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LABOUR LAW — I
(LABOUR MANAGEMENT RELATIONS)

*Bushan Tilak Kaul**

I INTRODUCTION

IN THE year 2007, a number of cases on various important areas under the Industrial Disputes Act, 1947 which have a direct bearing on industrial relations have been decided by the apex court covering, *inter alia*, conceptual areas of 'retrenchment', 'workman', issues relating to powers of the government to make reference and allied matters, disciplinary proceedings, jurisdiction of the industrial adjudicator in disciplinary matters and new approach of the court towards reliefs in 'retrenchment' and disciplinary matters and issues relating to regularisation. No significant decision has been reported either under the Industrial Employment Standing Orders Act, 1946 or the Trade Unions Act, 1926.

II INDUSTRIAL DISPUTES ACT, 1947

Retrenchment

Section 2(oo)(bb) construed liberally

The decision of the apex court in *National Small Industries Corp. Ltd.* v. *V. Lakshminarayanan*[1] is yet another instance of the court having liberally construed section 2(oo)(bb) to exclude termination of the service of the worker from the definition of 'retrenchment', even when the case at hand appears to be a clear case of camouflage and *mala fides* on the part of the management to evade application of section 25F of the ID Act.

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1 (2007) 1 SCC 214. This case essentially was on the issue as to whether the respondent, an 'apprentice trainee', was a 'workman' under section 2(s) of the ID Act and whether termination of his service amounted to 'retrenchment' under the Act. The court observed that in view of section 18 of the Apprentices Act, 1961 he was not a workman. The court, however, observed that in any case, even if it is accepted that he was a 'workman' under the ID Act, his termination would not amount to 'retrenchment' in view of exclusion in sub-clause (bb) of section 2(oo) in the definition of 'retrenchment'. It is in this context that a critical evaluation of this case becomes important. Also see *infra* note 22.

Similar approach of the court is visible in *Punjab SEB* v. *Sudesh Kumar Puri*.[2] Here, the workman was engaged as meter reader on contract basis. After disengagement he made a claim that he had worked for a considerably long continuous period and his services were terminated by the board in violation of section 25F of the Act which contention was upheld by the labour court who directed his reinstatement but restricted the back wages to 25%. The management impugned the award in the high court. The high court held that the contract by the board was a camouflage with a view to avoid application of the provisions of the Act. In the special leave to appeal by the management, the Supreme Court held that the reference by the high court to the decision in *Steel Authority*[3] had no relevance to the case at hand as that judgment related to a case of contract labour. The present dispute was not a case of that nature. On the contrary, there was an agreement governing engagement and the payment was made per meter reading basis at fixed rate and no regular employment was ever offered to any of the workman. According to the court, the material on record clearly established that the engagement of the workman was for specific period and conditional. Further, it appeared from the records that on the appointment of regular meter readers, the engagement had been dispensed with. Since the engagement provided for disengagement in the event of appointment of regular meter readers, the case was covered by section 2(oo) (bb) and did not attract provisions of section 25-F of the Act. The court, however, made it clear that this judgment should not be construed as the court having expressed any opinion on such subsequent contractual engagements.

It is submitted that the court ought to have appreciated that there were admittedly regular vacancies of meter readers and the claim of the workmen was not one for regularisation or appointment against a regular vacancy but for non-compliance of section 25-F of the Act. The said provision is applicable in a case where a vacancy exists but engagement is made for indefinite period or till the regular incumbent on regular vacancy is appointed and such cases cannot be held to be intended to be excluded from the definition of 'retrenchment' under section 2(oo) (bb) by treating such engagements as either purely contractual or for a specified period of time.

Average pay in section 2(aaa) explained

Retrenchment compensation of 15 days average pay for every year of continuous service has to be determined strictly in terms of the definition of 'average pay' given in section 2(aaa) of the Act and not on the basis of hypothetical calculations. The Supreme Court observed that the language used in section 2(aaa) being absolutely plain and clear, there was no difficulty in giving effect to it.[4] The 'average pay' in accordance with section

2 (2007) 2 SCC 428.
3 *Steel Authority of India Ltd.* v. *National Union Waterfront Workers*, (2001) 7 SCC 1.
4 *Guru Jambheshwar University* v. *Dharam Pal*, (2007) 2 SCC 265.

2(aaa)(i) would come in case of monthly paid workman to average of the wages payable in the three completed calendar months. This legal position was laid down by the court in the following factual matrix:

The respondent was being paid wages amounting to Rs.1642/- per month in the immediate three preceding months before his retrenchment. The respondent having worked for two years and one month was entitled to 30 days of average pay in order to comply with the requirement of section 25-F of the ID Act. The employer had given the employee concerned a cheque of Rs.1642/- at the time of his retrenchment to make full compliance of section 25-F (b) of the Act. The Supreme Court held that the labour court as well as the high court had erred in law in accepting the argument that the monthly pay of Rs.1642/- should have been divided by 26 and not by 30 and the quotient so arrived at should have been multiplied by 30 i.e. 15x2 as he has worked for two years and one month. The court held that one day's average pay of the workman worked out was not correct and was not in accordance with the definition of average pay in terms of section 2(aaa). The average pay in accordance with section 2(aaa)(i) would come to Rs.1642/- and the retrenchment compensation paid by the employer was in strict compliance with the requirement of section 25-F (b) of the Act.

Service at two units of the same employer computable together for continuous service for purpose of section 25F only in case of functional integrity and not otherwise

In *Haryana Urban Development Authority* v. *Om Pal*[5] the respondent was appointed as a daily wager. He worked for a period of 140 days in the appellant's sub division 2 at Panipat and thereafter at the appellant's sub-division 3 for a period of 90 days. Subsequently, his services were terminated. His main case before the industrial tribunal was that the services rendered by him in both the sub-divisions should have been counted for the purpose of section 25F read with section 25B of the ID Act and non-compliance with section 25F entitled him to reinstatement and continuity of service with full back wages. The labour court upheld his contentions and granted the relief prayed for. The writ petition impugning the said award was dismissed by the high court.

In the special leave to appeal by the management, the Supreme Court observed that it was not disputed before it that the two sub-divisions constituted two different establishments though they were controlled by the same authority but only because there was only one controlling authority it could not mean that the establishments were not separate. The respondent had not produced the offers of appointment before the industrial tribunal. If offers of appointment had been issued in his favour by the two sub-divisions separately, the same *ipso facto* would lead to the conclusion that they were separate and distinct. If his appointment was only on the basis of entry in the

5 (2007) 5 SCC 742.

muster roll(s), the designation of the authority that was authorized to appoint him as a daily wager would be the determinative factor. It was not his case that he was appointed in both the establishments by the same authority. The industrial tribunal unfortunately had not gone into the said question at all. The court held that once the two establishments are held to be separate and distinct having different cadre strength of workmen, if any, the period during which the workman was working in one establishment would not enure to his benefit when he was recruited separately in another establishment, particularly when he was not transferred from one sub-division to another. In the present case he was appointed at both places on daily wages. The court heavily relied upon its earlier decision in *Union of India* v. *Jummasha Diwan*[6] where it was held that when a casual employee was employed in different establishments under the same employer having different administrative setups, different requirements in different projects, the concept of continuous service could not be applied. Further, the court held that it is also now well settled that despite a wide discretionary power conferred upon the industrial tribunals/labour courts under section 11A of the ID Act, the relief of reinstatement with full back wages should not be granted automatically only because it would be lawful to do so. Grant of relief would depend on the fact situation obtaining in each case. It would depend upon several factors, one of which would be as to whether the recruitment was effected in terms of the statutory provisions operating in the field, if any. The court held that the workman had worked for a very short period in the year 1994-95. The tribunal had committed an illegality, while passing an award in the year 2003, in directing the reinstatement of the respondent with full back wages. The court observed that although it was of the opinion that the respondent was not entitled to any relief, it directed the appellant to pay him a sum of Rs.25,000 as relief.

Similar approach of the court is also discernible in *District Red Cross Society* v. *Babita Arora*.[7] Here, the Supreme Court held that the industrial tribunal as well as the high court had failed to appreciate that maternity hospital which was not receiving any grant from the government and was run entirely on charitable basis from donations received from public was functioning as a distinct entity and had to be closed down due to financial stringency. The other three units referred to by the respondent were receiving grants from the government and were functioning as separate entities. The mere fact that they had not been closed down, could not lead to the inference that the termination of services of the respondent was by way of retrenchment which was illegal on account of non-compliance of provisions of section 25-F. They had not appreciated that on closure, the termination of the service of the workmen automatically takes place. Termination of service of all workmen working therein on closure is different from a retrenchment

6 (2006) 8 SCC 544.
7 (2007) 7 SCC 366.

simpliciter under section 25F. The court made it clear that the law as it stands, it is not necessary that a closure should result in closing of the entire establishment of an employer. If a unit or part of an undertaking which has no functional integrity with other units is closed, it would amount to closure of that unit within the meaning of section 25-FFF read with section 2(cc) of the Act. Where the provisions of section 25-FFF of the Act are attracted, the workmen are only entitled to compensation as provided in section 25-FFF which has to be calculated in accordance with section 25-F. The tribunal and also the high court clearly erred in holding that as other units of the appellant were functioning, the termination of service of the respondent amounted to retrenchment. The court held that the respondent would be entitled to compensation only in accordance with section 25-FFF of the Act.

Retrenchment and seasonal employments

In *Ganga Kisan Sahkari Chini Mills Ltd.* v. *Jai Veer Singh*[8] the workmen claimed that they were permanent appointees and the orders of termination were contrary to the standing orders. The case of the management was that the factory in which they were employed was a seasonal factory which commenced its trial season in the year 1984-85 and certain persons were taken as casual employees on daily wage basis and they did not have any lien on any permanent or seasonal post as the factory was to commence production after the trial season was over and on establishment of the sugar factory. The workers were engaged as a stopgap arrangement only for the trial season and thereafter applications from the public at large were invited and in which process the respondents were not selected. The labour court directed reinstatement of the workmen with back wages and retaining allowance. The findings of the labour court were affirmed by the high court.

The Supreme Court set aside the award and also the order of the high court holding that the high court had wrongly held that it was for the employer to show the nature of appointment. The court held that the workmen belonged to the seasonal category and even the high court had come to the finding that they were not permanent employees as they had failed to produce their appointment orders. Yet, it came to the abrupt conclusion that the burden of proof lay on the employer to establish the nature of the appointment. According to the court the said conclusion reached by the high court was clearly contrary to law. It also found that the award of the labour court was legally unsustainable, as it had itself observed that the workmen had been appointed on seasonal post and had yet ordered their reinstatement. The court held in the circumstances that their cases did not fall within the definition of 'retrenchment' being workmen who belonged to seasonal category and, therefore, the question of reinstatement did not arise.

8 (2007) 7 SCC 748.

Continuous service for retrenchment compensation: central and state position at variance

The decision of the court in *Sriram Industrial Enterprises Ltd.* v. *Mahak Singh*[9] clearly brings out two important aspects having a direct bearing upon application of retrenchment law. Firstly, it highlights the variance in the approach of central legislation and the UP Industrial Disputes Act, 1947 in defining 'continuous service' for the purposes of qualifying for retrenchment compensation before the termination of service of any employee. The state law position is more preferable to the central law position and must also be adopted under the central law in the better interests of workers to enable them to have wherewithal between 'job lost' and 'job found.' It completely waters down the earlier approach[10] of the court that non-production of documents by the management on the order of the labour court or tribunal cannot lead to an adverse inference against the management. This case shows that such a direction cannot be allowed to be taken lightly by the management. The management has to satisfy the tribunal on the basis of cogent evidence/reasons why documents could not be produced and why an inference against the management should not be drawn. These two important aspects have in detail been discussed in this case. The factual matrix of the case were as under:

The case of the workmen before the industrial tribunal was that they had been appointed by the petitioner between the years 1987 to 1991 and they had worked continuously from the date of their appointments till they were retrenched in the years 1994-1995, respectively. Although they had worked continuously from the date of their appointment for more than 240 days in a calendar year, they had been illegally retrenched from the services in violation of the provisions of section 6 of the U.P. Industrial Disputes Act, 1947 (same as section 25F of ID Act). They accordingly claimed reinstatement in service with all back wages. In the reference relating to their termination before the labour court, the workmen produced bonus slips, search slips, deduction of provident fund slips and attendance cards for various months and other documents available with them. On the basis of these documents, they also sought direction from the tribunal that the management be required to produce certain documents which were in their custody including the attendance register, payment of bonus record and various other documents relating to engagement of the respondents as workmen under it. Admittedly, in pursuance of the orders of the tribunal to produce the entire record as required by the workmen, only the extract of attendance record of the last 12 calendar months of the workmen immediately preceding their alleged date of termination had been produced from which it was evident that none of the workmen had worked for more

9 (2007) 4 SCC 94.

