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INDUSTRIAL RELATIONS LAW

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I INTRODUCTION

IN THE year 2009, a number of decisions in different areas of industrial relations law have been handed down by the apex court, more important of which are surveyed here. Most of these decisions relate to the issues arising out of disputes under the Industrial Disputes Act, 1947 (ID Act). Issues that have engaged the attention of the court relate to the governmental references and related matters; circumstances warranting applicability of the common law principle of estoppel, waiver and acquiescence in industrial adjudication; misconducts, disciplinary action and need to follow principles of natural justice in disciplinary proceedings; new judicial policy in the matter of grant of relief in disciplinary and retrenchment matters; issues relating to pendency proceedings and binding nature of settlements and awards.

The ID Act contains statutory prohibition against the commission of 'unfair labour practices' by the employers as well as workmen and prescribes stringent penalties for their commission. The Act, however, does not provide statutory civil remedies against such practices which would have been better course than the penal remedy given the fact that there is hardly any prosecution, much less successful prosecution, reported under the relevant provision of the Act. One important area which engaged the attention of the apex court was the scope of the statutory civil remedies available to the worker against the unfair labour practices under the Maharashtra Recognition of Trade Unions and Prevention Act, 1971. The court ably spelt out the scope and extent of powers conferred thereunder on the industrial adjudicators in proven cases of unfair labour practice. The need for adopting similar statutory provisions under the ID Act is the felt necessity of the time.

Decisions reported under the Industrial Employment (Standing Orders) Act, 1946 deal with issues relating to status and scope of standing orders and their effect on the powers conferred on industrial adjudicators under the industrial relations law. Under the Trade Unions Act, 1926, there has,

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however, been no reported decision of the apex court during the year under survey.

II ETTLEMENT OF INDUSTRIAL DISPUTES

The High Court is bound to pass speaking order while deciding a case. Reasoned decision is the hallmark of sound justice delivery system. Reasons introduce clarity in the order and are indicative of application of mind, more so when it is amenable to further challenge. In *Uttar Pradesh Road Transport Corporation* v. *Jagdish Prasad* Gupta,[1] the Supreme Court came down heavily against the order of the Allahabad High Court in which, after issuing notice to the workman who filed his reply pursuant thereto, it summarily dismissed the writ petition of the state against the award of the labour court awarding reinstatement of the workman with 50 per cent back wages. The services of the workman had been terminated by the state on the basis of the inquiry officer's report holding him guilty of various misconducts. The basic stand of the state before the Supreme Court was that the order of the High Court was non-reasoned and the High Court had not considered various issues raised by it. Emphasising the need to give reasoned order, the apex court referred to its earlier judgment in *State of Orissa* v. *Dhani Ram Luhar*,[2] where the duty and obligation of the High Courts to record reasons while disposing off cases had been stressed. Holding that the impugned non-speaking order was clearly unsustainable and liable to be set aside, the court remitted the matter to the High Court to hear the writ petition and to dispose it off by a reasoned order.

Workman

Master-servant relationship

In *Kanpur Electricity Supply Co. Ltd.* v. *Shamim Mirza*,[3] a legal issue of contemporary importance before the Supreme Court was whether the appellant company was justified in disowning its liability towards the respondent workmen by denying employer-employee relationship and claiming inapplicability of retrenchment law benefits to them by resorting to modern techniques of circumventing such relationship.

The appellant company claimed that the respondents were the employees of the contractor who was selected after inviting tenders. The contractor

1 (2009) 12 SCC 609; also see *U.P. SRTC* v. *Nanhe Lal Kushwaha* (2009) 8 SCC 772 and *P.V.K. Distillery Ltd.* v. *Mahendra Ram* (2009) 7 SCC 705.

2 (2004) 5 SCC 568.

3 (2009) 1 SCC 20. The appellant company was constituted by the U.P. government and was charged with several duties under the Electricity (Supply) Act, 1948 in relation to generation, transmission and distribution of electricity within the state. The appellant opened various cash centres in different divisions and sub-divisions for collection of electricity bills and for the said purpose, awarded contract to one of the contractors who filed his tender. Under the agreed terms and conditions, the machines were to be operated by the said concern, through its employees, for which it was to be paid Rs.175/- per day, per machine.

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was awarded contract for installation of *Bradma* machines for collection of electricity bills at various cash centres in different divisions and sub-divisions where the respondents were required to collect cash for the contractor and deposit the same in the office of the appellants. The case of the respondents was that they had been appointed as cashiers at two sub-stations when the appellant had adopted the policy of centralization of all the 16-17 sub-stations for the purpose of collection of electricity bills. They were trained for this purpose. Apart from collecting the electricity bills, they were also depositing the cash so-collected in the treasury. Their services were terminated without assigning any reason to them, whereas persons junior to them were still working on the posts of cashier in violation of retrenchment law.

Before the labour court, the stand of the appellant was that there was no relationship of master and servant between them. The respondents were the employees of the contractor who was responsible for the operation and upkeep of the machines. Further, the cash was to be handled by the appellant's cashier and that the respondents were not cashiers but the employees of the contractor.

Upon consideration of the evidence produced by both the parties, the labour court held that though no appointment letters had been filed by the workmen, it had come on evidence that before taking the work, letters were issued to them by the assistant manager of the appellant. Further, though the signatures of the respondents did not appear in any of the columns of the electricity cash and revenue (ECR) rolls, their designation as cashier had been mentioned on all these sheets and in some of the letters there were signatures of the assistant engineer. The court also noted that in the contract given to the contractor for operating *Bradma* machines it was mentioned that it would be the responsibility of the contractor to operate these machines at all the 16 sub-stations but the cash was to be handled by the cashier of the appellant only. The appellant failed to prove that any of its other cashiers' had handled the job of cash collection. The labour court, therefore, came to the conclusion that there was no ground to presume that the workmen were the employees of the contractor and it stood proved that they were in the regular employment of the appellant as cashiers. Thus, the workmen having worked for more than 240 days, their termination was illegal for not complying with retrenchment law.

On appeal, the High Court held that the labour court had considered all the aspects of the matter in the light of the evidence on record and, therefore, no interference was called for. However, it modified the award to the extent that the workmen would be entitled to only 50 per cent of the back wages.

The Supreme Court observed that it was trite that the burden to prove that a claimant was in the employment of a particular management, primarily lies on the person who claims to be so but the degree of proof, so required, varies from case to case. It is essentially a question of fact to be determined having regard to the cumulative effect of the entire material placed before

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adjudicatory forum by the claimant and the management. In the instant case, the workmen did not produce letters of appointment as also their salary slips but they adduced some contemporaneous documentary evidence, including ECR sheets bearing the signatures of the workmen and that of another senior officer of the appellant company, which showed that they were collecting cash on behalf of the appellant, depositing it in the van or central office of the appellant and were answerable to the officials of the appellant. The court also referred clause 5 of the terms and conditions of the contract awarded to the contractor which provided as under:

> You will be responsible for the operation of the machines only. The cash handling is to be done by KESA, cashier or a representative of KESA duly authorized by Dy. CAO/Head Cashier.

The court pointed out that from the evidence of the witnesses examined on behalf of the workmen, it was only the respondents who were collecting the cash and not other employees of the appellant and evidence was led by the appellant to rebut this fact. It also noted that evidence on record showed that the engagement of the workmen was prior to the award of contract to the contractor. In the light of the above facts and the evidence on record, the apex court held that the courts below were justified in holding that the workmen had established their claim of employer-employee relationship and were entitled to reinstatement. It, however, did not award back wages since there was nothing on record to show that the respondents were selected through a regular recruitment process or they were actually qualified for the post of cashier.

Salary is a criterion only in relation to supervisory work

In *Hongkong & Shanghai Banking Corpn. Ltd.* v. *Govt. of India*,[4] the management wanted the case of the employee to be thrown out of the industrial tribunal merely on the ground that she was drawing more than Rs.58,000/- per month and was not entitled to raise an industrial dispute before the central government industrial tribunal (CGIT) against her termination. The CGIT while adjudicating on the issue of her non-employment directed the management to pay her *interim* relief of Rs.30,000/- per month subject to the condition that if she finally did not succeed, the *interim* compensation paid to her would be adjusted against terminal benefits which were to be paid to her by the management. The said *interim* order was affirmed by the High Court. On appeal, the Supreme Court found the order to be fair and just given the fact that the interests of the management were duly protected. It directed the CGIT to dispose off the matter expeditiously within two months from the date when the orders reached the tribunal and left the management at liberty to raise before the

4 (2009) 13 SCC 771.

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CGIT all issues including the issue as to whether the employee was a workman. The CGIT was required to decide the status of the employee on merits without being influenced by the observations of the court in the appeal.

It is submitted that salary amount is relevant only in the case of employees performing mainly supervisory functions and in no other case where the workman is mainly performing either skilled or unskilled or manual or technical or clerical or operational work.

Work charged employees not on par with regular employees

In *Punjab SEB* v. *Jagjiwan Ram*,[5] the Supreme Court clarified that work charged employees can claim protection under the ID Act or the rights flowing from any particular statute but they cannot be treated at par with the regular employees of the establishment. They can neither claim regularization of service as a matter of right nor can they claim pay scales and other financial benefits at par with regular employees. It is only if service of a work charged employee is regularized under any statute or a scheme framed by the employer that he becomes a member of the regular establishment from the date of regularization. His service in a work charged establishment cannot be clubbed with service in a regular establishment unless a specific provision to that effect is made either in the relevant statute or the scheme of regularization. If the statute or scheme under which service of work charged employee is regularized does not provide for counting of past service, the work charged employee cannot claim benefit of such service for the purpose of fixation of seniority in regular cadre, promotion to higher post, fixation of pay in higher scales and grant of increments, *etc.* The court held that work charged employees constitute a distinct class and they cannot be equated with any other category or class of employees much less regular employees.

Apprentice trainee – right of employment, if any

In *Laxmi Rattan Cotton Mills Ltd.* v. *State of U.P.*,[6] the respondents were engaged as trainee investigators on monthly stipends with certain terms and conditions which, *inter alia,* provided "that the management shall have no obligation whatsoever to provide any job in these mills after completion of the said period of training." Although no assurance was given to them that on completion of training they would be appointed as trainee investigators, they were nonetheless appointed as clerks in the clerical pay scale on fixed term basis which they accepted without any protest or demur. They were at a later date made permanent clerks which status they accepted without any demur whatsoever. The company, however, became sick resulting into a reference being made to the board for industrial and

5 (2009) 3 SCC 661.
6 (2009) 1 SCC 695.

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financial reconstruction (BIFR), whereupon a proceeding was initiated. Eventually, the mill was closed, upon obtaining approval from the central government in terms of section 25-O of the ID Act. After closure of the mill, the respondents raised a demand through a union seeking appointment in the post of investigators from the date of their initial appointments with arrears and difference in pay. The appropriate government made a reference to the industrial tribunal. The tribunal decided the reference in favour of the respondents on the ground, *inter alia*, that subsequent to their appointment as clerks, the appellant should have given preference to them over outsiders appointed as investigators by the appellant. The award of the tribunal was upheld by the High Court. During the pendency of the writ petition before the High Court, the appellant offered a voluntary retirement scheme which was accepted by the private respondents and they even obtained compensation as clerks.

The Supreme Court, on appeal by the management, held that the tribunal fell in error while deciding the reference in favour of workers on the ground that as soon as the vacancy of investigator arose the appellant should have offered it to them. The workers had no legal right to the said post. Further, they accepted the post of clerk without demur. Having opted for the voluntary retirement scheme floated by the employer, the workers had accepted their designation to be that of 'clerks'. Further, the court held that the industrial tribunal as well as the High Court had failed to consider the fact that the time when the industrial dispute was raised, the mill had already been closed.

Bar to raise an industrial dispute

Could a workman raise an industrial dispute almost after a period of 12 years from the date of his removal from service and seven years after the division bench of the High Court dismissed his writ appeal challenging his removal from service? This issue was raised in *Technical Teachers Training Institute* v. *C. Balasubramaniam*.[7] The order of the division bench had attained finality as it had not been challenged any further. The workman raised the said dispute under the amended section 2-A of the ID Act (Amended by Tamil Nadu Act 5 of 1988)[8] which amendment came into force after his services were dispensed with. Though the labour court should not have entertained his dispute under the amended provision but it did. The management sought quashing of the proceedings first before the High Court and later in the Supreme Court on the grounds, *inter alia*, of *res judicata* and delay.

