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# LABOUR MANAGEMENT RELATIONS

*Bushan Tilak Kaul**

## I INTRODUCTION

IN THE year 2011, unlike earlier years, not many decisions have been handed down by the apex court in the area of industrial relations law. The cases that have been reported cover only some of the areas of importance. Like in the previous years, most of the reported decisions pertain to the areas of retrenchment and disciplinary matters. One significant decision, which does not strictly pertain to industrial relations law, has been included in the present survey as it exemplifies the zeal of some of the judges of the apex court to recognize and enforce basic human rights of down-trodden and unorganized workers who constitute a vast majority of the workforce of our country; whose protection and concern is the signature tune of our Constitution. The court has recognized the need to ensure that globalization and liberalization must have human face and cannot be allowed at the cost of human exploitation. Some of the decisions of the Delhi High Court having a bearing on industrial relations law have been included in the survey. However, there has been no significant decision reported either under the Industrial Employment (Standing Orders) Act, 1946 or under the Trade Unions Act, 1926.

## II PIL FOR ENFORCEMENT OF RIGHTS OF UNORGANISED WORKERS

In *Delhi Jal Board* v. *National Campaign for Dignity and Rights of Sewerage and Allied Workers,*[1] the Supreme Court had an occasion to deal with the question of compensation payable to families of unorganized labour engaged by the local bodies for cleaning of sewers who were employed through contractors. This appeal

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1 (2011) 8 SCC 568. The sewer worker who died due to the negligence of the employer left behind his heirs who did not have the means and resources for seeking intervention of the judicial apparatus of the state. It is the petitioner organization which is engaged in the welfare of sewage workers who was constrained to file the present petition as a representative petition before the Delhi High Court to highlight the plight of sewage workers many of whom die on account of contemptuous apathy shown by the public authorities and the contractors engaged by them and even private individuals/ enterprises in the matter of providing safety equipments to those who are required to work under extremely odd conditions.

arose out of a public interest litigation (PIL) filed by the respondent before the Delhi High Court against the Delhi Jal Board (DJB), a local body, for grant of compensation to the family of the deceased worker who had died while cleaning sewers. There were cases of such deaths prior to the filing of this petition and also during the pendency of this petition. The division bench of the high court requested one of the sitting judges of the court, S. Muralidhar J, to suggest a workable solution to the problem faced by sewage workers, who, after hearing the representatives of the writ petitioners, the DJB and other instrumentalities of the state and on examination of various documents, made his recommendations for protection of the workers engaged in cleaning of manholes. Thereafter, the division bench of the high court, after considering all the relevant materials including the recommendations of Muralidhar J passed, inter alia, the following interim directions to the respondents, pending the final disposal of the PIL:

i) To provide free medical examination and treatment to sewer workers and the treatment was to continue for all such workers found to be suffering from occupational disease, ailment or accident until the workmen are cured or until death.
ii) The services of the sewer workers were not to be terminated either by the respondent or the contractor engaged by them, during the period of illness and they were to be treated as if on duty and paid their wages.
iii) Compensation payable by the DJB, which could be recoverable from contractors, if permissible in law, to all workmen suffering from any occupational disease or ailment or accident in accordance with the provisions of the Workmen's Compensation Act, 1923.
iv) Immediate compensation by way of *ex-gratia* solatium of Rs. One lakh to the family of the deceased worker with liberty to recover the same from contractors, if permissible in law.
v) Statutory dues such as provident fund, gratuity and bonus were to be paid to all the sewer workers, including contract workers, as applicable in law.
vi) To provide modern protective equipments to all sewer workers in consultation of the petitioner organization.
vii) To provide to the workers various welfare measures and other facilities.

In view of the aforesaid recommendations, the Delhi High Court, as an interim measure, directed the DJB to deposit Rs. 79,000/- in the Delhi High Court Legal Services Committee (DHCLSC) payable to the deceased worker in addition to the Rs. 1.71 lakhs awarded as compensation already paid to the family of the deceased worker. It was this interim order which was challenged by the DJB before the Supreme Court.

The Supreme Court at the very outset pointed out that the said direction issued by the Delhi High Court was for ensuring that the goal of justice set out in the preamble to the Constitution of India was fulfilled, at least in some measure, for the disadvantaged sections of the society who have been deprived of fundamental rights to equality, life and liberty for the last more than six decades even after independence. The court pointed out that the present appeal was also illustrative of how the state apparatus was insensitive to the safety and well being of those who were, on account

of sheer poverty, compelled to work under most unfavourable conditions and regularly face the threat of being deprived of their life. The court recounted that parliament and state legislatures have made provision for payment of compensation to the legal representatives of those killed in air, rail or motor accidents and also those who die in factory/industry/ establishment due to accidents arising out and in the course of employment. Even those who were killed in police action get compensation in the form of *ex-gratia* announced by the political apparatus of the state. However, the court expressed its disgust with the fact that neither the law makers nor those who have been entrusted with the duty of implementing the laws have cared to enact any law for the welfare of the unorganized workers nor has any appropriate mechanism being set up for protecting persons employed by or through the contractors to whom services meant to benefit the public at large were outsourced by the state or its agencies or its instrumentalities like the appellant for doing works, which were inherently hazardous and dangerous to life nor made provision for payment of reasonable compensation in the event of their death.

The court noted that Delhi generates much quantity of sewage and, therefore, the plight of sewer workers could not be brushed aside. In the light of the submissions made by the appellant before the court, the court framed the following three issues for its consideration:

i) Whether the high court was justified in entertaining the writ petition filed by the respondent no.1 by way of PIL for compelling the state instrumentalities / contractors to take effective measures for safety of sewage workers and ordering payment of compensation to the families of the victims of accidents taking place during sewage operations;
ii) whether the directions given by the high court amount to usurpation of the legislative power of the state; and
iii) whether the high court was entitled to issue interim direction for payment of compensation to the families of deceased workers.

Before dealing with question no. 1, the court at the very outset attempted to erase the impression and misgivings of some people that the superior courts exceed the unwritten boundaries of their jurisdictions in entertaining petitions on behalf of poor, illiterate and ignorant who cannot vindicate their rights and silently suffer denial of fundamental and legal rights due to inactions or omissions of the state apparatus or its agencies. The court stated that all the three organs of the state are bound to give effect to the constitutional values envisaged in parts III and IV of the Constitution. It deprecated the failure on the part of the state in taking sufficient measures to ensure that benefit of welfare measures do not reach millions of downtrodden and disadvantaged sections of the society. The court considered it very unfortunate that when the judiciary has issued directions for ensuring that right to equality, life and liberty no longer remained as an illusion for a disadvantaged people, a theoretical debate is started by raising bogey of judicial activism or judicial overreach and orders issued for the benefit of weaker sections of the society are invariably subjected to challenge in the higher courts. It also stated that it was a fact that in a large number of cases, the sole object of this litigative exercise is to tire out

those who genuinely espouse the acts of the weak and the poor. The court referred to a number of decisions[2] to emphasize that social action litigation has come to stay in this country and that there can be no more objections to the maintainability of the writ petition filed by the respondent no.1 in the face of such catena of decisions.

The court observed that the high court entertained the petition and issued directions for protection of the persons employed to do work relating to sewage operations and such directions were part of its obligation to do justice to the disadvantaged and poor sections of the society. It added that the superior courts will be failing in their constitutional duty if they decline to entertain petitions filed by genuine social groups, NGOs and social workers when they espouse the cause of those who are deprived of the basic rights available to every human being. It is the duty of the judicial constituent of the state like its political and executive constituents to protect the rights of every citizen and every individual and to ensure that everyone is able to live with dignity. The court highlighted the fact that given the option, no one would like to enter the manhole of sewage system for cleaning purposes, but these people are forced to undertake such hazardous jobs with the hope that at the end of the day they will be able to make some money and feed their families. They risk their lives for the comfort of others. It was unfortunate that for the last few decades a substantial segment of the urban society has become insensitive to the plight of the poor and downtrodden including sewage operation workers who take such jobs on account of sheer economic compulsions. The urban society does not understand why a person is made to enter a manhole without safety gears and proper equipments. They look the other way when the body of a worker who dies in the manhole is taken out with the help of ropes and cranes. In this scenario, the courts are not only entitled but are under a constitutional obligation to take cognizance of the issues relating to the lives of the people who are forced to undertake jobs which are hazardous and dangerous to life. The superior courts will be failing in their constitutional duty if they shut their doors for such disadvantaged sections of the society. The court observed that if the system can devote hours, days and months to hear the elitist class of eminent advocates who are engaged by those who are accused of evading payment of taxes and duties or otherwise causing loss to public exchequer or who are accused of committing heinous crimes like murder, rape, dowry death, kidnapping, abduction and even acts of terrorism, some time can always be devoted for hearing the grievance of vast majority of silent sufferers whose cause is espoused by bodies like the respondent no.1.

While dealing with question no. 2, the court referred to *Vishaka,*[3] *Vineet Narain*[4] and *Association for Democratic Reforms*[5] where it has exercised power under article 32 read with article 142 of the Constitution and issued guidelines and directions to

2 *People's Union for Democratic Rights* v. *Union of India* (1982) 3 SCC 235, *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar* (1980) 1 SCC 98, *Municipal Council, Ratlam* v. *Vardhichan* (1980) 4 SCC 162 and *State of Uttaranchal* v. *Balwant Singh Chaufal* (2010) 3 SCC 402.

3 *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241.

4 *Vineet Narain* v. *Union of India* (1998) 1 SCC 226.

5 *Union of India* v. *Association for Democratic Reforms* (2002) 5 SCC 294.

fill the vacuum and unoccupied areas. In view of the principles laid down in the aforementioned judgments, the court did not have any slightest hesitation to reject the argument that by issuing the directions the high court has assumed the legislative power of the state. What the high court had done was nothing except to ensure that those employed/engaged for doing work which is inherently hazardous and dangerous to life are provided with life saving equipments and the employer takes care of their safety and health. The court made it clear that the state and its agencies cannot absolve themselves of the responsibility to put in place effective mechanism for ensuring safety of the workers employed for maintaining and cleaning the sewage system. The human beings who are employed for doing the work in the sewers cannot be treated as mechanical robots who may not be affected by poisonous gases in the manhole. The state and its agencies/instrumentalities or contractors engaged by them are under a constitutional obligation to ensure the safety of the persons who are asked to undertake hazardous jobs. The argument of choice and contractual freedom was not available to the appellant and the like for contesting the issues raised by respondent no.1.