10 *Range Forest Officer* v. *S.T. Hadimani*, (2002) 3 SCC 25; *Municipal Corporation Faridabad* v. *Sri Niwas*, (2004) 8 SCC 195.

than 240 days during the said period. The tribunal noted that the management failed to assign any cogent reason for not producing the attendance register of the previous years. It allowed the workmen to lead secondary evidence in support of their case. The tribunal did not lay any importance to the non-production of the documents asked for on the ground that the petitioner did not keep such records relating to the temporary hands. Relying only on the documents that had been produced before it, it held that the workmen had not put in 240 days of service in a calendar year preceding the termination of their services and, therefore, the provision of retrenchment compensation was not attracted.

Feeling aggrieved, the workmen filed writ petitions in the high court impugning the award. The high court held that in the circumstances of the case the tribunal should have drawn an adverse presumption under section 114(g) of the Evidence Act against the management. Taking further note of the expression 'continuous service' under section 2(g) of the U.P. Act, the high court noted that section 2(g) of the U.P. Act, unlike section 25B of the ID Act, does not use the words 'preceding the date with reference to which calculation is to be made' before the 12 calendar months and, therefore, having rendered 240 days service in any twelve calendar months was sufficient to attract retrenchment compensation provision under the state Act. Accordingly, the high court quashed the award of the labour court and directed the management to reinstate the workmen with continuity of service and pay half back wages from the date of their illegal retrenchment. The management preferred SLP against the said judgment of the high court.

In the Supreme Court, the management submitted that the workers in this case had worked only for 165.5 days during the preceding 12 months on daily wages and had no lien over the said job. It relied upon the earlier judgment of the court in *Range Forest Officer* and *Municipal Corporation, Faridabad* v. *Sriniwas*[11] to contend that drawing an adverse presumption for non-production of evidence is not applicable in all cases where other circumstances may exist on the basis of which such intentional non-production may even be found justifiable on reasonable grounds. Further, it was argued that the tribunal had correctly assessed the legal position and no interference was called for and, therefore, the high court had wrongly shifted the burden of proving that the workmen had worked for 240 days or more in a calendar year on the employer. On the other hand, it was pointed out by the workmen that under section 2(g) of the U.P. Act the workmen had to show that in any 12 calendar months they had put in 240 days of service for attracting section 6N of the U.P. Act and not in the preceding 12 calendar months. The workmen were, therefore, entitled to show that they had worked for 240 days in a calendar year for any year prior to termination of their services which they could have proved if the records as demanded by them had been produced by the management before the tribunal.

11 *Ibid*.

The Supreme Court held that production of only extracts of the attendance records for the year 1991 onwards and not the entire attendance records of the workmen as directed by the tribunal amounted to non-compliance of the said order and the assertion of the management that attendance records for the years 1991 onwards were irrelevant was not correct and acceptance of the said stand by the tribunal amounted to serious infirmity. The tribunal in not drawing an adverse presumption for non-production of the said records had in fact acted contrary to the principles laid down in *U.P. Drugs and Pharmaceuticals Co. Ltd.* v. *Ramanuj Yadav*.[12] The court held that the high court had adopted the correct approach in drawing an adverse inference against the management while deciding the controversy between the parties. Further, the high court had correctly understood the definition of 'continuous service' in section 2(g) of the U.P. Act where, unlike section 25B of the ID Act, the requirement of 240 days service is not to be calculated in the last preceding 12 calendar months before termination but during a period of 12 months not necessarily during the said period preceding termination which interpretation has already been accepted by the court in *U.P. Drug and Pharmaceuticals Co. Ltd.* The high court had rightly drawn an adverse presumption for non-production of attendance register and the muster rolls for the years 1991 onwards. The best evidence having been withheld, the high court was entitled to draw such adverse inference. The court observed that the views expressed by the court on the question of burden of proof in *Range Forest Officer's* case were watered down by the subsequent decision in *R.M. Yellatti* v. *Assistant Executive Engineer*.[13] The court held that the workmen had discharged their initial onus by producing bonus slips, wage slips, deductions of provident fund slips and attendance cards for various months and other documents available with them. Therefore, no interference was called for with the decision of the high court holding that due to non-production of the documents in its possession the petitioners had failed to discharge the onus and disprove the workers claim. The court held that the high court was justified in directing the petitioners to reinstate the workmen with continuity of service and to pay half back wages w.e.f. 1995, being the date of their illegal retrenchment.

Appointment on casual basis not an unfair practice per se

In *Gangadhar Pillai* v. *Siemens Ltd.*[14] the court has held that only because an employee has been engaged as a casual or temporary employee or that he has been employed for a number of years, the same by itself cannot lead to the conclusion that such an appointment has been made with the object of depriving him of the status and privilege of a permanent employee. It is not the law that on completion of 240 days of continuous service in a

12 (2003) 8 SCC 334.
13 (2006) 1 SCC 106.
14 (2007) 1 SCC 533.

year the employee concerned would become entitled to regularisation of his services and/or permanent status. The concept of 240 days in a year was introduced in the industrial law for a definite purpose. Under the ID Act, the concept of 240 days was introduced so as to fasten the statutory liabilities upon the employer to pay compensation to be computed in the manner specified in section 25-F of the Act before he is retrenched from the services and not for any other purpose. In the event of violation of the said provision taking place, the termination of services of the employee may be found to be illegal, but only on that account, his services cannot be directed to be regularised. Direction to reinstate the workman would mean that he gets back the same status.

The court held that the object of engaging the workman on temporary employment was *bona fide* and was not to deprive the employee concerned from the benefit of a permanent status. The appellant had been appointed on temporary basis for the duration of the project/site work on different places and on completion of the projects his services used to be terminated. The court held that the findings of the tribunal as also of the high court were erroneous and it was a fit case warranting exercise of extra-ordinary jurisdiction under article 136 of the Constitution. The court referred to one of its earlier orders in which it had asked the management to reconsider the plea of the petitioner to continue in employment or provide employment in the same or different project keeping in view that he had worked for 12 years from time to time. However, it had made it clear that the petitioner would not claim any back wages if the management provided some suitable employment to him in any of the projects. The management had stated that although he had been engaged on contract basis, it was not averse to using its good offices with the contractors to see that one of its contractors on the site where work was going on engaged him. The court while dismissing the appeal expressed its satisfaction that the respondent had been able to provide some succor to the appellant by using its good offices as one of its contractors agreed to engage the appellant on total emoluments of Rs. 10,000 per month.

This case clearly shows that the court has allowed the management to throw the workman at the mercy of the contractors even when he had rendered more than 12 years of service thus undermining his legitimate expectations.

Closure and construction works

Lal Mohammad (I)[15] related to 25 workers who were employed in a project and were assigned different jobs of work as clerks, account clerks, store clerks, store cashiers etc. Initially these workmen were required to

15 *Lal Mohammad* v. *Indian Railway Construction Ltd*., (1999) 1 SCC 596. For detailed discussion of the case see Bushan Tilak Kaul, "Labour Law-I (Industrial Relations Law)" XXXV *ASIL* 370 at 388-91 (1999).

undertake training and were, therefore, treated as appointed on *ad hoc* basis. and not appointed on regular basis. They were supposed to be given pay scale after successful completion of the training. They were placed in regular timescale with obligation to be transferred to any other project of the company in India. After completion of the projects they were served with retrenchment notices under section 25F by the management, validity of which they challenged in a writ petition before the high court. Their contention was that chapter V-B of the Act governed them and, therefore, notices under section 25F were invalid. It is important to state here that during the pendency of the proceedings before the Supreme Court, the respondent had issued notices in 1998 to these workmen stating that the project had been completed and, therefore, their services were no longer required and they should collect their 'deemed retrenchment' compensation under section 25-F from the management, which they did not collect. Since the matter was pending before the Supreme Court they could not have challenged the said orders before the high court from which the earlier proceedings had arisen. It was argued before the Supreme Court that the said notices were issued even when the said project was not fully closed and the work still subsisted. It was also the case of the workmen that they were the workmen of the corporation and not employees attached to the project. The court held that the notices under section 25F were bad as the chapter VB of the ID Act applied in this case. The court observed that since the subsequent developments raised certain factual issues, therefore, it was better to remand issues arising therefrom before the high court. It, accordingly, directed the high court to give opportunities to these 25 appellants to amend their writ petitions by inserting relevant submissions for challenging the subsequent impugned notices of closure to them and thereafter to adjudicate on the following issues:

i) whether the project where they were working was subjected to a factual closure as stated in the impugned notices in 1998 or whether the project was still not completed;
ii) whether the 1998 notices were in fact and in law closure notices as per section 25-O read with section 25-FFF or whether they still remained retrenchment notices and hence would be violative of section 25-N;
iii) even if it was held that the project in question was in fact closed down, whether the 25 appellants were employed in the project or they were employed by the respondent company entitling them to be absorbed in any other project of the company.

The court directed the high court to pass appropriate orders in the remanded writ petitions accordingly. Keeping in view that the appellants were out of service, it deemed it fit to observe that the remanded writ petitions be placed for disposal before the division bench to avoid delay due to further tiers of the appellant proceedings.

The matter accordingly came up before the division bench of the high court but in view of differences of opinion between the two judges of the division bench, the matter was referred to a full bench of the high court. The full bench came to the conclusion that they were not entitled to any of the benefit of continuation of service or regularisation, as the project in which they were employed stood closed. The workmen impugned this judgment in an SLP before the Supreme Court. The legal issues that boiled down for the consideration of the court in *Lal Mohammad (II)*[16] were:

i) Whether factually the closure was effected in February-March 1998 or not?
ii) Whether the appellants were employees of the project or of the company?

On the first question the Supreme Court agreed with the findings of the full bench of the high court that the work of the project stood completed in 1998. On the second question, the court held that the appellants were not employees of the company but were employees of the project. The court referred to the appointment orders which stated that the employment of the company was regulated by the service rules and none of the posts which had been mentioned against these persons was in the list annexed to the schedule appended to the IRCON Recruitment Rules, 1979. The court took note of the fact that an opportunity was given to the petitioners to appear for regular selection in the company which opportunity they failed to avail. The court further held that simply because benefits of the company were extended to them did not mean that they were deemed to be employees of the company. The rules of the company had a legal sanctity as they have been framed in terms of the memorandum and articles of association with the approval of the government. In their case the methodology prescribed had not been followed at the time of their appointment. They were appointed being the local hands as workmen who were required for the completion of the project. They could not claim as a matter of right to be made permanent employees or to be regularised in the company. A distinction had to be borne in mind as to who was the employee of the company and who was the employee of the project. Since they were employees of the project their services had been terminated after completion of the project.

Coming to the provisions of the ID Act the court held that since this was a project for construction of some railway lines, therefore, the rigour of section 25-O (1) for seeking a permission of the government was not required in the present case in view of proviso to section 25-O(1) which excludes the undertakings set up for the construction of buildings, bridges, roads etc. from the application of section 25-O (1). They were only entitled

16 *Lal Mohammad* v. *Indian Railway Construction Co. Ltd.*, (2007) 2 SCC 513.

to 'deemed retrenchment' compensation on closure of the construction project under section 25FFF(2) if the project was not completed within two years after its commencement. The appellant having already been given notice of termination in 1998 were only entitled to 15 days of overall pay for every year of continuous service and if the said compensation had not already been paid the same was directed to be paid to them. The court held that the employees working under a scheme/project have no vested right so as to claim regularisation of their services with regular pay scales. When the scheme/project comes to an end the service of the employees working on the project also come to an end. Therefore, in the present case, once the construction project in question had been completed, it was not incumbent upon the respondent construction company to necessarily employ these persons at other projects in any other parts of the country.