The Supreme Court observed that the respondent, having chosen to approach the High Court challenging the order of his removal from service both before the single judge and the division bench unsuccessfully, could

7 (2007) 15 SCC 722.

8 This Amending Act allowed a workman to approach labour court directly in cases of dismissal/ discharge/retrenchment.

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not be allowed to re-agitate the matter and challenge the very validity of his removal from service under section 2-A of the ID Act. It was not a case of his having withdrawn his writ petition or writ appeal before the High Court. It is the settled law that the decision inter-parties which has become final binds the parties. Apart from that, the workman having suffered the order, which had become final, could not be permitted to reopen the case again questioning the very validity of his removal from service or for that matter the question of quantum of punishment imposed on him. Besides, the court held that although limitation may not have been pleaded as a bar but the conduct of the workman in approaching the labour court after 12 years of his removal from service and seven years after the division bench passed the order could not be ignored. If the plea of the workman were to be allowed, it would give rise to a situation where even the labour court might have to examine the validity of the order of the division bench of the High Court which had become final which could not be permitted to happen. Thus, the management succeeded in getting quashed the proceedings before the labour court.

Reference: delay fatal

In *U.P. SRTC* v. *Ram Singh*,[9] the appellant's case before the Supreme Court was that the labour court should not have entertained the dispute at all, particularly in view of the gross delay of 13 years. In support, it relied on the judgments of the Supreme Court in *Nedungadi Bank Ltd.* v. *K.P. Madhavankutty*[10] and *Prakash Chandra Sahu* v. *State Transport Authority*.[11] This issue was raised in the following factual matrix: The workman was dismissed from service after departmental proceedings were initiated against him for his lapses as a booking clerk in the appellant corporation. In the opinion of the appellate authority, though he was careless in his duty, it did not warrant an order of dismissal and, therefore, substituted it with an order of removal and a fresh chance was given to the workman to work with the appellant organisation. It was, however, clarified that the workman would not get benefit of his earlier service. The workman thereafter joined service and after 13 years later, the workman raised an industrial dispute alleging that the order of the appellate authority insofar as it had denied him the benefit of the past service was wrong and sought redressal. The state government made a reference of the dispute to the labour court which set down the matter for *ex parte* hearing on the ground that the appellant had not filed a written statement despite repeated opportunities. The management preferred an application for recall of the said order which was rejected by the labour court. The labour court passed an *ex parte* award setting aside the order of the appellate authority insofar

9 (2008) 17 SCC 627.
10 (2002) 2 SCC 455.
11 (1997) 9 SCC 32.

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as it directed that the workman would not be entitled to the benefit of his earlier service with the appellant. Feeling aggrieved, the appellant filed a writ petition which was ultimately rejected by the High Court. The workman retired from the service after superannuation.

In the special leave petition filed by the management, the Supreme Court held that the High Court had erred in not setting aside the award of the labour court. It observed that apart from the unacceptable manner in which the appellant was denied the opportunity of participating in the proceedings, including being debarred from cross-examining the workman, the labour court should not have entertained the industrial dispute given the enormous delay. Further, in several decisions it has been held that while delay cannot by itself be a sufficient reason to reject the industrial dispute, nevertheless the delay cannot be unreasonable. Referring to *Prakash Chandra Sahu*,[12] the court stressed the fact that due diligence and promptness has to be observed in raising the dispute. It was possible that the management's records pertaining to the employee might have been destroyed during the intervening period. In such circumstances, it would be difficult for the management to obtain witnesses who would be competent to give evidence after so many years if the labour court wished to hold a further enquiry into the matter. Dealing with the delay of 13 years, the court observed that that was unreasonable and the mere fact that workman was making repeated representations would not justify his raising the issue before the labour court belatedly. The lack of diligence on the part of the workman was apparent. The court also held that the decision of the High Court as well as the award of the labour court could not be sustained. The court, however, directed that the amount paid to the workman pursuant to the *interim* order of the High Court be not recovered from him.

In *State of Karnataka* v. *Ravi Kumar*,[13] the court noted that the workman had decided to challenge his termination before the High Court after 14 years claiming that his termination was in violation of section 25F of the ID Act. It also noted that he had filed the writ petition only after coming to know that some other daily wagers had got some relief. The High Court had dismissed his writ petition as not maintainable with the observation that the workman would give a representation to the state government and it might consider whether the dispute of his non-employment should be referred for adjudication under section 10(1)(c) of the ID Act. Taking advantage of the said observation, the workman sought reference and the government obliged. He filed his statement of claim and the assistant executive engineer who was the sole respondent contended that the reference was stale and denied that the workman had served in his office. The labour court rejected the reference. The said award was set aside by the

12 *Ibid*.
13 (2009) 13 SCC 746.

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High Court with the direction to the state government and the assistant executive engineer to reinstate him without any back wages.

On challenge by the state, the Supreme Court observed that it was not possible to expect the assistant executive engineer to prove after 14 years that the daily wager worked or did not work for 240 days in a year or he voluntarily left the work. It further observed that when the state government was not a party before the labour court, the workman could not implead it as party in the writ petition challenging the award nor could the High Court grant any relief against the state government. It set aside the impugned order of the High Court and restored the award of the labour court rejecting the claim.

Common law principle of estoppel, waiver and acquiescence applicable in industrial adjudication

In *SAIL* v. *State of W.B.*,[14] the court observed that the workmen whether before the labour court or in the writ proceedings before the High Court, represented by the same union which was registered under the Trade Unions Act, 1926 and entitled to espouse the cause of the workmen, had taken a definite stand that they had been working under the contractor. According to the court, it would not lie in their mouth to take a contradictory and inconsistent plea in subsequent proceedings that they were also the workmen of the principal employer. To raise such a mutually destructive plea was impermissible in law. The court opined that such mutually destructive plea should not be allowed to be raised even in industrial adjudication. The court held that common law principle of estoppel, waiver and acquiescence are applicable in an industrial adjudication. It was the stand of the appellants that admittedly they were employed by the contractor. The court observed that so far as the question of under-payment as pleaded and categorizing it as a unfair labour practice was concerned, it obviously related to the contract, but it could not by any stretch of imagination be categorized as sham and bogus.

In *Sarva Shramik Sangh* v. *Indian Oil Corpn. Ltd.*,[15] the court, however, did not adopt the *SAIL*[16] approach because of the uniform stand taken by the union of workers in all their pleadings that the contract system adopted by the Indian oil corporation was sham or camouflage. After perusing the records, the court discerned that the reliefs sought were different in various proceedings initiated by the union. The court held when the parties are different, issues are different, the question of either *res judicata* or finality of proceedings, acquiescence or estoppel will not arise.

Misconducts, departmental enquiry and the principles of natural justice

The principles of natural justice are attracted whenever a person suffers a civil consequence or a prejudice is caused to him by an administrative

14 (2008) 14 SCC 589.
15 (2009) 11 SCC 609.
16 *Supra* note 14.

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action. These principles are also attracted where there is some right which is affected by any act of administration including a legitimate expectation.[17] Principles of natural justice now equated with fairness comprise of two fundamental rules of fair procedure: (a) that a man may not be a judge in his own cause (*nemo judex in causa sua*) and (b) the other side should be heard (*audi alteram partem*). It is fundamental to fair procedure that both sides should be heard and it is often considered that this principle is broad enough to include the rule against bias since fair hearing must be an unbiased hearing.

The Supreme Court in *Biecco Lawrie Ltd.* v. *State of W.B.*[18] reaffirmed various facets of the principles of natural justice. The court observed that denial of notice and opportunity to respond vitiates an administrative decision. A notice to be adequate must contain the following: (i) time, place and nature of hearing; (ii) legal authority under which the hearing is to be held; (iii) statement of specific charges which a person has to meet. Fair hearing also calls for a right to rebut any evidence that necessarily involves essentially two factors,[19] namely (a) cross-examination, and (b) legal representation, wherever permitted by the rules. The court again clarified its oft-repeated stand that denial of representation by a lawyer in a domestic enquiry as such is not *per se* violative of the principles of natural justice.

Instigation, insubordination and using filthy language: serious misconducts

In *Biecco Lawrie Ltd.*, the respondent, who was working as a general *mazdoor* in the switchgear works, was charge-sheeted on charges of major misconduct, namely instigation, insubordination and using of abusive and filthy language against his superiors in terms of the standing orders of the appellant company. The workman/respondent through a letter admitted all the charges and sought condonation and mercy attributing his acts to his mental illness which was not considered by the appellant company on the ground that he was on an earlier occasion also charged on similar grounds and given a chance to amend his conduct. The inquiry officer held that the respondent was guilty of major misconduct which became the basis for his dismissal from service by the management. Subsequent to this, he raised an industrial dispute.

The tribunal, holding that there was violation of the principles of natural justice, heard the matter afresh on merits. In the course of examination, one of the witnesses specifically mentioned the abusive language which was recorded in *vernacular* and this witness was also examined by him. The tribunal, on consideration of the inquiry report and evidence on record, affirmed the order of dismissal passed against the respondent and gave a

17 *Ashoka Smokeless Coal India (P) Ltd.* v. *Union of India* (2007) 2 SCC 640.
18 (2009) 10 SCC 32.
19 *State of J & K* v. *Bakshi Gulam Mohammad,* AIR 1967 SC 122.

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reasoned order. It specifically found the charges alleged against the respondent stood proved. While doing so, it also took into consideration prior conduct of the respondent.

The respondent approached the High Court which set aside the award holding that the charge of using abusive language was not specific but vague. It remitted the matter to the tribunal for reconsideration on the basis of the existing evidence only with respect to the charge of disobedience in not carrying out the orders of the superiors. The industrial tribunal, accordingly, heard the matter on the basis of the same evidence on record and held that the service of the respondent was illegally terminated by the appellant. It held that the dismissal order was not justified and the same was liable to be set aside. It also directed reinstatement of the respondent with full back wages.

The appellant challenged this order of the tribunal in the High Court which it dismissed without assigning any reason. It passed the orders on the basis of the findings of the tribunal. Feeling aggrieved, the appellant preferred an appeal before the division bench of the High Court which was also dismissed. The appellant filed a special leave petition before the Supreme Court.

The Supreme Court culled out pivotal questions for its consideration, namely (i) Whether the order of dismissal was passed in violation of principles of natural justice rendering the order of dismissal bad and unjustified; (ii) Whether the tribunal was justified in reversing its own decision subsequently when no further evidence had been adduced; and (iii) Whether the High Court was right in its appreciation of evidence in exercise of its powers in the matter of interfering with the order of dismissal. To answer these questions, the Supreme Court dealt with each issue raised by the workman in respect of violation of principles of natural justice, namely (i) vague allegations, (ii) departmental bias, (iii) violation of *audi alteram partem* rule, (iv) denial of legal representation, (v) failure to supply original documents, and (vi) punishment being disproportionate to the guilt. The court dealt with all these aspects of the principles of natural justice separately as follows:

(i) *Allegations must be specific*: The court stated that the allegations must of course be specific but found it difficult to agree with the workman that the charge-sheet did not contain the specific abusive language making it difficult for him to defend his case. The charges laid down were precise and specific and there were no patent or latent vagueness, nor were these unintelligible. Therefore, the entire plea taken by him could not be accepted.

(ii) *Departmental bias*: Merely because the officer conducting the enquiry belongs to or is a part of the management cannot be a sufficient ground to sustain the presumption of institutional bias. The court observed that departmental bias arises when the functions of the judge and the prosecutor are combined in the same

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department as it is not uncommon to find that the same department which initiates the matter and also decides it and, therefore, at times, departmental fraternity and loyalty militates against the concept of fair hearing.[20] But merely because the company lawyer was also the enquiry officer, it could not be said that he was 'biased and partisan' who favoured and was partial towards the management.[21]

(iii) *Audi alteram partem*: The golden rule is to hear the other side and hearing given must be fair and reasonable. This rule is often considered to be broad enough to include the rule against bias since a fair hearing must be an unbiased hearing. One of the essential features of fair hearing is that a person should be served with a proper notice, *i.e.* a person has a right to notice. Notice should be clear and precise so as to give the other party adequate information of the case he has to meet and make an effective defence. The charge-sheeted employee has a right to cross-examine the witnesses of the management and also right to produce witnesses in defence, of course with right to the management to cross-examine them.[22]

In the present case, the inquiry officer had sent due notice and postponed the date of hearing various times to permit the respondent to present his case. However, the respondent did not present himself except on three days and ultimately the inquiry officer held the inquiry *ex parte*. Therefore, this was not a case where the respondent was not afforded a chance to cross-examine the witnesses presented by the department. Rather, it seemed to be a case where the respondent had waived his right to cross-examine by absenting himself from the inquiry. He seems to have abstained for not being permitted legal representation and also for not furnishing him with the original documents or the list of evidence upon which the management was relying.