Dealing with question no.3, the court then went on to examine whether the high court was justified in issuing interim directions for payment of compensation to the families of the victims. At the very outset, it deprecated the attitude of a public authority like the DJB, which had used the judicial process for frustrating the effort made by respondent no.1 for getting compensation to the workers who died due to the negligence of the contractor to whom the work of maintaining sewage system was outsourced. The court also expressed its dismay that the high court had thought it proper to direct payment of a paltry amount of Rs. 1.5 to Rs. 2.25 lakhs to the families of the victims. The court referred to the judgment in *Rudul Sah* v. *State of Bihar*[6] where it exercised its power under article 32 for compensating a person who was unlawfully detained for 14 years. It found sufficient reasons for making a departure from the old and antiquated rule that a person who has suffered due to the negligence of the public authority can claim damages by filing a suit. The court referred to its earlier judgments in *Nilabati Behera,*[7] *Paschim Banga Khet Mazdoor Samity*,[8] *Chandrima Das*,[9] *Common Cause*[10] and other similar judgments to come to the conclusion that the appellant's challenge to the interim directions given by the high court for payment of compensation to the families of the workers deserved to be rejected. The court did not stop there. It felt that the high court should have taken cue from the judgment in *Chandrima Das* and awarded compensation which could be treated as reasonable. According to the court, though it was not possible to draw any parallel between the trauma suffered by a victim of rape and the family of a person who died due to the negligence of others, but the high court could have taken note of the fact that the Supreme Court had approved the award of compensation of Rs. 10.00 lacs in 1998 to the victim of rape. Keeping

6 (1983) 4 SCC 141.
7 *Nilabati Behera* v. *State of Orissa* (1993) 2 SCC 746.
8 *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal* (1996) 4 SCC 37.
9 *Chairman, Railway Board* v. *Chandrima Das* (2000) 2 SCC 465.
10 *Common Cause, A Registered Society* v. *Union of India* (1999) 6 SCC 667.

in view the increase in the cost of living, the high court would have done well to award compensation of at least Rs. 5.00 lakhs to the families of those who died due to negligence of the public authorities like the appellant who did not take effective measures for ensuring safety of the sewage workers.

The court observed that it could have remitted the case to the high court for passing appropriate order for payment of enhanced compensation but keeping in view the fact that further delay would add to the miseries of the family of the victim, it deemed it proper to exercise power under article 142 of the Constitution and directed the appellant to pay a sum of Rs. 3.29 lakhs to the family of the victim through DHCLSC which would be in addition to Rs. 1.71 lakhs already paid by the contractor. The court dismissed the appeal subject to the aforesaid directions regarding the amount of compensation to be paid by the appellant. It also made it clear that the appellant would be entitled to recover the additional amount from the contractor. At the same time, the court directed that the respondent no.1 would also be entitled to file appropriate application before the high court for payment of enhanced compensation to the families of other victims. The court had no doubt that the high court would entertain such request. It directed the appellant to ensure compliance with the various directions of the high court within two months from the date of judgment and submit the report to the high court to obviate the further delay in implementation of the directions contained in the first order passed by the high court on 20.08.2008. It also directed the appellant to ensure that these directions were complied with by the contractor engaged by it for execution of the work relating to laying and maintenance of sewer system within the area of its jurisdiction. A report to this effect was also required to be submitted to the high court within two months.

## III INDUSTRIAL DISPUTES ACT, 1947

**Labour rights cannot be allowed to be defeated**

In *Bhilwara Dugdh Utpadak Sahakari S. Ltd.* v. *Vinod Kumar Sharma Dead by L.Rs.*,[11] the Supreme Court noted that the appeal before it revealed unfortunate state of affairs prevailing in the field of industrial relations in the country. It demonstrated the harsh reality that the employers in order to avoid their liability under various labour statutes very often resort to subterfuge in trying to show that their employees are in fact employees of the contractor. The court, therefore, emphasized the need to ensure that this subterfuge comes to an end. It reemphasized the philosophy underlying labour legislation which is to protect workers against exploitation by the employer by guaranteeing them their basic rights and to level up their position so that they are placed well in their bargaining position. The court was emphatic that conferment of benefits to the labour through various legislation cannot and should not be allowed to be defeated by showing that daily wagers or casual workers are engaged through contractors to defeat their entitlements/rights under the law. Such practices need to be discouraged and made impermissible. The court made it clear that globalization/liberalization in the name of growth cannot be at the human cost of exploitation of workers.

11 AIR 2011 SC 3546.

In the present case, attempt was made to show before the labour court that the workers in question were the workers of the contractor. The labour court found the case at hand was a clear case of counter subterfuge for which adequate reasons were given by it. This subterfuge was resorted to by the employer to pay the workers less than what wages were being paid to the regular workers. The labour court held that these workers were working under the orders of the principal employer but were being paid reduced salary. This finding of the labour court was not disturbed by the high court. An attempt to trash the findings of the labour court as upheld by the high court was made before the Supreme Court.

The Supreme Court did not buy the argument of the employer that the workers were contract labours. It held that the case at hand was not a case of genuine contract labour and, therefore, was distinguishable from ratio of *SAIL*.[12] In *SAIL* the question was whether on abolition of contract labour, the contract labour became automatically the employees of the principal employer. This was not the issue in the present case at all. Here the findings of the labour court were that the workers were not the employees of the contractor but of the principal employer. *SAIL* judgment applies where the employees were initially employees of the contractor and later sought absorption in the service of the principal employer. The court had no hesitation in stating that the two cases were distinguishable. The present case being a case of a sham contract, the labour court was within its powers to go behind the arrangement and satisfy itself that the contract was a subterfuge which it stated unhesitatingly to be so. The Supreme Court had no hesitation in coming to the conclusion that in the case at hand there was no infirmity in the findings of the labour court.

**Tests to determine contract of service with the principal employer**

In *General Manager, (OSD), Bengal Nagpur Cotton Mills, Rajnandgaon* v. *Bharat Lal*,[13] the court observed that it is now a well-settled legal position that if the industrial adjudicator finds that the contract between the principal employer and the contractor is a sham, nominal or merely a camouflage to deny employment benefit to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. There are two well recognized and established tests to find out whether the contract labourers are the direct employees of the principal employer which are:

i) Whether it is the principal employer who pays the salary instead of contractor; and
ii) whether the principal employer has the power to control and supervise the work of the employee.

In the case at hand the labour court/industrial court constituted under the Madhya Pradesh Industrial Relations Act had answered both the questions in the affirmative

12 *Steel Authority of India* v. *National Union Waterfront Workers* (2001) 7 SCC1 (in short *SAIL*).

13 (2011) 1 SCC 635.

and as a consequence held that the workman in question was not the employee of the contractor but was the employee of the appellant, the principal employer, and had directed the latter to reinstate him in service in a reference made to the labour court which award of the labour court was upheld by the industrial court in appeal preferred by the appellant. The high court did not interfere with the concurrent findings of the courts below. In the special leave petition preferred by the principal employer, the Supreme Court on a careful consideration of the whole matter was of the view that the labour court and the industrial court had committed serious error in arriving at these findings which had been upheld by the high court without examining the contentions of the appellant on merit. The court observed that in regard to the first test referred to above as to who pays the salary, the labour court and the industrial court had placed the onus wrongly on the appellant when it was for the employee to aver and prove that he was paid salary directly by the principal employer and not by the contractor. This onus was not discharged by the workman. Even in regard to the second test the employee did not establish that he was working under the direct control and supervision of the principal employer. The court observed that the industrial court misconstrued the meaning of the terms "control and supervision" and held that as the officers of the appellant were given some instructions to the employee working as a guard at the company premises alongwith other guards engaged through the contractor, he was deemed to be working under the control and supervision of the appellant. This was contrary to the definition of the expression "control and supervision" given in the context of contract labour in *International Airport Authority of India* v. *Air Cargo Workers' Union*[14] where the court observed thus:

> … if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.
> … The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor.

In the light of the above, the court held that the industrial court ought to have held that the employee was not the direct employee of the appellant, the principal

14 (2009) 13 SCC 374 at 388.

employer. The court also took serious note of the fact that the employee concerned had deliberately suppressed and misrepresented the facts which in themselves were, in the opinion of the court, yet another reason to deny any relief to him. The employee was careful enough not to disclose his address (either his residence or place of work) at any stage of the proceedings whether before the labour court or the industrial court or the high court or the Supreme Court. He all along gave his address as c/o his counsel in Chhatishgarh. He had even asserted from the very beginning that he was unemployed and maintained that stand even before the Supreme Court. He had said so giving an impression that he had been continuously unemployed. When the appellant produced before the Supreme Court an employment certificate issued by the current employer of the employee, the appellant asserted that in the absence of his particulars they had no means to find out his status. The court took note of the fact that he had been disengaged in 1982 and had approached the labour court in 1987 when there was material to show that he had taken employment with Western Coal Field Ltd. in 1985 and had been earning a fairly higher amount than what he was earning earlier. The court took all these factors into account to deny any back wages or directions to pay back wages during the pendency of the litigation. The court allowed the appeal of the principal employer and set aside the orders of the labour court, the industrial court and the high court.

**Reference issues**

*Constitution of National Labour Tribunal*

In *Bata India Limited* v. *Union of India,*[15] the central government constituted a National Industrial Tribunal under section 7B of the Industrial Disputes Act, 1947 (ID Act) and referred the dispute relating to termination of the services of 200 shop managers of the appellant company all over India represented by the All India Bata Shop Managers Union. The constitution of the said National Industrial Tribunal and the reference itself were challenged before the Delhi High Court under articles 226 and 227 of the Constitution of India for the issue of a writ of *certiorari* for quashment of the order of the central government.

The single judge of the high court differed with the earlier judgment of the single judge of the Delhi High Court in *FDC Ltd.* v. *Union of India*[16] holding that the said judgment did not lay down the correct proposition of law and eventually expressed the view that the constitution of the national tribunal was valid and there had been no illegal exercise of jurisdiction. The order of the single judge in the instant case was assailed on various grounds before a division bench, some of which are as under:

a) The single judge should have followed the principle of judicial discipline and referred the matter to a larger bench when he did not agree with the single judge of the court in *FDC.*
b) The law laid down by *FDC* has correctly interpreted section 7B of the ID Act.

15 180 (2011) DLT 351 (DB).
16 136 (2007) DLT 226.

c) The interpretation placed by the single judge in the instant case on section 7B of the Act is erroneous as the central government could not have taken recourse to the said provision to constitute a tribunal for adjudication of the industrial dispute of the present nature.
d) The intent behind section 7B is not to decide individual dispute of a workman/workmen but the fundamental purpose for constitution of a tribunal is to decide cases of national importance or of such nature where establishments in different states are likely to be interested or affected by the disputes such as pay scales of workers, general service of working conditions, wage disputes, bonus etc.

