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LABOUR LAW—I

(LABOUR MANAGEMENT RELATIONS)

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I INTRODUCTION

IN THE year 2008, the Supreme Court has rendered a number of decisions in various important areas of industrial relations law. All the reported cases are under the Industrial Disputes Act, 1947 covering mainly jurisdictional issues, choice of forum to pursue grievances on the part of the workers and conceptual framework of various definitions under the Act. The issue whether part-time workers fall within the ambit of definition of 'workman' under section 2(s) of the Act seems to have been finally settled in their favour. Further, reported cases on issues relating to reference, strike law and new approach of the court towards disciplinary matters including moulding of relief in retrenchment cases are also the subject matter of the present survey. No significant decision either under the Industrial Employment (Standing Orders) Act, 1946 or under the Trade Unions Act, 1926 has been reported.

II INDUSTRIAL DISPUTES ACT, 1947

Jurisdictional issues

In *Rajasthan SRTC* v. *Mohar Singh*,[1] an important question of law that arose for consideration before the Supreme Court was whether the jurisdiction of the civil court which had decreed the suit of the workman was barred by section 9 of the Civil Procedure Code (CPC). This question arose in the following factual matrix:

The disciplinary authority took a decision to proceed departmentally against one of its drivers under the Road Transport Corporation Act, 1950 for abstaining from duty unauthorizedly. On the basis of the enquiry report, it terminated his services. The workman filed a civil suit wherein the civil court framed the following issues:

i) Whether the order of termination was illegal and bad in law?

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1 (2008) 5 SCC 542.

ii) Whether the civil court had got no jurisdiction to entertain and try the suit?

The trial court held that the order of termination was bad in law since the principles of natural justice were not observed inasmuch as the documents relied upon by the management had not been supplied to him; he was not allowed to cross-examine the witnesses of the management and that the enquiry officer had acted like a prosecutor. In the result, the termination was set aside and he was reinstated with full back wages and with all the mandatory benefits including continuity of service. Appeals preferred by the management both before the first appellate as well as second appellate courts were dismissed. Hence this special leave to appeal before the Supreme Court.

Dealing with the submissions of the management that the suit tried by the civil court was barred by section 9 of the CPC, the Supreme Court observed that the provisions of the Industrial Dispute Act, 1947 (ID Act), apparently did not expressly bar the jurisdiction of the civil court. Therefore, the question that needed consideration was as to whether the same was barred by necessary implication. Refering to the principles laid down by it in *Premier Automobiles* v. *Kamlekar Shantaram Wadke*[2] on this aspect the court observed that the civil court may have limited jurisdiction in service matters but it cannot be said to have no jurisdiction at all to entertain a suit. It may not be entitled to sit in appeal over the order passed in the disciplinary proceedings or on the quantum of punishment imposed. It may not in a given case direct reinstatement in service having regard to section 14(1)(b) of the Specific Reliefs Act, 1963 but it is a trite law that where the right is claimed by the plaintiff in terms of common law or under a statute other than the one which created a new right for the first time and also provided a forum for enforcing the said right, the civil court also has jurisdiction to entertain a suit if the plaintiff claims benefit of a fundamental right as adumbrated under article 14 of the Constitution or mandatory provisions of statute or statutory rules governing the terms and conditions of the service.

The court observed that the decision taken by the disciplinary authority in the present case under the Road Transport Corporation Act ordinarily would be subject matter of a suit. The civil court, however, as noticed above, exercises limited jurisdiction. If, however, the employee concerned is a workman within the meaning of the provisions of the ID Act, 1947, he, apart from the common law remedies, may take recourse to the remedies available before an industrial court. When a right accrues under two statutes vis-à-vis the common law right, the employee concerned will have an option to choose his forum. The court also observed that distinction has to be noticed between a right which is conferred upon an employee under a statute for the first time for enforcement of which a forum has also been created thereunder and one

2 (1976) 1 SCC 496.

which is created to determine the cases under the common law right. It is only in the former case that the civil court's jurisdiction may be held to be barred by necessary implication.

Under the industrial law and in particular the 1947 Act, the authorities specified therein including appropriate governments and the industrial courts have various functions to perform. Safeguards have been provided under the Act to see that services of the workman are not unjustly terminated. The 1947 Act provides for a wider definition of 'termination of service' and conditions precedent for such termination have been provided for thereunder. Had the plaintiff claimed a right under the ID Act or the sister laws the jurisdiction of it would be barred, but if no such right were claimed, it would have jurisdiction. The court observed that in the present case it was not concerned with the situation where the plaintiff had claimed any right arising under the ID Act or under the Industrial Employment (Standing Orders) Act. The appellant being a 'state' within the meaning of article 12 of the Constitution and a creature of a statute was bound to comply with the requirements of article 14 as also other provisions of part III of the Constitution. It was also bound to comply with the mandatory provisions of the statute (The Road Transport Corp. Act) or the regulations framed under it. It was bound to follow the principles of natural justice. In the event, it was found that the action of the state was violative of the constitutional provisions or the mandatory requirements of a statute or statutory rules as in the present case, the civil court would have jurisdiction to direct reinstatement with full back wages. The court did not find any merit in the appeal and dismissed it accordingly.

In contrast to the above situation, in *Chief Engineer, Hydel Project* v. *Ravinder Nath*,[3] the question that arose for consideration of the Supreme Court was whether the management who had failed to raise the plea of bar of jurisdiction of the civil court to pronounce on a subject of violation of section 25-G of the ID Act could be allowed to raise the said objection at the stage of the proceedings before the apex court. This question arose in the following facts and circumstances:

A group of employees whose services were terminated by the appellant/ management filed a civil suit seeking the relief that termination of their service by way of retrenchment was illegal being violative of the 'first come last go' principle envisaged in section 25-G of the Act and, therefore, they were entitled to reinstatement with back wages. The appellant, however, did not raise any objection about the maintainability of the suit on the ground that the dispute being an industrial dispute was beyond the jurisdiction of the civil court. The civil court directed reinstatement with back wages holding that the management had violated the principle of 'first come last go'. The management did not raise such an objection even before the high court in appeal. However, the management had earlier filed a special leave petition in the

3 (2008) 2 SCC 350.

Supreme Court raising such an objection but the court disposed it off by directing the high court to hear the appeal expeditiously. The said objection was again raised when the matter came before the Supreme Court second time against the judgment of the high court on merits upholding the judgment of the civil court. The respondent's contentions before the Supreme Court was that civil court's jurisdiction could not be questioned at this stage since it was not raised before the civil court and the appellate courts.

The court referred to its earlier judgments[4] to state that it has been consistently held that the jurisdiction of the civil courts stands ousted if the dispute, *inter alia*, relates to enforcement of a right created under the ID Act such as chapter VA and the only remedy available to the suitor is to get an adjudication under the 1947. Bringing out clearly the distinction amongst several categories of jurisdictions of the courts, the court referred to the following observations made by it in an earlier judgment:[5]

> The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.

Further, the court also took notice of the fact that there were certified standing orders in vogue in the office of the appellants and the services of the respondent workers were terminated in terms of the certified standing orders and, therefore, the breach thereof fell in the exclusive area of the machinery provided under the ID Act and as such the civil court's jurisdiction was specifically barred. It was the case of the respondents that the principles underlying the provisions of the Industrial Employment Certified (Standing Orders) Act, 1946 providing for maintenance of seniority list was completely ignored and a highly arbitrary and discriminatory approach was resorted by the employer by picking and choosing the plaintiffs for the purpose of termination. The court held that

4 *Premier Automobiles Ltd., supra* note 2; *Jitendra Nath Biswas* v. *Empire of India & Ceylone Tea Co.*, (1989) 3 SCC 582; *Rajasthan SRTC* v. *Krishna Kant*, (1995) 5 SCC 75; and *Rajasthan SRTC* v. *Zakir Hussain*, (2005) 7 SCC 447.

5 *Harshad Lal Modi* v. *DLF Universal Ltd.*, (2005) 7 SCC 791 at 803-04.

keeping in view the complaint of the workers, the dispute clearly fell outside the civil court's jurisdiction on the subject matter in question.

The court applied the doctrine of *coram non judice* and held that the original decree itself having been passed without jurisdiction, there could be no question of upholding the same merely on the ground that the objection to the jurisdiction of the civil court was not taken at the initial, first appellate or second appellate stage and was taken only at the stage of the Supreme Court.

Some aspects of the decision of the Supreme Court in *State Bank of India* v. *S.N. Goyal*,[6] are appropriate to be mentioned here having bearing on jurisdictional issue. This case related to removal of a manager of the bank on proved misconduct in the State Bank of India, a statutory body governed by the State Bank of India Act, 1955. The officers/employees of the bank are governed by the rules framed under the Act. The question was whether the civil court in which he challenged his removal and sought declaration that his removal was bad in law and prayed for a direction of his reinstatement with all consequential benefits had the jurisdiction or not. Since the matter related to manager's removal, the ID Act was not applicable and, therefore, the jurisdiction of the civil court could not be held to be barred even though the matter related to a statutory body. The court observed that the general principle is that contract of service is not specifically enforceable under section 14 of the Specific Reliefs Act, 1963. Even if termination of contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of an employee is only to seek damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. But this principle is subject to three well recognized exceptions which are:

(i) where a civil servant is removed from service in contravention of provisions of article 311 of the Constitution of India (or any law made under article 309);
(ii) where the workman having the protection of the ID Act is wrongly terminated from service;
(iii) where the employment of a statutory body is terminated from service in breach or violation of any mandatory provision of a statute or statutory rules.

The court observed that there is a distinction between public employment governed by statutory rules and private employment governed purely by contract. The test for deciding the nature of relief – damages or reinstatement with consequential relief – is whether employment is governed purely by contract or by a statute or by a statutory rule. Even where employer

6 (2008) 8 SCC 92.

is a statutory body, but relationship is purely governed by contract with no element of statutory governance, contract of personal service will not be specifically enforceable. Conversely, where employer is a non-statutory body, but employment is governed by a statute or statutory rules, a declaration that termination is null and void and that the employee should be reinstated can be granted by the court.[7] The court ruled that the civil court can in an appropriate case order reinstatement with consequential reliefs in cases like the present one where the employment of the employee was governed by statutory rules framed under section 43(1) of the State Bank of India Act, 1955, as a result of which an action for declaration that the termination was invalid and that he was deemed to continue in service is maintainable and would not be barred by section 14 of the Specific Reliefs Act.

But since in the present case the misconduct of the manager of misappropriation of the customer's money has been proved in fair, proper and valid enquiry which cast doubts in the integrity and honesty of the bank or its officers in handling funds of customers/borrowers of the bank and its employees, the court held that, in the absence of any valid ground of challenge, the courts below including the trial court ought to have held that the penalty of removal from service did not warrant any interference. The court held that the suit should have been dismissed instead of being allowed with the relief of reinstatement with consequential benefits. The court, accordingly, allowed the appeal and set aside the judgment and decree of the courts below.

Choice of forum

The decision of the court in *Telecom District Manager* v. *Keshab Deb*[8] deals specifically with the subject of choice of forum. It ruled that a daily wager or casual employee working in a government department or in an instrumentality of a state which falls within the definition of 'industry' and seeks enforcement of fundamental rights or statutory rights under the ID Act has a choice in the matter of selecting his forum between Central Administrative Tribunal (CAT) under the Administrative Tribunals Act, 1985 or Industrial Tribunal constituted under the ID Act with all attendant consequences. To appreciate the resolution of this otherwise vexed issue, it is necessary to state the factual matrix and the legal position declared by the Supreme Court.

In this case the respondent sought employment as a driver in the office of the appellant but he was informed that he could not be appointed in view of the fact that there was a ban on recruitment then and his case would be

7 See *S.B. Dutt (Dr.)* v. *University of Delhi*, AIR 1958 SC 1050; *Vaish Degree College* v. *Lakshmi Narain* (1976) 2 SCC 58; and *Dipak Kumar Biswas* v. *Director of Public Instruction*, (1987) 2 SCC 252.

8 (2008) 8 SCC 402.

considered only after the ban was lifted. He was informed that he should apply through employment exchange etc. He was, however, appointed as a casual labour on daily wages and was continued in that position for a number of years. He was arrested under the Police Act. On conviction he was sentenced to eight days imprisonment and a fine. He was not allowed to join back his duty. He filed a petition before the high court stating that he was 'workman' within the meaning of section 2(s) of the ID Act and did not hold a civil post and, therefore, his case did not fall within the jurisdiction of the CAT. He further raised the contention that his services were terminated without meeting the statutory requirements as contained in section 25-F of the ID Act and he sought relief of regularization of his services in the office of the petitioners in the scheme known as Casual Labour (Grant of Temporary Status in Regularisation) Scheme. It was the case of the petitioner management before the high court that having regard to section 14 of the Administrative Tribunals Act, the writ petition was not maintainable. The high court transferred the matter to the CAT, Gauhati bench. The appellant contended before the CAT that the respondent being a casual employee was not entitled to the benefit of the scheme of regularization. The CAT allowed the application of the workman holding that the termination order was illegal on the ground that the action of the appellant being punitive in nature, he had been condemned unheard. The writ petition preferred by the appellant against the order of the CAT was dismissed by the high court. Hence the special leave to appeal before the Supreme Court.