Master-servant relationship

General

The law is well settled that there is a distinction between statutory canteens and non-statutory canteens which are required to be established under a statute and stand on a different footing than those which are run by welfare committees. In *Canteen Mazdoor Sabha* v. *Metallurgical and Engineering Consultants (India) Ltd.*[17] (MECON) the Supreme Court observed that in order to bring the canteen employees on par with the employees of the VIP Guest House and Tea Club of MECON management, one had to decide what was the relationship of the employees of the canteen with the management of the respondent organisation. Without first crossing this hurdle it was not possible to come to any decision whether the employees who are recruited by MECON management at VIP Guest House or Tea Club could be treated on par with the employees of the canteen of MECON and invoke principle of equal pay for equal work. In order to grant equal pay for equal work one has to first address the question whether there was any master and servant relationship between the canteen employees and MECON. If that was not established then there was no question of seeking any parity with the pay scales of the employees of MECON. Simply because the canteen workers were discharging same duties as were being discharged by the VIP Guest House or the Tea Club would not attract the principle of equal pay for equal work. The court concluded that on the evidence available on record no such relationship between the two could be said to have existed. The management of MECON did not manage the canteen. The employees of the canteen were employed by the canteen welfare committee and not by MECON. Therefore, the canteen was not being run either under a statutory

17 (2007) 7 SCC 710.

obligation or an obligation arising out of any standing order or other binding circulars of MECON. There was no evidence to show that providing of canteen service was a part of the service conditions of the employees of MECON. The workmen of the canteen were never transferred either to the VIP Guest House or to the Tea Club or vice versa. The workmen of the VIP Guest House and Tea Club were appointed by MECON. The court held that there was no master and servant relationship between the employees of canteen and MECON and, therefore, no question of giving them the salary on par with that of the employees of MECON arose.

'Legal assistant', if 'workman'

In *Muir Mills Unit of NTC (U.P.) Ltd.* v. *Swayam Prakash Srivastava*,[18] the question arose whether 'Legal Assistant' fell within the definition of 'workman' under section 2(s) the ID Act and whether termination of his service on completion of the probation on account of unsatisfactory work was illegal?

Before the labour court the management contended that he was not a 'workman' and that his services had been rightly terminated in terms of the letter of appointment. The labour court in its award held that he was a 'workman,' the termination of his services was illegal and that he was entitled to reinstatement within a month with back wages. The Allahabad High Court upheld the award. After sometime the company received a show-cause notice from the deputy labour commissioner asking it to explain why a recovery certificate of over Rs 10 lakhs be not issued in favour of the respondent for its failure to comply with the award as upheld by the high court. The appellant challenged the order of the high court dismissing its writ petition in the Supreme Court. The court settled the following three issues raised before it for its consideration:

1. Whether 'Legal Assistant' falls within the definition of 'workman' under the Industrial Disputes Act?
2. Whether the award of the labour court directing the reinstatement of the respondent with back wages was perverse?
3. Whether the respondent having worked as a probationer for just a year had enjoyed over 15 years of wages without having worked for the same should be held to be entitled to compensation in lieu of reinstatement even if the termination was held to be illegal?

18 (2007) 1 SCC 491. The court reiterated the decision in *P.N. Verma* v. *Sanjay Gandhi PGI of Medical Sciences*, (2005) 1 SCC132 where it was held that services of a probationer can be terminated before confirmation, provided such termination is not stigmatic. It further held that in the event of a non-stigmatic termination of the services of a probationer, principles of *audi alteram partem* are not applicable. If the termination order of the probationer refers to the performance being 'not satisfactory', such an order cannot be said to be stigmatic and the termination would be valid.

Dealing with issue no.1 the court at the very outset drew a distinction between 'occupation' and 'profession' thus:[19]

> Furthermore, if we draw a distinction between occupation and profession we can see that an *occupation* is a principal activity (job, work or calling) that earns money (regular wage or salary) for a person and a *profession* is an occupation that requires extensive training and the study and mastery of specialized knowledge and usually has a professional association, ethical code and process of certification or licensing. Classically, there were only three professions: ministry, medicine and law. These three professions each hold to be a specific code of ethics and members are almost universally required to swear to some form of oath to uphold those ethics, therefore, "professing" to a higher standard of accountability. Each of these professions also provides and requires extensive training in the meaning, value and importance of its particular oath in the practice of that profession.

The court, further observed thus:[20]

> A member of a profession is termed a *professional*. However, *professional* is also used for the acceptance of payment for an activity. Also a *profession* can also refer to any activity from which one earns one's living, so in that sense sport is a profession.

In the light of the above observations, the court held that it was clear that the respondent was a professional and never could a professional be termed as 'workman' under any law. Even otherwise he had failed to prove that he was not performing supervisory job. In terms of the appointment letter and the termination order, the management had reserved all rights to discharge the respondent from the service of the mill without assigning any reasons and without any notice if his services were found unsatisfactory during probationary period. The provisions of retrenchment compensation were not applicable to him as his services had been terminated under an agreement which specified the date for the termination of service. His termination, therefore, was not illegal and the question of back wages did not arise. Resultantly, the court allowed the appeal of the management. The court concluded by holding that the respondent was not a 'workman' and, therefore, no recovery certificate needed to be issued in favour of the respondent in lieu of the show-cause notice issued by the deputy labour commissioner.

It is submitted that the Supreme Court had gravely erred in law in holding that a professional can never be held to be a 'workman' under any law. The

19 *Id.* at 503.
20 *Ibid.*

court did not appreciate that the definition of 'workman' under section 2(s) includes employees discharging primarily technical work. A legal assistant performs technical work and he cannot be excluded from the definition of 'workman' if he is not primarily performing supervisory or managerial function. It is only where a 'technical' workman is performing supervisory work and his salary exceeds the prescribed limit or that he is mainly performing managerial or administrative function that he stands excluded under the excluding part of the definition of section 2(s). This judgment runs counter to the well-settled principles for determining whether a person is a 'workman' or not. It is wrong to hold that professionals *per se* are excluded from the definition of 'workman'. This judgment, it is submitted, is very pedantic and needs reconsideration.

In *C. Gupta* v. *Glaxo-Smithkline Pharmaceuticals Ltd.*[21] the Supreme Court observed that the amendment to the definition of 'workman' which came into force w.e.f. 21.08.1984 could not be said to be merely declaratory or clarificatory in nature. It had introduced for the first time a new category of persons who were doing 'operational' work. Further, in the definition the words 'skilled' and 'unskilled' were made independent categories unlinked to the word 'manual'. The court made these observations in the following circumstances:

In this case the respondent had appointed the appellant to the post of industrial relations executive with a stipulation in the appointment letter that his services were liable to be terminated without assignment of any reason with a notice period. The appellant's services came to be terminated in pursuance of the said stipulation on the ground that his services were no longer required. The termination took effect before the amended definition of workman by the 1982 amending Act came into force. He raised an industrial dispute relating to his non-employment claiming before the labour court that he was a 'workman' within the meaning of section 2(s) of the ID Act. The labour court allowed the claim of the workman and directed his reinstatement with all consequential benefits including pay revision, if any.

The management challenged the award before the high court primarily contending that he was not a 'workman' being a qualified legal person and the nature of his duties, work and functions were to advise the management of the company which required knowledge of law and the matters arising out of the affairs of the company. On the other hand, it was submitted by the petitioner that his work was primarily technical and he was not employed to do administrative or managerial work. Neither the single judge nor the division bench of the high court agreed with the stand of the workman with the result that he filed a SLP before the Supreme Court.

The court observed that the termination of the workman had taken place on 15.09.1982 whereas the definition of 'workman' was amended by

21 (2007) 7 SCC 171.

Parliament on 31.08.1982 and it came into force only on 21.08.1984. The amendment of the definition being prospective, the definition of 'workman' as prevailing on the date of his termination had to be taken into account. The court held in the present case that the appellant was appointed as industrial relations executive and the duties undertaken by him when tested on the basis of the test laid down earlier by the court overwhelmingly fell within the managerial cadre. Hence, the high court had rightly held that he could not come within the definition of 'workman' within the meaning of section 2(s) of the ID Act.

Apprentice is not a workman

Under section 2(s) of the ID Act it will be seen that an 'apprentice' is treated as 'workman' for the purposes of the Act, but by virtue of section 18 of the Apprentices Act, 1961 every apprentice undergoing apprenticeship training in a designated trade is designated as a trainee and not a 'worker' and the provisions of any law with respect to labour are not to apply to or in relation to such 'apprentice'.[22] This is indeed a paradoxical situation as what is given by one hand is taken away by the other. This calls for an immediate amendment to section 18 of the Apprentices Act, 1961 so as not to deny or deprive the apprentice trainee of the benefit of labour law in general and the ID Act, in particular.

Scope of powers of government to make reference

Scope of powers of the appropriate government under section 10(1) of the Act and section 10 of the CLRA, 1970

The appropriate government exercises administrative powers both in relation to making a reference for industrial adjudication to a labour court or industrial tribunal under section 10 of the Act as also in relation to abolition of contract labour in terms of section 10 of the Contract Labour (Regulation & Abolition) Act, 1970 (CLRA). The appropriate government is required to apply its mind in both situations before exercising its powers. The exercise of power by the appropriate government in both situations would not be beyond the pale of judicial review.[23]

While issuing a notification under the CLRA the government would have to proceed on the basis that the principal employer had appointed contractors and such appointments were valid in law. It is a well-settled legal position that neither the labour court nor the writ court could determine the question as to whether the contract labour should be abolished or not, the same being within the exclusive domain of the appropriate government under the CLRA, 1970. However, while referring a dispute for adjudication under the ID Act for regularisation of the workers of the contractor by the principlal employer

22 *Supra* note 1.
23 *Steel Authority of India* v. *Union of India*, AIR 2006 SC 3229.

on the plea of the workers that the contract system is a camouflage, validity of the appointment of the contractor would itself be an issue. In such a case the appropriate government must *prima facie* satisfy itself that there exists a dispute as to whether the workmen are in fact not employed by the contractor but by the management. Relationship of employer and employee is essentially a question of fact. Determination of such questions would depend upon a large number of factors.

Limits on judicial powers and incidental issues under the Act

In *Rashtriya Chemicals & Fertilizers Ltd.* v. *General Employees' Assn.*,[24] it seems that the respondent association had been demanding abolition and prohibition of contract labour in the civil works and carpentry establishment of the petitioner on the ground that the contractors were dummy and sham contractors. The central government conveyed its decision to the respondent association refusing to abolish and prohibit the continuance of such contract labour. The petitioner association challenged this decision of the central government before the high court conceding before it that the said issue could not be decided by the high court in the writ jurisdiction under article 226 of the Constitution and that the industrial tribunal was the appropriate forum to go into such question. The writ petitioners requested the high court that order may be made referring the matter to the industrial tribunal and meanwhile to afford interim protection to the contract labour. While accepting this prayer, the high court directed the central government to make reference of the dispute whether the contracts between the management and the contract labour were sham or bogus and a camouflage to deprive the contract employees concerned of the benefits available to permanent workmen of the management. Further, whether such workmen were entitled to be declared as permanent workers and what wages and consequential benefits they were entitled to. It also passed certain interim orders.

Assailing this order of the high court before the Supreme Court the management, relying on the decision of the Supreme Court in *Steel Authority of India Ltd.* v. *National Union Waterfront Workers*,[25] contended that the high court ought not to have given directions in the manner they were given. It was further argued that the reference ought to have been sought under the ID Act and it was for the appropriate government to issue such reference.