The division bench of the court held that judicial discipline dictated that the single judge should have referred the matter to a larger bench if he did not agree with the view expressed by the single judge in the *FDC Ltd.* Having said so, the court decided to consider both the judgments in its quest to lay down the correct interpretation of section 7B. The court stated that on plain reading of section 2(ka) which defines 'industrial establishment or undertaking' it can be found that it has broader canvas and should not be construed narrowly. The court found on perusal of the pleadings that a charter of demand was submitted to the company by the union relating to the service conditions of shop managers and when no settlement could be arrived at strike was resorted to by them. Thereafter, the management terminated the services of the workers/shop managers. It was, thus, manifest that the dispute had not arisen because of different situations or different events or cause of actions or initiation of departmental proceedings for different charges against the workers. The clusters of disputes that had arisen had a singular relevant issue. Once a definitive meaning conferred on the term 'industrial establishment' on a broader spectrum and the dictionary clause was taken recourse to, the court was of the opinion that industrial disputes were of such a nature that industrial establishments situated in more than one state were likely to be interested in or affected by such disputes. To give an example, if a dispute was adjudicated in one state either in favour of the management or employee the same was likely to affect another employee, as he has an inseparable interest in it. The Act being a beneficial legislation warranted to be interpreted in favour of the beneficiary when it was possible to take two views of the provision. The court found that in the *FDC,* the petitioner had challenged the validity of the notification issued by the central government under section 7B constituting a National Industrial Tribunal with the headquarters in India. It was contended before the high court that a dispute of national importance only could be referred to the National Industrial Tribunal or the dispute should be of such a nature in which the establishment constituted in more than one state were likely to be interested or affected, and merely because the medical representatives of one establishment were working in more than one state did not entitle the government to refer the dispute to the National Industrial Tribunal.

After referring to section 7B of the Act and taking note of the contentions raised by the parties before it, the division bench of the high court observed that the single judge in *FDC* was dealing with the dispute before it where reference was made to the National Industrial Tribunal relating to 48 employees stationed in different states who were required to approach the tribunal in one place in India,

i.e., Kolkata. The division bench held that in *FDC,* the dismissal of a group of workers could not be considered as an important question of law or a question of national importance. In *FDC,* the single judge read the provisions of section 7B con-jointly when the provisions needed to be read disjunctively. The need for setting up a National Tribunal need not necessarily arise only when a question of national importance is raised, but can be constituted even when the workmen employed in establishments in different states are going to be affected and they need not necessarily be of different establishments and can be belonging to the same establishment.

The division bench of the high court did not agree with the view expressed by the singe judge of the high court in *FDC,* and deferred with the view expressed by the single judge in *Bata India Ltd.*[17] The division bench observed that the single judge in *FDC* had misconstrued the provision. It had held that a dispute of national importance would be such where some important question of law is involved which is going to affect the fate of the workers in general throughout India. In the said case, it was wrongly understood that the issue raised must touch a large number or identical workmen and a question of law of national importance must be involved. The division bench of the court in *Bata India Ltd.* opined that the single judge in *FDC* had given a restricted meaning, scope and ambit of section 7B and the said decision did not lay down the law correctly and accordingly it overruled the decision rendered by the single judge in *FDC*. It observed that the object and purpose of the Act is to expedite and ensure quick and effective decision of industrial dispute which is essential so that industrial harmony is restored. Section 7B also ensures that possibility of conflicting decision and confusion arising therefrom is avoided. The division bench of the high court arrived at the following conclusions:[18]

a) The single judge should have, as a matter of judicial discipline, referred the matter to a larger bench when he noted his disagreement with the decision rendered to in *FDC*.
b) There is no absolute bar for interference in exercise by power under article 226 of the Constitution when a matter is referred to by a government to the industrial tribunal if the reference suffers from jurisdictional error or no industrial dispute exists.
c) If factual disputes are involved, it is advisable that the industrial tribunal should adjudicate the same and the writ court should not exercise the discretion and refrain from interfering with the order of reference.
d) The reference made by the central government to the national industrial tribunal in respect of the dispute arisen in obtaining factual matrix cannot be found fault with and hence the view expressed by the single judge on that score cannot be flawed.
e) The decision rendered in *FDC* does not lay down the law correctly as the interpretation placed on section 7B is basically erroneous as both the limbs have been treated to be conjoint and insegregable.

17 *Supra* note 15.
18 *Id* at. 365-366.

The court had no hesitation in coming to the conclusion that the termination of the services of shop managers having been made in consequence of their participation in strike was a matter of concern to the workers in more than one state and any decision by a tribunal in one state would necessarily not result in similar decision in other state though the factual matrix was common. Therefore, to maintain uniformity in all such cases it was incumbent that reference could be made to national industrial tribunal for uniformity of decision in similar set of facts.

*Delay in seeking reference was not culpable*

In *Kuldeep Singh* v. *General Manager, Instrument Design Development and Facilities Centre*,[19] the question for consideration before the Supreme Court was whether the labour court and the high court were justified in rejecting the claim of the workman for reliefs against his termination in violation of sections 25F to 25H of the ID Act merely on the ground of delay when the labour court concluded in categorical terms that the services of the workmen were terminated by the management without complying with the provisions of section 25F of the Act rendering the termination illegal, null and void and deserved to be set aside. The Supreme Court held that the management had undoubtedly to follow the provisions of the Act while effecting termination which position has been accepted by the labour court and has not been challenged before it by the management. The court held that in view of the fact that there is no prescribed limit for the appropriate government to exercise its powers under section 10 of the Act, therefore, the real test for making a reference is whether at the time of reference the dispute exists or not. The court observed that when the reference is made, it is presumed that the state government is satisfied that case for exercise of powers under the provisions of section 10 is warranted and the labour court cannot go behind the reference. At the same time, it is not open to the government to go into the merits of the dispute concerned and once it is found that an industrial dispute exists then it is incumbent on it to make reference as it cannot itself decide the merit of the dispute. It is for the appropriate forum or court to decide the same.

The satisfaction of the appropriate government being merely subjective, it cannot normally decline to make a reference for latches committed by the workman. On adducing adequate reasons for the delay by the workman, the government is bound to refer the dispute to the appropriate forum for adjudication. However, in the absence of any specific period of limitation prescribed for reference of dispute to adjudicatory authorities it is only reasonable that dispute should be referred as soon as possible after they have arisen and after conciliation proceedings have failed, particularly, when dispute relates to discharge of workman. If sufficient materials are not put forth for the enormous delay, it would certainly be fatal.

In the present case the court was satisfied that the delay was not so culpable as to disentitle the workman to any relief. The workman concerned had placed on record a number of representations made to the government functionaries at various levels till 1996 from 1992 when his services were terminated and the reference was made by the appropriate government in 1999. In the circumstances, the court set

19 (2010) 14 SCC 176.

aside the award of the labour court insofar as it held that the reference of the state government was bad and incompetent having raised the dispute so belatedly and dismissed the claim statement of the workman on that ground and also the order of the high court affirming the said order of the labour court. The court held that the findings of the labour court that the order of termination was illegal, null and void was in order and, therefore, it ordered reinstatement of the workman with consequential service benefits but without back wages within a period of eight weeks. It also directed the management to pay Rs. 50,000/- as costs to the workman payable within the same period.

*Industrial dispute in respect of malafide VRS*

In *Man Singh* v. *Maruti Suzuki India Ltd.*,[20] the question that came up for consideration was whether the workmen after having received the entire amount under voluntary retirement scheme (VRS), could claim that they were coerced to opt for VRS and raise industrial dispute against their non-employment?

In this case, the reference made by the appropriate government referring the dispute raised by the workmen against their non-employment alleging that they were coerced to opt for VRS to the labour court for adjudication was challenged by the management before the single judge of the Punjab & Haryana High Court in a writ petition which directed that the workmen should refund the entire amount paid as compensation under VRS to the management with 7.5% interest thereon as the condition precedent for adjudication of such reference by the labour court. The workmen impugned the order of the single judge before the division bench of the high court which found the order of the single judge in order except that it reduced the interest payable by the workmen to 6% in place of 7.5% as ordered by the single judge. The workmen challenged the order of the single judge as well as that of the division bench before the Supreme Court.

The Supreme Court held that the present case was squarely covered by its earlier judgment and order in *Ram Chandra Shankla* v. *Vikram Cement*[21] and observed that those "who seek equity must do equity". Since the workmen were claiming that they were treated unfairly and the reference needed adjudication, it was but natural that they return the entire amount to the management before the reference could be subjected to adjudication. The court, however, waived the interest element and directed the workmen to refund the entire amount paid to them by the management towards VRS compensation and directed that in case the amount was deposited within the time fixed by the court, the reference shall proceed in accordance with law, otherwise it would stand quashed.

*Stale Claim*

In *AIIMS* v. *Sanjay Kumar*,[22] a division bench of the Delhi High Court held that the case at hand was one of those cases which had become stale over the period of time. The services of the daily wager were terminated in 1996. He had filed an application before the conciliation officer belatedly in 2005. On submission of his

20 (2011) 9 SCALE 390.
21 (2008) 14 SCC 58.
22 (2011) 179 DLT 545.

failure report, a reference was made to the labour court in 2007 which was challenged before a single judge of the high court. The management contended that the case was absolutely stale and by no stretch of imagination it could be held that an industrial dispute did exist, warranting a reference for adjudication. The single judge observed that delay and latches could be taken by the management in its written statement to be filed before the labour court, more so, when the management had already entered appearance before the labour court. The single judge held that the writ petition was without substance and dismissed the same.

In the letter patent appeal before the high court against the judgment of the single judge, the division bench of the court observed that since the workman had not taken any steps whatsoever for a span of nine years in the matter, the dispute had become extinct by efflux of time. It tantamounted to acceptance of the order by the workman. He could not have been idle for such a long span of time. The division bench was of the considered view that the reference made by the respondent was totally unsustainable and quashed the same. The court passed the order keeping in view the number of decisions of the court[23] having a bearing upon stale claims and latches on the part of the workman in espousing his case.

**Section 17-B**

In *Rajasthan Gramin Bank* v. *Bishal Lal Bairwa*,[24] the challenge was made before the Supreme Court to the order of the single judge and affirmed by the division bench of the High Court of Rajasthan directing the management to comply with the provisions of section 17B of the ID Act by paying last drawn wages to the workman during the pendency of the writ petition impugning the award of reinstatement awarded by the labour court. The case of the management before the Supreme Court was that the high court while allowing the application preferred by the workman under section 17B of the Act had proceeded on the premise that the management had failed to controvert the specific plea of the workman that he was not gainfully employed when in fact the management had stated in its reply that the workman had after his dismissal worked in two transport companies for different periods. The management further averred that it had placed on record the vouchers showing payment of salary by the transport companies with supporting affidavits. It was, therefore, contended that the single judge as well as the division bench of the high court had ignored the said evidence and, therefore, the directions for payment of last drawn wages to the workman during the pendency of the writ petition by the management deserved to be set aside.