The Supreme Court observed that in a case of the present nature where, *inter alia*, an employee maintains a writ petition not only on the ground of violation of the equality clause enshrined under article 14 of the Constitution but also on the ground of violation of the provisions of the ID Act he has an option to choose his own forum. Section 28 of the Administrative Tribunals Act does not bar the jurisdiction of the industrial tribunal. An employee who claims himself to be a workman, therefore, will have a right of election in the matter of choice of forum. It was, therefore, not correct to contend that the CAT had no jurisdiction to pass the impugned judgement. Furthermore, the respondent claimed regularization in services. Such an application was maintainable. As to whether he would be entitled to such a relief or not, was a different question. The court observed that the CAT indisputably was entitled to exercise its jurisdiction for the enforcement of the fundamental rights of the employee. The court held that the CAT and consequently the high court were correct and that termination of services of the respondent were illegal being violative of the principle of *audi alteram partem*. The order of termination being stigmatic in nature was liable to be set aside. The court, however, made it clear that while granting a relief the superior court should have taken into consideration the factors relevant therefor which, in its opinion, in the instant case were:

(a) Recruitment of the respondent was ex-facie illegal as prior thereto neither any advertisement was issued nor the employment

exchange was notified in regard to the vacancy.

(b) It appeared that the respondent had not even got himself registered with the local employment exchange.

(c) He being a daily rated casual employee did not have any right to continue in service.

The court observed that even in a case where an order of termination of a casual employee is held illegal an automatic direction for reinstatement with full back wages is not contemplated. He was at best entitled to one month's pay in lieu of one month's notice and wages of fifteen days for each completed service as envisaged under section 25-F of the ID Act. He could not have directed to be regularised in service or granted a temporary status. Such a scheme has been held to be unconstitutional in *Secy., State of Karnataka* v. *Uma Devi (3)*.[9] The court was of the opinion that grant of compensation instead of direction of reinstatement with back wages would meet ends of justice. Even if the provisions of section 25-F had not been complied with, the respondent was entitled to be paid a just compensation. While, however, determining the amount of compensation the court must also take into account the stand taken by the management. They not only had taken an unreasonable stand but also had raised a contention in regard to the absence of the jurisdiction of the tribunal (CAT) and had admittedly not complied with the order of the tribunal for a long time. In the peculiar facts and circumstances of the case, the court held that the interest of justice would be sub-served if the respondent was directed to be paid a compensation of rupees one lakh fifty thousand within four weeks failing which it would carry on an interest of 9% p.a.

Concept of 'industry'

In *State of Rajasthan* v. *Ganeshi Lal*,[10] the question before the labour court in a reference was whether disengagement of a peon working in a temporary capacity attached to the public prosecutor under the Joint Legal Remembrance & Director Litigation, Law Department, Jaipur was in violation of the provisions of section 25-G of the Act. The claim of the employee was resisted by the state on the ground that the law department was not an 'industry'. The labour court held that the law department was an 'industry' in view of what has been stated by the Supreme Court in relation to various public works department, irrigation department, schools and hotels in various judicial decisions. The single judge before whom the award of the labour court was challenged by the state government accepted this view. In the Supreme Court, the state argued that by no stretch of imagination the law department of the state could be considered to be an 'industry'; that being so he was not a workman and, therefore, the provisions of retrenchment law did

9 (2006) 4 SCC 1.
10 (2008) 2 SCC 533.

not apply to him. It was also submitted that the question whether government department can be treated as an 'industry' was under consideration of the larger bench of the Supreme Court. The court observed that the labour court and the high court had not even indicated as to how the law department is an 'industry'. It had merely said that in some cases irrigation department and public departments have been held to be covered by the definition of 'industry'. The court referred to various English decisions where it has been held that it was imperative for the court to give reasons for arriving at a conclusion. Surprisingly, the Supreme Court also without stating any reasons observed that the accepted concept of an 'industry' cannot be applied to the law department of the government. It expressed the view that the approach of the labour court and the high court was indefensible. In view of the fact that the workman had been reinstated in the post he was holding at the time of his termination by the state, the court left it to the state to consider whether the respondent should be continued in view of the fact that he had worked for some years even though it had held that the award of the labour court and the order of the high court were clearly unsustainable and was allowing the appeal to that extent.

It is submitted that in the year under survey there are cases[11] where even the Supreme Court has given decisions without giving detailed reasons in support of the view taken by it.

Part-time worker is a 'workman'

The observations of Arijit Pasayat J in *Uttaranchal Forest Hospital Trust* v. *Dinesh Kumar*[12] gives the impression that part-time workers do not fit into the scheme of retrenchment law and are not entitled to the benefits of section 25-F of the Act. However, the court in *Divisional Manager, New India Assurance Co. Ltd.* v. *A. Sankaralingam*[13] has since clarified that the said observations of Pasayat J in *Uttaranchal Forest* case were only a passing reference to the status of the part-time employee where the main issue before the court was whether in that case the workman had in fact put in 240 days of service which could have entitled him to the benefit of section 25-F.

In *New India Assurance Co. Ltd.* the workman was appointed as a sweeper-cum-water carrier in the company on a monthly wage of Rs.130/-. He thereafter made a request that his services be regularised but on the contrary he was orally informed that his services were no more required even though he had put in three years of service. The appropriate government subsequently referred the dispute for adjudication. The points of reference, in pith and substance, were whether the claim of the employee that he had put

11 See *Uttaranchal Forest Hospital Trust* v. *Dinesh Kumar*, (2008) 1 SCC 542; *Haryana Land Reclamation and Development Corpn. Ltd.* v. *Nirmal Kumar*, (2008) 2 SCC 366; and *New India Assurance Co.* v. *Vipin Behari Lal Srivastava*, (2008) 3 SCC 446.

12 (2008) 1 SCC 542.

13 (2008) 10 SCC 698.

in three years of service as sweeper-cum-water carrier was correct, whether his termination was justified and to what relief he was entitled to. The tribunal held that he was not a 'workman' as he had only worked as part-time employee, that too on an *ad hoc* basis and that duration of his work was only one hour or two hours in a day for which he was paid a sum of Rs.150/- per month and he was entitled to work elsewhere as well. The award of the labour court was challenged by the workman before the high court. A single judge of the high court held that the labour tribunal had given a wrong finding by holding that he had only worked for two hours a day which was factually wrong. The court held that even otherwise, the definition of 'workman' in section 2(s) and the definition of 'continuous service' were not restricted in their applicability to only full-time employees as both these definitions have embracing tenor taking within their ambit even part-time employees. The single judge, accordingly quashed the award of the tribunal and ordered his reinstatement with full back wages and left the matter of regularisation of his service to be considered by the employer in accordance with law. The division bench of the high court confirmed the judgment of the single judge.

Dissatisfied with the judgment of the high court, the employer preferred an appeal before the Supreme Court contending, *inter alia*, that the respondent was not entitled to the benefit of section 25-F being in part time employment of the employer. It relied on the judgment in *Uttaranchal Forest Hospital Trust*.[14] On the other hand, the workman relied upon the number of earlier judgments of the court in support of his stand that there was absolutely no distinction between a full-time and part-time employee and the workman who was working on part-time did not lose his status as a workman even when he was employed in more than one employment. It was further contended that section 25-B which defined 'continuous service' also did not make any distinction between part-time and full-time employee.

The court held that it found overwhelming support in favour of the view taken in the decisions rendered by the apex court as well as various high courts that a part-time employee would be a workman as understood in section 2(s) and would have the benefit of section 25-F of the Act.[15] The preponderance of judicial opinion that a workman working even on a part-time basis would be entitled to the benefit of section 25-F was clear from the judgments of the court in *Silver Jubilee Tailoring House*, *Birdhichand Sharma* and *Shankar Balaji Waje* where it has in clear terms suggested that

14 *Supra* note 11.

15 *Birdhichand Sharma* v. *Civil Judge*, AIR 1961 SC 644; *Shankar Balaji Waje* v. *State of Maharashtra*, AIR 1962 SC 517; *Silver Jubilee Tailoring House* v. *Chief Inspector of Shops & Establishments*, (1974) 3 SCC 498; *Govindbhai Kanabhai Maru* v. *N.K. Desai*, 1988 Lab IC 505 (Guj); *Yashwant Singh Yadav* v. *State of Rajasthan*, 1990 Lab IC 1451 (Raj); *Rajaram Rokde & Bros.* v. *Shriram*, 1977 Lab IC 1594 (Bom); *P.N. Gulati (Dr.)* v. *Labour Court*, 1977 Lab IC 1088 (All); *Simla Devi* v. *Presiding Officer*, (1997) 1 LLJ 788 (P&H); *Telecom* v. *Naresh Brijlal Charote*, 2001 Lab IC 2127 (Bom); *Coal India Ltd.* v. *Labour Court*, (2001) 2 LLJ 45 (Del); *Kailash Chand Saigal* v. *Om Parkash*, (2006) 132 DLT 192 (Del).

a workman employed on a part-time basis but under the control and supervision of an employer is a 'workman' within the meaning of section 2(s) of the Act and is entitled to claim the protection of section 25-F should the need so arise. The court also upheld the views of the Delhi High Court[16] and a division bench of the Rajasthan High Court[17] that a part-time employee can be a workman under the Act and entitled to the benefit of section 25-F. It stated that it was in respectful agreement with the opinions expressed in these judgments by the high courts to this effect. It, accordingly, held in clear terms that a part-time worker is covered within the meaning of section 2(s), is entitled to the benefit of continuous service under section 25-B and cannot be retrenched without complying with the mandatory provisions of section 25-F of the Act. The court observed that in *Ram Lakhan Singh*,[18] on which reliance was placed by the petitioner, the issue of status of part-time worker, did come up before the Punjab & Haryana High Court.[19]

Coming back to the case at hand, the court was of the opinion that from the perusal of the reference it was evident that the question as to the status of the workman as full-time or part-time employee was not an issue and the only dispute was as to whether he was a workman with the appellant employer or not. The court observed that it had not been disputed before it that the workman had indeed been employed but the dispute was only with regard to his status as a full-time or part-time employee. The question for consideration, therefore, for the court was the status of a part-time employee and as to whether such an employee falls within the definition of 'workman'. The court referred to both the definitions of 'workman' in section 2(s) and 'continuous service' in section 25-B under the Act and observed that a bare perusal of the definitions would reveal that their applicability is not limited only to full-time employees but all that is required is that workman claiming continuous service must fulfil specific conditions, *inter alia*, laid down in the two provisions so as to seek the shelter of section 25-F of the Act. The basic difference between a person who is engaged on a part-time basis for one hour or two hours and one who is engaged as on daily wage on regular basis has not been kept in view in the present case either by the labour court or by the high court, the court opined. The documents filed by the parties clearly established that the claim of having worked for more than 240 days

16 *Coal India Ltd.* v. *Labour Court*, (2001) 2 LLJ 45 (Del); *Kailash Chand Saigal* v. *Om Parkash*, (2006) 132 DLT 192 (Del).

17 *Yashwant Singh Yadav* v. *State of Rajasthan*, 1990 Lab IC 1451 (Raj).

18 *Ram Lakhan Singh* v. *Labour Court*, 1989 Lab IC 1650 (P&H).

19 Bedi J. in his judgment in *Divisional Manager*, *New India Assurance Co. Ltd* refers to this case as if it was decided by the apex court when the fact of the matter is that it was a decision handed down by a division bench of Punjab & Haryana High Court and not by the Supreme Court. While construing the scope of sections 2(s) and 25-B of the Act, the high court in *Ram Lakhan Singh* observed that a person working on a part-time basis could not *stricto sensu* claim to be in continuous employment of the employer but the larger question as to whether such an employee could be a 'workman' under section 2(s) of the Act so as to claim benefit of section 25-F thereof was left open for future consideration.

was belied. It had not been established that the respondent worked only when the work was available as and when required and he was not called for work when the same was not available. The labour court itself had noted that the workman was engaged in work by others as he was working in the appellant's establishment for one hour or little more on some days. It was also evident from the documents before the labour court that whenever the respondent was working for full period of work he was paid Rs.35/- per day and on days he worked for one hour he was getting Rs.5/- only.

The Supreme Court in the present case endorsed the view taken by the high court that the workman had in fact worked virtually on full time basis till 5.00 PM for more than three continuous years and, therefore, was entitled to protection of section 25-F of the Act independently on that ground.