Allowing the appeal of the petitioner, the Supreme Court held that the high courts couldn't straightaway direct the appropriate government to refer the dispute. The court held that it is for the appropriate government to apply its mind to relevant factors and satisfy itself as to the existence of a dispute before deciding to refer it. The exception to the above position is when the high courts find that the appropriate government's refusal to make a

24 (2007) 5 SCC 273.
25 (2001) 7 SCC 1.

reference of a dispute is unjustified. In such circumstances the court may direct the government to make a reference. The high court had to consider whether the stand taken was inconsistent in the instant case. The writ petitioner itself had accepted that certain issues could not be decided in the writ petition and could be decided only by the labour tribunal and that being so, the high court giving directions in the nature it gave did not appear to be appropriate. The high court should have left the respondent association to avail remedy available in the ID Act. Setting aside the decision of the high court, the Supreme Court left it to the respondent association, if so advised, to move the appropriate government seeking reference of the purported dispute to the tribunal. The state government, if approached, would be well within its power to consider whether any reference was called for. The court made it clear that it was not expressing any opinion on the desirability or otherwise of making a reference.

In *Director, Food and Supplies* v. *Gurmit Singh*[26] the Supreme Court held that a tribunal or labour court cannot invalidate a reference on the ground of delay. If the employer makes a grievance that the workman has made a stale claim then the employer can challenge the reference by way of a writ petition and contend that since the claim is belated there was no industrial dispute. The labour court or tribunal cannot strike down the reference on the ground of delay. The long delay for making the adjudication could be considered by the adjudicating authority while moulding the reliefs. That's a different matter altogether. The labour court in the instant case had not considered the plea about non-applicability of the ID Act when it was specifically pleaded by the appellant that it was not an 'industry' under the ID Act. The existence of an industrial dispute is a jurisdictional factor and absence of jurisdictional fact deserves invalidation of the reference and not the fact of delay in raising industrial dispute.

'Appropriate government' for making a reference

In *Bikash Bhushan Ghosh* v. *Novartis India Ltd.*[27] the appellant was workman in the respondent company situated in West Bengal. They were transferred to different places in different states. According to them, the said orders were violative of the memorandum of understanding and were issued to victimize them, as they were trade union activists. Request to withdraw such orders did not evoke any response from the management with the result conciliation proceedings were initiated. However, the management terminated the services of these workmen during the pendency of the conciliation proceedings. The termination orders were served on the workmen in West Bengal. They sought a reference of the dispute on the ground that the terminations were without enquiry, unauthorized, illegal and

26 (2007) 5 SCC 727; also see *State of Punjab* v. *Anil Kumar*, (2007) 9 SCC 663.
27 2007) 5 SCC 591.

arbitrary. The state government made a reference of the dispute before an industrial tribunal in West Bengal. The management challenged the maintainability as it was of the view that the State of West Bengal had no jurisdiction to make the reference. The tribunal held that the reference was maintainable and on merits set aside the orders of termination as illegal and directed reinstatement of these workmen in service with back wages.

The management challenged the award before the high court. A single judge of the high court dismissed the writ petition. The management preferred a writ appeal in the high court. The division bench of the high court, without going into the merits of the case, held that the State of West Bengal had no jurisdiction to make the reference and allowed the appeal of the management. Against this order the workmen preferred a special leave to appeal in the Supreme Court.

The apex court observed that the appeal of the workman had to be decided in the light of the following principal issues which determine the question of jurisdiction and they were:

i) Where did the order of termination of service operate?
ii) Was there some nexus between the industrial dispute arising from termination of the services of the workmen and the territory of the State of West Bengal?

The court observed that the well-known test of jurisdiction of a civil court including the residence of the parties and the subject matter of the dispute substantially arising therein were applicable. It observed that the *situs* of the employment of the workmen would also be a relevant factor for determining the jurisdiction of the court concerned.

The court observed that in the present case the reference of the dispute having been made only with respect to the legality of the termination orders, the appellants could not have questioned the transfer orders. The transfer orders were thus not an issue before the tribunal. The termination orders having been served on the appellants by the management at Calcutta, the termination orders were passed for non-compliance with the transfer orders. If the termination orders eventually were set aside the appellants would have been deemed to be continuing to be posted in Calcutta. Hence, the transfer of the appellants had a direct nexus with the termination of their services. It was, therefore, not correct for the respondents to contend that the State of West Bengal was not the appropriate government. The court held that a part of the cause of action had arisen in Calcutta in respect whereof the State of West Bengal was the appropriate government. It may be that in a given case, two states may have the requisite jurisdiction in terms of section 10(1)(c) of the ID Act. Even if it is assumed that other state governments had also jurisdiction, it could not mean that although a part of cause action arose within the territory of the State of West Bengal, it would have no jurisdiction to make the reference. Further, the appellants being workmen within the meaning of the ID Act, their services were protected in terms of the said

Act. If their services were protected, an order of termination necessarily had to be communicated under law. Communication of the order of termination itself gave rise to a cause of action as an order of termination takes effect from the date of communication of the said order. Lastly, the court observed that if CPC is given effect to, even if the Industrial Tribunal, West Bengal has no jurisdiction, in view of the provisions contained in section 21 CPC, unless the management suffered any prejudice, it could not have questioned the jurisdiction of the court. For the above reasons, the court set aside the judgment of the division bench of the high court, allowed the appeal and remitted the matter to the high court for consideration of the writ appeal on merits.

Amendment of pleadings in a reference

It is also a well settled legal position that by taking recourse to amendment made in the pleading, the party cannot be permitted to go beyond his admission.[28] In *Steel Authority of India* v. *Union of India*[29] the Supreme Court observed that keeping in view the primary object of the ID Act being promotion of industrial peace and harmony, this principle would be applied in an industrial adjudication having regard to the nature of the reference made by the appropriate government as also in view of the fact that an industrial adjudicator derives its jurisdiction from the reference only. Thus, if a definite stand taken by the employees in their pleadings/statement of claim is that they have been working under contractors, they cannot be allowed to take a contradictory and inconsistent plea later that they were also workmen of the principal employer. To allow them to raise such a mutually destructive plea is impermissible in law.

Disciplinary action, principles of natural justice and the powers of industrial adjudicator under section 11A

Sympathy, generosity and past good conduct not relevant factors in disciplinary matters

In *A.P. SRTC* v. *Raghuda Siva Sankar Prasad*[30] the Supreme Court held that the delinquent employee having admitted his guilt before the enquiry officer and further having deposed before him that he had handed over the stolen property back, any request of the delinquent employee later to the labour court to excuse him did not deserve any sympathy. His order of removal had to be sustained. The court further held that once an employee had lost the confidence of the employer, it would not be safe and in the interest of the corporation to continue the employee in service. The loss of confidence becomes the primary factor and not the amount of money. In such a situation sympathy and generosity cannot be permissible factors to be taken

28 *Modi Spinning and Weaving Mills Co. Ltd.* v. *Ladha Ram* (1976) 4 SCC 320.
29 *Supra* note 23.
30 (2007) 1 SCC 222.

into account by any judicial forum. It held that no interference with the removal from service was called for and the punishment of removal, being just, reasonable and proportionate to the proved misconduct, could not be said to be disproportionate. The court further held that past conduct of the workman couldn't be a relevant consideration in departmental proceedings. Further, in view of the fact that the enquiry report here clearly revealed that the departmental enquiry was conducted after giving a fair and reasonable opportunity to the delinquent employee and after following due procedure under the regulations applicable, the high court was not justified in modifying the punishment. The court made it clear that high court could modify the punishment in exercise of its jurisdiction under article 226 of the Constitution only when it found that the punishment imposed was shockingly disproportionate to the charges proved and certainly not on the ground of generosity or misplaced sympathy. The court went to the extent of saying that it was not open to the tribunals and courts to substitute their subjective opinions in place of the one arrived at by the domestic tribunal. In the instant case theft committed by the workman amounted to misconduct and his order of removal was in accordance with law. In the circumstances, the court held that the order of the tribunal upholding the punishment imposed by the management was in order and the high court had erred in interfering with the punishment imposed.

Finding of fact in a civil matter cannot be overlooked in a departmental enquiry when misconduct and civil proceeding founded on same facts

In *Jasbir Singh* v. *Punjab & Sind Bank*,[31] an important principle has been laid down by the Supreme Court that a finding of fact in favour of the workman in a civil matter which has become final cannot be overlooked by the enquiry officer or even by the management in a disciplinary matter especially when the case of the management in the departmental enquiry is founded on the same allegations which formed the basis of the case/claim before the civil court against the workman. This principle is logical given the fact that burden of proof both in the departmental enquiry and civil suit are based, unlike in a criminal case, on preponderance of evidence. It is for this reason that an acquittal in a criminal court, where the guilt has to be proved beyond reasonable doubt, is not being held as bar to proceed against the workman in a departmental enquiry if the alleged criminal offence also amounts to a misconduct. The principle that a finding in a civil suit cannot be overlooked by the management or by the courts in examining a disciplinary action by the management was laid down in the following factual matrix:

The appellant, a confirmed peon, in the respondent bank was alleged to have forged the signature of a depositor and fraudulently withdrawn a certain

31 (2007) 1 SCC 566.

amount. A departmental proceeding was initiated against him. A criminal case was also initiated under sections 409/201 IPC. The trial court acquitted him of the charges and passed scathing remarks against the bank for having unfairly and illegally extracted confessions from him. However, despite acquittal in the criminal case, the departmental proceedings continued and ultimately ended in an *ex-parte* report to the effect that the charges have been proved which resulted in his removal. The respondent bank also filed a suit against the appellant for recovery of the said amount. The suit was decreed. The employee having preferred an appeal against the decree, the appellate court held that the bank failed to prove that the appellant had withdrawn or embezzled the said amount. It held that the bank was not entitled to recover the said amount. That judgment was not challenged by the bank and attained finality.

It seems that the workman impugned the order of his removal in the high court. Without taking note of the decision of the appellate court which had set aside the decree against the workman, the high court upheld the decision of the management by relying on the bipartite settlement between the bank and the workers union. It also opined that the departmental proceedings could be initiated even after the acquittal in a criminal case and there was no infirmity in initiating departmental enquiry against him even after his acquittal by the criminal court and by basing the order of removal on the findings of such enquiry. The appellant employee filed the appeal impugning the judgment of the high court.

The Supreme Court while allowing the appeal of the employee held that the respondent bank had invited the findings of a competent civil court on the issue as to whether the appellant had committed any embezzlement or not. Embezzlement of funds having been the principal charge against the appellant in all the proceedings, the respondent bank had failed to prove any of the charges before any court of law. The judgment of the appellate civil court having attained finality was binding on the respondent bank. The court held that in a case of this nature the high court should have applied its mind to the facts of the matter with reference to the materials brought on record. It had failed to do so and had not taken note of the decision of the appellate civil court. It could not have refused to look into the materials on record. The court held that the judgment of the high court could not be sustained. It could not have refused to look into the materials on record solely on the basis of the bipartite settlement to hold that the departmental proceedings could have been proceeded even after judgment of acquittal passed in the criminal case. The court held that both the civil and criminal courts established that the appellant was treated very unfairly and unreasonably for all intents and purposes. Criminal case was foisted against him. The criminal court had given a clear finding that bank officers extracted a confession from him in a very cruel manner. The respondent bank had proceeded against the appellant both in civil as well as in criminal

proceedings and at both the independent forums it had failed. The court directed his reinstatement with back wages, continuity of service and other consequential benefits. The court also awarded costs in favour of the appellant and against the bank which it quantified at Rs.10, 000.