The Supreme Court, on perusal of the material on record, was of the view that the high court had failed to take into consideration the material which was relevant for deciding the controversy before it. The single judge clearly had proceeded on the basis of the statement of the workman that he was not gainfully employed. The single judge had observed that this statement of the workman had not been

23 *Nedungadi Bank Ltd.* v. *K.P. Madhavankutty* (2000) 2 SCC 455; *Dharappa* v. *Bijapur Coop. Milk Producers Societies Union* (2007) 9 SCC 109 and *Ajiab Singh* v. *Sirhind Co-operative Marketing-cum-Processing Service Society Ltd.* (1997) 6 SCC 82.

24 (2010) 13 SCC 248.

controverted by the management which fact was not correct keeping in view the material on record before it. The court held that in view of the factual scenario, as emerging from the record, the order of the single judge as upheld by the division bench could not be sustained. Accordingly, it allowed the appeal and set aside the orders passed by the single judge as well as the division bench of the high court and remanded the matter to the single judge for fresh adjudication in accordance with law.

**Retrenchment law: Reliefs for violation**

In *Davinder Singh* v. *Municipal Council, Sanaur*,[25] the workman challenged the order of the Punjab & Haryana High Court before the Supreme Court whereby the award passed by the Labour Court, Patiala for reinstatement of the appellant was set aside and he was held entitled to last drawn wages in terms of section 17B of the ID Act. This appeal arose in the following facts and circumstances:

The workman was engaged by the respondent for doing work of clerical nature on a consolidated salary of Rs. 1000/- per month. After having put in more than two years of service his services were discontinued admittedly without complying with section 25-F of the ID Act. The industrial dispute raised by him became the subject matter of reference to the labour court. The case of the respondent was that his services had to be discontinued because no approval was given by the authorities for his continuance in service. The labour court passed an award of reinstatement of the appellant without back wages which was challenged before the P&H High Court by the management. The division bench of the high court took the view that the labour court should not have ordered reinstatement because his appointment was contrary to the recruitment rules and articles 14 and 16 of the Constitution and it would not be in the public interest to sustain the award of reinstatement after a long lapse of time. The division bench held that the workman shall be entitled to wages in terms of section 17-B.

Before the Supreme Court the counsel for the workman submitted that the judgment and order of the high court was liable to be set aside because it had ignored the judicially recognized parameters for the exercise of powers under article 226 of the Constitution. It was contended that the high court was not justified in upsetting the award of reinstatement simply because there was some time gap between the reference of the dispute by the state government and adjudication thereof by the labour court.

The Supreme Court observed that the high court had neither found any jurisdictional infirmity in the award of the labour court nor it came to the conclusion that the same was vitiated by an error of law apparent on the face of the record. Notwithstanding this the high court had set aside the direction given by the labour court for reinstatement of the appellant. The court observed that in its view the approach adopted by the high court in dealing with the award of labour court was *ex-facie* erroneous and contrary to law laid down in *Sayed Yakoob*,[26] *Swaran Singh*,[27]

25 (2011) 6 SCC 584.

26 *Syed Yakoob* v. *K.S. Radhakrishnan,* AIR 1964 SC 477.

27 *Swaran Singh* v. *State of Punjab* (1976) 2 SCC 868.

*PGI Chandigarh*,[28] *Surya Dev Rai*[29] and *Shalini Shyam*.[30] It held that the reasons assigned by the high court for setting aside the award of reinstatement were legally untenable. In the first place it deserved to be noticed that the respondent had engaged the appellant in the backdrop of the ban imposed by the state government on filling of the vacant posts. The respondent had started a water supply scheme and for ensuring timely issue of bills and collection of water charges, it needed services of a clerk. However, on account of the restrictions imposed by the state government, regular recruitment was not possible. Therefore, a resolution was passed for engaging the appellant on contract basis. In furtherance of the said resolution the respondent engaged the appellant who was already in its employment as a clerk for a period of six months on consolidated salary. His services were continued by virtue of another resolution. His services were disengaged after he was continued beyond the periods prescribed in those resolutions. It is true that engagement of the appellant was not preceded by consideration of the competing claims of other eligible persons, but that was because there was a ban imposed by the state government. The Supreme Court found it surprising that the division bench of the high court did not note this important facet of the employment of the appellant and decided the writ petition by assuming that his appointment/engagement was contrary to the recruitment rules and articles 14 and 16 of the Constitution. Further, failure of the local government to convey its approval to the resolution of extending his appointment could not be made a ground for bringing an end to the engagement of the appellant without complying with the mandate of section 25-F. The other reason given by the high court in the delay of the adjudication of the dispute was equally untenable. The appellant could hardly be blamed for the delay, if any, in the adjudication of the dispute by the labour court or the writ petition filed by the respondent.

The court observed that a delay of 4-5 years in the adjudication of the disputes by the labour/industrial tribunal is a normal phenomenon. If what the high court had done was to hold justified, gross illegalities committed by the employer in terminating the services of the workman would amount to conferring legitimacy in majority of such cases. The court had no hesitation to disapprove the approach adopted by the high court in dealing with the appellant's case. The court further observed that the plea of the respondent that the action taken was covered by section 2(oo)(bb) was clearly misconceived and was rightly not entertained by the labour court because no material was produced by the respondent to show that the engagement of the appellant was discontinued by relying upon the terms and conditions of the employment. The court set aside the impugned order and restored the award of the labour court awarding reinstatement to the workman. It directed that the workman be reinstated within a period of four weeks from the date of the judgment and further held him entitled to wages for the period between the date of award and the date of actual reinstatement. The court further directed the respondent to pay the arrears of the appellant within a period of three months from the date of the receipt of the order of the court.

28 *PGI Medical Education & Research* v. *Raj Kumar* (2001) 2 SCC 54.
29 *Surya Dev Rai* v. *Ram Chander Rai* (2003) 6 SCC 675.
30 *Shalini Shyam Shetty* v. *Rajendra Shankar Patil* (2010) 8 SCC 329.

In *Bharat Sanchar Nigam Ltd.* v. *Man Singh,*[31] the workmen in question had put in more than 240 days of service as casual workers with the appellant when they were removed from the service by the management without complying with the mandatory provisions of section 25-F of the ID Act. The labour court ordered their reinstatement and which award was upheld by the high court. The Supreme Court held that in view of a catena of decisions of the court the workers who were not holding any post but were engaged as daily wagers should not have been reinstated but should have been paid compensation instead. The court held that the labour court was not justified in ordering their reinstatement and directed that each of the workmen shall be paid a sum of Rs.2.00 lacs as compensation for violation of section 25-F instead of reinstatement as ordered by the labour court and upheld by the high court.

In *Ranbir Singh* v. *The Executive Engineer,*[32] the appellant workman was engaged on daily wages in the year 1992 and his services were terminated in 1999 on the ground that he was involved in a criminal case which ended in his acquittal. He raised an industrial dispute complaining violation of section 25-F. This dispute became the subject matter of reference to the labour court which ordered his reinstatement with 50% back wages. The State of Haryana challenged the order exclusively on the plea that the award of the back wages was not justified.

The single judge of the high court went beyond the relief prayed for and set aside the entire award and instead awarded compensation of Rs. 60,000/- to the appellant. The matter was taken before the division bench by the workman contending that the judgment of the single judge was bad and deserved to be set aside as it had gone beyond the prayer and had set aside the award *in toto*. The division bench held that in terms of a number of decisions of the Supreme Court favouring compensation in place of reinstatement in respect of daily wagers, the order of the single judge deserved to be affirmed and the technicality with regard to the prayer in the writ petition would not stand in the way. Hence the appeal was preferred by the worker to the Supreme Court.

The Supreme Court found that the challenge to the order of the single judge was justified. The court opined that the order of the single judge as well as of the division bench was well beyond the scope of the prayers in the writ petition. If the state felt aggrieved by the award of the labour court there was no impediment in its way to challenge it in its entirety. The court observed that parties are bound by their pleadings and, therefore, a prayer clause cannot be construed or dubbed as a technicality. The court set aside the orders of the single judge as well as that of the division bench and restored the order of the labour court to the extent of reinstatement. The court was informed that the workman had in fact been reinstated but after the order of the division bench his services had been terminated. The court directed that the back wages envisaged would be payable only from January 2010 till his reinstatement as a consequence of its order. The court also awarded cost in favour of the appellant.

31 2012(1) SCC 558.
32 2011 (1) SCR 587.

**Issue of regularization**

In *Union of India* v. *Vartak Labour Union,*[33] the question arose whether the high court was justified in directing the Union of India to regularize the services of the members of the respondent union who had been employed by the Border Roads Organization (BRO) as casual labour for more than 30 years. The high court had directed that the workers who had put in more than five years of service should be regularized forthwith and those who were working as daily wagers for less than five years be not retrenched or their services terminated till they become eligible for regularization in terms of the directions given by the court.

The Supreme Court held that the respondent union's claim for regularization of its members merely because they had been working for the BRO for a considerable period of time could not be granted in the light of the series of court decisions where it has been consistently held that casual employment terminates when the same is discontinued. Further, merely because a temporary or casual worker has been engaged beyond the period of his employment it would not entitle him to be absorbed in regular service or made permanent, if the original appointment was not in terms of the process envisaged by the relevant recruitment rules.

However, the court while parting with the case observed that it was constrained to observe that the conduct of the appellants in engaging casual workers for a period of less than six months, and then giving them artificial breaks so as to ensure that they do not become eligible for permanent status, does not behove the Union of India and its instrumentalities which are supposed to be model employers. Therefore, the court in the facts and circumstances of the case, directed that where members of the respondent union have been employed in terms of the regulations and have been consistently engaged in service for the past 30 to 40 years, of course with short breaks, the Union of India would consider framing of an appropriate regulation/ scheme for the absorption and regularization of the services of the casual workers engaged by the BRO for execution of its on-going projects/schemes.

In the final analysis, the court allowed the appeal and set aside the judgment and order of the high court directing the respondent to absorb the daily rated workers.