20 An illustrative case against the departmental bias is the decision of the court in *Hari Khemu Gawali* v. *Commissioner of Police,* AIR 1956 SC 559, where an externment order was challenged on the ground that since the police department which heard and decided the case was the same, the element of departmental bias vitiated the administrative action. The court rejected the challenge on the ground that so long as the two functions (initiation and decision) were discharged by two separate officers, though they were affiliated to the same department, there was no bias. The court held that mere presumption of bias cannot be sustained on the sole ground that the officer who conducted the inquiry was a part of the management.

21 For this view, the court placed reliance on *South Indian Cashew Factories Workers Union* v. *Kerala State Cashew Development Corporation Ltd.* (2006) 5 SCC 201.

22 In *S.C. Girotra* v. *UCO Bank* (1995) Suppl.(3) SCC 212, the bank obtained certain reports prepared on which the charges were based and these reports were by bank officers who were examined by the enquiry officer. On the basis of the report, an employee was dismissed. The court held that there was violation of the principles of natural justice as the employee was not allowed to cross-examine the officers who deposed orally before the inquiry officer.

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(iv) *Right to legal representation*: The court referred to its earlier decision in *N. Kalindi* v. *Tata Locomotive & Engg. Co. Ltd.*,[23] where it had held that a representation through a lawyer in an administrative proceeding was not considered as an indispensable part of natural justice as oral hearing was not included in the *minima* of fair hearing. To what extent it is allowed depends upon the provisions of the statute or the standing orders, if applicable.[24] Referring to *Harinarayan Srivastav* v. *United Commercial Bank*,[25] the court held that refusal of the inquiry officer to permit representation by an advocate even when the management was being represented by a law graduate will not be violative of the principles of natural justice if the charges were simple and not complicated.

In the present case, the respondent had based his case firmly on the fact that he was denied legal representation. The court observed that if the legal representation was not permissible under the rule, he could nonetheless have taken the help of a friend or of the registered trade union which could have very well taken up his matter. The High Court had decided the case in his favour on the fact that the management was represented by a person who was a commerce graduate and passed the diploma course of social welfare officer who even though was not a lawyer, yet was a legally trained person and thus there was violation of the principles of natural justice. The court held that this stand of the High Court was legally untenable as the workman could have sought permission from the tribunal or could have asked for help from the registered trade union. The charges against the workman were specific and simple and not difficult to comprehend and, therefore, there was no need for legal representation.

The court further held that the present case also fell in one of the exceptions to the principles of natural justice in view of his clear admission that he had committed the misconduct of using abusive language and indulged in insubordination but having attributed the same to his persisting mental disease. In the circumstances, even if it was assumed without admitting that there was denial of legal representation and/or that he did not know the specification of the charges leveled or that he was not supplied full details of documents, the observance of principles of natural justice would be a useless formality in view of his clear admission of guilt.[26]

23 AIR 1960 SC 914.

24 In *Crescent Dyes and Chemicals Pvt. Ltd.* v. *Ram Naresh Tripathi* (1993) 2 SCC 115, it was held that right to legal representation through a lawyer or agent of choice may be restricted by a standing order also and it would not tantamount to denial of natural justice.

25 (1997) 4 SCC 384.

26 The court here relied upon its earlier judgments in *S.L. Kapoor* v. *Jagmohan* (1980) 4 SCC 379 and *Karnataka SRTC* v. *S.G. Kotturappa* (2005) 3 SCC 409 in support of this legal position.

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(v) *Supply of original documents*: The court observed that it is a well-accepted principle that supply of adverse material need not be, unless the law otherwise provides, in its original form and it is sufficient if the summary of the contents of the material is supplied provided it is not misleading. Thus, what is essential is substantial fairness and this may in many situations be adequately addressed and achieved by telling the affected party the substance of the case that he has to meet, without discussing the precise evidence or the sources of information.

The court held that the respondent in the present case had been provided with various chances to present his case before the inquiry officer and also present his evidence to justify his defence. Further, the respondent could not claim that he was unaware of the broad charges framed against him and the witnesses against him.

(vi) *Failure to attend enquiry*: In the instant case, the respondent attended inquiry on one occasion and refused to attend on the next date on the ground of denial of legal representation. The court, relying on *Eastern Electric & Trading Co.* v. *Baldev Lal*,[27] held that the delinquent employee could not object to the *ex parte* inquiry and the inquiry could not be said to be vitiated. The inquiry was, thus, held to be valid.

(vii) *Punishment was not harsh*: The court held that the punishment was not harsh in comparison to the charges leveled against the respondent. Relying on *UP SRTC* v. *Subhash Chandra Sharma*,[28] the court held that abusive language is a serious misconduct and it was crystal clear that the trend of judicial decisions is to minimize the interference with the managerial prerogative. The punishment awarded to the workman for using abusive language and insubordination was absolutely shocking the conscience of the court.

The court observed that the single judge of the High Court misused the power vested in him by remanding the case to the industrial tribunal for reconsideration when the charges were found to be proved. The tribunal also had erred in reversing its own decision on the same evidence. There was no violation of natural justice and more so after fresh inquiry was conducted by the tribunal. The court also opined that even if the work assigned to the respondent was not a part of his job, it did not entitle the workman to abuse his superiors and create an unhealthy atmosphere where the other workers might just take a clue from the unruly behaviour and subsequently use it to the detriment of the company.

In view of the above, the court upheld the order of dismissal passed against the respondent by the management.

27 (1975) 4 SCC 684.
28 (2000) 3 SCC 324.

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Unauthorized absence: a serious misconduct

In *Regional Manager, Bank of Baroda* v. *Anita Nandrajog*,[29] the respondent/workman who was an accounts clerk in the appellant bank went to join her husband who was employed at Libya on two occasions in 1986 and 1987. She remained absent from duty for 260 days but the appellant bank condoned her acts of absence of leaving the country without permission. She again left for Libya in 1998 without permission and without any sanction of leave. She did not turn up to join her duties for more than 150 consecutive days. The appellant bank invoked the provisions of clause 17(b)[30] of the bipartite settlement between the bank and the employees union and issued notice to her to report for duty within 30 days, failing which it would be presumed that she had voluntarily retired from the service of the bank. She did not report for duty but instead sent two letters to the management that she would be resuming duty in the last week of August, 1989. Thereafter, she requested for extension of leave without pay upto April, 1990 on the ground of her domestic problems. Despite her letters, she did not resume duty in the last week of August, 1989 with the result that the bank sent a written communication to her treating her to have voluntarily terminated her employment. She was asked to approach the appropriate authority for claiming terminal benefits.

Aggrieved by the aforesaid action of the bank, she approached the central government assailing her termination as illegal which resulted in a reference being made. The tribunal held that her termination was illegal and unjustified which award of the tribunal was upheld by the High Court in the writ petition filed by the appellant bank. The bank filed special leave petition before the Supreme Court.

The Supreme Court observed that keeping in view the factual matrix of this case, the management had been extremely lenient to the respondent/ workman by condoning her absence on the two occasions. It seems that she thought she could do whatever she liked, remain absent whenever she liked and for whatever period she liked. Even when her request in 1988 for leave for 60 days was not acceded to by the management, she remained absent without leave and kept sending letters for extension of leave although she was on unauthorized absence. She did not have any leave to her credit and remained on unauthorized leave for a period of more than 150 days

29 (2009) 9 SCC 462.

30 Clause 17(b) provided thus:

When an employee goes abroad and absents himself/herself for a period of 150 days or more consecutive days without submitting any application for leave, or for its extension, without any leave to his/her credit or beyond the period of leave sanctioned originally/subsequently or when there is a satisfactory evidence that he/she has taken up employment outside India or when the management is reasonably satisfied that he/she has no intention of joining duties, the management may at any time thereafter give a notice to the employee at his last known address calling upon him/her to report for duty within 30 days of the date of notice, stating, inter alia the grounds for coming to the conclusion that the employee has no intention of joining duties and furnishing necessary evidence, where available.

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continuously with no intention of joining duty. The court observed that such behaviour on the part of an employee was clearly unfortunate and improper and the management was justified in drawing a presumption that she had no intention of resuming her duty. Relying on two of its earlier judgments in *Syndicate Bank* v. *Staff Assn.*[31] and *Punjab & Sind Bank* v. *Sakattar Singh*,[32] the court stressed the point that no establishment can function if it allows its employees to behave in such a manner. It upheld the action of the appellant bank terminating the service of the respondent as a voluntary cessation of her job, and set aside the award of the tribunal and also impugned order of the High Court upholding the said award.

It will be seen from the above that the Supreme Court has taken unauthorized absence very seriously and made some departure from its earlier approach in *D.K. Yadav* v. *JMA Industries Ltd.*,[33] where the court ruled that even where such a presumption was permissible to be drawn from the standing orders, principles of natural justice had to be read in such standing orders and right of hearing should precede issuance of the order treating absence of the employee as voluntary abandonment of service.

Negligence:

Subhash v. *Divisional Controller, Maharashtra SRTC*[34] is a well-balanced judgment as it shows the special concern of the court that benefits of long years of service should not be denied to the employees because of some aberration/s in long service career. The appellant was employed as driver in 1980 with the respondent corporation and made permanent in 1985. After nearly 20 years of service as driver, it was alleged that while driving the bus on the fateful day, it ramped on the railing of the bridge due to his rash and negligent driving resulting in damage to the bus. The transport officer held an inquiry into the accident and the disciplinary authority issued charge-sheet to the appellant, sought his reply and thereafter appointed an inquiry officer to inquire into the charges against him. The inquiry officer, after conclusion of the inquiry, held that charges were proved against the appellant and he was dismissed from service.

The appellant challenged the order of dismissal before the appellate authority. The first appellate authority set aside the order of dismissal and directed that he be appointed afresh without any monetary benefit for the past service. Consequent upon this order, he joined duty reserving his right to challenge the order of denying him reinstatement with continuity of service and back wages. He then filed a complaint under section 28 read with items 5 and 9 of the schedule IV of the Maharashtra Recognition of Trade Union and Prevention Act, 1971, before the industrial tribunal,

31 (2000) 5 SCC 65.
32 (2001) 1 SCC 214.
33 (1993) 3 SCC 259.
34 (2009) 9 SCC 344.

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Aurangabad. This was dismissed by the industrial tribunal, *inter alia*, holding that the order of the first appellate authority warranted no interference, so did the High Court in the writ petition. Thereupon, he filed a special leave petition before the Supreme Court.

The Supreme Court noted that there was negligence on the part of the appellant in driving the bus on that fateful day and as a result of that the bus ramped on the railing of the bridge resulting in damage to the bus. The appellant's misconduct to that extent was amply established and as a matter of fact there was no challenge to the said finding by the appellant. The court also took note of the fact from the impugned order that during his service tenure of 21 years, he had been punished twice. However, the appellate authority, after considering his past service record and the fact that in the accident none of the passengers was injured, held that it was appropriate to set aside the order of dismissal from service and order that fresh appointment be given to the appellant but without any benefit for the past service. The court after looking into all the relevant aspects thought it fit in the interest of doing complete justice that the order of the appellate authority be modified by ordering his reinstatement with continuity of service but without back wages. The court felt that in the interest of justice and fair play, denial of back wages for the entire period from the date of dismissal until his rejoining the duties would be an appropriate punishment. The appeal of the appellant was, accordingly, allowed in part to the extent stated above.

Reference in disciplinary matters: issues relating to reliefs

The awards of the labour courts and industrial tribunals reducing the penalty of removal or dismissal from service by lesser punishments in exercise of powers under section 11-A of the ID Act in disciplinary matters of the conductors of the state road transport corporations in not having issued tickets and/or having carried luggage without ticket again came up for scrutiny before Supreme Court.[35] An analysis of the said decisions only goes to show that the court has not deviated from its path of treating them as serious misconducts warranting no sympathy and by and large upholding the orders of the disciplinary authorities.

