found that the workman had stepped into the witness box and had called upon the management to produce the nominal muster roll for the period commencing from 22.11.1988 to 20.06.1994. The period for which he had worked was borne out in the certificate issued to him from the former assistant engineer which was an exhibited document available on record. The management in the rebuttal produced nominal muster rolls, three of which even did not relate to the period concerned. They only produced nominal muster rolls for the period 20.01.1994 to 20.04.1994. There was no explanation from the side of the management as to why for the remaining period the nominal muster rolls were not produced. The court rightly held that there was nothing to disbelieve the certificate issued by the former assistant engineer. The court held that the division bench of the high court had not given any reason for discarding the said certificate. In these circumstances the court held that the division bench ought not to have interfered with the concurrent finding of facts recorded by the labour court and confirmed by the single judge. It was not a case where the allegations of the workman were founded merely on an affidavit. He had produced cogent evidence in support of his case in the form of the certificate issued to him by the former assistant engineer with whom he had worked. The management was duty bound to produce before the labour court the nominal muster roll for the relevant period particularly when it was summoned to do so. The court held that it was not placing this judgment on the shifting of the burden or on drawing of adverse inferences. The court while parting with the case observed that the government departments ought to maintain proper records and when required, must produce them before the adjudicating authority, more so, in the case of daily wagers who have no appointment letters or letters of termination or proofs or certificates showing number of days worked by them as daily wagers. If government maintains such records and produces before the court, when summoned, this system will obviate litigation and pecuniary liability of the government. The court, accordingly, restored the award of the labour court and directed the government to restore the name of the appellant as a daily wager in the nominal muster roll.

It is submitted that this judgment is correct appreciation of the law and will go a long way in providing justice to the daily-wage earners who are

23 (2002) 3 SCC 25.

otherwise left at the mercy of the management and are an exploited lot. It is hoped that this judgment will help in streamlining the system of taking people on nominal muster rolls and in making the employer more responsible and less litigative. This judgment is intended to make public bodies realize that the money of the public exchequer is precious and cannot be allowed to be squandered away on avoidable litigations.

Impact of new economic policy of government on normal relief of reinstatement for violation of section 25-F

In *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey*[24] the important question that came up for consideration of the court was whether direction to pay back wages consequent upon a declaration that a workman has been retrenched in violation of the provisions of section 25F of the Act is to be observed as a matter of rule. The court observed that although direction to pay back wages in such situations used to be the usual rule but now, with the passage of time, a pragmatic view of the matter is being taken by the court realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years to go, namely, when the workman was retrenched. The court took note of the fact that in the present case it was not disputed that the respondent workman had not pleaded that he after his purported retrenchment was wholly unemployed. The court held that no precise formula could be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it would depend upon the facts and circumstances of each case. However, it cautioned against grant of such relief in an automatic fashion or mechanical way merely because there was violation of section 25F or an analogous provision.

In the instant case the services of the workman was terminated on the expiry of his tenure under the U.P. Industrial Disputes Act, 1947 in a project work in terms of the policy decision of the government in 1990 to close the project but the said termination was effected without complying with the retrenchment compensation provisions.[25] The labour court awarded his reinstatement with back wages. The court, however, modified the award of the labour court to the extent that the workman would be entitled only to 25% of the back wages in view of the fact that the state government had taken the policy decision to close the establishment and, therefore, the government could not be saddled with the liability of full back wages.

24 (2006) 1 SCC 479.

25 *Ibid.* It is important to state here that the State of U.P. did not amend the definition of 'retrenchment' in U.P. Industrial Disputes Act, 1947 as was done by the Central Government by amending the definition of 'retrenchment' by the Industrial Disputes (Amendment) Act, 1982 taking tenure appointments out of the definition of 'retrenchment'.

Issues relating to rule of 'last come first go'

In *Regional Manager, SBI* v. *Rakesh Kumar Tewari*[26] the Supreme Court spelt out the legal position under sections 25G and 25H of the Industrial Disputes Act and the applicability of the said provisions. Section 25G contains the principle of 'last come first go'. This principle predicates the following:

1. The workman retrenched belongs to a particular category;
2. there was no agreement contrary to this rule and
3. the employer has not recorded any reasons for departing from it.

These are all questions of fact in respect of which evidence would have to be led. The onus to prove the first requirement is on the workman, whereas in respect of two and three the onus is on the employer. When any action is brought by the workman complaining violation of section 25G the industrial adjudicator must necessarily afford a fair opportunity of leading such evidence to both the parties. This would in turn entail laying of a foundation for the case in the pleadings. If the plea is not put forward such an opportunity is denied, quite apart from the principle that no amount of evidence can be looked into unless such a plea is raised. If the respondent/workman has raised no allegation of violation of section 25G in his statement of claim before the industrial tribunal and his only case was that section 25H of the Act has been violated, it would not be open to the tribunal to conclude that the termination of the services of the workman was invalid because of any violation of section 25G by the management.

Section 25H, unlike section 25G, deals with a situation where the retrenchment is assumed to have been validly made. In the circumstances, if the employer wishes to re-employ any employee he must first offer employment to the retrenched workmen giving them preference over others. These sections, therefore, operate in different fields.

In the present case the workman had raised no allegation of violation of section 25G in his statement of claim before the industrial tribunal. His only case was that section 25H of the Act had been violated. The tribunal, however, held that section 25G had been violated overlooking the fact that the order of reference by the central government did not refer to section 25G but only to the question as to whether there was violation of section 25H of the Act. Under these circumstances the court had no hesitation in setting aside the award of the tribunal holding that the management had violated section 25G of the Act.

In *State of Rajasthan* v. *Sarjeet Singh*[27] the State of Rajasthan framed a scheme for supply of water in the villages. For implementation of the scheme the state was to contribute 50% of the total cost and the rest of the 50% was to be borne by the g*ram panchayat*. For giving effect to the scheme the g*ram*

26 (2006) 1 SCC 530.
27 (2006) 8 SCC 508.

panchayat employed several persons including respondent no.1 as pump driver. He was initially appointed for a period of six months. The term of his appointment was extended from time to time. The total period during which he remained employed was for more than one year. When the scheme came to an end his services were terminated. In his statement of claim for regularisation as pump driver before the conciliation officer the state government took the stand that he was appointed by the g*ram panchayat* and, therefore, his claim against the state could not survive. The industrial tribunal held that while terminating his services the mandatory requirements of sections 25-G and H were not complied with and consequently he was reinstated with continuity of service along with 30% of the back wages. This award was assailed before the single judge of the high court who opined that no document was produced by the state to show that the case of respondent no.1 fell within section 2(oo)(bb) of the Act to take out his case from the provisions of the retrenchment law. The division bench of the high court affirmed this finding. The Supreme Court held that there was nothing on record to show that respondent no.1 was appointed by the state government. It was not in dispute that his initial appointment was made by the *gram panchayat* for a period of six months pursuant to and in furtherance of the scheme. The Public Health and Engineering Department might have released payment of his salary. But that could not lead to the conclusion that the relationship of employer and employee came into being. His appointment was for a fixed period. Though his service might have been continued but it appeared that the same was to remain in force till the scheme was completed. The Supreme Court observed that the case attracted clause (bb) of section 2(oo) in terms of the decision of the court in *Municipal Council, Samrala* v. *Sukhwinder Kaur*.[28]

The court observed that it is now well settled that the powers under section 11A of the Act must be judicially exercised. Respondent no.1 having been appointed under a scheme was appointed for a specific purpose. The concept of there being dual employer although may not be unknown in industrial jurisprudence but the labour court had misdirected itself that the termination of services by the appellant was illegal being in violation of sections 25G and H of the Act. If the *gram panchayat* was in management of scheme the employer would be the *panchayat* and not the state. In fact the respondent/workman had impleaded them both as parties. The labour court and consequently the high court had failed to consider this vital aspect of the matter. The court observed that it is well settled that when a project or a scheme or an office itself is abolished relief by way of reinstatement is not granted even when there is a violation of section 25F of the Act.[29] Even if it was assumed that in terminating the services of the respondent/workman there was violation of sections 25G and H, though the court found no factual basis for it, the same would not mean that the labour court should have automatically

28 (2006) 6 SCC 516.
29 *State of MP* v. *Arjunlal Rajak,* (2006) 2 SCC 711.

passed an order of reinstatement in service with back wages. The court observed that ordinarily it would have set aside the judgement of the high court but in exercise of its jurisdiction under article 142 of the Constitution it directed the state to pay a sum of Rs.30,000/- to respondent no.1.

Subject matter of reference and scope of powers of industrial tribunal

In *State Bank of Bikaner & Jaipur* v. *Om Prakash Sharma*[30] the Supreme Court has gravely erred in not appreciating that when a reference is made under section 10(1) of the Act the labour court or the industrial tribunal is within its power under section 10(4) of the Act to adjudicate on the points of reference and also the matters incidental thereto. The two issues that were to be considered by the industrial tribunal here were: (i) whether termination of the services of the respondent was justified; and (ii) whether employing his junior Vijay Kumar, in his place, without giving him an opportunity of employment, was in violation of section 25H of the Act and to what relief he was entitled to. The question whether the management had been maintaining a list of employees to determine issue of seniority of the workers for the purposes of determining if there was violation of section 25H of the Act, it is submitted, was a matter incidental to the main points of reference. The industrial tribunal was, therefore, justified in requiring the employer, as a matter incidental to these issues, to produce the seniority list which he was bound to maintain and in drawing an adverse inference on its failure to maintain the same. By holding that this question could not have been gone into by the tribunal, the Supreme Court has not correctly appreciated the scope of powers of the industrial tribunal under section 10(4) of the Act.

The premise in the present case was that Vijay Kumar was junior and, therefore, the consideration of the issue of maintenance of seniority list of workmen to be maintained under rule 77 of the Industrial Disputes (Central) Rules framed under the Act was within the competence of industrial tribunal. The penalty prescribed under rule 79 for not maintaining seniority list of workers could not deter the tribunal from giving the relief to which the workman was entitled under the Act for violating section 25 H of the Act. Failure to maintain the seniority list of workmen attracts penalty under rule 79 whereas failure to follow the rule laid down in section 25H entitles the remedy of reinstatement with or without back wages or at least compensation.