Criterion for award of back wages in disciplinary and retrenchment matters differentiated

The court in *J.K. Synthetics Ltd.* v. *K.P. Agrawal*[32] dealt with some important and interesting aspects concerning relief in the matter of disciplinary action as contrasted with the relief in case of termination by way of retrenchment. This case also deals with another important issue of the power of industrial tribunal to make corrections and the nature of corrections in the award. The factual matrix of this case were as under:

The respondent who was working as an assistant in the appellant company was issued three charge sheets to which he filed his objections/explanations. Not satisfied with his explanation, the management ordered an enquiry against him in respect of the alleged charges. Accepting the report of the enquiry officer, which held that the charges were proved, the employer imposed punishment of dismissal on him. He raised an industrial dispute and the appropriate government made a reference to the labour court to adjudicate on the issue of his non-employment. The labour court held that the enquiry was not fair and appropriate and permitted the parties to adduce additional evidence. It held that the charge of insubordination and disorderly behaviour in the first charge sheet was not proved; the second charge sheet, namely, that the first respondent had made false (indecent) allegations against his superior officers, and thereby violated office discipline, stood proved; and the third charge sheet, that the employee had admitted that he had not prepared the annual accounts correctly, gave the employee the benefit of doubt by holding that the mistakes in the accounts might not have been committed knowingly or deliberately and, therefore, may not amount to habitual negligence or carelessness. Thus, in effect the finding in regard to the three charges were – (i) not proved; (ii) proved; and (iii) entitled to benefit of doubt. On the said findings it made an award substituting order of dismissal by stoppage of increments of two years as punishment keeping in view that in the four years of service there was no complaint against him in the past.

The award was in the meantime published but before it became enforceable, the workman filed an application under section 6(6) of the U.P. Industrial Disputes Act, 1947 (equivalent to section 11(7) of the ID Act) read with section 152 of the CPC seeking correction of the award to the effect that the workman was entitled to reinstatement with continuity of service and full back wages from the date of his dismissal order which had been set aside

32 (2007) 2 SCC 433.

by the award of the labour court. The appellant opposed the said application on the ground that – (i) labour court had become *functus officio* after publication of the award and, therefore, it could not amend the award; (ii) the prayer amounted to seeking review of the award and there was no jurisdiction or power to grant such relief; and (iii) that the respondent was not entitled to the relief of back wages, as the labour court had held that one misconduct was proved.

The labour court allowed the application and held that in view of the punishment of stoppage of two annual increments the employer shall pay the full back wages of the period under unemployment i.e. from the date of dismissal order to the date of reinstatement in which the amount which was paid to the workman as interim relief or any other mode could be adjusted. This order was challenged before the high court. A single judge of the high court dismissed the petition challenging the modification of the award holding that there was an omission in the award which could be corrected under section 6(6) of the U.P. Act. The court, while dismissing the petition of the management, took note of the fact that the respondent who wilfully failed to reinstate the workman in terms of the award even after no stay was granted against the reinstatement of the employee was not entitled to equitable discretion under article 226 of the Constitution.

The said order of the single judge was challenged before the Supreme Court in special leave petition. After hearing the parties the court laid down following four important questions which required to be authoritatively answered by it:

i) Whether a provision enabling a court to correct any clerical or arithmetical mistake or error in the order arising from any accidental slip or omission, empowers the labour court to grant a relief of back wages which was not granted in the original award?
ii) When the punishment of dismissal is substituted by a lesser punishment (say stoppage of increments for two years), and consequently the employee is directed to be reinstated, whether the employee is entitled to back wages from the date of termination to the date of reinstatement?
iii) Whether on the facts and circumstances, the labour court was justified in interfering with the punishment of dismissal?
iv) If the employer was otherwise entitled to relief, whether it can be denied on the ground that it had failed to reinstate the employee, inspite of the non-staying of the direction of reinstatement?

The court summarised the scope of the powers of the labour court/ industrial tribunal under section 6(6) of the U.P. Act (section 11(7) of the ID Act) in the following manner:

i) If there is an arithmetical or clerical or typographical error in the order it can be corrected.

ii) Where the court had said something which it did not intend to say or omitted something which it intended to say, by reason of any accidental slip/omission on the part of the court, such inadvertent mistake could be corrected.

iii) The power cannot be exercised where the matter involves rehearing on merits or reconsideration of questions of facts or law, or consideration of fresh material, or under the arguments which were not advanced when the original order was passed. Nor can the power be exercised to challenge the reasoning and conclusions.

Coming to the present case, the court observed that the reference to the labour court consisted of two parts, namely, whether the termination of the workman was proper and legal, and if not, to what benefits or compensation the workman was entitled to. The award as originally made answered the first part in the negative but did not answer the consequential second part of the reference. The award in fact had ended rather abruptly. On application being made under section 6(6) of the U.P. Act the labour court recorded that it had accidentally omitted to answer the second part of the reference and rectified the omission by adding a paragraph. The court was of the view that this case squarely fell under *Tulsipur Sugar Co. Ltd.* v. *State of U.P.*[33] and the labour court had power to amend the award.

The court, however, observed that whether such modification was warranted or not was a different question. The next question, therefore, was whether the facts and circumstances here warranted grant of back wages, assuming that the punishment imposed by the management was excessive. It was contended before the court by the employee that there were a number of earlier judicial decisions of the court where the order of dismissal or removal was set aside and the employee was directed to be reinstated with full back wages. To this, the court observed that back wages is not to be considered to be an automatic or natural consequence of reinstatement keeping in view the significant changes that have taken place in the judicial approach in the last two decades. Further, a distinction has to be maintained in respect of back wages awarded where termination/retrenchment is held illegal and invalid for non-compliance with statutory requirement like section 25F of the ID Act or related to the cases where the court found that the termination was motivated or amounted to victimisation and those where back wages were ordered to be paid where termination were set aside not because the misconduct had not been proved but the termination orders being held to be excessive, the court or tribunal awarded a lesser punishment resulting in the reinstatement of the employee. In the later set of cases i.e. where the power under section 11-A of the ID Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment and a consequential direction is issued for reinstatement, the court is not

33 (1969) 2 SCC 100.

holding that the employer was in the wrong or dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised the dismissal is valid and in force. When the punishment is reduced by a court as being excessive there can be either a direction for reinstatement or a direction for a nominal lump sump compensation and if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What is required to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits follows as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement itself is a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. The court warned that that should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for the purposes of pensionary/ retirement benefits, and not for other benefits like increments, promotions etc.

The court also observed that there is a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits should follow", as a matter of course. It ruled that the disastrous effect of granting several promotions as a consequential benefit to a person who has not worked for 10-15 years and who does not have the necessary benefit of experience for discharging higher duties and functions of promotional posts, is seldom visualized while granting consequential benefits automatically. The court observed that it was necessary that whenever courts or tribunals direct reinstatement they should apply their judicial mind to the facts and circumstances to decide whether continuity of service and/or consequential benefits should also be directed. Even if the court or tribunal finds it necessary to award back wages the question would be whether back wages should be awarded fully or partially (and if so, the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to several factors mentioned in *GM, Haryana Roadways* v. *Rudhan Singh*[34] and *U.P. State Brassware Corporation Ltd.* v. *Uday*

34 (2005) 5 SCC 591.

Naraian Pandey.[35] Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternate employment. The court, however, carved out two explanations to these general rules, namely, (i) that where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of misconduct, and (ii) where the court reaches a conclusion that the enquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimize him and the disproportionately excessive punishment is a result of such scheme or intention. In such cases the principle relating to the back wages etc. will be the same as those applied in cases of illegal termination.

The court observed that in the instant case the labour court had found that a charge against the employee in respect of serious misconduct was proved but it felt that the punishment of dismissal was not warranted and, therefore, imposed a lesser punishment of withholding of two annual increments. In these circumstances, it ruled that the award of back wages was neither automatic nor consequential. The court held that in the facts of the present case, back wages was not warranted at all.

The court then examined the issue as to whether the labour court was justified in interfering with the punishment of dismissal once serious charge was proved even though in respect of another charge the finding recorded was not proved and in regard to third charge benefit of doubt was given to the employee. The court held that the recent trend in regard to scope of interference with punishment in matters involving discipline at the workplace has changed and the courts have adopted more or less an attitude of non-interference unless the punishment was harsh and wholly disproportionate to the charge. It observed that interference with the punishment could not be resorted to on compassionate ground or irrational or extraneous factors.

In the present case the charge established against the employee was a serious one. The labour court had not recorded a finding that the punishment was harsh or disproportionately excessive. It interfered with the punishment only on the ground that the employee had worked for four years without giving room for any such complaint. It had ignored the seriousness of the misconduct. Hence interference was not warranted. The court ruled that it has been the consistent view of the court that in absence of a finding that the punishment was shockingly disproportionate to the gravity of the charge established, the labour court should not interfere with the punishment. The court, accordingly, held that punishment of dismissal did not call for interference.

35 (2006) 1 SCC 479.

The court observed that it was true that when the employer challenged the award of the labour court and sought stay of the award, the high court only stayed the award in regard to back wages but did not stay the award directing reinstatement; and if he had been reinstated in 1983 he would have served it till the date of his superannuation which he attained during the pendency of the matter in the high court which fact the high court had taken into account while dismissing the writ petition of the management. The court held that firstly the assumption that there was a lawful order of the tribunal or that there was wilful violation thereof was not sound. Further, the employer was not given an opportunity to explain why the employee was not reinstated. In fact, it had been the contention of the employer that the workman did not report back to service even though it was ready to reinstate him subject to final decision. The court held that the mere fact that the respondent was not reinstated in pursuance of the award of the labour court could not warrant dismissal of the writ petition. In conclusion the Supreme Court set aside the order of the high court and also the award of the labour court and upheld the punishment of dismissal imposed upon the respondent workman.

Powers of high court in the matter of interfering with order of disciplinary authority in cases of proved misconduct are very limited

In *U.P. SRTC* v. *Ram Kishan Arora*[36] the only question which arose for consideration of the Supreme Court was as to whether it was open to the high court to substitute the punishment awarded by the disciplinary authority after it did not find fault with the findings of the enquiry officer to the extent that there was material on record to prove that his behaviour against the officials was critical and he had himself completed/forged the details on the waybill. The court observed that it is now a well-settled position in law that commission of a criminal breach of trust by a person holding a position of trust is a misconduct of serious nature. The said charge leveled against him by the management having been proved and which finding of the enquiry officer having been accepted by the high court, the high court in exercise of its jurisdiction under article 226 of the Constitution of India was not at all justified in reducing the punishment from removal to stoppage of two annual increments. The high court had not arrived at the conclusion that the quantum of punishment imposed upon the workman was disproportionate to the gravity of his misconduct. The court observed that even in such a situation the course which would have been ordinarily open to the high court was to remit the matter to the employer for reconsideration of the question in regard to the quantum of punishment. The high court could not have without recording any reason substitute its opinion to that of the disciplinary authority. The court held that the judgment of the high court could not be sustained. It set aside the award of the labour court ordering reinstatement

36 (2007) 4 SCC 627.

after holding that the findings of the enquiry officer were perverse and also the high court insofar as it had interfered with the punishment of removal imposed by the disciplinary authority.