In *Divisional Manager, Rajasthan SRTC* v. *Kamruddin*,[36] the conductor during his probationary period of two years was found on not less than five occasions to have not issued tickets to passengers for which he was given warnings. He was again found guilty of not issuing tickets to two passengers and carrying large quantity of luggage without tickets for which he was proceeded against departmentally. He was thus found guilty of the misconducts and his services were terminated. The labour court on reference found that the inquiry on the basis of which his services were

35 *Divisional Manager, Rajasthan SRTC* v. *Kamruddin* (2009) 7 SCC 552; *Depot Manager, A.P. SRTC* v. *V.V. Rao* (2007) 15 SCC 675; *U.P. SRTC* v. *Nanhe Lal Kushwaha* (2009) 8 SCC 772.

36 (2009) 7 SCC 552.

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terminated was in order but held that the punishment was disproportionate to the gravity of his misconduct. It, accordingly, replaced the order of termination by lesser punishment of stoppage of two increments with cumulative effect and ordered his reinstatement with continuity in service but without back wages which award of the labour court was upheld by the High Court.

Dealing with the challenge to the said award by the corporation, the Supreme Court observed that the case at hand was not one where misconduct was not proved or that the inquiry was not fair. Relying on two of its earlier judgments,[37] the court observed that it is now settled legal position that if a conductor of a corporation whose main duty or function is to issue tickets, collect fare and deposit the same with the corporation was either dishonest or so grossly negligent in performing his duty, he was not fit to be retained as a conductor whose acts of omission and commission were bound to cause financial loss to the corporation. Such workman deserved to be shown the door and it would be misplaced sympathy to award him lesser punishment. The court restored the penalty of termination of service and set aside the award of the labour court. It observed that the power of the labour court or industrial tribunal in terms of section 11-A of the ID Act to interfere with the quantum of punishment, although cannot be denied, but it was also well settled principle of law that the said power has to be exercised judiciously.

In *Depot Manager, A.P. SRTC* v. *V.V. Rao*,[38] the labour court by its award substituted the order of dismissal by penalty of stoppage of increments with cumulative effect and the corporation was directed to reinstate the conductor who was charge-sheeted for issuing invalid tickets to eight passengers with continuity of service with full back wages. Though it agreed that the workman had discharged his duties in an irresponsible manner and had allowed eight passengers to travel in the bus without ticket, it did not treat the said acts as a serious misconduct to warrant punishment of dismissal. The management had in the inquiry examined the ticket examiner who supported the allegation that eight passengers were found without valid tickets and his statement was recorded. The tribunal, however, had taken serious objection to the fact that the passengers had not been examined in the inquiry. The Supreme Court took serious note of the misconduct and held that the labour court was not justified in holding that the punishment imposed on the workman was shockingly disproportionate. It, however, took note of the fact that since the workman had already been reinstated in service, it did not propose to reopen the matter. The court, however, held that the direction to pay full back wages was wholly unwarranted and modified the award to that extent.

37 *Karnataka SRTC* v. *B.S. Hullikatti* (2001) 2 SCC 574 and *Rajasthan SRTC* v. *Ghanshyam Sharma* (2002) 10 SCC 330.

38 (2007) 15 SCC 675.

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In *U.P. SRTC* v. *Nanhe Lal Kushwaha*,[39] the labour court held that on two occasions the misconduct of the conductor for carrying passengers without tickets stood proved but the punishment by way of termination was excessive. It directed reinstatement with continuity of service restricting the payment of back wages to 75 per cent. The High Court modified the award of the labour court to the extent that no back wages shall be payable to him but he may be given continuity of service for the purposes of retiral benefits. The Supreme Court after referring to its earlier judgment,[40] observed that the responsibility of the conductor being a fiduciary position, the misconduct was serious one and could not have been dealt leniently as was done by the labour court and the High Court. The court deprecated the practice adopted by the High Courts in disposing of the writ petitions without assigning any reasons. It observed that the courts should not ordinarily interfere with the discretion exercised by the employer in awarding punishment, the wide language of section 11-A of the Act notwithstanding. The court found fault with the award of the labour court as well as the order of the High Court in not assigning sufficient or cogent reason as to on what premise the punishment imposed upon the respondent by the employer was excessive. It found no basis on which the labour court had interfered with the punishment imposed by the employer. The court observed that it was not the amount of loss to the corporation which would be very material for the purposes of determining the quantum of punishment. It held that the award of the labour court and also the judgment of the High Court could not be sustained.

The very approach of the Supreme Court in *P.V.K. Distillery Ltd.* v. *Mahendra Ram*[41] in circumscribing the powers of the industrial adjudicators in disciplinary matters under section 11-A is erroneous. The court moves on the basic premise that section 11-A of the Act gives powers to the labour courts to give appropriate relief in the case of discharge or dismissal of a workman in exceptional circumstances.[42] The fact of the matter is that section 11-A brought revolutionary change in the powers of the labour courts. The court has itself referred to its earlier judgment in *Hindustan Motors Ltd.* v. *Tapan Kumar Bhattacharya*[43] to bring home the point that section 11-A is couched in wide and comprehensive terms and vests wide discretion in the tribunals in the matter of awarding proper punishment and also in the matter of the terms and conditions on which reinstatement of the workman should be ordered. It necessarily follows that the tribunal is duty bound to consider whether in the circumstances of the case, back wages have to be awarded and, if so, to what extent. Therefore,

39 (2009) 8 SCC 772.
40 *U.P. SRTC* v. *Hoti Lal (*2003) 3 SCC 605.
41 (2009) 5 SCC 705.
42 This judgment is in conflict with a later judgment of the court in *Harjinder Singh* v. *Punjab State Warehousing Corporation (*2010) 3 SCC 192.
43 (2002) 6 SCC 41.

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to say that it is only in exceptional cases that they can give relief is far from the truth. It is unfortunate that it is the mindset of the judges of the superior courts that has led to this state of confusion inspite of express language of the statute conferring wide powers to labour courts and tribunals in the matter of their satisfaction in respect of proof of the misconduct and grant of final relief to the workman in disciplinary matters leading to discharge or dismissal.

In *Management of Aurofood Pvt. Ltd.* v. *S. Rajulu*,[44] the court was dealing with a case of a dismissal of an employee under standing orders of the company for having used abusive language against his superiors. The labour court had passed an award holding that the disciplinary action initiated against the workman was not an act of victimization, that charges against him stood proved and the findings of the inquiry officer were justified. The High Court, on the other hand, observed that the misconduct even if held to be proved was trivial in nature and the punishment of dismissal shocked its conscience. It noted that the punishing authority had without notice to the workman taken his antecedents into account in ordering his dismissal which was not permissible in law. It directed his reinstatement with full back wages which order of the single judge was upheld by the division bench. The Supreme Court after hearing the parties and perusing the record noted that division bench of the High Court had held that the workman was not given the requisite material that was required by him to prepare his defence, more particularly when his antecedents had been taken into account depicting him as incorrigible. Further, he had not been given any opportunity to rebut these charges. The High Court had also found that the allegations against him even if taken to be true were trivial and could not justify an order or dismissal from service. The court refused to interfere with these issues of fact arrived at by the High Court holding that no interference was warranted. During the course of hearing, at the initiative of the court, suggestion was made to the counsel of the management about payment of compensation to the workman in view of the fact that he was out of the job for 20 years and the Supreme Court had stayed his reinstatement in service in terms of the order of the High Court. The counsel for the management offered a compensation package of Rs.5.00 lakhs which was not accepted by the workman who preferred implementation of the judgment of the High Court in letter and spirit. The court was of the opinion that consequent upon the bitter relations between the parties it would be inappropriate to foist cantankerous and abrasive employee on the management. It dismissed the appeal of the management but directed that instead of reinstatement the respondent would be entitled to the payment of Rs.10.00 lakhs compensation as full and final settlement with respect to his entire claim.

44 (2008) 14 SCC 608.

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Relevance of gainful employment in the final relief in dismissal matters: burden of proof

In *Managing Director, Balasaheb Desai Sahakari S.K. Ltd.* v. *Kashinath Ganapati Kambale*,[45] the Supreme Court observed that it is now well settled by a catena of decisions[46] of the court that having regard to the principles contained in section 106 of the Evidence Act, 1872, the burden of proof to show that the workman was not gainfully employed during the period of termination of his service is not on the employer. The court was dealing with a case of dismissal of a workman on the ground of various misconducts which became subject matter of reference to a labour court under the Bombay Industrial Relations Act, 1946. Before the labour court, it was attempted to be proved by the company that the workman was running a footwear shop because of which he neglected his duty. The labour court placed no reliance on the said evidence holding that the management had not produced any licence or record to show that he was running the said shop. The labour court while holding him guilty of misconduct passed an award of reinstatement with continuity of service with 50 per cent of back wages on the premise that the punishment of termination from service was disproportionate to the charges of misconduct leveled against him. The appeal preferred by the appellant company was dismissed by the industrial court. A writ petition filed by the appellant was also dismissed by the single judge of the Bombay High Court.

The Supreme Court, while disposing of the special leave petition of the management, observed that some material had been brought on record to show that the respondent was gainfully employed which evidence was not considered in its proper perspective by the labour court and the industrial tribunal. The court observed that it may be correct that a person cannot afford to remain unemployed for a long time but for arriving at a conclusion whether the respondent was gainfully employed or not, large number of factors were required to be considered. The court also observed that the labour court ordinarily should not interfere with the discretion exercised by the employer unless the same is found to be inconsistent with the provisions of a statute or otherwise perverse or unjust. In the present case, the court noted that apart from remaining unauthosizedly absent without leave, the respondent had been charged with indiscipline at the workplace for which he was found guilty. Therefore, forfeiture of 50 per cent back wages was not an adequate punishment. In the case of this nature, he should have been awarded some punishment in lieu of order of dismissal and, furthermore, the question as to whether he was entitled to back wages or not should have been considered on the basis of materials brought on record by the parties. The court was of the opinion that no back wages should have been awarded to

45 (2009) 2 SCC 288.

46 *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey* (2006) 1 SCC 479; *Kendriya Vidyalaya Sangathan* v. *S.C. Sharma* (2005) 2 SCC 363 and *Allahabad Jal Sansthan* v. *Daya Shankar Rai* (2005) 5 SCC 124.

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him. When it was informed that a sum of Rs. 60,000/- towards back wages had already been paid to him, it directed that any amount paid to him shall not be recovered.

Retrenchment

Relief in cases of violation of retrenchment compensation

In *P.V.K. Distillery Ltd.* v. *Mahendra Ram*,[47] the order of reinstatement, continuity of service and payment of full back wages ordered in favour of the workman by the labour court for violation of law relating to retrenchment which order was upheld by the High Court was impugned before the Supreme Court. The court observed that the High Court was under an obligation to give reasons in the judgment before affirming or denouncing a judgment of an inferior tribunal. Keeping in view the facts and circumstances of the case, it modified the award restricting the relief in respect of back wages to 50 per cent in place of full wages as ordered by the labour court and upheld by the High Court.

In *Malwa Vanaspati and Chemical Co. Ltd.* v. *Rajendra*,[48] the worker's allegation was that his services had been terminated by an oral order in violation of law relating to retrenchment compensation and that he was being prevented from attending to his work. The dispute culminated into a reference. The labour court directed the management to allow the workman to rejoin his duty pending adjudication. By a final award, it directed the appellant management to continue him on duty and pay him back wages. This award was upheld by the High Court. In special leave to appeal, the Supreme Court held that since the respondent had already been taken into service, ends of justice would be served if back wages are restricted to 50 per cent only, given the facts and circumstances of the case. It, accordingly, modified the award and the order of the High Court was partly set aside.