Unfortunately, in the present case the industrial tribunal itself had given findings which were not consistent. On the one hand, it gave a finding that no seniority record was maintained as was required under rule 77 of the Industrial Disputes Rules. On the other hand, it also gave a finding that the respondent had failed to prove that after termination of his services the other workman, Vijay Kumar, was employed in his place in violation of section 25H of the Industrial Disputes Act or otherwise. Had the management maintained a seniority list the workman could have easily established his case of violation

30 (2006) 5 SCC 123.

of section 25H. The evidence led by the workman showed that it might have been that in the terms of reference there was a mistake in giving the name of the workman who replaced him, the correction of which ought to have been sought by approaching the appropriate government for rectifying the mistake in the reference. That was not done by the workman but the fact that no seniority list was maintained was itself a serious wrong. The court failed to appreciate that the labour court was within its powers to consider the issue of maintenance of seniority list as a matter incidental to the main points of reference and non-compliance of the rules created a presumption in favour of the workman; more so, when the workman was able to show the salary voucher allegedly issued in the name of one Vijay Sharma. Had the management prepared a seniority list which it was bound to prepare under the rules, the position would have been clear as to whether in the reference there was a mistake in giving the name of his junior. The labour court, however, held that the said rule 77 being mandatory in nature the respondent was entitled to be reinstated in service with 50% back wages which relief it was entitled to grant if the Supreme Court had appreciated that the labour court was within its right to consider the incidental issue of maintenance of seniority list by the management.

Disputed questions of fact should form subject matter of reference and not of a writ petition

In *A.P. Foods* v. *S. Samuel*[31] the workers approached the A. P. High Court for a direction to the Andhra Pradesh Nutrition Council, a registered society, owned and controlled by the Government of Andhra Pradesh, for paying bonus to its employees in terms of a government order which according to the management did not apply to them. The Supreme Court held that since disputed questions of facts were involved in the case at hand like entitlements of the workers to bonus and that an alternate remedy was available to them under the Act to raise an industrial dispute relating to payment of bonus, the high court should not have entertained the writ petition and should rather have directed them to avail of the statutory remedy available under the Act. However, because of the long passage of time the court in this case directed the Andhra Pradesh Government to refer the matter for adjudication by an appropriate tribunal. The court gave this direction keeping in view the fact that

31 (2006) 5 SCC 469. Also see *ONGC Ltd.* v. *Shyamal Chandra Bhowmik*, (2006) 1 SCC 337 where the Supreme Court held that the high court should not have entertained the writ petitions directly when claim of service of more than 240 days in a year was raised. Whether a person has worked for more than 240 days or not is a disputed question of fact which could not have been examined by the high court. Proper remedy for a person making such a claim is to raise an industrial dispute under the Act and onus of proof will be on the person who claims that he has worked for more than 240 days. The court held that the proper course in such a matter is to give a direction that in case a dispute is raised before the appropriate government, it shall refer the matter to labour court/industrial tribunal concerned for adjudication within a given time-frame.

in a number of cases the court had in the past, after noticing refusal of a reference by the appropriate government, ordered the appropriate government to refer the matters for adjudication instead of directing the government to consider/reconsider the matter for reference to adjudication machinery under the Act. The court directed the parties to place all material in support of their respective stands before the tribunal. Further, it directed the government to make the reference within three months from the date of passing of the present order with direction to the tribunal to which reference is made to dispose of the reference within four months from the receipt of the reference to ensure expeditious disposal of the matter.

Delay in seeking reference of dispute can be fatal

In *U.P. SRTC Ltd.* v. *Sarada Prasad Misra*[32] the workman was initially engaged on purely temporary basis as a conductor and thereafter purely on *ad hoc* basis temporarily for a period of one month. His services not being required were terminated by giving one month's notice. He accepted the order of termination alongwith salary of one month in lieu of notice without protest. After about seven years thereafter he raised an industrial dispute assailing his termination as illegal and being violative of the retrenchment provisions. Before the conciliation officer the management raised the preliminary objection about the maintainability of his claim on the ground that it was a stale claim. Inspite of this objection the conciliation officer condoned the delay and submitted failure report which became basis for a reference to the labour court. The labour court held that there was violation of the retrenchment law and, therefore, directed reinstatement of the workman with full back wages. When assailed before the high court, a single judge of the high court, as an interim measure ordered reinstatement with 50% back wages subject to the final order. Subsequently, the high court, after hearing the matter on merits, held that the award of the labour court did not warrant interference. Before the Supreme Court the management confined the challenge to the award of the labour court insofar as it ordered reinstatement with continuity of service and back wages.

The Supreme Court upheld the limited grievance of the corporation holding that it was justified in raising legitimate objection as regards the payment of back wages from the date of the order of removal given the fact that he had invoked the labour forum after seven years. It held that it was not appropriate to order back wages for the period from the date of the termination till his reinstatement. The court observed that the payment of back wages is a discretionary power which has to be exercised keeping in view the facts and circumstances of each case. No straightjacket formula could be laid down for

32 (2006) 4 SCC 733. Also see *Asstt. Engineer, CAD* v. *Dhan Kunwar*, (2006) 5 SCC 481 where the court observed that so far as the delay in seeking the reference is concerned no formula of universal application could be laid down as to when delay becomes fatal to disentitle the workman to any benefit even if a reference of the dispute has been made by the appropriate government to a labour court or an industrial tribunal.

universal application. Further, the court has of late consistently held that when the question of entitlements to back wages comes for consideration, *prima-facie*, it is for the employee to prove that he had not been gainfully employed. Initial burden is on the employee to show that he remained without any employment. In *M.P. SEB* v. *Jarina Bee*[33] it was observed that reinstatement in service and payment of back wages are two different things and payment of back wages is not a natural consequence of setting aside order of dismissal. In *Allahabad Jal Sansthan* v. *Daya Shankar Rai*[34] it was indicated that the law is not in absolute terms that in all cases of illegal termination of service a workman must be paid full back wages. In *Haryana State Coop. Land Development Bank* v. *Neelam*[35] it was stated that the aim and object of the Act is to impart social justice to the workmen but keeping in view his conduct, payment of back wages would not be automatic on entitlement of relief to reinstatement. In *G.M., Haryana Roadways* v. *Rudhan Singh*[36] the court reiterated that there is no rule of thumb nor cast iron rule that each and every case, where the industrial tribunal records a finding that the order of termination of service was illegal, that an employee is entitled to full back wages. A host of factors which are relevant must be taken into consideration. Considering the case law on point and applying the principles enumerated above, the court held that the ends of justice would be met if the workman was allowed back wages to the extent of 50% from the date of the award till he was reinstated in service.

In *U.P. SRTC* v. *Babu Ram*[37] the court again dealt with belated claims and also other related aspects which need consideration. Here the workman was engaged purely on temporary basis in the year 1980 to meet the urgent needs during the *Kumb* festival. His services were terminated in late 1983 on the ground that there was no further need for engaging his services. The matter was referred for adjudication in 1998 by the state government. The management contended before the labour court that the reference was based on belated claim and, therefore, was liable to be rejected. However, the labour court did not record any specific finding on this objection of the management and held that the termination was illegal for non-compliance with the retrenchment provisions under the Act. It passed an award ordering reinstatement of the workman with continuity of service and back wages. The writ petition against the award of the labour court was dismissed by the high court even when the management reiterated its stand that the reference was belated and the workman had failed to offer any explanation for the belated claim raised after 15 years and that it had taken this stand consistently before the conciliation officer and also before the labour court.

33 (2003) 6 SC 141.
34 (2005) 5 SCC 124.
35 (2005) 5 SCC 91.
36 (2005) 5 SCC 591.
37 (2006) 5 SCC 433.

The Supreme Court held that so far as the delay in seeking a reference is concerned no formula of universal application could be laid down. It would depend on the facts of each case. However, the court referred to various earlier judgements to show that where there was a delay on the part of the workman the court had denied relief in cases of stale claims.[38]

The court observed that in the present case both the labour court as well as the high court ought to have gone into the question as to whether there was delay on the part of the workman in raising industrial dispute or seeking a reference under section 10 of the Act. The management having consistently raised its preliminary objection about the maintainability of the reference on the ground of delay, the onus of proof was on the workman to show that he had raised an industrial dispute within a reasonable time and/or he was not responsible for the delay of the decision, if any, in the conciliation proceedings which have been initiated earlier. It was for him to show that dispute was raised within a reasonable time. The court observed that the high court could not have moved on hypothetical basis and assumed that the dispute might have been raised promptly but was delayed by the state government and that the workman could not be penalized for delay in finalizing the conciliation proceedings and reference under section 10 of the Act. This conclusion of the high court was based on surmises and conjectures and that being so, the court ruled that the order of the high court was clearly unsustainable. The court set aside the said order and remitted the matter to the high court to consider the question of delay in seeking reference and directed it to decide the matter in accordance with law.

Disciplinary jurisprudence: new approach of the Supreme Court

The new economic policy and the court's concern for discipline

The Supreme Court has made it clear that in view of the change in economic policy of the country it might not now be proper to allow the employees to break the discipline with impunity.[39] The court further observed that India being governed by rule of law, all actions, therefore, must be taken in accordance with law. Also, the law declared by the Supreme Court being binding on all courts and tribunals in the country under article 141 of the Constitution, it directed the tribunals not to normally interfere with the quantum of punishment imposed by the employers unless an appropriate case was made out for doing so. It ruled that the tribunals could neither ignore the ratio laid down by court nor refuse to follow the same. The court once again emphasised the importance of maintenance of discipline in the workplace and

38 *Shalimar Works Ltd.* v. *Workmen*, AIR 1959 SC 1217; *Nedungadi Bank Ltd.* v. *K.P. Madhavankutty*, (2002) 2 SCC 455; *Ratan Chandra Sammanta* v. *Union of India*, 1993 Supp (4) SCC 67; *S.M. Nilajkar* v. *Telecom District Manager*, (2003) 4 SCC 27.