Issues relating to reference

In *Ministry of Textiles* v. *Murari Lal Gupta*,[20] the Supreme Court observed that except in certain unexceptional cases the court should not direct reference to be made to labour court or industrial tribunal. It is within the domain of the government to decide as to in which case reference is to be made and in which case reference is not to be made. Keeping in view the fact that the unit in which the workman had been directed to be reinstated with back wages by the labour court in the present reference had already been closed down and that the workman had approached the high court after a number of years seeking directions for reference of the dispute to the adjudication machinery which it had done, the Supreme Court in the instant case substituted the award of reinstatement with back wages handed down by the labour court and upheld by the high court with an amount of Rs.50, 000/- in full and final settlement of all his claims against the management. The court set aside the directions of reinstatement and/or backs wages.

In *Haryana Land Reclamation and Development Corpn. Ltd.* v. *Nirmal Kumar*,[21] the labour court had awarded reinstatement with back wages limited to 50% from the date of the reference which award of the labour court which award was upheld by the single judge of the high court. The corporation in its appeal before the Supreme Court took the stand that there was a belated dispute raised by the respondent workman against his termination alleging violation of the law relating to retrenchment.

The Supreme Court issued notice limited to quantum of back wages and after hearing the parties on merits extensively quoted from its earlier two judgments in *Nedungadi Bank Ltd.* v. *K.P. Madhavankutty*[22] and *S.M. Nilajkar* v. *Telcom District Manager*[23] to conclude that the workman could

20 (2008) 5 SCC 759.
21 (2008) 2 SCC 366.
22 (2000) 2 SCC 455.
23 (2003) 4 SCC 27.

not be non-suited on the ground of delay. Keeping in view the delay in raising the dispute and the fact that the appellant was suffering from huge losses from 1990 onwards, the court restricted the back wages to Rs.10, 000/- to be paid within a period of two weeks from the date of the order of the court and accordingly disposed off the special leave petition.

It may be again stressed that this case also does not spell out the detailed facts and the reasons for arriving at the conclusion in this case except that the court has extensively taken quotations from two of its earlier decisions. It applied the legal position enunciated in the earlier two judgments to the facts of the present case.

Reference in respect to issue of promotion

In *U.P. Sugar and Cane Development Corpn. Ltd.* v. *Chini Mill Mazdoor Sangh*,[24] the Supreme Court observed that the question of granting promotion is a management function and the labour court could not arrogate to itself such a function in the absence of findings of *mala fide* or victimization or any unfair labour practice. Even if any labour court or industrial tribunal found that promotion had been made which was not justified on the above mentioned ground the proper course for it was to set aside the promotion/promotions and ask the management to consider the cases of superseded employees and decide for itself whom to promote, except of course, the person whose promotion has been set aside by the tribunal.

Supreme Court's interpretation of the provisions relating to strike notice resulting in absurd consequences

In *Essorpe Mills Ltd.* v. *Presiding Officer, Labour Court*,[25] the respondent workers who were employed in the appellant mill, a public utility service within the meaning of section 2(n) read with schedule I of the ID Act, went on an illegal strike for which they were proceeded against departmentally. During their suspension period the union representing them served a notice on the employer on 14.03.1991 that strike by workers would commence *on* or *after* 24.03.1991. A copy of the strike notice was also given to the conciliation officer. The respondent workmen were thereafter dismissed from service. These workers filed petitions under section 2A of the Act before the labour court for reinstatement with back wages and

24 (2008) 9 SCC 544. The court relied on the views expressed by the constitution bench of the court in *Brooke Bond India (P) Ltd.* v. *Workmen*, AIR 1966 SC 668 and that of the court in *Hindustan Liver Ltd.* v. *Workmen*, (1974) 3 SCC 510 wherein while considering the question of an employer's right to transfer a workman in the absence of victimisation, unfair labour practice or violation of any condition of service, the Supreme Court reiterated its earlier views and held that promotion was a managerial function and industrial adjudicators could not assume the role of the management in the matter.

25 (2008) 7 SCC 594.

continuity of service.[26] The labour court by its award held that the strike was illegal. However, in exercise of the power under section 11A of the Act it substituted the punishment of dismissal by order of discharge and awarded compensation of Rs.50,000/- to each workman. The award was assailed both by the appellant as well as by the workmen before the high court. Before the high court the workmen contended, *inter alia*, that their dismissal/discharge was wrong on the ground that they were dismissed during the pendency of the "deemed" conciliation proceedings under section 20 of the Act. The appellant management having not sought approval of their dismissal from the conciliation officer which it was obliged to do under proviso to section 33(2)(b) of the ID their dismissal was illegal.

The single judge took the view that a copy of the strike notice dated 14.03.1991 having been sent to the conciliation officer, the conciliation proceedings were pending before the conciliation officer on the date of dismissal. Since the dismissal was without the approval of the conciliation officer in terms of section 33 of the Act, the same was illegal. The writ appeal of the management was also dismissed by the high court, hence the present special leave petition of the management.

The Supreme Court observed that section 22(1) of the Act prohibits a strike in a public utility service in four situations, namely: (a) within notice period of six weeks, (b) within 14 days of giving such notice, (c) before the expiry of the date of strike specified in such a notice, (d) during the pendency of the conciliation proceedings before a conciliation officer and seven days after conclusion of such proceedings. The court observed that strike notice in the present case was issued on 14.03.1991 stating that the strike will commence on or after 24.03.1991. It opined that just ten days' notice does not satisfy the requirement of advance notice stipulated under section 22(1). Therefore, it was not a valid notice. Consequently, in the eyes of law there was no commencement of conciliation proceedings as a result of such notice. Unless a conciliation proceeding was pending at the time of dismissal of workmen, section 33 would not be attracted and there was no question of seeking prior approval of the conciliation officer in such a case. The court observed that the high court has failed to appreciate that under section 33-A of the Act failure on the part of the management to obtain permission/prior approval of the conciliation officer under section 33, only entails the legal consequence that the conciliation officer shall take the

26 *Vide* Tamil Nadu Act 5 of 1988, s. 2A has been renumbered as sub-s. (1) and after sub-section, as so renumbered the following sub-s. has been reinserted, namely:
"(2) Where no settlement is arrived at in the course of any conciliation proceeding taken under this Act in regard to an industrial dispute referred to in sub-section (1), the aggrieved individual workman may apply, in the prescribed manner, to the Labour Court for adjudication of such dispute and the Labour Court shall proceed to adjudicate such dispute, as if, such dispute has been referred to it for adjudication and accordingly all the provisions of the Act relating to adjudication of industrial disputes by the Labour Court shall apply to such adjudication."

complaint of the contravention of the provisions of section 33 into account in mediating in and promoting the settlement of such industrial dispute. Therefore, according to the court, the order of dismissal in any event was not illegal. The court observed that the conciliation officer unlike the labour court or an industrial tribunal has no power of adjudication. Therefore, he could not set aside the order of dismissal and the dismissal order remained valid.

Dealing with the argument of the workers that there was a deemed conciliation, the court observed that before the single judge the primary issue was as to whether any notice of conciliation had been issued by the conciliation officer so that the conciliation proceedings could be said to be pending. According to the court, no conciliation proceedings were pending under section 22(4) of the Act and the high court seemed to have lost sight of crucial words "notice of strike or lockout under section 22". Section 22 presupposes a notice to the employer before the workman resorted to strike. Sub-section 6 of section 22, according to the court, also has relevance because within a particular time period after receipt of the notice under sub-section (1) the conciliation officer is bound to report to the appropriate government about receipt of such notice. The court observed that the stand of the workmen that simultaneous notice is required to be given to the conciliation officer in Form 'L' and, therefore, section 20 had full application was untenable because Form 'L' refers to rule 71 and not section 22. According to the court, there was nothing in section 22 which requires giving of intimation or copy of the notice to the conciliation officer. The court observed that at the stage of notice under section 22 there was no industrial dispute. The date of the notice was 14.03.1991 and the proposed strike was on 24.03.1991, therefore, on the face of it, it could not be treated to be a notice as contemplated under section 22(1)(a) as six weeks' time before the date of strike was not given. Therefore, the inevitable conclusion was that the notice could not be treated as one under section 22 and the conciliation proceedings could not be deemed to have been commenced nor said to be pending. The court treated the plea of the workmen that in terms of section 22(1)(b) they could go on strike after 14 days of giving the notice as untenable. It held that if the said plea of the workmen was accepted six weeks' time stipulated in section 22(1)(a) would become redundant. The expression "giving such notice" as appearing in section 22(1)(b) refers to the notice under section 22(1)(a). The workmen, therefore, could not have gone on strike within six weeks' notice period in terms of section 22(1)(a) and 14 days thereafter in terms of section 22(1)(b). The court thus held that the judgments of the single judge as well as the division bench could not be sustained and deserved to be set aside which it accordingly ordered.

A look at Form 'L' shows that there was nothing required to be mentioned by the striking workers or their union except the date on which they proposed to go on strike. Section 22 provides that once a notice has been given the said notice will operate for a period of six weeks only during which period the workers can go on strike except during the period of first

14 days from the date of notice or any date specified in the notice which cannot be less than 14 days prescription provided under the Act. The complete misappreciation of the law on strikes by the court is writ large in the following words of the court:[27]

> Somewhat unacceptable pleas has been taken by Respondents 2 to 23 that in terms of section 22(1)(b) after fourteen days of giving the notice, the workmen can go on strike. If this plea is accepted six weeks' time stipulated in section 22(1)(a) becomes redundant. The expression "giving such notice" as appearing in section 22(1)(b) refers to the notice under section 22(1)(a). *Obviously, therefore, the workmen cannot go on strike within six weeks' notice in terms of section 22(1)(a) and fourteen days thereafter in terms of section 22(1)(b)*. (emphasis supplied)

It is submitted that it is not correct interpretation of section 22 of the Act to say that workers cannot go on strike within six weeks' notice in terms of section 22(1)(a) and 14 days after in terms of section 22(1)(b) of the Act. The correct legal position is that a strike notice when given remains valid for a period of six weeks and during this period the workers cannot go on strike for first 14 days or any date specified in the notice thereafter. If the workers fail to go on strike within the said six weeks' period, they are obliged to give a fresh notice of strike. It is unfortunate that in the facts of the case it is nowhere mentioned whether the workers actually went on strike and if they, at all, went on strike whether they went on strike on 24.03.1991 or thereafter. The question before the court was not the legality of the strike but the validity of the strike notice and whether the conciliation proceedings were deemed to have commenced after the strike notice was received by the conciliation officer under section 22.

The plea of the workmen that in terms of section 22(1) (b) of the Act they could go on strike after 14 days of the notice was correct plea and could not be held to be unacceptable. If the interpretation given by Pasayat J that the workmen cannot go on strike for six weeks' of the notice and 14 days period thereafter is accepted as correct it will render section 22(1)(b) *otiose*.

Further, the decision of the two judge bench in *Essorpe Mills Ltd.* is in clear conflict with an earlier decision of the court in *Workers, Industry Colliery* v. *Industry Colliery*[28] where a division bench of three judges of the

27 *Supra* note 25 at 601.

28 AIR 1953 SC 88. In this case the union of the workers gave a notice on 13.10.1949 to the management under s.22(l)(a) of the Act that they proposed to call a one day strike on the expiry of 6.11.1949 for the fulfilment of their demands. The strike notice was in accordance with rule 85 of the rules framed under I.D. Act, 1947 (similar to the instant rule 71) sent to the Regional Labour Commissioner (Central), Dhanbad who was the conciliation officer in this case and other higher functionaries in the Ministry of Labour, Government of India. This notice was received in the office of the Regional Labour Commissioner (Central), Dhanbad

court dealt with the scheme underlying prohibition on strikes in public utility services under section 22 of the ID Act in general and strike notice under section 22(1) (a) in particular. The court dealt with the scheme underlying section 22 thus:

> *Notice of strike having been given in terms of cl. (a) and 14 days having elapsed after giving of such notice as required by cl. (b)* and the actual strike having taken place after November 6, 1949, being the date specified in the strike notice, the only other question for consideration is whether the strike took place during the pendency of any conciliation proceedings before a Conciliation Officer, and seven days after the conclusion of such proceedings. *Under S. 20(1)(a) conciliation proceeding shall be deemed to have commenced on the date on which a notice of strike under S. 22 is received by the Conciliation Officer.* In this case the strike

on 15.10.1949. The Regional Labour Commissioner held conciliation proceedings at Dhanbad on 22.10.1949 but the union of the workers by its letter of the same date alleged that they were convinced that nothing would come out of the same and that the proceedings should, therefore, be considered "to be ceased" which communication of the union was conveyed to the Chief Labour Commissioner, New Delhi by the Regional Labour Commissioner in his report and it was stated therein that he was not in favour of recommending a reference of the demand to the industrial tribunal. The said failure report stated that the central government may be informed of the situation which report/communication was received in the office of the Chief Labour Commissioner, New Delhi on 25.10.1949. A copy of the failure report of the Regional Labour Commissioner was received by the Ministry of Labour only on 17.11.1949. In the meantime, on 7.11.1949, the members of the union went on one day strike as per their strike notice. The management contended before the Supreme Court that strike was illegal. The question raised before the Supreme Court was whether the strike was illegal. The court after detailing out the scheme underlying s. 22 which it read alongwith ss. 12 and 20 of the Act held that the strike was illegal because on 7.11.1949 the conciliation proceedings were still pending, as the report of the conciliation officer was received by the government only on 17.11.1949 as in terms of s. 20(2)(b) bringing the conciliation proceedings come to an end. It may also be pertinent to state here that the view taken by a division bench of the Karnataka High Court in *Mineral Miner's Union* v *Kndrennikh Iron Co. Lid.* (1989) I LLJ 277 (Kant., D.B.) is consistent with the view taken by the Supreme Court in *Workers, Industry Colliery* and it has given correct interpretation to s. 22(l)(a). In this case on 1.9.1984 the union gave a notice of strike of its intention to go on one day's token strike any day after 20.9.1984. Consequently, the conciliation proceedings took place in terms of s. 20(1) of the Act on 19.9.1984. The conciliation officer submitted the failure report to the state government on 12.10.1984 and the parties were informed about the failure of conciliation proceedings on 9.11.1984. Subsequently, on 10.12.1984, the union went on strike. The management informed the workmen that they were not entitled to wages from 10.12.1984. A division bench of the Karnataka High Court held that if at the time stated in s. 22(1)(d), the date of strike specified in the notice of strike expires, the workmen have to issue a fresh notice as provided in s.22 of the Act once again, and all other statutory consequences flowing out of the said notice would follow on issuance of the said notice. Whenever a notice as provided by s.22 is issued, even though such notice is necessitated by the failure of the conciliation proceedings, the provisions of ss.12(1) and 22 in their entirety will be attracted.