In *State of Orissa* v. *Bilash Chandra Ojha*,[49] the management had raised various issues before the labour court to which the dispute of non-employment of a workman was referred. The management had taken the plea that it was a case of voluntary abandonment of service and that the agricultural department was not an 'industry' and also that he had not put in 240 days of service to be entitled to the benefit of section 25-F of the ID Act. The labour court held that the workman had worked for more than 240

47 (2009) 5 SCC 705. It is important to state here that in the *interregnum*, the appellant's factory remained closed for a number of years and ultimately it was declared as a sick unit. The management of the company was substituted with the new management for its rehabilitation/ reconstruction. The appellant then moved to the High Court challenging the validity and legality of the award by which the workman had been reinstated with all consequential benefits. The High Court held that there was no reason to doubt the findings given by the labour court and declined to interfere with the award passed by the labour court.

48 (2009) 12 SCC 490.

49 (2009) 12 SCC 264.

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days preceding the date of termination of his service and for non-compliance of section 25-F it ordered reinstatement of the workman but without back wages. The writ petition of the state was dismissed by the High Court. Before the Supreme Court, it was argued that the labour court as well as the High Court had not considered the relevant aspects, namely (i) whether the agricultural department was an 'industry' and (ii) whether there was any scope for the worker being regularized, when the labour court found that the respondent was admitted on casual basis. Further, whether there was termination by the management or there was abandonment of service by the worker was also a question which was not considered by the labour court and the High Court. The court held that these were matters which should have been considered by the tribunal and the High Court since these would have direct relevance to the final decision in the matter. It, therefore, remitted the case to the High Court to consider these aspects afresh.

In *District Programme Coordinator, Mahila Samkhya* v. *Abdul Kareem*,[50] the workman was employed as a driver in the appellant society which was engaged in various activities like encouraging, assisting, promoting group action by women as a means of their empowerment and equal participation in the process to bring about social change and to empower the women. His services were engaged on fixed tenure basis. However, before the expiry of the tenure period, his services were terminated by giving him one month's wages in lieu of notice under the agreed terms of the offer of appointment. It also transpired that there was some oral enquiry against some of his acts of omission and commission. He raised an industrial dispute relating to his non-employment alleging violation of section 25-F and, in the alternate, alleging that the termination was a camouflage. The labour court on reference held that as no disciplinary enquiry was conducted before the termination order was passed, it was illegal and awarded reinstatement with full back wages which award was upheld by the High Court but it reduced the back wages to 30 per cent. The Supreme Court held that the finding arrived at by the labour court as also the High Court being concurrent, it did not call for interference on the question of wrong termination. However, it held that the relief of reinstatement with 30 per cent of back wages was not the appropriate relief especially as the work was only a project run by the society which had come to an end in 1999. It, accordingly, directed the management to pay a sum of Rs. 56,000 to the workman by way of compensation within eight weeks from the date of communication to meet the ends of justice. It further directed that should the management fail to comply with its order within the stipulated period, the compensation amount shall bear interest @ 12 per cent per *annum*.

50 (2008) 17 SCC 61 : AIR 2009 SC 512.

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Retrenchment compensation law violations in case of daily wagers: Compensation as appropriate relief

In *Jagbir Singh* v. *Haryana State Agriculture Mktg. Board*,[51] the workman had put in one year of service as a daily wager on a consolidated salary. Thereafter, his services came to an end. He raised a dispute relating to non-employment alleging non-compliance with retrenchment law. The labour court held the termination illegal and awarded reinstatement with continuity of service and full back wages. The award was challenged before the Punjab & Haryana High Court which held that even if the workman had completed 240 days of service in a calendar year, he was neither entitled to be reinstated nor could be granted back wages. This order was challenged before the Supreme Court. The Supreme Court held that it was true that the court in a catena of decision had held that the award of reinstatement with full back wages would follow where the workman had completed 240 days of work in a year preceding the date of termination. Particularly so in case of daily wagers, the court observed that a distinction has to be made in the grant of relief between a daily wager who does not hold a post and a permanent employee. The court held that if the labour court had erred in granting relief of reinstatement with all consequential relief to the workman, the High Court too had erred in not giving any relief to the workman when he ought to have been awarded compensation as relief after the award of labour court granting reinstatement and full back wages was upset by the High Court. The court held that while awarding compensation, a host of factors, *inter alia*, manner and method of appointment, nature of employment and length of service are relevant. Of course, each case will depend upon its own facts and circumstances. The court granted compensation of Rs. 50, 000/- to the workman in view of the fact that he had put in just one year of service as daily wager.[52]

In *Haryana State Coop. Supply Mktg. Federation Ltd.* v. *Sanjay*,[53] the Supreme Court was called upon to deal with the question of correctness of the award passed by the industrial tribunal, Hissar as upheld by the Punjab & Haryana High Court ordering reinstatement of the workman with continuity of service and payment of 50 per cent back wages holding that district manager, HAFED, Jind and district manager, HAFED, Hissar were an industrial establishment within the meaning of section 25-F read with section 25-B and non-compliance by the latter with section 25-F rendered termination illegal as entire service had to be counted for the purposes of determining 240 days of continuous service. The facts and circumstances of the case were: The employee was initially engaged as chowkidar by the district manager, HAFED, Jind in August, 1998 for 29 days. On expiry of the said contract, fresh contracts were executed and he rendered service

51 (2009) 15 SCC 327 : AIR 2009 SC 3004.
52 See also *Krishna Bhagya Jala Nigam Ltd.* v. *Mohd. Rafi* (2009) 11 SCC 522.
53 (2009) 14 SCC 43.

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there until 31.12.1998. Thereafter, he was engaged afresh by the district manager, HAFED, Hissar on 15.01.1999 where he worked up to 31.05.1999. His services were not renewed. He issued a demand notice under section 2-A of the ID Act alleging that his non-employment was in violation of section 25-F of the Act and his entire service needed to be counted in computing 240 days of continuous service. The case of the management before the industrial tribunal was that the workman worked at two different units of HAFED and the period of service rendered at these two places could not be clubbed for the purposes of section 25-F of the Act. The industrial tribunal, Hissar accepted the claim of the workman and awarded reinstatement with 50 per cent back wages which award was upheld by the Punjab & Haryana High Court. Against this order, an appeal was filed before the Supreme Court. A question arose whether the work rendered by the workman in the offices of the district manager, HAFED, Jind and the district manager, HAFED, Hissar could be clubbed together for the purposes of application of section 25-F of the ID Act. The court observed:[53a]

> A workman is deemed to be in continuous service for a period of one year if during the period of 12 calendar months preceding the date of termination, he has actually worked under the employer for not less than 240 days by virtue of section 25-B(2) of the ID Act. The words 'has been in continuous service… under an employer" in Section 25-F are crucial.

It held that the office of the district manager, HAFED, Jind and the office of the district manager, HAFED, Hissar "are two separate and distinct establishments and cannot be treated as one for the purposes of reckoning continuity of service within the meaning of section 25-F read with section 25-B of the Act." The court, therefore, held that Section 25F was not attracted because the said workman had not completed 240 days of continuous services under the employer in the year preceding his termination. The court, accordingly, set aside the judgment of the High Court and the award passed by the industrial tribunal, Hissar.

Awards and settlements

In *Radhakrishna Mani Tripathi* v. *L.H. Patel*,[54] the appellant raised an industrial dispute concerning his non-employment by the management which became the subject matter of reference to the labour court. The labour court gave an *ex parte* award in favour of the workman directing his reinstatement with full back wages and continuity of service. The award was made pursuant to taking evidence (*ex parte*) led on behalf of the workman. The award was

53a *Id.* at 45.

54 (2009) 2 SCC 81; also see *Kendriya Vidyalaya Sangathan* v. *R.V. Palde* (2008) 17 SCC 683. The court relying on its earlier judgment in *Anil Sood* v. *Labour Court-II* (2001) 10 SCC 534, held that the labour court does not become *functus officio* after making of the award and that an award without notice would be a nullity.

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published subsequently. Thereafter, the management filed an application before the labour court making a prayer for recall of the order on the ground that no notice was served upon it and it was not aware of the proceedings before the labour court. The management contended that it came to know about the matter only on receiving a copy of the award sent to it by the court. It further submitted that without any loss of time, it filed application for recall of the award. On the recall application, the tribunal found that the workman had obtained the *ex parte* order by knowingly suppressing the correct address of the management and, as a result, the notice issued by the labour court was never served on the management. The labour court recalled its earlier order and fixed the matter for fresh hearing. The appellant challenged this order before the High Court by way of a writ petition. The High Court dismissed the writ petition and confirmed the award passed by the labour court. Thereupon an appeal was filed before the Supreme Court. It was argued before the Supreme Court that an application for recall could be made within 30 days from the publication of the award. Thereafter, it would not be open to the labour court to entertain it, as the matter would have gone completely beyond its authority. In support of this stand, reliance was placed on *Grindlays Bank Ltd.* v. *Central Government Industrial Tribunal*.[55]

The court found that it could not accept the aforesaid contention of the workman in view of the position of law made clear by the court in the later decision in *Anil Sood* v. *Labour Court-II*.[56] The court after referring to the provisions of sub-sections (1) and (3) of section 11 of the Act held that the party against whom award is to be made must get due opportunity to defend which is a matter of procedure and not that of power in the sense in which language is adopted in section 11 of the ID Act. When matters are referred to the tribunal or court, they have to be decided objectively and the tribunals/courts have to exercise their discretion in a judicial manner without arbitrariness by following the general principles of law and rules of natural justice. The court dealing with the powers of the labour court under section 11 read with the Industrial Disputes (Central) Rules, had observed in *Anil Sood* thus:[56a]

> 7. The power to proceed ex parte is available under Rule 22 of the Central Rules which also includes the power to inquire whether or not there was sufficient cause for the absence of a party at the hearing, and if there is sufficient cause shown which prevented a party from appearing, then if the party is visited with an award without a notice which is a nullity and, therefore, the Tribunal will

55 (1980) Supp. SCC 420.

56 (2001) 10 SCC 534. In *Anil Sood*, the award was made on 11.09.1995 and the application for its recall was filed on 06.11.1995 which was rejected by the tribunal on the ground that it had become *functus officio*.

56a *Id.* at 536.

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have no jurisdiction to proceed and consequently, it must necessarily have power to set aside the ex parte award.

8. If this be the position in law, both the High Court and the Tribunal (sic Labour Court) fell into an error in stating that the Labour Court had become *functus officio* after making the award though ex parte….

In view of the aforesaid legal position, the court found no substance in the workman's submission based on section 17A and affirmed the order of the labour court setting aside the *ex parte* order.

In *SAIL* v. *Madhusudan Das*,[57] the Supreme Court observed that a memorandum of settlement entered into by, and between, the management and employees is binding under section 18(3) of the ID Act both on the employer and the workmen. In the event any party thereto commits a breach of any of the provisions of such a settlement, ordinarily an industrial dispute is to be raised. However, where a settlement relates to the public body and its workers and the settlement provides for appointment on compassionate ground, the courts cannot sustain the claim of the workman on such a provision in the settlement when it is well established legal position that the appointment on compassionate ground cannot be claimed as a matter of right. It must be provided for in the rules. The criteria laid therefore was that the death of the sole bread earner of the family must be established. It is meant to provide for a minimum relief. When such a contention is raised, the constitutional philosophy of equality behind making such a scheme is to be taken into consideration. Articles 14 and 16 of the Constitution mandate that all eligible candidates should be considered for appointment in the post which has fallen vacant. Appointment on compassionate ground offered to a dependent of a deceased employee is an exception to the said rule. It is a concession, not a right. In this case, the respondent's father was appellant's employee. The father was on shift duty who was asked to continue in the morning duty also which he voluntarily accepted. While on duty, he suddenly collapsed and was declared dead on the spot.

In a tripartite settlement arrived at before conciliation officer between the management and the workers' union, one of the clauses provided that employment to one of the direct dependents of an employee would be provided, 'in case of death due to accident arising out of and in the course of employment'. Similarly, there was another provision in the settlement which provided that 'in case of death or permanent total disablement due to accident arising out of and in course of employment, employment to one of the (employee's) direct dependent will be provided.'

The Supreme Court stated that the main issue was whether death of the respondent's father was due to an accident or it was a natural death. The court found that there was no material before it to suggest that death was

57 (2008) 15 SCC 560 : AIR 2009 SC 1153.

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accidental. On the question of plea of appointment of a dependent of a deceased employee on compassionate ground, the court observed that it was a matter involving policy decision. Appointment on compassionate ground cannot be claimed without there being specific pleadings to this effect. Further, reliance on the terms of the settlement requires proof that death had occurred in an accident. There being no finding of fact that death of the deceased took place due to an accident, the conditions for grant of compassionate appointment were not met and, therefore, the appellant was not bound to provide compassionate appointment to the respondent.