**Disciplinary action and related issues**

*Misconduct: Burden of proof*

In *Amar Chakravarty* v. *Maruti Suzuki India Limited*,[34] a very important issue that came for consideration of the court was whether a distinction has to be made with respect to the onus of proof in a case where the workman asserts that he has completed one year of continuous service on the one hand, and the case where the management dismisses an employee on the ground of alleged misconduct but without holding a departmental enquiry, on the other. In the former case judicial approach in the recent cases is to place onus of proof on the workman. The question that arose in this case was whether the same approach could be extended to cases of dismissals where no departmental enquiry has been held at all and the management asserts that the workman has been dismissed for committing misconduct.

33 (2011) 4 SCC 200.
34 (2010) 14 SCC 471.

The Supreme Court in this case made it very clear that it is only where a departmental enquiry has been held and the workman has been dismissed on the basis of findings of the enquiry officer that the burden shifts to the workman to prove that his termination was illegal. But where no enquiry has been held and the management for the first time makes an application for permission to adduce evidence before the tribunal to sustain its action, the onus of proof to prove that the dismissal was on account of misconduct is on the management. This legal position was settled by the Supreme Court in the following facts and circumstances:

> The respondent/management dismissed the services of the appellant/ workman and others without holding any enquiry mainly on the allegation that he had, *inter alia*, participated in a tool down strike and had exhorted other workers to slow down the work so that there was fall in the production of cars. The workman raised an industrial dispute regarding his non-employment which was referred by the state government to the Labour Court, Gurgaon requiring it to examine whether the termination of service was justified and in order and if not, to what relief he was entitled to. The labour court framed the issues and on the issue whether the termination of service of the workman was justified and if not, to what relief was he entitled to it placed the onus of proof on the management. However, on a motion made by the management the labour court, by a short order, shifted the onus in relation to the aforesaid issue on the workman stating in his order that this was being done 'in view of the latest law on the point'.

Being aggrieved by the said order, the workman preferred a writ petition before the high court which was dismissed by it observing that the onus of establishing a plea of victimization or that the workman had completed one year of service now rested on the workman. The high court held that the order of the labour court could not be said to be perverse or illegal warranting interference. The workman challenged both these orders before the Supreme Court.

The apex court held that the judgment of the high court was clearly indefensible. The court observed that while it is true that the provisions of the Evidence Act *per se* do not apply in an industrial adjudication, it is trite that its general principles do apply in proceedings before the industrial tribunal or the labour court, as the case may be. In any proceedings, the burden of proving a fact lies on the party that substantially asserts the affirmative of the issue, and not on the party who denies it.[35] Therefore, it follows that where an employer asserts misconduct on the part of the workman and dismisses or discharges him on that ground, it is for him to prove the misconduct by the workman before the industrial tribunal or the labour court, as the case may be, by leading relevant evidence before it and it is open to the workman to adduce evidence *contra*. In the first instance, a workman cannot be asked to prove that he has not committed any act tantamounting to misconduct. It is well settled law that where the issue for consideration is as to what stage, the management is entitled to seek permission to adduce evidence in justification of its

35 *Anil Rishi* v. *Gurbaksh Singh* (2006) 5 SCC 558 at 561.

decision to terminate the services of the employee, the right of the employer to adduce additional evidence in a proceeding before the labour court under section 10 of the Act, questioning the legality of the order terminating the service must be availed of by the employer by making a proper request at the time when it files its statement of claim.[36] The court held that if the employer has not held the enquiry or the enquiry has been found to be defective, it is open to the employer to adduce evidence for the first time justifying his action and it is open to the employee to adduce evidence *contra*. The court held that the inevitable conclusion is that where no enquiry was conducted before the service of a workman is terminated, the onus to prove that it was not possible to conduct the enquiry as was alleged in this case and that the termination was justified because of the misconduct by the employee, lies on the management. It is for the management to prove, by adducing evidence, that the workman is guilty of misconduct to the satisfaction of the industrial tribunal or the labour court and that the action taken by it is proper.

In the present case, the services of the appellant/workman having been terminated on the ground of misconduct, without holding a domestic enquiry, it would be for the management to adduce evidence to justify its action. It would be open to the appellant/workman to adduce evidence in rebuttal. The court held that the order passed by the labour court, shifting the burden to prove the issue in question on the workman was fallacious and the high court should have quashed it. The court allowed the appeal of the workman and directed the labour court to dispose of the reference expeditiously. The workman was awarded costs which were quantified at Rs. 10,000/- in respect of each such appellant whose appeals came to be heard along with this appeal.

*Admission of guilt: Dismissal justified*

In *SBI* v. *Hemant Kumar,*[37] the workman worked as a cashier-cum-clerk in the appellant bank. It was discovered that he had been indulging in misappropriation of money by making fictitious entries and manipulations in the banker's ledger. After these malfeasance came to light, he not only admitted his guilt but also deposited the amount of Rs. 14,000/- to make good the amount earlier defalcated by him. He was served with a charge sheet giving details of his acts of omission and commission to which he did not give any reply. An enquiry officer was appointed who gave a number of opportunities to him but he did not participate in the enquiry on various pretexts. Finally, the charges were proved against him on the basis of evidence of the management witnesses. The enquiry officer submitted his report holding him guilty of all the charges. A copy of the enquiry report was sent to him alongwith a letter informing him that it was tentatively decided to dismiss him from service and requiring him to show cause and to appear for a personal hearing. The workman gave his reply to the enquiry report and after hearing him in person the disciplinary authority passed the order of his dismissal from service against which

36 See *Karnataka SRTC* v. *Lakshmidevamma* (2001) 5 SCC 433; *Workmen* v. *Firestone Tyre & Rubber Company of India (P) Ltd.* (1973) 1 SCC 813 and *Shambhu Nath Goyal* v. *Bank of Baroda* (1983) 4 SCC 491.

37 AIR 2011 SC 1890: (2011) 11 SCC 355.

he preferred an appeal. In his appeal he sought mercy and admitted his guilt in writing and prayed for a lenient view be taken in the matter. His appeal was turned down.

He raised an industrial dispute which was referred for adjudication to the Central Government Industrial Tribunal-cum-Labour Court. It held that the enquiry against him suffered from violation of principles of natural justice and set aside the order of dismissal directing his reinstatement with full wages. The high court did not interfere with the award of the labour court, hence the appeal by way of special leave petition.

The Supreme Court found that the tribunal had completely erred and the reasons given by it were perverse and unreasonable for condemning the departmental enquiry as defective and completely untenable. The court held that a number of opportunities were given to the workman who was out to get the proceedings delayed. Further, the court observed that the workman himself had on two occasions admitted his guilt which admissions themselves were sufficient for his dismissal. The Supreme Court found that the high court's order was equally unsustainable.

*Powers of high court and industrial adjudicator in disciplinary matters: Difference*

In *State Bank of Bikaner and Jaipur* v. *Nemi Chand Nalwaya*,[38] the Supreme Court observed that it is now well settled that the high court and the Supreme Court do not act as appellate courts and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence will not be a ground for interfering with the findings in a departmental enquiry. Therefore, the courts will not interfere with the findings of facts recorded in a departmental enquiry except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether the enquiry tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. The court observed that the courts will, however, interfere with the findings in disciplinary matters, if the principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, *malafide* and based on extraneous considerations. Dealing with the question of the powers of the high court and the Supreme Court to interfere with the punishment imposed by the disciplinary authority, the court observed that the high court and the Supreme Court will have to consider whether the punishment imposed upon the employee is shockingly excessive or disproportionate to the gravity of the proved misconduct. The loss of the confidence in the employee will be an important and relevant factor.

Dealing with the case at hand, the court observed that when an unknown person comes to the bank as in this case and claims to be the accounts holder of a long inoperative account, and a bank employee, who does not know such person, instructs his colleague to transfer the account from 'dormant' to 'operative' category (contrary to instructions regulating dormant accounts) without any verification and such person succeeds in getting the money and cheating the bank, the bank cannot be found

38 (2011) 4 SCC 584.

fault with if it says that it has lost confidence in the employee concerned and is unfit to be retained in service.

In this case, there was also a criminal proceedings initiated against the employee by the bank but he was acquitted by the criminal court giving him the benefit of doubt. The Supreme Court made it clear that his acquittal in the criminal case could in no way render a completed disciplinary proceeding invalid nor affect the validity of the finding of guilt or consequential punishment. The court held that the standard of proof required in criminal proceedings being different from the standard of proof required in departmental enquiries, the same charges and evidence may lead to different results in the two proceedings, i.e. finding of guilt in departmental proceedings and an acquittal by giving benefit of doubt in the criminal proceedings. The court observed:[39]

> This is more so when the departmental proceedings are more proximate to the incident, in point of time, when compared to criminal proceedings, the findings by the criminal court will have no effect on previously concluded domestic enquiry.

In the present case, the employee was dismissed in 1990. He was acquitted in 1994 and he challenged the order of dismissal in 1994 before the Rajasthan High Court. The Supreme Court observed that an employee who allows the findings in the enquiry and the punishment by the disciplinary authority to attain finality by non-challenge, cannot after several years, challenge the decision on the ground that subsequently, the criminal court has acquitted him. It held that the high court was not justified in quashing the punishment and directing reinstatement with back wages and consequential benefits. The court held that the order of the high court directing back wages amounted to rewarding a person who had been found guilty of misconduct. However, having regard to the fact that the proven charge did not involve either misappropriation or fraudulent conduct and other circumstances of the case the court substituted the punishment of dismissal by compulsory retirement, which did not involve reinstatement.

It is submitted that the court here was dealing with the case of dismissal of a clerk in a state instrumentality, i.e., a public sector bank who had not taken recourse through industrial adjudication route but had invoked the writ jurisdiction of the high court to challenge the order of dismissal and findings of the enquiry officer who had held him guilty of both the charges leveled against him but the disciplinary authority exonerated him of one of the charges but imposed the punishment of dismissal on him in respect of the proved charge. The law declared by the Supreme Court in this case to that extent is correct but the position would have been different had he taken recourse through the route of industrial adjudication where the powers of the labour court or industrial tribunal are much wider. The powers of industrial adjudicator under the Industrial Disputes Act are appellate in nature and are wider than those of the high court or the Supreme Court which are only supervisory. It is submitted that the industrial adjudicator can re-appreciate the evidence led before

39 *Id.* at 588.

the enquiry officer as is clear from a number of decisions of the Supreme Court[40] before the advent of the new approach of the Supreme Court where the court has attempted to dilute the powers of the labour court or the industrial tribunal while exercising powers under section 11A[41] which, it is submitted, is not correct appreciation of law.[42]

*Absence from duty without sanction of leave: Misconduct*

In *Hindalco Industries Ltd.* v. *Suman Lata Tuteja,*[43] a single judge of the Delhi High Court held that the workmen concerned had continued to be absent from duty without getting her leave sanctioned and the mere fact that she had been applying for leave could not imply sanction of leave by the management. It found no justification in the award of the labour court which had set aside her removal from service and ordered her reinstatement with back wages and continuity of service. The high court held that failure on the part of the workman to respond to the repeated communications of the management to join back in service amounted to insubordination and obvious loss of confidence. The court, however, made it clear that the salary paid to her *vide* the interim orders of the court need not be refunded by her to the management. The balance amount deposited by the management in the court was directed to be returned to the management by the registry together with the interest that accrued thereon.