39 *Hombe Gowda Educational Trust* v. *State of Karnataka*, (2006) 1 SCC 430.

referred to some of its recent decisions[40] under the Act to bring home the fact that the new trend in the decisions of the court is intended to strike a balance between present need and the earlier approach of the court to the industrial relations where only the interest of workman was sought to be protected. According to the court, the earlier approach made the discipline at the workplace suffer a set back. The court observed that the change in the approach of the court in recent decisions is intended to achieve the avowed object of faster industrial growth of the country.[41]

It is submitted that merely because article 141 makes law declared by the Supreme Court binding on all courts and tribunals it does not mean that the court should circumscribe the power of the industrial tribunals that lawfully belongs to them under express provisions of section 11A of the Act. Section 11A confers on them wide powers to interfere with the quantum of punishment in appropriate cases, not necessarily confined only to cases where punishment is disproportionate to the misconduct, as is being asserted by the court in a number of it's decisions.

Disciplinary action and principles of natural justice

It is well settled law that the doctrine of principles of natural justice are not embodied rules.[42] The principles of natural justice cannot be put in a straightjacket formula as they depend upon the facts and circumstances of each case. To sustain the allegation of violation of principles of natural justice one must establish that prejudice has been caused to him due to non-observance of principles of natural justice.

In *L.K. Verma* v. *HMT Ltd.*,[43] some general principles governing disciplinary proceedings are discernable which may as well be important in the field of labour jurisprudence given the fact that the court is consistently following theory of deterrence in disciplinary matters. The court observed that the following are well settled legal principles to be kept in mind while dealing with misconduct of employees:

i) It is by now a settled legal position that things admitted need not to be proved.[44]

ii) Suspensions are of three kinds and the distinction is to be borne in mind. An order of suspension can be passed by way of punishment in terms of conduct rules. An order of suspension can also be

40 *Mahindra and Mahindra Ltd.* v. *N.B. Narawade*, (2005) 3 SCC 134; *Bharat Forge Co. Ltd* v. *Uttam Manohar Nakate*, (2005) 3 SCC 134.

41 *Supra* note 39 at 441.

42 *Syndicate Bank* v. *Venkatesh Gururao Kurati*, (2006) 3 SCC 150.

43 (2006) 2 SCC 269.

44 *Ibid*. In the present case the employee had accepted that he made utterances, which admittedly lacked civility and that he had also threatened a superior officer which were serious misconducts. The court stated that it was for the employee to show that he had later on felt remorse therefor.

passed by the employer in exercise of its inherent power in the sense that it may not take any work from the delinquent officer but in that event the entire salary is required to be paid to the employee concerned. Further, an order of suspension can also be passed if such provision exists in the rule providing that in place of salary the delinquent employee should be paid only subsistence allowance specified in the rule.

iii) The court reiterated the position already stated in *Mahindra and Mahindra* that verbal abuse is a serious misconduct and the order of dismissal cannot be said to be excessive.[45]

In the present case, the action of the management imposing penalty of dismissal was challenged before the high court by the employee who was a safety officer in the undertaking and, therefore, the scope of the jurisdiction of a labour court or industrial tribunal was not an issue before the Supreme Court. The court found no reason to interfere with the order of dismissal given the fact that the employee had himself admitted having used abusive language against his superior and had failed to prove any circumstance which called for interference with the punishment of dismissal awarded by the management.

In *Syndicate Bank*[45a] the Supreme Court held that non-supply of the documents which do not form part of the charges or which are not relied upon by the enquiry officer to arrive at his conclusion cannot cause prejudice to an employee and, therefore, no case can be said to have been made out where an employee could complain that principles of natural justice have not been followed. It is only those documents which are relied upon by the enquiry officer to arrive at his conclusion, non-supply of which would cause prejudice being violative of the principles of natural justice. The court approved the observations of the single judge of the high court that compassion is no ground for converting the order of removal from service into compulsory retirement.

Acquittal in criminal trial does not vitiate order of punishment based on proved misconduct in a departmental enquiry – the two being distinct

In *T.N.C.S. Corpn. Ltd.* v. *K. Meerabai*,[46] the Supreme Court deprecated the judgments of the single and division bench of the high court for having lost sight of the well settled law that the scope of the criminal proceedings in a criminal case is different and distinct from the scope of the disciplinary proceedings in a departmental enquiry, both being quite distinctly exclusive and independent of each other, more so when they are based on different sets of facts and charges.[47] The court held that mere fact that the trial court had

45 *Supra* note 40.
45a *Supra* note 42.
46 (2006) 2 SCC 255.
47 *Id.* at 263. Also see *Ajit Kumar Nag* v. *G.M. (PJ), Indian Oil Corpn. Ltd.*, (2005) 7 SCC 764.

acquitted the employee of the offences under sections 409 (criminal breach of trust by public servant) and 477A (falsification of accounts) under Indian Penal Code (IPC) could not stand in the way of a disciplinary action on the basis of proved misconducts founded on separate set of facts. The court observed that in this case the order of dismissal passed by the disciplinary authority and the order of the appellate authority dismissing the employee's departmental appeal were exhaustive orders, incorporating statements of the correct and relevant facts of the case and impeccable conclusions based on dispassionate appreciation of the evidence on record and supported by legally irrefutable reasons. A bare perusal of the enquiry officer's report showed that the respondent had fully participated in the enquiry proceedings.

The court held that the high court had failed to consider and appreciate dispassionately and judicially the corporation's most emphatically pronounced plea that it would be virtually impossible for them to reinstate the respondent who was found in the departmental enquiry guilty of misappropriation and other malpractices. His conduct had caused enormous loss in stock and cash to the corporation which was primarily concerned with the distribution of essential commodities amongst the weaker sections of the population of the state. Where honesty and integrity, as in the present case, are inbuilt requirements of functioning, the matter needs to be dealt with firm hands and not leniently. The court observed that the employee in this case dealt with public money and was engaged in financial transactions and acted in a fiduciary capacity and, therefore, highest degree of integrity and trustworthiness was a must and unexceptionable. Judged in this background, the court found that the conclusion of the single judge as affirmed by the division bench setting aside the order of dismissal and ordering reinstatement of the employee with back wages was legally unsustainable. The court set aside the same and restored the order passed by the disciplinary authorities upholding the order of dismissal.

The plea of the workman for taking a lenient view in the matter was not accepted by the court. The court observed that scope of judicial review being very limited, sympathy or generosity as a factor was impermissible. Loss of confidence was the primary factor and not the amount of money misappropriated which was a serious charge and which had been proved in the enquiry; there was nothing wrong in the corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefor with the quantum of punishment awarded by the disciplinary authority which was upheld by the appellate authority.

In *South Bengal State Transport Corpn.* v. *Sapan Kumar Mitra*,[48] the respondent, a bus driver with the corporation, took a sharp turn on the left side to save a collision with a truck coming from the opposite direction as a result

48 (2006) 2 SCC 584.

whereof the bus fell into a bay. Due to this accident 15 precious lives were lost and number of other passengers were seriously injured. A departmental enquiry and a criminal proceeding were initiated against him. The criminal case ended in acquittal of the workman on the ground that sufficient evidence was not available to the court to come to the conclusion of guilt of the workman. He was removed from the service after holding a departmental enquiry against him. It may be mentioned here that the transport department of the state government had directed the district magistrate to hold an enquiry as to who was responsible for this accident. The district magistrate submitted his report holding the workman responsible. Considering the report of the district magistrate, the deposition relied on by him and also deposition before the enquiry officer, the enquiry officer came to the conclusion that the workman due to his rash and negligent driving caused the accident. The disciplinary authority passed an order of removal from service relying on the report of the enquiry officer. The workman successfully challenged the order of removal by filing a writ petition in High Court of Calcutta on two grounds: (i) that the order of removal was bad and invalid in law as the documents relied on by the enquiry officer did not at all feature in the list of documents attached to the charge sheet nor copies of the same were supplied to him and, therefore, no reliance could be placed on such documents; (ii) that the disciplinary authority could not continue with the departmental proceedings and impose punishment of removal from service against the workman after his acquittal in the criminal case. The single judge upheld the first ground in holding that the departmental proceedings were vitiated. On the second question it held that acquittal in criminal proceedings could be no bar against holding of departmental enquiry and punishing the employee if found guilty in the departmental enquiry. However, he thought it fit to set aside the order of removal and directed the management to supply copies of the documents to the workman for his comments against the said documents and thereafter reach a fresh conclusion on the question of removal from service after giving him a reasonable opportunity of being heard. The management filed writ appeal against the aforesaid order of the single judge. The division bench rather decided to go on merits and set aside the order of removal and directed the corporation to reinstate the workman with full back wages.

The Supreme Court in appeal held that the disciplinary authority ought not have passed the order of removal from service without supplying to the workman copies of the documents relied upon by the enquiry officer and the disciplinary authority. The court held that single judge of the high court was justified in sending the case back to the disciplinary authority and ordering him to supply to the workman a copy of the enquiry report alongwith a report of the district magistrate and other documents relied upon by him and thereafter to proceed from that stage after seeking comments on those reports from the workman to reach a fresh conclusion. However, the court held that the division bench of the high court in the writ appeal was not justified to shortcut the procedure by going into the merits on the removal of the workman from service particularly when the single judge has not decided the question

on merits and when the disciplinary authority had passed the order of removal practically relying on the enquiry report copy of which was not supplied to the workman for filing his comments. The court also brought home the fact that the disciplinary authority or the enquiry officers are not the courts and, therefore, strict procedures that are followed by the courts may not be strictly adhered. The division bench should not have preempted the decision of the disciplinary authority on facts on a *prima facie* finding on the subject of enquiry when the disciplinary authority was yet to make up its mind. The court observed that it would be open for the workman or his authorized representative to cross-examine the witnesses and also to raise the question of admissibility of the Xerox copy of the report of the district magistrate before the disciplinary authority. The court directed that during the pendency of the departmental proceedings the workman who was deemed to be treated as suspended during the pendency of the matter before the disciplinary authority in terms of the order of the single judge should be paid subsistence allowance in accordance with the rules of the Corporation.