Pendency proceedings and reliefs

In *Gujarat Agricultural University* v. *All Gujarat Kamdar Karmachari Union*,[58] the Supreme Court by a well reasoned judgment upheld the award of the industrial tribunal with modification in respect of the final relief granted by the tribunal. The issues raised in this case were of far-reaching consequence covering the gamut of binding nature of settlement, pendency proceedings and change in the conditions of service prejudicial to the workmen in violation of sections 9-A and 33 of the ID Act during the pendency proceedings. The factual matrix and the important issues that arose for consideration of the Supreme Court were as follows: The appellant, the Gujarat agricultural university, fully aided by the state of Gujarat and engaged in the educational activities, particularly relating to agriculture, allied sciences and humanities with various agricultural research stations at different places in Gujarat, engaged daily rated workers for various activities relating to agricultural research farms, fisheries, dairies and veterinary and other allied sciences. Sometime earlier, it entered into a settlement during the pendency of conciliation proceedings with the respondent union through its representatives. According to the terms of the said settlement, the daily wagers were entitled to permanency on completion of 240 days of work for the last three years prior to a particular date and were entitled to work for six days in a week with one off day. The settlement was to be operational for a period of three years from the date of its signing. The workers' union gave a notice of termination of settlement under section 19(2) of the ID Act one month before the due date of expiry of the three year period so as to synchronize it with the expiry of the statutorily binding period of the settlement. However, no fresh settlement was entered into between the employer and the workmen with the result that the settlement continued to be in operation in the absence of any fresh settlement or any award replacing the said settlement under section 19(6) of the ID Act.

With regard to the daily rated workers working in a particular zone, it appears that a dispute arose about regularization of their service resulting in a reference at the instance of the workers' union. During the pendency of this reference, the government of Gujarat issued a notification by which second and fourth Saturdays were declared holidays. The employer, *i.e.* the

58 (2009) 15 SCC 335.

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university issued a circular on the basis of the said notification declaring second and fourth Saturdays of every month as holidays and 11 days *Diwali* holidays. Accordingly, the daily rated workers were not provided any work during these holidays. These workers felt aggrieved by the change in their service conditions during the pendency of the reference without following the prescribed procedure under section 33 of the ID Act and, accordingly, filed separate complaints under section 33-A complaining breach of the said provision. These workers prayed for a declaration that the action of the employer enforcing leave on second and fourth Saturdays and 11 days during *Diwali* without pay was illegal. They prayed that they be paid wages for those days. The university took the stand that demands made by the workers had no nexus with the pending reference and, therefore, there was no breach of section 33 of the Act. Further, being a fully-aided government institution, it followed the rules of the state government and accordingly declared holidays as per governmental instructions. It asserted that there was neither breach of section 33 of the ID Act as alleged by the workers nor was any change made in the service conditions of the workers concerned attracting section 9-A of the Act.

The tribunal held that there was violation of sections 33 and 9-A of the ID Act as the settlement was in operation and continued to be in operation inspite of notice given by the workers' union. The workers were entitled to wages during the forced holidays and further that the university shall not grant leave without pay for more than one day in a week in terms of the settlement. It also awarded costs in favour of the workers. This award was challenged before the High Court where both the single judge and the division bench upheld the award. In appeal preferred by the university, it raised the following contentions before the Supreme Court:

i) That the workers were daily wagers who did not hold any post and, therefore, there was no condition of service for such workers and the question of change of their conditions of service did not arise.
ii) Even if the settlement covered their conditions of service, it had come to end on the expiry of three years, more so because the notice of termination of settlement was given by the workers themselves. Therefore, the circular of the university providing for holidays could not be made subject to the said settlement.
iii) The complaints filed by the workers were not maintainable as there was no breach of section 33 inasmuch as the alterations in the alleged conditions of service was not related to nor had any connection with the industrial dispute pending adjudication before the industrial tribunal.
iv) In any case no wages should be paid to the workmen for the days they did not work on the basis of the decision of the court in *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey*.[59]

59 (2006) 1 SCC 479.

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The Supreme Court dealt with these four contentions mainly under three heads:

a) The settlement which continued in force unless replaced by fresh settlement or award itself defined conditions of service of daily rated workers even though they held no post. The court observed that it was true that daily wagers were not the holders of a post but the expression 'conditions of service' occurring in section 33(1)(a) of the ID Act was not restricted to the holders of post but had wide import and related to workmen who may be temporary, *ad hoc*, daily rated, permanent, semi-permanent or otherwise. Coming to the present case, the court observed that the settlement provided that those workmen who worked for 240 days in each year continuously for the last three years prior to 01.07.1980 and those who had worked for 240 days continuously for a period of three years after July, 1980 shall be treated as permanent. It further provided that instead of taking work for nine hours in a day for five days in a week, the work to be taken from them should be for eight hours in a day for six days in a week. The settlement further provided for one weekly off. These terms in the settlement were nothing but conditions of service of the concerned workmen. Further, in terms of section 19(2) read with section 19(6) and the judgment of the court in *LIC* v. *D.J. Bahadur*[60] if notice of termination of settlement is given, the award or settlement would still survive and would be in force between the parties until a new award or negotiated settlement took its place. In the instant case, as there was no new contract or award which replaced the previous one, the parties continued to be bound by it and there certainly was a dispute pending in which workers had sought regularization and claims on par with the regular employees and higher wages.

b) Pendency of a dispute relating to demand for regularization and working conditions including wages of permanent employees by daily rated wagers and reduction of wages because of forced employment had direct nexus and, therefore, amounted to change of conditions and gave rise to a cause of action under section 33-A for non-compliance with section 33. What section 33 of the Act provides, *inter alia*, is that during the pendency of any proceedings before the labour court or industrial tribunal in respect of an industrial dispute, the employer shall not in regard to the matter *connected* with the dispute, change conditions of service prejudicially to such workmen.

60 (1981) 1 SCC 315.

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The claim of the daily rated workers for regularization was based upon their having put in 240 or more days service in the last preceding three years which was a condition precedent to their demand for permanency. Therefore, pending adjudication of such dispute and demand, increase in the number of unpaid holidays and resultant reduction of the working days would necessarily be a matter connected with the dispute. The forced unpaid holidays would not only result in recording lesser number of working days to their credit but would also have the effect of reducing the total wages to which the they would be actually entitled to. The demand and dispute for regularization in service based on continued employment under the employer arises to prevent sudden discontinuation and to claim benefits at par with regular employees so as to achieve stability and equitable standard of life. While struggling to achieve this goal, if the daily rated workers were thrust with forced unemployment in the name of additional holidays, it could not be said that the change in conditions of service was not connected with the dispute. The court, therefore, had no hesitation in upholding the findings of the labour court as upheld by the High Court that the action of the management had the effect of affecting the service conditions of the daily wages as it had direct nexus with the pending dispute of regularization before the industrial tribunal.

(c) The last question was whether the industrial tribunal was justified in directing the employer to pay wages to the complainants in excess of weekly off days by marking their presence on those days and also for *Diwali* holidays. The court referred to the doctrine of 'no work no pay' on the one hand and also the equally important principle in service jurisprudence that if any employer had wrongly denied an employee his due then he should be given full monetary benefits. The court observed that none of these principles is absolute nor can these be applied as a rule of thumb. The court also referred to the principle evolved of late that a person is not entitled to get something only because it would be lawful to do so. It then referred to the principle enunciated in *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey*[61] that in view of prevailing market economy, globalization, privatization and outsourcing, the courts, while granting relief, cannot order payment of full back wages as the natural consequence. It then referred to various earlier decisions where in the matter of termination of workman in violation of section 25-F of the ID Act, the court had consistently taken the view that the relief by way of reinstatement and back wages is not automatic.[62]

61 (2006) 1 SCC 479.

62 The court also referred to its recent decision in *Jagbir Singh* v. *Haryana State Agriculture Mktg. Board* (2009) 15 SCC 327 that the award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly daily wagers is not been proper and instead compensation ought to be awarded. The court observed that a daily wager who does not hold a post has to be distinguished from a permanent employee.

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The court observed that although the law laid down in the above case is in the context of illegal retrenchment of the workman in violation of section 25-F of the Act, here also where no work was taken from the daily rated workers on second and fourth Saturdays and eleven days during Diwali festival, the payment of full wages for the aforesaid period should not follow as a matter of course. It observed that it was true that these daily rated workers could not work on those days because of the wrongful act of the employer but at the same time it could not be overlooked that the change in the working days was brought about by the employer because the government of Gujarat had declared second and fourth Saturdays as holidays and also festival holidays for its employees. The court held that the action of the employer insofar as daily rated workers governed by the settlement were concerned was wrong as it did not follow the prescribed procedure before bringing out the change, nevertheless the said action could not be said to be actuated by ulterior motive.

The court felt that a just balance needed to be struck and the principle of 'no work no pay' did not deserve to be given a complete go-by. The interest of justice would be sub-served if the employer was directed to pay 50 per cent of the wages to the workers in lieu of additional holidays granted to them in excess of one day weekly off and 11 days Diwali holidays. The court accordingly allowed the appeal to the extent mentioned above and directed the appellant to calculate the amount and pay the same to the complainants within six weeks from the date of the judgment failing which the unpaid amount would carry an interest @ 8 per cent from the date it became due until the date of payment.

In *Metropolitan Transport Corpn.* v. *V. Venkatesan*,[63] the services of the respondent/employee who was working in the legal department, were terminated on the basis of a departmental enquiry which order of termination was set aside by the industrial tribunal in proceedings under section 33(2)(b) of the ID Act. The industrial tribunal *vide* its order dated 11.07.2003 held that the order of removal was void and inoperative as the corporation had not sought approval. It also declared that the complainant was deemed to have continued in service and he was entitled to all benefits. During the pendency of the dispute before the tribunal, the respondent/employee got himself registered as an advocate with the state bar council on 12.12.2000.

The corporation challenged the order of the tribunal in the High Court which by an *interim* order stayed the operation of the award subject to the corporation depositing the entire back wages as awarded by the industrial tribunal and compliance with the provisions of section 17-B of the ID Act. The corporation, instead of paying the last drawn wages to the workman, reinstated him on 15.06.2004 without prejudice to the pending writ petition which was dismissed by the High Court sometime in 2006 and thus the

63 (2009) 9 SCC 601.

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award was upheld. Since the back wages for the period from 12.12.1986 to 15.06.2004 were not paid to the workman in terms of the award, the respondent approached the labour court concerned under section 33-C(2) of the ID Act which was allowed. This order of the labour court was challenged before the Madras High Court by the management, the principal ground being that having been enrolled as an advocate on 12.12.2000, the respondent was gainfully employed and not entitled to back wages. The workman also filed a writ petition seeking enforcement of the said order. While the corporation's writ petition was dismissed, the High Court directed the labour department on the writ petition of the respondent to take necessary steps in recovering the due sum from the corporation. This order of the single judge was challenged in appeal before division bench of the High Court which was dismissed. On appeal, the Supreme Court held that notwithstanding its earlier judgments[64] that payment of full back wages should not be held to follow an order of reinstatement, the misconception still persists that whenever reinstatement is directed, 'continuity of service' and 'consequential benefits' should follow, as a matter of course. The court observed:

> The "disastrous effect of granting several promotions as a 'consequential benefit' to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualized while granting consequential benefits automatically." Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether 'continuity of service' and/or 'consequential benefits' should also be directed.

Even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded full or only partially (and if so, the percentage). Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors.[65] Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated

64 *A.P. SRTC* v. *S. Narsagoud* (2003) 2 SCC 212; *A.P. SRTC* v. *Abdul Kareem* (2005) 6 SCC 36; *Rajasthan SRTC* v. *Shyam Bihari Lal Gupta* (2005) 7 SCC 406.

65 See *U.P. State Brassware Corpn. Ltd.* v. *Uday Narain Pandey* (2006) 1 SCC 479 and *Haryana Roadways* v. *Rudhan Singh* (2005) 5 SCC 591.

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employee to search for or secure alternative employment. The court noticed that in the seventies and eighties, the directions for reinstatement and the payment of full back wages on dismissal order having been found invalid would ordinarily follow as a matter of course. But there is a change in the legal approach now.