**Unfair labour practice: Meaning and scope**

In *Siemens Ltd.* v. *Siemens Employees Union,*[44] an attempt was made by the Supreme Court to define 'unfair labour practice' which conceptually has neither been defined in the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (in short 'the Maharashtra Act') nor under the Industrial Disputes Act. The court held that any 'unfair labour practice' within its very concept must have some elements of arbitrariness and unreasonableness and if unfair labour practice is established, the same would bring about the violation of equality guaranteed under article 14 of the Constitution. Therefore, it is axiomatic that anyone who alleges 'unfair labour practice' must plead it specifically and such allegations must be established properly before any forum can pronounce on the same. The court stressed the need for determining the concept of 'unfair labour practice' in the light of the changed economic scenario. While dealing with a complaint of 'unfair labour practice' in the changed economic scenario, the changed context needs to be kept in mind. It also emphasized that the state which has to don the mantle of a welfare state, must keep in mind that the twin objectives of industrial

40 See *Workmen of M/s. Firestone Tyre and Rubber Co. of India (P) Ltd.* v. *Management* (1973) 1 SCC 813 and *Scooter India Ltd.* v. *Labour Court* (1989) Supp (1) SCC 31.

41 *Harjinder Singh* v. *Punjab State Warehousing Corpn.* (2010) 3 SCC 192 at 209-10; also see Bushan Tilak Kaul, "Labour Management Relations" XLVI *ASIL* (2010) 499 at 529.

42 See Bushan Tilak Kaul, "Disciplinary Action and Powers of Industrial Adjudicators: A Critique of Judicial Intervention" 49 *JILI* (2007) at 309-364 at 363.

43 (2011) 185 DLT 301 (Del).

44 (2011) 9 SCC 775.

peace and economic justice are paramount. Therefore, the courts and statutory bodies while deciding what 'unfair labour practice' is, must also be cognizant of the aforesaid twin objectives.

The court noted that it was for the first time that 'unfair labour practice' was defined and codified in the Maharashtra Act; whereas in the ID Act, which is a central legislation, unfair labour practice was codified and brought into force by the amending Act, 46 of 1982 with *w.e.f.* 21.08.1984.[45] Earlier the Trade Union (Amendment) Act, 1974 amended the TU Act, 1926 and inserted therein "unfair labour practice" on the part of the Trade Unions, workers and employers and empowered the labour court to adjudicate on these issues. The said amendment though became part of the statute but was never enforced. Under the ID Act, 'unfair labour practices' are defined in clause 2(ra) to mean the practices specified in the fifth schedule which was also inserted by the 1982 amending Act. The fifth schedule has two parts. The first part refers to 'unfair labour practices' on the part of the employers and trade union of employers and the second part refers to unfair labour practices on the part of the workmen and trade union of workmen. The court found some clear difference between the provisions relating to 'unfair labour practices' in the Maharashtra Act and those in the central Act, i.e., ID Act. The ID Act prohibits an employer or a workman or a trade union from *committing* any 'unfair labour practice' while the Maharashtra Act prohibits an employer or union or an employee from *engaging* in any 'unfair labour practice'. The prohibition under the ID Act is aimed at preventing the commission of an 'unfair labour practice' whereas the Maharashtra Act mandates that the concerned parties cannot engage in any 'unfair labour practice'. The word 'engage' is more comprehensive in nature as compared to the word 'commit' under the Central Act.[46]

In the present case, the court at the very outset, set out to examine whether the labour court and the high court had not erred in not reading provisions of the settlement between the employer and the workers' union harmoniously. There was a settlement entered into between the employer and the workers union of which three clauses were material for judicial determination of the issues before the Supreme Court. Clause 7 provided that employees or officers or staff categories shall not be asked to do normal production work. Clause 12 provided that this settlement shall not be utilized for eliminating the employment potential or promotional opportunities to the existing workmen. Clause 16 provided that the agreement shall come into force *w.e.f.* 01.01.1981 and shall remain in operation unless it is changed in accordance with the provisions of the law.

Coming to the facts of the case, the recognized trade union, in the present case, challenged the notification dated 03.05.2007 whereby applications were invited from the workmen to appear for a selection process to undergo a two year long period as an 'officer trainee' where the training was to be imparted to them in the

45 Earlier, the Trade Unions (Amendment) Act, 1947 amended in TU Act, 1926 and incorporated therein 'unfair labour practice' on the part of the trade unions, workers and employees and empowered the labour court to adjudicate on these issues. The said Amendment though become part of the statute but was never enforced.

46 *Hindustan Lever Ltd.* v. *Ashok Vishnu Kate* (1995) 6 SCC 326.

field of manufacturing, quality inspection and testing, logistics and technical sales order execution. The notification stated that after the successful completion of the said training the trainees would to be designated as 'Junior Executive Officers'. The notification was challenged by way of a complaint under section 28 of the Maharashtra Act for 'unfair labour practices' on the part of the company and its senior management before the Industrial Tribunal, Thane, Maharashtra.

The case of the trade union was that though the designation of junior executive officers was that of officers belonging to the management cadre, in fact it was merely a nomenclature, with negligible content of managerial work. It was urged that the job description of a junior executive officer was the same as that of a workman, with little additional duties. Resultantly, the junior executive officers of the factory would now to do the very same work that had always been done by the workmen. It was submitted that such a move was, in effect, an alteration in the conditions of service of the workmen, as some vacancies available for workmen in the switch board unit were to be reserved for officers from the management cadre. Consequently, there would have been a reduction in the job opportunities for workers. Such a change could not have been affected without giving the workmen a prior notice to such effect in terms section 9A of the ID Act, 1947. Further, it was stated that clause 7 of the settlement which ensures that the job opportunities for the workers should not be reduced by the company by making its managerial staff perform the workmen's job. Clause 16 ensures the perpetuity of this settlement unless expressly overruled by a subsequent settlement. It was alleged that the notification of 2007 was, therefore, violative of clause 7 of the Maharashtra Act and violation of a settlement in operation amounts to an 'unfair labour practice'. The labour court which examined the matter did not agree that there was any change in the service conditions of the employees to their prejudice warranting notice under section 9A of the ID Act but held that the circular issued by the management was in breach of clause 7 of the settlement and, therefore, the complainant union had proved the 'unfair labour practice' under items 9 of schedule IV of the Maharashtra Act. The high court upheld the findings of the labour court. Hence the present appeal to the Supreme Court.

The Supreme Court at the outset observed that in the instant case no allegation of victimization has been made by the respondent union in the complaint before the labour court. In the absence of any allegation of victimization it felt that it was difficult to find out a case of 'unfair labour practice' against the management in the context of the allegations in the complaint. It was nobody's case that the management was punishing any workmen in any manner. It also noted that no workmen of the appellant company had made any complaint either to the management or to the union that the management was indulging in any unfair labour practice. Even then the labour court had come to certain findings of unfair labour practice against the management. The court also noted that in response to the circular inviting applications from workers for appointment as officer trainees to undergo training programme for two years and on successful completion of the training to be designated as junior executive officers, more than 154 workers had applied for nearly 89 positions, which only showed that there was overwhelming response to the offer of the management.

The court felt that the labour court and the high court had read clause 7 of the settlement in isolation and had completely ignored clause 12 of the said settlement. The court held that if a harmonious reading is made of clauses 7 and 12, it will be clear that clause 7 cannot be given an interpretation which makes clause 12 totally redundant. Clause 7 contains a prohibition against the employees or officers or staff of the appellant company from doing normal production work but the said clause cannot be read in such a manner as to nullify the purport of clause 12 which reserves the promotional employment potential of existing workmen. So, in the instant case, if by way of rearrangement of work, the management of the appellant company gives promotional opportunity to the existing workers that does not bring about any violation of clause 7 of the said settlement rather such a rearrangement of work will be in terms of clause 12. At the same time, if some of job of executive officers are the same as is done by the existing workers that does not bring about such a violation of clause 7 as to constitute 'unfair labour practice'. What is restricted under clause 7 is asking the officers to do the normal production work. There is no blanket ban in asking the officers from doing any production work. Therefore, both clauses, i.e., clauses 7 and 12 of the said settlement must be reasonably and harmoniously construed to make it workable with the evolving work culture of the appellant company in facing the new challenge in the emerging economic order which has changed considerably from 1982. The court observed that even if it is assumed that the 1982 agreement still subsisted, even then when a challenge is made of 'unfair labour practice' on the basis of violation of a clause of 1982 agreement on the basis of a complaint filed in 2007, the labour court and high court must consider the said agreement reasonably and harmoniously keeping in mind the vast changes in the economic and industrial scenario and the new challenges which the appellant company has to face in the matter of reorganizing work in order to keep pace with the changed work culture in the context of the scientific and technological development. The labour court and the high court should have taken into account all subsequent settlements between the management of the said company and the union in 1985, 1988, 1992, 1997 and 2004 while adjudicating on the complaint. Both the labour court and the high court failed to notice that in its complaint the union had accepted that they were not objecting to the promotion being granted to the workers. The court found that the stand of the workers' union was not consistent with the nature of the complaint filed before the labour court.

The court also took note of the fact that none of the workers had complained that they were forced to apply for the said promotional positions. It felt that when the workers themselves did not consider the scheme as unfair to them, could the union take upon itself the burden of saying that the scheme was unfair? The court also felt that in the instant case the respondent union was unfortunately seeking to do that. The court felt that both the labour court and the high court had failed to appreciate the basic fundamental issue in their adjudication and had come to an obviously erroneous finding. Apart from the aforesaid clear factual position, legally also the management of the company is not prevented from rearranging its business in the manner it considers best, if in the process it does not indulge in victimization. The court felt that in the given situation it could not be appreciated how by introducing the scheme of promotion to which the workers overwhelmingly

responded on their own, it could be said that the management had indulged in 'unfair labour practice'. It was not the case of the union that its recognition was being withdrawn or tinkered with or that it was losing its power of collective bargaining. It may be that the number of workers was reduced to some extent pursuant to the promotional scheme to which the workers had voluntarily responded. No union can insist that all the workmen must remain workmen perpetually otherwise it would be an unfair labour practice. Workers have a right to get their promotion and improve their lot if the management offers them with a *bonafide* chance to do so. The court was very clear that the fact of the matter was that if the order of the high court was upheld, the same would go against the interest of the erstwhile workmen of the appellant company who had responded to the said scheme of promotion. It was contended before the Supreme Court that there were concurrent findings of the labour court, single judge as well as the division bench of the high court and, therefore, the court should not interfere with the concurrent findings in the instant case. The Supreme Court observed that it is not an inflexible rule that the court should not interfere or upset a concurrent finding. This jurisdiction is special and the court can and should exercise its discretion conferred on it wherever it thinks it is necessary to interfere to do justice. There can be no hard and fast rule in the exercise of this jurisdiction. Just because the findings which are assailed in a SLP are concurrent cannot debar the court from exercising its jurisdiction if the demand of justice requires its interference.