Misconducts, disciplinary proceedings and scope of powers of labour court/ industrial tribunal under section 11A

Physical assault: a serious misconduct

In *Hombe Gowda Educational Trust*, the correctness of the dismissal order passed by the management against a lecturer[49] in a private educational institution in the State of Karnataka governed by the Karnataka Private Educational Institutions (Discipline and Control) Act, 1975 was in issue. The allegation against the lecturer was that he had assaulted the principal of the educational institution with a *chappal*. In a departmental enquiry he was found guilty of the said charge. He preferred an appeal against the dismissal order before the educational appellate tribunal under section 8 of the said Act averring that he had been provoked by the principal to resort to such conduct. The tribunal framed preliminary issue as to whether the departmental proceedings against the lecturer were in consonance with the provisions of rule 14(2) of the CCS (CCA) Rules. The tribunal was constituted under section 10 of the said Act. By a legal fiction under the said Act, proceedings before the tribunal are treated to be judicial proceedings. It held that the departmental proceedings were invalid in law and the management was allowed to adduce evidence before it to prove the charges against the lecturer.

It is important to state here that the principal in his evidence before the tribunal had stated that he did not permit the lecturer to sign the attendance

49 Although teachers have not been accepted as 'workman' under section 2(s) of the Industrial Disputes Act because of preconceived judicial notions, yet this case of a lecturer in an educational institution is being discussed under the Industrial Disputes Act because this dispute has arisen under a state legislation where the tribunal constituted under the the said Act enjoys powers analogous to section 11-A of the Industrial Dispute Act in the matter of dismissal and discharge.

register on the date of the alleged incident which led to a verbal altercation and turned into a heated dialogue followed by use of vulgar language and assault by the lecturer when he had pushed him. It was proved by the management before the tribunal that the lecturer had assaulted the principal. The tribunal, however, reduced the punishment and awarded punishment of withholding of three increments only keeping in view the fact that it was the principal who was responsible for giving provocation to the lecturer. Accordingly, the tribunal directed that the lecturer was entitled to be taken back in service with all pecuniary benefits like salary and allowances retrospectively from the date of dismissal minus and subject to withholding of three increments. Aggrieved by the said order of the tribunal the management preferred a writ petition before the Karnataka High Court.

The high court held that once action of the lecturer in assaulting the principal with *chappal* stood proved, even if there was provocation given by the principal the said conduct of the lecturer could not be justified. The high court, however, noticed that the punishment imposed by the tribunal could not be given effect to as the lecturer had attained age of superannuation and, therefore, the court directed the management to pay back wages to the lecturer to the extent of 60% only. The management assailed the order of the tribunal as well as that of the high court before the Supreme Court.

The Supreme Court observed that the lecturer had been charge-sheeted of commission of a serious offence and had been found guilty both by the tribunal as also by the high court. Even a grave provocation by the principal could not justify his act and could not be a relevant fact for imposing a minor punishment on him. The court further observed that the tribunal's jurisdiction under the aforesaid Act being akin to one under section 11A of the Industrial Disputes Act, the tribunal while exercising such discretionary jurisdiction no doubt could substitute one punishment by the other but such a power has to be exercised sparingly as it exercises a limited jurisdiction in this behalf. The court held that the jurisdiction to interfere with the quantum of punishment could be exercised only when, *inter alia*, it is found to be grossly disproportionate. The court observed that assaulting a superior at a workplace amounts to an act of gross indiscipline more so when the employee is a teacher. Even under grave provocation a teacher is not expected to abuse the head of the institution using filthy language and assault him with a *chappal*. The punishment of dismissal from service, therefore, could not be said to be wholly disproportionate so as to shock one's conscience, the court observed. The court recognized that dismissal no doubt put a person to a grave hardship but that would not justify a gross misconduct going unpunished. Although the doctrine of proportionately may be applicable in such matters to a punishment of dismissal from service but such a punishment cannot be said to be unheard of. Coming back to the facts of this case, the court held that indiscipline in an educational institution in particular should not be tolerated. Only because the principal of the institution had not been proceeded against, the same by itself could not be a ground for exercising discretionary jurisdiction by the court. It might or might not be that the management was selectively vindictive but

no management could ignore the serious lapse on the part of the teacher whose conduct had to be an example to the pupils.

Use of abusive and threatening language as 'misconduct'

In *Anand Regional Coop. Oil Seedgrowers' Union Ltd.* v. *Shaileshkumar Harshadbhai Shah*,[50] the respondent who was an assistant engineer in the quality control department of the appellant cooperative society was dismissed from service after he was found guilty of having used abusive and threatening language against his superior which misconduct was proved by the management in a departmental enquiry held against him. On a reference the labour court found the punishment excessive and directed his reinstatement with 25% back wages. In the high court, the single judge as well as the division bench of the high court upheld the award of the labour court.

In the Supreme Court, the management contended that the labour court had committed an error in exceeding its jurisdiction under section 11A of the Act in interfering with the quantum of punishment. The court held that it is now well settled that the industrial court has a limited role to play in the matter and it does not have power to interfere with the quantum of punishment except where there exists sufficient reasons therefor. The court found it difficult to agree with the finding of the labour court that "if the nature of offence is grave he could have been inflicted punishment of stoppage of increments". The court found no basis for such observations made by the labour court.

However, the court observed that there was another aspect of the matter which it thought could not be lost sight of; there were identical allegations made against several other persons and the management had not taken serious note of their misconduct although they were similarly situated. These employees were allowed to take the benefit of voluntary retirement scheme. Such offer might not have been made to the respondent or he may not have opted for the same. The court directed that having regard to the overall situation and peculiar circumstances of this case, the interest of justice would be sub-served if the award of the labour court as affirmed by the high court was substituted by a direction that the respondent/employee be given the benefit of voluntary retirement scheme from the month in which the other workmen were given such benefit thereof. The court accordingly modified the impugned judgment of the high court and allowed the appeal of the management to that extent.

It is submitted that the approach of the court here seems to be better in comparison to the one it took in *Hombe Gowda Educational Trust* v. *State of Karnataka*[51] where it refused to take into account the conduct of the principal of the educational institution while considering the correctness of the order of dismissal against the lecturer.

50 (2006) 6 SCC 548.
51 *Supra note* 39.

Betrayal of trust as 'misconduct'

The decision of the court in *U.P. SRTC* v. *Mahendra Nath Tiwari*[52] is yet another illustration where the court has adopted deterrent policy in disciplinary matters and has held the order of removal of the bus conductor was justified. The court set aside the order of the labour court imposing a lenient punishment. The court passed the said order in the following factual matrix:

In this case the respondent/conductor was found to be unauthorisedly driving the bus of the corporation and no ticket had been issued to a lone passenger sitting in the bus when the checking party inspected the bus. It was also found that the respondent/conductor had in his possession 12 used tickets. The labour court found the domestic enquiry relied upon by the corporation improper. He gave an opportunity to the parties to lead evidence. The corporation adduced evidence in support of the charge before the labour court but the respondent adduced no evidence. The labour court inspite of absence of the evidence on the side of the respondent interfered with the punishment of removal from service. It took a curious view that since no action has been taken by the corporation against the driver, no action could be taken against the respondent alone and that the punishment awarded was too severe. He accordingly directed the reinstatement with back wages but imposed the penalty of stoppage of his annual increment. The high court dismissed the writ petition of the corporation holding, *inter alia*, that the embezzlement alleged against the respondent by not issuing the ticket to a lone passenger was a paltry sum of Rs.1.50 only. The high court also held that the punishment was totally disproportionate.

The Supreme Court took strong exception to the approach adopted by the labour court and the high court and held that the conductor by unauthorizedly driving the vehicle had endangered the life of the public using the road as well as the property of his employer which itself was a serious misconduct justifying his dismissal. Similarly, the fact that one passenger was found travelling and had not been issued a ticket for that journey, constituted a grave charge against the conductor who was really in a position of trust as far as the corporation was concerned. The court observed that his act of omission and commission suggested that there was room to doubt the honesty of the respondent. The charges showed a betrayal of the trust placed on the conductor by the employer. The court held that these were grave misconducts justifying dismissal. Since the SLP had been limited to the question of payment of back wages, the court set aside the award of back wages and made it also known that it was entitled to reopen the appeal in its entirety and consider the question of punishment and the legality of reinstatement ordered by the labour court and affirmed by the high court. This could be done by giving a notice in that behalf to the respondent and giving him an opportunity of being heard. But it did not think it necessary to do so at this distance of time. Therefore, it

52 (2006) 1 SCC 118.

somewhat reluctantly, refrained from adopting that course, though according to it this was a fit case where neither the labour court nor the high court had any justification in interfering with the order removing the respondent from service. The court held that the conduct of the respondent as a conductor of the corporation was totally irresponsible and clearly constituted misconduct on his part deserving the maximum punishment.

Unauthorised absence as 'misconduct'

In *G.M., Vijaya Bank* v. *Pramod Kumar Gupta*,[53] the respondent, employed in the bank as a clerk, allegedly abstained from duty without leave. Thereafter the bank issued notice directing him to report for duty within 30 days time. He reported back to duty within the stipulated time but again after a short period abstained from duty without any prior intimation. Subsequently, he was again issued second notice dated 08.09.1992 to report for duty within 30 days which was received by him on 14.09.1992. He reported for duty on 12.10.1992 but was not permitted by the bank to resume duty on the plea that he should have joined duty within 30 days from the date of issuance of the notice. The workman raised a dispute after four years protesting against his termination. The matter was referred to the industrial tribunal. It held that there was delay on the part of the workman in seeking redressal which showed that he must have been gainfully employed elsewhere and was earning from other sources as a result of which he kept mum for many years. It further held that the evidence led before him by the management clearly established that he was carrying on business with his brother which evidence was not controverted by the workman. In this view of the matter, the tribunal held that the decision of the bank that he had relinquished and abandoned the services of the bank appeared to be fully justified and there was no illegality on the part of the bank in taking the action against him. The tribunal answered the reference accordingly.