The court then referred to a long line of cases where it has consistently taken the view that the relief of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even when the termination of an employee was held to be in contravention of the prescribed procedure. The court also observed that in view of the fact that the respondent was enrolled as an advocate on 12.12.2000 and continued to be so until the date of his reinstatement, he could not be held to be entitled to full back wages. It added that income received by him while pursuing legal profession had to be treated as income from gainful employment. Taking the overall facts and circumstances of the case including the fact that he was enrolled as an advocate for approximately four years, the court held that demand of justice would be met if the respondent was awarded back wages of Rs. 4.00 lakhs instead of Rs.6,54,766/- as awarded by the labour court.

Unfair labour practices and civil reliefs: need to imbibe Maharashtra model

The Supreme Court in *Maharashtra SRTC* v. *Casteribe Rajya Parivahan Karmachari Sanghatana*[66] ruled that the powers granted to the industrial and labour courts under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (the Maharashtra Act, 1971) are wide and cannot be circumscribed by the *ratio* in *Uma Devi(3)*. Further, the court held that the certified standing orders are contractual terms and cannot override the statutory provisions of the Maharashtra Act, 1971.

The Maharashtra Act, 1971 fills the gap that exists in the industrial relations law at the central level insofar as the establishments covered by the ID Act in Maharashtra state are concerned. Since at the central level, there is no statutory law on recognition of trade unions and statutory civil remedies against unfair labour practices are conspicuous by their absence, the Maharashtra Act, 1971 fills in these gaps in the ID Act, wherever it is applicable in the state of Maharashtra. The need for similar provisions in the central law has long been overdue but Parliament has had no time to provide such measures as industrial relations and rights of labour have been relegated to last priority of the successive central governments. In the state of Maharashtra, one finds that the Bombay Industrial Relations Act, 1948 applies to some of the industrial establishments and in some others, it is the ID Act which is applicable.

66 (2009) 8 SCC 556. The court reaffirmed the decision in *North-East Karnataka RTC* v. *M. Nagangouda*that 'gainful employment' would also include self-employment.

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The present case arose in relation to an industrial establishment to which both the ID Act and the Maharashtra Act were applicable. The questions that came up before the Supreme Court have been neatly stated by R.M. Lodha J thus:[66a]

(i) Whether a direction to the Maharashtra State Road Transport Corporation ('the corporation') by the industrial court, and confirmed by the High Court, of giving status, wages and all other benefits of permanency, applicable to the post of cleaners, to the complainants was justified?
(ii) Whether the two complaints filed by an unrecognized union under the Maharashtra Act alleging unfair labour practice on the part of the employer under Item 6 of Schedule IV of the said Act were maintainable?

In this case, the union, although a registered union under the Trade Unions Act, 1926 but unrecognized under the Maharashtra Act, filed two complaints before the industrial court, Bombay alleging that the corporation had indulged in unfair labour practice under various items including item 6 of schedule IV of that Act. These workers were engaged by the corporation as casual labourers for cleaning the buses between the years 1980-1985. The complaint of the union was that these employees were required to work everyday at least eight hours at the concerned depot of the corporation; the work done by them was of permanent nature but they were being paid a pittance; and the posts of the sweepers and cleaners were available with the corporation. Another complaint was filed by 19 individual employees before the industrial tribunal, Thane, raising an identical dispute. The corporation opposed these complaints on various grounds, which among others, were: (i) These complaints were not maintainable as the union which had filed them was an unrecognized union whereas only the recognised union had *locus* to file such complaints under the Maharashtra Act; (ii) The complainants were engaged for cleaning the buses on contract basis @ Rs. 1.50 paisa per bus and they were not employed as *badlis*, casual or temporary workers; (iii) The engagement of these workers was of purely casual in nature.

The industrial tribunal, Thane held that the corporation indulged in unfair labour practice under item 6 of schedule IV by continuing the complainants as temporary/casual/daily rated workers for years together and thereby depriving the benefits of permanency. It, accordingly, directed the corporation to cease and desist from the said unfair labour practice within one month from the date of the order by giving status, wages and all other benefits of permanency applicable to the post of cleaners to the complainants from 1982. There were cross writ petitions filed by the parties

66a *Id.* at 561.

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which were disposed of by a common order by the single judge of the High Court who held that complaints by a unrecognized union under item 6 of schedule IV of the Maharashtra Act were maintainable and the corporation indulged in unfair labour practice under item 6 as well as item 5 of schedule IV. It, accordingly, directed that the employees mentioned in the two complaints filed by the union be given benefit of permanency including salary and allowances from the date of filing of the respective complaints. The corporation preferred a letters patent appeal against the order of the single judge which was dismissed by the division bench of the High Court relying upon the general standing order 503 of the corporation and also on the decision of the constitution bench of the Supreme Court in *State of Karnataka* v. *Umadevi(3).*[67] Against this order an appeal was filed before the Supreme Court.

The question for consideration of the Supreme Court was whether the provisions of the Maharashtra Act, 1971 had been denuded by the constitution bench decision in *Umadevi (3)*. It held that it had not. The court observed that the powers given to the industrial and labour court under section 30[68] were very wide and the affirmative action mentioned therein was inclusive and not exhaustive. The court also observed that it was clear from the plain language of item 6 of schedule IV that employing *badlis*, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees was an unfair labour practice on the part of the employer. In this case, it was established in the complaint and, therefore, the industrial and labour courts were empowered to issue preventive as well as positive directions to an erring employer. The court opined that the Maharashtra Act and the powers of the industrial and labour courts were not at all under consideration in *Umadevi(3)*. As a matter of fact, the issues, like the one pertaining to unfair labour practice, were not at all referred to or considered or decided in *Umadevi (3)*.

The court observed that it was true that *Dharwad Distt. PWD Literate Daily Wages Employees' Association* v. *State of Karnataka*[69] arose out of an industrial adjudication and was considered in *Umadevi (3)* and it was held to be not laying down correct law. But a careful consideration of the decision in *Umadevi (3)* leaves no doubt that what the Supreme Court was concerned in this case was the exercise of power by the High Courts under

67 (2006) 4 SCC 1.

68 Section 30 gives wide powers to the industrial and labour courts to grant relief to prevent unfair labour practice which include cease and desist orders against the person who has committed unfair labour practice and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the court be necessary to effectuate the policy of the Act.

69 (1990) 2 SCC 396.

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article 226 and the Supreme Court under article 32 of the Constitution in the matter of public employment. It was concerned with situations where the employees had been engaged as contractual, temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders for their regularization and conferring them status of permanency had been passed.

The court held that *Umadevi (3)* was an authoritative pronouncement for the proposition that the Supreme Court (article 32) and High Courts (article 226) should not issue directions of absorption, regularization or permanent continuation of temporary, contractual, casual, daily wage or *ad hoc* employees unless the recruitment itself was made regularly in terms of the constitutional scheme. *Umadevi (3)* did not denude the industrial and labour courts of the statutory power under section 30 read with section 32 of the Maharashtra Act to order permanency of the workers who had been victims of unfair labour practice on the part of the employer under item 6 of schedule IV where the posts on which they had been working exist. *Umadevi (3)* cannot be held to have overridden the power of the industrial and labour courts in passing appropriate order under section 30 of the Maharashtra Act once unfair labour practice on the part of the employer under item 6 of schedule IV was established.

The court reiterated the principle enumerated in *Mahatma Phule Agricultural University* that it cannot direct creation of posts but emphasised that where post exists, the employers cannot resort to unfair labour practices to deny labour their legitimate right to be considered for absorption. It is to prevent precisely such actions on the part of the employer that powers of labour court and tribunal to grant appropriate relief including granting of regular status to workers has been envisaged under the Maharashtra Act.

The court observed that the factual matrix of the present case revealed that it was the admitted position before the industrial tribunal, Thane and Bombay that the post of cleaners in the corporation were in existence. No factual foundation had been laid by the corporation before the industrial tribunal that the post of cleaners did not exist, rather the evidence on record reflected otherwise.

The court also examined whether the recruitment of these workers was in conformity with standing order 503 which prescribed the procedure for recruitment of class IV employees of the corporation which was to the effect that 'such posts shall be filled up after receiving the recommendation from the Service Selection Board' which exercise did not seem to have been done in the present case. The court held that the standing orders could not be elevated to the status of statutory rules. Standing orders are not statutory in nature. The breach of standing orders by the corporation is itself an unfair labour practice. The employees concerned having been exploited for years by engaging them on piece-rated basis, it was too late in the day to take the stand that the procedure laid down by standing orders having not been followed, these employees could not be given status and privilege of

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permanency. The stand of the corporation, if accepted, would tantamount to putting premium on their unlawful act of engaging in unfair labour practice. The court observed that the labour courts and industrial tribunals acting under section 30 of the Maharashtra Act, were within their power to pass orders of permanency, issue directions to cease and desist order and not only cease and desist order as contended by the corporation. The court concluded thus:[69a]

> Seen thus, the direction of giving status, wages and all other benefits of permanency applicable to the post of cleaners to the complainants, in the facts and circumstances, is justified and warrants no interference.

The court further examined the question as to whether an unorganized union could file the complaint on behalf of the complainant workers under section 21 of the Maharashtra Act in respect of item 6 in schedule IV of the Act. It held that the language of section 21 was very clear and the *locus* to file such complaint lies only with the recognised trade union. It was important to bear in mind that the concept of recognition of trade union has been introduced in the Maharashtra Act with a view to facilitate the collective bargaining for the employees in certain undertakings. Section 21(1) excluded individual employees, unrecognized union or any other form of association or union other than a recognised union under the Maharashtra Act to appear or act or be represented in the proceedings relating to unfair labour practice specified in items 2 and 6 of the schedule IV. The right to represent the employee(s) in matters relating to unfair labour practice in items 2 and 6 of schedule IV to the Act under section 21 is exclusively available to the recognised union and none else. Unrecognized union is not competent to file complaint insofar as unfair labour practice under items 2 and 6 of schedule IV to the Maharashtra Act is concerned and this view has also been taken by the court earlier in *Shramik Uttarsh Sabha* v. *Raymond Woolen Mills Ltd*.[70] In view of this interpretation the employees whose complaints were filed by unrecognized unions were not entitled to the directions of the labour and industrial courts due to non-maintainability of the complaints by the unrecognized trade unions. However, the court, in exercise of its power under article 142 of the Constitution to do justice to all, directed that even those employees whose complaints were filed by unrecognized trade unions in the present case would get the status, wages and other benefits of permanency applicable to the post of cleaners.

This case shows concern of the court against perpetuation of the unfair labour practices by an instrumentality of the state. It emphasised the need to provide effective remedies to the workers against such practices. The

69a *Supra* note 66 at 579.
70 (1995) 3 SCC 78.

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court even invoked the powers under article 142 of the Constitution to do justice in the matter. This judgment is a positive contribution to the development of labour law equitable to the interest of the workers when of late, unfortunately, workers rights have suffered dilution.

Jurisdictional Issue

In *Apollo Tyres Ltd.* v. *C.P. Sebastian*,[71] the respondent filed a suit against the appellant company for a declaration that he was still a workman and continued to be so under it and entitled to wages and consequential benefits. He also sought in the said suit a declaration that the order issued by the appellant transferring him from Kerala to West Bengal was intended to victimize him and was, *inter alia*, *mala fide* and illegal. The appellant company filed its written statement raising the plea that the civil court had no jurisdiction to deal with the matter. The trial court allowed the objection of the appellant and dismissed the suit filed by the respondent. He filed an appeal which reversed the judgment and decree of the trial court and remanded the matter to the trial court for fresh disposal after holding that the civil court had jurisdiction to entertain the dispute. The management challenged the said order of the appellate court before the High Court of Kerala which upheld the order and fixed the time frame for disposal of the suit by the trial court. It is this order of the High Court in the second appeal which was impugned before the Supreme Court in the special leave petition.