Illegal strike can be basis of disciplinary action

In *Coimbatore District Central Cooperative Bank* v. *Coimbatore District Central Cooperative Bank Employees Assn.*[37] the respondent union gave a strike notice in view of the suspension of certain employees and withholding of their salary by the management. The management informed the workers to refrain from going on strike. The conciliation officer in the meanwhile commenced conciliation proceedings in connection with the issues raised by the union. The workers commenced strike inspite of the advice of the conciliation officer not to go on strike. It seems that the strike was commenced during the pendency of the conciliation proceedings rendering the strike illegal. Within two days of the strike the management issued notices to the union requiring it to advise the workmen to join their duties immediately by tendering unconditional apology. It seems that the workers accepted this gesture of the management and a settlement was arrived at between the management and the union and substantial number of workers resumed their duty. 53 workers, however, refused to join their duties and continued their illegal strike which affected the bank very badly. It was alleged that they also threatened other employees with dire consequences if they returned to work. The management initiated disciplinary proceedings against such workmen and placed them under suspension pending enquiry, which was simultaneously ordered. The workmen were informed of the allegations but inspite of the notices they did not participate in the disciplinary proceedings and remained absent. The enquiry officer held *ex-parte* enquiry against them and they were held guilty of charges. The employees were punished by way of penalty of stoppage of annual increments of one to four years with cumulative effect and non-payment of salary during suspension period. The management opined that although the case was an appropriate one to impose extreme penalty of dismissal but by taking a liberal view a lesser punishment was imposed. Thereafter, the workmen joined their duty. They, however, filed an appeal against the penalty order to the executive committee of the bank which was dismissed. Being aggrieved by the decision of the executive committee they raised an industrial dispute against the penalty order and a reference was made to the labour court as to whether the punishment of stoppage of annual increments of 1 to 4 years was justified and whether the workmen were entitled to be paid salary during suspension period. After considering the evidence in its entirety and the relevant case law on the issue, the labour court held that all the charges leveled against the workmen were proved. It also held that the enquiry was legal, valid and in consonance with the

37 (2007) 4 SCC 669.

principles of natural justice. According to the tribunal the evidence established that the employees administered threats. On the basis of the said findings the labour court held that it could not be said that the action of the management was illegal, unlawful or improper. It rejected the reference. The award of the labour court was impugned by the union in a writ petition before the high court. The single judge of the high court did not disagree with the findings recorded by the labour court and upheld the award of the labour court only to the extent that the workmen were not entitled to the wages for the period they had not worked. However, the single judge held that the stoppage of 1 to 4 annual increments with cumulative effect was harsh and had far reaching consequences inasmuch as it adversely affected the workmen throughout their service and the retiremental benefits to be received by them adversely affecting their families and accordingly it set aside the same. It directed the management to pay the arrears in respect of stoppage of increments with interest @ 12% per annum within a specified time limit.

The management, aggrieved by the above said order preferred an intra-court appeal before the division bench of the high court. The division bench noted that it is settled law that the question of choice and quantum of punishment is within the discretion of the management. But the sentence has to suit the offence and the offender and there was limited scope of interference with the order. It opined that proper punishment would be stoppage of increment/increments without cumulative effect on all the 53 employees and it would serve the ends of justice. It also held that the order passed by the single judge directing the management to pay interest was not proper and the said direction was accordingly set aside. The management still not satisfied, decided to impugn the order of the division bench in the Supreme Court. It was the case of the management that both single judge and division bench of the high court were in error in interfering with the order passed by the management particularly when a well-reasoned award made by the labour court had confirmed the action of the management. Once the enquiry had been held to be in consonance with the principle of natural justice, charges had been proved and the order of punishment had been passed, it could not be interfered with in judicial review by a writ court. The jurisdiction of the high court under articles 226 and 227 of the Constitution was limited to the exercise of power of judicial review. In exercise of that power the high court could not substitute its own judgment and, therefore, the order of the high court had to be quashed. It was also the case of the management that the misconduct was serious one as the workmen had by abstaining from work caused inconvenience in essential services. On the other hand, the case of the union was that the punishment imposed was clearly harsh and was grossly disproportionate.

The court took a serious view of the attitude of the workers who had gone on illegal and unlawful strike in a public utility service inspite of a settlement having been arrived at. These workers had refused to join their duty which action of theirs was *ex-facie* illegal. Further, they had adopted

wrong attitude in not participating in departmental enquiry. The court held in its considered view the action taken by the management against them was not arbitrary, illegal, unreasonable or otherwise objectionable. The labour court had offered opportunity of hearing to both parties and had disagreed with the stand of the union that the disciplinary proceedings were not in consonance with the principles of natural justice. It held that the enquiry was in accordance with the law and it also recorded the findings that the allegations leveled against the workmen were proved. In view of the charges leveled and proved against the workmen the punishment imposed upon them could not be said to be excessive, harsh and disproportionate. The court held that the award passed by the labour court was perfectly just, legal and proper and required no interference by the high court in exercise of power of judicial review under articles 226 and 227 of the Constitution. The court observed that doctrine of proportionality has not only arrived in our legal system but has come to stay. It observed thus:[38]

> [W]ith the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".
> "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision maker has ordered his priorities reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.

The court referred to *de Smith* who has in his masterly work on 'Judicial Review of Administrative Action' stated that proportionality involves balancing test and necessity test. Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. The court stated that so far as our legal system is concerned the doctrine is well settled. If the punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to the court to interfere in such matters.

38 *Id.* at 678.

The question, therefore, was whether in the facts and circumstances of the present case the high court was justified invoking and applying the doctrine of proportionality. In its view the answer had to be in the negative. The court observed normally when the disciplinary proceedings have been initiated and findings of fact have been recorded in such enquiry, it couldn't be interfered with unless such findings were based on no evidence or was perverse or was such that no reasonable man in the circumstances of the case would have reached such finding. The labour court had rightly held that the charges had been proved in a departmental enquiry conducted in accordance with the principles of natural justice and the punishment imposed on the workmen could not be said to be harsh so as to warrant interference with it. The court held that high court was not right in exercising the power of judicial review under articles 226 and 227 and virtually substituting its own judgment for the judgment of the management and/or of the labour court more so when the charges were extremely serious in nature and could not have been underestimated or under-rated by the high court. The 53 employees could not be equated other employees who had entered into an amicable settlement with the management and, therefore, there was no violation of article 14 of the Constitution. The court referred to an earlier judgment in *Union of India* v. *Parama Nanda*[39] where it had set aside the action of the Central Administrative Tribunal in reducing the punishment of an employee who was the main accused responsible for preparing the whole plan of defrauding a party and other two employees who were dealt with leniently by the management as they had only helped in the plan prepared by him. The court also referred to another decision of the court in *Obettee (P) Ltd*. v. *Mohd. Safiq Khan*[40] to show that the employees can be differently dealt with in the matter of punishment depending upon the gravity of the charge against them.

The court, however, took into view the subsequent conduct of the employees who had been since their reinstatement performing their duties faithfully and satisfactorily to the satisfaction of the appellant bank and no proceedings had been initiated against them thereafter for the last 35 years. Keeping in view that the industrial peace had been restored and any adverse order at this stage may affect the peace in the bank and the stand of the bank having been vindicated and the correct position declared, the court accepted the submission of the employees not to interfere with the limited relief granted by the division bench of the high court. But at the same time, the court made it clear that neither the order of the single judge nor of division bench of the high court was right in interfering with the order of the tribunal. In exercise of plenary power of article 142 of the Constitution the court tempered justice with mercy and did not think it proper to deprive the 53 workmen of the limited benefit under the order passed by the division bench of the high court.

39 (1989) 2 SCC 177.
40 (2005) 8 SCC 46.

Disciplinary action and pendency proceedings

In *United Bank of India* v. *Sidhartha Chakraborty*,[41] the respondent was dismissed from service by the bank after holding departmental enquiry on the charge of misappropriation. It was indicated in the dismissal order that in view of the pendency of an industrial dispute before the Assistant Labour Commissioner (Central), Calcutta an application under section 33(2)(b) was being filed for approval of the action taken by the appellant bank which it seems was either not filed or pursued. The respondent raised an industrial dispute before the Regional Labour Commissioner (Central), Guwahati for his reinstatement with full back wages assailing the legality and validity of the order of dismissal. The conciliation proceedings having failed a reference was made by the Ministry of Labour, Government of India to the Industrial Tribunal at Guwahati. The reference was on the question of legality and validity of the order of dismissal. The tribunal held that enquiry was in full compliance with prescribed procedures, the principles of natural justice and the imposition of punishment of dismissal was in order. Aggrieved by the award passed by the tribunal the workman filed a writ petition assailing the same. Before the single judge the only question raised was that the appellant bank had in fact filed an application under section 33(2)(b) of the Act for approval of the action taken by the bank in dismissing the respondent but no such approval had been given. The appellant bank took the stand that it was not necessary because the provisions of section 33(2)(b) are not mandatory relying upon the decision of the court in *Punjab Beverages (P) Ltd.* v. *Suresh Chand*.[42] The single judge relied upon a subsequent decision of the court in *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* v. *Ram Gopal Sharma*[43] and held that the decision in *Punjab Beverages* could not have any application having been overruled in *Jaipur Zila* and ordered reinstatement of the workman with consequential benefits. Further it also rejected the stand of the management that the principles of doctrine of prospective overruling would be applicable as decision in *Punjab Beverages* was holding the field "at the time the action was taken". The division bench of the court upheld the decision of the single judge.

In the special leave to appeal preferred by the management, the Supreme Court observed that in *Jaipur Zila* it has been held that proviso to section 33(2)(b) of the Act affords protection to a workman to safeguard his interest and it is in the nature of a shield against victimisation and unfair labour practice by the employer during pendency of an industrial dispute and, therefore, the mandatory nature of the proviso to section 33(2)(b) cannot be diluted as otherwise the very purpose of the provisions would become meaningless. The employer could not be permitted to take advantage of its own wrong. The court held that keeping in view the avowed object behind the proviso to section 33(2)(b), the said provision could not be allowed to be

41 (2007) 7 SCC 670.
42 (1978) 2 SCC 144.
43 (2002) 2 SCC 244.

diluted. It was mandatory in character and, therefore, the judgment of the single judge as affirmed by the division bench did not suffer from any infirmity.

The management took an alternative plea that the single judge and the division bench were not justified in directing payment of full back wages and the court thought that the plea needed consideration in view of legal position settled in the earlier judgments[44] that payment of back wages has a discretionary element involved in it and the same has to be exercised keeping in view the facts and circumstances of each case and no straitjacket formula can be evolved though, however, there is statutory sanction to direct payment of back wages in its entirety. Considering the peculiar facts of the case and the background against the respondent and the position of law as it stood at the time the order of dismissal was passed, the court ordered that the quantum of back wages was restricted to rupees two lakhs to be paid within a period of four weeks from the date of the order. The court directed that if any amount had already been paid the same should be deducted from the amount directed to be paid.

It was contended before the court by the bank that it be granted liberty to take action in terms of section 33(2)(b) of the Act. The court noted that neither the single judge nor the division bench had dealt with the desirability to give such liberty. Considering the background facts of proved misconducts by the workman the court felt that it was a fit case where such liberty could be granted. It gave liberty to the management, if so advised, to take action against the workman in terms of section 33(2)(b) of the Act.

Regularisation

General

In *Oil & Natural Gas Corpn. Ltd.* v. *Engg. Mazdoor Sangh*[45] the appellant was a public sector corporation, constituted under an Act of Parliament, to provide for production and sale of petroleum and petroleum products. In order to achieve these objects, the corporation carries out geological and geophysical surveys for the exploration of petroleum. Such work of survey is seasonal and is generally undertaken between November each year and May of the following year. The workload is far less during the monsoon period and is generally referred to as the off-season. Every year when such survey work or field season begins, the corporation starts recruiting casual/contingent/temporary workmen for specified periods and their services are terminated at the end of the field season. Such practice appears to have been continuing from the very inception of the corporation

44 *P.G.I. of Medical Education and Research* v. *Raj Kumar*, (2001) 2 SCC 54; *Hindustan Motors Ltd.* v. *Tapan Kumar Bhattacharya*, (2002) 6 SCC 41; *Indian Rly. Construction Co. Ltd.* v. *Ajay Kumar*, (2003) 4 SCC 579; *M.P. SEB* v. *Jarina Bee*, (2003) 6 SCC 141 and *Kendriya Vidyalaya Sangathan* v. *S.C. Sharma*, (2005) 2 SCC 363.

45 (2007) 1 SCC 250.

in 1956. While in 1956 the corporation had a staff strength of 450 employees, the number swelled to about 25000 by the year 1979 and has increased even further since then.