Aggrieved by the award of the industrial tribunal, the workman assailed the same in a writ petition before the Allahabad High Court which was allowed. The Supreme Court which heard the special leave petition of the bank observed that on perusal of the order of the high court it was clear that it had not considered the question as to whether the workman was gainfully employed or not during the relevant period in question. It had also not adverted to the categorical finding recorded by the tribunal on this aspect. The high court had without dealing with these aspects directed the appellant bank to reinstate the workman on the post held by him with continuity of service and all other consequential benefits. It was contended before the Supreme Court by the bank that the workman had not discharged his burden by adducing evidence that he was not gainfully employed. On the other hand, the workman contended that even though he had reported for duty to the bank he was not allowed to join duty and, therefore, he could not be penalized for

53 (2006) 7 SCC 379.

the mistake committed by the bank in not permitting him to join the duty and that the procedure envisaged in the bipartite settlement governing unauthorized absence of the staff members had not been followed. It was further contended by him that notice dated 08.09.1992 called upon the workman to report for duty from the date of publication of the notice and not within 30 days from the date of issue as wrongly stated in the order of termination. He had reported for duty on 12.10.1992 which was well within 30 days of service of notice. It was further contended by him that it is settled position in law that an order shall not be effective unless it is published or communicated to the officer concerned. It was also contended that the tribunal was wrongly persuaded by the oral testimony of the witness of the bank that the workman was gainfully employed which lacked any basis in the pleading or proof in any form of document.

The court observed that there was much force in the contention of the workman that period of 30 days has to be reckoned only from the date of the service of the notice i.e. on 14.09.1992. If that date was taken into consideration the respondent had joined the duty well within 30 days i.e. on 12.09.1992. The court held that the order passed by the high court ordering reinstatement was to stand. But the high court was not right in ordering full back wages with all consequential benefits without considering the relevant issues. In the light of the stand of the parties and also the fact that the bank had wrongfully refused the workman to join his duty within 30 days, the court remitted the matter to the high court to consider the question of payment of back wages for the period in question. It made clear that the high court has to consider the matter afresh on the question of back wages only. The bank was also left free to hold any departmental enquiry against the workman for his absence from duty during the relevant period. The court further directed that since the issue of back wages is being sent back to the high court for consideration afresh, the respondent would not be entitled to payment of back wages for the period in question which will depend upon the ultimate order that may be passed by the high court.

Grant of fictitious loan as 'misconduct'

In *Karnataka Bank Ltd.* v. *A.L. Mohan Rao,*[54] the workman was working as an attendant in the appellant bank. He was charge sheeted for gross misconduct inasmuch as he had colluded with one of the branch managers and managed grant of a fictitious loan. During the enquiry he admitted that he had prepared the loan agreement and had made the relevant entries in the ledger. He also admitted that he had prepared the relevant credit/debit withdrawal slips and also prepared other documents required for the purposes of the loan. He also admitted that he had prepared these documents knowing that he had no authority to prepare these documents or to make the entries in the ledger. After a proper departmental enquiry found him guilty, his services were

54 (2006) 1 SCC 63.

terminated. He raised an industrial dispute which was referred to the industrial tribunal-cum-labour court for adjudication which dismissed his claim. He assailed the award in the high court. The single judge of the high court found that the misconduct had been proved but on the notion of sympathy held that the correct punishment should be reinstatement without any back wages and without continuity of service except continuity of service for the purposes of terminal benefits which order was upheld by the division bench of the high court. The Supreme Court held that a gross misconduct of this nature did merit termination and it failed to see what other type of misconduct would merit termination. It held that it is not for the courts to interfere with the decision of the disciplinary authority in a gross misconduct of this nature so long as the enquiry had been fair and proper and the misconduct proved. In such matters it was for the disciplinary authority to decide what was the fit punishment. The court held that in any case, given the seriousness of the misconduct, it could never be said that the termination of service was not appropriate punishment. The court, accordingly, set aside the orders of the single as well as the division bench of the high court and restored the order of termination passed by the disciplinary authority.

Falsification of accounts/misappropriation as 'misconduct'

In *Maharashtra State Seeds Corpn. Ltd.* v. *Hariprasad Drupadrao Jadhao*,[55] the enquiry officer after holding the employee guilty of grave misconduct in violating instructions for distribution of seeds and falsification of a huge amount, preparation of false documents and also misappropriation of cotton seeds recommended certain punishments including that of a permanent withholding of two increments. On the basis of the said recommendations, the appellant corporation issued notice to the workman to show cause as to why two increments of pay from his salary should not be directed to be withheld permanently. He showed cause thereto. However, another show cause notice in supersession of the earlier notice was issued by the appellant company on the ground that the charges which were proved against the respondent workman were serious in nature and having regard to the gravity thereof why the punishment of dismissal should not be imposed. The respondent workman filed his show cause in furtherance of the said notice. Upon consideration of the said show cause the services of the respondent workman were terminated. He impugned the legality of the said order before the high court. The high court after holding that the disciplinary proceedings had been held in accordance with the law interfered with the quantum of punishment directing his reinstatement with continuity in service with full back wages holding that withholding of two increments of pay permanently should be imposed on him. The high court held that if the disciplinary authority intended to differ with the enquiry officer, it was incumbent upon him to assign specific reasons therefor and the disciplinary

55 (2006) 3 SCC 690.

authority could not thus change its mind and take different views at different times.

The management impugned the judgment of the high court before the Supreme Court. The Supreme Court observed that the enquiry officer was a fact-finding body and had no jurisdiction to recommend any punishment to be imposed on the respondent/workman by the disciplinary authority. The disciplinary authority although acted on the said recommendation at the first instance it was within its right to correct its mistake as the same was apparent on the face of the record. The disciplinary authority did not commit any illegality in issuing the second show cause notice, as the enquiry officer had no jurisdiction in that behalf.[56] Mistake, furthermore, may either be of law or fact. By reason of the mistake on the part of the enquiry officer, the respondent/workman could not have been inflicted with the minor penalty although he deserved a major penalty.

The court observed that the high court had proceeded on the basis that in the absence of the specific provision the second show cause notice was impermissible. The high court had failed to consider that there was no statutory interdict in this behalf. An administrative order can be recalled and a mistake can be rectified. It was not shown before the court that the disciplinary authority lacked inherent jurisdiction in relation thereto. The respondent/workman held an office of trust. He distributed seeds to the farmers and collected a huge amount from them. He not only defalcated a huge amount but also misappropriated some bags of seeds. It was not proper for the high court which exercises limited powers in disciplinary matters to have interfered with the quantum of punishment. The high court in exercise of judicial review can interfere with the quantum of punishment in a limited manner, if it was shockingly disproportionate. In such a case the high court is bound to record reasons for coming to such conclusion.

In *U.P. SRTC* v. *Suresh Pal*,[57] the court observed that the petitioner held the position of trust as a conductor in the employment of the corporation. If a person in that position starts misappropriating the money by not issuing a ticket and pocketing the money thereby causing loss to the corporation, then that is a serious misconduct. The court took serious note of the fact that if this kind of a misconduct was indulged in by a conductor in the very first year of his service and if such persons are allowed to be let off with light punishment, then that would send a wrong signal to the other persons similarly situated. Such situations should not be dealt with lightly. The courts do not substitute the punishment unless they are shockingly disproportionate. If the punishment is interfered or substituted lightly in exercise of its extraordinary jurisdiction then it would amount to abuse of the process of court. The court took serious note of the order of the tribunal as upheld by the single judge of the high court substituting the punishment of dismissal by punishment of one censure and

56 See *M. Ahammedkutty Haji* v. *Tehsildar*, (2005) 3 SCC 351.
57 (2006) 8 SCC 108.

stoppage of two increments with cumulative effect. The tribunal had ordered reinstatement of the workman without back wages but with continuity of service with cumulative effect subject to the aforesaid punishment. The Supreme Court held that a mere statement that the order of dismissal was disproportionate would not suffice to substitute dismissal by lighter punishment. The court observed that all state road transport corporations in the country had gone in red because of the misconduct of such kind of incumbents. In its opinion it was time that misconducts should be dealt with an iron hand and not leniently.

Being in possession of excess amount in violation of rules as 'misconduct':

In *Divisional Controller, N.E.K.R.T.C.* v. *H. Amaresh*,[58] the misappropriation of funds by the appellant employee, a conductor in the appellant corporation, was only Rs.360.95 paise. The possession of the said excess amount on the part of the respondent, a fact proved in the departmental enquiry as well as evidence led before the labour court, was itself a 'misconduct.' The workman did not have any explanation for having carried the said excess amount. The labour court set aside the order of dismissal and substituted it with reinstatement alongwith 75% back wages opining that the evidence of the passengers ought to have been taken. The high court upheld this finding but modified the relief insofar as the back wages was concerned and reduced it to 25%.

The Supreme Court in the special leave to appeal observed that there was total non-application of mind by the labour court. The labour court had directed reinstatement of the workman with 75% back wages despite holding him guilty of charge of pilferage levelled against him. The court agreed with the appellant that any dereliction of duty in this regard was highly detrimental to its financial well being and was against public interest. The court observed that the high court also failed to appreciate that proved acts of misconduct either of dishonesty or of gross negligence by bus conductors has been responsible for losses to the state corporations and, therefore, they ought not to be retained in service. There could be no misplaced sympathy with such conductors.[59] The court also observed that the labour court as well as the high court had miserably erred by not considering that the workman was in a drunken state which fact was not denied by him. The court held that order of reinstatement passed by the labour court and upheld by the high court was contrary to the law declared by the court in *B.S. Hullikatti*.[60] It has been held in catena of cases that loss of confidence was primary factor and not the amongst of money misappropriated. Sympathy and generosity cannot be a factor when an employee is found guilty of pilferage or of misappropriating the corporation's funds. There was nothing wrong in the corporation losing

58 (2006) 6 SCC 187.

59 See *Regional Manager, RSRTC* v. *Ghanshyam Sharma,* (2002) 10 SC 330; also see *Karnataka SRTC* v. *B.S. Hullikatti,* (2001) 2 SC 574.

confidence or faith in such an employee and awarding punishment of dismissal. It was wrong on the part of the labour court and high court in insisting on the evidence of the passengers which was not essential.

The court accordingly set aside the order of the labour court as well as the high court and restored the order of dismissal.