> notice was received by the Regional Labour Commissioner (Central), who is the Conciliation Officer, on October 15, 1949 and the conciliation proceedings, therefore, commenced on that date under S. 20(1).... The Regional Labour Commissioner (Central) did not send the report direct to the Central Government but sent it to the Chief Labour Commissioner, New Delhi... This report, however, was received by the Central Government on or about November 17, 1949 and it is only on receipt of that the conciliation proceedings are to be deemed to have concluded according to provisions of S. 20(2)(b). Prima facie, therefore, the strike which took place on November 7, 1949 was during the pendency of the conciliation proceedings as held by the authorities below. (emphasis supplied).

The notice of the workers reproduced in para 21 of the judgment could not be said to be different from one prescribed in Form 'L' of rule 71 of the Central Rules and, therefore, it is incomprehensible as to how the same could not be treated as a notice as contemplated in section 22(1)(a). The law relating to the notice as contemplated in section 22 of the Act can be summaried as below:

If the strike is to be resorted to in a public utility service, section 22 enjoins upon the persons proposing to go on strike to comply with the following requirements:

(a) The notice of the intention to go on strike should be in the prescribed manner as required by sub-section (4). Rule 71 of the Industrial Disputes (Central) Rules 1957 requires that the notice shall be in Form L.[29]
(b) Before the date of strike, the notice should have been given within six weeks. In other words, from the date of the notice to the date of strike a period of six weeks should not have elapsed. After the expiry of six weeks, a fresh notice with all its requirements will all over again become necessary [section 22(1)(a)].
(c) A period of 14 days must have elapsed from the date of notice to the date of the strike [section 22(1)(c)].
(d) The date of strike specified in the notice must have expired on the day of strike which cannot be a date prior to the expiry of 14 days from the date of the notice [section 22(1)(d), rule 71, Form L].
(e) The conciliation proceedings should not be pending before the conciliation officer.

The judgment of the Supreme Court is incomprehensible and the interpretation placed by it on sections 20 and 22 of the ID Act is contrary to the scheme under the ID Act and to say the least leads to absurd

29 Various states have promulgated similar rules of their own.

consequences. The court has failed to read the statute as a whole which is one of the primary rules in the interpretation of statutes. By failing to read the statute as a whole, the court has overlooked the plain language of section 12(1) of the Act which casts a statutory duty upon the conciliation officer to intervene on receipt of a copy of the strike notice under section 22. Therefore, the plain language of section 12(1) makes it clear that strike notice to the conciliation officer is a requirement under the Act and accordingly on receipt of such notice the conciliation proceedings are deemed to have commenced before the conciliation officer by virtue of section 20 of the Act. It is preposterous to suggest that at the stage of notice under section 22 there is no industrial dispute existing. The fact of the matter is that the machinery under the Act can intervene even when the dispute may not have arisen but is only apprehended. The fact that conciliation proceedings before the conciliation officer had commenced on receipt of strike notice under section 22(1)(a), the conciliation officer was bound to conciliate in the matter notwithstanding the fact that the strike was illegal and could be one of the aspects taken into account while submitting his report to the appropriate government. But the employer was bound to take approval of the action from him who had to *prima facie* satisfy himself about the validity of the enquiry in accordance with principles of natural justice.

The observation of the court that *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* v. *Ram Gopal Sharma*[30] had no application to the case at hand is not free from doubt. It has in clear terms emphasised the mandatory nature of section 33(2)(b) thus:[31]

> An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under section 33-A notwithstanding the contravention of section 33(2)(b) proviso, driving the employee to have recourse to one or more proceedings by making a complaint under section 33-A or to raise another industrial dispute or to make a complaint under section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment.

In view of the above analysis of the law on strikes in public utility services and the incongruities writ large in the judgment of Pasayat J. which have created lot of uncertainty in law in the said area, the judgment in *Essorpe Mills Ltd.* needs to be reviewed, earlier the better.

30 (2002) 2 SCC 244.
31 *Id.* at 254.

Choice of reliefs available in cases of violation of retrenchment law

A closer examination of the decisions in cases involving violation of mandatory provisions enjoining duty on the employer to comply with certain prior conditions for effecting retrenchment shows the court making departure from grant of relief of reinstatement with consequential benefits to compensation only.

In *Mahboob Deepak* v. *Nagar Panchayat, Gajraula*,[32] the court has emphasised that a daily wage employee who has completed 240 days of work in a year preceding the date of retrenchment can complain of non-observance of mandatory requirement of section 25-F of the ID Act but by no reason thereof can an employee claim any right to be permanently absorbed in service or to be regularised in service in public employment in the absence of any statute or statutory rule. The court declared that it is now well settled by a catena of decisions of the court that in a situation where there is non-compliance of section 25-F by the management in respect of employees who are daily wagers or who have put in only few years of service, it is within the powers of industrial adjudicators to direct payment of adequate monetary compensation in place of directing reinstatement with full back wages.[33] Similar approach of the court is discernable in *Sita Ram* v. *Moti Lal Nehru Farmers Training Institute*.[34] The respondent here was a research institute, a subsidiary of the Indian Farmers Fertilizers Corporation, engaged, *inter alia*, in imparting training to farmers for facilitating improved agricultural production. It also undertook poultry farming, pisciculture, cow-shelter, dairy farming, plantation, bee-keeping work for which daily wagers were appointed. Industrial dispute arose in which it was claimed by the appellants that they had been working with the respondent institute for a long time and after December 1996 services were no longer being taken from them. The labour court having regard to the fact that the respondent having been called upon to produce relevant records failed/neglected to do so and drew an adverse inference against the management. It also took into consideration the oral as well as documentary evidence adduced on behalf of the appellants to hold that they had worked for a period of more than 240 days. It held that the management was bound to have complied with section 6-N of the U.P. Industrial disputes Act, 1947 (same as section 25-F of the ID Act) which provided for conditions precedent for valid retrenchment and failure to do so had rendered the orders of termination of services as bad in law. The labour court directed that they be reinstated with 25% of the back wages. The high court set aside the award of the labour court, opining, *inter alia*, that the burden of proof had wrongly been placed on the respondents. The workman filed special leave petition against the decision of the high court.

32 (2008) 1 SCC 575. In *BSNL* v. *Mahesh Chand*, (2008) 3 SCC 474, the Supreme Court has reiterated the position that initial onus is on workman to prove that he worked for 240 days in a year to be eligible to the benefit of s. 25-F of the ID Act.

33 See *M.P. Admn.* v. *Tribhuban*, (2007) 9 SCC 748.

34 (2008) 5 SCC 75.

The Supreme Court observed that although at one point of time, the burden of proof used to be placed on the employer, but in view of the catena of recent decisions, it must be held that the burden of proof is on the workman to show that he has completed 240 days in a year.[35] The question as to whether the burden of proof was on the employer or on the workman is no more *res integra*. The court, however, observed that it was not oblivious of the distinction between the provisions of the ID Act, 1947 and the U.P. Industrial Disputes Act, 1947 inasmuch as whereas in the former, the workman has to prove that he has worked for more than 240 days in the preceding 12 months of the date of his termination, there was no such requirement in the case of latter. The appellants had brought on record at least some documentary evidences to show that they have been working at least for two years. Even provident fund had been deducted from their wages. Each of the appellants had examined themselves before the labour court and they had called for the requisite documents. The documents produced before the labour court were wholly irrelevant. What was called for from them was the documents for the period during which the appellants claimed to have been working with the respondents. It was evident that the respondents have withheld the best evidence. The wage sheet, the provident fund records and other documents were in their possession, records of which they were statutorily bound to maintain. It may be true that the labour court did not draw any adverse inference expressly, but whether such an adverse inference has been drawn or not must be considered upon reading the entire award. The court held that the high court had wrongly opined that the award suffered from an error of law and was otherwise based on surmises and conjectures. The court observed that the question still to be considered by it was as to whether the labour court was justified in awarding reinstatement of the appellants in service.

Keeping in view the period during which the services were rendered by the respondents, the fact that the respondent had stopped its operation of bee farming, and the services of the appellants were terminated in December 1996, the court held that it was not a fit case where the appellants could have been directed to be reinstated in service. The court agreed that that the industrial court has discretionary jurisdiction in granting the relief, but at the same time such discretion was required to be exercised judiciously. Relevant factors like, nature of appointment, the period of appointment, the availability of the job etc. were the relevant considerations which should be taken into account by the adjudicating authority. The court referred to its earlier decisions in *Jaipur Development Authority* v. *Ramsahai*,[36] *M.P. Admn.* v. *Tribhuban*[37] and *Uttaranchal Forest Development Corpn.* v. *M.C.*

35 *ONGC Ltd.* v. *Ilias Abdulrehman*, (2005) 2 SCC 183; *Range Forest Officer* v. *S.T. Hadimani*, (2002) 3 SCC 25; *R.M. Yellatti* v. *Asstt. Executive Engineer*, (2006) 1 SCC 106; *State of Maharashtra* v. *Dattatraya Digamber Birajdar*, (2007) 12 SCC 172 and *Ganga Kisan Sahkari Chini Mills Ltd.* v. *Jaiveer Singh*, (2007) 7 SCC 748.

36 (2006) 11 SCC 684.

37 (2007) 9 SCC 748.

Joshi,[38] where it had opined that payment of adequate amount of compensation in place of a direction to be reinstated in service in cases of this nature would subserve the ends of justice. In the facts and circumstances of this case, the court directed payment of Rs.1.00 lac to each of the appellants by the management which in its opinion would meet the ends of justice. The appeal was allowed to the aforementioned extent.

Again in *Ghaziabad Development Authority* v. *Ashok Kumar*,[39] the court observed that labour court or industrial tribunal before passing an award of reinstatement of a workman in a statutory authority in an industrial dispute must take into account the fact that a statutory authority is obliged to make requirements only upon compliance with the equality clause contained in articles 14 and 16 of the Constitution of India. Any appointment made in violation of the said constitutional scheme as also the recruitment rules, if any, would be void and no public interest would be served if after a long period of time an employee who was appointed in services in violation of the rules would be directed to be reinstated in service. In such cases it would be appropriate for the labour court or industrial tribunal to order payment of compensation to the workman rather than reinstatement in service.

Section 25-N: some issues

In *Cable Corporation of India Ltd.* v. *Commissioner of Labour*[40] the management challenged before the Supreme Court the judgment of the division bench of the Bombay High Court upholding the view of the single judge that once the review application in terms of section 25-N(6) of the Act is rejected the appropriate government is not precluded from making a reference for adjudication under the said provision.