In view of the aforesaid phenomenon relating to the employment of seasonal workers, the respondent union, on behalf of its members who had been recruited as such casual/contingent/temporary workmen, raised an industrial dispute in the form of a demand for regularisation of such workmen resulting in a reference being made under the ID Act. The subject matter of reference was whether the demand of the union that employees employed by ONGC who had completed 240 days or more in the corporation as casual/contingent/temporary workmen were entitled to be regularised as permanent workmen from the date of their engagement in ONGC with other consequential benefits. When the reference was pending, the union filed a complaint under section 33-A of the ID Act alleging that ONGC had started giving work to contractors in preference to the casual/contingent/temporary workmen and had thus altered the terms of the workmen and committed breach of section 33-A of the Act. The tribunal held that it was not permissible for it to examine whether the work of ONGC was seasonal or whether it had breached the terms of service of the workmen but it directed ONGC to follow the principle of last come first go in case it wanted to terminate the services of casual/temporary workmen on the ground that they had no work. In such a case, ONGC was required to obtain the prior permission of the tribunal under section 33(1)(a) of the Act. Consequent upon such order ONGC sought permission of the tribunal, which directed it to terminate the services of casual/contingent/temporary workmen except 189 out of the 269 workmen who were indicated in the list filed by the union.

In the main reference the tribunal came to the finding that only a temporary workman who had put in not less than 240 days of attendance in a period of 12 consecutive months was entitled to be considered for conversion on regular basis. The tribunal took note of the practice of ONGC of recruiting casual workmen in the beginning of November every year and terminating their services in April-May every year as recurring phenomenon. But it also observed that keeping workmen, casual/badli/temporary over long spells of time amounts to unfair labour practice. It observed that it would in the fitness of things if some scheme for regularizing such workmen was prepared. In order to find a solution to the said problem, the tribunal took recourse to the certified standing orders which governed the parties and in particular rule 2 of the said orders which read as follows:

> 2. Classification of workmen. – (i) The contingent employees of the Commission shall hereafter be classified as under:
>
> (a) temporary, and
>
> (b) casual
>
> (ii) A workman who has been on the rolls of the Commission and has put in not less than 180 days of attendance in any period of 12 consecutive months shall be a temporary workman, provided that a

> temporary workman who has put in not less than 240 days of attendance in any period of 12 consecutive months and who possesses the minimum qualifications prescribed by the Commission may be considered for conversion as regular employee.
> (iii) A workman who is neither temporary nor regular shall be considered as casual workman.

On the basis of the above clause in the standing order the tribunal held that a casual workman who had put in attendance of 180 or more days in 12 consecutive months automatically became a temporary workman and could after completion of 240 days of attendance in any period of 12 consecutive months and on possessing requisite qualifications be considered for conversion as a regular employee as and when regular vacancies arose giving them relaxation of one year in the matter of age limit that may be prescribed under the rules of the ONGC. The tribunal made it clear that such workmen had to compete with others seeking employment through employment exchange or similar lawful manner. ONGC was warned to ensure that no officer in its employment should resort to unfair labour practice of inducing any casual workman to change his name. Similarly, no workman would hereinafter change his name to conceal his previous employment with ONGC. The single judge of the high court on being approached by the workman modified the award, *inter alia*, holding that no such eligible workmen shall be made to wait for the availability of vacancies of the regular post but for being made permanent they will have to wait for their turn as and when the permanent post become available. It also held that for this purpose, the age requirement shall be seen with reference to the point of time when such employees were initially employed instead of the relaxation as had been directed by the industrial tribunal in the impugned award. A division bench of the high court modified the order of the single judge and directed that the workman concerned should be directly treated as regularised w.e.f. 01.05.1999 with further direction to give them actual benefits on par with regular employees, including all perquisites and applicable allowances, as also regular employment w.e.f. 01.05.2005. It made it clear that the aforesaid directions would apply to the surviving employees out of 189 employees who had been accepted as having acquired temporary status.

In a special leave to appeal, the management of ONGC impugned the modifications made in the award of the tribunal both by the single judge as well as the division bench of the high court. The Supreme Court upheld the directions given by the industrial tribunal as reasonable and allowed them to stand against the directions given by the high court. In arriving at this conclusion the court was greatly persuaded by the fact of the nature of the employment and the period during which these field workers were employed. According to the court it would have been difficult for the appellants if seasonal workers were to be treated on par with regular employees as directed by the single judge of the high court. It would have been more difficult for ONGC to adjust the workmen in permanent employment when

the need for them was only seasonal. The court also took into account that the monopolistic control over geological survey of oil and natural gas that ONGC enjoyed has changed in view of the fact that other players were allowed to operate in this field by the new economic policy of the Government of India. It was now just another competitor alongwith others engaged in this field of activity, notwithstanding the fact that it was a government company. According to the court, the tribunal had rightly found a via media in directing that the 153 workmen who had admittedly completed 240 days and had acquired temporary status were entitled to be regularised against vacancies as and when such vacancies became available. The court further safeguarded the interest of these workmen by directing that till such time as these 153 workers were not absorbed against the regular vacancies in the category concerned, no recruitment from outside should be made by the ONGC. Further, even in the matters of seasonable employment, the said 153 workmen or the numbers that remain after regularisation from time to time were to be considered for employment before any other workmen are engaged for the same type of work in the field. The court directed the ONGC to make a serious attempt to regularise the services of the workmen concerned in terms of the order passed by the tribunal, as quickly as possible but preferably within a period of two years from the date of the order of the court.

Legal position of an industrial worker in a government company distinguished from a government servant: Issues relating to regularisation

In *Hindustan Aeronautics Ltd.* v. *Dan Bahadur Singh*[46] the Supreme Court explained that legal position of a government servant is entirely different from that of a workman working in an industrial establishment which is a government company within the meaning of section 617 of the Companies Act. A government servant enjoys status and security of tenure on account of certain constitutional provisions. A permanent government servant has a right to hold the post and he cannot be dismissed or removed or reduced in rank unless the requirement of article 311 of the Constitution or the rules governing his service are complied with. On the other hand, an employee working in an industrial establishment enjoys a limited kind of protection. The type of tenure of service normally enjoyed by a permanent employee in government service, namely, to continue in service till the age of superannuation, may not be available to an employee or workman working in an industrial establishment on account of various provisions in the ID Act where the tenure may be cut short not only on account of any disciplinary action taken against him but on account of unilateral act of the employer. An employee may lose his employment in various contingencies envisaged under the ID Act such as lay off, retrenchment, transfer of undertaking and

46 (2007) 6 SCC 207.

closure situations. Therefore, the claim for permanency in an industrial establishment has to be judged from a different angle and would have different meaning.

In this case a trade union of daily-rated *Malis* working in the appellant government company and certain individual workmen filed two separate writ petitions in the high court to seek a direction for regularisation of the services of such daily-rated *Malis* on the ground, *inter alia*, that they had put in 240 days of continuous service in each calendar year during the past several years but artificial break in service was created with a view to deprive them of their continuity in service. They further sought the relief that such daily-rated *Malis* be placed in the pay scale of *Malis* and treated as continuing in service without any break. The appellant company opposed the writ petitions, *inter alia*, on the ground of shortage of continuous and full-time work for such type of workmen.

A single judge of the high court issued a direction to the appellant company to absorb the members of the respondent union as regular employees or such of them as might be required to do the work available on perennial basis and be paid the wages of regular employees. A further direction was issued that even those not absorbed as regular employees should not be disengaged and should be regularised as and when the perennial work was available. In an intra-court writ appeal, a division bench of the high court upheld the judgment of the single judge, hence the present special leave petition by the appellant.

The contention of the appellant company before the Supreme Court was that its employees were not government servants but were mainly governed by the provisions of the ID Act and, therefore, the reliefs prayed by them were akin to one that could be granted only to the government servants and not to industrial employees.

The Supreme Court held that the direction issued by the high court in effect had two components i.e. creation of posts and also payment of regular salary as in the absence of a post being available a daily wager could not be absorbed as a regular employee of the establishment. It held that the impugned judgment of the high court could not be sustained and the respondents could not be entitled to the reliefs prayed for by them in view of the fact that the high court had not appreciated the distinction between government employees and the employees working in government owned companies. Such a relief is generally considered in case of government servants. The court also made it very clear that mere fact of having put in 240 days of work in a calendar year does not confer any right on an employee or workman to claim regularisation in service. It relied on its earlier decisions to carry home this settled legal position.

Execution proceedings

Bharat Heavy Electricals Ltd. v. *Anil*[47] relates to the execution of an

47 (2007) 1 SCC 610.

earlier order of the Supreme Court in which the court had held that the services of the workmen concerned were wrongfully terminated and they had worked for more than 240 days in 12 calendar months. The court had further held that although these workmen were employed through contractors by BHEL as gardeners to clean the parks in the vast land owned by BHEL and to keep the entire BHEL campus neat and clean, it was BHEL which was retaining control over them and were working under its supervision and, therefore, it upheld the award of the labour court holding that BHEL was the principal employer and the contractor was the immediate employer. The award as upheld by the Supreme Court directed BHEL to reemploy them in its services or get them employed under the contractor. After this judgment, these workers approached the assistant labour commissioner (ALC) for execution of the award of the labour court as upheld by the Supreme Court. The ALC directed BHEL to reengage these workers through contractor in compliance with the award of the labour court. The workers were aggrieved by the order of the ALC as according to them the award in the first place had directed the BHEL to reemploy them in its service and, therefore, the order of the ALC directing BHEL to reengage them through contractor was liable to be quashed. The high court quashed the order of the ALC and directed BHEL to reinstate these workers directly in its service.

The aforementioned order of the high court was challenged by BHEL before the Supreme Court. BHEL contended that the Supreme Court having confirmed the award of the labour court which directed it to reemploy these workers in its service or to get them employed through an intermediary, namely, the contractor, it was not bound to absorb them in its own employment. The doctrine of merger had limited application to the facts of the present case and the said doctrine applied to the operative part of the award and not to reasoning or observations in the award. The industrial dispute relating to non-employment was raised by the workmen under section 2-A of the UP Act complaining about the termination of service and it was the case of the workers themselves before the tribunal that they were engaged by the contractor but the work which they had performed was for BHEL. The labour court had treated BHEL as the principal employer and the contractor as an immediate employer and the only issue before the labour court was whether termination of services of these workers was justified and lawful and, if not, the benefits/relief which each of the workers were entitled to. It was the case of the BHEL that the workers in the present case could not claim direct employment from BHEL as the labour court while granting reinstatement had itself made an enabling provision by which the said workers were directed to be reemployed by BHEL in its services directly or get them employed under its contractor. BHEL having got them employed through the contractor had complied with the award of the labour court. The subject matter of the dispute before the labour court, according to the BHEL, was the validity of the termination and not direct employment from BHEL and if it was the case of the workers that they should have direct employment from BHEL they were required to raise a fresh regular

industrial dispute not under section 2-A but under section 2(l) of the 1947 UP Act (same as section 2(k) of the ID Act, 1947) which required espousal by a union which was not done in the present case. Since they had not been employed on regular basis directly by BHEL but were employed through a contractor they must seek abolition of contract labour after making an existing regular union in BHEL as a necessary party. An individual dispute under section 2-A which is deemed to be industrial dispute only in case of non-employment, such a dispute could not be converted into an industrial dispute under section 2(l) without a proper reference.

On the other hand, the stand of the workers before the Supreme Court was that in the earlier round of litigation the labour court, high court as well as the apex court had held that the respondents were in fact the employees of BHEL and, therefore, it had directed to treat them as employees of BHEL. It was urged that the findings recorded by the labour court and the high court were confirmed by the Supreme Court and the respondents were directed to be treated as employees of BHEL and, therefore, the doctrine of merger was squarely applicable. In view of this the ALC had erred in directing BHEL to reemploy the respondents through the contractor and there was no reason to interfere with the judgment of the high court directing BHEL to reemploy the respondents directly as their workers. It was also the case of the workers in the earlier litigations that the judgment of the high court which was confirmed by the Supreme Court stated that BHEL had resorted to a camouflage in order to avoid the provisions of the ID Act. The respondents were *malis*. They were required to look after the lawns of the company and in the earlier round even after the award the company had refused to pay compensation to the workers either directly or through the contractor and the contractor had disowned their liability and the workers had been left with no alternative but to file an application for implementation of the award.