In a case like the present one where the court finds that the concurrent findings are based on patently erroneous basic issues involved in adjudication, it can interfere. The court found that the present case was a fit case for interference. The labour court and the high court had failed to have a correct perspective of the questions involved in this case and obviously came to an erroneous finding. The court allowed the appeal and set aside the order of the high court in which had merged the order of the labour court. The court, however, made it clear that while implementing the scheme, the management of the appellant company must not bring about any retrenchment of the workmen nor should the workmen be rendered surplus in any way.

**Personal contract of service not transferable**

In *Sunil Kr. Ghosh* v. *K. Ram Chandran,*[47] the Supreme Court observed that it is a settled law that without consent, the workmen cannot be placed to work under different management and in that event, those workmen are entitled to 'deemed retrenchment' compensation in terms of the ID Act, 1947. In view of the said legal position, the court was of the view that the workmen were entitled to the benefit of such direction and it is the obligation on the part of the transferor company to comply with the same. The court was also satisfied that the single judge of the high court who had given such a direction and rightly so was conscious of the fact that these workmen failed to avail the VRS within the stipulated time and had not retired from the service of the transferor company. However, taking note of the fact that the workmen cannot be compelled to join the transferee company against their

47 (2011) 13 SCALE 23.

wish and without their consent and all along they were fighting for their cause in various forums against such transfer of the undertaking such as civil court, labour court, the government and the high court and even in the Supreme Court, it was of the view that the single judge of the high court was fully justified in passing such an order by virtue of which a mandatory duty was cast upon the transferor and the transferee to comply with the direction to pay 'deemed retrenchment' compensation to them.

In the circumstances, it was improper for the management now to turn around and to contend that since the appellant workmen have neither been retired nor retrenched from service nor had they resigned as such there was no question of any payment or to comply with the directions passed by the single judge of the high court.

**Pendency proceedings**

In *Container Corporation of India Ltd.* v. *Sanjeev Kumar,*[48] the challenge was made before the Delhi High Court to the award made by CGIT allowing an application filed by the respondent workmen under section 33A of the ID Act and declaring the order of removal passed by the management removing the workmen from service to be null and void and further directing that the workmen shall be deemed to be in service with all consequences. The court observed that for the purpose of section 33A of the ID Act, the workman has to show that the employer had contravened section 33 of the ID Act during the pendency of the proceedings before the tribunal. The proviso to section 33(2)(b) of the ID Act provides that when there is an industrial dispute pending before the tribunal or the CGIT, the employer can discharge or punish by way of dismissal or otherwise a workman concerned in such dispute for any misconduct not connected with such dispute but subject to fulfillment of two conditions. The first is that he should be paid wages for one month and the second is that the employer should make an application to the tribunal for approval of the action taken by the employer. The mandatory nature of the proviso to section 33(2) (b) has been emphasized by the Supreme Court in *Jaipur Zila Sahakari.*[49] The said decision by a five judge bench of the Supreme Court was necessitated because of an apparent conflict in certain earlier decisions – *Punjab Beverages Pvt. Ltd.*[50] on the one hand and *Strawboard Manufacturing Co*[51]. and *Tata Iron and Steel Co.*[52] on the other, which required reconciliation. One of the questions addressed by the five-judge bench in *Jaipur Zila Sahakari* was whether the contravention of section 33 would render the order of dismissal void or inoperative or, upon a finding that there is a breach of section 33(2) by an employer, whether it would remain open to the tribunal to examine the justification of the dismissal on merits. The decision in *Jaipur Zila Sahakari* conclusively held that compliance with the proviso of section 33 of the ID Act by the employer is

48 (2011) 184 DLT 79 (Del).

49 *Jaipur Zila Sahakari Bhoomi Vikas Bank Ltd.* v. *Ram Gopal Sharma* (2002) 2 SCC 244.

50 *Punjab Beverages (P) Ltd.* v. *Suresh Chand* (1978) 2 SCC 144.

51 *Strawboard Manufacturing Co.* v. *Goind,* AIR 1993 SC 2430.

52 *Tata Iron & Steel Co. Ltd.* v. *S.N. Modak,* AIR 1966 SC 380.

mandatory. In other words, where an industrial dispute with which a workman is concerned is pending and the employer removes the workman from service for a misconduct not connected with the pending disputes and fails to seek the approval of the tribunal before which such dispute is pending, the order of removal would be rendered void and inoperative. It has been emphasized that "if approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available".[53] The Supreme Court further explained that there is no need "of a separate or specific order for his reinstatement".[54]

In the present case, the CCIL never approached the CGIT before whom an industrial dispute was pending concerning the workmen to seek approval under section 33(2)(b) for its action in removing the respondent from service by the order of the management. With that step having not been taken, the CCIL could not obviously take advantage of its own fault. The court found no merit that CGIT could have, at the highest, only awarded the workman back wages from the date of his removal till his reinstatement and no other relief. The court held that there was also no merit in the contention that the removal order could not be held to be *void ab initio* but only ineffective and inoperative on account of the CCIL not seeking approval under section 33(2)(b), ID Act. The court held that failure on the part of the employer in obtaining approval under section 33(2)(b) has the effect of rendering the order of dismissal void and inoperative and the workman would be entitled to full back wages as if he was never removed from service. The CCIL could not in the instant case plead that it was not aware of the correct legal position as regards the precise industrial dispute in regard to which the respondent was concerned workman. The court found that there was no error on the face of the record.

In *Prem Shankar Jha* v. *Chief General Manager, DTC,*[55] the appellant was appointed and was working as driver with the respondent corporation. He was charge sheeted and removed from service in 1974. Since an industrial dispute was pending, an application under section 33(2)(b) was filed by the respondent. The tribunal held that it was not possible to grant approval of the removal of the appellant on the basis of the enquiry held by the respondent corporation. However, in view of the request made by the respondent corporation the management was allowed to adduce evidence in support of its case and yet it failed to substantiate the charge of misconduct against the workman. The effect, therefore, was that the tribunal refused to grant approval under section 33(2)(b). The challenge before the single judge of the high court did not yield any result. The division bench of the high court held that the workman who had since died was represented by his legal heirs were bound to succeed and were entitled to back wages from the date of removal till the date of his superannuation. Thereafter, they were entitled to retirement benefits in accordance with law.

53 *Supra* note 49, at 253.
54 *Ibid*.
55 (2011) 182 DLT 97.

**Right to representation by a lawyer under the ID Act**

In *Hygienic Foods* v. *Jasbir Singh,*[56] a two judges bench of the Supreme Court was of the *prima facie* view that section 36(4) of the ID Act debarring lawyers from appearing before the labour court/industrial tribunal is unconstitutional being violative of articles 14 and 19(1) (g) of the Constitution of India. This *prima facie* view taken by the court was in recognition of the fact that industrial law has become so complex that a layman cannot possibly present his case properly before the labour court/industrial tribunal. Similarly, section 13 of the Family Courts Act, 1984 debarring lawyers from appearing before the family courts also suffers *prima facie* from the same vice because family law too has become so complex that an ordinary layman cannot possibly be expected to put up his/her case properly before the family court. Hence, to debar lawyers will really be denying justice to millions of people. The court expanded the scope of the special leave petition *suo motu* by adding the grounds challenging the validity of the family court. The court issued notice to the Attorney General and also appointed an *amicus curiae* in this case to assist the court in further proceedings when detailed arguments will be heard by the court.

**Jurisdictional issues**

In *Bihar State Electricity Board* v. *Ram Deo Prasad Singh,*[57] poor workmen who were security guards in the appellant corporation on being dismissed from service by the appellant board suffered on all counts. They were victims of bad legal advice which resulted in filing of civil suits seeking declaration that their order of dismissal were bad and that they were entitled to reinstatement with all consequences. Although, the suit was filed beyond the period of limitation but eventually the suit was decreed in 1981 and became the subject matter of first appeal before the Addl. District Judge, Patna who upheld the judgment and decree of the trial court by a judgment in 2006 but without appreciating the effect of section 89 of the Bihar Reorganization Act, 2000. The judgment and order of the first appellate court became the subject matter of second appeal before the Patna High Court which again upheld the decree passed by the trial court but again without appreciating the effect of section 89 of the Bihar Reorganization Act, 2000 which aspect proved fatal in the Supreme Court. The board finally approached the Supreme Court by way of special leave to appeal. The Supreme Court found the findings recorded by all the three tier courts below wanting and unacceptable on the following grounds:

i) The suit seeking declaration that their dismissals were bad, unconstitutional and inoperative in law and that they were legally deemed to be in continuous service was itself not maintainable as they were 'workmen' under the ID Act and their service conditions were governed by the Industrial Employment (Standing Orders) Act, 1946 and the relevant rules framed by the board. It was, therefore, open to them to raise an industrial dispute

56 (2011) 4 (UJ) 2149 SC.
57 AIR 2011 SC 3423.

concerning their dismissal from service in terms of the well settled legal principles laid down in number of cases including the *Premier Automobile Ltd.*[58]

ii) The suit was also not maintainable as the same had been filed beyond limitation time and there was no explanation for the delay in filing the suit.

iii) Section 89 of the Bihar Reorganization Act, 2000 made it clear that the proceedings stood transferred to Jharkhand courts and the board had ceased to function from the said date and all proceedings were rendered null and void in terms of the provision of the Bihar Reorganization Act, 2000.

The court held that it had to come to an inescapable conclusion that the plaintiff/ respondent suit itself was not maintainable on the above grounds and was liable to be dismissed and it accordingly set aside the judgment and decree passed by the trial court. Thus, the poor workers suffered on all counts because of bad legal advice and wrong appreciation of law by the appellate courts below.