In this case the company had made an application in terms of section 25-N(2) to the specified authority for permission to retrench a substantial number of workers working at one of it's units. The specified authority after giving an opportunity of being heard to the company, workmen and other interested persons, including workers' union and after conducting an enquiry by a reasoned order partly allowed the application of the company by granting permission to retrench a substantial number of workmen mentioned in the order. The correctness of that decision was assailed by the workers union by filing applications under section 25-N(6) of the Act for review of the decision or to refer the matter for adjudication. By an order the applications preferred by the union were rejected on the ground that such applications could be preferred only by the workmen and not by the unions. Besides it was observed that no new point was raised in the review proceedings which warranted fresh examination. Accordingly, the applications for review/

38 (2007) 9 SCC 353.
39 (2008) 4 SCC 261.
40 (2008) 7 SCC 680.

reference came to be rejected. The aforesaid order of the specified authority was challenged through writ petition by one of the unions which came to be partly allowed by the single judge of the high court holding that findings of the specific authority that unions had no locus was contrary to the law laid down by the Supreme Court in *Mumbai Kamgar Sabha* v. *Abdulbhai Faizullabhai*.[41] Further, the single judge held that right of review is possible only on limited grounds and since no new points had been raised by the unions, the prayer for review was rightly rejected. The single judge relying upon the judgment of a division bench of the Gujarat High Court in *Rajya General Kamdar Mandal* v. *Packart Press*[42] further held that merely because review application was rejected, the reference could not be said to be barred under section 25-N(6) of the Act and accordingly directed the specified authority to refer the matter for adjudication to the industrial tribunal in accordance with section 25-N(6) of the Act which order of the single judge was upheld by a division bench in the writ appeal of the management. The management preferred to special leave to appeal in the Supreme Court against the order of the division bench as well as the single judge.

The stand of the management both before the high court and the Supreme Court was that once the review application was disposed of, there was no scope for further making a reference. Further, it was the case of the management that the high court had lost sight of the fact that language of section 25-N(6) is very clear and determinative as the expression used is "or". If the view of the high court was upheld it would mean substitution of the word "and" for "or". On the other hand, it was submitted by the workmen that the reference is an additional protection and this legal position is no longer *res integra* after the decision of the constitution bench in *Orissa Textile & Steel Ltd.* v. *State of Orissa*.[43] It was further contended that considering the fact that though the scope of the review was limited, that is why, unlike reference, a limited period of 30 days is provided which shows the urgency of the matter. The court observed that *Orissa Textile & Steel Ltd.* was really considering the question as to whether provisions for review and reference were in addition to judicial review and it never said that they are cumulative and not alternative. Referring to *Fakir Mohd.* v. *Sita Ram*[44] the court observed that normally the word "or" is disjunctive and "and" is conjunctive. In its view, had the legislature intended that the reference could be made after the government or the specified authority deals with the review power, it would have said so specifically by using specific words. It could have provided for a direct reference, the parameters of review being different from a reference. In the opinion of the court a plain reading of the provision makes the position clear that two courses are open. Power is

41 (1976) 3 SCC 832.
42 (1995) 2 CLR 683 (Guj).
43 (2002) 2 SCC 578.
44 (2002) 1 SCC 741.

conferred on the appropriate government either on its own motion or an application made, review its order or refer the matter to the tribunal. Whether one or the other course could be adopted depends on the facts of each case, the surrounding circumstances and several other factors. When the language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the statute speaks for itself. The court observed that the spirit of the law may be elusive and unsafe guide and the supposed spirit cannot be given effect to in opposition to the plain language of the provisions of the Act. The court held that the inevitable conclusion was that the appeal deserved to be allowed and the orders of the high court were accordingly set aside.

Section 25-O: some issues

In *Sarva Shramik Sanghatana (KV)* v. *State of Maharashtra*,[45] an important question that arose for consideration of the Supreme Court was whether the employer could be precluded from filing fresh application for permission to order closure of his industry after having earlier withdrawn such application to prove its *bona fide* that he was open to an amicable settlement with the workers on the issue. In this case the workers heavily relied on order 23, rule 1(4) of the Civil Procedure Code CPC) which provides that if the plaintiff withdraws his suit without permission of the court he is precluded from instituting any fresh suit in respect of the said subject matter. The validity of the submission of the workers had to be considered in the light of the following factual matrix.

The respondent company which had about 7500 employees in its textile mill at Mumbai was under financial crunch due to heavy losses suffered on account of high increase in the cost of production and competition both in the domestic and international market. With the object to reduce its operational cost it entered into two settlements with its recognised union for reducing the workforce through an offer of voluntary retirement scheme (VRS). It was only after the said scheme was upgraded that it received an overwhelming response from the employees. Only about 275 employees did not accept the VRS. When the manufacturing activities in the textile mill came to an end and being left with these workers only, it was constrained to file an application for seeking permission for closure under section 25-O of the ID Act. Before the aforesaid application under section 25-O of the Act could be decided, the management received a letter from the deputy labour commissioner informing it that as per the directions of the Minister for Labour, Maharashtra, a meeting had been convened for discussing the matter in dispute and sought their participation in the meeting. It responded to the Minister for Labour's intervention by stating that it could have waited for some more days for the 60 days period to be over from the date of the filing of the application when it would be deemed to have been permitted to declare

45 (2008) 1 SCC 494.

closure if no decision was communicated to it within that period on the application, but it was open to negotiation. Further, in order to create a conducive atmosphere for holding talks at the behest of the Minister of Labour with the remaining employees who had not taken VRS, it made it known to the deputy labour commissioner that it was withdrawing its application under section 25-O (1), but reserved its right to move fresh application under the section as and when necessary. Accordingly, the Commissioner of Labour, Mumbai allowed the respondent company to withdraw its application under section 25-O(1). However, the efforts for amicable settlement failed. Hence, the respondent company filed fresh application under section 25-O(1) before the Commissioner of Labour, Mumbai for permission to close the mill. The entertainment of this application was opposed by the appellant on the ground that the first application was withdrawn but without any liberty from the authority concerned to file a fresh application. Accordingly, the workers union, the appellant, filed a writ petition before the Mumbai High Court praying that the Commissioner of Labour, Mumbai should be directed not to take any further proceedings in relation to the closure application under section 25-O. The said writ petition was dismissed by the high court.

The appellant union preferred SLP before the Supreme Court contending before it that the principle underlying rule 1(4) order 23 CPC[46] should be extended in the interest of administration of justice to the cases of withdrawal of applications/petitions before judicial/quasi judicial bodies if not on the ground of *res judicata* but on the ground of public policy. It was contended by it that it would also discourage the litigant from indulging in bench hunting tactics. In support of its stand it relied on *Sarguja Transport Service* v. *STAT*.[47] It was the case of the appellant union that the labour commissioner having granted permission to withdraw the application under sectio 20(1) to the management without reserving any liberty to it to file fresh application should be read as a bar from filing similar application.

The court observed that although, the CPC does not strictly apply to the proceedings under section 25-O(1) of the ID Act or other judicial or quasi judicial proceedings under any other Act, some of the general principles in CPC may be applicable. For instance, even if section 11 CPC does not in terms strictly apply because both the proceedings may not be suits, the general principle of *res judicata* may apply. However, this did not mean that all provisions in CPC would strictly apply to proceedings which are not suits. The court held that order 23 rule 1(4) CPC will apply only to suits and an application under section 25-O(1) not being a suit, the said provision will not apply in respect of such application.

46 Under this rule the plaintiff is precluded from filing any fresh suit in respect of a subject matter where he withdraws from a suit without seeking any liberty to institute a fresh suit in respect of the subject matter of such suit and is allowed to withdraw the said suit.

47 (1987) 1 SCC 5.

Further, the court observed that the bar under section 25-O(4) only applies when an order is passed *on merits* either granting or refusing permission which order becomes final for a period of one year. In the present case, the court was satisfied that the application for withdrawal of the first petition under section 25-O(1) was made *bona fide* because the respondent company had received a letter from the deputy labour commissioner calling for a meeting of the parties for an amicable settlement. In fact, the respondent company could have waited for the expiry of 60 days from the date of filing of its application under section 25-O(1), on the expiry of which the application would be deemed to have been allowed under section 25-O(3) of the Act. The fact that it did not do so, and instead applied for withdrawal of its application under section 25-O(1), showed its *bona fides*. The court observed that the respondent company was trying for an amicable settlement which approach of the company was *bona fide*.

The court held that the decision in *Sarguja Transport* has to be read in the light of the facts and circumstances of the case and cannot be treated as Euclid's formula. The court held that it was satisfied that the respondent company was trying for an amicable settlement and was not looking for bench hunting when it found that an adverse order was likely to be passed against it. Hence *Sarguja Transport* was squarely distinguishable and will apply only when the first petition was withdrawn for purposes of bench hunting or for some other *mala fide* purpose. The court also explained that the observations of the court in the earlier decision in *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey*[48] that the provisions of CPC are applicable to the proceedings under the ID Act were made in the context of order 7 rule 7 of the CPC which confers powers upon the court to mould relief in a given situation. Hence the said observations must be read in its proper context and it could not be interpreted to mean all the provisions of CPC would strictly apply to proceedings under the ID Act.

Since the management had alleged that it was suffering huge financial liability per day even when the mill was lying closed and the workers concerned were getting wages for doing nothing for a long time, the court directed the Labour Commissioner, Mumbai to decide the application of the petitioner company very expeditiously in accordance with law preferably within a period of two months of production of copy of order by it.

Misconducts, disciplinary action and powers of industrial adjudicator under section 11A

General

In *Firestone Tyre and Rubber Co. of India (P) Ltd.*[49] it was, *inter alia*, held by the Supreme Court that after the insertion of section 11-A in the ID

48 (2006) 1 SCC 479.
49 (1973) 1 SCC 813.

Act, the industrial tribunal cannot only differ from the findings of an enquiry officer in a proper case and hold that no misconduct is proved but also differ with the disciplinary authority on the quantum of the punishment even in cases where the departmental enquiry has been held by the employer and the findings of misconduct are arrived at. It was in the light of these principles that the court in *Mazdoor Sangh* v. *Usha Breco Ltd.*,[50] posed the question to itself as to whether the case at hand was a proper case where the labour court ought to have re-appreciated the evidence and interfered with the punishment imposed on the workmen when it itself had concluded that enquiry report was not perverse and domestic enquiry was held according to the principles of natural justice.

The court held that the interpretation given to section 11-A in *Firestone Tyre and Rubber Co. of India (P) Ltd.* must be applied at different stages. Firstly, when the validity or legality of the domestic enquiry is in question; secondly, in the event the issue is determined in favour of the management no fresh evidence is required to be adduced by it, whereas in the event it is determined in favour of workmen, subject to the request which may be made by the management at an appropriate stage, it will be permitted to adduce fresh evidence before the labour court. Indisputably, in the event, fresh evidence is adduced before the labour court by the management the labour court will have jurisdiction to appreciate evidence. But in a case where the materials brought on record by the enquiry officer fall for re-appreciation by the labour court, it should be slow to interfere with it. It must come to a conclusion that the case was a proper one for doing so. The court observed that the labour court should not interfere with the findings of the enquiry officer only because it is lawful to do so. It is not proper to take recourse to it only because another view is possible. It expected it to exercise appropriate restraint even as an appellate authority, the court observed. The court stressed the importance of the fact that the enquiry officer also acts as a quasi-judicial body given the fact that the parties are not only entitled to examine their respective witnesses, but they can cross-examine the witnesses examined on behalf of the other side. They are free to adduce documentary evidence. The parties as also the enquiry officer can call for even other record and is bound to comply with the basic principles of natural justice. While determining the issue as to whether the workman is guilty of misconduct alleged to have been committed by him or not, the workman is within his right to raise all contentions including the contention of lack of *bona fide* or unfair labour practice as also allegation of victimisation on the part of the management and can lead evidence in this behalf. The enquiry officer can give a finding based on sufficient and cogent reasons only and only when such a question has been raised and evidence led in support thereof.

The court observed that it is one thing that the findings of the enquiry officer is perverse or betrays the well-known doctrine of proportionality but

50 (2008) 5 SCC 554.

it is another thing to say that only because two views are possible, the labour court shall interfere with the findings of the enquiry officer. In other words, it is one thing to say that on the basis of material on record, the labour court comes to a conclusion that a verdict of guilt has been arrived at by the enquiry officer where the materials suggested otherwise but it is another thing to say that such a verdict was also a possible view. Before a departmental proceeding the standard of proof is not that the misconduct is to be proved beyond reasonable doubt but the standard of proof as to whether the test of preponderance of probability has been met.

In the instant case, there was allegation of use of abusive language by the two employees who were also trade union members against the representatives of the contractors of the management in the premises of the management and use of iron rods leading to the stoppage of the work in the factory at their instigation. A departmental enquiry was ordered against them where they were found guilty of having committed the misconducts alleged against them. An industrial dispute was raised whereupon a reference was made before the labour court. The workers alleged victimisation and unfair labour practice on the part of the management against them being office bearers of the workers union. The labour court held that the enquiry officer's report could not be said to be perverse and the principles of natural justice had been followed in holding the departmental enquiry, yet it came to the conclusion that on the basis of the evidence on record the management had failed to establish any of the charges levelled against them and ordered their reinstatement with full back wages which was reduced to 50% of the back wages by the single judge of the high court where the award came to be challenged before him. In the letter patent appeal against the decision of the single judge, a division bench of the high court allowed the said appeal as regards the question posed by the labour court as to whether the management had been able to prove the charges levelled against the workmen on the basis of the evidence brought on record. The division bench of the high court held that the labour court had itself come to the conclusion that the domestic enquiry was valid and proper and, therefore, there was no occasion for the labour court to ask the question whether on evidence the charges had been proved.