Causing wilful loss as 'misconduct'

In *South Indian Cashew Factories Workers' Union* v. *Kerala State Cashew Development Corpn. Ltd.*,[61] the appellant union had raised an industrial dispute on behalf of one of its members questioning the correctness of the order of reversion passed against the workman by the management. He was charge-sheeted with the misconduct of causing wilful loss to the corporation, habitual breach of rules, making false allegations against the superior officers and gross negligence of duty. A domestic enquiry was held against him, where the enquiry officer held that the charges were proved in the enquiry. After considering the findings of the enquiry officer and the seriousness of the charges levelled against the employee the management imposed the punishment of reverting him as a factory clerk, but protecting the salary he was drawing. According to the management, he was not dismissed from service by taking a lenient view, even though the misconducts proved in the enquiry were serious. The labour court held that the enquiry was properly held and there was no violation of principles of natural justice and the findings were not perverse but interfered with the punishment.

The Supreme Court observed that if the enquiry is fair and proper then in the absence of allegations of victimisation or unfair labour practice, the labour court has no power either to interfere with the findings of the enquiry officer or the punishment imposed by the employer in cases other than those covered under section 11-A. It is only in cases covered by section 11-A of the Act that ample powers have been given to the labour court/industrial tribunal to reappraise the evidence adduced in the enquiry and also sit in appeal over the decision of the employer in imposing punishment. The court held that since in the present case the punishment awarded to the workman being reversion, section 11-A was not applicable and, therefore, the principles laid down in *Indian Iron and Steel Co. Ltd.* v. *Workmen*,[62] were applicable and not those laid down in *Workmen* v. *Firestone Tyre and Rubber Co. of India (P) Ltd.*[63] The court held that interference could only be made with the punishment ordered by the management where the enquiry held was in violation of principles of natural justice or that there was an allegation of victimisation or malafide or unfair labour practice or that the punishment was completely disproportionate with the misconduct.

60 *Ibid.*
61 (2006) 5 SCC 201.
62 AIR 1958 SC 130.
63 (1973) 1 SCC 813.

Scope of power of high court to interfere with punishment

In *Amrit Vanaspati Co. Ltd.* v. *Khem Chand*,[64] the court reiterated the legal position that even if no enquiry is held by the employer or the enquiry is found to be defective, the tribunal, in order to satisfy itself about the legality or validity of the punishment order passed by the management, has to give an opportunity to the employer and the employee to adduce evidence before it. It is open to the employer to adduce evidence first time justifying his action, and it is open to the employee to adduce evidence *contra*. The court observed that a high court, while exercising powers under writ jurisdiction, can neither deal with the aspects whether the quantum of punishment meted out by the management to a worker for a particular misconduct was sufficient or not, nor can it interfere with the factual finding of the labour court which are based on appreciation of evidence before it.

In the present case, it may be stated that the charge sheet against the workman was that he had asked other employees to stop work and threatened to kill senior officers and also other co-workers willing to work by throwing them into the boiler. The high court had set aside the order of dismissal differing with the conclusion arrived at by the labour court that the charge was proved and had directed the management to pay the workman back wages to the extent of 75% of the wages till the date of his superannuation or till the date of the closing of the unit alongwith closure compensation and other admissible benefits. In the SLP against this order, the Supreme Court held that the high court had erred in interfering with the well-considered order passed by the labour court confirming the order of dismissal. However, keeping in view the fact that the workman had been dismissed from the service which order of dismissal has been set aside by the high court and having in the meantime attained the age of superannuation and having been without any employment and without any income whatsoever, the court directed the management to pay through a demand draft a sum of Rs.1,25,000/- to the employee with neither of the parties having any claim whatsoever against each other.

Scope of section 17-B: non-applicability even in case of professional/self employed

In *Kamala Nehru Memorial Hospital* v. *Vinod Kumar*,[65] the Supreme Court held that the entitlement of the workman under section 17-B of the Industrial Disputes Act was relatable to non-employment and non-receipt of adequate remuneration of the workman.

In the present case the management had adduced ample evidence to show that the respondent/workman was enrolled as an advocate within one year of his non-employment and was a busy practitioner with decent professional income. It had even given a list of large number of cases in which he had appeared. It was contended by the management before the Supreme Court

64 (2006) 6 SCC 325.
65 (2006) 1 SCC 498.

that, in the circumstances, the high court was not justified in granting him last drawn wages under section 17-B of the Act on the ground that "because of the compulsions of unemployment he has no option but to continue for a short period as a practicing advocate". The court held that there was no material on record to support such conclusion drawn by the high court which was clearly contrary to the material on record. The respondent/workman was not entitled to any entitlement under section 17-B of the Act which had been granted to him by the high court during the pendency of the writ petition impugning the award of the labour court which had ordered his reinstatement.

Unfair labour practice

In *Haryana State Agricultural Marketing Board* v. *Subhash Chand*,[66] the respondent was appointed on contractual basis as an arrival record clerk during paddy seasons. After termination of his service he raised an industrial dispute relating to his non-employment claiming that his termination was in violation of section 25G of the Act and the management has taken recourse to unfair labour policy which contention of the workman was upheld by the labour court as well as by the high court. The main question that came up for consideration before the Supreme Court was whether the management had taken recourse to unfair labour practices as defined in clauses (b) and (d) of item 5 to the Fifth Schedule appended to the Industrial Disputes Act, 1947.[67]

The court held that it was not a case where the workman was continuously appointed with artificial gap of one day only. Indisputably he has been reemployed after termination of his service on contract basis after long intervals and his case squarely fell under section 2(oo)(bb) of the Act and was not retrenchment and, therefore, the question of applicability of Chapter V-A would not arise. Coming to the question whether his termination was in violation of sections 25G and H, the court held that the appointment being seasonal and purely ad hoc, no case for violation of sections 25G and H was made out. Coming to the question of unfair labour policy the court held that no case was made out to show that the non-employment of the workman was not in good faith or was in the colourable exercise of the employer's right or that it was made for false reason. Coming to item 10 of the Fifth Schedule of

66 (2006) 2 SCC 794. Also see *Regional Manager, SBI* v. *Rakesh Kumar Tewari*, (2006) 1 SCC 530; here the court held that before an action can be termed as unfair labour practice it would be necessary for the labour court to come to a conclusion that the workmen were continued for years as casual, *badlis*, or temporary workmen with the object of depriving them of the status and privileges of permanent workmen. Further, artificial breaks in the service of such workmen would not allow the employer to avoid a charge of unfair labour practice.

67 Item 5 (b) and (d) of the Fifth Schedule are reproduced below:
5. To discharge or dismiss workmen -
.....
(b) not in good faith, but in the colourable exercise of the employer's rights;
.....
(d) for patently false reasons.

the Act the court held that the word 'status' and 'privilege' referred to in the said item must emanate from a statute.[67a] If legal right had been derived by the workman to continue in service in terms of the provisions of the Act under which he was governed, then only would question of depriving him of any 'status' or 'privilege' arise. He had only worked on his showing for 356 days while as according to the management he had worked only for 208 days which controversy had not been decided by the labour court. No provision was shown under the Industrial Disputes Act under which he was entitled to any 'status' or 'privilege'. Therefore, the court held that the Industrial Disputes Act had no application in the instant case. The findings of the labour court as well as the high court that the disengagement of the workman was an unfair labour practice was accordingly set aside by the court.

Regularization

The decision of the apex court in *Secretary, State of Karnataka* v. *Umadevi (3)*,[68] has become a subject matter of great debate amongst legal scholars. It has been criticized being a complete 'U' turn from the position earlier taken by the court in favour of regularisation of the services of the daily wagers, casual workers, ad hoc workers employed in the central, state governments and its instrumentalities requiring them to frame schemes to regularize them on completion of certain years of service as casual/daily wagers/ad hoc workers. It has been termed as a retrograde step and an unusual decision where the court has overruled its earlier judgments that run inconsistent with the ratio of this judgment even without referring to them.

For appreciating whether such a criticism against this judgment is justified, it is necessary for us to go to the background in which this judgment was handed down and also consider the legal issues involved in this case which aspects *ex facie* seem to have been almost overlooked by the critiques of this judgment. It also seems that the critiques have also not appreciated the basic concepts underlying the service jurisprudence in this country.

The starting point is that the critiques of the court in *Umadevi* have not at all referred to an earlier judgment of the court in *Union Public Service Commission* v. *Girish Jayanti Lal Vaghela*,[69] where a division bench of the court had drawn a clear distinction between private employment and public employment. The court in *Girish Jayanti Lal Vaghele* clearly stated that private employer in India enjoys almost complete freedom to select and appoint anyone he likes and there is no statutory provision mandating advertising of the post or making of selection strictly on merit, even where some kind of competitive examination is held. A private employer has absolute

67a Item 10 of the Fifth Schedule describes it as an unfair labour practice "to employ workmen 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 workmen."

68 (2006) 4 SCC 1.

69 (2006) 2 SCC 482.

liberty to appoint a less meritorious person. Only those private employees who are covered by the definition of 'workman' under the Industrial Disputes Act, 1947 or any other such allied enactment enjoy protection against arbitrary or mala fide dismissals and are governed by the provisions of said legislation. In a private establishment normally employee does not enjoy any statutory protection regarding his tenure of service. On the contrary, a regular government servant enjoys security of tenure because of the constitutional provisions like articles 16, 309 and 311, unlike a private employee, though in both cases there is, undoubtedly, an employer-employee relationship. By virtue of such constitutional provisions employment under the government is a matter of 'status' and not a 'contract' even though the acquisition of such status may be preceded by a contract, namely, an offer of appointment made by the government and the same being accepted by the employee. Rights and obligations between the government and its employee are not determined by the contract between the two parties but by the statutory rules framed by the government in exercise of the powers conferred by article 309 of the Constitution and the service rules made which can be unilaterally altered by it. There is, therefore, a substantial difference between an employee working in a private establishment and a government servant on account of the aforesaid provisions in the Indian Constitution. It is in this context that the judgment in *Umadevi* has to be understood.