**Miscellaneous**

The decision of the Supreme Court in *The Secretary, A.P.D. Jain Pathshala* v. *Shivaji Bhagwat More*[59] is a watershed laying down that neither the government can by administrative instructions create either a judicial or quasi-judicial adjudicatory forum nor can a high court in exercise of its power of judicial review do so. The court laid down that the tribunals with adjudicatory powers can be created by the Constitution or by statutes. It is possible to achieve the independence associated with a judicial authority only if it is constituted in terms of the Constitution or a law made by the legislature. The court held that the constitution of a grievance committee as a public adjudicatory forum, whose decisions are binding on the parties to the dispute, by an executive order of the government is impermissible even though the same has been done by the executive in pursuance of the orders of the high court.

Creation, continuance or existence of a judicial authority in a democracy must not depend on the direction of the executive but should be governed and regulated by an appropriate law enacted by a legislature. So long as the state government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power under article 162 cannot be circumscribed and if there is no enactment covering a particular aspect, the government could carry on the administrative directions or instructions, until the legislature makes a law in that behalf. The executive power of the state cannot be extended to creating judicial tribunals or authorities exercising judicial powers and rendering judicial decisions.

The power of the state to exercise executive powers on par with the legislative powers of the legislature is "subject to the provisions of this Constitution". The provisions of the Constitution, namely, articles 233, 234 and 247 for constituting subordinate courts, and articles 323A and B for constituting tribunals by law made by the legislature, make it clear that judicial tribunals shall be created only by statutes or rules framed under the authority granted by the Constitution.

58 *Premier Automobiles Ltd.* v. *Kamalakar Shantaram Wadke* (1976) 1 SCC 496.

59 (2011) 13 SCC 99.

If the power to constitute and create judicial tribunals by executive orders is recognized, there is every likelihood of chaos and confusion.

In this case the Government of Maharashtra by a government resolution decided to accord sanction for implementation of the *shikshan sevak* scheme in all recognized private schools, higher secondary schools, junior colleges/B.Ed. colleges of the state. The said scheme in essence provided for:

i) appointment of *shikshan sevak's* for a term of one year on payment of a fixed honorarium;
ii) renewal of such appointment annually if the work was found to be satisfactory; and
iii) absorption of such *shikshan sevaks* into service as teachers on completion of the specified years of service.

It provided for constitution of a three member- grievance redressal committee (GRC) (consisting of three senior officers of the Education Department) to consider and decide the grievances relating to selection, appointment, re-appointment or mid-year cancellation of appointment.

The Bombay High Court disposed of several writ petitions challenging the said scheme recording the submission made on behalf of the state government that it would amend the scheme by incorporating several modifications suggested by the court. While doing so, the court also directed the state government to reconstitute the GRC with a retired districted judge as chairman of the region. The high court further directed that all complaints relating to unsatisfactory work or misconduct etc. will be forwarded to the committee which shall take decision within 30 days from the date of the receipt of the record after giving a right of hearing to the parties concerned. It further directed that all complaints in respect of appointments and terminations shall be dealt with only by the committee above and no other authority. It also observed that as the scheme was being implemented on interim basis it directed that no civil court shall entertain any suit or application in respect of the disputes which were required to be dealt with by the committee.

In compliance with the said decision and directions of the high court, the state government by another resolution modified its earlier resolution. Clause 17 of the modified scheme implemented the directions of the high court regarding the reconstitution of the GRC including therein a judicial officer as its chairman.

One of the *sevaks* who was appointed for a period of three years was removed from service in between which he assailed before the school tribunal which he withdrew and filed before the GRC which held that the termination was illegal and directed his reinstatement without back wages but with continuity of service with further directions to the education officer to approve the appointment of the sevak as a regular teacher/assistant teacher. The management challenged the order of the GRC. The high court held that the GRC had power to decide the illegality of the order and when it came to the conclusion that the termination was illegal the sevak was to be treated as continuing on the rolls of the school and since the school received grants-in-aid, the school was bound to comply with the directions issued by the GRC. It is this decision of the high court and also of the GRC that came to be challenged before the Supreme Court.

The court observed that neither the Constitution nor any statute empowers a high court to create or constitute quasi-judicial tribunals for adjudicating disputes. The high court in exercise of the power of judicial review, cannot issue directions that the civil courts shall not entertain any suit or application in regard to a particular type of disputes (in this case, disputes relating to *shikshan sevak*) and create exclusive jurisdiction on a quasi-judicial forum like the grievance committee to be entitled to deal with them. The high court cannot in exercise of its judicial power interfere with the jurisdiction of the civil courts vested under section 9 of the CPC. The high court, cannot, by a judicial order, nullify, supersede or render ineffectual the express provisions of an enactment.

Any such grievance committee (as in the present case) created by an executive order, either on the direction of the high court or otherwise, can only be a fact finding body or recommending body which can look into the grievances and make appropriate recommendations to the government or its authorities, for taking necessary actions or appropriate reports to enable judicial tribunals to render decisions.

The grievance committee cannot be a public quasi-judicial forum nor can its decisions be made final and binding on the parties, on disputes relating to *shikshan sevak*. An opinion of the grievance committee that the termination of the services of *shikshan sevak* is illegal and cannot have the effect of either reinstating the employee into service, or deemed to be a declaration that the *shikshan sevak*, continues to be the employee of the school.

The court observed that even assuming that the committees constituted under *shikshan sevaks* Scheme was a quasi-judicial tribunal, it could not direct reinstatement nor direct that the employee be deemed to continue in service by declaring the termination to be bad. The court observed that it is a well-settled law that personal contracts are not specifically enforceable and the courts cannot direct reinstatement in service or grant declaration that a contract of personal service subsists and that the employee even after removal is deemed to be in service. The three recognized exceptions to this service rule where contracts of personal services are enforceable are:

i) where a public servant having the protection of article 311 is dismissed from service in contravention of the said provision;
ii) where a dismissed workman seeks reinstatement before IT/LC under the industrial law; and
iii) where a statutory body acts in breach of violation of mandatory obligation imposed by a statute.

Therefore, the directions of the high court in its order that when the grievance committee holds that the termination of the *shikshan sevak* is bad, he is deemed to continue on the rolls of the management is erroneous and is liable to be set aside as his case does not fall in any of the three exceptions. The court held that the decision of the grievance committee was not an enforceable or an executable order but only a recommendation that can be made the basis by the education department to issue appropriate direction. The court emphasized that it was needless to add that persons

aggrieved by such directions of the state government would be entitled to challenge such directions either before the civil court or in a writ jurisdiction.

## IV TRADE UNION LAW

In *Gyana Pattnaik, General Secretary, Tata Refractories Sramik Sangha, District Jharsuguda, Orissa* v. *State Implemtn. Offr-cum-Lab. Commr. Orissa,*[60] the Labour Commissioner, Orissa, Bhubaneshwar, appointed District Labour Officer, Jharsuguda, as the returning officer to conduct the election in 2010 for the office bearers of the Tata Refractories Sramik Sangha, the only recognized union of the company. This order was subjected to challenge in the Orissa High Court. The high court rejected the contention that the appointment of the returning officer was bad in law and upheld the decision of the labour commissioner. The high court disposed off the writ petition by directing that the returning officer to conduct the election and complete the election process, in all respects within a specified period of time by following the procedure contemplated in the model election rules *vis-à-vis* the registered byelaws of the association.

The petitioner felt aggrieved by the said direction which presumably meant the following up of the procedure of verification of membership and observance of recognition of trade union rules promulgated in 1994 and challenged them in the Supreme Court.

The court noted that the election of the office bearers of the union had taken place in April 2007, and, although the term of office bearers was for one year, still no steps had been taken so far for conducting further elections which had resulted in a vacuum even though the appellants claimed that they had been continuing in the management of the trade union. The court, therefore, was keen to find a way out to resolve the impasse. The court noted that there are no provisions in the Trade Unions Act dealing with the subject matter of conducting elections of the office bearers of the trade unions. But keeping in view the nature of the dispute involved, especially when different groups were claiming to be the office bearers of the union, the court wanted to take a pragmatic approach to resolve the impasse. It accordingly appointed the district labour officer as the returning officer to conduct the elections of the office bearers of the trade union within a period of 12 weeks. It directed him to prepare a fresh programme for conduct of the elections within the time specified and hold it in accordance with the bye-laws of the union and by secret ballot. It further directed that the election expenses would be borne by the trade union.

## V CONCLUSION

The year under survey has witnessed very few cases having been decided by the apex court in the area of industrial relations law. The reported cases relate mainly to the retrenchment and disciplinary matters. Collective disputes have not reached the court for adjudication. There is now a realization among the judges of the apex court that globalization/liberalization in the name of growth cannot be at

60 (2011) 130 FLR 902 (SC).

the cost of the rights of the workers who need protection against exploitation. In the matter of grant of relief in cases of violation of retrenchment law, one can discern that there is no uniformity in the matter of grant of reliefs. This aspect needs immediate consideration so that the reliefs granted by the industrial adjudicators/court do not result in disparities and inconsistencies. The Supreme Court in *Amar Chakravarty*[61] has laid down the correct legal position that the onus of proof is on the employer to sustain the action of the management on the alleged misconduct in the absence of departmental enquiry. The court has rightly set aside the order of the high court and the labour court who seem to have been swayed by the recent approach of the court that the onus of proof is on the daily wager/casual workers that they have put in one year of continuous service for entitlement of retrenchment law benefits. The court has done a yeoman service to the unorganized sewer cleaning workers engaged through contractors by the state instrumentality like the Delhi Jal Board whose right to social security in the event of death and contracting of occupational disease has been recognized through judicial activism. Further, provisions for their protection against hazards by providing them necessary safety kits for doing their jobs and for their health care in the event of contracting any disease during their operations and for welfare measure have been subject matter of directions by the Delhi High Court. These directions are laudable and need to be effectively enforced. However, despite this innovative approach of the Supreme Court and the Delhi High Court, deaths of sewer workers continue to be reported which only go to show the culpable apathy on the part of the administration in not giving effect to the directions in their letter and spirit for which they deserve to be dealt with severely. The Delhi High Court in *Bata India Ltd.*[62] has correctly interpreted the provisions under the ID Act dealing with the competence of the central government to constitute national labour tribunal to deal with a subject matter arising out of common cause of action of those affected by disciplinary action for having participated in an all India strike and has rightly overturned the view of the single judge in *FDC*.[63] Finally, one of the ways of looking at the decline in the number of reaching the Supreme Court in the area of industrial relations law is perhaps a dilemma in the mind of the workers as to whether the court continues to be the last hope of 'bewildered and downtrodden'?

61 *Supra* note 34.
62 *Supra* note 15.
63 *Supra* note 16.