The Supreme Court observed that the labour court had taken into consideration only some portion of the deposition of witnesses and not the other portions. The labour court should not have based its decision on mere hypothesis. It could not on the one hand say that the report of the enquiry officer was not perverse and on the other hand say that misconduct had not been proved. It could not overturn the decision of the management on *ipse dixit*. It recognised that the jurisdiction under section 11-A is wide one but that has to be exercised judiciously. Judicial decision cannot be exercised either whimsically or capriciously. The court observed that in the present case the approach of the labour court appeared to be that the standard of proof on the management was very high. When both the parties had adduced evidence the labour court should have borne in mind that the onus of proof

loses all its significance. It may scrutinize and analyze the evidence but what is important is how it does so. The very findings of the labour court that domestic enquiry was supported by the evidence taken at the enquiry shows that the labour court had committed an error of jurisdiction. The court held that it had no reason to interfere with the judgment of the division bench *albeit* for different reasons.

It is submitted that in all the recent judgments[51] rendered so far, the court has failed to appreciate that the industrial adjudication was exercising supervisory jurisdiction in disciplinary matters before the enactment of section 11-A but after the enactment of section 11A, there were changes brought about in the legal position inasmuch as in the matters relating to dismissal and discharge referred to industrial adjudication by way of reference, the adjudication machinery was conferred the appellate powers and it could re-appreciate the evidence relating to issue of very proof of the misconduct and also interfere with the quantum of punishment imposed even where misconduct was proved. It is for the first time in this case the court at least assumes that for all intents and purposes labour court acts as an appellate authority over the judgment of the enquiry officer.

Factors generally to be taken into account in awarding punishment for misconducts in public employment cases

In *Talwara Coop. Credit and Service Society Ltd.* v. *Sushil Kumar*,[52] the Supreme Court observed that grant of relief of reinstatement in exercise of powers under section 11A of the Act is not automatic nor is the relief of grant of back wages. The industrial adjudicator while exercising its power under section 11A of the Act is required to strike a balance in a situation where the employee/workman has worked only for few years. For the said purpose, certain relevant factors, as for example, nature of service, the mode and manner of recruitment viz., whether the appointment has been made in accordance with the statutory rules so far as a public sector undertaking is concerned, etc. should be taken into account. The court referred to various earlier judgements[53] laying down various norms in this regard. For the purpose of grant of back wages, one of the relevant factors would indisputably be as to whether the workman had been able to discharge his burden that he had not been gainfully employed after termination of his service. The court observed that in a large number of cases referred to by it a paradigm shift is discernible in the matter of burden of proof as regards

51 See Bushan Tilak Kaul, "Disciplinary Action and Powers of Industrial Adjudicators: A Critique of Judicial Intervention" 49 *JILI* 309 (2007); also see *infra* note 56.

52 (2008) 9 SCC 486.

53 *Haryana Roadways* v. *Rudhan Singh*, (2005) 5 SCC 591, *St. Michael's Teacher's Training Institute* v. *V.N. Karpaga Mary*, (2008) 7 SCC 388, *U.P. SRTC Ltd.* v. *Sarada Prasad Misra*, (2006) 4 SCC 733, *Municipal Council, Sujanpur* v. *Surinder Kumar*, (2006) 5 SCC 173, *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey*, (2006) 1 SCC 479, *State of M.P.* v. *Arjunlal Rajak*, (2006) 2 SCC 711, *R.B.I.* v. *S. Mani*, (2005) 5 SCC 100.

gainful employment on the part of the employer holding that having regard to the provisions contained in section 106 of the Evidence Act, the burden would be on the workman. The burden, however, is a negative one. If the same is discharged by the workman, the onus of proof would shift to the employer to show that the employee concerned was in fact gainfully employed.

The court observed that when the question arises as to how and in what manner the balance has to be struck, it may also become necessary for the industrial adjudicator to consider as to whether the industry has been sick or not. If it is found that the industry was not in a position to bear the financial burden, an appropriate award, as a result whereof the equities between the parties can be adjusted, should be passed.

In the instant case, the court noticed that the employee was employed for a short period and that too in different spells. It held that the appellant being a sick unit, interest of justice would be served if instead of reinstatement with full back wages he was paid a compensation of rupees two lakhs over and above the amount which the appellants had deposited in terms of section 17B of the ID Act.

Judicial attitude towards different misconducts

Unauthorized absence

In *Pepsu RTC* v. *Rawel Singh*,[54] a departure from the earlier approach of the court in the matter of appreciating the scope of powers of industrial adjudicator is discernible. In this case the Supreme Court has rightly recognised the right of tribunal to differ with the quantum of punishment even where misconduct had been proved. The court took into account the fact that the unauthorized absence of the workman was only for few days and, therefore, dismissal was harsh. It decided to set aside the order of dismissal by reinstatement without back wages and at the same time treating the entire service as continuous service for entitlement to other consequential benefits.

On the contrary, in *L&T Komatsu Ltd.* v. *N. Udayakumar*,[55] the court applied the theory of non-interference with the management's action of dismissal keeping in view the persistent conduct of the workman. Here, the employee remained absent unauthorizedly for 105 days in a financial year inviting disciplinary action on the basis of a regular departmental enquiry in accordance with the principles of natural justice. He was dismissed from service resulting in a reference after he raised an industrial dispute questioning his dismissal from service. The labour court found that though the workman remained absent unauthorizedly, the extreme punishment of dismissal from service was too harsh and disproportionate to the gravity of charge and that lesser punishment would meet the ends of justice. Accordingly, it set aside the order of dismissal and directed the management

54 (2008) 4 SCC 42.
55 (2008) 1 SCC 224.

to reinstate the workman with continuity of service but without back wages. The high court noted that there were proved cases of misconduct of unauthorized absenteeism for 15 times but the workman had not improved his conduct. It, therefore, modified the award of the tribunal to the extent that the workman would only be entitled to reinstatement without continuity of service.

On appeal, the Supreme Court held that keeping in view the earlier judgments[56] the labour court could have exercised its discretion under section 11-A of the ID Act only on the existence of certain factors like the punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which required the reduction of the sentence or the past conduct of the workman which may persuade the labour court to reduce the punishment. The court held that the conclusion was inevitable in this case that the labour court and the high court were not justified in directing the reinstatement by interference with the order of dismissal.

Indecent and riotous behaviour

In *West Bokaro Colliery (TISCO Ltd.)* v. *Ram Pravesh Singh*,[57] the respondent workman was dismissed from service on proof of misconduct that he left the place of work without permission of his superiors and indulged in indecent riotous and disorderly behaviour with the superiors as well as with the co-workers. The industrial tribunal on reference interfered with the findings of the domestic enquiry, *inter alia*, on the ground that the delinquent employee who left the duty at 12.25 PM could not have reached the place of occurrence at 12.30PM alongwith his associates. In his award he substituted the order of dismissal with reinstatement and 50% of back wages. This award was upheld by the high court. In the special leave to appeal before the Supreme Court, the court identified two issues which required consideration in this case: (1) Whether it was proper for the tribunal to re-appreciate the evidence and arrive at findings different from domestic enquiry; and (2) what is the standard of proof in domestic enquiry.

The court held that in the present case the tribunal had interfered with the findings recorded by the domestic tribunal as if it were the appellant tribunal. The court observed that though there was evidence on record regarding indecent, riotous and disorderly behaviour of the respondent workman towards his superiors in the evidence adduced by the management witnesses, the tribunal had discarded their evidence by observing that in the absence of independent witnesses the statement of the workmen who were present at the scene of occurrence and deposed against him could not be

56 See *Mahindra and Mahindra Ltd.* v. *N.B. Narawade*, (2005) 3 SCC 134; *M.P. Electricity Board* v. *Jagdish Chandra Sharma*, (2005) 3 SCC 401; *Kushnakali Tea Estate* v. *Akhil Chah Mazdoor Sangh*, (2004) 8 SCC 200; *Bharat Forge Co. Ltd* v. *Uttam Manohar Nakate*, (2005) 2 SCC 489; and *Orissa Cement Ltd.* v. *Adikanda Sahu*, (1960) ILLJ 518 (SC).

57 (2008) 3 SCC 729.

believed. The court held that the industrial tribunal had fallen in error in discarding the evidence produced by the management only because independent witnesses were not produced. It was not anybody's case that independent witnesses were available at the scene of occurrence and the management had failed to produce them. It was possible that at the time of occurrence only the workers of the management and others involved in the incident were the only persons present and no independent evidence was available. The statement of fellow workers having established his misconduct, the enquiry officer had to accept the testimony of the witnesses produced by the management who had clearly implicated the respondent. It was a legitimate conclusion which could be arrived at and it would not be open to the industrial tribunal to substitute the said opinion by its own opinion. The court observed that where two views are possible on evidence of record, the industrial tribunal should be very slow in coming to a conclusion other than the one arrived at by the domestic tribunal or by substituting its opinion in place of the opinion of the domestic tribunal. The court also took note of the fact that even if it was accepted that the delinquent worker left the place at 12.25 PM and could not have reached the place of occurrence within five minutes then also the fact of the matter remained that he had left the place of work during his duty hours unauthorizedly which was one of the misconducts alleged against him.

The court also made it clear that acquittal in a criminal case would not operate as a bar for drawing up of a disciplinary proceeding against a delinquent worker. The court reiterated the well-settled legal position that yardstick and standard of proof in a criminal case is different from the one in the disciplinary proceedings. The standard of proof in a criminal case is proof beyond all reasonable doubt while the standard of proof in a departmental proceeding is preponderance of probabilities. The court held that the labour court fell in factual as well as legal error in setting aside the findings recorded by the domestic enquiry. It restored the order of dismissal passed by the domestic tribunal and the punishing authority and set aside the order of the labour tribunal and of the high court.

Theft

In *Workmen* v. *Balmadies Estates*,[58] a charge sheet was issued against two employees alleging that they had stollen large quantity of chemicals from the storeroom during the specified period. An enquiry was held in which they participated till evidence of two management witnesses was recorded. They also cross-examined those two witnesses. The enquiry officer held that the two delinquents had committed theft. Thereafter they were dismissed from service by the management. An industrial dispute was raised by them which became subject matter of reference. The labour court decided, as a preliminary issue, that the principles of natural justice had been

58 (2008) 4 SCC 517.

followed by the enquiry officer but held that there was no direct evidence to show that the two workmen had committed theft. It concluded that the evidence was not properly appreciated by the enquiry officer and the findings of guilt was based on very slender evidence. The single judge before whom the award was challenged by the management observed that the labour court had failed to take note of the direct evidence of two management witnesses and held that the appreciation of the evidence by the labour court was perverse and its interference with the orders of termination was unsupportable in law. In the writ appeal, the stand of the workman was that the evidence of the management witness could not be treated as direct evidence and the labour court had the power to re-appreciate the evidence and, therefore, the single judge should not have interfered with the order of the labour court. The court did not find any substance in the writ appeal and dismissed it. The workman filed special leave petition before the Supreme Court. In the meantime, they were also proceeded against by the state for the offence of theft and it seems that they had made certain incriminating statements about themselves before the police.

The Supreme Court in principle recognised that the power of the labour court under the Act expanded vastly after the introduction of section 11-A of the Act in the statute. The court observed that it is fairly well settled now that in view of the wide power of the labour court it can, in an appropriate case, reconsider the evidence which has been considered by the domestic tribunal and on such reconsideration arrive at a conclusion different from the one arrived at by the domestic tribunal. The court, however, made it clear that the assessment of evidence in a domestic enquiry was not required to be made by applying the same yardstick as a civil court could do when a *lis* is brought before it. Further, the Evidence Act, 1872 is not applicable to the proceeding so far as the domestic enquiries are concerned, though principles of fairness can apply. It also observed that it is fairly established that in a domestic enquiry guilt may not be established beyond reasonable doubt and the proof of misconduct could be sufficient. In a domestic enquiry all materials which are logically probative including hearsay evidence can be acted upon provided it has a reasonable nexus and credibility. Even confessional evidence and circumstantial evidence, despite lack of any direct evidence, was sufficient to hold the delinquent guilty of misconduct and to justify the order of termination that had been passed.

The court held that in the present case the confession made by the two delinquent employees in the presence of the management and also in the presence of other employees were admissible in evidence as in the enquiry there was no cross-examination with regard to these confessional statements and there was no complaint by the delinquents even after the charge sheet was filed that the confessions had been extracted from them and/or that they had been compelled to make such a statement by reason of any threat to them. Even when they cross-examined the witnesses, they did not even suggest that what had been stated by the witnesses was incorrect. The court held that the findings of the labour court that such confessional statements could not be

relied upon in the absence of any other direct evidence were perverse and could be termed to be based on misconception of law. It held that the high court had rightly observed that the evidence could not have been brushed aside by the labour court in the manner done by it.