Our constitutional scheme envisages employment by the government and its instrumentalities on the basis of a procedure established in that behalf. Although, equality of opportunity is the hallmark of our Constitution but the Constitution of India provides also for affirmative action to ensure that unequals are not treated as equals. Thus, any public employment has to be in terms of the constitutional scheme which has to be on the basis of equal opportunity subject to protective discrimination or affirmative action strictly in accordance with the provisions of the Constitution. For regular, long-term and permanent appointments regular process of recruitment or appointment has to be resorted to. But for short term or temporary appointments or engaging workers on daily wage basis a sovereign government, considering the economic situation in the country which may not permit recruitments on regular basis but at the same time there being urgency to execute various works or projects which brooks no delay, is not precluded from making such urgent or short term appointments. Going by a law newly enacted, the National Rural Employment Guarantee Act, 2005, the object of which is to give employment to at least one member of the family for 100 days in a year, on paying wages as fixed under the Act itself, shows that such short term appointments are permissible. But regular appointment must be the rule. However, it has been noticed that sometimes the process of regular appointment is not adhered to and the constitutional scheme of public employment is bypassed. The union, the states, their departments and their instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted. Not only this

they have permitted these irregular appointees or those appointed on contract or on daily wages to continue indefinitely. They in turn, approach the courts, seeking directions, to make them permanent in their posts and to prevent regular recruitment to the posts concerned raising pleas of equitable considerations. The courts in turn have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which the court calls as "litigious employment", has arisen having serious consequences on the constitutional scheme. While granting such directions, the courts had overlooked various conceptual aspects of service jurisprudence which have been brought to the fore in this case.

At the very outset, the court in *Umadevi* felt it was necessary to bring to focus the conceptual aspects of 'regularisation' and conferment of 'permanence' and the distinction between them in service jurisprudence. The court made it clear that it was a misconception to consider that 'regularisation' meant 'permanence.' The words 'regular' or 'regularisation' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularity and are meant to cure only such defects as are attributable to methodology followed in making appointments. Only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process can be regularized and that alone can be regularized. When rules framed under article 309 of the Constitution are enforced, no regularisation is permissible in exercise of the executive power of the government under article 162 of the Constitution in contravention of the rules. Thus, there is a basic distinction in the concepts of 'regularisation' and 'permanence'; while the former provides rectifying irregularity in the appointment and not the illegality and the latter conveys the nature of the tenure of appointments. Granting permanence of employment is a totally different concept and cannot be equated with regularisation. It is this distinction which has to be appreciated while dealing with the analysis of the judgment in *Umadevi*.

Referring to its earlier judgments,[70] the court observed that it is settled legal position that if the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, the appointment is *per se* illegal and illegality cannot be regularized. Regularisation or ratification is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. The court held that keeping the constitutional scheme of

70 *State of Mysore* v. *S.V. Narayanappa*, AIR 1967 SC 1071; *R.N. Nanjundappa* v. *T. Thimmiah*, (1972) 1 SCC 409; *B.N. Nagarajan* v. *State of Karnataka*, (1979) 4 SCC 507.

public employment in this country in view, the executive or for that matter the court, in appropriate cases, would have only the right to regularize appointment made after following the due procedure, even though a non-fundamental element of that process of procedure has not been followed. The right of the executive and that of the court would not extend to giving a direction that an appointment made in clear violation of the constitutional scheme and the statutory rules made in that behalf, be treated as permanent. Such an appointment cannot be directed to be treated as permanent. The court was of the opinion that earlier in *Daily Rated Casual Labour*,[71] the court, without keeping the above distinction in mind, was swayed to direct the state government to frame a scheme of absorption of daily rated casual labour continuously working in the posts and telegraph departments for more than one year relying on the concept of socialistic republic reading therein such an implied obligation on the state. The court felt that while it might be one thing to direct payment of equal wage to regular and daily wage staff doing the identical work but it would be quite a different thing to say that a socialist republic and its executive is bound to give permanence to all those who are employed as casual or temporary hands and that too without a process of selection or without following the mandate of the Constitution and the laws made thereunder concerning public employment. The court observed that economic and financial implications of any public employment are relevant factors and so also the viability of the department or viability of a project is of equal concern for the state. Can the court impose on a state a financial burden of this nature by insisting on regularisation or permanence in employment, especially when those employed temporarily are not needed or permanently or regularly? According to it, the court ought not to impose a financial burden on the states by such directions which in turn may become counterproductive.

The court also did not approve the judgment in *Dharward District PWD*[72] where the court had stated that it should individualise justice to suit a given situation. The court did not accept this view as it felt that the Supreme Court being the constitutional and apex court should render justice according to law and lay down the law not in an individual case but as the law for the country. It felt that consistency was a virtue and it was the duty of the court to follow consistency in its approach and not to decide cases without reference to the legal principles already settled. Passing orders not consistent with its own decisions would have the effect of not only sending confusing signals but also tend to usher in arbitrariness. The court in *Umadevi* deprecated such exercise of powers by the high courts under article 226 of the Constitution. The court observed that whether such directions were intended to be exercised under article 226 of the Constitution which had the effect of defeating the

7 1 *Daily Rated Casual Labour* v. *Union of India*, (1988) 1 SCC 122.

7 2 *Dharward District PWD Literate Daily Wage Employees Assn.* v. *State of Karnataka*, (1990) 2 SCC 396.

concept of social justice and equal opportunity for all needed to be seriously pondered over. According to the court the time had come when it should be clearly stated that courts should desist from issuing orders preventing regular selection or recruitment at the instances of such persons. Those who have not secured regular appointment as per the procedure established should not be allowed continuance in the positions held by them by virtue of the directions of the court. The wide powers given to the high courts under article 226 of the Constitution were not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of the public employment. The court's role as a sentinel and as the guardian of equal rights protection could not be forgotten. The court observed that the directions which could not be said to be consistent with the constitutional scheme of public employment were tried to be justified on the basis of equitable considerations or individualization of justice.

The court stated that the further question that arose was to consider equality to whom? Was it equality for the handful of people who had approached the court with the claim or equality for the teeming millions of this country seeking employment and fair opportunity for competing for public employment? The court opined that one needed to consider both the sides of the coin and not only one side of the coin i.e. those who approached the court claiming regularisation/permanence and those teeming millions who seek right to be considered for public employment in accordance with the rule of law providing equal opportunity to all. It was this conflict which was referred to the constitution bench for resolution.

The court in *Umadevi* reiterated that the power of the state as an employer is more limited than of a private employer inasmuch as it is subjected to constitutional limitation and cannot be exercised arbitrarily. Article 309 of the Constitution gives the government the power to frame rules for the purposes of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of union or any of the states. That article contemplates the drawing up of a procedure and rules to regulate recruitment and service conditions of the appointees appointed to the public posts. It is well acknowledged that because of this the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment etc. If the rules have been made under article 309 of the Constitution, then the government can make appointments only in accordance with the rules as the state is meant to be a model employer. It is settled legal position that no government order, notification or circular can be substituted for statutory rules framed under the authority of law. This is because, following any other course would deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. The Employment Exchanges (Compulsory Notification of Vacancies) Act 1959 was enacted to ensure equal opportunity for employment seekers. The Act places an obligation on employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies based on a procedure.

However, the employer is not obliged to employ only those persons who have been sponsored by employment exchanges. It can also resort to inviting applications by public advertisement of vacancies in national dailies or otherwise.

It is in this background in which the approach of the court in *Umadevi* has to be appreciated. And the legal issue, therefore, which becomes material is whether casual or daily wager or ad hoc employees can be regularized in service without considering whether they fulfil eligibility conditions under the recruitment rules and following the legally prescribed procedure for appointment in the central or state governments or their instrumentalities purely on equitable considerations that the workers had put in number of years as casual or daily wage or ad hoc workers.

This issue arose in *Umadevi* in respect of temporarily engaged daily wage workers in the commercial taxes department in some of the districts of the State of Karnataka who claimed that they worked in the department based on such engagement for more than ten years and hence they were entitled to be made permanent employees of the department entitled to all the benefits of the regular employees. Though the Director of Commercial Taxes recommended that they be absorbed, the government did not accede to that recommendation. Thereupon they approached the administrative tribunal with their claim. Their claim was rejected by the administrative tribunal but it ordered that they are entitled to wages equal to the salary and allowances that were being paid to the regular employees of their cadre in government services with effect from the dates from which they were respectively appointed. The high court also directed the state to consider their cases for regularisation within a period of four months from the date of the receipt of that order. The high court seems to have proceeded on the basis of the earlier judgment of the Supreme Court in *Dharwad District PWD Literate Daily Wage Employees Assn.* v. *State of Karnataka*.[73] Another development that simultaneously arose was that the government directed cancellation of appointments of all casual workers/daily wage workers made after 01.07.1984. Hence this order of the state cancelling such appointments was impugned by the association of daily wagers/casual workers and individual members in a writ petition before the Karnataka High Court. A single judge of the high court directed the workers to make representation to the state government which was directed to consider the cases of claimants for absorption and regularisation in accordance with the earlier judgments of the Supreme Court in similar matters. In the writ appeal by the state government a division bench of the high court held that the employees were not entitled to the benefits of the scheme framed by the Supreme Court in *Dharwad District PWD* case.

Feeling aggrieved, the members of the association filed special leave petitions in the Supreme Court. When these matters came up before a bench of two judges, they referred the cases to a bench of three judges in view of

73 *Ibid*.

conflicting decisions by three-judge benches of the court and by the two-judge benches. The three-judge bench felt that the matter required consideration by a constitution bench.

The constitution bench of the court held that adherence to the rule of equality in public employment is a basic feature of our Constitution and since rule of law is the core of our Constitution, court should ensure that no order should be passed by a court in violation of article 14 or pass orders overlooking the need to comply with the requirements of articles 14 and 16 of the Constitution. It was not open to the court to prevent regular recruitment at the instance of the temporary employees whose period of employment has come to an end or of ad-hoc employees who by the very nature of their appointment do not acquire any right. The constituion bench of the court observed that the high courts acting under article 226 of the Constitution, should not ordinarily issue directions for absorption, or regularisation or permanent continuance unless the recruitment itself was made regularly in terms of the constitutional scheme. Merely because an employee has continued under cover of an order of the court he would not be entitled to any right to be absorbed or made permanent in the service. The high courts would not be justified in issuing interim directions as any interim relief would have the effect of stalling the regular procedure for selection or impose on the state the burden of paying an employee who is really not required. If ultimately he succeeds, the court should mould the relief in such a manner that ultimately no prejudice will be caused to him. The court may be justified in giving direction to follow 'equal pay for equal work' but it does not mean that the court could direct that appointments made without following the due process established by law, be deemed permanent or issue directions to treat them as permanent. Doing so would be negation of the principle of equality of opportunity. It should not and cannot grant a relief which would amount to perpetuating an illegality. A person accepts casual or daily rated employment with open eyes and is aware of the nature of his employment. The court observed that otherwise it would enable authorities jettisoning of the procedure established by law for public employment. Appointment so made would fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in article 14 of the Constitution.