The Supreme Court observed that on the face of the case, it was of the clear view that the suit filed by the workman was barred by section 14(b) of the Special Relief Act, 1963 which provides that a contract of personal service cannot be enforced in a civil suit. If the workman had any grievance and if he was a 'workman' within the meaning of section 2(s) of the ID Act, he should have raised an industrial dispute and sought relief under the ID Act before the industrial tribunal or labour court. The court also brought out clearly the distinction between the powers of the labour court/industrial tribunal and those of the civil court in the matter of personal contracts. While the former enjoys the power to enforce contracts of personal service, to create contracts, to change contracts, *etc.*, the latter does not enjoy such power. It also made it clear that a contract of personal service includes all matters relating to the service of the employee, *e.g.* confirmation, suspension, transfer, termination, *etc.*

In its view, the reliefs claimed by the workman were clearly seeking enforcement of a contract of personal service and the civil court had no jurisdiction to grant such reliefs.[72] It upheld the judgment and order of the trial court that the civil court had no jurisdiction and had rightly dismissed the suit of the workman.

71 (2009) 14 SCC 360.

72 *Pearlite Liners (P) Ltd.* v. *Manorama Sirsi* (2004) 3 SCC 172 was referred to by the court.

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III INDUSTRIAL EMPLOYMENT
STANDING ORDERS

Status of standing order

In *Madhya Pradesh State Electricity Board* v. *S.K. Yadav*,[73] the Supreme Court had to consider the effect of a certified standing order which provided that any employee who desired to obtain leave of absence "shall apply to the manager or the officer authorized by him. It shall be duty of the Manager or the officer to pass orders thereon on two days fixed for the purpose…." In this case, the case of the employee was that he had applied for leave but he was not communicated any decision thereon and, therefore, in the absence of any order of rejection, it should be deemed that the leave was sanctioned. It is now a well settled principle that when a public authority is required to pass an order in terms of the statute within the period stipulated therein, non-compliance would not mean that the presumption will be in favour of the person seeking decision on the matter unless the standing order or the statute, as the case may be, specifically provides for drawing of such presumption. The court held that the workman could not take shelter under the said standing order to contend that he had applied for leave and, therefore, could not be held to be unauthosizedly absent. It was not in dispute that in terms of the aforesaid standing order, order on the application filed by the workman should have been passed within the period stipulated but non-compliance therewith would not vitiate the ultimate order as the said provision must be held to be directory in nature and not mandatory. The court held that in this case, the labour court had proceeded on a wrong premise that by not refusing to grant leave, the same would be deemed to have been granted. The standing order did not contemplate such a situation. The question as to whether leave had been granted or not will again depend on facts and circumstances of each case and no legal inference could be drawn therefrom.

In *Tirupati Jute Industries (P) Ltd.* v. *State of W.B.*,[74] the appellant company was governed by the Industrial Employment (Standing Orders) Act, 1946 and the relevant standing order, namely 14(e) provided that "(n)o order of dismissal shall be made unless the workman concerned is informed in writing of the alleged misconduct and is given an opportunity to explain the circumstances alleged against him." The said standing order further provided that "the approval of the Manager of the establishment and, where there is no Manager, of the employer is required in every case of dismissal…"

In this case, an inquiry was held against workmen in respect of various serious charges of wrongful confinement of general manager, threatening him with dire consequence and using of filthy language. Their services were terminated by the management by way of dismissal after accepting inquiry officer's report in which they were held guilty of the charge. The industrial

73 (2009) 2 SCC 50.
74 (2009) 14 SCC 406.

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tribunal held that the workmen were not given due opportunity to contest their cases before the inquiry officer and there was thus violation of the principles of natural justice. It directed their reinstatement with full back wages from the date of their dismissal till the date of their reinstatement. The management challenged this award before the High Court where the workmen raised a fresh contention at the hearing before the single judge that their order of dismissal was illegal as they were not approved by the manager of the establishment or the employer as required by standing order 14(e). The single judge held that the tribunal committed an error in not taking notice of the fact that the workmen were given due opportunity to defend themselves in the domestic inquiry but they had chosen not to appear before him and, therefore, it could not be said that the inquiry was opposed to the principles of natural justice. He, accordingly, set aside the findings of the tribunal being contrary to record. But he accepted the contention of the workers raised for the first time before him that there was no approval in regard to the dismissal as required under standing order 14(e) and, therefore, the order of dismissal passed by the disciplinary authority had no effect in the eyes of law. Consequently, he quashed the order of dismissal and directed that the workmen be reinstated with all consequential benefits as per the award of the industrial tribunal.

The division bench of the High Court, in appeal by the management, opined that though the workmen had not raised the contention of violation of standing order 14(e) before the tribunal, there was no need to remand the matter to the tribunal for providing an opportunity to the management to place necessary record which it had failed to place before the tribunal, but having regard to the fact that the matter was more than a decade old and some of the workers had already reached the age of superannuation, therefore, it decided to uphold the order of the single judge. In appeal, the Supreme Court delineated the important question whether the High Court could have permitted the workmen to raise a contention based on a disputed question of fact for the first time in the writ proceedings and decide the same against the management without giving it an opportunity to lead evidence thereon.

The case of the management was that the workmen ought not to have been permitted to raise a new contention alleging non-compliance with standing order 14(e) for the first time before the High Court thereby denying them an opportunity to establish that there was no violation of the said standing order. It was also contended that the order of dismissal was signed by the director of the appellant company in three of the four cases and by the manager in the fourth case and the order clearly stated that the management/manager had considered the findings and proceedings of the inquiry officer and had accepted the same. A reading of the order clearly showed that the findings of the inquiry were accepted by the management, which meant, the board of directors of the company, which was the employer. The standing order 14(e) was intended to apply only where the disciplinary authority was lower in rank to the manager or the board of

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directors of the company. The decision of the High Court was, therefore, bad and erroneous as no compliance with standing order 14(e) was warranted. The court observed that the findings of the single judge that sufficient opportunity was granted to the workmen to participate in the inquiry and inspite of that they did not participate in the inquiry, had recorded a finding setting aside the tribunal's findings in that behalf was not challenged by the workmen presumably because ultimately the appellant's writ petition was dismissed on other grounds. The division bench also affirmed the said finding.

In regard to findings that there was no approval by the manager/ employer it was not in dispute that such a contention was never raised before the tribunal. The issue of violation of standing order 14(e) having been raised for the first time demanded in fairness that an opportunity to demonstrate that such approval was in fact available or that such approval was not required, having regard to the fact that a decision was taken by the manager or the board of directors, which was the employer. Neither the single judge nor the division bench could have assumed that there was no approval without giving an opportunity to the appellant to establish that there was approval. It was no justification for the division bench to deny opportunity to the appellant by remanding the matter to the tribunal mainly because there was considerable delay in the disposal of the matter. In any case, if it was assumed by the High Court that there was non-compliance with the requirement of standing order 14(e), it ought to have given due opportunity to the employer/appellant to produce before it relevant material to establish that it had complied with standing order 14(e). Even this was not done. The court held that the findings of the single judge affirmed by the division bench holding that there was no approval as required by standing order 14(e) deserved to be set aside as the same was based on no evidence.

The court observed that in the normal course it would have been necessary to remand the matter to the tribunal for examination of the issue. But because of certain subsequent events it was necessary for the court to exercise jurisdiction under article 142 of the Constitution to do complete justice. The orders of termination were passed in 1990-91 and all the four employees had reached the age of superannuation long ago. There was, therefore, no question of any of them being reinstated even if the matter was referred to the tribunal and they had succeeded before it. The High Court had found that the charges were proved and only technical contention about approval remained to be decided. The court observed that on the facts and circumstances it was necessary that a quietus should be given to this litigation by directing the appellant to pay one-third of the back wages in full and final settlement, to the workmen. It allowed the appeal, set aside the award of the tribunal and orders of the single and division bench of the High Court. The orders of dismissal of the four workmen passed by the employer were not disturbed. Instead, the appellant was directed to pay to the workmen one-third of the back wages for the period between the respective dates of dismissal and superannuation.

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In *Novartis India Ltd.* v. *State of W.B.*,[75] the appellant company was a successor in interest of Sandoz (India) Limited. The respondents were appointed as sales representatives. As per the terms of appointment, they could be transferred from one place to another. They were transferred to different places and directed to report for duties at the transferred places. They filed representations requesting for withdrawal/cancellation of their orders of transfer and did not join their services at the transferred places. Their services were terminated without holding any domestic inquiry by paying one month's wages. They raised an industrial dispute about the non-employment alleging that their services could not be terminated without holding a departmental inquiry against them. On reference, the industrial tribunal passed an award that since no domestic inquiry was conducted before passing the orders of termination, the same were bad in law. It was observed that since the respondents had superannuated in the meantime, the question of directing their reinstatement did not arise. They were entitled to be paid back wages from the date of their termination till the date of attaining superannuation calculable on the basis of the last pay drawn. The appellant challenged the said award before the Calcutta High Court which was dismissed by the single judge. The division bench of the High Court quashed the award holding that state government was not the appropriate government who made reference which order of the division bench was challenged by the workers before the Supreme Court. The apex court differed with the findings of the division bench and, while setting aside the judgment, remitted the matter for consideration on merits. Consequently, the matter was considered by the division bench. It upheld the decision of the labour court and did not interfere with the relief of payment of back wages.

The Supreme Court in the SLP filed against the judgment of the High Court issued notice wherein it confined only the question of back wages. The court observed that when an employee does not join his transferred place, he commits misconduct. A disciplinary proceeding can be initiated but must precede the order of discharge by way of punishment. The order of discharge is not a substitute for an order of punishment. If an employee is to be dismissed from services on the ground that he had committed a misconduct, he was entitled to an opportunity of hearing. Had such an opportunity been given to them, they could have shown that there were compelling reasons for their not joining at the transferred places. Even a minor punishment could have been imposed. The appellant precipitated the situation by passing a post-haste order of termination of their services. There did not exist any justifiable reason for doing so. The services of the employees were permanent in nature and they were not employed in public but private employment. Their termination of services was, therefore, held to be illegal and *void ab initio.*

75 (2009) 3 SCC 124.

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Coming to the question of back wages, the court held that it was well settled proposition in law that back wages cannot be claimed as a matter of right. However, these wages are ordinarily to be granted, keeping in view the principles of grant of damages for which certain guidelines and several factors such as nature of appointment; the mode of recruitment; the length of service, *etc.* need to be taken into account. The conduct of the workman concerned also plays a vital role in deciding the issue. Income derived by the employee during the *interregnum* period should also be taken into account. Each decision, therefore, would depend on the facts of each case. In the present case, the order of discharge was held to be *void ab initio*. An award of reinstatement of service was denied to them only because in the meantime they attained their age of superannuation. The court, therefore, held that the respondents were entitled to back wages from the date of termination of their services by way of compensation.

IV CONCLUSION

With the adoption of the new economic policy by the central government and the judiciary's overwhelming support for it, collective disputes seem to be on the verge of vanishing point. Workers are now more interested in protecting their jobs than raising demands for higher wages and better conditions of service. Consequently, labour rights, more or less, continue to suffer dilution though there are some sporadic pronouncements which give a flicker of hope that the labour jurisprudence painstakingly built up by the then activist judges of the court during the late seventies and eighties is not completely obliterated.[76] For instance, the approach of the court in *Maharashtra SRTC* v. *Casteribe Rajya Parivahan Karmachari Sanghatana*[77] shows the concern of the court against perpetual unfair labour practices resorted to by the instrumentalities of the state and the need for protection against them. The court distinguished the case at hand from *Umadevi (3)* and made it clear that *Umadevi (3)* cannot have the effect of denuding the statutory provisions conferring wide powers on the industrial adjudicators in proven cases of unfair labour practice. This judgment is a positive contribution to the development of labour law equitable to the interest of the workers which, of late, unfortunately, have suffered dilution. In fact, Lodha J in this pronouncement showed sensitivity and the need for a humane approach towards the rights of the workers.

The hallmark of the decisions of the apex court under survey is its insistence that the High Courts must give reasons for their decisions. The court has found it difficult to discern the rationale from many of the judgments of the High Courts that have come before it for its consideration

76 *Harjinder Singh* v. *Punjab State Warehousing Corporation* (2010) 3 SCC 192; also see *Subhash* v. *Maharashtra SRTC* (2009) 9 SCC 344.

77 *Supra* note 68.

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under article 136 of the Constitution. The apex court has once again insisted that while interfering/modifying awards of the industrial adjudicators in disciplinary matters of dismissal and discharge and granting reliefs in the event of violations of the retrenchment compensation law, they must follow the parameters of the new judicial policy governing the grant of reliefs laid down by the court.

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