Misappropriation

In *U.P. State Road Transport Corpn.* v. *Vinod Kumar*,[59] the workman who was removed from service on the ground of misconduct of having recovered fare from passengers without issuing tickets raised an industrial dispute in which he did not press the legality of the enquiry proceedings and confined his case before the labour court only to the conclusion reached by the enquiry officer as also the punishment awarded to him by the disciplinary authority. However, the labour court held that the charge of misappropriation had not been proved and thus punishment of removal from service was harsh. It substituted the punishment of removal by stoppage of one increment without any cumulative effect and directed him to be reinstated with full back wages which relief was modified by the high court in the writ petition filed by the management to reinstatement and 50% of the back wages.

The Supreme Court allowed the SLP of the corporation against the judgment and order of the high court holding that since the respondent had not challenged the correctness or the legality of the enquiry conducted, it was not open to the labour court to go into the findings recorded by the enquiry officer regarding misconduct conducted by the workman. The court observed that it is well settled legal position that punishment of removal/dismissal is the appropriate punishment for an employee found guilty of misappropriation of funds; and the court should be reluctant to reduce the punishment on misplaced sympathy for a workman. The court held that there was nothing wrong in the employer losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering with the quantum of punishment. The court set aside the judgment of the high court as well as the award of the labour court and restored the order of removal from service ordered by the disciplinary authority.

Loss of confidence

In *Afaq Hussain* v. *U.P. SRTC*,[60] the Supreme Court deprecated the approach of the high court in holding that the management had lost the confidence of the workman on the basis of allegations to this effect by the management in the written statement. The court observed that pleadings are not proof and the management witnesses had not disclosed as to which rule was violated by the workman and why he lost the confidence of the management. Such a contention was required to be established by adduction of proper evidence.

59 (2008) 1 SCC 115.
60 (2008) 5 SCC 715.

Power of management to continue disciplinary proceedings for losses caused due to negligence and make recoveries from retirement benefits

In *U.P. State Sugar Corpn. Ltd.* v. *Kamal Swaroop Tondon*,[61] although the issue raised in this case has not arisen *via* ID Act but because this case involved important questions having direct bearing upon the power, if any, of the employer to make recoveries from the retirement benefits for the actual losses caused to the employer on the basis of disciplinary action, a close examination of the ratio is warranted. This case also deals with the issue of the right of the employer to proceed against an employee departmentally even after his retirement. These questions of great importance, which arose in the area of public employment law, have direct bearing on the private employment law as well, hence the importance of this decision. To appreciate the issues that arose in this case it is pertinent to refer to the factual matrix.

The respondent was in the employment of the corporation as a resident engineer. By a notice of the management he was required to show cause against the proposed disciplinary proceedings against him on the alleged grounds that he had due to lack of precautions, irregularity, gross negligence and carelessness on his part caused a loss of a definite amount of money to the management. He showed cause and denied the allegations. Not satisfied with his reply, the corporation issued show cause notice to the respondent for the loss caused to it due to negligence and careless on his part on the same day when the respondent was retiring on attaining superannuation. He challenged the show cause before the high court on the ground that he having retired from service no proceedings could have been initiated on his ceasing to be the employee of the corporation. He also sought quashment of the charge- sheet and the departmental proceedings. During the pendency of the petition, orders seeking recovery of losses caused by him to the corporation were issued for making recovery from the gratuity of the respondent. He amended his writ petition and sought quashing of the orders of recovery from his gratuity. The high court held that the order commencing disciplinary enquiry against the respondent was illegal, as he had retired on that day when he was served with a show cause notice and consequently it also quashed the orders seeking recovery of losses from his gratuity. It was this order of the high court which the corporation challenged before the Supreme Court.

The Supreme Court was convinced on the basis of the records that the proceedings against him had not been initiated after he retired from service. The court referred to the well-settled legal position that retirement benefits are earned by the employee for long and meritorious service rendered by him and are not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for dedicated and devoted service. The court referred to the judgment of the court in *Garment Cleaning Works* v. *Workmen*[62] where

61 (2008) 2 SCC 41.
62 AIR 1962 SC 673.

Gajendragadakar J, speaking for the court, observed that it was not inclined to hold that in all cases where the services of an employee are terminated for misconduct gratuity should not be paid to him. It is only if the misconduct for which the service of an employee is terminated has caused financial loss to the works then before gratuity could be paid to the employee he can be called upon to compensate the employer for the whole losses caused by him and after this compensation is paid to the employer, if any balance from the gratuity claimable by the employee remains i.e. to be paid to him.

The court made a distinction between resignation and retirement. Resignation brings about complete cessation of master servant relationship, but retirement does not do so. In case of retirement, master and servant relationship continues for grant of retirement benefits. It is also settled legal position that departmental enquiry can be initiated against a government servant after superannuation and pension can be reduced on proved charges of misconduct, negligence or financial irregularity committed during the period of service. The court also observed that when financial loss was caused to the government by any act or omission on the part of the employee, the purpose of enquiry, if held, might not be to inflict any punishment but to determine pension of an employee. Such an action can be taken so that the government may not have to suffer financially.

The court observed that the appellant corporation was within its right to proceed and continue its enquiry even after the retirement of the respondent as far as the financial loss caused to the corporation because of the negligence on the part of the employee and the same could be set off against the terminal benefits claimed by the respondent/workman. The court held that there is no rigid, inflexible or invariable test that can be applied as to when the proceedings should be allowed to be continued and when they should be ordered to be dropped where there is inordinate delay for initiating departmental proceedings against an employee. In such cases there is neither lower limit nor upper limit. If on the facts and in the circumstances of the case, the court if satisfied that there was gross, inordinate and unexplained delay in initiating departmental proceedings and continuation of such proceedings would seriously prejudice the employee and would result in miscarriage of justice, it may quash them. The court, however, hastened to add that it is an exception to the general rule that once the proceedings are initiated, they must be taken to the logical end. It made it clear that it could not be laid down as a proposition of law or a rule of universal application that if there is delay in initiation of proceedings for a particular period, they must necessarily be quashed.

In the present case, the high court had not quashed the proceedings on the ground that there was inordinate and unexplained delay on the part of the corporation in initiating such proceedings against the respondent. The court held that the corporation had resorted to minor penalty proceedings of recovery from pay or from such other amounts as may be due to the employee of the whole pecuniary loss caused to it by negligence or breach of its order and, therefore, it was not necessary for it to follow detailed and

lengthy procedure laid down for imposition of minor penalty. Such proceedings could be initiated by issuing a notice which in the present case was done many days before his retirement and served on him during his employment with the corporation. Therefore, the high court was wrong in quashing the proceedings and setting aside the orders of recovery. Considering the facts and circumstances of the case in their entirety, the court held that the high court was wrong in holding that the proceedings were initiated after the respondent had retired and there was no power, authority or jurisdiction with the corporation to take any action against him and in setting aside the orders passed against him. It held that the proceedings could have been taken for the recovery of financial loss suffered by the corporation due to negligence and carelessness attributable to the respondent. Such action could not be termed as illegal or without jurisdiction. The court set aside the order of the high court. The court observed that the high court having allowed the petition only on the ground that the proceedings could not have been initiated against the respondent, it thought it appropriate to remit the matter to the high court so as to enable the rival contentions be considered for taking an appropriate decision on merits.

Issues relating to section 33-C(2)

Need for construing the meaning of 'workman' under section 33-C(2) liberally

In *A. Satyanarayana Reddy* v. *Presiding Officer, Labour Court*,[63] interpretation of the provision of section 33-C(2) of the Act *vis-à-vis* voluntary retirement scheme (VRS) framed by the State of Andhra Pradesh was in question before the Supreme Court. This question arose in the following facts and circumstances:

The appellants were workers of a state co-operative sugar undertaking. The management of the industrial undertaking laid off workers including the appellants for which compensation was to be paid. The workers union of the said undertaking filed a writ petition in the Andhra Pradesh High Court challenging a memo issued by the management whereby and where-under lay off compensation was denied to the workmen. They claimed existing legal right for obtaining lay off compensation for a period of nearly seven years. In the meantime, the State of Andhra Pradesh sold the said undertaking to another concern that absorbed some of the workmen. Out of the said absorbed workers some of them were paid lay off compensation and some were not. Later the company was shifted to another state because of which many workers lost the opportunity to continue to be the employees. The Government of Andhra Pradesh provided special compensation package in the form of VRS for the workers who did not opt for employment with the new owner. The appellants opted for the VRS and were paid special compensation.

63 (2008) 5 SCC 280.

However, the management did not make a provision for payment of compensation for the lay off resorted to by the management earlier. Resultantly, these workers filed a writ petition through their union before the high court for direction to pay them lay off compensation which was independent of the VRS. The management opposed the writ petition contending that the workers having taken VRS and the relationship of the employer-employee having ceased, the writ petition was not maintainable. The single judge, however, opined that the workers should have approached the appropriate labour court or industrial tribunal and worked out their remedies by way of a claim petition and by leading appropriate evidence before the said court. The writ petition was accordingly disposed of with such liberty.

Pursuant to and in furtherance of the said observations of the high court, the workers filed applications under section 33-C(2) claiming lay off compensation for the period of five years. The labour court did not entertain the said applications holding that the same were not maintainable in view of the decision of the court in *A.K. Bindal* v. *Union of India*[64] where it was held that the workmen filing applications under section 33-C(2) must be workmen under section 2(s) of the Act which had four categories of workmen: (i) persons presently employed; (ii) persons dismissed from service; (iii) persons discharged from service; and (iv) persons retrenched from service. The labour court further held that persons who had ceased to be employees whether voluntarily or due to superannuation did not fit into the definition of section 2(s). Such persons even though they had got a right to receive benefit from the employer were not entitled to file petition under section 33-C(2) because they were not 'workman' under section 2(s) of the ID Act. The writ petition preferred by the workers against the said order of the labour court before the single judge of the high court was dismissed. In the special leave petition before the Supreme Court, the workers contended that in terms of the judgment of the court in *National Buildings Construction Corpn.* v. *Pritam Singh Gill*[65] the labour court and consequently the high court had committed manifest error in passing the impugned order insofar as they failed to take into consideration that the existing right of workman for obtaining the lay off compensation payable to them under the Act had nothing to do with the VRS and furthermore having regard to the directions of the high court in the earlier writ petition the proceedings under section 33-C(2) were maintainable. In *NBCC* it was observed that section 33-C(2) must be so construed as to take within its fold a 'workman' who was employed during the period in respect of which he claims relief even though he was no longer employed or has ceased to be a workman at the time of making application for claiming lay off compensation. It was held that the

64 (2003) 5 SCC 163.
65 (1972) 2 SCC 1.

term 'workman' as used in section 33-C(2) includes all persons whose claim requiring computation under section 33-C(2) in respect of an 'existing right' arising from his relationship as an industrial workman with his employer. The court had observed that by adopting this construction alone it could advance the remedy and suppress the mischief in accordance with the purpose and object of inserting section 33-C(2) in the Act.

In the present case, the court observed that a literal meaning given to section 2(s) would indicate that the workmen ceased to enjoy the protection conferred against them under the Act after having opted for VRS. The court, however, posed the question to itself as to whether it could be said that the appellants continued to be 'workman' after having taken voluntary retirement for the purposes of filing an application under section 33-C(2) was the question. The court also found that while deciding *Vijay Kumar* v. *Whirlpool of India Ltd.*[66] the division bench of the court had followed *A.K. Bindal* but decision in the *NBCC* had not been noticed in the aforesaid decision. The court, therefore, observed that in view of apparent conflict in the decision of the court in *NBCC* and *A.K. Bindal* it was necessary that the question being of some importance should be considered by a larger bench and it accordingly directed that the records be placed before the Chief Justice for passing appropriate orders.

It is submitted that on the face of it the view taken by the court in *NBCC* is the correct interpretation and squarely fits with the object of section 33-C(2) and it will be wrong to deny worker his entitlements merely because the management defers payment of his existing rights and later on ceasing to be employee is denied his legitimate due on purely technical grounds. The provision being a welfare provision should be given purposive construction and not literal construction.

Proceedings under section 33-C(2) cannot be maintained on basis of disputed documents

In *D. Krishnan* v. *Vellore Coop. Sugar Mill*,[67] the appellants two in number claimed that they had put in overtime for a specified number of hours on each day in the employees canteen in which they were posted and were entitled to the overtime wages for the said period. They made several representations in this respect to the labour welfare officer as well as to the employer claiming payment of overtime wages. They were informed that a similar claim by another employee was pending in the labour court and the decision in that case would be made applicable to their cases as well. It appears that the labour court, in the meantime, rendered its decision in favour of the employee and the management was directed to pay overtime wages to him which were in fact defrayed by the management. Frustrated in their efforts to get the benefit given to the other employee in terms of the

66 (2008) 1 SCC 119.
67 (2008) 7 SCC 22.

order of the labour court, the appellants filed an application under section 33-C(2) of the Act making a claim for overtime wages. The management submitted its counter denying that they were ever directed to work overtime. It was the case of the management that in fact they had never done so. It was also its case that the proceedings under section 33-C(2) being in the nature of execution proceedings, the labour court could not have, under this jurisdiction, determined the rights of the parties, as was required in the present case. The management had not in its counter raised the objection that the employees were not workmen but the said plea was taken in the written submissions before it.