The court then dealt with the argument in favour of regularisation based on the doctrine of legitimate expectation. It held that invocation of the doctrine of legitimate expectation couldn't enable the employees to claim that they must be made permanent or they must be regularized in the service though they had not been selected in terms of the rules for appointment. The argument of legitimate expectation, if accepted, would run counter to the constitutional mandate. The state holds out no promise while engaging persons either to continue them where they are or to make them permanent. The state cannot constitutionally make such a promise. This theory cannot be invoked to seek a positive relief of being made permanent in the post. The court held that there is no violation of articles 14 and 16 of the Constitution if a casual or daily rated worker is not regularized or made permanent. It was argued before the court

that there being utter poverty, unemployment on large scale and also there being no equality of bargaining power, the action of the state in not making the employees permanent would be violative of article 21 of the Constitution. The court held that in the guise of upholding rights under article 21 of the Constitution, a set of persons could not be preferred over a vast majority of people waiting for an opportunity to compete for state employment. The acceptance of the arguments of legitimate expectation would negate the rights of the vast majority conferred on them by article 21 of the Constitution. The court also did not agree that article 23 of the Constitution will be breached if the employment on daily wages is resorted to. The court held that daily wagers cannot be equated with forced labour as they are fully aware about the perils of short term appointments more so when such appointments have been accepted voluntarily. The court did not accept the argument that the right to life protected by article 21 of the Constitution would include the right to employment at this juncture. The law being dynamic and our Constitution being a living document, such a right may be accepted at some future point of time but not at present. The National Rural Guarantee Act, 2005 may perhaps be a beginning. The acceptance of such a plea at the instance of the employees seeking regularisation would lead to a consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it were read as part of right to life, would stand denuded by giving preference to those who have got in casually or through the backdoor. By recognizing that an appointment to a post in government service or in the service of its instrumentalities can only be by way of proper selection in the manner recognised by the relevant legislation framed under the constitutional provisions the courts will be giving effect to the obligation cast on the state under article 39(a) of the Constitution to ensure that all citizens equally have the right to adequate means of livelihood. In the name of individualizing justice, the courts cannot shut their eyes to the constitutional scheme and the right of the numerous against the few who have got in casually or come through the backdoor. The directive principles of state policy have also to be reconciled with the rights available to the citizens under Part III of the Constitution and, if so reconciled, the obligation of the state is to one and all and not to a particular group of citizens. The court referred to an earlier constitution bench judgment in *Rai Shivendra Bahadur (Dr.)* v. *Governing Body of the Nalanda College*,[74] to bring home the legal position that a court exercising extraordinary writ jurisdiction cannot direct the government to make an employee permanent where he cannot show that he has an enforceable legal right to be permanently employed or that the state has a legal duty to make them permanent.

The court, however, directed that the question of regularisation of services of duly qualified persons in duly sanctioned post employed on casual or daily rated basis or on *ad-hoc* basis, who have continued for ten years or

74 AIR 1962 SC 1210.

more but without the intervention of orders of the courts or of tribunals, be considered on merits in the light of the principles settled by the court in the earlier referred cases.[75] The court directed the Union of India, the state governments and their instrumentalities to take steps to regularize, as a one time measure, the services of such irregularly appointed persons in duly sanctioned posts but not under the cover of orders of the courts or tribunals and further directed them to ensure that regular recruitments were undertaken to fill those vacant sanctioned posts that required to be filled, in cases where temporary employees or daily wagers were not being employed. The process was required to be set in motion within six months from the date of the judgment. The court clarified that regularisation, if already made, but not sub-judice, need not to be reopened based on this judgment.

The court made it clear that there should be no further bypassing the constitutional requirement and regularizing or making permanent those not duly appointed as per the constitutional scheme. The court made it further clear that those decisions which run counter to the principles settled in this decision or in which directions run counter to what was decided in the present case would stand denuded of their status as precedents.

III. TRADE UNIONS ACT

Maintainability of a writ petition by an unregistered trade union

In *B. Srinivasa Reddy* v. *Karnataka Urban Water Supply & Drainage Board Employees' Assn.*,[76] the employee's association had challenged the appointment of the appellant as managing director in a writ petition before the High Court of Karnataka. The high court allowed the writ petition declaring that he was not entitled to hold the post of the managing director of the board which decision was impugned before the Supreme Court. Some significant questions of law arose for consideration of the court, *inter alia*, were as to whether the writ petition was maintainable at the instance of a unregistered trade union and what was the *locus standi* of the trade union of the employees in challenging the appointment of the managing director of the board. The court referred to the provisions of the Industrial Disputes Act having a bearing upon the representation of the workers by their union. Under section 2(qq) of the Industrial Disputes Act 'trade union' has been defined as 'trade union' registered under the Trade Unions Act, 1926. Section 36 of the Industrial Disputes Act provides that a workman who is a party to a dispute shall be entitled to be represented by any member of the executive or other office bearers of a registered trade union of which he is a member or by any member of the executive or other office bearer of a federation of a trade union to which the registered trade union of such workman is as a member affiliated. Thus, under the Industrial Disputes Act right of representation is given only to the registered trade unions. In the present case, the petitioner union of the

75 *Supra* notes 70 and 71.
76 AIR 2006 SC 3106.

workers had in the writ petition made a false averment that it was a registered trade union. The court held that the false averment made by the union itself was a good ground to dismiss the writ petition. The said averment was also reflected in the order passed by the high court. The fact of the matter was that the registration of the union under the Trade Unions Act had been cancelled earlier to the filing of the writ petition and the trade union had ceased to be a registered and recognised trade union at the time of the filing of the writ petition. The fact of the cancellation of the registration of the union came to the knowledge of the Board long after the disposal of the earlier writ petition where the court had given a finding that the union had *locus standi* to challenge the appointment of the appellant to the post of the managing director solely on the ground that it was a registered trade union.

The Supreme Court observed that high court had gravely erred in refusing to examine the question of *locus standi* on the ground that it was decided in the earlier writ petition which operated as *res judicata* and that the petitioners even otherwise had *locus standi*. The court referred to part III of the Trade Unions Act which sets out rights and liabilities of the registered trade union under the said enactment. An unregistered trade union or a trade union whose registration has been cancelled has no rights whatsoever. Even the rights available under the Industrial Disputes Act have been limited only to those trade unions which are registered under the Trade Unions Act, 1926 by insertion of the clause 2(qq) in the Industrial Disputes Act w.e.f. 21.08.1984 defining a 'trade union' to mean a 'trade union' registered under the Trade Unions Act. The Supreme Court observed that the high court had miserably failed and gravely erred in holding that the respondent union has *locus standi* to question the appointment of the appellant as managing director in the light of the change of law that has been brought about by insertion of section 2(qq) of the Industrial Disputes Act by the Amendment Act 46 of 1982 and having regard to the provisions of chapter III of the Trade Unions Act, 1926. The court held that it has been held in a number of earlier judgments of the court that the union has *locus standi* if the facts and circumstances of the case so justify but has at the same time cautioned that if a citizen is no more than a wayfarer or officious intervener without any interest or concern that what belongs to the anyone of the 660 million people of this country, the doors of the court will not be ajar for him.[77]

The court observed that in the instant case the employees association had approached the high court with unclean hands. The employees who approached the court for such relief should have come with frank and full discloser of facts. If they failed to do so and suppressed material facts, their petition was liable to be dismissed. In support, the court referred to its earlier judgment in *Narayan Das* v. *Government of Madhya Pradesh*,[78] wherein it

77 See *Fertilizer Corporation Kamgar Union Registered, Sindri* v. *Union of India* (1981) 1 SCC 568; also see *People's Union for Civil Liberties* v. *Union of India*, (1982) 3 SCC 235.

78 AIR 1974 SC 1252.

was held that if a wrong and misleading statement is deliberately or wilfully made by a party to a litigation with a view to obtain favourable order, it would prejudice or interfere with the due course of judicial proceedings and thus amount to contempt of court.

In view of the above, the court held that it was thus crystal clear that the employee's union had approached the court by suppressing material facts and had snatched an order on the basis of wrong averments when the employee's union had no status to maintain the writ petition on the date relevant in question. Courts cannot grant any relief to a person who comes to the court with unclean hands and with *mala fide* intention/motive. Therefore, the writ petition filed by the employee's association was liable to be thrown out on this single factor. In the opinion of the court it was an eminently fit case for award of exemplary costs but considering the financial aspect of the employees and taking a lenient view of the matter, the court did not order any cost.

IV CONCLUSION

Although the decision of the court in *Bangalore Water Supply* is all set for reconsideration by a larger bench, it is submitted that it would be better if the central government rises from its slumber and comes out with a comprehensive legislation on industrial relations on the lines recommended by the two National Commissions on Labour. Need for a good, structured and object-oriented labour relations law is imperative if rapid economic growth tempered with social justice is to be achieved. The need of the day is also to have a uniform set of definitions in the industrial relations law so that the Supreme Court is spared of the trouble of once again hearing marathon arguments on what 'industry' should or should not include and from writing voluminous judgments stating which of the activities fall within the definition of 'industry.' The said well-structured law should also take care of the areas like 'retrenchment' and 'disciplinary matters' so that the law in these areas is made crystal clear leaving no scope for further inconsistencies and variations in the judicial interpretations. The Supreme Court of late has been adopting, generally speaking, a pedantic approach with respect to definition of 'retrenchment', 'workman' and 'the scope of power of the industrial adjudicator' while dealing with disciplinary matters.

The Supreme Court in *Umadevi* has certainly brought to the fore issues that need to be the subject matter of a healthy academic debate. The earlier approach of the court needs to be examined in the light of the issues addressed in this judgment, dispassionately. A fresh debate on the questions raised and not denunciation of *Umadevi* is called for. The hard reality is that employment of daily rated or *badli* or *ad hoc* workmen in the lower rungs of public employment has over the time been made not primarily because of the need for urgent hands but to facilitate backdoor entry of favoured ones in the public employment.