The court observed that the central question which it was asked to answer concerned the subject of the dispute decided by the award of the labour court. It observed that the right to employment or setting aside the earlier order of termination, the right to wages and the right to obtain work from BHEL are different from the right to status as employees of the BHEL. It held that under the said award the workers were entitled to obtain work from BHEL through its contractors. They were entitled to wages under the said award. However, under the said award of the labour court there was no abolition of the contract labour. The labour court had not conferred the status of a workman *qua* BHEL. It had not granted permanency to them. On the contrary after holding that the work of *malis* was supervised and controlled by BHEL, award made an enabling provision by directing BHEL to reemploy the said workmen in its service or employ them through the contractor. In fact, the operative part of the award further stated that it was the contractors who had failed to retain the workmen and terminated their services in breach of section 6-N (same as section 25-F of the ID Act). This enabling direction was given on the footing that the work carried out by these workmen was under the control and supervision of BHEL. The court further stated that

observations made in the judgment of the high court as well as its earlier round of litigation reported in *BHEL* v. *State of U.P.*[48] had to be read in the context of the operative part of the award. The court held that there was one more reason for coming to the above conclusion. There is a difference between an individual dispute which is deemed to be an industrial dispute under section 2-A of the 1947 Act on the one hand and an industrial dispute espoused by the union in terms of section 2(k) of the said 1947 Act. An individual dispute which is deemed to be an industrial dispute under section 2-A concerns discharge, dismissal, retrenchment or termination whereas an industrial dispute under section 2(k) covers a wider field. It includes even the question of status. This aspect according to the court was very relevant for the purposes of deciding the case at hand. The court referred to an earlier judgment in *Radhey Shyam* v. *State of Haryana*[49] where the high court after considering various judgments of the apex court had held that section 2A contemplates nothing more than to declare individual dispute to be an industrial dispute. It did not have the effect of amending the definition of industrial dispute set out in section 2(k) of the ID Act, 1947. The court observed thus:[50]

> Section 2-A does not cover every type of dispute between an individual workman and his employer. Section 2-A enables the individual worker to raise an industrial dispute, notwithstanding, that no other workman or union is a party to the dispute. Section 2-A applies only to disputes relating to discharge, dismissal, retrenchment or termination of service of an individual workman. It does not cover other kinds of disputes such as bonus, wages, leave facilities, etc.

The court referred to the award of the labour court where it had also held that the respondents had proceeded with their case on the footing that they were engaged by the contractors, but the work that they performed was for the BHEL. In view of this stand of the workers the operative part of the award stated that the said workers shall be given work by BHEL as direct workmen or through its contractor. The question, which it felt was to be answered, was: why did the labour court provide for an enabling direction in its award? The court stated that the answer was simple. The labour court had not granted a status of direct employment *per se* because BHEL had its own recognised union and that union was not impleaded as respondent. The workers here were not directly recruited in BHEL. They had never applied for job in BHEL. Their appointment letters appears to have been given by the contractor. BHEL had its own waiting list of workers who claimed

48 (2003) 6 SCC 528.
49 (1998) 2 LLJ 1217 (P&H).
50 *Supra* note 47 at 618.

permanency/regularisation and they were not before the labour court. It was in the backdrop of these circumstances the labour court had enabled BHEL either to directly employ the respondents or employ them through the contractor. The contractor before the Supreme Court had stated that they were given work by him and they were paid wages by him. The court held that in these circumstances the ALC was right in directing BHEL to reemploy these workers either directly or through the contractor. The order passed by the ALC was an order of the execution court and is in terms of the award of the labour court. The court, accordingly, set aside the judgment of the high court and upheld the order of the ALC.

The court made it clear that this order would, however, not preclude the workmen for raising an industrial dispute claiming status of the direct workmen of the company after joining a recognised union or union concerned in the said reference. The court held that this order would not prevent the workmen from seeking abolition of contract labour in accordance with law.

Binding nature of settlement

In *Mohan Mahto* v. *Central Coal Field Ltd.*[51] the Supreme Court observed that it is settled legal position that a settlement within the meaning of section 18(3) of the ID Act is binding on both the parties i.e. the employer and the workmen and continues to remain in force unless the same is altered, modified or substituted by another settlement. The right to obtain appointment on compassionate grounds if incorporated in a settlement as defined in section 2(p) of the Act remains binding between the parties. The binding nature of the settlement will apply to all the workmen who fall within the expanding definition of workman under section 2(s) of the Act and would confer a right upon such workmen to obtain appointment on compassionate grounds, subject of course, to compliance with the conditions precedent contained in the settlement for grant of compassionate appointment. The court held that if no period of limitation was provided in the settlement the state was expected to act reasonably. While doing so it was expected to provide for a period of limitation, which was reasonable. What should be a reasonable period would depend upon the rules operating in the field. The state is expected not only to work fairly but also reasonably and *bona fide*.

The court held that the son of the employee who died in harness had applied in terms of the relevant clause of the settlement but the management failed to place his name in the list for consideration for appointment on compassionate ground. Even after he had attained majority he had again applied but was not appointed because of the failure of the respondents to put his name in the list. The court directed the management to give him benefit of the settlement as he fulfilled the eligibility conditions. The court

51 (2007) 8 SCC 549.

held that grant of appointment on compassionate grounds though an exception to article 16(1) of the Constitution cannot be denied to a dependant of an employee who died in harness where a binding settlement enjoined a duty upon the employer to provide such appointment to his dependant on fulfilling the requisite conditions.

Miscellaneous

Whether provisions of Sales Promotion Employees (Conditions of Service) Act, 1976 oust the jurisdiction of authorities constituted under the A.P. Shops and Establishments Act, 1988

In *SPIC Pharmaceuticals Division* v. *Authority under Section 48(1) of A.P. Shops and Establishments Act, 1988*[52] an issue of considerable importance came up before the Supreme Court whether the provisions of Sales Promotion Employees (Conditions of Service) Act, 1976 oust the jurisdiction of the authorities constituted under the A.P. Shops and Establishments Act, 1988 (in short 'the Shops Act') and consequently the authorities under the Shops Act are excluded from entertaining appeals preferred by the aggrieved sales promotion employees challenging termination of their services. The further question was whether the authorities constituted under the Shops Act had no jurisdiction to entertain any appeal preferred by the sales promotion employees challenging the action of the employer in terminating their services.

In this case the employees were involved in the manufacture of pharmaceutical products. The appellant had engaged the services of the employees for the purposes of marketing its products and who in common parlance are known as medical representatives. Charge sheets were issued against the employees concerned and the management after holding enquiries terminated their services. They invoked the jurisdiction of the labour court challenging the orders of termination but later on withdrew them and moved the authority under the Shops Act. The authorities under the Shops Act directed reinstatement of the employees in service together with back wages which orders were challenged in the writ petitions by the management before a single judge of the high court. The writ petitions as well as the writ appeals of the management were dismissed by the high court. The main contention of the management before the Supreme Court in the SLP was that the authority under the Shops Act had no jurisdiction to entertain the appeals preferred by the employees as their service conditions were governed and regulated by the provisions of the Sales Promotions Act, which is a special legislation, an argument which the competent authority under the Shops Act had rejected earlier. Further, it was argued that Parliament enacted the Act as it thought that it would be more appropriate to have a separate legislation for governing service conditions of the sales promotion employees, and

52 (2007) 2 SCC 616.

accordingly made the provisions of the ID Act applicable conferring rights on the sales promotion employees to challenge the order of dismissal, discharge or retrenchment in the forums created and constituted under the said Act. The management further argued that Parliament had also specified application of certain laws to sales promotion employees which included the Workmen's Compensation Act, 1923, the Minimum Wages Act, 1948, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965 and the Payment of Gratuity Act, 1972 and except these legislations no further Act including Shops Act has been made applicable to them.

On the other hand the workmen argued that there were two forums applicable to the employees i.e. under the provisions of the ID Act and the Shops Act, which supplement each other and the formed does not exclude application of the latter. It was for them to choose either of the forum created under the said legislation.

The Supreme Court opined that the forums created under the ID Act could more effectively deal with the issues raised. The court without deciding on the issue of jurisdiction of the authorities under the Shops Act directed the state government to refer the dispute to the appropriate forum under the ID Act for adjudication of the issues within the time specified by the court. The court did not express any opinion on the merits of the case.

It is submitted that the order of the court subjecting the employees to further protracted litigation could have adjudicated the matter in the light of the well settled principles laid down in the earlier judgments that the two pieces of legislation complement each other and do not exclude the application of either. Given the fact that in disciplinary matters the Supreme Court has circumscribed the powers of the labour court and industrial tribunals, it is a misnomer to think in the present day that the ID Act gives more effective remedy than the one under the Shops Act. Given the fact that the authorities under the latter Act had already decided the matter in favour of the employees, the Supreme Court ought to have dealt with the matter on merits and adjudicated on the issue than subjecting the workers to further proceedings.

III CONCLUSION

The trend in the decisions of the apex court in various areas of industrial relations law in the year under survey depicts that the court has over the years been relentlessly following what it calls as 'new approach'[53] to industrial relations law to give impetus to the new economic policy of the Government of India so that the interest of all the parties, namely, workers, employers and the society are taken care of. The present composition of the court has said in so many words that the earlier approach of the court was only

53 See *U.P. State Brass Ware Corporation Ltd* v. *Uday Narain Pandey*, (2006) 1 SCC 379.

'worker-oriented' interpretation.[54]

The court has liberally construed section 2(oo)(bb) to exclude termination of the service of the worker from the definition of 'retrenchment', even when the cases at hand appeared clear cases of camouflage and *mala fide* on the part of the management to evade application of section 25F of the ID Act.[55] Further, the court has surprisingly declared that professional workers are not covered by the definition of 'workman' even when the definition of 'workman' covers 'technical' and 'operational' personnel within section 2(s), provided they are not engaged mainly to do 'managerial' or 'supervisory' work.[56]

The court has in pursuance of its declared 'new approach' dealt with the issues relating to the criterion for granting back wages and other consequential benefits in the event of different forms of termination of service. It has brought out clear distinction between illegal retrenchments and other illegal termination of services on the one hand and grant of appropriate reliefs and consequential benefits, if any, in cases where the industrial adjudicator exercises its power under section 11A of the Act reducing the punishment in cases where terminations are otherwise valid.[57] The new approach of the court having come to stay, this distinction is reasonable and cannot be faulted.

It is not only the recent judicial interpretation of various provisions under the Act which are working to the detriment of the workers but even the existing legislative framework appears to be self-defeating, for example, though section 2(s) of the ID Act includes an 'apprentice' within the definition of 'workman' for the purposes of the Act, but by virtue of section 18 of the Apprentices Act, 1961 every apprentice undergoing apprenticeship training in a designated trade is designated as a trainee and not a 'worker' and the provisions of any law with respect to labour are not to apply to or in relation to such 'apprentice'. This is indeed a paradoxical situation as what is given by one hand is taken away by the other. This calls for an immediate amendment to section 18 of the Apprentices Act, 1961 so as not to deny or deprive an apprentice trainee of the benefit of labour laws generally and the protection under the ID Act, in particular.

The positive aspect of the judicial approach is that it has ruled that keeping in view the avowed purpose behind section 33 of the Act being to prevent employer from resorting to unfair labour practices, the mandatory character of section 33(2)(b) cannot be allowed to be diluted.[58]

The court has rightly brought out the distinction between government employment and employment in non-governmental sector and the difference in the quality of protection that is available to the employees in the two

54 *State of U.P.* v. *Jai Bir Singh*, (2005) 5 SCC 1 at 24-25.
55 *Supra* notes 1 and 2.
56 *Supra* note 18.
57 *Supra* note 32.
58 *Supra* note 41.

sectors.[59] A government servant enjoys status and security of tenure on account of certain constitutional provisions while as an employee working in an industrial establishment enjoys a limited kind of protection under ID Act where the tenure may be cut short not only on account of any disciplinary action taken against him but also on account of unilateral act of the employer. An employee may lose his employment in various contingencies envisaged under the ID Act such as lay off, retrenchment, transfer of undertaking and closure situations. Therefore, the claim for permanency and regularisation in an industrial establishment has to be judged from a different angle and would have different meaning.

59 *Supra* note 46.