The labour court observed that only documentary evidence that has been submitted by the parties were the time cards produced by the employees and the various representations made by them to the management making demand for overtime wages. On perusal of the documents, it held that the workmen had indeed worked overtime and they were entitled to payment accordingly. It also turned down the contention of the management that these two employees did not fall within the definition of 'workman' under section 2(s) of the Act on the ground that the same plea had not been taken in the written statement but only in the written submissions. The labour court also held that though application under section 33-C(2) was in the nature of execution proceedings and a determination of the claim could not be made there-under, but as section 59 of the Factories Act, 1948 provided for the payment of overtime wages and as the documents on record had proved the performance of overtime work, the behaviour of the management was "liable to be punished", more particularly as it had not challenged the order of the labour court in the case of other workman which order had become final. The labour court, accordingly, allowed the application of the workmen.

The single judge of the high court before which the order of the labour court was challenged confirmed it but the division bench in the writ appeal observed that the reliance of the labour court on documentary evidence alone, and that too in a case of claim of overtime wages was not tenable and termed it unusual on the part of the workmen not to enter the witness box to substantiate their claim. It held that the punch time cards, which found the basis of their case, did not constitute sufficient proof as the burden of proof in such a matter rested on the person claiming the overtime. The division bench of the high court also observed that the specific stand of the management being that the workmen had never been authorized to work overtime, the claim of the workmen must fail on this count also. The high court finally concluded that in the light of the settled position of law, proceedings under section 33-C(2) of the Act could only be effective in case of a pre-existing right and as the claim of the worker was disputed, this was not a matter for decision under the said provision.

In the special leave petition filed by the workmen against the order of the division bench of the high court, it was argued by them that though the proceedings under section 33-C(2) of the Act were indeed in the nature of execution proceedings but this provision also visualized some enquiry, even

if casual one. It was also argued that there was a difference between the terminology of sections 33-C(1) and 33-C(2) inasmuch as section 33-C(1) dealt with money due to any workman from an employer under a settlement or award etc. whereas section 33-C(2) was much wider in its application and visualized entitlement with respect to money even if a pre-existing right was created by a statute. Since in the present case section 59 of the Factories Act, 1948 visualized payment of overtime wages, a simple enquiry under section 33-C(2) was fully justified. The workmen heavily relied on *East India Coal Co.* v. *Rameshwar*.[68] It was further argued that even assuming for a moment that there was some evidence to raise a suspicion that the appellants were managers and not workmen, the dominant purpose of their employment had to be seen and the dominant purpose being that of workmen, even if they were delegated some minor managerial activities that would not change their appointment. On the other hand, the management relied on *MCD* v. *Ganesh Razak*[69] and *State of U.P.* v. *Brijpal Singh*[70] to plead that the proceedings under section 33-C(2) were in the nature of execution proceedings and no determination of a right could be made.

The court after considering the rival contentions observed that the fact that the proceedings under section 33-C(2) are in the nature of execution proceedings such proceedings pre-supposed some adjudication leading to the determination of a right, which has to be enforced. The court held that there has been no such adjudication in the present case. The reliance of the workmen was exclusive on documentary evidence placed on record, which consisted primarily of the punch time cards, and the representations that had been filed time to time before the management which claim of the workmen had been hotly disputed by the respondents. The court, therefore, opined that the question that arose in this situation was whether reliance only on the documentary evidence was sufficient to prove the case. The court was also of the opinion that there were statements of record from time to time in the very documents relied upon by them in support of their case that they were, *prima facie*, managers and it was, therefore, beyond the jurisdiction of the labour court to determine their status in proceedings under section 33-C(2) of the Act. The court also held that though section 59 of the Factories Act undoubtedly provide for extra payment as overtime wages but according to rule 78-B of the Tamil Nadu Factories Rules, 1950 only an employee authorized to work overtime by an overtime slip would be entitled to claim overtime allowance.

In the present case, it was the specific case of the management that no such slips have ever been issued. Additionally, in the absence of any supporting oral evidence by the workmen which would also result in their cross-examination, a mere reliance on the documents filed by them was

68 AIR 1968 SC 218.
69 (1995) 1 SCC 235.
70 (2005) 8 SCC 58.

insufficient for determination of factual basis of the issues involved in the proceedings under section 33-C(2) of the Act. The court held that in this view of the matter reliance upon *Rameshwar*'s case on the scope of ambit of section 33-C(1) *vis-à-vis* section 33-C(2) was not acceptable. The court also observed that on account of lack of particulars with respect to the matter of other workman in whose case the labour court had granted the benefit of overtime, it was not possible for it to evaluate the matter on facts. The court held that there was no merit in the appeal and it accordingly dismissed it.

Distinction between permanency and regularization

In *Hindustan Petroleum Corpn. Ltd.* v. *Ashok Ranghba Ambre*,[71] the apex court had to bring out the distinction between 'regularisation' and 'permanency' in the service/labour jurisprudence in the public employment law which is becoming an essential component of industrial relations law in India. This distinction became necessary in view of constant confusion both at the level of industrial adjudication as well as at the level of high courts. To appreciate the distinction drawn by the court between the two concepts so that the distinction is internalized by all concerned it is necessary to give some important developments in this case leading to conceptualization of the distinction by the apex court. The factual matrix of the case was as below:

The workman concerned had been working for a number of years on casual basis as an unskilled workman with the respondent. He filed writ petition under article 226 of the Constitution praying that he be declared as permanent workman on the post of compounder/dresser w.e.f. the date he had been employed. The corporation stopped engaging him during the pendency of the writ petition on the plea that it had engaged him purely on *ad hoc* and temporary basis without following procedure of law. Being aggrieved by the said action he raised an industrial dispute, which ultimately was referred by the central government to the industrial tribunal for adjudication. The tribunal allowed the reference. It held that the workman not having been regularly appointed as compounder/dresser but was a daily wage employee and having worked for more than 240 days in the calendar year just preceding the date of his oral termination, the action amounted to retrenchment within section 25-F of the Act and he was entitled to reinstatement with back wages. The tribunal, however, made it clear that it was not considering the question or regularisation of services of the workman because the reference did not cover the question of regularisation and that the workman had already filed a writ petition for regularisation which was pending in the high court for decision. The award of the industrial tribunal was upheld by the single judge as well as by the division bench of the high court when challenged by the management. The matter came to an end there and award attained its finality.

71 (2008) 2 SCC 717.

In the meantime, a division bench of the high court allowed the writ petition of the workman and directed the corporation to make the workman permanent and grant him benefits from the date of filing of the writ petition. This order of the high court became the subject matter of challenge before the Supreme Court. It was admitted by the corporation before the Supreme Court that order holding termination of services of the workman being illegal and contrary to law had reached finality and the workman had since been reinstated and granted benefits which accrued to him in terms of the award of the labour tribunal. The short but an important and significant issue, therefore, before the Supreme Court was whether the impugned order of the high court granting the status of permanency to the workman and all benefits flowing therefrom to the workman was in order and permissible under law.

The Supreme Court held that the high court was in clear error in equating reinstatement of the workman in service in earlier proceedings with confirmation and granting status of permanency. The court held that continuation in or regularisation of service of an employee and extending the benefit of confirmation and making him permanent are two different concepts. The court held that the high court had erroneously proceeded on the assumptions that regularisation meant permanence. The court referred to its earlier judgments in *State of Maysore* v. *S.V. Narayanappa*[72] and *B.N. Nagarajan* v. *State of Karnataka*[73] to clarify that regularisation would not mean that the appointment would have to be considered permanent. The words 'regular' or 'regularisation' do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant only to cure only such defects as attributable to the methodology followed in making the appointments and cannot be construed so as to convey an idea of the nature of tenure of appointment. The court observed that in the present case the workman was never sponsored by the employment exchange nor was an advertisement issued for the filling of the post to which he was appointed. The cases of other similarly situated persons were not considered and the appointment was not legal and lawful. In industrial adjudication the order of termination was quashed, as it was not in accordance with retrenchment law. But that did not mean that the workman had substantive right to hold the post. The high court was, therefore, wrong in directing the corporation to make the workman permanent and to extend him all benefits on that basis from the date of filing of writ petition. The court held that said directions of the high court had to go and were accordingly quashed. However, keeping in view that the workman had been working with the corporation since 1984 and had completed two decades of service, his case deserved to be considered for permanency by the corporation sympathetically and for this purpose if there was any age bar the corporation would not treat him ineligible on that count in view of the fact that he had already been in its service since 1984. Further,

72 AIR 1967 SC 1071.
73 (1979) 4 SCC 507.

the court also directed that if there was any statutory rule or administrative instructions or guidelines which require minimum educational qualification and/or experience, it was open to the corporation to insist with such rules, instructions and guidelines but if there was power of relaxation with the corporation or any of its officers it should consider that aspect as well in view of his long service and rich experience.

It is submitted that the court in the present case has laid down the correct distinction between 'regularisation' and 'permanence.' At the same time, it has adopted a humane approach towards the workman who had rendered long years of service with rich experience and unblemished service record. This kind of blending of law and equitable considerations are difficult to find in the recent decisions of the court.

Issues relating to regularisation

In *Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidyalaya* v. *United Trades Congress*,[74] the Supreme Court observed that working for more than 240 days continuously from the date of the engagement itself does not confer any right upon a workman to be regularised in service. Working for more than 240 days in a year becomes relevant only for the purposes of attracting retrenchment compensation law under the ID Act. The court held that the industrial court in this case had committed a serious error in passing the impugned award of directing that the workman was entitled to permanency and the consequential benefits and further the high court had also gravely erred in not interfering with the said award on a wholly wrong premise.

The court held that the proper course for the labour court as well as the high court was to determine the nature of work undertaken by the university and also the kind of work it was undertaking for which it had engaged workmen whose employment was on temporary basis in nature. The workman concerned had failed to produce his appointment letter which only showed that he was appointed on daily wages or on *ad hoc* basis. The court held that it was inconceivable that an employee appointed on regular basis would not be given an offer of appointment and should not be placed on a pay scale. It had no hesitation in proceeding on the premise that the workman was appointed on daily wages basis. The court held that any appointment which is not in conformity with the constitutional and statutory requirements is rendered illegal and, therefore, the question of granting permanent status to such an employee was beyond the power of the industrial court and the high court. The court recorded the concession granted by the university that it had framed a scheme under which steps for regularisation of daily wage or *ad hoc* employees was being considered and that he would be considered for being absorbed pursuant to the scheme. The court directed that if his turn for consideration of regularisation had already come, a decision thereon should

74 (2008) 2 SCC 552.

be taken expeditiously. The court, however, set aside the judgment of the high court as well as the award of the industrial court.

III CONCLUSION

The legal position on the jurisdiction of civil courts in matters of termination of service of workers has been further crystallized.[75] The court has observed that distinction has to be noticed between a right which is conferred upon an employee under a statute for the first time and a remedy for which is provided thereunder like under the ID Act and the one which is created to be determined under the common law right. The court held that if a right is claimed under the former i.e. under ID Act or the sister laws, the jurisdiction of the civil courts will be barred, but if no such right is claimed, the civil courts will have jurisdiction. The court also held that where a civil court has no jurisdiction over the subject matter of the suit being wholly covered by the ID Act, an order passed by the civil court having no jurisdiction is a nullity. It has finally settled the legal position that an employee, who holds a civil post in the central government and also falls within the definition of 'workman' employed in an 'industry' has a choice in the matter of selecting his forum for seeking redressal of his grievances. For this, he may either approach the Central Administrative Tribunal (CAT) under the Administrative Tribunals Act, 1985 or the dispute resolution machinery envisaged under the ID Act, with all attendant consequences. It is gratifying to note that the court has ruled in favour of part-time workers in the matter of their coverage under the Industrial Disputes Act and their right to seek redressal under the said Act.

The decision of the court in *Essorpe Mills Ltd.* is contrary to the scheme under the ID Act in general and the provisions of section 22 in particular rendering section 22(1) (b) *otiose.* The provisions relating to strike notice under section 22(1) (a) in public utility services have been completely misconstrued by the court which is contrary to the interpretation of the said provisions by a division bench of three judges in *Workers, Industry Colliery* v. *Industry Colliery*[76] and is bound to result in absurd consequences. This interpretation of section 22 needs reconsideration, sooner the better.

75 See *supra* notes 1 &3.
76 See *supra* note 28.